ARBITRATION AND INSOLVENCY IN THE CONTEXT OF THE EUROPEAN REGULATION ON CROSS-BORDER INSOLVENCY 1346/2000

Elena Turtureanu

July 17, 2009

This is a Bucerius/WHU MLB thesis

13,363 words (excluding footnotes)

Supervisor 1: Prof. Clifford Larsen
Supervisor 2: Prof. Dr. Hans-Eric Rasmussen-Bonne
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List of Abbreviations

cf. Confer
e.g. exempli gratia (for example)
ECJ European Court of Justice
EIR Council Regulation (EC) 1346/2000 on Cross-Border
et al. et alia (and others)
F.2d Federal Reporter, Second Series
F.3d Federal Reporter, Third Series
Ibid the same place
ICC International Chamber of Commerce
Inc. Incorporation
Insolvency
No. Number(s)
OHG Austrian Supreme Court
Op.cit ‘opus citatum’ (from the cited work)
p. Page
Para. paragraph(s)
pp. Pages
Rev. arb. Revue de l’arbitrage
UNCITRAL United Nations Commission on International Trade Law
v. versus
Vol. Volume
ZPO Zivilprozessordnung
Introduction

“Insolvency Law must be complementary to, and compatible with, the legal and social values of the society in which it is based and which it must ultimately sustain. Although insolvency law generally forms a distinctive regime, it ought not to produce results that are fundamentally in conflict with the premises upon which laws other than the insolvency law are based.”¹

In the current economic climate, the transnational insolvency regimes have been subject of a permanent debate. “As the shape of the global economic stage transforms from round to flat”,² it is most likely to bring an increase in situations where the various insolvency systems come across with the arbitration rules. The issues arising thereafter and how were they perceived by the national courts on the one hand, and by arbitral tribunals on the other hand, are subject of this paper.

The insolvency courts, when faced with arbitration are tempted to take a purely domestic perspective. Accordingly, a certain tendency can be detected favoring the application of the law of the place of insolvency proceedings in the context of arbitration. Likewise, the Arbitral Tribunal, in the light of the party agreement to arbitrate, is concerned with the application of its own rules or the law of the arbitral situs. Under these circumstances an ‘inherent’ conflict arises between the two judicial authorities.

However, when seeking for guidance on the interplay between arbitration and insolvency, little or no attention to be found in the books concerned with the issues.

Furthermore, the intention behind the present text is to provide first with an overview on the international legal framework in the context of cross-border insolvency; second, what are the legal issues arising when international insolvency law meets arbitration (e.g. matter of jurisdiction, applicable law) and whether arbitration survives bankruptcy; third, how are the

aforementioned issues addressed in the light of European Regulation on Cross-Border Insolvency (Council Regulation 1346/2000).

In order to illustrate the complexity and diversity of issues that arise when insolvency meets arbitration and the extreme impact they produce on the effect of arbitration, this paper will examine recent case law arising in the context of cross-border insolvency within the European Community.
1. The main features and principles of International Insolvency Law

Most of the legal systems provide for a legal framework addressing the rules to be followed when the debtor is unable to pay its debts or liabilities as they come due. Consequently, a large range of interests (e.g. creditors, guarantors, of debt, employees etc.) are ‘accommodated’ by the insolvency proceedings commenced against a debtor. In general, the common consent expressed in the literature is that the insolvency proceedings must create a balance between the variety of social, economic and other policies’ implication as well as the legal and economic goals of insolvency proceedings per se.³

Depending on the level of economical and legislative developments, as well as cultural and social, the insolvency laws are different from country to country. However, despite the legal differences, they all promote efficiency, value maximization of the assets, certainty among the involved interests as well as to ensure equitable treatment to all the involved parties.⁴

Even more differences appear in cross-border insolvency proceedings, as stated: “The phenomenon of cross-border insolvency is encountered where the dispersal of the debtor’s assets and activities generates a spread of interests and claims involving the potential application of more than a single system of law”.⁵ In these circumstances, the potential application of more than one legal system creates uncertainty and insufficient predictability among the creditors who cannot be protected at an early stage, when they are initially contracting with the debtor, on whether their claims will be enforced in case of the debtor’s default.⁶

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⁴ Ibid., p. 10 et seq.
The most important issues that arise in cross-border (‘multinational’) insolvencies involve first, jurisdiction (“choice of forum”)\(^7\) which court can hear and decide on the matter; second, the applicable law (“choice of law”)\(^8\) and third, the ‘recognition and enforcement’\(^9\) of the foreign insolvency proceedings, questions which most of the time are subject to the private international law of the concerned states.\(^10\)

In the context of international insolvencies issues two ‘doctrinal perspectives’\(^11\) have been adopted by different legal systems.\(^12\) The first one is principle of universality, where the state of the opening of insolvency proceedings determines all the consequences followed thereof, such as the power of the trustee, the rules on distribution or the status of the current contracts, and on the other hand, as opposed to the former, is the principle of territoriality, which is concerned with the effects of the insolvency proceedings limited only to the territory of the state where they have been opened.\(^13\)

\textit{1.1. Principle of Universality}

The universality principle provides for international cooperation between countries, as it refers to extraterritorial effects of the insolvency proceedings.\(^14\) Accordingly, the insolvency proceedings commenced in one country, affect all the debtor’s assets, despite of their place of location. In other words, universality is concerned with the centralization of all the insolvency claims in one forum: i) all the creditors will deal only with one insolvency proceedings; ii) all the assets, regardless of their location, are encompassed within one jurisdiction; iii) all the actions taken by the respective court will produce effects thereafter in all the other concerned jurisdictions and iv) also the applicable law will be the ‘lex concursus’.\(^15\)

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\(^7\)See Omar [2008] p. 40.
\(^8\) See supra note 7, op.cit. p.40.
\(^9\) Ibid., p. 40.
\(^13\) See also, Wessel [2006] Para 10009.
\(^14\) See Omar [2008] p 42.
\(^15\) ‘Lex concursus’ is the legal system and rules of insolvency law in force in the state where the insolvency proceedings have started; see on this issue Wessel B. [2006] Para 10010; cf. Omar [2008].
The principle is favored by US and few European countries, such as The Netherlands and Germany. For example, pursuant to Section 20 of the Dutch Bankruptcy Act, the bankruptcy proceedings initiated in the Netherlands encompasses all the debtor’s assets, regardless of their location outside the Netherlands; thus, the Dutch law does not make any difference between local and foreign creditors, they are all encouraged to file their claims with the insolvency administrator, in order to satisfy their claims.17

Similarly, the countries that have adopted the UNCITRAL Model Law on Cross-border Insolvency also are concerned with universal effects of insolvency.18 Furthermore, the European Regulation on Cross-Border Insolvency (hereafter EIR) adopts a universal model, allowing the debtor to open the insolvency proceedings at the place where it has the center of main interests, extending its effect over all the debtor’s assets located within the European Union.20

The biggest advantage of this principle is that it provides for an equal treatment to all the creditors, without distinguishing, local or foreign. Also, it prevents the assets dissipation among different jurisdictions. It has been said that the universality approach is more “cost effective”, as it avoids the “double or possibly even greater costs of several proceedings” and consequently, it leads to a “better economic result”.22

It becomes apparent that the disadvantages are conferred on the foreign creditors, who are faced with unknown foreign insolvency proceedings and also unfamiliar foreign law, this leading to confusion and uncertainty.24

16 The two terms ‘bankruptcy’ and ‘insolvency’ have been used, in England and Wales, by making the distinction on the applicability to different categories of persons; the former term is used for individuals and the later is used for corporations; The reader shall consider that these two terms, in this paper, are to be used interchangeable, as synonyms; See also Omar [2008], p. 3.
18 The United Nations Commission on International Trade Law (UNCITRAL) on May 1997, see infra at 3.1.
21 EIR Recital 12.
22 See further details in Wessel [2006] Para 10022 (iv).
23 Ibid, Para 10022 (iv).
1.2. Principle of Territoriality

Unlike the universality perspective, the principle of territoriality prescribes that national sovereignty has priority; as the courts of one jurisdiction - the courts of the opening of bankruptcy - have their power limited to the country where they are located “the legal effects of these proceedings will therefore abruptly stop at this state’s border.” Accordingly, each country, where the assets of the debtor are located, may assume jurisdiction to decide over the concerned claims, since the law of the state of the opening does not allow for an extraterritorial effect. Mainly, it requires the ‘multinational debtor’ to initiate insolvency proceedings in each country it has assets, a fact that will create additional costs to the debtor, as well as to the creditors. Furthermore, it allows the domestic courts to “shield local creditors from biased foreign courts and suspect foreign law.” The applicability of this principle will consequently lead to the situation where each country concerned with the debtor’s assets located therein, will apply its own law and therefore the effects derived thereafter, thus “the states’ insolvency law is not immune to certain influences from abroad.”

The advantages of territoriality are based upon the idea that the local insolvency law will be applicable with the aim and effects of excluding any foreign insolvency law. In the literature it has been held that the principle of territoriality “is in line with the practical reality”, based on the argument, that most of the businesses, running internationally, are organized in ‘group of companies’, thus each entity has its own (independent) legal personality and from this context, they are subject to the law of the country by country basis.

Besides the arguments described above, in favor of territoriality, the principle has its disadvantages, based upon the fact that the insolvency proceedings restricted only to the territorial jurisdiction of the concerned court, is most likely to be followed by too many insolvency proceedings, in this manner increasing the costs and the time frame for resolving

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26 Wessel [2006] Para 10009: ‘Principle of territoriality states that the assets located in other jurisdictions than the state of the opening of insolvency proceedings, remain untouched. The same effects occur with respect to the trustee’s rights over the estate.’
31 Ibid., Para 10014 (c).
32 Ibid.
the claims.\textsuperscript{33} Furthermore, it may encourage ‘forum shopping’\textsuperscript{34}, since the creditors will look for the more favored forum to recover their claims. Also, an inevitable negative consequence is asset and resource dissipation.\textsuperscript{35} In the context of the two doctrines available among different legal systems, it becomes apparent, that the principle of universality seems to be more appropriate when dealing with transnational insolvencies. It offers a double dimension of effects, on the one hand to the creditors, local or foreign, and on the other hand to the assets.\textsuperscript{36}

After carefully considering the theories described above, it is appropriate to mention that despite of the fact that insolvency is exclusively a matter of judicial courts, in the international context it does not remain isolated from other areas where the debtor may be involved. At this point, of particular interest is to examine how and in which context the unfortunate situation of insolvency meets the private system of resolving disputes, namely commercial arbitration. Before entering into a deep analysis it is necessary first to consider the essential and specific attributes of international commercial arbitration.

\section{The main features of International Commercial Arbitration}

Arbitration is form of dispute resolution, common in both international and domestic context. It recognizes the parties’ right to agree on how they want their potential dispute to be resolved, by ordinarily selecting private persons to decide on their conflict, having binding effect, capable for enforcement. The traditional approach of defining arbitration taken in France is as follows: “\textit{Arbitration is a device whereby the settlement of a question, which is of interest for two or more persons, is entrusted to one or more other persons – the arbitrator or arbitrators – who derive their powers from a private agreement, not from the authorities of a State, and who are to proceed and decide the case on the basis of such an agreement}”\textsuperscript{37}

\begin{flushright}
\textsuperscript{33} See more details about the disadvantages of the territoriality principle in Wessel [2006] para 10015.
\textsuperscript{34} The ‘forum shopping’ principle refers to the situation when the claimant chooses among the jurisdictions, that would generally have jurisdiction to hear the claim, the most favourable one; See discussion on this issue Ulrich Magnus and Peter Mankowski, \textit{Brussels I Regulation, European Commentaries on Private International Law}, [2007]; cf. also Wessel [2006].
\textsuperscript{36} See Wessel [2006] Para 10010.
\end{flushright}
From the broad definition, the main characteristics of arbitration can be draw: first, arbitration has a pure ‘consensual’ character; second, the dispute is resolved by “non-governmental decision makers” who derive their power from the parties’ agreement; and third, the arbitration results in a binding award. In contrast to national courts, the parties are free to decide on the applicable law and all the other details that may arise in a context of a future dispute.

The foremost principle underlying international arbitration is the party autonomy. It became the most favored by the parties involved in a cross-border business relationship, as it is considered by far, one of the most neutral means by which international disputes may be resolved. Moreover, in international arbitration the party autonomy is regarded as extending far beyond the choice of national law to govern the procedure or the substantive contract. In this context, the parties are free to consider the procedure to be followed, included directly or by reference to arbitration rules. The New York Convention of 1958, under Article V (1) (d) implicitly recognizes the right referred above; similarly, under European Convention of 1961 in Article IV.

After examining the main attributes of the matters subject in this paper, it becomes necessary to further discuss the recent developments of the international legal framework in the context of the International Insolvency Law.

3. The unification and harmonization of the international insolvency law

In the absence of the International insolvency law as a “systematic elaborated legal framework”, and in the light of the cross-border insolvency cases, the economic integration encompassing transnational cooperation among countries became less effective. Uniformity

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38 See other definitions in Born B. Gary, ‘International Commercial Arbitration, Commentary and Materials’ (cited as Born 2001) (2nd edition) [2001] p. 1: “International arbitration is a means by which international disputes can be definitely resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers”; Cf. Common law authors define arbitration as involving “two or more parties faced with a dispute which they cannot resolve themselves, agreeing that some private individual will resolve it for them and if the arbitration runs its full course […] it will not be settled by a compromise but by a decision” see Alan Redfern and Martin M. Hunter, ‘Law and Practice of International Commercial Arbitration (2nd Edition) Sweet & Maxwell, London [1991], Para 7 et seq.
40 Ibid., Para 51 et seq.
43 See on this issue generally see Wessel [2006], Para 10004.
of bankruptcy laws, as a prerequisite for increasing the economic effectiveness, became more and more demanding.\textsuperscript{45} It becomes apparent that in the current economic environment, bankruptcy is an inevitable reality, in this way leading towards harmonization of its principles and standards between trading countries.\textsuperscript{46}

The most important legal questions concerned with cross-border insolvencies are related to the issues of jurisdiction, applicable law, effects and recognition of the insolvency proceedings.\textsuperscript{47} As a result, “most multinational debtors and creditors find asset distribution arising from international insolvency proceedings to be unpredictable”.\textsuperscript{48}

After years of efforts and attempts to adopt a uniform set of rules, dealing with cross-border insolvencies, it has resulted in the adoption in 1997 of UNCITRAL Model Law on Cross Border Insolvency (\textit{cited as UNCITRAL})\textsuperscript{49} and few years later the European Regulation on Cross-border Insolvency (\textit{cited as EIR}).\textsuperscript{50}

\textbf{3.1. The UNCITRAL Model Law on Cross-border Insolvency}

The United Nations Commission on International Trade Law on May 1997 has adopted the Model law on cross-border insolvency. The Model law does not attempt a substantive unification of insolvency law\textsuperscript{51} it is rather concerned with providing for a set of recommendations for the enacting States, for incorporating them into their national laws, aiming to harmonize the domestic laws.\textsuperscript{52}

It provides for the legal framework on cross-border insolvency, designed to give assistance to the Contracting States with a harmonized legal framework, in such way facilitating the administration and the management of insolvency proceedings with an international

\textsuperscript{45} See 10 Duke J. of Comp. & Int'l L [2000] p. 470
\textsuperscript{47} See Wessel [2006], Para 10007 et seq.
\textsuperscript{52} See Wessel B. [2006], Para10185.
dimension “a vehicle for the harmonization of law”. In its preamble, the Model Law provides for the objectives it tries to achieve: first, an equitable and better administration of insolvency proceedings; second, judicial cooperation between courts and other legal bodies where the debtor has assets; third, to offer certainty for trade and investment; forth, value maximization of the debtor’s assets.

The Model law is applicable only to collective creditor’s actions; it does not interfere with individual actions. Pursuant to Article (1), the Model Law extends the jurisdiction over all the debtor’s assets regardless of location. According to UNCITRAL Model law on Cross-border Insolvency, as a general principle in insolvency law, the collective system, providing for an efficient and equal distribution of the assets available to the creditors, is more favored than to leave the creditors’ freedom to bring individual claims or remedies against the estate. In literature it has been said that the collective system is based on “the basic economic theory that greater value may be obtained from keeping the essential components together rather than breaking them up a disposing of them in fragments”.

The scope of the UNCITRAL Model Law is very broad; it encompasses any foreign proceedings in connection to the debtor’s bankruptcy, where the assets of the insolvent debtor are located in foreign jurisdictions. The Model Law addresses especially the access of the foreign insolvency representative to the insolvency proceedings of the local courts and the recognition of the foreign insolvency proceedings; access of the foreign creditors to take part of the local insolvency proceedings, prescribing an equal treatment as local creditors. The cross-border cooperation established by the Model Law is designed to confront and prevent the attempt of forum shopping.

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53 See UNCITRAL.
54 See also Howell L. Jonathan [2008] p. 125.
55 Ibid.
3.2. The European Regulation No 1346/2000 on Cross-Border Insolvency

The European Regulation on Cross-Border Insolvency\(^\text{60}\) of May 2000 is the result of a long-term project that began in the early 1960s. Article 1 of Brussels Convention 1968 which excludes insolvency matters form its scope of application, was followed by the first draft of the European Community text in 1995 dealing solely with insolvency matter. The later formed the basis for the version that the Council of Ministers was to approve as the European Insolvency Regulation later on 2000.\(^\text{61}\)

The European Regulation on Cross-Border Insolvency, since its adoption, has been regarded as a useful and indispensable tool, expressing the effort of providing the legal framework for resolving the cross-border insolvencies. The EIR is applicable to all the European Member States, except Denmark, and it has direct and binding effect upon all the Member States.\(^\text{62}\)

The purposes and objectives of the EIR are prescribed in the Preamble, stating that for proper function of the internal market, the cross-border insolvency proceedings shall operate in an efficient and effective way, thus reducing the incentives for ‘forum shopping’.\(^\text{63}\)

The EIR is provides with rules for the international jurisdiction of a court within a Member State to open insolvency proceedings; it also provides, with rules for the (automatic) recognition of these proceedings in other Member States and the powers of the ‘liquidator’ in other Member States. The Regulation also deals with important choice of law (or: ‘private international law’ or ‘conflict of law rules’) provisions.

3.2.1. The underlying principles of the European Insolvency Regulation

The European Insolvency Regulation is applicable to collective insolvency proceedings “which entail the partial or total divestment of a debtor and the appointment of a liquidator”.\(^\text{64}\)

The ‘divestment’ of the debtor, as one of the main features and consequences of the insolvency, implies the loss of the power of control over his assets. Similarly, according to the


\(^{61}\) For historical background of the EIR, see infra 68Virgos-Schmit Report (1996); Wessel B. [2006] p. 228.

\(^{62}\) See Recital 8 of the Preamble of EIR; For Denmark see Nordic Bankruptcy Convention of 7 November 1933 which includes the five Nordic countries (Denmark, Sweden, Norway, Finland and Iceland).

\(^{63}\) EIR Recital 2 and 4.

\(^{64}\) EIR Article 1 (1)
French version ‘le dessaisissement’ means dispossessing of the right of the management, the later being given to the appointed administrator.65

The EU Insolvency Regulation contains provisions of *procedural laws* (e.g. Art. 3 ‘the international jurisdiction of the insolvency court’), *substantive* (e.g. Art. 18 ‘the rights and obligations of the liquidator’) as well as provisions on the *conflict of laws* rule (Art. 4 ‘the applicable law to the insolvency proceedings’).

The jurisdiction to open the *main insolvency proceedings* belongs to the courts of the Member States within the territory of which the debtor’s centre of main interests is located.66 Pursuant to Recital 13 of the EIR, the centre of main interests of the debtor, in absence of proof to the contrary, “should correspond to the place where the debtor conducts the administration of his business on a regular basis and is therefore ascertainable to the third parties”.67 The opening of the main insolvency proceedings has a universal effect over all the debtor’s assets. Virgos-Schmit Report contains a list of the legal consequences produced by the universal effect of the main insolvency (e.g. all the creditors are encompassed within the proceedings, all the assets regardless of location, but limited to the Community territory).68

For safeguarding and protecting the ‘diversity of interests’, the Regulation provides for the possibility to open *secondary insolvency proceedings*, only if the debtor has an ‘establishment’ within the territory of another Member State (the effects of the secondary proceedings shall be limited only to the assets located within the territory of that member State).69 In order to “satisfy the need for unity in the Community”,70 the Regulation stipulates for a mandatory coordination between the main and secondary insolvency proceedings. The

66 Article 3 (1) of EIR.
67 See ECI of 2 May 2006 in Re Eurofood IFSC Case C-341/04 for interpretation of the centre of main interests.
68 Virgos-Schmit Report, Para 19 (hereafter referred to as Virgos-Schmit Report 1996) is written by Professor Miguel Virgos and Mr. Etienne Schmit. The Report contains a set of rules, having the role of an interpretative guide to the 1995 Insolvency Convention. The later has been amended 5 years later and became of what is presently called the Insolvency Regulation. The content of the Insolvency regulation is almost identical with the 1995 Convention. Regardless of the fact that the Report had never been adopted by the European Minister of Justice (thus it does not have a binding effect), it is regarded and used as “unofficial guide” of interpretation for both literature and courts (see Wessel [2006] Para 10489), available at http://aei.pitt.edu/952/; cf. Wessel B. [2006], para 10464.
69 Article 3 (2) and 2 (h) and Recital 12 of the EIR; see also Virgos-Schmit Report as cited in Wessel B. [2006] para 10460.
70 Recital 12, last sentence of EIR.
rationale of the provision is laid down within the overall purpose of the Regulation, in this context, to “avoid over-rigid centralization”.71

After carefully considering the ideas provided above, it becomes apparent that the Insolvency Regulation is based on the principle of universality, however limited to the possibility of opening of the secondary proceedings in other Member States.72

As with respect to the provisions on conflict of laws rule and applicable law, as stated in Article 4, as well as in Recital 23 of the EIR, detailed analysis and interpretation will be given in Chapter II and III of this paper. However, at this stage we shall mention that, according to Article 4 (1) of the Regulation, the law applicable to the insolvency proceedings and the effects followed thereafter are to be governed by the law of the state where the main proceedings of insolvency have been opened.73 Accordingly, the applicable law to the secondary insolvency proceedings, as prescribed in Article 27, is the law of the country where those proceedings have been initiated.

Another aspect regulated by the Insolvency Regulation is concerned with the recognition of the insolvency proceedings upon the commencement of the proceedings within the territory of one Member State. Pursuant to Article 16 of the Insolvency Regulation,74 the recognition shall occur without any formalities – ‘automatically’- unless it would be against the ‘public policy’ of the concerned State.75

Considering the importance of the harmonization the International Insolvency Law, it is appropriate to consider that without the countries’ cooperation it would not be possible. Further concern is with the allocation of jurisdiction in a cross-border context, to both bankruptcy court as well as arbitral tribunal.

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72 Ibid., see supra 71.
73 Article 4 (1) of the EIR.
74 Article 16 (1) of the EU Insolvency Regulation: “Any judgement opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings”.
75 Article 26 of the EU Insolvency Regulation: “Any Member States may refuse to recognise insolvency proceedings opened in another member State or to enforce a judgement handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that States’ public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual”.

Chapter II Allocation of jurisdiction in cross-border insolvency and arbitration

1. The jurisdiction of the bankruptcy courts and “vis attractiva concursus”

As mentioned in the previous Section, at the European Community level a uniform set of rules governing the cross-border insolvency is provided by the European Insolvency Regulation. The EIR is concerned with the issues arising in cross-border insolvencies, providing for international jurisdiction of the court where the insolvency proceedings have been opened. According to the Regulation, the jurisdiction to open the main insolvency proceedings is given, as stated in Article 3(1), to the court of the Member State where the centre of main interests of the debtor is located. Since Article 3 (1) institutes only the international jurisdiction, the territorial jurisdiction is to be established by the law of the Member State in question.

The centre of main interest is one of the key issues provided by the Insolvency Regulation, since it determines on the one hand, which courts have jurisdiction, and on the other hand, what is the applicable law (Article 4 (1) provides that the applicable law as to the effects of insolvency is the law of the state where the proceedings are opened). In this context, it must be noted, as a preliminary point that to some extent, the domestic insolvency laws of the Member States adopt, the so-called principle of ‘vis attractiva concursus’ according to this principle the court of the opening of insolvency proceedings

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77 Recital 2 EIR.
78 Article 3 (1) EIR reads as follows: “The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary”.
79 Recital 15 EIR.
80 Article 4 (1) EIR: “save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the ‘State of the opening of proceedings’.
81 ‘Vis attractive concursus’ literally means ‘the attractive force of the bankruptcy proceedings’. The concept is used as describing the rule based on the premise that the court of the opening of insolvency proceedings should exercise jurisdiction over any related or concurrent insolvency proceedings involving the insolvent debtor. It has to be noted, that the doctrine is not universally accepted or adopted. The doctrine, is most related to France where pursuant to Article 635 of the Cibil Code of 1838, the bankruptcy courts were offered exclusive jurisdiction over all the matters connected with insolvency.; for complete and deep analysis regarding the topic see Dalhuisen J.H. On International Insolvency and Bankruptcy, as cited in Fletcher F. Ian, Insolvency in Private International Law (2nd edition), Oxford University Press [2005] at ‘Table of latin terms and expressions’.
has exclusive jurisdiction over all insolvency matters, as well as any disputes arising from insolvency. In other words, the bankruptcy court will extend its jurisdiction over matters which usually, would fall outside of its jurisdiction.

Of particular interest to is whether this rule of exclusive jurisdiction of vis attractiva concursus is contained in the European Insolvency Regulation. In Virgos-Schmit’s Report it is stated that the European Insolvency Regulation is silent with respect to the ‘vis attractiva’ principle, requiring for the concentration of all the actions arising from or directly related to insolvency solely before the bankruptcy court. In this context, relevance for further explanation has Recital 6 of the EIR stating that all the actions related or derived from insolvency proceedings have to be determined and decided by the bankruptcy court of the opening state. The rationale has been explained by ECJ confirming that: “concentrating all the actions directly related to the insolvency of an undertaking before the courts of a Member State with jurisdiction to open the insolvency proceedings is consistent with the objective of improving the effectiveness and efficiency of insolvency proceedings having cross-border effects” as well as avoiding forum shopping effects.

In the light of the ECJ’s approach and interpretation, it becomes apparent, that the principle ‘vis attractiva concursus’ may be interpreted as being adopted by the Insolvency Regulation, but in a very delicate manner. Furthermore, in Virgos-Schmit Report is stated that the principle can be found in the Insolvency but only partially, as it is relevant only in the light of Article 25 of EIR which is concerned with enforceability and recognition of other judgments. To be noted that in cross-border matters, under the ‘vis attractiva concursus’ the forum state would assume jurisdiction over more matters, which otherwise would have felt outside of its international jurisdiction. Therefore, it is very important to agree whether the Regulation adopted or not the principle. As will be described below in the following sections the

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84 Virgos-Schmit Report [1996].
86 Recital 6 of EIR “the Regulation should be confined to provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.”
89 Jona Israël, p. 269 et seq, see supra note 83.
Regulation has not adopted the principle, since it provided for a list of exception which would have come into conflict with the principle. After a careful consideration on the above mentioned rules, it becomes apparent to us the EIR’s objective and goal is to prevent and avoid the possibility of more than one court to exercise jurisdiction over claims directly connected with the insolvency proceedings, would undermine the pursuit of such an objective.  

As far as arbitration is concerned the jurisdiction of the Arbitral Tribunal is of particular importance and will further be examined.

2. General aspects on the jurisdiction of the Arbitral Tribunal

The Kompetenz-Kompetenz principle, fundamental for the legitimate operation of the Arbitral Tribunal, is concerned with the arbitrators’ power and authority to determine their own jurisdiction. The competence of the Arbitral Tribunal is solely derived from the parties’ agreement to submit their future disputes to arbitration. Most of the national arbitration statutes, as well as institutional rules on arbitration, contain specific rules concerned with the arbitral tribunal’s jurisdiction. In this context, pursuant to English Arbitration Act of 1996, Section 30: “unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is to: (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; (c) what matters have been submitted to arbitration in accordance with the arbitration agreement”.

Similarly, UNCITRAL Model Law on International Commercial Arbitration, under Article 16 provides that “the arbitral tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement”. The competence of the arbitral tribunal to rule on its own jurisdiction is also provided by the International Chamber of Commerce Arbitration Rules (ICC) under Article 6(2) “[...] any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself”. Considering the rules cited above, it is to be noted that the Arbitral Tribunal, on the one hand, gains its jurisdiction in the light of the arbitration agreement concluded between parties, and

90 Para 24 ECJ C-339/07, see supra note 88.
91 Doug Jones, Competence-Competence, The International Journal of Arbitration, Mediation and Dispute Management (hereafter referred to as Doug J.) Volume 75, Number 1, February 2009, p.56.
92 See Section 30 of English Arbitration Act of 1996; See also, Doug J., op.cit. p. 58.
on the other hand, it gains power of authority to decide, first on its own jurisdiction and thereafter on the matters submitted before it.

Furthermore, of particular interest is whether the aforementioned statement concerned with the general rule of Tribunal’s jurisdiction would be similarly applicable in the context of insolvency. Notably, the matter is not addressed either by any of the Institutional Rules of Arbitration (see e.g. LCIA; ICC), or by any Insolvency Conventions (including EIR).

2.1. The jurisdiction of the Arbitral Tribunal to rule in context of Insolvency proceedings

In an international context where one of the parties to arbitration is subject to insolvency proceedings in a foreign jurisdiction became of extreme importance. This is the peak where the international arbitration law and insolvency law come into conflict. The first question arising at this stage is whether the Arbitral Tribunal, concerned with an action in the context of which one of the parties is subject to foreign bankruptcy proceedings, is competent to take a specific position or rather disregard them.95

As mentioned above, no indication is given in any of the Institutional Rules of Arbitration or any other relevant statutes regarding the issue of insolvency and arbitration.96 Moreover, the Arbitral Tribunal cannot simply rely on the application of insolvency law as national law would be bound to do; for example, when dealing with insolvency proceedings within European Community, the national courts will be required to apply the Insolvency Regulation.97 The reason is based on the fact that the Tribunal is not ‘permanently’ connected with a specific state, consequently it does not have a lex fori.98 In this context, it may be necessary for the Arbitral Tribunal to make a connection with an appropriate national jurisdiction. Common practice and consent in the literature99 is that in International Arbitration, reliance is to be made on the laws of the place of arbitration.100

Assuming that the Arbitral Tribunal is located in Germany, in absence of any rules governing the concerning the matter, it may be appropriate to rely on the German law which contains the

96 Ibid., p. 60.
98 Ibid., op.cit. p. 60, see supra 95.
provisions of the Insolvency Regulation. Accordingly, by applying the Insolvency Regulation the Arbitral Tribunal may be required to recognize the Insolvency proceedings commenced against the party subject to arbitration.\(^\text{101}\) The recognition procedure is laid down in Article 16 of the EIR\(^\text{102}\) providing that the opening of the insolvency proceedings in one Member State shall be recognized in all the other Member States. Considering the fact that the Insolvency Regulation does not impose an exclusive jurisdiction on the recognition attributed to the national courts and also, since the recognition procedure occurs automatically, it may be concluded, that on the one hand the arbitral tribunal would have the option to decide on the matter taking into account the Insolvency Regulation.\(^\text{103}\)

On the other hand, the arbitral tribunal may not be bound to follow the rules prescribed in the Regulation, since there is no provision which would require such a behavior.\(^\text{104}\) In this respect, relevance has the approach taken in ICC arbitration involving *Vivendi SA (and subsidiaries, Deutsche Telekom AG and subsidiaries) and Elektrim SA*\(^\text{105}\), Polish holding company. The Federal Supreme Court of Switzerland\(^\text{106}\) has rendered a remarkable decision regarding the impact of the bankruptcy proceedings on a pending arbitration with the seat in Switzerland to which the Elektrim SA was a party.\(^\text{107}\) Arbitration proceedings were pending in Switzerland when the Polish company Elektrim became insolvent. According to the Polish insolvency law the arbitration pending or non-pending shall be discontinued or declared void by virtue of insolvency.\(^\text{108}\) The question before the Court was whether the impact of insolvency on pending arbitration proceedings is to be governed by the law of the seat of the Arbitral Tribunal before which the action was pending (Switzerland), or to apply the insolvency law of the opening court (Polish Law).\(^\text{109}\)

The Federal Supreme Court has decided that the law having relevance is the law of the seat of the Arbitral Tribunal, thus the Swiss Law. Further, by applying the law of the seat the pending

\(^{101}\) See Philipp K. Wagner [2009].

\(^{102}\) Article16 EIR „Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings”.

\(^{103}\) Philipp K. Wagner [2009] p. 61, see supra note 95.

\(^{104}\) Ibid., See supra note 95.

\(^{105}\) Federal Supreme Court (Switzerland) of March 31, 2009 in *Vivendi SA (and its subsidiaries; Deutsche Telekom and its subsidiaries) v. Elektrim SA* No. 4A 428/2008.

\(^{106}\) See *Vivendi SA v. Elektrim SA*, No. 4A 428/2008, see supra 105.

\(^{107}\) See *Vivendi SA v. Elektrim SA*, No. 4A 428/2008, see supra 105.

\(^{108}\) Article 142 reads as follows: “Any arbitration clause concluded by the bankrupt shall lose its legal effects as at the date bankruptcy is declared an any pending arbitration shall be discontinued”.

arbitration proceedings have to be continued. In this context, it becomes apparent that the Arbitral Tribunal is not bound to recognize the insolvency proceedings commenced against the concerned part, nor to apply the insolvency law of the opening state. Presumably this indicates that the pending arbitration proceedings are to be decided by the law of the arbitral situs, as being the law with the closest connection to the case.

Likewise, very recently, the English High Court of Justice has ruled on a similar matter, concerning the same debtor (Elektrim - Polish holding company) in Elektrim v. Vivendi.110 At this time, the arbitration proceedings, involving J Syska, the admistrator of Elektrim SA and Vivendi Universal SA, were pending when Elektrim went bankruptcy under Polish Insolvency Law. English Court has decided that the Polish Insolvency law, which, as mentioned above, under Article 142 of the Insolvency Code, would render any arbitration null, is not applicable. Moreover, the law of the seat of arbitration which is English Law has to be applied as to the effects of insolvency proceedings commenced in Poland to the pending arbitration proceedings in London. Consequently, according to English Law the arbitration proceedings have to be continued regardless of insolvency.111

The legal basis and reasoning of the Court, as well as the applicability of the Insolvency Regulation to pending arbitration proceedings will be discussed in detail in Chapter IV.

Further, of extreme importance for the Arbitral Tribunal is to consider its obligation to render an enforceable award (see Article 36 of ICC Rules on Arbitration).112 The grounds for refusal of enforcement, as well as for recognition, are laid down in Article V of the New York Convention (hereafter ‘The Convention’).113 Of particular importance to us, in the context of a conflict between insolvency law and arbitration, is to examine the refusal on the grounds of the public policy defense, as stated under Article V (2) (b) of the Convention. The equal and fair distribution among all the creditors has been regarded as “both domestic and international public policy.”114 Relevant is French law,115 which considers the principle as part of the

\[^{110}\text{English High Court of Justice of 2 October 2008 in Elektrim v. Vivendi, EWHC 2155 (Comm); The reader shall be aware that the legal aspects involved in the case, as well as the reasoning of the Court will be further treated in Chapter III.}\]

\[^{111}\text{Elektrim v. Vivendi, EWHC 2155 (Comm).}\]

\[^{112}\text{Article 36 ICC.}\]


\[^{114}\text{See Lew, Julian D.M., Mistelis, Lukas A., Kröll, Stefan M., Comparative International Commercial Arbitration, 2003, p. 345.}\]

In this context, it becomes apparent that an arbitral award rendered by the Arbitral Tribunal disregarding the principle of ‘equal distribution’ among the bankruptcy creditors, when seeking enforcement before the bankruptcy court or other relevant jurisdiction, would most likely lead to annulment, respectively refusal of recognition.

Despite of the fact that the principle of equal distribution is not expressly stated in the Insolvency Regulation, ECJ when interpreting the Regulation considers it as part of the main objective the Regulation aims to achieve “to ensure equal distribution of available assets amongst all the creditors.” In this context, the Insolvency Regulation is to be regarded as part of the ‘ordre publique communitaire’, aiming to protect certain public interest involved in the insolvency proceedings. Similarly, an award will be set aside or refuse enforcement if it is granted disregarding the principle of equal distribution, as part of the ‘ordre communitaire’ of the EIR. Moreover, there appears to be no specific provision, neither in the New York Convention nor the arbitration statutes, indicating the steps to be taken in the event of the bankruptcy of one of the parties to arbitration.

Notwithstanding with the aforementioned defense in favor of insolvency, we note at the outset that the “public policy” limitations, based on the New York Convention are to be construed narrowly. Moreover, as stated in Fotochrome Inc. v. Copal Co. the public policy defence is to be applied “only where enforcement would violate the forum state's most basic notions of morality and justice.” In the light of the legislative history of the provision, no certain guidelines to its construction are offered. However, the common consent expressed in the case law is that an expansive construction of the provision is to be avoided, as it would ‘vitiates’ the Convention's basic effort to eliminate pre-existing obstacles to enforcement.

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117 See para 70 of the decision of the ECJ 17 May 2005, C-294/02 Commission v. AMI Semiconductor Belgium BVBA, stating : “[T]he aim of the [Insolvency] Regulation was to ensure the efficiency and proper coordination of insolvency proceedings within the European Union and thus to ensure equal distribution of available assets amongst all the creditors. The Community institutions would enjoy an unjustifiable advantage over the other creditors if they were allowed to pursue their claims in proceedings brought before the Community judicature when any action before national courts was impossible.”

118 United States Court of Appeals (2nd Circuit) of 29 May 1975, 517 F.2d 512 Fotochrome Inc. v. Copal C, Para 12 et seq.


120 United States Court of Appeals (2nd Circuit) of 23 December 1974 in Parsons & Whittemore Overseas Co., Inc. v. Societe General de L'Industrie Du Papier (Rakta), 508 F.2d 969, Para 7, 9 et seq.
Therefore, concluding, we believe that due to the general pro-enforcement bias informing the Convention and increased use of arbitration as neutral system for mitigating conflicts, on the one hand, and on the other hand, due to the increased transnational transactions and mixture of different national systems, the defenses on the public policy shall be construed in a very narrow manner. Enforcement of a foreign arbitral award may be denied only if there is a violation of the ‘most basic notions of morality and justice’.  

On those grounds, we do not find the principle of ‘equal distribution’ among all the creditors as convincing for a possible annulment of an arbitral award rendered as such. Moreover, as stated in the literature, ‘equal distribution’ does not necessarily mean fairness. The key of distribution is rather based on the principle of ‘equitability’, and not equality, as ECJ or other courts stated when ruling on this defense. “It is therefore the ranking …, and not the equality that is the essence of bankruptcy and of creditors’ relationships more generally.”  

In the UNCITRAL Guide to Enactment is stated that “this key objective recognizes that all creditors do not need to be treated identically, but in a manner that reflects the different bargains they have struck with the debtor”. The doctrine of the equitable treatment of the creditors pervade many aspects of an insolvency law, such the application of the stay or suspension, provisions to set aside acts and transactions.

Furthermore, returning to the Arbitral Tribunal’s obligation to render an enforceable award, according to Article V (2) (a) New York Convention enforcement may also be denied if the subject matter is not arbitrable under the law of the country in which enforcement and recognition is sought.

As a preliminary point, it is appropriate and necessary to mention that the arbitrability issue will not be addressed in this paper, it will be occasionally mentioned when the relevant case law or decision will require. However, little remarks will be provided as such.

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121 See 508 F.2d 969, Para 7, 9 et seq, see supra 120
The common consent found in the literature and also pursuant to various national insolvency statutes, the ‘pure bankruptcy’ issues are not arbitrable. Such issues concern for example the nomination of the trustee, the collection and distribution of the estate and other measures required in insolvency proceedings.125

After carefully considering the provided ideas, further considerations will be given on the issues involving the

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Chapter III Insolvency after the commencement of arbitration proceedings (‘pending arbitration proceedings’)

1. The conflict of laws rule and applicable law to insolvency proceedings

The ‘lex generalis’ applicable to the effects generated by the commencement of insolvency proceedings is stipulated in Article 4 of the Insolvency Regulation “the law applicable to insolvency proceedings and their effects shall be that of the Member state within the territory of which such proceedings are opened [...] the state of the opening proceedings” – ‘lex fori consursus’.\(^{126}\) In this sense, the law of the state of the opening governs the insolvency proceedings “in all of its stages and in all of its effects”.\(^{127}\) Besides the basic principles of the applicable law, the EIR provides also for a set of exceptions to the general rule, aiming to promote certainty and legitimate expectations among the interested parties.\(^{128}\)

The exceptions provide *inter alia* for a uniform choice of law rule regarding the pending proceedings concerning the debtor upon the commencement of insolvency. In this respect, Article 15 of EIR stipulates that the “lex fori processus” – the law of the fora where the lawsuit is pending- governs the effects of insolvency: “the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending”.

In the language of Article 15, the ‘lex fori processus’ shall “solely” govern the effects of the pending lawsuits. Such a restriction on the applicable law was necessary; because of the many differences that exist between the laws of the Member States, the intention of the legislator was to emphasis that there should be only one law which exclusively will govern the effects of the pending proceedings.\(^{129}\)

This provision is of foremost importance as one shall carefully distinguish between the effects of insolvency proceedings on the lawsuit pending and those on the individual enforcement

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\(^{126}\) Virgós/Garcimartín, op.cit. p. 72, Para 117.

\(^{127}\) Ibid. p.70 Para 114.

\(^{128}\) Recital 24 of the EIR: [...] “to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule”; cf. Virgos-SchmitReport, Para 18.

\(^{129}\) Ibid., Para 256, p. 141.
The first is concerned with actions e.g. involving the separation of third-party property from the debtor’s estate or actions claiming preferential satisfaction, being governed by the ‘lex processus’, as provided by Article 4(2)(f) together with Article 15 – the law of the state where the lawsuit is pending. And the second is concerned mainly with actions such as ‘distress’, ‘execution’, ‘sequestration’ and are governed by the ‘lex generalis’, as provided by Article 4 (2) (f) – the law of the state where the insolvency proceedings have been opened.

It was suggested that the applicability of Article 15 of the Insolvency Regulation, has relevance only when the lawsuit in question is pending before a judicial authority located within the territory of Member States. It is worth mentioning that the view was favored by the Austrian Courts where, in similar conditions, Austrian law is to be applied to Austrian proceedings brought by creditors, concerning assets subject to the bankruptcy estate, prior to commencement of insolvency proceedings in Germany, on the basis that Article 15 governs the pending proceedings. Further, in another decision the Austrian Supreme Court held that Austrian law is to be applied to Austrian proceedings brought against a company in respect to which insolvency proceedings were subsequently opened in Italy.

Support for these considerations may be found in a recent decision of the English High Court of Justice in Mazur Media Ltd. v. Mazur Media GmbH. The lawsuit against the German party was pending before English Court, prior to commencement of its insolvency proceedings in Germany. Consequently, the Court before whom the lawsuit was pending, had the discretion under Article 15 of the Insolvency Regulation together with the national rules on insolvency, to permit the continuance of the pending proceedings, regardless of the allegations brought by the insolvent party. This is an illustrative case where the lawsuit pending are to be solely decided by the law of the courts where it is pending, and not by the...

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131 See supra Chapter II: the effects of insolvency on arbitration agreements and the preclusion of individual actions; See also, Fletcher I. F. (2nd edition) p. 420; conf. Wessel [2006] Para 10711.
133 Austrian Supreme Court (OGH) of 17 March 2005, 8 Ob 131/04d; See also the OGH, of 23 February 2006, 9 Ob 135/04z as cited in Elekrim v Vivendi EWHC[2008] 2155, Para 42.
134 Austrian Supreme Court OGH of 24 January 2006, 10 Ob 80/05w as cited in Elekrim v Vivendi EWHC [2008] 2155, Para 42.
135 Ibid.
lex fori concursus. Moreover, the question of what is the meaning of an “asset” or “right” remains with the lex fori concursus. Further, it becomes apparent to examine, in the light of the case at hand whether arbitration proceeding were to be considered ‘lawsuit pending’ in the meaning of article 15.

The interpretation of Article 15, as slightly mentioned above, does not seem to raise questions or doubts when referring to the lawsuit pending as including only proceedings before judicial courts. Of particular interest is whether the exception prescribed by Article 15 was meant to equally include pending arbitration proceedings.

1.2. The effects of insolvency on pending arbitration – Article 4(2) (f) and 15

The EU Insolvency Regulation (1346/2000/EC) does not provide any rules with respect to pending arbitration proceedings; likewise, dissenting opinions have been expressed since its adoption. The scholar Dr. Klauss Pannen contends that the arbitration proceedings are excluded from the meaning of the lawsuit intended to be covered by Article 15. Consequently, only the lawsuits pending before judicial courts are subject to the rule and the arbitration proceedings and other non-contentious matters are to be governed by the general provision - the lex fori concursus.

On those grounds, it becomes apparent to examine the wording of Article 4(2) (f) together with Article 15. Article 4 (2) (f) reads as follows: “the law of the state of the opening […] shall determine in particular […] the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuit pending”. Accordingly, the lawsuit pending is to be interpreted in the light of the meaning of ‘proceedings brought by individual creditors’, because the pending lawsuit are to be considered as an ‘advanced’ level of the proceedings brought by the creditors. To put it in different words, the pending proceedings have their origin in proceedings brought by the individual creditors; they are just under the name of lawsuit pending because of the timeframe reasons, and not subject matter reasons. Accordingly, this indicates that the proceedings brought by individual creditors are to be decided by the law of the court where they are pending, thus at this stage they would have

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138 To be noted that the lex fori processus will not be applicable whenever the concerned assets are not included in the insolvency estate, they will rather governed by the lex fori concursus, as the lex generalis in this matter, in this respect see Fletcher I.F., (2nd edition) p. 420 et seq; cf. Pannen, Para 7, p. 300; conf. Virgos/Garcimartin (2004) Para 258, p. 141.

139 See Wessel [2006] Para 10712.


141 See Pannen K, Para 8, p. 300.
the status of lawsuit. Further, as far as arbitration is concerned, we find appropriate to apply the same reasoning mentioned above similarly to arbitration, since the activity of arbitration is sufficiently analogous to the activity of national courts: it is organized in a legal context, the arbitrator is required to apply the law, the arbitral award constitutes res judicata and it may constitute, in certain circumstances an executor decision. The basis of arbitration proceedings as well as judicial proceedings is a proceeding, on the basis of a claim, which becomes pending once it is filed before the competent judicial authority.

This interpretation would be consistent with the teleological interpretation taken by the ECJ in Commission v. AMI Semiconductor Belgium (see previous Chapter III). In this case, the ECJ interpreted the arbitration proceedings, filed after the commencement of insolvency, to be considered as ‘proceedings brought by individual creditors’, thus falling under the general provision on the applicable law to insolvency, namely the lex fori concursus. Moreover, by analogy, in UNCITRAL Model Law on Cross-Border Insolvency, the term ‘proceedings’, contained in Article 20, is intended to apply to arbitration.

Similarly, according to Virgos/Garcimartin, the rule contained in Article 15, as completing the rule of Article 4 (2) (f), is to be interpreted as broad enough to equally include arbitration proceedings under the meaning of ‘lawsuits pending’.

If this is the case, then when shall we consider the arbitration proceedings as fulfilling the criteria of ‘pending’? When the parties filed the claim with the arbitral tribunal or when the arbitrators have been already nominated? The common consent expressed in the literature, it that an autonomous interpretation shall be given when interpreting the meaning of the term “pending”.

In Virgos/Garcimartin states, that by pending one shall understand the case when the plaintiff did all the necessary actions he must take to initiate a lawsuit, upon the commencement of insolvency. The time frame is the basic criteria when finding the meaning of “pending”, however it has to be assessed autonomously from the various meaning

142 English High Court of Justice of 2 October 2008 in Elektrim v Vivendi, EWHC 2155 (Comm.), para 58
143 See Virgos/Garcimartin [2004] Para. 261
144 See supra Chapter II at 2.2. the ‘pending’ criteria for judicial lawsuits
145 See Wessel B. [2006] Para 10712;
147 Virgos/Garcimartin, op.cit., Para 259.
existing under national laws. A lawsuit comprises both “active” and “passive” legal proceedings, where the insolvent debtor can be either defendant or plaintiff.

Different views can be observed in the literature defining when arbitration shall be considered as started, thus pending. It has been stated that the simple notice or request for arbitration would not be sufficient to consider arbitration proceedings as having the status of pending, thus ‘lawsuit’ pending. For Philippe Fouchard, arbitration is pending, once the arbitral tribunal was constituted “namely that all the arbitrators have accepted their mission”. Similarly, this view has been confirmed in a recent French decision, by the French Supreme Court (Cour de Cassation), which held that arbitration is pending once the arbitral tribunal has been definitelly constituted, accordingly when the arbitrators accepted their mandates.

The interpretation of lawsuit pending, equally applicable to pending arbitration is supported by Univ. Prof. Dr. Alfred Burgstaller in an extract of Zivilverfahrensrecht, stating that “if there is an arbitration proceedings pending in a member state, the question whether this proceedings has to be suspended depends on the law of the member state (possibly including Rules of Arbitration)”. It is known that appointing the arbitrators may take much time, in this sense one may say that considering arbitration as pending only once the arbitral tribunal has been constituted would not be the best solution for arbitration. Taking the national courts for example, the pending proceedings will be considered as such once the request has been filed before the court.

The effects of the insolvency proceedings on the pending arbitration or court proceedings, are governed by the procedural law of the Member State or of the Arbitral Tribunal, where the lawsuit is pending, as whether or not the proceedings are to be suspended, continued or any appropriate procedural modification are needed to reflect the loss or the restriction of the power of the disposal and administration of the debtor and the intervention of the liquidator in

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148 Ibid.
149 See Pannen K, Para 8.
152 As cited in [2008] EWHC 2155 (Comm) 02 October 2008, Para 58.
his place.\textsuperscript{154} The rationale of such a provision rests with the preservation of the status-quo of the pending lawsuit.\textsuperscript{155}

In the light of the Insolvency Regulation, the matter, whether pending arbitration proceeding is to be interpreted as a lawsuit pending, has been addressed and resolved under a recent decision rendered by English Court in \textit{Elektrim v Vivendi}\textsuperscript{156}. The case concerned arbitration proceedings in London before LCIA between \textit{Elektrim v Vivendi}. Elektrim became subject of bankruptcy proceedings in Poland, after the commencement of the arbitration proceedings in London. Since the debtor was located within the territory of the European Union, the Insolvency Regulation would be the law governing the matter.

Article 4(2) of the EIR provides that the Polish insolvency law is to be applied to (2) (e) "the effects of insolvency proceedings on current contracts… and also to […] (2) (f) “the effects of the insolvency proceedings on proceedings brought by creditors, with the exception of lawsuits pending." Continuing with the later, Article 15 stipulates that "the effects of insolvency on lawsuits pending concerning an asset or a right of which a debtor shall be divested shall be governed solely by the law of the Member State in which that lawsuit is pending." Accordingly, Elektrim argued that pursuant to the EU Insolvency Regulation, the law governing the effects of the insolvency proceedings is the law of the state where those proceedings are opened, hence Polish Law.\textsuperscript{157} Pursuant to the Polish insolvency law, any arbitration agreement concluded by the debtor shall lose its legal effects upon the bankruptcy order and any pending arbitration proceedings shall be discontinued (Article 142 of Polish Bankruptcy Law). If the provision is applicable, the arbitration agreement shall be annulled. Article 142 reads as follows: “Any arbitration clause concluded by the bankrupt shall lose its legal effects as at the date bankruptcy is declared any pending arbitration shall be discontinued”\textsuperscript{158}


\textsuperscript{156} High Court of Justice of 2 October 2008 in Elektrim v Vivendi SA [2008] EWHC 2155.

\textsuperscript{157} [2008] EWHC 2155 (Comm).

\textsuperscript{158} Article 142 Polish Insolvency Law.
1.2.1. Arbitration as a “lawsuit” – Article 15

In this respect, Elektrim held that Article 15 is not applicable to arbitration proceedings as through ‘lawsuit’ one shall understand an action in court and not before arbitral tribunal. Following the line of arguments of Christopher Clarke J, if arbitration has started prior to insolvency proceedings (as is the case here) it shall be considered a lawsuit within the meaning of Articles 4(2) (f) and 15. If it can be continued or not, regardless of insolvency, it is a matter of the law where arbitration is pending. It was English law governing the arbitration proceedings and since it does not prescribe any objections on discontinuing arbitration, the arbitration proceedings were continued.

In Elektrim v Vivendi, the parties share two different interpretations, which have raised contradictory discussion on to what extent should “lawsuit pending” proceedings shall be construed. Elektrim’s position is that “lawsuit pending”, contained in Article 4 (2) (f) and 15 is limited to the individual execution actions against the assets of the insolvent debtor. Particularly, it refers to, first “proceedings brought by individual creditors”, in the meaning of proceedings by way of execution or enforcement against the assets of the debtor, regardless whether the court assistance is needed or not; and second, proceedings such as “lawsuit pending”, in the meaning of proceedings by way of execution where the court assistance is required. It contends that the Article 15 refers to those executions against the debtor’s assets and rights which require the court assistance.159

Moreover, Elektrim contends that Article 4 (2)(f) and 15, referring to “lawsuit pending” must mean the same, namely, that execution by the individual creditors are subject to lex concursus, unless such an execution is a pending action, initiated before the commencement of bankruptcy proceedings.160 On the contrary, the other party, Vivendi contends that the two articles mark a distinction between executions, to which Article 4 (2) (f) applies (indicated by paragraph 91(f) of the Report) and other legal proceedings concerning the assets or rights of the estate (as provided for in Article 15), to which it does not.161

160 Ibid., Para 27.
161 Ibid., at 28.
A different opinion is held by the scholar Virgos Miguel, who contends that difference should be made between lawsuit and individual enforcement actions. The first shall be understood as actions which are aimed to determine the existence, validity or content of a claim. Accordingly, the individual enforcement actions of the creditors, they should be governed by the “lex fori concursus” while the lawsuit pending shall be governed by the “lex fori processus”. Important when considering the application of Article 15 is the time framework when the creditors’ claims have been initiated before a court, it means that, only the actions brought before the commencement of the bankruptcy proceedings are subject to the exception of the “lex fori processus”. The provision is silent with respect to the pending action before an arbitral tribunal, but since Article 4 (2) does not expressly exclude the arbitration proceedings from its wording, and also the “literal wording” of Article 15 is broad enough to comprise arbitration proceedings.

This interpretation was confirmed by a recent decision rendered by Supreme Court of Switzerland. In the context of the pending arbitration proceedings before the Arbitral Tribunal located in Switzerland, one of the parties became insolvent. Consequently, the insolvent party alleged that the arbitration proceedings shall be discontinued in the light of the Polish Insolvency Law. The later provides that the any arbitration agreement or proceedings shall be annulled or discontinued upon the commencement of insolvency. In the context of pending arbitration before the arbitral tribunal the Supreme Court held that it is the law of the seat of arbitration which has to be applied and not the law of insolvency.

1.2.2. Arbitration agreements as “current contracts” – Article 4 (2) (e)

If however, the arbitration proceedings has yet to commence, they are falling within the jurisdiction of Article 4(2)(e) being regarded as current contracts, as contended by the insolvent party, on the one hand, and on the other by Christopher Clarke. Where the arbitration was not pending at the time of insolvency, then the general choice of law stated in Article 4 (1), together with Article 4 (2)(e) (on current contracts) are to be applied.

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162 Ibid., at 30.
163 Virgos/Garcimartín, p. 140, at 254 - 255
164 Ibid, p 142, at 261.
165 Federal Supreme Court (Switzerland) of March 31, 2009 in Vivendi SA (and its subsidiaries; Deutsche Telekom and its subsidiaries) v. Elektrim SA, No. 4A 428/2008.
166 See Article 142 Polish Insolvency Law: “Any arbitration clause concluded by the bankrupt shall lose its legal effects as at the date bankruptcy is declared an any pending arbitration shall be discontinued”.
It is of foremost importance, before taking any position as with the aforementioned statement, first to examine what shall one understood by a ‘current contract’ and whether the arbitration clause contained therein is to be considered as such.

The non-insolvent party (Vivendi) contended that Article 4 (e), which deals with “current contracts”, does not apply to arbitration agreements. Since Article 4 (2) (e) refers only to substantive matters, such as ‘supply of goods and services’, the arbitration agreement are falling outside of its area of applicability. Moreover, it stated that the arbitration agreements are falling with Article 4(2) (f) which is regarded as a “complete code for procedural contracts- such as arbitration agreements”.

This view has been favored in cases involving issues of International Arbitration; for example, in All-Union Foreign Trade Association Sojuznefteexport v. Joc Oil, Ltd the ruling of FTAC (Foreign Trade Arbitration Commission (FTAC) of the USSR Chamber of Commerce and Industry) held that “the arbitration is treated as a procedural contract and not as an element of the material-legal contract. The subject of an arbitration agreement is distinguished form the subject of a material –legal contract (contract of purchase and sale). The subject of the agreement is the obligation of the parties to submit the examination of a dispute between the plaintiff and defendant to arbitration”. The Court has concluded that the arbitration agreement by virtue of its procedural content and independently of the form of its conclusion, it is autonomous in relation to the material-legal contract.

The view taken in Elektrim v Vivendi, by the insolvent debtor (Elektrim), is that the arbitration agreements are to be regarded as “current contracts” within the meaning of Article 4 (2) (e), since it imposes continuing obligations on the parties. Containing further, that the arbitration agreements offer a continuing right to the parties to submit their dispute to arbitration, thus, imposing a negative obligation not to bring the proceedings before national courts.

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168 Elektrim Para 81.
170 Ibid p.60-61.
172 Elektrim v Vivendi, Para 64, 68; See also, Foster David, Walsh Simon, The effects of insolvency on Arbitration proceedings, in The European & Middle East Arbitration Review 2009.
When making the distinction between the applicability of Article (2) (e) and Article 4(2) (f) with respect to arbitration, it has to be mentioned that the applicable law in both situation is identical – it is the ‘lex fori concursus’. If article 4(2) (e) is applicable, the arbitration, pending and non- pending, falls under the law of the opening of insolvency proceedings ‘lex fori concursus’. Accordingly, if Article 4 (2) (f) is applicable, then a distinction shall be considered: the non-pending arbitration proceedings, at the date of insolvency, will fall under the law of the opening of insolvency, and on the contrary, if the arbitration proceedings were pending at the concerned date, then they will be regarded as “lawsuit pending” being subject to the ‘lex fori processus’ (Article 15).

Therefore, after the aforementioned submission, one conclusion can be drown, that the arbitration agreements are to be regarded as a matter of procedural law, thus falling under the jurisdiction of Article 4 (2) (f) which deals with individual claims, pending and non-pending, at the time of insolvency. When the arbitration proceedings have not been commenced against the debtor, subject to insolvency proceedings, the first part of the article 4 (2) (f) is applicable - “the individual claims brought by the creditor”; and when the arbitration proceedings have been initiated against the debtor who subsequently becomes insolvent, the second part of Article 4 (2) (f), the individual claims of the creditors, pending at the moment when insolvency opened, together with Article 15, are applicable.\textsuperscript{173} As it will be shown further, such interpretation is line with the ECJ approach.

\textsuperscript{173} [2008] EWHC 2155 (Comm) (02 October 2008) , Para 81, 99.
Chapter IV Insolvency before the commencement of arbitration
Proceedings (non-pending proceedings)

1. Conflicting policies: arbitration and bankruptcy

It is undisputed that there is an “inherent conflict”\textsuperscript{174} between arbitration law and bankruptcy law. An illustrative example of such a conflict can be found in \textit{Sonatrach v. Distrigas}\textsuperscript{175} where the Massachusetts Bankruptcy Court held that “[…] bankruptcy policy exerts an exorable pull towards centralization while arbitration policy advocates a decentralized approach towards dispute resolution”.\textsuperscript{176}

As a general rule, pursuant to different national laws, the insolvency proceedings are concerned with collective actions. In this respect, the German InsO (Insolvenzordnung)\textsuperscript{177}, under Section 1 stipulates that “insolvency proceedings shall serve the purpose of the collective satisfaction of the debtor’s creditors by liquidation of the debtor’s assets […]”. The rationale of the rule is laid down in the main objectives of the insolvency proceedings: to enable an ‘equitable, orderly and systematic’\textsuperscript{178} distribution of the debtor’s assets to all the estate’s creditors. In other words, as stated by the court in \textit{Phillip v Hunter}\textsuperscript{179}: “The great principle of the bankruptcy laws is justice founded on equality”.

After a careful consideration of the ideas provided above, it is apparent to us that the restriction limited to collective actions, gives rise to problems whenever the creditors are bringing individual claims against the insolvent debtor. If allowing such actions, it is most likely that the value of the estate will be lowered, together with a considerable reduction of

\textsuperscript{177} See Section 1 German Bankruptcy Code (Insolvenzordnung – InsO) of 5 October 1994, (Bundesgesetzblatt 1994 I S.2866).
the debtor’s assets, thus leading to unequal distribution of the assets among the interested creditors.\textsuperscript{180}

Since arbitration, on the one hand, is concerned with separate proceedings against the debtor, and the insolvency proceedings, on the other hand, is concerned with collective proceedings, the conflict between the two policies becomes apparent. However, there is a strong belief in the literature, as well as in the case law\textsuperscript{181}, that the restriction to collective actions in insolvency, are not applicable to arbitration. In this respect, according to French law\textsuperscript{182} the arbitration agreements are to be enforced against the liquidator, the administrator or the debtor in reorganization proceedings, regardless of the insolvency, the later having no effect on the arbitration agreements concluded prior to insolvency.\textsuperscript{183}

On the contrary, the view taken in the United States, as decided under the case law, is quite different from France. In *Zimmerman v Continental Airlines, Inc.*\textsuperscript{184} the court held that the underlying principles of the bankruptcy law, as stated in the US Bankruptcy Code, ‘impliedly modify’ the objectives of the arbitration law, as stated under the Federal Arbitration Act.\textsuperscript{185} Further, the Court contended that the enforcement of the arbitration agreement in the bankruptcy proceedings shall be left with the bankruptcy’s court discretion.\textsuperscript{186} Similarly, as stated above, in *Sonatrach v Distrigas*,\textsuperscript{187} the Bankruptcy Court of Massachusetts held that the favoring policy towards arbitration of the Federal Arbitration Act, overrode the principles of the bankruptcy law.\textsuperscript{188}

The conflict between arbitration and insolvency law, as it will be shown in this Section, is also indirectly present in the context of the European Insolvency Regulation. Accordingly, it is appropriate to further examine what are the restrictions imposed in the light of the Regulation and how are they affecting arbitration.

\textsuperscript{180} Virgos/Garcimartin, p. 69, Para 109-110.


\textsuperscript{182} French Bankruptcy Law 85-98 of 25 January 1985: Article 33(1) and 158 are not applicable to arbitration agreement entered into before the insolvency proceedings, available at [http://www.legifrance.gouv.fr](http://www.legifrance.gouv.fr).


\textsuperscript{184} United States Court of Appeals 1983 (3\textsuperscript{rd} Circuit) - 712 F.2d 55 in *Zimmerman v Continental Airlines Inc.*

\textsuperscript{185} See above 184 *Zimmerman v Continental Airlines Inc.* as cited in Lazic V., see supra 183

\textsuperscript{186} Ibid., see also Lazic V.,

\textsuperscript{187} See supra 175.

\textsuperscript{188} Ibid.
1.1. European Insolvency Regulation

The EU Insolvency Regulation requires that the insolvency proceedings falling under its jurisdiction must be collective. In this regard, the Virgos-Schmit Report, under paragraph 49 states that “all the interested creditors may seek satisfaction only through the insolvency proceedings, as individual action will be precluded”. It appears obvious that, in order to avoid the competition of the creditors, the insolvency’s law main function is to provide for set of rules which are aimed to prescribe the appropriate ‘fora’ which would best distinguish and establish the rights of the involved parties.

In order to achieve the aimed effect of efficiency, the provisions on the applicable law shall be binding and directly applicable to the Member States (See Recital 8 EIR). On the matters covered by it, the Regulation sets out uniform rules of conflict of law, fact that leads to a replacement of the national rules of international private law.

The general rule on conflict of laws is laid down in Article 4 (1): “save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the ‘State of the opening of proceedings’.

The law applicable to insolvency proceedings – lex fori concursus - governs the conditions of the opening, conduct and effects of the insolvency proceedings, unless otherwise stated by the EIR. The conflict of laws rule is applicable to both, main and secondary proceedings, also to independent territorial proceedings. Moreover, the law of the opening of the insolvency proceedings governs all the effects, procedural and substantive, on the persons and the legal relations concerned. The substantive effects with respect to the competence of the law of

189 Article 1 Council Regulation 1346/2000: “This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator”.
190 See also Wessel B. [2006] Para 10500.
191 See supra note 180, p. 69, Para 110.
192 Jona Israël, European Cross-Border insolvency Regulation, p. 273; See also, EC 1346/2000 Recital 23.
195 Recital 23 EIR; cf., Silke, p. 571; Virgos-Schmit Report, Para 73.
the opening state under Article 4 (1) are those typical of insolvency law (e.g. informing the creditors; filing the claims).\textsuperscript{196}

In the light of the EIR, Article 4 has been mainly disputed, as whether the conflict of law rules contained therein are to be applied similarly to arbitration. After carefully considering the legal framework and the conflict of law rule applicable to insolvency proceedings within the European Union, as prescribed by the EIR, the questions referred further is whether the drafters of the EIR had the intention to include arbitration under its applicability or they rather left the matter to the discretion of national courts/arbitral tribunals.

Notably, the Regulation is silent with respect to the arbitration agreements contained in the contracts subject to the conflict of law rules under the EIR. In this context, recently, ECJ ruled on the applicability of the Insolvency Regulation to arbitration, in \textit{Commission v. AMI Semiconductor Belgium}.\textsuperscript{197}

The facts of the case are as follows: The Commission, representing the European Community, on 8 June 1998 concluded a contract with a number of companies: ‘AMI Semiconductor’ (governed by Belgian law); ‘A-Consult’ (governed by Austrian Law); ‘Intracom’ (governed by Greek law); ‘Ision’, ‘Euram’, ‘Nordbank’, ‘InterTeam’ (all governed by German law), in the context of the Esprit Project No. 26927. The Contract contained an arbitration clause providing for exclusive jurisdiction of the Court of First Instance of the European Community and in case of appeal, the Court of Justice of the European Community.\textsuperscript{198} On 12 August 2002, the Commission commenced arbitration proceedings against the defendants before the Court of First Instance. The claim was forwarded to the Court of Justice of the European Communities\textsuperscript{199} since, pursuant to Article 238 EC Treaty, the jurisdiction belongs to the Court of Justice.\textsuperscript{200} As long as, the jurisdiction of the ECJ has not been contested, the matter will not be addressed in detail.

\textsuperscript{196} Virgos-Schmit Report Para 90; cf. Silke, p. 571; Further see, C. Moss, I.F. Fletcher and S. Izaac, The EC Regulation on insolvency proceedings: a commentary and adnotated guide, Oxford University Press, 2002 (hereafter referred to as Fletcher/Moss) p. 45.
\textsuperscript{197} See ECJ 17 May 2005, C-294/02 \textit{Commission v. AMI Semiconductor Belgium BVBA}.
\textsuperscript{198} ECJ C-294/02, see supra note 197.
\textsuperscript{199} EC Treaty Article 238 “The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law”.
\textsuperscript{200} Article 238 EC Treaty, Official Journal of the European Union 321 E/7,
In the meantime, on 8 November 2001 the German company – InterTeam, due to the winding-up decision, it was dissolved and removed from the Commercial Register, resulting in the lost of the legal capacity, pursuant to German law.\textsuperscript{201} Further, in July 2002, the two Austrian companies, A-Consult and Ision went bankrupt.\textsuperscript{202}

The questions referred by the Commission concern the admissibility of the action to arbitrate in so far as it is directed against the three defendants that are subject to winding-up proceedings, or have been, wound up.\textsuperscript{203} In the light of the provisions and conflict of laws rule, stipulated in the Insolvency Regulation, and as mentioned above, under Article 4 (1) the law applicable to insolvency proceedings is the law of the state of opening, herein, German law and Austrian law.\textsuperscript{204}

Accordingly, pursuant to Section 6(1) of the Austrian Bankruptcy Code (KonkursordnungRGBl. No 337/1914) the actions brought against the insolvent debtors, are inadmissible.\textsuperscript{205} Similarly, under the provisions stipulated in German Insolvency Code (Insolvenzordnung)\textsuperscript{206} and as argued by the Advocate General, the inadmissibility of an action against Inter-team is due to the lack of legal capacity and thus, the impossibility to be a party to the arbitration proceedings.\textsuperscript{207}

On those grounds, the three defendants refused to comply with the arbitration proceedings initiated against them, objecting that the action is inadmissible as far as they are concerned, primarily because, when the action was brought, they were involved, at different stages, in insolvency proceedings.\textsuperscript{208} Consequently, it is common ground, that any action of the kind brought by the Commission (arbitration claim), against the insolvent parties, under the

\textsuperscript{201} BGBl. I 1994 S. 2866, Section 87 , 80 and 174; “Pursuant to the Section 87, the opening of the insolvency proceedings against a company produces specific effects: 1st, upon the commencement of insolvency, all the assets of the debtor are vested in the insolvency administrator, which means that the claims against the insolvent debtor must be served on the administrator and not to the company; 2nd “the creditors of the insolvency proceedings shall only be permitted to enforce their claims under the provisions governing the insolvency proceedings” and 3rd, the actions brought directly against the insolvent company or administrator are inadmissible.”; See also 57 of C-294/02.

\textsuperscript{202} ECJ C-294/02, Para 36-39, supra note 197.

\textsuperscript{203} Ibid, Para 54.

\textsuperscript{204} Ibid., Para 60.

\textsuperscript{205} See ECJ C– 294/02, Para 58, See supra note 197.

\textsuperscript{206} See German Insolvency Code (Insolvenzordnung) of 5 October 1999, BGBl. I, p. 2866, Section 80, 87 and 174 et seq.

\textsuperscript{207} See supra note 197. Para 60.

\textsuperscript{208} Ibid., Para 50 supra note 197.
relevant national provisions\textsuperscript{209} would have been held to be inadmissible if brought before national courts.\textsuperscript{210}

Given that in conjunction with the arbitration clause, the jurisdiction is conferred to the Court of Justice (Article 238 EC Treaty), would the aforementioned action be equally inadmissible before the European Court of Justice? In this respect, no indication is given, neither in the Statute of the Court of Justice nor its Rules of Procedure regarding the actions concerned with arbitration in the context of insolvency. Accordingly, the Court found appropriate to refer to the common procedural rules of the Member States and applied therein to the arbitration.\textsuperscript{211}

Further, based on the principles common to the procedural laws of the Member States, from which it is necessary to deduce the rules to be applied in the absence of Community provisions in the matter, ECJ ruled that a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure (Article 4(2) (f)).\textsuperscript{212} Consequently, the Court stressed that Community institutions (here the Commission as a plaintiff) would enjoy an unjustifiable advantage over the other creditors if it would allow them to pursue with their claims in proceedings brought before the ECJ when any action before national courts was impossible.\textsuperscript{213} The issue is concerned with the proper interpretation of Article 4 (2) (f) which states that “the effects of insolvency proceedings on proceedings brought by individual creditors” are governed by the law of the opening of insolvency, approach taken by the Court in the case at hand. Thus considering the claim brought on the basis of an arbitration agreement as an individual claims, falling under the law of the opening of insolvency – ‘lex fori concursus’.

On those grounds, it must be noted, that ECJ’s approach leaves room for further interpretation. Namely, assuming the Commission’s claim would have been submitted before an Arbitral Tribunal; as a preliminary point, should the Arbitral Tribunal first refer to its procedural rules, as ECJ did or shall it follow its own rules of procedure, regardless of the fact that they do not indicate?

\textsuperscript{209} Reference to Paragraph 6 of the KO for A-Consult and Paragraph 87 of the InsO in the case of Ision.
\textsuperscript{210} ECJ C-294/02, Para 65.
\textsuperscript{211} Ibid., 66 \textit{et seq}.
\textsuperscript{212} See ECJ C- 294/02 Para 2, 68-70, See supra note 197.
\textsuperscript{213} Ibid., Para 2, 68-70.
As mentioned above, in *Vivendi SA (and subsidiaries, Deutsche Telekom and subsidiaries) v Elektrim SA*\(^{214}\), the Supreme Court decided that the Arbitral Tribunal shall apply the law of the situs as the law governing the effects of insolvency on arbitration. Accordingly, the lex fori concursus does not produce any effects on arbitration. Nevertheless, it shall be noted that in *Vivendi SA v. Elektrim SA*, the arbitration proceedings were pending at the time when one of the parties became bankrupt, while in *Commission v AMI Semiconductor Belgium*, the arbitration proceedings have been brought after the commencement of the insolvency proceedings against the respective parties.

Similarly, in *Elektrim (represented by J. Syska as administrator) v Vivendi*\(^{215}\), English court decided in favor of arbitration, stating that the law of the seat of the Arbitral Tribunal (English law) is applicable to the arbitration proceedings and not the law of the state where the insolvency proceedings are running (Polish law). The reasoning of the Court was based on the applicability of Article 15 of EIR, as an exception from the lex generalis. Pursuant to Article 15, the effects of insolvency proceedings, in case of ‘lawsuit’ pending upon the commencement of insolvency proceedings, are to be governed by the lex processus’ (the law of the court where the lawsuit is pending). As with respect to Article 15, the reasoning taken by the Court when deciding that it shall be equally applied to arbitration, further analysis will be provided in the next Section of this paper (see Chapter III).

In the light of these cases, it becomes apparent first to consider that the Arbitral Tribunal shall not be bound by the provisions of the European Insolvency Regulation, as far as the later does not impose such a behavior on the one hand, and on the other hand, they are not bound by the laws of a specific state.\(^{216}\) Secondly, the Arbitral Tribunals, as private judicial bodies are governed by rules different than the national courts and they gain their jurisdiction in the light of the parties’ common will. It becomes, thus appropriate, to underline that they shall not interfere with rules to which they do not intend to belong. However, their discretion indirectly is limited to the extent of ‘ordre communitaire’ or ‘public policy’ as examined in the previous Section.\(^{217}\)

As far as in *Commission v AMI Semiconductor Belgium* the arbitration proceedings were not pending at the date when the defendants became insolvent, it would not be appropriate to

\(^{214}\) See supra Chapter II, at 1.1; Federal Supreme Court (Switzerland) of March 31, 2009 in *Vivendi SA (and its subsidiaries, and Deutsche Telekom and its subsidiaries) v. Elektrim SA No. 4A 428/2008.*

\(^{215}\) [2008] *Elektrim v Vivendi*, EWHC 2155 (Comm).

\(^{216}\) See supra Chapter II at 2.

\(^{217}\) See *supra* Chapter II.
similarly apply the same approach as taken in the aforementioned cases, however it does not
mean that the result as to the applicable law may not be the same. In this way, it is necessary
to further examine what are the effects to the actions, including arbitration, brought after the
insolvency proceeding were initiated and under which provision of EIR will they fall.

1.2. Arbitration regarded as “proceedings brought by individual creditors” Article 4 (2) (f)

From the perspective of the insolvency law, one of the major principles is the preclusion
of the actions brought by individual creditors.\textsuperscript{218} In the light of different jurisdictions, after the
commencement of the insolvency proceedings, all the claims against the estate may be
pursued only by filing in bankruptcy proceedings.\textsuperscript{219} Under the European Insolvency
Regulation, such preclusion is prescribed in article 4 (2) (f), providing for the protection of
the assets against the claims brought by the individual creditors, consequently being governed
by the lex fori concursus “\textit{the law of the state of the opening [...] shall determine in
particular [...] the effects of the insolvency proceedings on proceedings brought by individual
creditors, with the exception of lawsuit pending}”.

Recalling, this is the rule applied by the Court in \textit{Commission v AMI Semiconductor Belgium},
where the ‘lex fori concursus’ was Austrian and German law. Accordingly, in absence of any
express exception provided in the EIR, this provision was intended to comprise also
arbitration proceedings which were brought after the opening of insolvency proceedings,
except the pending arbitration at the date of insolvency.\textsuperscript{220}

In Virgos-Schmit’s Report is stated that through ‘proceedings brought by individual creditors’
shall be understood ‘execution actions brought by individual creditors’, their suspension or
prohibition after the opening of the collective insolvency proceedings.\textsuperscript{221} Additionally, in
\textit{Elektrim v Vivendi}\textsuperscript{222}, the judge Mr. Clarke explicitly stated that by “proceedings brought by
individual creditors”, shall not be understood only proceedings by way of execution.
Accordingly, they shall be regarded as proceedings of whatever nature: “including both,
proceedings by way of execution (with or without court orders) and actions brought to
establish the validity of a claim”.\textsuperscript{223}

\textsuperscript{218} Lazic, V. [1998] Para 4 see supra note 183.
\textsuperscript{219} See Para 4 et seq. see supra note 183.
\textsuperscript{220} Ibid., at Para 4 et seq. see supra note 183.
\textsuperscript{221} See Virgos-Schmit Report, Para 91; see also Wessel B. [2006] Para 10627 (f).
\textsuperscript{222} English High Court of Justice of 2 October 2008 in \textit{Elektrim v Vivendi}, EWHC 2155 (Comm).
\textsuperscript{223} [2008] EWHC 2155 (Comm) 02 October 2008.
As with respect to arbitration, in Virgos/Garcimartin, has been said that the expression used by the legislator - ‘proceedings brought by individual creditors’- may be interpreted in a very broad way, so that it may include arbitration and also enforcement measures initiated by the creditors. As stated by the ECJ in AMI Semiconductor, such an interpretation would be in line with the objectives of the Regulation: 1) to ensure a good administration of the insolvency, by avoiding one creditor to gain advantage over the others; and 2) to protect the certainty and expectations of the transactions. Having all these actions concentrated under the jurisdiction of the state of the opening would allow the achievement of those objectives.

However, contrary to mentioned court decisions, a solution has been found in favor of enforceability of the arbitration agreements in bankruptcy. In Truck Drivers Local Union No. 807 v. Bohack Corp., the claims submitting to arbitration have been filed against the debtor, after the opening of bankruptcy proceedings. The Second Circuit held that the arbitration clause contained in the employment contract survived bankruptcy, but it was at the bankruptcy’s court discretion to refuse or not arbitration.

2. A Teleological interpretation of the Insolvency Regulation

In the context of Commission v. AMI Semiconductor Belgium, the Court dismissed all the claims against the insolvent defendants, consequently declared them inadmissible on the basis of the reasons and arguments explained in the light of the EU Community interest.

First: the Court based its interpretation by observing the actual facts of the case, ruling that the law of the state of the opening is applicable (Article 4 (1)), unless the claim is covered by the one of the exceptions provided by Article 4 (2). Accordingly, since Article 4 (2) (f) is concerned (‘preclusion of individual claims of the creditors’) the law of the opening of insolvency is applicable to the proceedings brought by the creditors, excepting the pending proceedings. ECJ adopted the teleological approach as a basis of interpreting the legal

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224 Virgós/Garcimartin, Para 121 (g), p.76.
227 See supra note 226, Para 319-321.
228 ECJ 17 May 2005, Case C-294/02 Commission v. AMI Semiconductor Belgium BVBA, Para 69.
229 See explanation of Britannica Encyclopaedia on the meaning of the teleology: the word is coming from Greek, “telos” meaning “purpose” “end”; “an explanation by reference to some purpose or end”; See also Dr. Karl Friedrich Lenz, professor who investigates using the various universally accepted methods of law
provisions contained in the Insolvency Regulation. It started with the analysis on the overall scheme and purpose of the Regulation.\textsuperscript{230}

In \textit{CILFIT},\textsuperscript{231} ECJ stated that “\textit{every provision of the EC Law must be placed in its context and interpreted in the light of the Community law as a whole}”\textsuperscript{232}. In the context of the Insolvency Regulation, the main objectives and purposes are laid down in its Preamble: to ensure a proper function of the internal community market and to provide for an efficient and effective way of administration of cross-border insolvency.\textsuperscript{233} It means that, if allowing the arbitration proceedings followed after the commencement of insolvency, it would result in overriding the purposes of the Regulation as stated above and equally prescribed in Recital 2, 3, 4 and 8 of EIR: to ensure equal distribution of available assets amongst all the creditors.

In consequence, if given the permission to the Commission to further pursue with its claim seeking for arbitration, the other creditors of the insolvent debtors would be deprived from an equal distribution of the assets, such an action being totally against the Regulation’s objectives. Moreover, as stated in Virgos-Schmit’s Report, at paragraph 43, ‘uniformity of interpretation is required in order to ensure equality in the rights and obligations derived from the Convention for the Contracting State’.

\textit{Second:} ECJ has dismissed the actions claiming for arbitration, further considering the rules on recognition of insolvency proceedings opened in a Member State by all the other Member States, as prescribed in Articles 16 and 17.\textsuperscript{234} The recognition\textsuperscript{235} shall occur de ‘ipso iure’ without any formalities.\textsuperscript{236} Consequently, as stated in Virgos-Schmit Report, the national borders are no obstacle to the efficient administration of international insolvency proceedings.
within the Member States. Automatic recognition serves for the proper function of the internal market, thus for safeguarding the community public interests and achieving of the Regulation’s purposes. Therefore, the Commission’s claim for arbitration was dismissed based on the reasons that the insolvency proceedings have been initiated in another member State and as required by the Community law, those proceedings are to be recognized by the other ‘foras’; furthermore, the claim shall be filed and considered before the competent bankruptcy court under the lex fori concursus.

Based upon the arguments provided by the ECJ in Commission v AMI Semiconductor Belgium it becomes apparent that arbitration proceedings brought after the commencement of insolvency proceedings are to be interpreted in the light of the rule provided by Article 4 (2) (f). In this sense, arbitration proceedings shall be regarded as “proceedings brought individual creditors” where under the rules prescribed by the Regulation such actions are to be decided under the law of the court where the insolvency proceedings have been opened. Presumably, this indicates that the arbitration agreements are affected by virtue of insolvency, since it is the law of the opening state which will govern all the individual actions of the creditors. Accordingly, the arbitration agreements will fall under the collective procedure of the insolvency.

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238 EC Regulation 1346/2000, Recital 2.
Conclusion

The economic benefits of an efficient administration in transnational bankruptcies are realizable solely on the basis of a formalized and distinct legal framework at an international level. The obstacle of achieving this goal is mostly related with the rigid abidance of the various legal systems to restrict the concept of jurisdictional autonomy in the context of cross-border insolvency. This is more obvious in the context of international arbitration, where the private regime of dispute resolution meets the public judicial courts.

As mentioned above, a big step towards the harmonization of the international insolvency law has been done by the adoption of the two main venues governing cross-border insolvencies: UNCITRAL Model Law on Cross-Border Insolvency and European Regulation on Cross-Border Insolvency. The importance of these frameworks established in the light of the current economic developments shall not be underestimated; however, given the fact that they do not prescribe any rules on how should one react when dealing with arbitration in the context of insolvency may be regarded as a ‘inevitable concern’.

It was revealed in the paper, mainly in the light of the Insolvency Regulation on which grounds do the national courts assume jurisdiction when faced with insolvency of a legal entity located within the European Union. Accordingly, Article 3 (1) of the EIR establishes an international jurisdiction with courts of the state where the debtor has its centre of main interests. Further, the law applicable to insolvency proceedings is the law of the state where the insolvency proceedings have been commenced. An extreme importance of the later is reflected in the context of arbitration, as from the examined case law, it can be deduced that the effects of insolvency on the party subject to arbitration proceedings, can vary from country to country, strongly depending on the applicable system of law, as well as on the correct and appropriate identification of that system. Hence, in order to avoid complex issues arising thereafter and any further uncertainties, a proper interpretation and findings in the context of European Insolvency Regulation is necessary.

The clear lesson to be drawn from the jurisprudence is that a certain tendency was distinguished favoring the application of the law of the arbitral situs in the context of
insolvency proceedings. The decisions rendered by the Federal Supreme Court of Switzerland and English High Court of Justice in the course of pending arbitration by virtue of insolvency gave an outstanding role to the law of the seat of arbitration. Moreover, the pending arbitration proceedings are to be interpreted in the meaning of Article 15 as ‘lawsuit pending’. In this way, the presumption that the concept of ‘lawsuit’ is to be attributed only to lawsuit before judicial courts was rebutted.

The rationale underlines the basic principle of arbitration, that of the party autonomy. The expectations of those who carefully agreed to have their disputes resolved by the private regime of arbitration shall not be regarded as less legitimate or ‘poor’ defended than those who expect their dispute to be resolved by a court, thus exposing to uncertainty.

Furthermore, inconsistency of the Insolvency Regulation as applicable in context of arbitration can be found in the interpretation of Article 4(2) (f) and 4(2)(e). The first governs the effects on the ‘proceedings brought by individual creditors’ and the second govern ‘the effects of insolvency on current contracts’. From the teleological approach, taken by ECJ in Commission v. AMI Semiconductor, arbitration when initiated after insolvency shall fall under Article 4(2) (f). Contrasting, in Elektrim (J Syska administrator) v. Vivendi arbitration, unless arbitration was pending it shall be considered ‘current contract’. As mentioned in the paper, distinction between ‘substantive’ and ‘procedural’ contracts to be considered.

As a general view and consent, the law of the place of arbitration shall be considered as most appropriate to be applied in the context of insolvency.

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239 See supra Chapter II.
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**Legislation**


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