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IMPACT OF EU INSOLVENCY REGULATION ON PROCESS OF RESOLVING DISPUTES BEFORE INTERNATIONAL COMMERCIAL ARBITRATION

ABSTRACT

The insolvency law contains summary processes for dealing with claims and protections against certain proceedings being initiated or continued. There has been some debate, as well as the recent case law, concerning the primacy of these rules over court proceedings and arbitration agreements. In the following article, we look at what the current position of Insolvency Regulation 2015/ 845 under EU law is, and we consider the relation between the arbitration and the insolvency proceedings and the impact on the arbitration agreement. Furthermore, we will discuss the differences between the EC Regulation 1346/2000 and the EU Insolvency Regulation 2015 /848.

*The first part will be dedicated to how the arbitration agreement and the Regulation relate. In the past, the initiation of insolvency procedure rendered the arbitration agreement null and void in some member states. Such cases happened under the Polish and Spanish national laws. Therefore, the case *Elektim v. Vivendi* will be discussed as an example. Moreover, the current situation in those countries will be analyzed.*

The second part of this paper analyzes the effects of the insolvency on the pending arbitration proceedings. A subject of discussion will also be the question of whether the arbitration procedure must be terminated or continued. A comparative analysis shows that some national laws provide for a compulsory termination of arbitration proceedings, while another group of countries allows for the continuation of the arbitration process.

In the third part, we will examine the amendments of the EC Regulation 1346/2000 adopted and implemented in the EU Regulation. We will try to analyze what changes there are and what their impact is on the arbitration proceedings.

In conclusion, all the arguments discussed in the paper will be summarized.

Keywords: *arbitration agreement, arbitration proceeding, bankruptcy proceeding, EC Regulation 1346/2000, EU Insolvency Regulation 2015 /848*

1. INTRODUCTION

The initiation of bankruptcy proceedings against a legal entity produces consequences that affect not only the entity that undergoes the proceedings but also

their creditors or other persons with whom the insolvent entity has entered legal relations.¹

For the entity that has undergone the insolvency proceeding,² the commencement of bankruptcy proceeding means the termination with the current way of doing business and entry into the regulated procedure which may result in complete shutdown of their legal personality.³ The consequence of initiating bankruptcy proceedings relates to the debtor that lacks legal capacity to take action concerning their estate and to sue or to be sued in the legal proceedings regarding the estate. These rights are “transferred” to the trustee.

For creditors and other contracting parties the main question is what happens with agreements that have been executed by a bankrupt party and other duties that party has assumed. The question is more complex if there is an arbitration agreement between a creditor and debtor. The main issue in that regard is how the dispute will be resolved –either before an arbitration tribunal as per the arbitration agreement, or as the bankruptcy proceeding entails in a national court. Depending on the institution that will have jurisdiction over resolving disputes, we may have different outcomes of the proceedings.

Keeping in mind that arbitration and bankruptcy proceedings are a special type of proceedings, we may identify a number of differences and similarities. The main similarity between bankruptcy and arbitration proceedings reflects in the purpose of such proceedings. Both proceedings are intended to resolve issues relating to the assets of the debtor. However, while the arbitration settles for meeting the individual requirements of the parties involved, the bankruptcy process is aimed at settling collective or group requests, in accordance with the rules and principles

¹ More about insolvency see Vasiljević, M., *Poslovno pravo*, Beograd 1999, p. 318 *et seq*; Čolović, V., *Stečajno pravo*, Banja Luka, 2010.

² The term insolvency has a broader meaning than the term bankruptcy. The insolvency proceeding is a collective term for all situations in which an entity encounters issues with performance of assumed duties. In the language of former Yugoslav countries, the term bankruptcy translates as “stečaj”, while the insolvency is “insolventnost” (non-performance of duties). To avoid a potential misunderstanding between the terms insolvency and bankruptcy in this article we will use the term bankruptcy as a proceeding used in national legal order for the situation when the debtor cannot fulfill the assumed duties. For the situation where the entity is a multinational company regulated by the regime of the EU Insolvency Regulation we will use the term insolvency. It should be noted as well that insolvency is a predominant term in international legal doctrine. The root of this term can be found in the English school of law where the term insolvency is used for a number of different proceedings that reflect the impossibility to meet the obligations. For further explanations see Sajter D.; Hudeček, L.: *Temeljni pojmovi i nazivi stečajnog prava*, URL: https://bib.irb.hr/datoteka/430868.Temeljni_pojmovi_i_nazivi_stečajnog_prava.pdf. Accessed 20 December 2016.

³ The initiation of bankruptcy proceedings does not imply that this procedure will end in bankruptcy of a person or entity. A legal entity may be reorganized in the process and continue to transact business.

that apply to bankruptcy.⁴ Taking this into consideration, we should note that the principle of jurisdictional attraction is of particular importance due to the fact that the court conducting the bankruptcy proceeding attracts all other proceedings under its jurisdiction (that are) directly related to the bankruptcy proceedings. Apart from the similarities, there are also numerous differences concerning the manner in which the jurisdiction of the court running a bankruptcy proceeding or of an arbitration tribunal is established,⁵ as well as differences in the main principles of insolvency and arbitration proceedings and the extent of legal protection provided in one and in another proceeding. These and other similarities and differences raise a question of the impact of bankruptcy proceedings on the arbitration as a method of private dispute resolution.

The impact of bankruptcy of a party on the arbitration proceeding brings about at least two other questions. Firstly, whether the bankruptcy of a party to the arbitration agreement affects the validity and existence of such agreement, and secondly, whether the initiation of proceedings determines the commencement of arbitration or, if the latter process is already underway, its further destiny. These are a few of the main issues we are going to discuss in this article.

2. BANKRUPTCY AND ARBITRATION AGREEMENT

Bankruptcy, as a term, is used to broadly designate the condition wherein a person's (natural person or legal entity) assets are worth less than their debts. In this condition one is unable to meet debts when they fall due.⁶ Bankruptcy in a narrower sense represents a legal process governed by national insolvency laws.⁷ In this article we will refer to bankruptcy in the narrow sense of the term, i.e. as insolvency proceeding initiated against and imposed upon the debtor's assets, and from that perspective we will discuss its relationship with the arbitration proceedings. In case when a bankruptcy proceeding is initiated against a legal entity holding assets in more than one country, we will resort to the term 'insolvency'.

The arbitration agreement is a prerequisite to determine the jurisdiction of an arbitral tribunal. The very effect of a valid arbitration agreement is reflected upon the establishing of jurisdiction of the arbitral tribunal which should resolve a dis-

⁴ Velimirović, M., *Poslovno pravo*, Podgorica, 2000, pp. 175-177.

⁵ About arbitration agreement, Perović, J., *Standardne klauzule u međunarodnim privrednim ugovorima*, Beograd, 2012, pp. 187 -217; Redfren, A.; Hunter, M.; Blackaby, N.; Partaside, C.; *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 2004, p. 5 *et seq.*

⁶ Rajak, H., *The Culture of Bankruptcy*, in *International insolvency law, themes and perspectives*, (Omar P. ed.), Ashgate, 2008, pp. 4-6.

⁷ *Ibid.*

pute.⁸ In determining the competence of international commercial arbitration, the arbitration agreement needs to fulfill the necessary requirements governed by the New York Convention on the recognition and execution of Foreign Arbitration Awards (NYC).⁹ According to the Convention “...every Contracting States shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of defined legal relationship, contractual or not, concerning a subject matter capable of settlement by arbitration”.¹⁰ The arbitration agreement has to be signed by the parties with the legal capacity to sign the arbitration agreement. In the case of bankruptcy, the arbitration agreements entered into by the debtor prior to the commencement of the bankruptcy proceedings may be attempted to be invoked against the trustee, and not against the debtor. After the commencement of the bankruptcy proceedings, the debtor is left without the capacity to sign this agreement.

As we can see from the above, it is necessary that the disputes can be subjected to arbitration for the purpose of a dispute resolution. In other words, the disputes have to be arbitrable. Arbitrable disputes are capable disputes in an objective (*ratione materiae*) and a subjective matter (*ratione personae*). Every country is free to define the arbitrability of a dispute in accordance with its own public policy considerations.¹¹

In that way, the principle of party autonomy, as an underlying principle of arbitration law, is restricted or limited by the arbitrability of the dispute. Bankruptcy disputes are deemed arbitrable, if related to “non-core” issues of bankruptcy, such as a proceeding in which creditor may solicit the arbitral tribunal to determine that the creditor’s claim is valid in order to register the claim in the creditor’s list in the bankruptcy court, or any disputes about the value of the creditor’s claim.¹² Such disputes are those arising from the contractual relationship between the parties.

Core insolvency disputes such as the declaration of bankruptcy,¹³ initiation and termination of the bankruptcy proceedings, equal treatment of creditors, appoint-

⁸ Lew, J., *The law applicable to the form and substance of the arbitration clause*, ICCA Congress series, No. 9, Paris, 1998, pp. 114-145.

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention, Official Journal of the Federal Republic of Yugoslavia- International treaties, No. 11/81, p. 607.

¹⁰ Art. 2 of the New York Convention

¹¹ More about arbitrability see Vukadinović, J., *Pojam arbitralnosti u arbitražnim pravima Srbije i Hrvatske*, Aktuelna pitanja savremenog zakonodavstva, Budva, 11-15. jun 2012, pp. 235-245.

¹² Yang, G., *Insolvency Proceedings and Their Effect on International Commercial Arbitration*, University of Ghent, 2013, p 7.

¹³ ICC award no. 9163.

ment of the trustee, verification, collection and distribution of the estate considered are non-arbitrable in most countries.¹⁴ Core (pure) bankruptcy disputes have to be resolved in a national court of law.¹⁵ In the national insolvency proceedings, national courts apply national insolvency law.

The situation is more complex in cross-border insolvency disputes. Cross-border disputes exist whenever the debtor has assets or creditors in more than one country. Such situations are regulated on the EU level by the EU Regulation on cross-border insolvency proceedings, which has been in effect since January 1, 2017.¹⁶ Before we move on to analyze the provisions of this Regulation (EU Regulation), we should first discuss the provisions of the (former) EC Regulation on Insolvency Proceedings (EC Regulation)¹⁷ and its connection to the arbitration proceedings.

Contrary to established rules of party autonomy in international arbitration, the EC Regulation, arguably, restricts the freedom of the arbitral tribunal to apply the choice of law rules chosen by the parties or that the arbitral tribunal deems are otherwise appropriate and replaces them with the mandatory choice of law rules provided for in the EC Regulation.¹⁸ The applicable law should be the law of country where the proceeding is initiated. That law should be *lex concursus*.¹⁹

As a result, the effects of the insolvency of a corporation will have effect on the enforceability of the current contracts against the insolvent estate, including arbitration agreements or on pending arbitral proceeding to which it is a party, are highly related to the personal law of the corporation.²⁰

The EC Regulation recognizes an exception to this rule in Article 15. According to Art. 15 of the EC Regulation “the effects of the insolvency proceedings on 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 the lawsuit is pending” (*lex fori / lex arbitri*).

¹⁴ Lazić, V., *Insolvency Proceedings and Commercial Arbitration*, Kluwer Law International 1998, p. 154. Lazić, V.; Jarvin, S.; Magnusson, A., *International Arbitration Court Decisions*, Juris Publishing, 2008, p. 768.

¹⁵ ICC award No. 6697 (1990), *Casa v Cambior*, Rev Arb 1992, p. 135.

¹⁶ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Official Journal of the European Union, L 141, 5 June 2015.

¹⁷ Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, [2000] OJ L 160, pp. 0001 – 0018.

¹⁸ Robertson M., *Cross Border Insolvency and International Arbitration Characterization and choice of law issues in light of Electrim SA (in bankruptcy) v. Vivendi SA*, MLB thesis, Bucerius Law School, 2009.

¹⁹ Art. 4 of the EC Regulation

²⁰ Karagianni, I., *Arbitration and Insolvency Proceedings*, International Hellenic University, 2014, p. 21.

According to these rules, the insolvency proceeding has to be run by the court in the country where the debtor has assets and applicable law should be the law of that country, except when a lawsuit is pending.

However, the question is what is the meaning of a pending lawsuit? Are arbitration proceedings covered by this term? The case *Elektrim v. Vivendi*²¹ brings up this issue.

As previously mentioned, the initiation of bankruptcy proceedings does not affect the validity of the arbitration agreement in most countries.²² In other words, most national jurisdictions consider that the arbitration agreement remains unaffected by the commencement of insolvency proceedings, though there are domestic laws providing for the exact opposite.²³

However, there are national laws that contain provisions directly addressing the effect of bankruptcy proceedings on arbitration, such as the Article 142 of Polish Bankruptcy and Reorganization Act (PBRA).

We will discuss this matter as we examine the case *Elektrim v. Vivendi* as an example. Vivendi, a French company, and its subsidiaries initiated arbitration under the ICC Rules with the seat of arbitration in Geneva against Elektrim S.A, a Polish company. The action was first taken in 2006. In August 2007 however, Elektrim was declared bankrupt in Poland. In a separate proceeding, Elektrim claimed that the Polish law with respect to bankruptcy should apply on the arbitration. The Polish company claimed the invalidity of the arbitration agreement based on the Art. 142 and 147 of the Polish Bankruptcy and Reorganization Act (PBRA), “Any arbitration clause concluded by the bankrupt shall lose its legal effect as of the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued.”

The arbitral tribunal qualified the issue of a bankruptcy of the Polish party as an issue of the standing to participate in the proceeding which depended on the preliminary issue of the party’s legal capacity. The tribunal held that the matter of

²¹ Swiss Federal Tribunal, March 31 2009, *Vivendi v 4A*, 428/2008. Interim award of 21 July 2008. URL: <http://www.swissarbitrationdecisions.com/sites/default/files/31%20mars%202009%204A%20428%202008.pdf>. Accessed 20 December 2016, and English Court of Appeal, July 9 2009, *Syska & Anor v Vivendi Universal SA & Ors*, [2009] EWCA Civ 677. URL: http://www.lawreports.co.uk/WLRD/2009/CACiv/Syska_v_Vivendi.html. Accessed 20 December 2016.

²² Lazić, V., *Arbitration and Insolvency Proceedings: Claims of Ordinary Bankruptcy Creditors*, URL=http://www.ejcl.org/33/art33-2.html#N_1_, 17 January 2017.

²³ Kroll, S., *Arbitration and Insolvency* in (Mistelis, L., Lew, J., eds), *Pervasive problems in international arbitration*, Alpheen aan den Rijn, 2006

legal capacity had to be taken according to general laws on conflicts of law of the Private International Law Act (PILA). This means that for a foreign legal entity, legal capacity is governed by the law at the place of incorporation.²⁴ In this case, the law of incorporation was the Polish law. The arbitration tribunal further held that, pursuant to that provision, Elektrim lost the capacity to be a party in the arbitration proceeding and the arbitration agreement was void.

As a consequence, the arbitration proceeding against Elektrim was abandoned. The Swiss Federal Supreme Court confirmed the award. Furthermore, in interpreting the Art. 142 of PBRA, the Court determined that any pending arbitration proceedings are to be terminated *ex lege*, even if they are at an advanced stage.²⁵

On the other hand, the English perspective on the same matter is completely different.²⁶ In 2003, Vivendi initiated LCIA arbitration proceedings against Elektrim with the seat of arbitration in London. As mentioned above, Elektrim was declared bankrupt in August 2007 and again pleaded the Polish Bankruptcy and Reorganization Act requesting the discontinuation of the arbitration proceedings. Contrary to the Swiss Arbitral decision, the LCIA posed the question as an issue of law applicable to the effect of bankruptcy on the lawsuit pending under the Article 15 of the Insolvency Regulation and found the English law to be applicable, being “the law of the Member States in which that lawsuit is pending”. The tribunal stated that the Article 15 should take precedence because it is *lex specialis* and deals more directly and pertinently with the problem at hand, whereas Article 4.2(e) is *lex generalis*. Article 4.2(e) of the EC Regulation covers all contracts (substantive agreements and procedural agreements), including arbitration agreements and contracts for reference of a dispute to arbitration. The LCIA decided that the English law governed the issues and not the Polish law, and according to the English law the arbitral tribunal had jurisdiction to arbitrate despite Elektrim’s bankruptcy. The English High Court confirmed the award. The arbitral tribunal and the English High Court were based on the EU Regulation on Cross-Border Insolvency which in the Article 15 states “the effects of insolvency proceedings

²⁴ Art. 154, 155 PIL.

²⁵ Lazić, V., *Cross border Insolvency and Arbitration, Which consequences of insolvency proceedings should be given effect in arbitration*, Chapter 18, *International Arbitration and International Commercial Law: Synergy, Convergence, and Evolution: Liber Amicorum Eric Bergsten*, Kluwer Law International, 2011, p. 343. This finding gave rise to strong criticism in the arbitration community, with most commentators arguing that Article 142 PBRA did not affect the capacity of an insolvent Polish entity to be a party in foreign arbitral proceedings. In their view the provision pertained to the validity of the arbitration agreement, which is an issue governed exclusively by the Swiss *lex arbitri*.

²⁶ *Syska and Elektrim SA (in administration) v. Vivendi Universal SA*, High Court of Justice Queen’s Bench Division Commercial Court, 2 Oct. 2008, [2008] EWHC 2155; Court of Appeal, [2009] EWCA Civ 677.

on a lawsuit pending concerning an asset or a right of which a debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending”.

The English High Court confirmed that the lawsuit pending included pending arbitral proceedings and thus the arbitral tribunal had correctly applied the English law to determine the effect of Elektrim’s bankruptcy on the pending arbitration. The arbitration agreements that relate to future, non pending arbitral proceedings constitute current contracts for the purposes of Art. 4.(1) of the EC Regulation and are thus governed by the *lex concursus*, while the arbitration agreements that relate to existing pending arbitration proceedings are covered by the exception in the Art. 4.2 (f) and 15 of the EU Regulation.²⁷

Conclusion. These articles govern not only the validity of the arbitration clause, but further effects of bankruptcy on pending arbitration as well. Both the loss of legal effect and discontinuation of pending arbitration proceedings are effects of bankruptcy on arbitration, and as such should fall under the Article 15 of the Insolvency Regulation when the applicable law is to be determined.²⁸ Also, we can add that arbitration proceedings are equivalent substitutes to ordinary legal proceedings in all Member States, and there is no substantive or procedural reason justifying a different solution.

The case *Elektrim v. Vivendi* opened a major debate in arbitral theory, but this “Elektrim era” has come to an end. On January 1, 2016, the new Polish Bankruptcy Act came into force. The new law derogates from the provision under which a declaration of bankruptcy rendered an arbitration agreement entered into by an insolvent party void. According to the new law a declaration of bankruptcy will not affect ongoing arbitration, in the way that arbitration will no longer have to be discontinued and will be treated in the same way as proceedings in the state courts. However, any new arbitration proceedings will have to be conducted against the official receiver of the bankruptcy estate if the bankrupt company is the respondent, or can be initiated only by the receiver if the bankrupt company is the claimant.²⁹

²⁷ Syska and another v. Vivendi Universal SA and others 2008, EWHC 2155, statement 11 and 71.

²⁸ Lazic V., *The Effects of Bankruptcy on Arbitration: An Unresolved Issue of Characterization and Applicable Law*, URL=<http://kluwerarbitrationblog.com/2015/09/14/the-effects-of-bankruptcy-on-arbitration-an-unresolved-issue-of-characterization-and-applicable-law/>. Accessed 10 January 2017.

²⁹ For more details see Galkowski, K., K., *Elektrim case era comes to an end*, URL <http://www.lexology.com/library/detail.aspx?g=461ea330-c8dc-42ac-a196-45b5c843f69b>, 10 January 2017.

3. IMPACT OF BANKRUPTCY ON ARBITRATION PROCEEDING

For a party that initiated an arbitration proceeding against a company which later declared bankruptcy the question emerges as to what will happen with the ongoing arbitral proceedings. The question is whether the bankruptcy of a party in the arbitration agreement leads to suspension (interruption) of all other procedures or otherwise affects the continuation of the arbitration proceedings.

In internal disputes where the applicable law is the law of the country of the tribunal seat, the suspension of the arbitral proceedings should be applied if it is so stipulated by the national law. According to the rule of suspension which reflects the principle of jurisdictional attraction, the commencement of bankruptcy proceedings as a form of court proceeding should terminate or interrupt all other actions in order to preserve the bankruptcy estate, and all creditors of the debtor (except for the privileged creditors) put in the same position.³⁰ This practically means that any already initiated judicial or administrative proceedings will be terminated or that they cannot be even initiated in the first place. In this sense, for the specific moment when bankruptcy proceedings are instituted, the Serbian Bankruptcy Act provides as follows: "As soon as the legal consequences of initiation of a bankruptcy proceeding have become effective, any and all judicial proceedings against the bankrupt debtor and their assets are to be suspended, as are any and all administrative proceedings initiated at the request of the bankrupt debtor and any and all administrative and tax proceedings the matter of which is to determine the pecuniary obligations of the bankrupt debtor".³¹ The rule of suspension or termination of all proceedings is applied to internal bankruptcy proceedings to such an extent that it can be considered a generally accepted rule or principle.³² This provision usually represents a mandatory provision on the national level,³³ and it reflects the principle of territoriality.

For example, if the arbitration proceedings were not terminated by the tribunal after the declaration of bankruptcy, the court would refuse to allow enforcement of the

³⁰ In this regard, it is implied that special principles apply in bankruptcy proceedings: such as the principle of collective protection of creditors, the principle of equality, the principle of universality etc. Vasiljević, M., *Kompanijsko pravo*, Beograd 2012, p. 440 *et seq*, Jovanović Zattila, M. ; Čolović, V., *Stečajno pravo*, Niš, 2013, pp. 20-22.

³¹ Art. 88 Law on Bankruptcy Procedure, The Official Gazette of the Republic of Serbia, ("Sl. glasnik RS", br. 104/2009, 99/2011 - dr. zakon, 71/2012 - odluka US i 83/2014) No. 84/04

³² Belohlavek, A., *Impact of Insolvency of a Party on Pending Arbitration Proceedings in Czech Republic, England and Switzerland and Other Countries*, Yearbook on International Arbitration, (Roth, M; Giestlinger, M., eds.), EAP, Berlin, 2010, pp. 145-166, URL= <http://ssrn.com/abstract=1721724>. Accessed 10 January 2017

³³ More about mandatory rules in International commercial arbitration, Vukadinović Marković, J., *Dejstvo normi neposredne primene u međunarodnoj trgovinskoj arbitraži*, Pravna riječ, 2016, pp. 139-152

rendered award. The principle of territoriality institutes a separate or independent proceeding to be pursued in each forum in which the debtor's assets are located.³⁴

Namely, in contrast to the so-called internal or national bankruptcy in which national judges apply national rules of the suspension, the arbitrators and judges in cross-border insolvency are faced with the dilemma of whether they are obliged to apply the principle of universality or principle of territoriality.

Since the national bankruptcy laws are mainly based on a territorial approach,³⁵ there are several issues that occur when multinational enterprises go bankrupt. The essential problem is that national legal systems can be confronted by each other, considering that there is a conflict of laws between different legal systems governing the bankruptcy proceedings.³⁶ Furthermore, locating the centre of main interest (COMI) of the multinational company, according to which the applicable law is determined, is even more complex when a company operates through its subsidiaries in different legal regimes.³⁷ For international or cross-border insolvencies,³⁸ the issue is, however, more complex,³⁹ especially in cases where prior to the opening of bankruptcy of one of the parties has already initiated arbitration proceedings. In these cases, as previously, the question arises whether the arbitrators, who lead the arbitration proceedings as a private procedure and under the authority of the private contracting parties in general are obliged to take into account the application of others' national rules on suspension of the proceedings, i.e. to accept the principle of suspension.⁴⁰ If so, what constitutes the legal basis of this commitment, especially in consideration of the fact that the arbitration tribunals do not have a classic *lex fori*⁴¹ and are not obliged to apply national provisions to open proceedings in court and to a recognized foreign proceeding?⁴²

³⁴ Omar, P., *European Insolvency law*, (1st edn), Ashgate, 2004, p. 24.

³⁵ *Ibid.*

³⁶ Warner, S., *Cross Border Insolvency: The COMI Issue in the Stanford Case* p. 3-4.
URL=http://www.legalhoudini.nl/images/upload/S%20Warner_Cross%20Border%20Insolvency.pdf. Accessed 15 January 2017.

³⁷ *Ibid.*

³⁸ Yang, G., *Insolvency Proceedings and Their Effect on International Commercial Arbitration*, p. 39.
URL=http://lib.ugent.be/fulltxt/RUG01/001/892/212/RUG01-001892212_2012_0001_AC.pdf. Accessed 20 January 2017.

³⁹ *Ibid.*, p. 3.

⁴⁰ *Ibid.*, p. 43.

⁴¹ Kovach, B. R., A Transnational Approach to Arbitrability of Insolvency Proceedings in International Arbitration, p.56.
URL=<http://www.iiiglobal.org/component/jdownloads/finish/391/5979.html>. Accessed 20 January 2017.

⁴² *Ibid.*, p. 57, note 290. states that the arbitrators in numerous ICC decisions are not related to the bankruptcy process opened beyond their seats

To avoid these difficulties, in the situation where one multinational company goes bankrupt, the national court applies the principle of universality. The legal basis for such action can be found in the above-mentioned provisions of EC and EU Insolvency Regulation.

The principle of universality is a system in which all aspects of the debtor's insolvency are encompassed by a single central proceeding under one insolvency law. The universality system usually relies on international treaties or conventions as the EU Insolvency Regulation. According to Article 3, the jurisdiction to initiate a single universal proceeding should be in the state in whose territory the debtor has the centre of their main interest.⁴³ This centre is presumed to be the place where the office is registered, if there is no proof to the contrary. According to the preamble of the regulation, COMI should be in the place where the debtor conducts their business administration on a regular basis and therefore ascertainable by third parties.⁴⁴ Likewise, the jurisdiction to initiate a secondary proceeding should be in the state where the debtor has an establishment. The effects of the secondary proceeding are restricted to the assets situated in that territory.⁴⁵

4. THE EUROPEAN INSOLVENCY REGULATION

The regulation on insolvency proceedings (EC) No 1346/2000, adopted by the Council of the European Union, went into force in 2002.⁴⁶ The regulation provides the first set of unified rules for the settlement of cross-border insolvency.⁴⁷ It has a binding nature and is directly applicable to the EU member states.⁴⁸ Therefore, it did not require any implementation by national legal systems.

The regulation has the following objectives: proper functioning of the internal market of EU,⁴⁹ avoiding incentives for transferring the assets from one member state to another while seeking a more favorable legal position (forum shopping),⁵⁰ improving efficiency and effectiveness in cross-border insolvency,⁵¹ and introduc-

⁴³ Art. 3 of the EU Insolvency Regulation

⁴⁴ Recital 13 of the EU Insolvency Regulation

⁴⁵ Kolmann, S., *European international insolvency law – Council regulation (EC) No. 1346/2000 on insolvency proceedings* (The European Legal Forum, 2002), p.169; URL= <http://www.simons-law.com/library/pdf/e/287.pdf>. Accessed 22. January 2017.

⁴⁶ *Ibid.*, p. 167

⁴⁷ *Ibid.*

⁴⁸ Except Denmark. More about direct effect and direct applicability see Vukadinović, R; Vukadinović Marković, J., *Uvod u institucije i pravo EU*, Kragujevac 2016, p. 137 *et seq.*

⁴⁹ Recital 2 of the EC Regulation No. 1346/2000

⁵⁰ *Ibid.*, recital 4

⁵¹ *Ibid.*, recital 8.

ing uniform rules on conflict of law rules.⁵² With respect to the determination of the courts with jurisdiction, the EC Regulation distinguishes between the main proceedings (Art. 3.1),⁵³ and secondary proceedings (Art. 3.2).⁵⁴

For the relationship between arbitration and insolvency proceedings the Art. 4 is important as it determines the applicable law to the insolvency proceeding. The law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are initiated.⁵⁵ The consequences of this provision are that the law of the State where the proceedings are initiated shall in particular determine the conditions for the commencement of such proceedings, how they will be run and closed. It shall determine in particular: the effects of insolvency proceedings on current contracts to which the debtor is party,⁵⁶ the effects of the insolvency proceedings brought by individual creditors, with the exception of lawsuits pending,⁵⁷ Another exception is provided under the Art. 15 and it reads: 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.

As we can see, this exception applies to the aforementioned arbitration cases. As a conclusion, we can point out that the arbitration proceedings in progress should be treated as pending law suits and applicable law should be the law of the country where the proceeding is conducted.

The regulation was subject to revision ten years after enforcement, which resulted in the adoption of the Recast Regulation in 2015 (EU Regulation).⁵⁸ The aim of the revision was to improve the operation of the regulation regarding its initial aims, and its resilience in economic crisis.⁵⁹ The EU Regulation extends the scope

⁵² *Ibid*, recital 23.

⁵³ 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 center of its main interests in the absence of proof to the contrary.

⁵⁴ Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

⁵⁵ Art 4 of the EC Regulation.

⁵⁶ Art. 4(e) of the EC Regulation

⁵⁷ Art. 4(f) of the EC Regulation

⁵⁸ Leandro, A., *The new European Insolvency Regulation*, URL=<http://conflictoflaws.net/2015/the-new-european-insolvency-regulation/>. Accessed 22 January 2017.

⁵⁹ *Ibid*.

of the regulation to proceedings whose aim is to give the debtor a ‘second chance’, by promoting a rescue culture (pre-insolvency proceedings). It includes provisions regarding the insolvency proceedings of corporate groups and puts in more controls to prevent abusive forum shopping.⁶⁰ It improves the coordination between the main and secondary proceedings, by making a stronger legal framework.

The EU Regulation provides that unless otherwise stated, the law of the Member State of the opening of proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main insolvency proceedings and for local proceedings. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.⁶¹ For the first time, the EU Regulation determines relationship between insolvency and arbitration proceeding, provides that “...the law applicable to the effects of insolvency proceedings on any pending lawsuit or pending arbitral proceedings concerning an asset or right which forms part of the debtor’s insolvency estate should be the law of the Member State where the lawsuit is pending or where the arbitration has its seat. However, this rule should not affect national rules on recognition and enforcement of arbitral awards”.⁶²

Regarding jurisdiction, the EU Regulation provides that the courts of the Member State within the territory of which the centre of the debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings.⁶³ In accordance with the international jurisdiction, the EU Regulation provides in article 6 (1): “The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them”. Article 6 (2) is important for the arbitration, and it states: “Where an action referred to in paragraph 1 is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them

⁶⁰ Recital 5 and 10 EU Regulation . “When the corporate’s centre of main interest is shifted in the preceding 3 months, the rebuttable presumption that centre of main interest is at the registered office will not apply.” See Deringer, B. F., *The recast EC Regulation on Insolvency proceedings: a welcome revision*,
URL=<http://www.freshfields.com/en/global/>. Accessed 22 January 2017.

⁶¹ Recital 66 of the EU Regulation.

⁶² Recital 73 of the EU regulation.

⁶³ Art. 3 of the EU Regulation.

is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.”

And the most important novelty of the EU Regulation refers to the effects of insolvency proceedings on arbitral proceedings. The Article 18 provides: “The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor’s insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat”. With this provision there is no more room for the dilemma about the law that applies to the pending arbitration proceedings.

5. CONCLUSION

Despite the fact that there are various areas in which the principles of insolvency law and arbitration law are conflicting, the commencement of bankruptcy proceeding does not affect the validity of the arbitration agreement. In the case of a cross-border insolvency proceeding, when the arbitral proceeding began before the insolvency proceeding against the debtor had, the arbitral tribunal should apply the law of the country of the seat of arbitral tribunal. In the event that the arbitration proceeding has not commenced, arbitrators shall respect the provision on general jurisdiction provided by EU Regulation.

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