



Center for International Legal Studies

6th Biennial Symposium on Arbitration, Mediation and ADR

- Arbitration and Bankruptcy -

**Various Effects of
Insolvency Proceedings on Arbitration**

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The Conflict

Possible Effects

Legal Framework

International Insolvency Principles

International Insolvency Law

Does the Place of Arbitration Matter?

Conclusion

The Conflict

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Insolvency	Arbitration
<ul style="list-style-type: none">▪ Safeguarding public interests▪ Mandatory rules (equal protection of creditors, debtor's loss of powers, seizure of all assets)	<ul style="list-style-type: none">▪ Principle of party autonomy▪ Large freedom of parties and arbitral tribunal to determine applicable law

Effects of insolvency proceedings on arbitration

- on subject matter arbitrability
- on arbitration agreement
- on (pending) arbitration proceedings
- on arbitrator's appointment
- on arbitrator's agreement
- on the merits of the dispute and the award
- on enforcement/annulment/ancillary proceedings

Arbitration law

- International treaties/conventions, institutional and other arbitration rules, national arbitration laws

Insolvency law

- International insolvency law: European Insolvency Regulation 1346/2000 (EIR), UNCITRAL Model Law on Cross-Border Insolvency, Nordic Bankruptcy Convention
- National substantive insolvency law

International Insolvency Principles

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Effects of principle of	Territoriality	Universality
Cross-border effects	No	Yes
Recognition	No	Yes
Applicable law	Lex fori	Lex (fori) concursum
Secondary insolvency proceedings	Yes	Exceptional

International Insolvency Law

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Some national legal systems

- Within EU: purely universal (EIR)
- Germany: purely universal
- UNCITRAL jurisdictions, e.g. USA, Japan: universal approach but territorial effects
- Sweden, Switzerland: territorial „light“ (reciprocity)
- China: mixed (reciprocity, public interests, protection of chinese creditors)

Does the Place of Arbitration (POA) Matter?

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Yes

- As far as the legal system at the POA is concerned (annulment proceedings, ancillary court proceedings)
- B/c there is no possibility of the parties to agree upon insolvency effects

Does the Place of Arbitration (POA) Matter?

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No

- B/c other jurisdictions with different legal systems may come into play
- If all legal systems involved are identical (e.g. w/in sphere of application of EIR)
- B/c non insolvent party may request an award nonetheless (set off, enforcement in non-attached assets abroad, insurance)

Can arbitrations act freely regardless of the legal situation at the POA?

- Doubtful b/c main insolvency principles (equal protection of creditors) require application and oppose the principle of party autonomy in arbitration
- However, possibility of non-insolvent party to demand decision upon clarification of insolvency aspects

Thank you for your attention!

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