



INSOLVENCY PROCEEDINGS AND INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

Insolvency proceedings and arbitration are absolutely distinct procedures, having different purposes. However, international commercial arbitration and insolvency do not coexist in isolation of one from another. Present paper is going to discuss the impact of insolvency proceedings on international commercial arbitration. In analyzing arbitrability of insolvency related issues, we may conclude that the fact that one of the parties is in insolvency proceedings does not in itself renders disputes as non-arbitrable. Only “core” or “pure” bankruptcy issues are excluded from the arbitration. The analysis of the case law provide that, insolvency proceedings are territorial in their nature and are limited to the state where insolvency proceedings are opened and therefore arbitral tribunal is not bound by the insolvency proceedings conducted in another state. However arbitral tribunal has a duty to render and enforceable award and therefore should carefully examine the mandatory provisions of the state where insolvency proceedings are pending.. The enforcement of the award rendered against party under insolvency proceedings may be refused in the state where insolvency proceedings are pending due to public policy reasons or non-arbitrability. It will be also relevant to examine the possible impact that UNCITRAL Model law on cross-border insolvency can have on the whole procedure of enforcement of the arbitral award in other states where insolvency proceedings are not pending.

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INTRODUCTION

Insolvency and arbitration are legal procedures but of different type and nature¹. Procedures, aims and principles of these two domains are absolutely different. Insolvency proceedings are proceedings for the collection and distribution of the assets of a debtor or proceedings providing for reorganization of the debtor's business in such situations.² Insolvency proceedings are the proceedings brought in the national courts³ based on a "system of ranking the claims and guaranteeing to the greatest extent possible equal treatment among member of each class of the creditors"⁴. Insolvency law has features of both public and private law nature.

Arbitration "is a private method of dispute resolution, chosen by the parties themselves as an effective way of putting an end to disputes between them, without recourse to the courts of law"⁵. The freedom of arbitration from the national courts and laws has found its greater emphasis in the context of international commercial arbitration. Therefore, arbitrators' jurisdiction is established by the will of the parties and is based on the arbitration agreement⁶, while the court's jurisdiction in insolvency proceedings is established by the relevant national legislation.

International arbitration and insolvency do not coexist easily⁷. Arbitration and bankruptcy are large domains. Neither domain is stable, uniform or unchanging. Bankruptcy rules vary widely among different jurisdictions, and the domain of arbitration is hardly homogeneous or

¹ Vesna Lazic: Insolvency proceedings and commercial arbitration (Kluwer Law International, T.M.C. Asser Instituut (1998)):2

² Ibid

³ Lazic, supranote 1:2

⁴ Stephan Kröll: Arbitration and Insolvency Proceedings- Selected problems in pervasive problems in international arbitration, Kluwer Law International, The Netherlands (2006) :357

⁵ Martin Hunter, Alan Redfern, Blackaby Nigel, Constantine Partasides: Law and practice of international commercial arbitration, Sweet and Maxwell (2004):1-01

⁶ Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International (1999):405

⁷ Jose Rosell and Harvey Prager "International arbitration and bankruptcy :United States, France, ICC", Journal of International arbitration, vol. 18 no 4 2001:417

static.⁸ “At the numerous border-crossing points where the domains tend to come together, the limits of each territory are generally not clearly marked”⁹

The thesis is going to discuss the issues which tribunal can face when one of the parties is subject to insolvency proceedings. This is a topical question as there are many cases when insolvency proceedings were commenced against one of the parties during ongoing arbitral proceedings. In the context of the existing financial crisis in the world the amount of insolvencies of large firms can increase, and therefore potential disputes can arise in the arbitration.

Problems of interaction between arbitration and insolvency however have been very seldom reflected in the legal writings.¹⁰ There have been published only few works with regards to insolvency proceedings and arbitration. Vesna Lazic in her book *Insolvency proceedings and commercial arbitration*, provided comparative analysis of different laws concerning bankruptcy and commercial arbitration and the role that insolvency law can play in arbitration. Stephan Kroll has provided comparative analysis of the laws on insolvency as well as arbitrability of insolvency related issues, and possible conflicts between arbitration and insolvency. Mantilla-Serrano in his article provided overview of the ICC cases, when one of the parties was under insolvency proceedings. Jose Rossel and Harvey Prager in their article made a review about bankruptcy and arbitration in the context of United States, France and ICC. However my research is going to be different as it's going to provide analysis of the case law showing the current trend that exists in the arbitration, it's going to provide a guideline for the arbitrator facing such kind of issues as well as it will provide the impact of Model Law on Cross Border Insolvency and EU Insolvency Regulation have on arbitration. In order to fulfill the aims of the thesis I am going to use comparative analysis and case study.

⁸ Rosell/Prager supranote 7:417

⁹ Ibid

¹⁰ Lazic supranote 1: 2

The thesis consists of three main chapters. In the first chapter I am going to address the issues of objective and subjective arbitrability of insolvency related matters. Attention is going to be given to the notion of arbitrability and non-arbitrability of insolvency related issues. In the context of subjective arbitrability I am going to discuss the issue of debtor's incapacity and whether trustee (insolvency representative, receiver, etc.) is bound by the arbitration agreement concluded by insolvent. It is to be discussed whether the fact that one of the parties is under insolvency is itself sufficient to suspend arbitral proceedings. An overlook of the doctrinal sources concerning this matter will be provided. Second chapter is going to discuss the impact of insolvency proceedings on ongoing arbitration, what is taken into account by the tribunal while deciding to proceed or to suspend with the arbitration. I will observe the matters which can impact on the ongoing arbitral proceedings after the commencement of insolvency proceedings against one of the parties. Territorial limits of insolvency proceedings, duty to render an enforceable award, mandatory provisions of the state where insolvency proceedings are pending are the points to be addressed in this chapter. The analysis of the arbitral awards and courts decisions are to be provided. Moreover it is going to provide some answers to the question with regards to the existence of the dominant trend that nowadays exist towards insolvency proceedings and international commercial arbitration. Third Chapter is going to address the impact of insolvency proceedings on the enforcement of the arbitral award. What are the legal and practical complications of enforcement of the arbitral award when one of the parties is in insolvency proceedings? The case law with regards to this matter will be analyzed.

CHAPTER 1: ARBITRABILITY OF INSOLVENCY RELATED ISSUES

The most important factor with regards to the insolvency and international commercial arbitration is the factor of arbitrability or non-arbitrability of insolvency related matters. The issue of arbitrability is the one that can give rise to the problems as well as the one that shows the collision of two domains arbitration on one hand and insolvency on the other. Before elaborating the issues which arbitrators can face when insolvency proceedings were commenced against one of the parties, it is relevant to determine the arbitrability of insolvency related matters.

Scholars make a difference between objective and subjective arbitrability for the purpose of differentiating between the parties that may arbitrate (subjective) and the disputes which can be arbitrated (objective).¹¹ When insolvency proceedings are opened against one of the parties, both issues of arbitrability arise. Whether insolvent party can be the party in the arbitration and whether the dispute itself can be arbitrated. In this Chapter firstly I will address the “objective arbitrability” and then I will discuss “subjective arbitrability” of insolvency related issues.

1.1 Objective arbitrability

Arbitrability involves determining the types of disputes which can be resolved by the arbitration and which can be resolved exclusively by the courts.¹²

According to art. II.1 of the New York Convention on the recognition and enforcement of foreign arbitral awards¹³ and art. V 2(a) of the UNCITRAL Model Law on International

¹¹ Eric Schwartz :The Domain of Arbitration and Issues of Arbitrability: the view from the ICC(9 ICSID Review-Foreign Investment Law Journal 1 (1994): 18

¹² Redfern/Hunter supranote 5: 3-12

¹³ New York Convention on recognition of foreign arbitral awards, 1958

Commercial Arbitration¹⁴ the parties can submit to arbitration all or any difference which may arise between them “*concerning a subject matter capable of settlement by arbitration*”.

Arbitration rules most of the time leave it to the applicable law to determine the disputes, which can be settled by arbitration.¹⁵ It has been noted by professor Rubino-Sammartino that international conventions and arbitration rules show “to consider as many disputes as possible to be capable of settlement by arbitration and identify the disputes which are capable of settlement by arbitration rather than concentrate on identifying the excluded ones”.¹⁶ When the issue of arbitrability arises, it is necessary to make recourse to the laws of different states, which include the law of the parties involved, the law governing the arbitration agreement, law of the seat of the arbitration, law of the place of potential enforcement of the award.¹⁷

In the arbitration, issues which usually are considered as non-arbitrable include intellectual property related matters(granting of patents and trademarks), antitrust and competitions laws, securities transactions, bribery and corruption, fraud¹⁸, insolvency related matters.¹⁹ However nowadays, arbitrators have started to adjudicate disputes involving such public matters discussed above.²⁰ States may provide in their national legislation that jurisdiction of the domestic courts can not be abrogated by the arbitration agreement concluded between the parties. Therefore certain types of disputes can remain outside the arbitration. The arbitration agreement concerning resolution of such matters by the arbitration will not be enforced by the domestic courts. It is understandable due to the fact that some

¹⁴ UNCITRAL Model Law on International Commercial Arbitration, 1985

¹⁵ Mauro Rubino-Sammartino: International arbitration. Law and practice 2nd edition Kluwer Law International (2001):172

¹⁶ Ibid:173

¹⁷ Redfern/Hunter supranote 5: 3-13

¹⁸ Ibid

¹⁹ Lazic supranote 1:42

²⁰ Fouchard supranote 6: 339

issues have much importance for the state, the issues that involve public matters. These issues are the issues involving public interest and public policy issues.²¹

Insolvency related matters are the issues which have private and public elements and therefore the arbitrability of insolvency related matters is problematic. Disputes which have a direct link with insolvency related issues are usually excluded from the domain of arbitration²² and arbitrators are not competent to adjudicate typical insolvency related issues. Typical insolvency issues include such issues as, the nomination of trustee, determination of the amount to be paid out of bankrupt's estate, verification, inventarization, collection and distribution of assets and reorganization of the business²³ as well as establishment of the existence and degree of privilege of the creditors, division of third-party assets, recover of assets from third parties.²⁴ Such claims are core issues of insolvency law, affecting "the commencement of insolvency proceedings, the rights of all creditors and "public at large"²⁵, and as such they fall outside the jurisdiction of the Tribunal, being excluded from the domain of arbitration. They are to be decided by special national bankruptcy courts. Therefore it is clear that typical insolvency related matters, which arise out of the application of bankruptcy law are excluded from the domain of arbitration and can not be arbitrated as such.

For the purpose of discussing arbitrability it will be relevant to analyze national laws of the countries in order to understand which disputes are considered as non-arbitrable. The laws of USA, France and Germany will be analyzed.

In the USA in order to solve the problems regarding insolvency and arbitration the courts have suggested several approaches. One of the criteria was established in the case

²¹ Lazic supranote 1: 42

²² Sigvard Jarvin and Annette Magnusson, *International arbitration court decisions* 2nd ed., Juris net LLC and Arbitration Institute of Stockholm Chamber of Commerce (2008): 767

²³ Lazic supranote 1: 154

²⁴ Jarvin supranote 22: 768

²⁵ Kröll supranote 4: 367

Allegaert v. Perot which is *the existence of non-arbitral matters*.²⁶ US Bankruptcy act in art. 157 make a distinction with regards to core and non-core proceedings. There is no definition of the core proceedings however it provides for the list of these proceedings which is not-exhaustive. For example, confirmation of plans, matters concerning administration of the estate, orders approving the use of lease property etc²⁷ are considered as core issues. Bankruptcy court is the one to determine whether the proceedings is a core or non-core.²⁸ Moreover the court in re Wood has defined a “core” proceeding “as one involving a right created by federal bankruptcy law and which would only arise in bankruptcy”²⁹ Therefore in the United States, Bankruptcy act provides for the list of core insolvency related issues, which can not be arbitrated.

In the major European legal systems only “pure” insolvency issues such as the opening of insolvency proceedings or appointment of the trustee are considered to be non-arbitrable.³⁰ For example, German Code of Civil Procedure in art. 1030 provides that “Any claim involving an economic interest can be subject of an arbitration agreement”³¹ The prevailing view in German legal literature is that “all disputes related to bankruptcy proceedings are arbitrable”.³² According to the French Civil Code “All persons may make arbitration agreements relating to rights of which they have the free disposal”³³ excluding “the matters of the public policy concern”³⁴. However the competent court has jurisdiction to adjudicate everything that concerns bankruptcy or liquidation.³⁵ On the contrary in Netherlands

²⁶ Allegaert v. Perot, 548 F. 2d 432 (2d Cir. 1977)

²⁷ 28 U.S.C.A. Sect. 157(2)(c),(l),(m)

²⁸ Ibid Sect 157(3)

²⁹ In re Wood, 825 F.d 90, 97(t Cir. 1987)

³⁰ Kröll supranote 4: 367

³¹ Section 1030(1) German Code of Civil Procedure (ZPO)

³² Lazic supranote 1:164

³³ Civil Code of France art. 2059

³⁴ Ibid art. 2060

³⁵ Decret No 85-1388 (27 December 1985) Art. 174

according to the Dutch Bankruptcy Act³⁶ which provides for the jurisdiction of the court to deal with the bankruptcy issues in the special procedure. Therefore only non-monetary claims can be considered as arbitrable under the Dutch Law.³⁷ Consequently, the laws provide different solutions for this problem. There is no problem with regards to the arbitrability of insolvency related matters in Germany, however in Netherlands only non-monetary claims are arbitrable, what basically means that all monetary claims to party subject to insolvency proceedings can not be arbitrable. French legislation provides for one court for settling all the insolvency related issues, however the Code of Civil Procedure makes it clear that the parties should freely dispose they rights. Only the legislation of the USA provides for the list of the matters which are considered as core bankruptcy issues.

There are also other factors which undermine the assumption that claims in insolvency should be considered arbitrable. It deprives the other creditors of their right to intervention concerning treatment of claims in the verification process. Another reason is that equal treatment of creditors in the verification process is lost.³⁸

Most of the issues dealt by the arbitrators involve ordinary contractual claims where one of the parties claims payment of certain amount of money. Therefore the subject matter, itself can be arbitrable. However, when one of the parties is in insolvency proceedings the payment of monetary sum can become non-arbitrable issue. Insolvency laws provide that claim to be paid out of debtor's estate can be made only in the procedure of verification³⁹, conducted by the national court or administrator. Is this fact itself sufficient to render a dispute as non-arbitrable. In the analyzed arbitral awards such issues were not presented. Even if ordinary monetary claims are arbitrable as they do not concern insolvency related issues, however

³⁶ Dutch Bankruptcy Act art. 122 in Lazic: 164

³⁷ Kröll supranote 4: 368

³⁸ Jarvin supranote 22:770

³⁹ Lazic supranote 1: 158

when one of the parties is subject to the insolvency proceedings, the claim itself becomes as non-arbitrable as now it is interlinked with the amount of the bankrupt's estate. But this issue was not considered by any arbitral tribunal. However, taking into account the decisions rendered by the arbitral tribunals which did not concern such matters, it is fair to conclude that none of the parties or tribunals themselves consider this fact as sufficient to render a dispute non-arbitrable.

The fact that one of the parties is in insolvency proceedings does not render the dispute as non-arbitrable. In *Casa v. Cambior* case the ICC Tribunal stated “ the fact that one of the parties is subject to bankruptcy proceedings is not in itself sufficient to render a dispute non-arbitrable. The only disputes which are excluded are those which have a direct link with the bankruptcy proceedings, namely those dispute arising from the application of rules specific to those proceedings.”⁴⁰ In one of the cases before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce⁴¹ the claim on the non arbitrability of the dispute as one of the parties is under insolvency proceedings in Ukraine was rejected by the Tribunal. Tribunal stated that the international commercial disputes can be heard by the domestic courts, arbitral tribunals and other courts which parties have chosen. And the fact that one of the parties is under insolvency proceedings does not make dispute as non-arbitrable and does not void the arbitration clause designated by the parties in their contract.⁴² Therefore, the fact that insolvency proceedings are commenced against one of the parties is not in itself sufficient to stop the arbitral proceedings. However if the claim is dealing with bankruptcy related issues examples of which has been shown in this paragraph, the arbitral tribunal is not competent to decide on them as national bankruptcy courts have exclusive competence to decide on these issues.

⁴⁰ *Casa v. Cambior* , Partial award in ICC case No. 6697 in Fouchard supranote 6: 356

⁴¹ Case No 94, “Praktika MKAS pri TPP Ukraini , Vneshneekonomichskiye spori, Pobirchenko I.G. K: Praksis (2006) : 822

⁴² Ibid

1.2. Subjective arbitrability

The capacity of the party is called “subjective” arbitrability and is one of the conditions for the determination of the validity of the arbitration clause.⁴³

For the purpose of the thesis I am going to address two points on “subjective” arbitrability. First whether insolvent has “locus standi” and second whether the trustee is bound by the arbitration agreement concluded by the insolvent.

According to the New York Convention art. II(3) the national courts should refer parties to the arbitration “unless it finds that the said agreement is null and void inoperative or incapable of being performed”.

The commencement of insolvency proceedings puts limitations with regards to the debtor’s rights of disposal and management of the estate.⁴⁴ The dispossession of the property comprising debtor’s estate will lead to the situation that the debtor’s actions can not legally bind the estate itself⁴⁵. The dispossession of the debtor also influences his capacity as to legal standing in proceedings concerning the property comprising the estate. The debtor lacks the right to sue or to be sued⁴⁶. The same view was confirmed by the Supreme Court of New York where the Court did not refer the dispute to arbitration, stating in connection with art. V1(a) of NYC inter alia that disputes involving the liquidator and insolvent are not arbitrable , since the insolvent insurer which agreed to arbitrate has become under an incapacity at the time of arbitration.⁴⁷

⁴³ Redfern/Hunter supranote 5: 148

⁴⁴ Lazic supranote 1:107

⁴⁵ Ibid:109

⁴⁶ Ibid: 184

⁴⁷ Adra Ins. Co Ltd.. v. Corcoran , XII YCA(1991) : 663

Regarding matters concerning the capacity of the insolvent party (or its representatives) to pursue the arbitration, the arbitrators consistently refer such issues to the personal law of the party, which for corporations is generally the law of the place of incorporation.⁴⁸

In England there is a rule that all the property of the insolvent becomes the property of the trustee.⁴⁹ Under the Dutch Bankruptcy Law after the bankruptcy order the estate passes to the trustee who is entitled to dispose and manage it.⁵⁰ The same approach is taken by the US Bankruptcy Code 1978, that the rights of the debtors transfers to the trustee and trustee is considered to represent the estate.⁵¹ Similarly to the other laws in Germany the debtors loses his right of disposal and management of the estate after the opening of the insolvency proceedings⁵² and those rights are transferred to the trustee.⁵³ The same approach was adopted in the legislation of France.

Consequently, under the examined legal systems it's fair to conclude that debtor against whom the insolvency proceedings are opened lacks the rights to dispose and manage the estate after the date of opening of insolvency proceedings or after the date of the issuance of bankruptcy declaration. Moreover the entire debtor's rights with regards to the estate are passed to the insolvency representative [trustee]. However, according to the view expressed in by the Dutch, German and US judiciary the trustee is not bound by the arbitration clause concluded by the debtor prior to insolvency proceedings when such a clause is a subject to impeachment by the trustee. The insolvency representative exercises this action according to the provisions of bankruptcy law concerning avoidance of some actions by the trustee.

⁴⁸ Fernando Mantilla-Serrano, *International Arbitration and Insolvency Proceedings*, *Arbitration International*, Vol. 11 No. 1 (1995):64

⁴⁹ M. Elland-GoldSmith "English Insolvency law- International aspects", *Revue des Droit des affaires internationals* 3(1989) :214

⁵⁰ Bankruptcy Act of the Netherlands 9 Faillissementswet 1893) art. 23

⁵¹ 28 U.S.C.A Sec. 323

⁵² Art. 6(1) Konkursordnung (10 February 1877) (RGB

⁵³ Ibid, art. 6(2)

Trustee can not be bound by the arbitration clause in the contract which is subject to avoidance as it can not be considered a party to it.⁵⁴

It would be relevant to examine the practice of the arbitral tribunals which faced the issue of subjective arbitrability of insolvency related issues.

In the award rendered by the Sole arbitrator in Zurich where Respondent alleged that Claimant has no “locus standi”, i.e. no right to appear as a party before the Sole Arbitrator. Respondent referred to the fact that Claimant was declared bankrupt and that the insolvency proceedings were suspended due to lack of assets. Sole Arbitrator on the issue regarding “locus standi” of the insolvent party ruled that “as the extracts from the Register of Commerce show that Claimant is a corporation and therefore it is capable of exercising of legal rights and incurring obligations”⁵⁵. Moreover the Sole arbitrator considered that due to the fact that the party is a corporation it is entitled to be a party to the arbitration proceedings and the fact that the party is in liquidation does not affect this ability”⁵⁶

In one of the ICC cases after the commencement of the arbitral proceedings one of the parties was dissolved and removed from the trade register. Thus the arbitrators were faced with the issue whether under these circumstances the party can be considered as a party to the arbitration. The Tribunal held “Whereas the present proceedings were initiated prior to the dissolution and alleged removal from the trade register of ..., *its present status is of little importance* and in fact has no effect on the validity of the proceedings pending before the arbitral tribunal; they are in fact perfectly in order as to their form”⁵⁷

The legal status of the parties to arbitration was also considered in one ICC unpublished award where Respondent claimed that Claimant did not exist anymore due to its bankruptcy. However considering the fact of the alleged bankruptcy of Claimant and its legal status ,

⁵⁴ Lazic supranote 1:201

⁵⁵ Award in Case No.415 of 20 November 2001, ASA Bulletin, Vol. 20 No. 3 (2002):469

⁵⁶ Ibid.

⁵⁷ Award in Case No. 2139 (1974), Yearbook Commercial Arbitration, P. Sanders (ed.), Vol. III (1978):221

Tribunal held that even if second Claimant is bankrupt this fact does not lead to the “*disappearance of the company as the official receiver would have been appointed and would have claimed company’s rights*” in the arbitral procedure. More importantly, Tribunal further held that bankruptcy of the Claimant is irrelevant to its legal existence.⁵⁸

In the interim award in case no 7337 tribunal rules on two important points which are relevant to be analyzed. First, the incapacity of the party and second, whether receiver is bound to arbitrate. On the first point Tribunal analyzed the provisions of Swedish Companies Act of 1975 holding that “According to the Swedish Companies Act of 1975, Chapter 13, Sect. 19, a bankrupt company is dissolved only when *the bankruptcy proceedings are terminated without any surplus.*”⁵⁹ Tribunal further elaborated that “*the rights and obligations of the corporation are assumed by the bankruptcy estate*” and what is more “the bankrupt company and the bankruptcy estate are, according to Swedish law, *two independent legal entities*”. An award arising from proceedings against the debtor is not binding against the bankruptcy estate”⁶⁰. Moreover it was held that “although an arbitration may be pursued against the debtor, the *bankruptcy estate is the proper party to all post-bankruptcy legal proceedings* as it has assumed, by universal succession, all rights and obligations of the debtor” and the bankruptcy estate represented by receiver is therefore party to the arbitration”⁶¹

Concerning second issue, whether Receiver is bound by the arbitration agreement the tribunal concluded that “*bankruptcy estate is bound by the agreement to arbitrate in the exclusive distributorship contract between claimant and manufacturer.*”⁶² In reasoning of the tribunal with regards to the binding effect of the arbitration agreement the Tribunal relied on

⁵⁸ Final award in case no. 4629 (1989), Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XVIII (1993): 11 - 33

⁵⁹ Interim award in case no. 7337 (1996), Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXIVa (1999): 152

⁶⁰ Ibid p. 153

⁶¹ Ibid

⁶² Interim award in case no. 7337 (1996), Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XXIVa (1999): 154

the expert's analysis of the relevant provisions of the Swedish Law. The expert analyzed that normally, under the interpretations of the precedents of the Supreme Court the bankruptcy estate is considered bound by the arbitration agreement.⁶³

In the case *International Technical Products Corporation, ITPEXport Corporation v. Islamic Republic Iranian Air Forces* the Iran- US claims Tribunal held that "Claimants have demonstrated that ITPC, ITPEXport, and the Trustee in Bankruptcy have been United States nationals at all relevant times. Thus, irrespective of whether the claims are to be deemed owned by ITPC and ITPEXport or by the Trustee, the Tribunal has jurisdiction"⁶⁴ Thus the Tribunal did not make difference with regards who is bound to arbitrate in the event if one of the parties filed a bankruptcy petition. The reasoning of the court makes it clear that Tribunal considered that Trustee is still bound to arbitrate.

In a similar cases submitted to ICC Court for scrutiny in which Paris was the place of the arbitration, Missouri law was applicable to the merits, the court reasoned that "the fact that the insolvent party has lost the capacity to sue, that the mandate of representation given expires with insolvency according to Germany Bankruptcy Code and that the Receiver becomes the sole legal representative of the insolvent's estate. The court suggests as a reasonable solution in international arbitration to invite the Receiver to continue the arbitral proceedings, if he so wishes"⁶⁵ Therefore the court concluded that under the German law as under many laws of other countries the legal representation of the party transferred to the trustee[insolvency representative or receiver]. However the court has not concluded that the Receiver is bound by the arbitration agreement, in it's turn it just stated that Receiver may be invited to continue arbitral proceedings. However this decision is also interesting in the other

⁶³Ibid: 154

⁶⁴ Partial Award in Case No. 302 (186-302-3) (1985), *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XI (1986): 338 - 346

⁶⁵ Unpublished ICC case in Mantilla-Serrano supranote 48:61

point that it nevertheless continued arbitral proceedings in spite of the existence of bankruptcy proceedings against one of the parties.

Consequently the from the analysis of the problem of arbitrability it's fair to conclude that only "pure" or "core" insolvency related issues are excluded from the domain of arbitration. With regards to the issue of subjective arbitrability the relevant analysis of the legislation and case law show that even though insolvent loses its capacity as a legal person its rights and obligations are transferred to the trustee, and some of the tribunals have concluded that indeed trustee is bound to arbitrate.

CHAPTER 2: IMPACT OF THE INSOLVENCY PROCEEDINGS ON THE ARBITRATION

During the arbitral proceedings when against one of the parties the insolvency proceedings are initiated or one of the parties files a bankruptcy petition the tribunal is in dilemma whether to continue or to suspend arbitral proceedings due to commencement of insolvency proceedings. It's fair to conclude that there are several issues which can impact on the ongoing arbitration and should be taken into account by the tribunal: arbitrability⁶⁶, duty to render an enforceable award and mandatory provisions of the state where insolvency proceedings are pending.

As has been proposed by professor Mantilla-Serrano that even in the cases when suspension of the proceedings seems mandatory, but one of the parties still requests the tribunal to proceed, the arbitrators should proceed because “no one knows best what suits the party's interest than the party itself”.⁶⁷ However I would like to disagree with this proposal, because all the cases should be decided on cases by case basis. Opening of insolvency proceedings can cause many additional issues to the arbitrators. Merely to proceed with the arbitration with no recourse to the problems of arbitrability of the dispute presented as well as enforceability of the rendered award can put at a stake the competence of the arbitrators and trust in arbitration itself.

⁶⁶ See Chapter I

⁶⁷ Mantilla-Serrano supranote 48:57

2.1. Territoriality of insolvency proceedings

The dominant trend in international commercial arbitration is that arbitral tribunals allow the arbitration to continue notwithstanding the existence of the parallel bankruptcy insolvency proceedings.⁶⁸

For example, ICC Court has not yet refused to organize arbitration because of the existence of insolvency proceedings against a party in the arbitration or affecting the legal standing of a party.⁶⁹

The analyses of the problem demonstrate that when one of the parties enters into insolvency proceedings most of the times it requests to suspend arbitral proceedings. One of the grounds on which the tribunal can refuse to stop arbitral proceedings is the territorial scope of the insolvency proceedings. Insolvency proceedings having only national scope of application and therefore they can not have extraterritorial effect in the country where the arbitration is taking place. In order to expand insolvency proceedings having only national scope of application trustee should apply to the court in the country where arbitration is taking place for the recognition of the insolvency proceedings commenced abroad.

In the award of the Bulgarian Arbitration Court, concerning French Bankruptcy it was held that there would not be a dismissal of the proceedings on the grounds that a bankruptcy proceeding had been initiated against one of the parties. It further held that declaration of bankruptcy in France “*does not constitute a procedural impediment for arbitral proceedings in Bulgaria*” as the foreign judgment by which respondent became a bankrupt has no

⁶⁸ ICC Cases No. 1350, (1968) (Clunet 1975: 931), (YCA III 1978: 220), and No.2139 Clunet 1975: 929, No. 4415(1984) (Clunet 1984: 952)

⁶⁹ Mantilla-Serrano supranote 55: 54

extraterritorial effect. Moreover it was further stated that “it can not deprive the court of its competence under the arbitration agreement”.⁷⁰

In *Behring International Inc. v. Islamic Republic Iranian Air Force*, the Iran-United States Claims Tribunal refused to stay arbitration proceedings holding that it was not bound by the Bankruptcy Code's automatic stay provision⁷¹.

The same approach of the Iran-United States Tribunal was also confirmed in the case *International Technical Products Corporation, ITPEXport Corporation v. Islamic Republic Iranian Air Forces* where the tribunal with regards to the question that one of the parties has filed a bankruptcy petition held that “the pendency of U.S. bankruptcy proceedings involving ITPC and ITPEXport does not affect the jurisdiction of the Tribunal over their claims”.⁷²

In the case before the Chamber of National and International Arbitration of Milan the tribunal decided on a preliminary procedural issue with regards to the fact that insolvency proceedings occurred against one of the parties while the arbitration was pending. The Tribunal made it clear that the arbitration would not be suspended because of the existence of parallel bankruptcy proceedings. More importantly the Tribunal held that “while state court proceedings are interrupted once a party enters insolvency proceedings, the same does not apply to arbitration”. Moreover arbitrators have analyzed relevant provisions of Italian Law, i.e. Article 78 of Royal Decree No 267/1942, and considered that the arbitration agreement “is not discharged or nullified simply because one of the parties to it becomes insolvent.”⁷³ The tribunal also noted that the fact that by Article 35 of the same Decree, a bankruptcy court

⁷⁰ Award in Case No. 152/1972 (1973), *Yearbook Commercial Arbitration* No IV (1979) :

⁷¹ *(Iran-United States Claims Tribunal in Behring International Inc. v. Islamic Republic Iranian Air Force, No. ITM/ITL 52-382-3, June 21, 1985)*

⁷² Partial Award in Case No. 302 (186-302-3) (19 August 1985), *Yearbook Commercial Arbitration*, A.J. van den Berg (ed.), Vol. XI (1986): 340

⁷³ *X and Y v. Z* Chamber of National and International Arbitration of Milan, Stefano & Benedetta Azzali & Coppo, *Chamber of National and International Arbitration of Milan, ITA Board of Reporters* (2005)

in charge of insolvency proceedings can empower a liquidator to sign an arbitration agreement is also indicative that arbitration and parallel insolvency proceedings are not inconsistent with each other”.⁷⁴

In one of the leading case regarding impact of insolvency proceedings on arbitration, Copal Co. Ltd.v. Fotochrome Inc the arbitral tribunal before the Japan Commercial Arbitration Association in Tokyo held that “*this arbitration should not be affected by the corporate reorganization proceedings to be conducted before the US District Court for the Eastern District of New York upon petition by the respondent*”⁷⁵).

In the award rendered by International Commercial Arbitration Court at the RF Chamber of Commerce and Industry (ISAC) , it was held that dismissal of arbitral proceedings on the grounds that bankruptcy proceedings have been initiated is the violation of fundamental principles of international commercial arbitration, in particular party autonomy to choose arbitration and exclude litigation as a mean for the resolution of their disputes.⁷⁶

Consequently the analysis of the cases show that the mere fact that one of the parties is under the insolvency proceedings is not sufficient to suspend the arbitration. Arbitrators clearly pointed out the territorial effect of insolvency proceedings, and that the arbitration is not bound by the insolvency proceedings opened abroad. The tribunals also made a distinction that even if the state court is bound to suspend all the proceedings the same effect can not be extended to the arbitration as the dismissal of the arbitration on the grounds of insolvency proceedings is violation of fundamental principles of international commercial arbitration.

⁷⁴ X and Y v. Z Chamber of National and International Arbitration of Milan, Stefano & Benedetta Azzali & Coppo, Chamber of National and International Arbitration of Milan, ITA Board of Reporters (2005)

⁷⁵ Copal Co. Ltd.v. Fotochrome Inc., (USA) Yearbook Commercial Arbitration, A.J. van den Berg (ed.), Vol. XII (1987): 151

⁷⁶ 186/2003. Award - 17.06.04, International Arbitration Court at the Russian Federation Chamber of Commerce

In one of the recent unpublished ICC awards⁷⁷, where the case involved a contract between Eastern European party and USA party. Arbitration was held in Paris and the applicable law was “the rules and standards of international contracts”. Procedural rules were the rules of the ICC subject to any mandatory requirements of the law of France. On the final stage of the proceedings US party has filed a bankruptcy petition under Chapter 11 of the United States Bankruptcy Code and therefore defendant made a reliance on the automatic stay of all proceedings by the virtue of application of Chapter 11. Tribunal decided that the bankruptcy proceedings in the USA are limited in their territorial effect and therefore have no extraterritorial impact on the arbitration in France.⁷⁸

However with regards to the abovementioned analysis it would be also fair to conclude that the opening of insolvency proceedings have a clear aim –distribution of the assets of insolvent and as all the creditors can participate in one common collective proceeding, the fact that arbitration is to be conducted clearly violates the rights of those mainly unsecured creditors to intervene into the arbitral proceedings. Therefore, the amount of the insolvent’s estate will be decreased by the rendered arbitral award. In most of the cases the tribunal was guided by the “territoriality” of the insolvency proceedings and they can not have impact on the ongoing arbitration.

⁷⁷ ICC case, the award has not been yet published, extracts in José ROSELL; Harvey PRAGER “International Arbitration and Bankruptcy: United States, France and the ICC”, *Journal of International Arbitration*, Vol. 18 No. 4 (2001): 424

⁷⁸ Ibid

2.2. Mandatory provisions of the state where insolvency proceedings are pending

Most of the time the parties designate the law governing their contractual relationship or the law governing arbitral procedure. However the designation of the governing law does not in itself hinder the application of the provisions of other law which is most of the time invoked by one of the parties. Most of these rules form a public law and some of them may form part of the public policy of the State.⁷⁹ Therefore the rules that form public policy, i.e. mandatory rules of another state can be applied by the tribunal.

Mandatory rules of law are defined as “imperative provisions of law which must be applied to an international relationship irrespective of the law that governs that relationship”⁸⁰; being “a matter of public policy” and, “reflect a public policy so commanding that they must be applied”^{81 82} even if the governing law is a different one. Mandatory rules serve different purposes: protection of monetary interests of the States, policing nature, safeguard of certain vital interests of the State and people welfare, protection of free trade and functioning of an effective market.⁸³

The application of the mandatory rules has found its basis in the Rome Convention on the law applicable to contractual obligations⁸⁴. Art. 7 of the Rome Convention provides

“When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of

⁷⁹ Marc Blessing : Mandatory Rules of Law versus Party Autonomy in International Arbitration, Journal of International Arbitration, Vol. 14 No. 4 (1997): 23

⁸⁰ Pierre Mayer, Mandatory Rules of Law in International Arbitration, in Arbitration International, 1986: 274

⁸¹ Ibid

⁸² Ibid

⁸³ Ibid: 26

⁸⁴ Rome Convention on the law applicable to the contractual obligations, 1980

their application or non-application". Hence Rome Convention allows the situation when the mandatory provisions of another states can be applied.

However among scholars there is no predominant view about applicability of mandatory provisions of another state. For example, professor Blessing considers that the issues of arbitrability "should not be impaired by taking into account or applying any foreign mandatory rules of law."⁸⁵

It should be noted that arbitration doctrine as well as practice refuse the application of mandatory rules of foreign state as the arbitration is based on the will of the parties and arbitrators are mandated by the choice of law made by the parties⁸⁶. It is difficult to disagree with this point as the arbitration is based on the agreement between the parties and the parties themselves stipulate the law that should govern arbitration.

The most important question is whether tribunal should apply the mandatory provisions of another state. This question is interconnected with the issue of insolvency proceedings. When insolvency proceedings are opened, most of the time the party under insolvency proceedings asks for the suspension of the arbitral proceedings based on the application of the provisions of its law to the proceedings. As has been already addressed⁸⁷ insolvency related issues are considered to be non arbitrable by the legislation of many countries. However, how the issues of mandatory nature of insolvency law were taken into account by arbitrators is difficult to determine due to the limited number of published awards.

In two ICC cases⁸⁸ the tribunal actually has taken into account the mandatory rules of insolvency law. Arbitrators have considered that the rules of insolvency law actually preclude payment against a party in insolvency, however allowed the tribunal to adjudicate the claim.

⁸⁵ Blessing, supranote 79: 30

⁸⁶ Daniel Hochstrasser: Choice of Law and "Foreign" Mandatory Rules in International Arbitration, Journal of International Arbitration, Vol. 11 No. 1 (1994): 58

⁸⁷ See Chapter 1

⁸⁸ Award in ICC case No. 7205, Award in ICC case No. 6697 in Mantillas-Serrano supranote 48: 70

However, in both of the cases French law was applicable and the Tribunal made a resort to the provisions of French law, not another state.

In recent ICC case discussed above⁸⁹ involving Eastern European Claimant and USA defendant, the latter claimed application of mandatory provisions of French Bankruptcy Law. However, tribunal did not consider application of provisions of French Bankruptcy Law as mandatory, as defendant was a USA company that filed a bankruptcy declaration under the laws of the USA. Moreover, the defendant had not sought any recognition of the US court's judgment regarding his bankruptcy in the courts of France. Furthermore, court held that provisions of the French Law concerning bankruptcy would only be mandatory for application if the debtor was declared bankrupt by the French Commercial Court and under the French Law.⁹⁰

In *Behring International Inc. v. Islamic Republic Iranian Air Force*, where one of the parties asked for the suspension of the arbitration based on the automatic stay provided by the US bankruptcy law, claiming for the application of these rules by the tribunal, tribunal also refused to apply the mandatory provisions of the USA law, concerning automatic stay of all the proceedings.⁹¹

Accordingly Tribunals are reluctant to apply the mandatory rules of another states. In cases where tribunal has applied mandatory provisions of insolvency law, the law was the governing law. Arbitrators usually make a reference to the territoriality of insolvency proceedings and that the existence of insolvency proceedings against one of the parties does not undermine jurisdiction of the tribunal as the mandatory provisions of another state are not applicable. It can be considered as a reasonable decision as arbitration is a private method of dispute resolution based on the will of the parties. However, the issue of application of

⁸⁹ See supranote 77

⁹⁰ Ibid426

⁹¹ *Behring International Inc. v. Islamic Republic Iranian Air Force*, Iran-United States Claims Tribunal No. ITM/ITL 52-382-3, June 21, 1985

mandatory rules are interconnected with the duty of the arbitrators to rendered an enforceable award, which is going to be addressed in the next paragraph.

2.3. Duty to render an enforceable award

The Arbitral tribunal has a duty to render an enforceable award. The fact that one of the parties is under bankruptcy proceedings sometimes can make enforcement impossible. The duty to render an enforceable award is derived from the rules of arbitral institutions. For example, according to the art 47 of the Arbitration Rules of Arbitration Institute of the Stockholm Chamber of Commerce⁹² “ the arbitral tribunal.... Shall make very reasonable effort to ensure that all awards are legally enforceable”. The same provision can be found in other arbitration rules as well.⁹³

In the award rendered by the Bulgarian Arbitration Court the tribunal considered that the fact that one of the parties has been declared bankrupt under the French Law “does not release the court of Arbitration from the duty to render an award”.⁹⁴ Therefore the Tribunal considered that the sole fact that one of the parties was declared bankrupt does not deprive the tribunal of a duty to render an enforceable award.

More importantly, the primary issue of the arbitral tribunal with regards to its duty to render a legally enforceable award is whether the award should take the form of ordering the defendant to pay a specified amount or whether the form of the award should be limited to issuing a declaration stating that the claim is founded and quantifying it. In deciding this issue, the arbitral tribunal should not forget that an international arbitration may provide

⁹² Arbitration Rules of Arbitration Institute of Stockholm Chamber of Commerce (2007).

⁹³ See, for example, International Chamber of Commerce Arbitration Rules (1 January 1998) art. 35 “In all the matters not expressly provided for in these rules, the Court and the Tribunal shall act in the spirit of these rules and shall make every effort to make sure that the award is enforceable at law”

⁹⁴ Award in Case No. 152/1972, of 3 November 1973, Yearbook Commercial Arbitration No IV , p.191-192

several forums in which the award may be enforceable, the claimant may reasonably expect an award ordering payment of the claim, and it is not the only aim of the arbitral tribunal to render an award that may resist a challenge in every possible jurisdiction⁹⁵.

In two ICC cases⁹⁶ the tribunal after analyzing provisions of French law had considered that it is permitted only to rule on the existence of the amount to be paid. Therefore they have only found the claim and did not make an order to be paid out of insolvent's estate. It should be also considered that determination of a specified sum or amount to be paid can be considered as a non-arbitrable issue. Therefore, it would be much safer to state that the claim is founded.

. In order to make an enforceable award when one of the parties is under insolvency proceedings, due regard should be given to several issues: the potential place of enforcement of the award, and the laws of the other states. The problem of enforceability of the award when one of the parties is insolvent is more of practical than of a legal nature. In a case where there are many places for potential enforcement (large multinational companies having assets in many states) and the assets of the insolvent have not become a part of insolvent's estate there is a great possibility of enforcement of the award in those states. However, in the cases where the place of potential enforcement is limited to the state where the insolvency proceedings were opened against insolvent, the challenges are more obvious. Depending on the legislation of the particular state, the court may not grant enforcement due to public policy and arbitrability issues. Moreover even if the court grants the enforcement of the award, the real enforcement will be up to the insolvency representative (insolvency administrator, etc).

Consequently, there can be primarily two concerns for the arbitrators in order to comply with the duty to render an enforceable award. First, the award should be *legally* enforceable.

⁹⁵ Rossel/Prager supranote 7: 431-432

⁹⁶ Award in ICC case No.7205, Award in ICC case No. 6697 in Mantillas-Serrano supranote 48:70

In insolvency proceedings there can be factual problems for the enforcement of the award, but the most important is to make it *legally* enforceable. Second, the arbitrators should avoid the form of ordering the defendant (insolvent party) to pay amount of money, the better solution is to state that the claim is found as it can help to avoid the problems of enforcement.

CHAPTER 3: IMPACT OF THE INSOLVENCY PROCEEDINGS ON THE ENFORCEMENT OF THE AWARD

The problem of coexistence of insolvency proceedings and international commercial arbitration can also appear after the rendering of the award against party subject to the insolvency proceedings. The party in favor of which the award is rendered faces the next stage –enforcement of the award. The problem of the enforcement of the award against insolvent party has several dimensions: first when the assets are available in multiple states and second when the assets are only available in the state where insolvency proceedings are pending. These issues will be addressed below.

When the party subject to the insolvency proceedings or insolvent party has assets in multiple states, the enforcement of the award is not a major issue for another party. However it can be an issue as well. In light of the Model Law on Cross Border Insolvency⁹⁷ (hereinafter Insolvency Model Law) and EU Regulation on insolvency proceedings (hereinafter Insolvency Regulations),⁹⁸ the enforcement of the award against party in insolvency proceedings can become an issue. Insolvency Model Law and EU Regulation are the instruments which aim to facilitate the cross border insolvencies. The basic principle of these legal instruments is the principle of unity and universality of insolvency proceedings.⁹⁹ The purpose is to avoid the problems that cross border insolvency can lead to. The effect of the EU Regulation and Insolvency Model law is that after the recognition of insolvency proceedings there is one insolvency proceeding and the assets become part of the debtor's estate. Therefore the party, even if the award is recognized, should go through the verification procedure.

⁹⁷ UNCITRAL Model Law on Cross Border Insolvency (1997)

⁹⁸ EU Regulation on insolvency proceedings, (29 May 2000)

⁹⁹ Art. 16 of the EU Insolvency Regulation ("Any judgment opening insolvency proceedings handed down by a court of the member state which has jurisdiction pursuant to art. 3 shall be recognized in all other member states from the time that it becomes effective in the state of the opening of insolvency proceedings". Art. 15 UNCITRAL Model Law on Cross Border Insolvency "A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed".

Another case when the enforcement is sought in the country in which insolvency proceedings are conducted is to be analyzed below. Art. V (2) of the New York Convention lists the grounds when the recognition and enforcement of the award can be refused. These grounds include : incapacity of one of the parties to the arbitration agreement, when the party was not given a proper notice, when the award contain matters which go beyond the scope of the disputes submitted to the arbitration, composition of arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, the award is not yet binding upon the parties , the subject matter of the dispute is not capable of settlement by the arbitration [arbitrability] and the recognition and enforcement would be against public policy of that country. In the case concerning a party under insolvency proceedings, the most important provisions under which the recognition and enforcement of the award can be denied when one of the parties is under insolvency proceedings is public policy and arbitrability.

In one German case¹⁰⁰ on recognition and enforcement of award against the party under insolvency proceedings, the German Court of First Instance in Bremen had made two important points .First the court considered that the fact that arbitral proceedings were started against the party prior to the commencement of insolvency proceedings “ has not affected the arbitration proceedings even though respondent, as trustee in bankruptcy has lacked knowledge of the proceedings”.¹⁰¹ Second in analyzing the point whether the party under insolvency had an opportunity to present its claim the court held the “the mere possibility to submit documents on a disputed contract or to give its view without knowing the arguments of the opponent, is not sufficient for due process (possibility to present its claims or

¹⁰⁰ Landgericht Bremen(German Court of First instance in Bremen), 20 January 1983 case #12 O 184/1981, XII YCA(1987) FR. Germany no. 28: 486-487

¹⁰¹ Ibid: 486-487

defenses).”¹⁰² Therefore the court concluded that there was a violation of the public policy under New York Convention due to the infringement of the due process clause.

This decision is important for two reasons. First, court decided that insolvency proceedings do not affect the arbitration and second that there was a violation of due process clause, in its turn violation of public policy. However, the second point was rejected by the Hamburg Court of Appeal, where the court considered that there was no violation of German public policy since “the suspension of the proceedings was not provided in the case of a composition by the relevant procedural rules of German law”¹⁰³

In another German case when one of the parties tried to enforce an award rendered by the Court of International Commercial Arbitration at the Chamber of Commerce and Industry of Ukraine against the part in insolvency proceedings the Brandenburg court of appeal held that recognition and enforcement are not affected by insolvency and “the provision in the German Bankruptcy Act that prohibits individual judicial execution against the bankrupt party once bankruptcy proceedings have been commenced *does not apply in enforcement proceedings*, as the declaration of the enforceability of a foreign arbitral award is not an executory measure; rather, it is a preliminary measure having no executory effect”¹⁰⁴. Moreover, Court held that according to the German Procedural Law the commencement of insolvency proceedings “*does not interrupt* arbitral proceedings and it’s irrelevant that the arbitral ward was rendered when the insolvency proceedings against the assets of the buyer had already been commenced.”¹⁰⁵

¹⁰² Ibid: 486

¹⁰³ OLG Hamm 2.11. 1983 IPrax 1985, p.218, XII YCA (1989)Fr. Germany No. 32: 629

¹⁰⁴ Germany 59. Oberlandesgericht [Court of Appeal], Brandenburg, 2 September 1999, No. 8 Sch 01/99, Yearbook Commercial Arbitration, vol. XXIX, (2004): 697-699

¹⁰⁵ Ibid

In one of the US leading cases, *Fotochrome v. Copal*,¹⁰⁶ after the award was rendered Copal decided to enforce and award in the USA and the court held “*the award, rendered in Japan after the stay of all proceedings, was a final judgment under Japanese law; and that the Convention entitled Copal to seek confirmation of its award as a judgment in the U.S.A.*”¹⁰⁷ Moreover, court reasoned that nothing in the New York Convention nor in the Arbitration Statute indicated what should be done in the even of bankruptcy and 'public policy' limitation of the Convention is to be construed narrowly and to be applied only where enforcement would violate the forum state's 'most basic notions of morality and justice'. Therefore, court decided that award is valid and binding and that there is no violation of public policy.

Comparably, in *Victrix S.S. Co v. Salen Dry Cargo A.B.*¹⁰⁸ the USA court denied the enforcement of the award. The claimant tried to enforce its award rendered in the arbitration in London against the defendant who had its assets in the USA and at the same time was subject to the insolvency proceedings in Sweden. The enforcement of the arbitral award was refused by the court, as the recognition of insolvency proceedings held in Sweden were granted in the United States. The enforcement was refused based on the fact that “insolvency proceedings in Sweden were ignored by the Claimant”¹⁰⁹ and the claim was not filed in those proceedings and as the arbitration was commenced after opening of insolvency proceedings. In *Victrix* case, in comparison with *Copal*, the enforcement the Claimant did not approach bankruptcy court for verification procedures. And due to the fact that insolvency proceedings in Sweden were recognized in the USA and the parts of the assets of insolvent became the part of insolvent's estate it's fair to presume that ignorance of insolvency proceedings held in Sweden became a part of public policy of the USA.

¹⁰⁶ *Fotochrome, Inc. v. Copal Co. Ltd.* 517 F.2d 512(2d Cir. 1975) , I YCA (1976): 202

¹⁰⁷ *Ibid*

¹⁰⁸ *Victrix S.S. Co. v. Salen Dry cargo A.B.*, 825 F.2d 709

¹⁰⁹ *Ibid*

To sum up, from the analysis of the case law there are several points which follow. The enforcement in such cases can be denied on the grounds of public policy, arbitrability of insolvency related issues.. Copal and Victrix cases show that enforcement can be denied if one of the parties ignored the insolvency proceedings, even insolvency proceedings conducted aboard, but which were recognized by the relevant state. The analysis of the German case law shows that the principal of individual judicial execution is not applicable in the enforcement proceedings under the German law and that insolvency proceedings do not have impact on the arbitration. Consequently, the enforcement of the award depends on the existence of pro arbitration public policy or pro-bankruptcy public policy. If the public policy in the country favors arbitration, there will not be any problem regarding enforcement of the award. However, as has been shown above, in a case if assets are only available in one state, where insolvency proceedings are pending, it should go via verification procedure. However, public policy definition is quite vague, sometimes court give broad or narrow definition of the public policy.

CONCLUSION

Present work was focused on the impact of insolvency proceedings on the international commercial arbitration. Analysis of the countries legislation on arbitration and insolvency as well as case law provides quite different approach towards this matter. Concerning the request of one of the parties to suspend the arbitral proceedings due regard should be given to the nature of claims, whether the dispute covers core or pure insolvency matters as well as representation of the party in the arbitral proceedings. The analysis show that only “pure” or “core” bankruptcy issues are outside of the domain of arbitration. However it’s still a question whether monetary claims against insolvent party are arbitrable. From the analysis of the case law and national legislation it becomes clear that trustee is bound by the arbitration agreement. Although some disputes arising in the context of non-core insolvency related issues may be resolved by arbitration in some countries, the provisions of bankruptcy law may impact on the conduct of arbitral proceedings and on the enforcement of the rendered award.

Tribunals in deciding to proceed with the arbitration mostly relied on the “territoriality of insolvency proceedings” and that the insolvency proceedings in one country can not have impact on the arbitration in another country. Arbitral tribunals are reluctant to apply the mandatory provisions of the state where insolvency proceedings are pending. However, it would be a reasonable solution to give due regard to the provisions of insolvency law so as not to hinder the enforcement of the award.

The issue of enforcement is one of the crucial points where domains of insolvency and arbitration collide. First, it is clear that there is no uniform practice with regards to the enforcement of the award. When there are many places for potential enforcement, there is no problem actually. But when the place of enforcement is limited to the country where insolvency proceedings were held, then enforcement can become an issue. The courts most of the time are reluctant to enforce awards against insolvent party. But in any case the party

which is going to enforce an award against insolvent should go through the verification procedure, most of the time conducted by the bankruptcy courts.

Adoption of the Model law on Insolvency as well as EU Insolvency Regulation can put more problems for the arbitration as such. In the case of the recognition of the insolvency proceedings in the country where the arbitration takes place the arbitral tribunal will likely to stop the proceedings, because of the recognition of insolvency proceedings in that country. Moreover it will have an impact on the enforcement of the arbitral awards. As the UNCITRAL Model Law and EU regulation provide for the principle of universality of insolvency proceedings and what in fact will lead to the unity of the assets of insolvent and unity of insolvency proceedings.

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