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Part 1: Insolvency and arbitration – stuck somewhere between party autonomy and non-arbitrability

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1. INTRODUCTION*

I will contribute to this esteemed journal with two parts, both of which analyzes a long-lasting, unresolved, and contentious issue of the intersection between international commercial arbitration and insolvency law.[1] The intersection is especially prevalent due to the two regimes serving conflicting purposes, and therefore the relationship has been characterized as a conflict between near polar extremes.[2]

It is inevitably the case that parties to an arbitration agreement can end up in some form of bankruptcy or insolvency.[3] In most jurisdictions, including the Swedish one, it is only courts[4] that have authority and jurisdiction to deal with so-called "core" bankruptcy

* Many thanks to my friend, mentor, and role-model, Rolf Åbjörnsson. A fantastic person that I admire and look up to.

1 An issue of significant importance, which I will not discuss in this two-part contribution is that when insolvency administrators decides to initiate investment treaty arbitration in order to recover assets by the state. *See e.g.* Nick Gallus, *Covid-19 and Investment Treaty Claims by Insolvency Administrators*, KLUWER ARBITRATION BLOG (11 January 2021) *http://arbitrationblog.kluwerarbitration.com/2021/01/11/covid-19-and-investment-treaty-claims-by-insolvency-administrators/*.

2 Aceris Law, *Insolvency and Arbitration: What Issues Arise?* (2020) available at: https://www.acerislaw.com/insolvency-and-arbitration-what-issues-arise/ (last accessed 30/11-2021).

3 GARY B. BORN, INTERNATIONAL COMMERCIAL AGREEMENT 994 (2014). For a book covering briefly both arbitration and insolvency law, *see* LARS HEUMAN, SPECIALPROCESS, UTSÖKNING OCH KONKURS (8TH edn. 2020).

4 Including specialized courts, e.g., specialized bankruptcy courts.

functions.[5] However, when disputes do not relate strictly to such core functions yet involve a bankrupt entity, the exclusive jurisdiction of the courts is questioned and it is a generally held view that the dispositive matters can become the subject of arbitration.[6]

There are indeed compelling arguments in favor of arbitrating against an insolvent party (primarily pro-arbitration oriented policies) and there are equally compelling arguments against such procedures (primarily pro-debtor policies).[7] Born eloquently noted the following regarding arbitrability of disputes against a bankrupt entity:

> Different national legislative regimes and judicial decisions have reached different conclusions about these types of disputes. In many such cases, the desirability of a centralized, usually "pro-debtor," forum for resolving all disputes involving the bankrupt entity is weighed against that entity's preexisting commitment to resolve disputes by international arbitration, with different legal systems adopting different resolutions of these competing interests.[8]

The pro-arbitration folks form allegiance around the bedrock principle of "party autonomy", while the pro-debtor folks seek unity in broader concepts of judicial value, such as clarity, foreseeability,

5 E.g., receivership, administration, distribution, winding-up, etc. For the Swedish context, *see* STEFAN LINDSKOG, SKILJEFÖRFARANDE, EN KOMMENTAR 1 § 4.2.1 (JUNO 3rd edn. 2018).

6 For a good outline, *see id*, at 1 § 4.2 (2020) (*see e.g.,* "[i] praxis har det fastslagits att ett konkursbo är bundet av konkursgäldenärens skiljeavtal beträffande en anmärkningstvist."). For interesting discussions, *see* Lars Heuman, *Är konkursboet bundet av ett skiljeavtal som gäldenären ingått före konkursen?* JURIDISK TIDSKRIFT (Nr 2 2008/09) and Rolf Åbjörnsson, *Insolvensrätt i praktiken*, in MIKAEL MÖLLER, GÖRAN LAMBERTZ & STEFAN LINDSKOG, FESTSKRIFT TILL TORGNY HÅSTAD (2010).

7 Arbitration is a rather decentralized, private procedure governed by the parties. Insolvency, on the other hand, is a centralized and transparent system that is governed by mandatory national laws and court regulated. *See* Aceris Law, Insolvency and Arbitration: What Issues Arise? (2020) available at: https://www.acerislaw.com/insolvency-and-arbitration-what-issues-arise/ (last accessed 30/11-2021).

8 BORN, *supra* note 3, at 995-996.

and fairness in the distribution of assets.[9] The ultimate doctrines to reflect the winner and loser in the pro-arbitration versus pro-debtor debate is the (non)arbitrability, (in)validity, and (in)capacity doctrines. As things stand currently, "the weight of authority, particularly in recent years, supports narrow non-arbitrability rules in this context".[10] Moreover, mostly, but not exclusively so, neither substantive validity rules nor capacity rules seem to put too many obstacles in place for arbitrating with a bankrupt entity in pro-arbitration jurisdictions.

The mentioned legal conundrum keeps on throwing up complicated issues for practitioners, scholars, arbitrators, judges, and legislators. Additional elements of complexion resurface in the international commercial arbitration context due to the transborder element of such procedure. Put simply, the intersection presents cumbersome interpretation and application issues in nuance, scope, and degree, but also holistic threshold policy issues such as the role of the non-arbitrability doctrine as a counterbalance to party autonomy and arbitrability.

In Part 1, I will start with a more nuanced question; that is, the effect of prohibitory insolvency laws abroad on international commercial arbitrations seated in Sweden. In Part 2, I will then deal with the broader threshold policy issue; that is, whether arbitrating with an insolvent/bankrupt party should at all be (non)arbitrable in Sweden.[11] The backwards order is meant to first underscore the transborder issues that may arise so that the soundness (or not) of the jurisdictional objection can be put in a proper context. In that way, the policy underpinnings of the law *de lege ferenda* will better reflect the holistic transnational concerns and the dual goal of preserving

9 HEUMAN, *supra* note 3 ("Konkursinstitutets funktion är att i ordnade rättsliga former fördela förlusterna proportionellt mellan borgenärerna med hänsyn till fordringarnas storlek. … Genom konkursbeslutet sätts stopp för en kapplöpning mellan borgenärerna").

10 BORN, *supra* note 3, at at 996.

11 BORN, *supra* note 3, at 994 (National legislation imposing an absolute prohibition against arbitration by insolvent entities often have laws that can be "characterized as either rules of substantive validity, having the effect of invalidating a previously-valid arbitration agreement, or as rules of capacity, having the effect of withdrawing the insolvent entity's capacity."). One of the most frequently encountered objections to the substantive validity of international arbitration agreements is insolvency. *Id*. at 844-845.

the integrity of arbitration as an institution and the exclusivity of courts in matters of *ordre public*. Ultimately, the two intersecting specialized judicial institutions compete for jurisdiction and both institutions are making claims to decision-making authority by either having superior expertise or competence (i.e., "empirical epistemic authority"), or on the basis of legitimacy (i.e., "normative epistemic authority").

Notwithstanding this, neither of the two parts will take the reader to a supposed forensic end-destination. I have no such to offer and am further hesitant to take a stance given the validity and logic in the reasoning from all sides. The fact of the matter is that there is nothing to conclude as such, there are merely different preferences rooted in various manifestations of political concerns and policy objectives. Thus, the reader will be free to shape his or her own mind based on what has been unveiled and in light of their own experiences and backgrounds. It is likely that the policy-orientation embraced is to a great extent shaped by the hat one wears–as an insolvency practitioner, arbitration practitioner, scholar, judge, politician, and so on. The crux of the matter is not necessarily what the law is *de lege lata* but rather *what* do we want to achieve, *why* do we want it, and *how* do we achieve the purported objectives *de lege ferenda*. Unfortunately for the reader, such a "what, why, and how" approach rooted not only in legal methodology, but perhaps more so in policy and decades of experience flies far above my punching sphere. However, I am confident enough to spot an area meritorious for further debate, and therefore bold enough to recommend that a task force is established with the purpose to navigate the maze of the intersection between arbitration and insolvency law in order to distill firm principles for

our legislative and judicial branches to treat as a stepping-stone for their preparatory work and decision-making.[12]

In Part 1, I will focus on the effect of exclusive insolvency legislation *vis-à-vis* international commercial arbitrations seated in Sweden. In this part, I will also "set the scene" of the discussion for both parts by briefly tying the evolution of arbitration–from hostility to pro-arbitration–to the arbitrability concept (*sw*: skiljedomsmässighet[13]) and the validation principle. I will also underscore other key arbitration characteristics that should be taken into account when considering the tension between arbitration and insolvency law.

In Part 2, I will delve deeper into the topic in theory by looking at whether the insolvency law should be exclusive in Sweden, and therefore whether such subject-matters where one party is insolvent/bankrupt should indeed be arbitrable or non-arbitrable.

12 Such a task force could be led by experts wearing all hats, e.g., former chief justice of the Swedish Supreme Court Stefan Lindskog and professor emeritus Lars Heuman. The task force could then constitute renowned insolvency- and arbitration practitioners and scholars, e.g., professor Kaj Hobér, Mr. Rolf Åbjörnsson, professor Marie Karlsson-Tuula, and Mr. Kristoffer Löf. The need is imminent. *See e.g.,* Åbjörnsson, *supra* note 6 ("Det är inte helt sällan som man som praktiker får erfara att lagstiftaren beträffande en konkret och för det praktiska rättslivet viktig fråga överlämnar avgörandet till rättstillämpningen, varvid man samtidigt får erfara att HD flera gånger anger att saken inte kan lösas genom domstolsavgörande och därför hänskjuter frågan till lagstiftaren. Man har sålunda uppnått en hygglig rundsgång."). For a good report or toolkit on the issue which could serve as guidance for such a domestic task force, *see* IBA Arbitration Committee, IBA Toolkit on Insolvency and Arbitration (2019), available at: https://www.ibanet.org/MediaHandler?id=087B4D4A-B82E-4FAC-817F-64EE50091D66 (last accessed 30-11-2021).

13 *See* Section 1(1) of the Swedish Arbitration Act. For a commentary, *see* LINDSKOG, *supra* note 6, at 1 § 4.1.

2. FROM HOSTILITY TO AN EMPHATIC POLICY FAVORING ARBITRATION: EXPLAINING THE ARBITRATION LOCOMOTIVE PUSHING AHEAD WITH FULL SPEED

By illustration, the evolution of a pro-arbitration policy can be demonstrated by looking at the U.S. international commercial arbitration experience.[14] The U.S. is a good yardstick given its positioning as the hub for capitalism and its vast litigation experience with respect to transborder commerce, trade, and investment.[15] The move from hostility to an emphatic policy favoring arbitration started taking shape by elevating the standing of party autonomy and increasing the currency of the subject-matter arbitrability doctrine.[16] Moreover, arbitral agreements are not lightly considered invalid and capacity challenges are not granted light-handedly. Already in 1945, the Second Circuit embraced party autonomy by citing to the preparatory work of the Federal Arbitration Act as follows:

> "Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs. * * * The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy

14 For more on the pro-arbitration/emphatic policy favoring arbitration development of international commercial arbitration in the U.S., *see e.g.,* Ylli Dautaj, *The Act is not the entire story: How to make sense of the U.S. Arbitration Act*, KLUWER ARBITRATION BLOG (4 April, 2018), available at: http://arbitrationblog.kluwerarbitration.com/2018/04/04/act-not-entire-story-make-sense-u-s-arbitration-act/ (last accessed 1/12-2021).

15 Historically, U.S. courts have been rather liberal and pragmatic with respect to granting subject-matter jurisdiction, personal jurisdiction, and considering a particular federal court to be a proper venue.

16 *See* William F. Fox and Ylli Dautaj, *The Life of Arbitration Law Has Been Experience, Not Logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act*, 21 CARDOZO J. CONFLICT RESOL. 1 (2019-2020).

> survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement."[17]

Following the approved standing of domestic arbitration, the emergence of free-market capitalism, and the internationalization of the free world through incremental globalization, transborder business transactions started becoming commonplace. With such practice came transnational disputes and the need for sensical, neutral, and expertise transnational dispute resolution. The U.S. courts met the demand in part by demonstrating an extreme willingness to defer to party autonomy. In so doing, the courts developed an almost unequivocal and categorical pro-enforcement bias of arbitration agreements as well as arbitral awards. Since then, it has barely looked back.

Three cases are of primary importance for the pro-arbitration evolution of international commercial arbitration in the United States, namely, *The Bremen v. Zapata Off-Shore Co*[18]; *Scherk v. Alberto-Culver Co*[19]; and *Mitsubishi Motors Corp. v. Soler Chrysler-Playmouth, Inc*[20]. In *Scherk*, the Supreme Court reasoned that:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if

17 *Kulukundis Shipping Co. v. Amtorg Trading Corp*., 126 F.2d 978 (2d Cir. 1942), p. 985.
18 407 U.S. 1 (1972).
19 417 U.S. 506, reh'g denied, 419 U.S. 885 (1974).
20 473 U.S. 614 (1985).

> Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.[21]

In the very well-known *Mitsubishi* case on enforcing an arbitration agreement despite a non-arbitrability objection on mandatory competition law, the Supreme Court held that:

> 40. As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration,", and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration. (citations omitted)

21 417 U.S. 506, reh'g denied, 419 U.S. 885 (1974) p. 516-517.

> 41. Accordingly, we "require this representative of the American business community to honor its bargain,", by holding this agreement to arbitrate "enforce[able] . . . in accord with the explicit provisions of the Arbitration Act."[22] (citations omitted)

In 1989, the Supreme Court doubled down on the emphatic pro-arbitration policy by re-iterating the pole position of party autonomy in arbitration. The Supreme Court held that:

> Moreover, since the FAA's principal purpose is to ensure that private arbitration agreements are enforced according to their terms, it cannot be said that application of § 1281.2(c) here would undermine the Act's goals and policies. Arbitration under the Act in a matter of consent, not coercion, and the parties are generally free to structure their arbitration agreements as they see fit.[23]

The U.S. evolution on the doctrine of international commercial arbitration is illustrative also for likeminded and culturally aligned countries, such as Sweden. The bottom line for such states is the doctrine moving in one direction only–i.e., in a one-way highway pro-enforcement pathway leading to *inter alia* increased subject-matter arbitrability and towards a stronger inclination to validate as opposed to invalidate an arbitral agreement (the "validation principle").

But why all the fuzz about the evolution of international commercial arbitration you may wonder? This evolution will now be put into the context of this paper. In 1987–i.e. two years following the *Mitsubishi* case–the U.S. District Court for the District of Massachusetts ordered an insolvent party to honor its international arbitration agreement[24], reasoning that:

> In weighing the strong public policy favoring international arbitration with any countervailing potential harm to bankruptcy

22 473 U.S. 614 (1985), pp. 40-41.
23 Volt Inf. Sciences v. Stanford Univ., 489 U.S. 468 (1989).
24 *See* BORN, *supra* note 3, at 999.

> policy upon the present facts, the Court finds the scales weighed in favor of arbitration.…no major bankruptcy issues will be implicated in valuing contract damages and the international arbitration panel requires no special expertise to accomplish their task. While international arbitration will require a temporary and limited incursion into the Bankruptcy Court's exclusive jurisdictional bailiwick, no bankruptcy policies will suffer adverse impact. Conversely, the very image of the United States in the international business community stands to be tarnished. It is important and necessary for the United States to hold its domiciliaries to their bargains and not allow them to escape their commercial obligations by ducking into statutory safe harbors.[25]

In that case, the district court weighed the strong policy favoring arbitration against any countervailing policy in order to determine a proportionate outcome.[26] There is, however, another case in the U.S. that stands out and one that the Swedish jurisdiction may want to glean at for *de lege ferenda* guidance, namely the *In re United*[27]. In that case, the Second Circuit reached a different outcome than the Massachusett's District Court but with a similar reasoning and methodological approach. The Circuit reasoned that:

> In exercising its discretion over whether, in core proceedings, arbitration provisions ought to be denied effect, the bankruptcy court must still "carefully determine whether any underlying purpose of the Bankruptcy Code would be adversely affected by enforcing an arbitration clause." The Arbitration Act as interpreted by the Supreme Court dictates that an arbitration clause should be enforced "unless [doing so] would seriously jeopardize the objectives of the Code." That inquiry constitutes a mixed question of law and fact with legal conclusions being reviewed de

25 *Societe Nationale Algerienne v. Distrigas Corp*., 80 B.R. 606 (D. Mass. 1987), p. 614.

26 There are U.S. case law where the courts have refused to compel arbitration on the countervailing position.

27 *In Re: United States Lines, Inc. United States Lines (s.a.) Inc., Debtors.asbestosis Claimants, Appellant, v. U.S. Lines Reorganization Trust, Appellee,united States Lines, Inc., United States Lines (s.a.) Inc., Debtors-appellees*, 318 F.3d 432 (2d Cir. 2003).

> novo, and factual determinations being reviewed for clear error. Where the bankruptcy court has properly considered the conflicting policies in accordance with law, we acknowledge its exercise of discretion and show due deference to its determination that arbitration will seriously jeopardize a particular core bankruptcy proceeding. We see no basis for disturbing the bankruptcy court's determination to that effect here.[28] (citations omitted)

In Sweden, the evolution of arbitration has similarly been trending in one, pro-arbitration, direction for many years. Moreover, in Sweden, just as in the U.S., we have a sophisticated set of insolvency laws to protect the market and financially distressed and aggrieved debtors. In Sweden, more than hundred years ago, we concluded that an arbitration agreement is binding on an insolvent party through universal succession.[29] Although this is the case, unresolved and unanswered issues remain outstanding.[30]

In the hope of not unintentionally hurting the rule of law and the utility in international commercial arbitration–i.e., retaining the prestige of arbitration as an exclusive dispute resolution mechanism for disputes that properly belong there–I ask the following questions: Have we unintentionally and good-willingly pushed the pro-arbitration and pro-enforcement doctrine too far? Will the emperor of arbitration be exposed as wearing no clothes or a suit too large to fill-out properly? Are the proponents unintentionally doing the work of its antagonists by slowly paving the way for dismantling arbitration or cloaking it in features not belonging to the procedure

28 *In Re: United States Lines, Inc. United States Lines (s.a.) Inc., Debtors.asbestosis Claimants, Appellant, v. U.S. Lines Reorganization Trust, Appellee,united States Lines, Inc., United States Lines (s.a.) Inc., Debtors-appellees*, 318 F.3d 432 (2d Cir. 2003).

29 "Plenimålet", NJA 1913 s. 191. Even though "Svenska Kredit" NJA 2003 s. 3 has complicated matters to a large degree. *See also* Thorsten Cars, Karnov Lagkommentar (Lag (1999:116) om skiljeförfarande), 2.7.1 on ("Vid universalsuccession – när en parts samtliga rättigheter övergår till ett annat rättssubjekt – blir skiljeavtalet i allmänheten gällande i förhållande till den nya parten … När en par försatts i konkurs kan alltså borgenär, som före konkursen slutit skiljeavtal med gäldenären, få beloppet av bevakad fordran fastställd av skiljemän..."). *See also* "Five Seasons" NJA 1993 s. 641 (reasoning in *obiter dicta* that universal succession is an exception to the rule that an arbitration agreement binds only the parties to it).

30 For an excellent analysis and discourse, *see* Heuman, *supra* note 6.

to accommodate new subject-matter concerns?[31] Lando highlighted the broader policy implications for the institution of international commercial arbitration as follows:

> The arbitrator will have to consider not only the interests of the parties but also those of international commercial arbitration considered as an institution. Today arbitration still enjoys *** [prestige] ***. If it became known that arbitration is being used as a deice for evading the public policy of states which have a governmental interest in regulating certain business transactions, its reputation may suffer. Arbitration can only survive as long as it is tolerated by states. It is in the interests of the business community that arbitration should be kept as free as possible from government intervention.[32]

3. SOME CHARACTERISTICS OF ARBITRATION: PARTY AUTONOMY, ARBITRABILITY, AND ENFORCEMENT

In arbitration, matters of a dispositive nature can be adjudicated. The parties can freely structure the arbitration procedure and the arbitrators are duty-bound to follow the instructions given by the parties (with the limitation of mandatory rules).[33] Conversely, a matter that is indispositive is non-arbitrable. Such non-arbitrable subject-matter

31 *See* Tibor Várady et al, INTERNATIONAL COMMERCIAL ARBITRATION – A TRANSNATIONAL PERSPECTIVE 65-66 (AMERICAN CASEBOOK SERIES, 7th ed. 2018) ("As, however, arbitration became the dominant method of settlement of international trade disputes, the spectrum of cases submitted to arbitration became much more broad. It now includes most difficult and complicated cases as well; it includes acrimonious confrontations, and disputes about huge sums of money. The newly emerging environment prompted some transformation. Informality has ceded ground to regulation, spontaneity has found a rival in conceptualization. Informality is still on the banner of arbitration, it is still one of its actual comparative advantages, but proportions have shifted.").

32 Ole Lando, Conflict-of-Laws Rules for Arbitrators, in BERNSTEIN, DROBNIG & KÖTZ, FESTSCHRIFT FÜR KONRAD ZWEIGERT (1981).

33 *See* LINDSKOG, *supra* note 6, at 0. 4.2. (2020). *See also* Section 21 of the Swedish Arbitration Act ("*The arbitrators shall handle the dispute in an impartial, practical, and speedy manner. They shall act in accordance with the decisions of the parties, unless they are impeded from doing so*.").

areas are those "not capable of settlement by arbitration".[34] It is national laws and courts that decide whether to treat "certain disputes as being more suitable for determination by their own public courts of law, rather than by a private arbitral tribunal".[35]

It is a generally held view that for any dispute resolution system to be reliable and to function effectively, the decision-making process should be legitimate, and its product must be sanctioned with coercive force if need be.[36] The enforceability of arbitration agreements and arbitral awards represents one of the central pillars upon which the international arbitration system rests.[37] In fact, international arbitration has been the preferred means of settling transnational disputes precisely because arbitral agreements and arbitral awards are generally treated as valid and enforceable.[38]

National law sometimes redresses the situation where one party is insolvent/bankrupt by not enforcing the arbitral agreement to which the now bankrupt party is an entity. This could be done by elaborating rules on subject-matter non-arbitrability.[39] A jurisdiction could elaborate rules that invalidates the arbitration agreement in a situ-

34 *See* Article II(1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

35 NIGEL BLACKABY AND OTHERS, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 29 (2015).

36 *See* PER EKELÖF ET AL, RÄTTEGÅNG. TREDJE HÄFTET 13 (2018). Finally, the enforceability of adverse awards applies equally when the award-debtor is an investor. In fact, the ICSID Convention was drafted with this in mind. *See also See* Alan S. Alexandroff & Ian A. Laird, *Compliance and Enforcement* in PETER MUCHLINSKI, FEDERICO ORTINO, AND CRISTOPH SCHREUER, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 1172 (2008) and Aron Broches, *Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution*, 2:2 ICSID Rev. 287, 310 (1987).

37 The New York Convention has been held to be "the pillar on which the edifice of international arbitration rests." J Gillis Wetter, *The Present Status of the International Court of Arbitration in the ICC: An Appraisal* 1 AM. REV. INT'L ARB. 91 (1990). *See also* Loukas A. Mistelis, *Award as an Investment: The Value of an Arbitral Award or the Cost of Non- Enforcement,* 28:1 ICSID Rev. 64, 66 (2013).

38 *See e.g.* White & Case and Queen Marry School of International Arbitration, 2018 International Arbitration Survey: the Evolution of International Arbitration, available at: https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration (last accessed 11/06-2019).

39 *See e.g.,* Heuman, *supra* note 6 ("En enklare och mera ändamålsenlig lösning innebär att ett skiljeavtal inte anses bindande mot boet. Därmed görs det klarts att domstolarna har exklusiv behörighet att pröva tvistiga fordringar och att det inte gäller några undantagsregler som kan förorsaka rättstillämpningsproblem.").

ation of insolvency/bankruptcy or else withdraw capacity from the now insolvent/bankrupt party.[40] An issue of significant importance is where the matter is non-arbitrable in one jurisdiction or where the arbitration agreement is invalid, while arbitrable or valid in a foreign jurisdiction where the arbitration was seated and under the law applicable to the arbitration agreement. Moreover, an eventual arbitral award in such a situation may at times prove to be a phyrric victory. Do such uncertain and cumbersome procedures really align with the characteristics of international commercial arbitration, and does it really reflect the legitimate expectations of the parties to an arbitration agreement?

4. ARBITRATION AND INSOLVENCY: THE EFFECT OF PROHIBITORY INSOLVENCY LAWS ABROAD ON ARBITRATIONS SEATED IN SWEDEN

In Part 2, I will discuss whether the Swedish jurisdiction should consider national legislation imposing an absolute prohibition against arbitration by insolvent entities or whether trustees or courts should have case-by-case discretion to decide whether to request, accept, or reject to arbitrate.[41]

In this Part 2, I will discuss the effect of such foreign prohibition on arbitrations seated abroad where there is no prohibition, more particularly in Sweden. Put differently, what should an arbitrator sitting in Sweden do when one of the parties to the arbitration is bankrupt and hails from a jurisdiction where the matter is non-arbitrable or where the arbitration agreement is either (a) considered invalid, or (b) that the estate lacks capacity to arbitrate? Should the arbitration agreement be enforced as binding between the parties? Born eloquently presented the crux of the matter as follows:

40 *See e.g.,* Mantilla-Serrano, *International Arbitration and Insolvency Proceedings,* 11 ARBITRATION INTERNATIONAL 51, 64 (1995) ("Regarding matters concerning the capacity of the insolvent party (or its representatives) to pursue the arbitration, the arbitrators consistently refer such issues to the personal law of the party, which for corporations is generally the law of the place of its corporation.").

41 *See* BORN, *supra* note 3, at 995-1002.

> International arbitral proceedings occasionally present the question whether rules in an insolvent party's home jurisdiction, providing for the invalidity of arbitration agreements or non-arbitrability of claims of an insolvent entity, should be given effect in other jurisdictions. For example, if a Polish (or Portuguese) company agrees to arbitrate in Switzerland (or England) then Polish (or Portuguese) bankruptcy legislation will likely be invoked in Swiss (or English) arbitral proceedings and, potentially, annulment or similar Swiss (or English) judicial proceedings.[42]

As we know, Sweden has been a preferred venue for international commercial (and investment) arbitration. Sweden has been the natural seat for Eastern European states to arbitrate in. If a bankrupt party is turned defendant in an international commercial arbitration seated in Sweden, should the arbitrators give effect to the foreign prohibition existing in that country? [43] The EU insolvency regulation can complicate this issue further with questions on where the insolvency proceeding commenced and when (i.e., before or while the arbitration was pending), but such analysis is not part of the scope of this paper.[44]

This is exactly what English and Swiss courts were confronted with more than 10 years ago. Notwithstanding this, the issue remains unresolved, and a lack of uniformity puts parties and arbitrators between a rock and a hard place. As we did with the U.S. evolution of the international commercial arbitration doctrine above,

42 BORN, *supra* note 3, at 1002.

43 For two prohibitory national laws, *see* 1414 Latvian Civil Procedure Law, Art. 487(8) (where the prohibition of disputes "regarding the rights and obligations of persons that have been declared insolvent before the making of the award by the arbitral tribunal" is elaborated through the nonarbitrability doctrine) and the Polish Bankruptcy Law, Art. 142 (where it is elaborated that "[a]n arbitration agreement concluded by the bankrupt shall lose its force from the date of the declaration of bankruptcy and pending proceedings shall be subject to discontinuance.").

44 *See* particularly Article 18 of the EU Insolvency Regulation, Regulation (EU) 2015/848 ("Article 18 [-] Effects of insolvency proceedings on pending lawsuits or arbitral proceedings[.] 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.") and Recital 73 (making it clear that Article 18 does not affect recognition and enforcement).

let us proceed by analyzing two other likeminded jurisdictions that are culturally aligned with Sweden (one common law and one civil law jurisdiction). From such comparative exercise, we can ask a series of questions relevant and ripe for debate in Sweden, too.

In *Syska & Elektrim SA v. Vivendi SA*[45], the parties had arbitrated in England pursuant to the London Court of International Arbitration Rules ("LCIA Rules"). Elektrim had filed for insolvency, and under Polish Bankruptcy Law the arbitration agreement was considered invalid due to lack of capacity.[46] Elektrim (in administration) challenged the tribunals jurisdiction. The Tribunal tried its jurisdiction and determined that under English law, the bankrupt entity had capacity to arbitrate and was forced to do so. The arbitration was continued. This was then challenged before the English courts. The English Court of Appeals upheld the arbitral tribunal's decision.

In *Vivendi SA v. Deuttsche Telekom AG*, the parties had arbitrated in Switzerland pursuant to the International Chamber of Commerce Rules ("ICC Rules"). In this case, as the case above, the arbitral tribunal heard a similar objection relying on the Polish Bankruptcy Law to invalidate the arbitration agreement due to lack of capacity. In this case, however, the arbitral tribunal determined that it lacked jurisdiction and suspended the arbitration. The Swiss Federal Court upheld the arbitral tribunal's decision. Thus, the arbitral tribunals and the courts took diametrically opposite directions, even though the Swiss case involved the same "Polish entity, which again argued that it no longer possessed the capacity to participate in arbitral proceedings".[47] The Swiss court reasoned in line with Article V(1)(a) of the Convention and concluded that the insolvent company's personal law was applicable.[48] It should be noted that the Swiss decision has been heavily criticized by arbitration scholars and practitioners and different approaches have been taken since (while not really under-

45 *Syska & Elektrim SA v. Vivendi Universal SA* [2009] EWCA Civ. 677. For a more recent decision but not directly on point, *see Riverrock Securities Limited v. International Bank of St Petersburg (Joint Stock Company)* [2020] EWHC 2483 (Comm).

46 Polish Bankruptcy Law, Art. 142.

47 *Vivendi SA v. Deuttsche Telekom AG*, 28 ASA Bull. 104 (2010) and commentary in BORN, *supra* note X, at 1002-1004.

48 BORN, *supra* note 3, at 1002-1004.

cutting the precedential value).[49] Moreover, EU insolvency regulation can complicate this issue further, but such analysis is not part of the scope of this paper.[50]

As is evident, the law applicable to the arbitration agreement makes or breaks the case at hand. If the arbitration agreement is, for example, to be interpreted by prohibitory law of a jurisdiction outside of EU, the arbitrator sitting in Sweden would likely be forced to accept a jurisdictional challenge. An arbitrator can also accept such challenge on grounds of incapacity under personal law, and therefore shut down further adjudication on the merits on the lack of subjective arbitrability.[51] However, arbitrators sitting in Sweden are more likely to consider the law applicable to the arbitration agreement to be the law of the seat (which it generally does unless there is an explicit agreement otherwise), and therefore validate as opposed to invalidate the arbitration agreement we saw in the cases above.[52] More-

49 *See e.g.*, Kaufmann-Kohler, Lévy & Sacco, *The Survival of the Arbitration Agreement and Arbitration Proceeding in Cases of Cross Border Insolvency: An Analysis from the Swiss Perspective*, PARIS JOURNAL OF INTERANTIONAL ARBITRATION (2010). *See also* 31 ASA Bull. 354, 362-63 and 5A_910/2019.

50 *See* particularly Article 18 of the EU Insolvency Regulation, Regulation (EU) 2015/848 ("Article 18 [-] Effects of insolvency proceedings on pending lawsuits or arbitral proceedings[.] 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.") and Recital 73 (making it clear that Article 18 does not affect recognition and enforcement).

51 Unless persuaded otherwise by the EU Insolvency Regulation, Regulation (EU) 2015/848.

52 *See e.g., Bulgarian Foreign Trade Bank Ltd (Bulbank) v. A.I. Trade Finance Inc*, NJA 2000, p. 538. This is also exactly what happened in a later Swiss Court decision, *see* 31 ASA Bull. 354 (2013) ("When the foreign entity is a legal person according to its status at the place of incorporation, it is also capable of standing as a party in an international arbitration seated in Switzerland. Possible limitations of the legal status as a person or a legal entity that are specific to the arbitral proceedings and leave the legal personality of the foreign entity untouched, are fundamentally irrelevant from the point of view of the capacity to be a party to an arbitration seated in Switzerland.…[I]f Art. 87 p-IL [the relevant provision of the Portuguese Insolvency Law] prevented an insolvent Portuguese entity from appearing as a party in a Portuguese arbitration, this would have no influence on its capacity to be a party in an international arbitration seated in Switzerland. It is decisive in this respect that Portuguese law affords the Appellant a legal personality through which it may be allocated rights and obligations.".."). For commentary, *see* BORN, *supra* note 3, at 1004 ("The Federal Tribunal instead applied Swiss law (as the law of the arbitral seat) to the substantive validity of the arbitration agreement, requiring an insolvent Portuguese party to honor its agreement to arbitrate in Switzerland. This subsequent holding of the Swiss Federal Tribunal, like that of the English Court of Appeal, reflects the general reluctance of national courts to give automatic effect to foreign bankruptcy legislation purporting to invalidate international arbitration agreements.").

over, arbitrators sitting in Sweden would likely be hesitant to make the decision based on the personal law of the insolvent/bankrupt party and would more likely than not see it as an issue of substantive validity. Applying the effect of the arbitration agreement pursuant to the law of the seat, Swedish arbitrators are likely to determine that the arbitration agreement should be enforced against the insolvent/bankrupt party. This is indeed in line with best arbitration practices.

That lends us to another series of questions: Should they give effect to the arbitration agreement in the situation outlined above? How far should arbitrators consider their best-efforts duty to render enforceable awards? The most notable pro-arbitration scholar, practitioner, and arbitrator is Born. He believes that:

> The better view is that the [New York] Convention requires, consistent with the practice of most states, a reasoned, case-by-case analysis of the needs of a particular insolvency proceeding and the impact of enforcement of an arbitration agreement on those proceedings, before the agreement to arbitrate may be denied effect. Moreover, again consistent with the weight of better-reasoned national court authority, there should be a strong presumption in cases involving international arbitration agreements that such agreements will be given effect.[53]

Are you ready to agree? What readers would be better to rebut or challenge this presumption than those of this journal. Had I sought reinforcement bias, I would have submitted this piece to an arbitration journal where the community seem so trusting of this position that it almost looks like a virtue written in the manifestation of the pro-arbitration comradeship. I am willing to venture out for compelling and persuading countervailing policies and arguments from insolvency experts. But first, let me provide some food for thought on the enforcement-conundrum and the role of foreign mandatory law.

On enforcement, is it effective and in line with parties' commercial expectations to arbitrate against a party where the attachment

53 BORN, *supra* note 3, at 1007.

of assets is uncertain and where the award is likely to be refused enforced in the bankrupt entities home jurisdiction? Does that undercut and frustrate the idea of arbitration, which is rooted to a large extent in procedural efficacy, cost efficacy, and direct enforcement? Should arbitrators consider the Article V of the New York Convention when deciding whether to pursue with arbitration in Sweden? The easy answer may appear to be "no", but is it the final answer?

A last thought that comes to mind is whether arbitrators in Sweden could instead treat (by taking into consideration or by application) the prohibition as mandatory law of a foreign jurisdiction, and therefore dismiss or reject the claim on the merits?[54] Put differently, if arbitrators sitting in Sweden rules that it has jurisdiction based on the law applicable to the arbitration agreement (i.e., that the matter is arbitrable and the arbitration agreement is valid), could arbitrators dismiss the claim in the merits phase on the application of foreign mandatory law (even though the applicable law would be Swedish)? If nothing else, it will make the non-insolvent party more hesitant to arbitrate against the insolvent entity for strategic purposes.

5. CONCLUDING REMARKS

In *Syska & Elektrim SA v. Vivendi Universal SA*, the English Court of Appeal upheld the arbitral tribunal's affirmative jurisdictional decision, concluding that the law governing capacity was English law.[55] In *Vivendi SA v. Deuttsche Telekom AG*, the Swiss Federal Court confirmed the arbitral award wherein the tribunal had discontinued the procedure on the basis of Polish bankruptcy law leading to a lack of capacity. Gore and Camp rightly noted that these "*dramatically different results, endorsed by sophisticated local courts, demonstrate the complex competing legal and policy implications of parallel insolvency*

54 Applying foreign mandatory law is problematic, even when parties with the seat of arbitration in Sweden have chosen a foreign law. *See* LINDSKOG, *supra* note 6, at 27 a §, 7.1 (2020). This problem is exacerbated manifold where the mandatory law is not the applicable law. For more on mandatory law, *see* BLACKABY, *supra* note 35, at 195-196. *See also* George Bermann, *Mandatory Rules of Law in International Arbitration*, in FRANCO FERRARI & STEFAN KRÖLL, CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (2011).

55 [2009] EWCA Civ. 677.

and arbitration proceedings".[56] The two positions are undoubtedly diametrically opposite. But which approach represent the "better view"?

It is suggested that arbitrators sitting in Sweden should at least, given the facts and circumstances of the case, consider a stay of the arbitral proceedings if a party is or has gone insolvent. Arbitrators should carefully explain why the stay is justified (or not) in a procedural order. Avoiding parallel arbitration(s) and insolvency proceedings may even effectuate the efficacy of the arbitral procedure, brings down costs, and is overall more aligned with the legitimate expectations of the parties. Thus, such a stay is compatible with Section 21 of the Swedish Arbitration Act.[57]

More than that, there is at least a feasibility of approving the bankrupt/insolvent party's objection as a defense on the merits as applicable foreign mandatory law of a third country. If the arbitrators determine that foreign mandatory law should be applied (which is highly controversial *per se*)–e.g., such that prohibits bankrupt entities from being a party to arbitration–they could, technically speaking dismiss the claim on the merits rather than *vis-à-vis* the objectional challenge of the arbitration agreement's substantive invalidity or due to a lack of capacity.

56 Kiran N. Gore and Charles H. Camp, *The Interplay Between Insolvency Proceedings and Parallel International Arbitration Proceedings in the Post-Pandemic World*, THE WORLD FINANCIAL REVIEW (16 July 2020).

57 Section 21 ("The arbitrators shall handle the dispute in an impartial, practical, and speedy manner. They shall act in accordance with the decisions of the parties, unless they are impeded from doing so.").