

1-1-2011

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Jay Lawrence Westbrook

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### Recommended Citation

Westbrook, Jay Lawrence (2011) "International Arbitration and Multinational Insolvency," *Penn State International Law Review*: Vol. 29: No. 3, Article 12.

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# International Arbitration and Multinational Insolvency

Jay Lawrence Westbrook<sup>1</sup>

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The collision between an increasing number of multinational arbitrations and an increasing number of multinational insolvencies constitutes the irresistible force meeting the immovable object. In many countries, an insolvency proceeding overrides most other laws and sweeps into its embrace virtually all legal matters relating to the debtor. Yet international arbitration as embodied in the United Nations Convention<sup>2</sup> has achieved a highly favored state of enforcement around the world.<sup>3</sup>

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1. Benno C. Schmidt Chair of Business Law, The University of Texas. I am grateful to Alexander Savage, Texas '11, and Omar Ochoa, Texas '11, for research assistance with this paper and to Riz Mokal for insights into English law. Any mistakes are all mine.

2. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. In the United States, the legislation applying the Convention is Chapter 2 of Title 9 of the United States Code. *See generally* 9 U.S.C. §§ 201-208 (2011).

3. Jay L. Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595, 616-17 (1983) [hereinafter Westbrook, *Coming Encounter*]. This article often refers to the court in country A, the place of arbitration, the “local” court, which applies local law, while the insolvency proceeding in country B is, for the purposes of this article, assumed to be the “main” proceeding under both the European Insolvency Regulation and the Model Law on Cross-Border Insolvency. *See*

This paper considers two aspects of the difficulties thus created. First we should determine the best domestic rule to reconcile the conflicting demands of the insolvency system and the international commercial arbitration system. That is, in an international case in which the debtor had committed to arbitration of disputes arising from a contract,

- a) Should a pending arbitration be halted, even temporarily, upon the opening of the insolvency proceeding?
- b) Should the contractual claims be resolved in arbitration, rather than in the insolvency claims-resolution procedures?

The rule a country adopts to govern those choices may be called the country's "claims-arbitration" rule. In a cross-border case, the challenge is to develop the proper choice-of-law rule to determine which country's claims-arbitration rule should apply in a given case. For example, when a court in Country A (often the place of arbitration) is asked to determine what claims-arbitration rule it will apply with regard to a debtor that is in an insolvency proceeding in Country B, should it choose its own claims-arbitration rule or the rule that would be applied by the insolvency court in Country B?<sup>4</sup> This issue came before two European courts as to the same debtor, with opposite results.

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Council Regulation 1346/2000, European Union Regulation on Insolvency Proceedings, 2000 O.J. (L 160) 1 (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R1346:EN:NOT> [hereinafter EU Regulation]; UNCITRAL Model Law on Cross-Border Insolvency, G.A. Res. 52/158, U.N. Doc. A/RES/52/158 (Dec. 15, 1997), *available at* <http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf> [hereinafter Model Law].

4. My focus is on insolvency proceedings involving multinational businesses and arbitration clauses and awards that are subject to the New York Convention. *See* New York Convention, *supra* note 2, at art. 1. A country might or might not apply a different rule to pre-insolvency arbitration clauses that are purely domestic—that is, that involve only domestic parties and a local place of arbitration. *Cf.* *Fotochrome, Inc. v. Copal Co. Ltd.*, 517 F.2d 512 (2d Cir. 1975) (enforcing arbitration award where arbitration proceeding would have been voided as violating the automatic stay if the place of arbitration had been in the United States). The present subject is sufficiently complex that I will not go into the possible differences in policy considerations as to enforcement in insolvency of a purely local arbitration clause or award, although most of the United States cases I discuss are domestic cases. I addressed the domestic-foreign distinction at length some years ago, and I hope soon to return to it. *See* Westbrook, *Coming Encounter*, *supra* note 3. *Fotochrome* is an old case, and it might not be applied today. *Cf.* *Societe Nationale Algerienne pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Distrigas Corp.*, 80 B.R. 606, 613-14 (D. Mass. 1987) (exercising discretion to enforce international arbitration clause where no significant bankruptcy issues were involved).

Elektrim was a Polish company that became involved in a staggering morass of litigation and arbitration throughout the first decade of the new century.<sup>5</sup> Vivendi, a venture partner of Elektrim, launched an arbitration proceeding against the Polish concern in London. Shortly before the first hearing in the arbitration, an insolvency proceeding for Elektrim was opened in Poland. The administrator of the insolvency took the position that Polish insolvency law abrogated the arbitration clause in the contract between the parties, leaving the matter to be resolved in court. Vivendi claimed the status of the arbitration was governed by English law, which would not halt the arbitration. The arbitration tribunal rejected the administrator's request for dismissal of the arbitration and went forward to hold hearings and issue an award. The United Kingdom courts upheld the tribunal, ruling that the European Regulation on Insolvency Proceedings<sup>6</sup> allocated the decision about the arbitration to the law of the country where the arbitration was pending.<sup>7</sup> Under English law the arbitration was permitted to go forward, even though the court recognized that the Polish proceeding was the "main" proceeding under the EU Regulation and that Polish law would hold the arbitration clause extinguished by the insolvency. A second English case, decided since the IACCL conference in Toronto, reached the same sort of result under the Model Law on Cross-Border Insolvency,<sup>8</sup> albeit with a more nuanced approach.<sup>9</sup>

Elektrim was involved in a second arbitration, in Switzerland.<sup>10</sup> The Swiss arbitral tribunal ruled that Polish law controlled and dismissed Elektrim from the multiparty arbitration. The Swiss Supreme Court agreed. While the Polish insolvency rules did not operate directly in Switzerland, under Swiss conflicts principles, the law of the insolvency jurisdiction should control and, thus, the arbitration should be halted as

5. For a discussion of the morass, see *Law Debenture Trust Corp. Plc v. Elektrim SA*, (2009) EWHC 1801 (Ch).

6. See EU Regulation, *supra* note 3.

7. *Syska v. Vivendi Universal SA*, [2010] B.C.C. 348. The decision was limited to a pending arbitration. See Ian Fletcher, *Effects on Arbitration Proceedings of the EU Regulation*, 22 *INSOLVENCY INTELLIGENCE* 60, 60-61 (2009).

8. Model Law, *supra* note 3.

9. *Cosco Bulk Carrier Co. Ltd. v. Armada Shipping S.A. (In re Armada Shipping S.A.)*, [2011] EWHC 216 (Ch). See the discussion in note 40 concerning the *Armada* court's approach.

10. *Vivendi S.A. v. Deutsche Telekom A.G. (Elektrim)*, Bundesgericht [BGer] [Federal Supreme Court] Mar. 31, 2009, 4A 428/2008, ASA Bulletin 1/2010 at 104 (Switz.) [hereinafter *Elektrim*]. See, e.g., Martin Aebi & Harold Frey, *Impact of Bankruptcy on International Arbitration Proceedings: A Special Case Does Not Make a General Rule*, 28 *ASA BULLETIN* 113 (2010) (hereinafter *Special Case*); Frank Spoorenberg and Isabelle Fellrath, *Switzerland: The Uneasy Relationship Between Arbitration And Bankruptcy*, *MONDAQ*, Jan. 13, 2010, <http://www.mondaq.com/article.asp?articleid=83270>.

against the insolvent debtor. Thus, the two cases involving the debtor *Elektrim* reached opposite results.

Needless to say, it is not for me to opine about the proper interpretation of English law, Polish law, Swiss law, or the EU Regulation.<sup>11</sup> The results just described may or may not have been correct under the relevant laws. My concern is to take the *Elektrim* cases as hypothetical examples to explore the choice-of-law rules explicitly or implicitly adopted in these cases and to consider which of them would make the best sense from a policy point of view if we were free to amend all applicable laws to produce the best results.

#### ARBITRATION AND THE INSOLVENCY CLAIMS PROCESS

We should begin by considering insolvency-court rules for adjudicating claims that would normally be subject to arbitration. As we have seen, in *Elektrim* the court assumed that UK law required that the claims be resolved in arbitration, while the Polish law, applied in Switzerland, sent the parties to the claims process in the insolvency court. These claims-arbitration rules address two questions: shall an arbitration be permitted to commence or go forward after an insolvency proceeding has begun, and if it does, should its results be conclusive and enforceable?

Most national insolvency laws impose a moratorium to halt domestic lawsuits and often arbitrations as well when an insolvency proceeding is brought.<sup>12</sup> Many countries claim their moratorium extends to the debtor's property all over the world, increasing the importance of being able to identify the claims-arbitration rule that applies.<sup>13</sup>

In most countries, however, there is a dearth of authority determining whether the claim will ultimately be resolved in arbitration, with the award being conclusive in the insolvency case on the merits of the parties' dispute. Few countries have a statutory rule on this question,

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11. The wisdom of modesty in this regard is illustrated by the fact that the Warsaw Court of Appeals may have overruled a lower court decision that the *Elektrim* arbitration award was not enforceable in the Polish bankruptcy. See Special Case, *supra* note 10, at n.41. I do not attempt in this paper to probe further Polish law in that regard.

12. See generally Jonathan Sutcliffe and James Rogers, *Effect Of Party Insolvency On Arbitration Proceedings: Pause For Thought In Testing Times*, 76 *ARB.* 277 (2010). There are some countries—for example, Mexico—where lawsuits are not halted, but are permitted to continue and to produce results binding in the insolvency court on the merits of claims. AM. L. INST., *TRANSNATIONAL INSOLVENCY: COOPERATION AMONG THE NAFTA COUNTRIES*, INTERNATIONAL STATEMENT OF MEXICAN BANKRUPTCY LAW (2003).

13. See AM. L. INST., *TRANSNATIONAL INSOLVENCY: PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES* 50, n.91 (2003). *But see Fotochrome*, *supra* note 4, at 516-17 (requiring in personam jurisdiction over a foreign party before the stay has any effect).

but some common-law countries have begun to generate case law approaches. In the United States, for example, a rule is emerging that usually enforces arbitration clauses against the debtor's bankrupt estate (and therefore against its creditors)<sup>14</sup> but creates certain categories of legal issues where the court may not enforce arbitration.<sup>15</sup> As to these categories (usually "core" cases involving claims peculiar to insolvency), some cases have held that the judicial claims process should be used, rather than the arbitration process, while others have said the court has discretion to choose one or the other, depending on the circumstances.<sup>16</sup> The US cases have shown a disinclination to distinguish between domestic and international arbitration in applying these rules.<sup>17</sup>

In *Elektrim*, the English court did not discuss the English claims-arbitration rule, but seemed to assume that an arbitration proceeding would routinely be completed and its award enforced despite a party's having entered an insolvency proceeding.<sup>18</sup> On the other hand, *Armada*, a more recent UK case, adopts a flexible rule somewhat like the United States approach just described.<sup>19</sup>

Powerful policies favor enforcement of arbitration agreements and awards, whether local or international. These policies are especially important in the international arena. The most important benefit of international arbitration is neutrality of forum.<sup>20</sup> That advantage is lost if the counterparty is forced in the case of insolvency to give up its right to neutral arbitration. Another pillar of the policy supporting international

14. The United States is an example of a country that provides for a broad stay of all lawsuits and arbitrations, at least temporarily, unless the court decides to permit them to go forward. See 11 U.S.C. § 362(a) (2006).

15. See, e.g., Alan N. Resnick, *The Enforceability of Arbitration Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 183 (2007) (calling for a general rule of nonenforceability of arbitration clauses in "core" bankruptcy proceedings); Michael D. Fielding, *Elevating Business Above The Constitution: Arbitration and Bankruptcy Proofs of Claim*, 16 AM. BANKR. INST. L. REV. 563, 568 (2008). See generally COLLIER ON BANKRUPTCY § 9019.95 (2010).

16. See, e.g., *In Re White Mountain Mining Company, L.L.C.*, 403 F.3d 164 (4th Cir. 2005) (international arbitration clause refused enforcement in core proceeding); *In re Nat'l Gypsum Co.*, 118 F.3d 1056, 1066 (5th Cir. 1997) (denying enforcement of arbitration clause but finding bankruptcy court discretion in all core cases). See generally Note, *Jurisdiction in Bankruptcy Proceedings: A Test Case for Implied Repeal of the Federal Arbitration Act*, 117 HARV. L. REV. 2296, 2307 (2004) (discussing cases decided each way).

17. *Id.*

18. See *Syska v. Vivendi Universal SA*, [2010] B.C.C. 348, 352.

19. Oddly, the judgment in *Armada* does not cite *Elektrim*, yet the two cases are quite similar in facts and issues presented, despite the inapplicability of the EU Regulation in *Armada*.

20. See ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION 401 (3d ed. 2006). See also GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 988 (3d ed. 1996).

arbitration is the predictability it provides for commercial transactions. The parties to an arbitration clause know it will almost always be given effect, and that quality gives it a great deal of commercial value.

International arbitration policy is embodied in the New York Convention, perhaps the most successful commercial convention of modern times. It is presently in force in some 145 countries<sup>21</sup> and has produced a high level of enforcement around the world.<sup>22</sup> However, in the insolvency area a country has the option of refusing enforcement against the debtor company under the Convention. The Convention offers a defense of “incapacity.” To quote a prior work of mine:

Article V(1)(a) authorizes nonenforcement if “[t]he parties to the agreement . . . were, under the law applicable to them, under some incapacity . . . .” Although this exception, on its face, seems to refer to the parties’ capacity at the time the arbitration agreement was made, rather than to their capacity at the time of the arbitration proceedings, the background of the provision suggests that the drafters were concerned with ensuring that both parties be properly represented during the arbitration proceeding; therefore, the provision refers to the parties’ capacity at the time of arbitration. [footnotes omitted]<sup>23</sup>

The Swiss Supreme Court relied upon just this sort of analysis in holding that Elektrim had lost its capacity to arbitrate under Polish law once its insolvency proceeding had been opened.<sup>24</sup>

The fact that the Convention can be understood to permit a defense to arbitration does not determine which result is the best policy.

Certain important requirements of insolvency procedures must be balanced against the benefits of arbitration. These requirements are closely related to the purposes of insolvency law. It is the essence of insolvency law that each creditor sacrifices many rights for the collective benefit of the creditor body, especially in a reorganization case.

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21. See Status of Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNITED NATIONS TREATY COLLECTION, available at [http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSOLINE&tabid=2&mtdsg\\_no=XXII-1&chapter=22&lang=en](http://treaties.un.org/pages/ViewDetails.aspx?src=UNTSOLINE&tabid=2&mtdsg_no=XXII-1&chapter=22&lang=en) (last visited Apr. 11, 2011) (listing countries that have ratified the New York Convention).

22. *Id.* See also LOWENFELD, *supra* note 20, at 401.

23. See Westbrook, Coming Encounter, *supra* note 3, at 614-15.

24. See *Elektrim*, *supra* note 10. At least one author criticizes the idea that insolvency creates an incapacity under the terms of the Convention. He would look at the proper “characterization” of the issue instead. Mark Robertson, *Cross-Border Insolvency And International Commercial Arbitration: Characterization And Choice Of Law Issues In Light Of Elektrim S.A. V Vivendi S.A. And Analysis Of The European Insolvency Regulation*, 12 INT’L ARB. L.R. 125-135 (2009). I would disagree, as would Professor Weintraub, seeing that approach as a label for a result. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (5th ed. 2006).

Insolvency claims procedures are often “summary” in nature. That is, they are designed in the interests of economy to resolve contentious claims more quickly and inexpensively than would the normal processes of litigation or arbitration. While that means the result may be “rough justice” as compared with more elaborate procedures, a less robust but less expensive procedure often makes sense when there is not enough value available to satisfy most claims in full and a relatively quick result is important to permit distributions to creditors at the earliest time. In addition, certain claims are unique to insolvency law. The Paulian (avoidance) actions are the most obvious examples. These sorts of claims are often intertwined with contract claims in disputes over commercial transactions.

The avoidance of expense and delay in the insolvency claims process has a special impact on the desirability of enforcing arbitration in multinational insolvency cases. International commercial arbitration is very expensive and often very slow.<sup>25</sup> Whatever the virtues of domestic arbitrations in saving litigation costs, international arbitrations are notoriously expensive, perhaps even more expensive than court procedures, and they often drag on for years. Thus in the international context, the argument for preferring court procedures on grounds of reduced expense and delay is enhanced.

Although various measures in an insolvency case may enhance value for all creditors, expenditures that benefit only one creditor or group of creditors necessarily reduce the recoveries of others. In that context, enforcement of an arbitration agreement or award is a priority in favor of the counterparty to that contract over all other unsecured creditors who are consigned to the court process.<sup>26</sup> An illustration with concrete figures makes this clear. If court resolution of the counterparty’s claim would cost \$50,000 of the assets available to the administrator, and arbitration costs \$100,000, then the counterparty has been preferred to the extent of \$50,000, and the other creditors have lost their share of that amount. Given that equality is the central principle of bankruptcy distribution, the granting of an implicit priority to one general creditor over another should require a powerful justification.

The virtues of predictability are especially important in international cases. As noted above, predictability is greatly improved as between the parties to multinational transactions by the presence of an arbitration

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25. See, e.g., Aníbal Sabater, *A New Landscape*, EXPERIENCE 35 (ABA 2010); Lorraine M. Brennan, Russ Bleemer, Andrew J. Gange, *Recent Developments In International Commercial Arbitration*, DISPUTE RESOLUTION MAGAZINE 14 (ABA 2009); Samuel V. Goekjian, *The Conduct of International Arbitration*, 2 LAWYER OF THE AMERICAS 409 (1979).

26. Of course, a counterparty could be secured, but usually is not.

clause in a contract. However, arbitration does not provide transparent predictability to other creditors of the debtor counterparty. A decision to enforce arbitration will affect hundreds or even thousands of parties—the other creditors of the debtor—who entered into contracts with the debtor without knowing what choices the debtor has made concerning arbitration. By contrast, the claims process in insolvency court is easily predictable. In the case of an international contract, the counterparty to the arbitration contract has a fairly strong chance of predicting the “center of main interests” (“COMI”) of the future debtor, which is the place where a main insolvency proceeding would be opened. The ease of predicting a company’s COMI leads to a greater likelihood that all creditors will be able to predict the claims-arbitration rule to be applied. Thus, the counterparty that enters into a contract with a corporation headquartered in Country B will be able to have its lawyers ascertain the rules concerning enforceability of arbitration clauses under the insolvency laws of Country B. In the example under discussion where the other contract party is a Polish company, the counterparty would know that its arbitration rights would not be enforced if the Polish concern entered an insolvency proceeding. That would also be the expectation of others who deal with the Country B company and have a concern about its financial circumstances.

However, even where these factors influence a court to deny effect to the arbitration clauses or arbitration awards, the best result may be different in some cases in which either arbitration or local litigation cases may have proceeded close to resolution by the time the insolvency proceeding is opened, as may have been true in *Elektrim*. Where that is true, the expense and delay of redoing a claims process almost completed may be greater than permitting the pending arbitration to be finished and an award entered.

These variables may provide some support for a discretionary rule like that emerging in some cases in the United States, because such a rule enables a court to choose one process or the other as suits the particular case. It also provides a mechanism whereby the party seeking arbitration and the tribunal itself might usefully influence the result by offering to finish the arbitration by a certain date at a fixed expense. Of course, such a rule also requires giving substantial discretion to the court, which some will find undesirable or inconsistent with existing legal regimes. On the other hand, the Polish rule greatly enhances predictability and in a highly transparent way: the insolvency claims procedure of the main proceeding would always be used in lieu of arbitration, a result in case of insolvency that the contract parties and the other creditors could include in the calculation of their pricing and terms.

## CHOICE-OF-LAW

*Territorialism and Universalism*

A brief overview of theories of multinational insolvency will put the choice-of-law issues in context. Territorialism and universalism are the terms used to describe the two approaches to multinational insolvency matters. Territorialism is the traditional “grab rule,” wherein each national court seizes what property it can and distributes its proceeds under local law. Universalism is based on the idea that an effective insolvency law, operating in rem as to hundreds or even thousands of claimants, must have a legal reach coextensive with the market.<sup>27</sup> Therefore, in a globalizing world we would ideally have one proceeding for a multinational company that would realize upon its assets and distribute the resulting value globally, whether by way of liquidation or reorganization.<sup>28</sup> Given the difficulties of achieving the ideal in a world of nation states, a notion of modified universalism has achieved considerable support.<sup>29</sup> It is understood as a pragmatic doctrine that seeks to achieve practical results that approach so far as possible those that would obtain in a pure universalist system. The logic of modified universalism tends in general to favor choice-of-law rules that apply the law of the “main” insolvency proceeding in many circumstances. The EU Regulation adopts that approach, although with many important exceptions.<sup>30</sup>

*The Choice of Law Questions*

In principle, there are no fewer than three choice-of-law questions that arise from the facts in the two *Elektrim* cases: the applicable insolvency law, the law applicable to halting the arbitration, and the law governing the ultimate enforceability of the arbitration agreement or award, in the insolvency court or elsewhere.

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27. See Jay L. Westbrook, *A Global Solution to Multinational Default*, 98 MICH. L. REV. 2276 (2000).

28. See AM. L. INST., PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES 8 (2003); Model Law, *supra* note 3.

29. See, e.g., Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2217 (2000) (opponent of universalism states that Model Law essentially adopts that approach).

30. See EU Regulation, *supra* note 3, at arts. 4, 15, 17-18, 27.

## APPLICABLE INSOLVENCY LAW

The first question seems easy enough in the *Elektrim* case. On the facts, the Polish proceeding seemed clearly to be the “main” proceeding as that term would be used under the European Regulation or the Model Law on Cross-Border Insolvency (“Model Law”).<sup>31</sup> In any event, there was no other pending insolvency proceeding, so there was no other insolvency law to be applied. Thus the first question is answered easily in both *Elektrim* cases: Poland provides the applicable insolvency law. That leaves the two questions related to the claims process.<sup>32</sup>

## APPLICABLE CLAIMS—ARBITRATION RULE

In a fully universalist system of the management of multinational insolvencies, the arbitration clause would be abrogated by the single applicable insolvency law, and the effect would be as if a Polish insolvency moratorium (or stay) was applied to halt the arbitration and to require litigation of the claim in the insolvency court. Conversely, in a fully traditional, territorialist jurisdiction, the answers to the claims-arbitration questions would be equally easy. The Polish insolvency case would have no effect locally, and the arbitration agreement and any resulting award would be enforceable in the local court at the place of arbitration and perhaps elsewhere, but not in the insolvency court.

However, in the world of modified universalism as reflected in both the European Regulation and the Model Law,<sup>33</sup> the local court<sup>34</sup> has an important role to play in answering the two claims-arbitration questions.<sup>35</sup> First, it must decide whether to halt the arbitration in light of the insolvency. Is that decision governed by local law or the law of the insolvency court? That is the first claims-arbitration issue. In the English *Elektrim* case, the court found that the European Regulation

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31. It appears that the English version of the Model Law was not applicable to the case.

32. Similarly in *Armada*, it was clear that the Swiss insolvency law was the only one plausibly applicable.

33. See *supra* note 30 and accompanying text.

34. Depending on the state of the arbitration proceeding and the circumstances of the insolvency proceeding, it will often be proper to apply to the arbitral tribunal in the first instance to request a stay or dismissal of the arbitration. That was done in both the *Elektrim* cases. For ease of expression, I will refer instead to the local court at the place of arbitration, which is where the insolvency administrator must turn if the tribunal refuses the request.

35. There is also an important choice-of-forum issue here. Should the choice-of-law questions and the underlying merits of the claims-process issues be decided by the local court, or should the local court defer to the insolvency court? This paper does not address that problem, although the author would argue that the insolvency court is generally the preferred forum for that decision. This area is one of many in multinational insolvency law where choice of law and choice of forum are intertwined.

allocated that issue to the local law and therefore applied English law to determine if the arbitration should have been halted, even temporarily.<sup>36</sup> Second, the court must decide if the arbitration should be permitted to resolve the merits of the claim.

#### CASE MANAGEMENT

The English court in *Elektrim* assumed the arbitration had not been stayed, so the award made after the opening of the Polish insolvency was not in violation of any applicable stay order. The decision thus ignored the question of a temporary stay.<sup>37</sup> That question is a matter of case management—aiming for maximization of value and accuracy of result. If a lawsuit or arbitration continues after an insolvency proceeding is brought, there is a serious risk it will not be well defended (or prosecuted), especially if a trustee or administrator has just been appointed, which is still the procedure in most kinds of insolvency proceedings in most countries. Indeed, experience in insolvency matters shows that the prior conduct of a lawsuit or arbitration may have been neglected by a corporate leadership caught in the turmoil of financial crisis. Thus the debtor's case may be weakened already when control of the debtor is assumed by an administrator unfamiliar with the matter and distracted by a host of other pressing concerns.

The consequence of an arbitration thus neglected is that deadlines may be missed, defaults may be entered, and some important arguments on the merits may not be made or may be made badly.<sup>38</sup> Lawyers may be unpaid and uninstructed, circumstances notoriously inconsistent with legal success. Preparation for a key hearing may be hasty and incomplete. If the result is that a claim is honored that would have been rejected in the normal contentious process or if the claim is awarded at an amount far higher than merited, then the other creditors of the debtor

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36. Interestingly, it appears that an arbitration would be stayed in England upon the filing of a winding up or an administration proceeding. Insolvency Act, 1986, c. 45, § 130(2); sch. B1 ¶ 43(6). The UK court did not look to its insolvency rule for this purpose, although one might have thought that law would be the obvious one to apply. A different rule applied under the Model Law as adopted in England. See *Armada*. On the other hand, the arbitration would apparently not be stayed if the creditor were secured. See *Armada* ¶ 49.

37. By contrast, the court in *Armada* was directed to the local insolvency law by the provisions of the Model Law, and it was therefore conceded that the arbitration involving the debtor was stayed upon recognition. Model Law, *supra* note 3, art. 20. Note that the EU Regulation applies the stay of the main proceeding (article 4) while the Model Law adopts the local stay. In articles 4 and 15 of the EU Regulation the English court found that local law applied to pending arbitrations, although they speak of “lawsuits.” That is a plausible reading, but the current author would have been glad to see an exploration of the policy arguments for a different interpretation.

38. See Westbrook, *Coming Encounter*, *supra* note 3, at 609.

have suffered unjustified injury.<sup>39</sup> The Vivendi-Elektrim arbitration award may have been quite correct, but it was for certain quite large—almost €2 billion. An award so large might elbow out all the other creditors by its sheer size. If we suppose for argument's sake it were twice as large as it would have been if properly defended, then the other creditors would likely have been severely prejudiced. Of course, I have no view whether the *Elektrim* award was accurate, nor do I know if the case was well defended. The defense may have been excellent in fact. The point is merely that if the case were not well defended because of the factors mentioned above, the result would be seriously unjust to a large number of innocent creditors of the debtor.<sup>40</sup>

The risk of flawed adjudication is sufficiently substantial by itself as to justify some outside control over pending proceedings to avoid these results.<sup>41</sup> That control might be exercised by the local court of the place of arbitration, in direct response to notice of the opening of the insolvency proceeding, or in response to a request from the foreign insolvency court for assistance in the form of a temporary stay of the arbitration. In appropriate circumstances, the insolvency court should telephone, fax, or mail the local court,<sup>42</sup> so that the local court can feel confident in the justice of the request. Given the mutual trust required by the legal structure of the EU,<sup>43</sup> the local court would presumably grant such a request almost always. Such a procedure granting a temporary, provisional delay of the arbitration would deal with the first part of the stay question as the case-management problem it really is.

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39. *See id.*

40. The *Armada* court recognized the importance of the factors of ill-defended claims and increased costs and delay. *Armada* ¶ 57. It ultimately gave the prize to arbitration of the claims largely because they were governed by English law, and the court wished not to “visit upon” the Swiss court the burden of applying English law. *Id.* ¶ 61. The point may be well taken but would perhaps have been better weighed by the Swiss court itself.

41. It was common ground in *Armada* under the Model Law and its application of the English stay that the arbitration with the debtor was stayed pending the ruling of the English court. *Armada* ¶ 21.

42. Again, I mean to include first resort to the arbitration tribunal when appropriate. As to court-to-court contacts, direct communication between courts and administrators has gone from being unknown to being increasingly accepted as a crucial part of the management of multinational insolvencies. *See Principles, supra* note 6; Model Law, *supra* note 8, arts. 25-26; Jay L. Westbrook, *International Judicial Negotiation*, 38 TEX. INT'L L.J. 567 (2003).

43. *See* Case C-341/04, Eurofood IFCS Ltd. v. Bank of America, N.A., 2006 E.C.R. I-3813, ¶¶ 39-40.

## ARBITRATION ON THE MERITS

Once the arbitration has been delayed and the insolvency administrator has had a reasonable opportunity to become familiar with the case and to consult with arbitration counsel, the remaining issue is whether the restraint of the arbitration proceeding should be lifted and the merits of the claim should be resolved there rather than in the insolvency court. The proper choice of applicable law determining that point is the final question presented above.

Obviously, there would be no point in permitting an arbitration to be commenced or a pending arbitration to proceed unless the results were final on the merits.<sup>44</sup> Enforcement of the award could be sought in the insolvency court or in jurisdictions outside the country where the insolvency is pending.

If enforcement is sought in the insolvency court, the award-creditor would argue that its claim against a share of the insolvency assets was conclusively established by the award. However, if the jurisdiction of the insolvency proceeding would apply its own law and that law would have insisted upon claims resolution through the court process, then it seems quite possible that the insolvency court would not enforce the arbitration award.<sup>45</sup> If the insolvency court has control, directly or through the cooperation of other courts, over substantially all of the debtor's assets, the award will be worth very little. If the insolvency court was an EU court and if it accepted the emerging English interpretation of article 15 of the EU Insolvency Regulation, then it might recognize the applicability of the law of the place of arbitration to an arbitration pending at the time of opening the insolvency proceeding. In that case it would enforce the award. On the other hand, it seems less likely a non-EU court would accept the applicability of the local claims-arbitration rule when the arbitration likely violated the foreign court's stay.<sup>46</sup> So as to the assets controlled in a non-EU insolvency proceeding, the arbitration may well have been a waste of time and money.

On the other hand, if there are substantial assets located in the place of arbitration, the award could be enforced against those assets.<sup>47</sup> In that case, the local court would be permitting action directly against assets under the legal control of the main proceeding in likely violation of the

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44. That is, the results would be final subject only to the New York Convention defenses. New York Convention, *supra* note 2, art. V.

45. I confess to wondering if the English insolvency court would be entirely sanguine about accepting a Polish award under the reverse circumstances.

46. See *supra* notes 13 & 14 and accompanying text.

47. The award might also be enforceable under the New York Convention in other jurisdictions that elected not to cooperate with the main proceeding, if there were substantial assets in such a jurisdiction.

main proceeding's stay or moratorium. That result would be territorialism of the classic variety and therefore would likely be repugnant to those jurisdictions, like the United Kingdom and indeed all the EU member states, that have embraced the principle of modified universalism.

The central point is that a jurisdiction's choice-of-law decision about arbitration should be closely linked to its policy on recognition and cooperation in insolvency matters. If a country takes a largely territorialist view, with little deference to a foreign insolvency proceeding pending in the debtor's home country, then its policy of supporting arbitration should probably prevail unless a local insolvency proceeding is filed. On the other hand, if a jurisdiction is committed to some significant degree to modified universalism or at least close international cooperation in multinational insolvencies, then the logic of that commitment requires a global approach to claims resolution to the maximum extent possible. If a local court permits arbitration to go forward to an award and enforces that award against local assets, then it has moved away from an international system back to the traditional territorial regime in insolvency matters. If it refuses to enforce against local assets and sends the arbitration award claimant to the insolvency court, and that court refuses to accept the award as conclusive, the arbitration will have cost everyone concerned much time and money for nothing.

So it seems right to argue that a court with a commitment to modified universalism in insolvency matters should apply the law of the insolvency court with regard to the proper process for resolving claims or should defer that decision to the insolvency court itself. If a company based in New York enters insolvency there, the court at the place of arbitration should in most cases adopt the American rule of usually permitting arbitration to go forward (although after a temporary delay as noted above), while in the case of a Warsaw-based company, the local court should halt the arbitration and refer the claimant to the insolvency court. Better still, in my view, in both situations the local court should submit the whole question to the insolvency court to decide if arbitration should be permitted.<sup>48</sup>

This conclusion is reinforced by the fact that the debtor prior to insolvency may have entered into more than one arbitration contract calling for arbitration in different jurisdictions, as in the case of *Elektrim*.

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48. Cf. *In re Atlas Shipping A/S*, 404 B.R. 726, 747 (Bankr. S.D.N.Y. 2009) (validity of New York attachments obtained after the opening of Danish proceedings referred to the Danish court for resolution). See also *CSL Australia Pty. Ltd. v. Britannia Bulk Plc*, 2009 WL 2876250 (S.D.N.Y. 2009).

If local law is applied to resolve the enforceability of the arbitration clause, *Elektrim* demonstrates there will often be disparate results unrelated to the merits of the claims. Only by applying the procedural law of the insolvency court can it be assured that the same process will be applied to similarly situated contract counterparties. Closely related is the fact that parties can choose the place of arbitration and therefore attempt to manipulate the procedural rules governing claims, especially if the debtor company seems financially shaky at the time the contract is written. It is much harder for a counterparty to influence the location of the main insolvency proceeding and therefore the enforceability of the arbitration clause. Finally, and not least important, modern reorganization procedures, which are crucial to preserving value for all creditors in large global insolvencies, require a central oversight and control of insolvency cases. The attempt to rescue a multinational often will not survive a multiplication of procedures across a number of national jurisdictions.

For all these reasons, it seems to me the best rules are that temporary stays of arbitration should routinely be granted upon the insolvency of one party and that the ultimate method of claims resolution should be determined under the law of the insolvency court. In some cases, the insolvency court should permit a pending arbitration to go forward if it has progressed well down the road to a decision on the merits, although preferably after a pause to permit the insolvency administrator to defend the claim properly.

Modified universalism has come to be viewed as the most desirable (or the least undesirable) of the possible approaches to multinational insolvencies. The logic of that approach—and the fact of globalization that underlies its rationale—leads almost always to the conclusion that the law of the main insolvency proceeding should be chosen to govern the various legal issues that may arise concerning the debtor and its assets.<sup>49</sup> Thus it is not surprising that a close analysis leads to the same result here.

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49. See, e.g., Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499 (1991); Jay Lawrence Westbrook, *Avoidance Of Pre-Bankruptcy Transactions In Multinational Bankruptcy Cases*, 42 TEX. INT'L L.J. 899 (2007).

