International Arbitration and Insolvency Proceedings

by FERNANDO MANTILLA-SERRANO

WHEN ONE of the parties in an international arbitration is subject to parallel insolvency proceedings (such as judicial administration, rehabilitation, receivership, bankruptcy, or liquidation), the arbitrator is faced with added difficulties and additional issues of fact and law.¹

To the same extent, it is clear that, in administered arbitration, the existence of insolvency proceedings will have an impact on the administration and supervision of the case by the institution. This impact ranges from the proper way to address the communications and notifications to the specific form that an award may take in order for it to be enforceable against the insolvent party.

The ICC International Court of Arbitration ("the ICC Court") currently handles more than 770 cases, some of which involve a party subject to insolvency proceedings. This experience may be useful for practitioners who wish to anticipate the problems raised by the insolvency of one of the parties to the arbitration and who seek to enhance the co-operation between the parties, the arbitrator, and the arbitral institution.

In addition ICC arbitrators have rendered awards analysing and deciding substantive issues related to or arising out of the insolvency of one of the parties. These awards, some of them not yet published, provide an objective sample of the concerns and dominant trends of international arbitrators when facing parallel insolvency proceedings.

Although there is abundant state court jurisprudence regarding arbitration in the presence of insolvency proceedings, this will not be discussed in the present survey unless the decisions relate to the ICC cases referred to below. Nor is the purpose of this article to undertake a study of the state of the law an arbitration and insolvency around the world or even...
For the present work, the author has concentrated on the awards approved and the cases set in motion by the ICC Court during the past five years.

The author has encountered 27 awards since 1989 (out of a total of approximately 500 awards rendered during that period) in which the existence of insolvency proceedings raised additional issues in the arbitration. To date, approximately 30 arbitrations are being conducted under the ICC Rules of Arbitration ('the ICC Rules') in the presence of parallel insolvency proceedings.

The analysis that follows reviews both the ICC's experience in administering this type of case and the arbitrators' approach in handling the issues raised by insolvency.

Since insolvency proceedings give rise to matters related to the administration of the arbitration (i.e. managerial work of the institution, and conduct of the proceedings by the arbitrator), as well as to particular issues submitted for decision to the arbitral tribunal, the present analysis will first address the questions that concern the progress of the arbitral proceedings and then it will examine those questions material to the outcome of the case.

I. ISSUES RELATED TO THE ADMINISTRATION OF THE PROCEEDINGS

These issues differ depending on whether the question presented arises for the institution or for the arbitrator.

The starting point for the active intervention of the arbitrator is the transmittal of the file to the arbitral tribunal. The author will therefore consider in turn the issues arising before and after transmittal.

(a) Before the Transmittal of the File to the Arbitral Tribunal

(i) Notification of the request for arbitration

The ICC delivers notification of the Request for Arbitration to the address indicated by the claimant. Although it is the claimant's responsibility to provide a proper address for notification, the ICC is in permanent contact with the claimant to inform him whether the Request has been successfully delivered. Thus, any problems encountered are immediately brought to the attention of the claimant, who is then invited to instruct the ICC as to the steps to be taken in order to ensure proper notification to the defendant.

In at least 11 of the pending cases analysed, the defendant was under insolvency proceedings when it received notification of the Request. In two such cases, the Request was initially refused at the address provided by the claimant. Although the ICC Rules would allow the proceedings to continue under those circumstances, some claimants have elected - as a precaution - to notify directly the defendant in accordance with the local law of the defendant's place of business. This approach seems advisable when such place is located in a country traditionally hostile to international arbitration, particularly, if said country is, as well, the place where the enforcement of the award will most likely be sought.

In some other cases the Request has been accepted, but its acceptance was followed up which a letter explaining the financial troubles of the party and raising as an issue the validity of the notification. This information is always conveyed to the claimant, who must inquire on his own as to the proper legal representative of the insolvent party (whether trustee, receiver, representative of the creditors' committee or syndic). The claimant then should provide the arbitral institution with an extra copy of the Request for notification to the said representative.

If the claimant is aware of a plurality of addresses for the insolvent defendant, it should instruct the arbitral institution to send copies of the Request for Arbitration to all addresses known.

In the event that the insolvent defendant neither files an answer nor participates in the proceedings, the arbitration will proceed so long as the ICC Court is satisfied of the *prima facie* existence of an ICC arbitration agreement. In such a
case, the ICC will normally send the correspondence to the defendant at all of the addresses indicated by the claimant.

(ii) Setting in motion of the arbitration

One issue that constantly arises in conjunction with the insolvency of one of the parties is the capacity of a party to stand in the arbitral proceedings.

To the extent that this issue is presented as a challenge to the existence or the validity of an agreement to arbitrate between the parties, it is the ICC Court that will consider whether to set in motion the arbitration.\(^5\) Otherwise, the question of the parties' *locus standi* will be addressed by the arbitrator alone.

The existence or validity of an arbitration agreement has been contested, in the outset of the arbitration, in situations where a party appears as assignee of the insolvent party\(^6\) as well as where the insolvent party has been liquidated and no assets remain to cover liabilities not previously declared in the insolvency proceedings.

Less frequently, the arbitration agreement has been challenged on the grounds that the defendant has ceased to exist as a result of the insolvency, or that the arbitral proceedings can no longer be brought against a defendant because of mandatory provisions of a given national law. National laws have also been relied upon to argue that the arbitration agreement is no longer effective.

Apart from common considerations regarding the prima facie existence of the arbitration agreement (which are common to any situation in which the existence or validity of the arbitration agreement has been put at issue), the ICC Court has not yet refused to organize an arbitration solely because of the existence of insolvency proceedings involving a party in the arbitration or affecting the legal standing of a party.

In those situations, once the Court is satisfied that there exists a prima facie agreement to arbitrate, it sets the arbitration in motion through application of Article 8.3 of the ICC Rules and informs the arbitrator that a ruling on his jurisdiction may be required.

Accordingly, the claimant in such circumstances should present to the ICC the elements that clearly show the existence of an ICC arbitration agreement and should make the allegations needed to establish a *prima facie* link between said arbitration agreement and the parties in the arbitration.

(iii) Payment of the advance to cover the costs of the arbitration

As private means to settle disputes, arbitration is a payable service. Apart from the parties' normal legal costs, the parties must pay the fees of the arbitrator, his expenses and - in institutional arbitration - the administrative fee of the institution.

Needless to say, a party that is having problems meeting its financial obligations may also have some difficulties in paying for the arbitration.

In ICC arbitration, the payment of the advance to cover the costs of the arbitration is normally made in two 50 per cent instalments that are to be paid in equal shares by the parties\(^7\) The first payment is requested at the time the Court sets in motion the arbitration. The second payment is to be made after communication of the Terms of Reference to the Court.\(^8\)

Payment of the first half of the advance fixed by the ICC Court is a pre-condition for the transmittal of the file to the arbitrator. The second half is required in order to allow the Terms of Reference to become operative and to permit the arbitrator to adjudicate the matter.

The ICC experience shows that if, under normal conditions, the parties are sometimes late in satisfying their financial obligations toward the advance on costs, such procrastination becomes a real problem when a party is subject to insolvency proceedings. In 12 out of the 30 pending cases surveyed, the insolvent party is not paying its share of the advance on costs.
Indeed, even in the absence of bad faith and despite any genuine interest in the arbitration, once a party finds itself under judicial control, every decision meets with a series of controls and authorizations that necessarily entail some delay in payment.

This situation demands special attention from the arbitral institution, which must distinguish a real difficulty of the insolvent party from a mere dilatory tactic aimed at frustrating the arbitral proceedings.

Of course, the more diligent party may pay the insolvent party's share of the advance, or - if the insolvent party has filed claims - it may request that separate advances on costs be fixed for the principal claims and the counterclaims so as to prevent the arbitrators from addressing claims for which the advance on costs has not been duly paid.

In at least one of the cases currently pending in the ICC, it took several months for the insolvent party to pay its first share of the advance on costs. The other party did not object to the Secretariat's granting such an exceptional extension to make payment.

In another case, the Bankruptcy Court prohibited all payments by the insolvent party. The other party requested the fixation of separate advances so that, if the insolvent party failed to make payment, the arbitration could proceed only with respect to the former's claims.

The fixation of separate advances was designed to 'unblock' arbitral proceedings. Said fixation must be understood by the parties - and it is applied by the ICC Court - as an exception to the general principle of fixing a global advance on costs payable in equal shares by the parties. The ICC Court will therefore carefully analyse -before deciding to fix separate advances - the particular situation of each case in order to ensure proper application of the ICC Rules and respect for the parties' procedural rights. The ICC will also inform the parties in advance of any financial consequences arising from its decision.

(iv) Rapidity of the proceedings

In light of the previous remarks, it is clear that the rapidity of the proceedings (and the response time demanded from the institution) does not always remain unchanged when there are parallel insolvency proceedings.

There is no need to elaborate on the reasons for delay. It suffices to mention that in seven of the cases now pending and analysed for the present survey, the proceedings have been suspended or considerably delayed before the transmittal of the file to the arbitral tribunal for reasons imputable solely to the insolvency of one of the parties.

More interesting is a case in which one of the parties filed for reorganization following submission of the Terms of Reference. The other party sought to file its claim in the reorganization proceedings only to find, much to its dismay, that in the absence of tide proving its credit (i.e. an award) its filing was not admissible. The effect of this situation was to give a second boost to the arbitration, which thereafter was conducted at a fast-track pace. The award was approved four weeks later and the 'proved' credit was finally admitted in the reorganization proceedings.

This case perfectly illustrates the kind of administrative issues that may arise for the arbitrators when conducting an arbitration in the presence of parallel insolvency proceedings.

(b) After the Transmittal of the File to the Arbitral Tribunal

(i) Suspension

Eight of the cases actually pending are or were suspended. In the first of two unrelated cases - both with an Italian party subject to insolvency proceedings in Italy - the case was suspended for more than a year while the competent Italian Court authorized the withdrawal of some claims from the arbitration. The second case was suspended pending approval (omologazione) of the rehabilitation plan. In all cases, the suspension was decided with the consent of the parties.

In still another case, between an Italian claimant and a Swiss defendant in bankruptcy, the arbitrators, sitting in Geneva and applying Swiss law to the merits, decided to suspend the arbitration upon joint request by the parties through application of Article 207 of the Swiss Federal law of 11 April 1989. This law,
according to the tribunal ‘provides for the suspension of any pending procedure (whether in courts or in arbitration) up to
the tenth day following the date of the creditors’ second assembly provided for by said law’. This is the sole case that the
author has found in which the arbitrators decided (by way of a procedural order) to suspend the arbitral proceedings
because of the existence of parallel insolvency proceedings. However, it must be noted that both parties had requested
the suspension.

This experience demonstrates that once a party enters any kind of insolvency proceedings, its first reaction is to request a
suspension of the arbitration, usually on the basis of the law applicable to said proceedings.

In those situations, the arbitrator should invite the parties to comment on the effects the insolvency proceedings may have
in the arbitration and should request the insolvent party (its counsel or representatives) to provide all particulars
concerning its representation.

If the insolvent party refuses either to participate or to provide clear information regarding its representation, the arbitrator,
particularly when the other party so requests, should proceed with the arbitration and send all correspondence and
notifications to the insolvent par at its last known address and to all other addresses indicated by the adverse party.\textsuperscript{10}

If the insolvent party does participate but maintains its request for suspension, the arbitrator, paying due regard to any
mandatory provision that he considers applicable,\textsuperscript{11} should be favourable to the continuance of the arbitration
proceedings. Even in circumstances in which the suspension seems mandatory, if the other party - with full awareness of
the relevant particulars - requests to proceed with the arbitration, the arbitrator should refuse to suspend the proceedings,
for no one knows best what suits the party’s interests than the party itself.

This approach does no harm to any of the parties and fosters arbitration. Indeed, if the suspension was not mandatory,
the arbitrator has done the right thing. If the refusal to suspend is judged to be contrary to international public policy or
considered to have impaired the procedural rights of the insolvent party, the arbitral award will not be enforceable against
said party (which, therefore, is not hurt with the decision not to suspend) and, in spite of this result, the other party may
well still be interested in having the arbitration finalized by such an award.\textsuperscript{12}

In four of the awards studied, the arbitrator was faced with a request to suspend the arbitral proceedings. All requests
were denied and the arbitration continued in

spite of the existence of parallel insolvency proceedings. This is consistent with the dominant trend in international
arbitration.\textsuperscript{13}

With respect to grounds for denying suspension, the arbitrators seem to rely heavily on the territorial effects of insolvency
proceedings.

Indeed, in the award rendered in one case (No. 6057. reported in \textit{Clunet} 1993 at p. 1016), involving a Syrian claimant and
a French defendant that went bankrupt during the arbitral proceedings, the arbitrators held that:

\ldots regardless of French law, the arbitral tribunal, sitting in Damascus and applying Syrian law, considers that its mission . . . is not to be
affected by a Courts decision rendered subsequently in France which, without more, is not intended to produce effects in Syria. (author’s
translation from the original in French)

A similar approach was followed by another ICC tribunal (ICC Case 5996, unpublished award rendered in 1991) in a case
involving a Cameroon claimant and a French defendant. In deciding upon the request of the defendant’s trustee in
bankruptcy to suspend the arbitration through application of the French Bankruptcy Law, the arbitrators held:

\ldots - That the [arbitral] tribunal, amiable compositeur, sitting in Tunis in an international arbitration, is not compelled to grant the trustee’s
request, for the tribunal is not bound by a particular (substantive or procedural) national law and, least of all, by the French law that is
completely foreign to the present proceedings. (author’s translation from the original in French)

A most interesting analysis is found in another ICC award (ICC Case 5954, unpublished), which was rendered in 1991 in
a case involving French and French-speaking African claimants and a state-owned company defendant from the African country. In this case, the arbitrators had characterized the agreement between the parties as a state contract and were confronted with the question raised by the parties whether the arbitration should be suspended in accordance with the bankruptcy judgment rendered by default in the African country against one of the African claimants.

The decision of the arbitrators, who sat in Paris and applied the law of the African country, is largely inspired by the conviction that the government deliberately provoked the bankruptcy of one of the claimants in order to frustrate the arbitration.

However, the interest of the approach adopted lies in the analysis of the recognition that an arbitral tribunal owes to a bankruptcy judgment. In this regard, the tribunal stated:

Whereas it seems to the arbitral tribunal that the postulated effect of the [African Country] bankruptcy judgment (holding that [the African claimant in bankruptcy] and its representatives lack the capacity to go forward in the present proceedings and that the bankruptcy trustee alone may go forward in their place) derives from recognition of the res judicata effect, disputing the idea that it is a matter of simple probative force or, a fortiori, of the force of fact, in Poitiers, 20 December 1972, Rev. crit dr. int pr., 1974, 125; H. Battifol & P. Lagarde, Droit international privé, t. 11, L.G.D.J., Paris, 1983, No. 745, touching upon this issue with regard to the 'authority' which they distinguish from the force of fact and probative force; see also F. Rigaux, Droit international privé, t II, Larcier, Brussels, 1979, No. 1314, regarding the powers of a successive administrator);

Whereas, as a consequence, if the bankruptcy trustee who has been nominated abroad may validly seek judicial redress under another legal system without need of a preliminary exequatur procedure, then in the case of a dispute it is nonetheless for the judge before whom the bankruptcy trustee is proceeding to determine whether the foreign judgment complies with the requirements for its execution;

Whereas the diverse doctrinal and jurisprudential sources (both those of general import and those specific to bankruptcy) that were produced by the respondents in this case do not contradict the tribunal's findings, and whereas a careful perusal reveals that there is reason to distinguish clearly on the one hand the right for an administrator designated abroad to seek judicial redress without preliminary exequatur and without any challenge lodged against the regularity of the intervening judgment (the majority of the excerpts that were produced deal only with this aspect of the problem, see G. Grassman, 'Effets nationaux d'une procédure d'exécution collective étrangère, redressement ou liquidation judiciaire, faillite, concordat', Rev. crit dr. int pr., 1990, p. 421 et seq.), and on the other hand, the necessity of reviewing the regularity of the judgment in case of dispute (see esp. H. Battifol & P. Lagarde, Droit international privé, t II, L.G.D.J., Paris, 1983, No. 739 et seq. and No. 750);

Whereas it results from the preceding considerations that the tribunal to which this case has been submitted must, without calling for preliminary exequatur, itself perform the verification required by immediate recognition of the res judicata whenever there is a dispute over the regularity of the judgment rendered within a judicial system different from that of the arbitral tribunal;

Whereas there is reason to emphasize in this respect that contrary to the allegations of the respondents the tribunal does not find itself called upon to suspend the proceedings in the sense of Article 370 of the French Code of Civil Procedure, and whereas the tribunal has concluded that the provisions of that code are inapplicable to the present proceedings, and whereas the terms of Article 370, even supposing that they are applicable, necessarily require that the judgment resulting in the removal of the debtor from the management should be French, or, if it is foreign, that the judgment should benefit from the res judicata in France once its regularity has been determined; . . . (translation. Emphasis on the original)

The arbitrators, by reference to the bilateral convention for judicial co-operation between France and the concerned African country, found that the bankruptcy judgment was not final and that the bankruptcy proceedings were tainted by certain irregularities. The arbitrators therefore denied both recognition of the judgment and suspension of the arbitration.14

Although there is nothing wrong with the decision not to suspend, the reasons provided by the arbitrators in the cases cited are reminiscent of those provided by a judge in a territorial forum. Such an approach, which amounts to an erroneous
identification of the place of arbitration with a judicial forum, should be avoided by international arbitrators.

Indeed, an arbitrator in international arbitration should not put himself in the place of a judge, for whom a single legal system is domestic and all the others are foreign. As a matter of principle, all national jurisdictions and legal systems -including the arbitrator’s own - are foreign to the international arbitrator.

Accordingly, rather than resorting to the territorial effects of the insolvency proceedings or recognition of the insolvency judgment (the typical reflex of a national jurisdiction), the arbitrator should examine whether there are any mandatory provisions (of, say, international public policy) that should be applied to or taken into account in the arbitral proceedings. This is probably already in the back of the arbitrator’s mind. In fact, the author has noted that in all of the awards cited above, the arbitrator reviewed the relevant provisions of the law cited in support of the request for suspension.15

Sometimes the insolvent party, without formally requesting the suspension of the arbitration, asks the arbitral tribunal for a delay to comment as to the continuance of the arbitration proceedings. Such delay - when reasonable - is normally granted in order to allow the representative of the insolvent party (whether receiver, Liquidator or other) to express said comments. However, in at least two cases the arbitrator has refused to reopen the debates in order to allow such comments. In this regard, a most interesting situation arose out of a case in which the award was recently approved by the ICC Court There, the defendant - who had fully participated and had been duly represented throughout the arbitration - entered into liquidation proceedings immediately after the arbitral tribunal had submitted its draft award for scrutiny by the ICC Court. Being informed of the existence of the arbitration, the defendant’s Liquidator - an attorney other than its counsel of record during the arbitral proceedings - requested communication of some documents from the arbitrators and a delay to express his comments on the arbitration. The arbitral tribunal, rightly, refused both requests since the final hearing had already been held and the debates were closed. The arbitrator, considering that the defendant had been represented and argued its case, decided that nothing in the insolvency could prevent the arbitrators from rendering the award.

In a similar case also recently submitted to the ICC Court for scrutiny of the draft award (the award has since then been approved), in which Paris was the place of the arbitration, Missouri law was applicable to the merits, and the parties were a German claimant - who filed for bankruptcy in Germany after the closing of the debates but before the submission of the draft award to the ICC Court - and a USA defendant (also, counterclaimant), the award states:

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It is controversial in Germany whether §240 ZPO [which commands the suspension of legal proceedings] is applicable to arbitration. A certain view is that it is applicable, at least to domestic arbitration. In any case, the fact that the bankrupt party has lost the capacity to sue, that the mandate of representation given expires with bankruptcy (§23 of the [German] Bankruptcy Code), and that the Receiver becomes the sole legal representative of the bankrupt’s estate, suggests as a reasonable solution in international arbitration to invite the Receiver to continue the arbitral proceedings and to give him the time needed to get acquainted with the matter, if he so wishes.

The arbitral tribunal proceeded in this way in the present case and the Receiver responded positively: he asked for the reinstatement (sic) of the proceedings and for an award to be made, and, at the same time, he confirmed that he legally represents the bankrupt’s estate to this effect; he did not request any allocation of time for reviewing the case which is consistent with the statement that he cannot afford an active role in the proceedings. In any case, the hearing in this case had been closed before the bankruptcy judgment, and the Receiver of [the claimant’s] bankruptcy may not have more rights in this respect than [the claimant itself].

Consequently, the Arbitral Tribunal continued the proceedings with [the claimant’s] bankruptcy estate represented by its Receiver as claimant party.

One last word with regard to suspension. In none of the cases reviewed was the issue of \textit{lis pendens} raised. This should not be a surprise since such a defence requires that two competent jurisdictions be presented simultaneously with the same dispute. In the presence of an arbitration clause (which operates to exclude the jurisdiction of state courts), it is difficult to imagine the simultaneous existence of two competent jurisdictions. Even if a particular issue such as whether to declare the bankruptcy is considered non-arbitrable, then with respect to such an issue, and without prejudice to the arbitrator’s authority to rule as to his own jurisdiction, there would not be two competent jurisdictions: the state courts would be exclusively competent Moreover with respect to the other matters there would be no identity of the subject matter.16

(ii) Participation of the insolvent party and communications
Fundamental to every proceeding, the respect of the parties’ procedural rights is one of the issues that is always of prime importance to the arbitrators. This is particularly true with regard to a party subject to any form of judicial administration or liquidation.

This is probably the reason why in awards rendered in the presence of parallel insolvency proceedings - as in awards rendered without the participation of one of the parties - the arbitrators are especially keen to set forth the particulars surrounding the insolvency proceedings, the representation of the insolvent party in the arbitration, and the way that party was duly summoned to and informed of the arbitral proceedings.

Particular attention is required when the insolvent party is defaulting in the arbitration. Although the arbitration or the hearing is not prevented from going forward, the arbitrators make every reasonable effort to ensure that the party in default is properly summoned.

Most of what has been said with respect to the notification of the Request for Arbitration applies as well to the notifications and correspondence addressed by the arbitral tribunal.

If the insolvency occurs before agreeing on the Terms of Reference, the arbitrator with the assistance of the other party should make every possible effort to address such notification or correspondence to the last known address of the insolvent party and to any other address where one may reasonably expect that the insolvent party may be put on notice (i.e., registered place of business, address of the receiver, syndic, trustee or, even, to the Bankruptcy Court in charge of the case). Needless to point out that the default of a party in the arbitral proceedings (even because of insolvency) does not prevent the arbitrator and the other party from agreeing upon Terms of Reference.

In the event the insolvency occurs after submission of the Terms of Reference to the ICC Court, the arbitral tribunal shall continue to send notifications and correspondence to the address indicated in said document unless the insolvent party or its representative provides a new address for notifications. In this regard, although some arbitrators have considered appropriate formally to amend (i.e., with the signature of the arbitrators and the parties) the Terms of Reference, said practice is neither necessary nor recommended.

(iii) Information concerning the insolvency proceedings

Normally, when a party enters insolvency proceedings during the arbitration, this information is immediately conveyed to the arbitral tribunal, the adverse party, and the institution.

Unfortunately, such disclosure is not always the rule. Although as a matter of principle every document (whether pleadings or correspondence) that is submitted in the course of the proceedings must be communicated to the parties, the arbitral tribunal, and the institution, the information regarding the existence of insolvency proceedings is somewhat harder to obtain in some cases.

In two of the awards analysed for the present survey, the counsel for the insolvent party informed only the ICC about the existence of the insolvency proceedings. Of course, the ICC immediately passed that information on to the arbitrator and the adverse party. In another case, such notice was given only to the arbitrator, who then conveyed it to the other party and the ICC. In any event, the ICC makes every permissible effort to ensure that all relevant information is communicated -according to the ICC Rules - to the participants in the arbitration proceedings.

As for the attitude of the tribunal when it is informed of the insolvency proceedings, it is worth mentioning that in most of the cases the arbitrators have played an active role in requesting from the insolvent party all the information concerning its reorganization or liquidation. However, as in case 6057 (Clunet 1993, p. 1016), the arbitrators do not necessarily request production of the judgment opening the insolvency proceedings. Nevertheless, they only take account of the possible effects of the insolvency when they are satisfied of its existence.

In this regard, the ICC Court places particular attention to the reasoning provided by the arbitrator. Thus, in one case where the arbitrator decided solely upon the allegation of one of the defendants and without further motivation to 'take as
a fact that [the other defendant - who was defaulting and, allegedly, insolvent ] has ceased to exist', and found that said defaulting defendant no longer had 'the capacity to be sued and to appear in court, the ICC Court requested the arbitrator to elaborate further and to provide additional motivation regarding the insolvent party's standing.

Even when the arbitrator manages to conduct the proceedings without being hindered by the existence of insolvency proceedings, it may happen, because of the insolvency, that he is nevertheless obliged to consider additional issues that may concern the merits of the case; such is the subject of the second part of this article.

II. ISSUES RELATED TO THE MERITS OF THE CASE

These are issues that transcend the administration of the proceedings and, in one way or another, may have a bearing on the manner in which the arbitral tribunal will address the dispute submitted to the arbitration.

Apart from the *locus standi* of the insolvent party (or its successor in interest), the possible revocation of the arbitration clause, and the arbitrability of the dispute - all of which put into question the jurisdiction of the arbitrator - there are several issues that may influence the actual decision of the substantive question submitted to the arbitral tribunal, but without preventing the arbitration from going forward.

(a) Issues Normally Raised as Preliminary Defences

(i) Locus standi

APPLICABLE LAW

Of all the issues presented to the arbitrator in the wake of parallel insolvency proceedings, *locus standi* has required the most work on the part of arbitral tribunals regarding the law to be applied to a specific issue.

However, in the present survey, the author has not found any substantive departure from the generally accepted criteria followed by international arbitrators in deciding the law applicable to issues relating to *locus standi*.

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 incorporation.

With regard to matters relating to the assignment of the claims and of rights under the arbitration clause, it is typical to apply the *lex contractus* as agreed to between the parties or determined by the arbitrator. A good example of this may be found in an unpublished ICC award (ICC Case 6206) rendered in 1990 where the arbitrators held: 'It is undisputed that the Agreement being subject to the substantive rules of Swiss law, the assignment should conform to Swiss law in order to be valid.'

Difficulties arising in the absence of a choice-of-law clause in the agreement are apparent in a pending case where the arbitrator, with the agreement of the parties, somewhat exceptionally felt compelled to appoint a neutral expert to clarify some issues concerning the capacity of the said party to stand in arbitration and the implications of the transfer of a business operated during the winding up of its assets.

REPRESENTATION

One of the principal effects of the insolvency proceedings is to put into question the ability of the insolvent party's regular representatives to continue with the day to-day management and representation of the party in the action.

Although in some cases (such rehabilitation) no fundamental change necessarily takes place in the powers of the insolvent party's regular representatives, it is also true that most of the time these powers are considerably limited or at least subjected to certain prior authorizations by the competent state judicial or administrative body.

Often when the insolvency occurs during the course of the arbitral proceedings, the representation of the insolvent party becomes a murky issue, and even the counsel-of-record may have doubts about his powers and the ability of the insolvent party to afford his legal advice. The principal effect of this situation is de facto suspension of the proceedings
While the issue of the insolvent party's representation is clarified.

However, when the insolvency occurs on the eve of the arbitration, the representation of the insolvent party is raised immediately as an issue. Such was the situation in six of the awards analysed.

In one of these cases (ICC Case 6192, unpublished award rendered in 1990), an arbitral tribunal applying Belgian law, sitting in Brussels and adjudicating a dispute between two Belgian parties, had to decide the issue raised by the defendant whether the trustees in bankruptcy could validly bring a claim in arbitration on behalf of the bankrupt corporation.

The position of the defendant was summarized by the arbitral tribunal as follows:

Whereas the defendants conclude that the Request for Arbitration is inadmissible in light of the lack of capacity of the claimants that results from the fact that the bankruptcy trustee may not enter into an arbitration agreement under Belgian doctrine and jurisprudence since the mechanism of bankruptcy implicates supervision of the Commercial Court;

Whereas the defendants admit that the trustee may prosecute an arbitration that was commenced before the declaratory judgment of bankruptcy;

Whereas the defendants cite Huys and Keutgen (L'Arbitrage en Droit Belge International, No. 47), according to which the trustee is bound to respect an arbitration clause that was signed by the bankrupt party before the bankruptcy so long as the clause is 'sufficiently complete that the trustee has no duty to perform, and specifically if it sets out the subject of dispute and the names of the arbitrators, or it at least indicates the manner in which arbitrators may be designated';

Whereas the defendants maintain nonetheless that the conditions indicated by the aforementioned authors would not have been fulfilled in the present case because, the reference to the Arbitration Rules notwithstanding, the defendants would have 'dunes' to perform, to wit, they would have to decide to institute the arbitral proceedings by submitting their Request, to select the arbitrator, and memorialize their agreement on the arbitral procedure as it was proposed by the arbitrator;

Whereas the defendants deduce therefrom that the claimants would not have had the power to set in motion the arbitration by submitting the request; . . .

The arbitral tribunal held:

Whereas there is no provision of bankruptcy law that prevents the trustee from entering into an arbitration agreement; whereas Article 492 of that law prescribes that the trustee may, with the authorization of the bankruptcy court, the bankrupt party being duly cited, reach a settlement with regard to all disputes involving the estate;

Whereas Articles 1676 to 1723 of the Judicial Code (i.e; the Sixth Part which governs arbitration) were introduced into the Code by the law of 4 July 1972, according to whose terms the European Convention of 20 January 1966 was approved, which embodies a uniform law in the field of arbitration;

Whereas Article 1672, 2º of the Judicial Code prescribes that whoever possesses legal capacity may conclude an arbitral agreement, except for legal entities of public law;

Whereas Article 492 of the bankruptcy law confers on the trustee the power to enter into a settlement upon authorization by the bankruptcy court, the bankrupt party being duly cited, there is no doubt that the trustee may enter into an arbitration agreement under the same conditions;

Whereas in the present case there is reason to determine whether the claimants, in setting in motion the present arbitration, have entered into an arbitration agreement that they should not have been able to enter into except upon authorization by the bankruptcy court, the bankrupt party being duly cited; . . .

Whereas it is appropriate to distinguish between entering into an arbitration agreement on the one hand and setting in motion an arbitration
on the other, that is, between concluding an arbitration agreement and executing one; . . .

But whereas in the present case the trustee did not enter into an arbitration agreement;

Whereas, . . . the subject of the dispute is described sufficiently within the arbitration agreement if the agreement notes the type of dispute to which it is being applied; and whereas, moreover, the formulation of the dispute may not be contained within the arbitration agreement, nor may it form

the subject of an agreement, and whereas in particular the terms of Article 1683, 1º of the Judicial Code prescribe that: 'The party which intends to bring the dispute before the tribunal notifies the adverse party of the dispute. The notification must make reference to the arbitration agreement and indicate the subject of the dispute if it was not indicated in that agreement'; and whereas this notification, with formulation of the dispute, therefore constitutes a simple act of execution of the arbitration agreement;

Whereas, on the other hand, in setting forth that the trustee is bound to respect an arbitration agreement that does not require the trustee to perform 'new duties' for the agreement to be set in motion, and in light of the fact that the agreement specifies the subject of the dispute and the manner in which the arbitrators are to be designated, the Brussels Court of Appeal [judgment of December 17, 1936 (Pass. 1936, I, 458)] and the authors have dearly indicated that the actions which need to be taken in order to designate the arbitrators do not constitute such 'new duties' which would prevent the trustee from being bound by the arbitral agreement and which he would be forbidden to perform;

Whereas, as a consequence, the submission of a request for arbitration, the formulation of the dispute and setting in motion of the procedure for the designation of the arbitrators, as well as the subsequent actions of setting in motion the arbitration, merely constitute acts of execution of the arbitration agreement: whereas no disposition of law denies the trustee the power to perform these actions nor does any disposition of law require authorization for these actions when the trustee is bound by an arbitral agreement validly concluded by the bankrupt party before the bankruptcy;

Whereas in the present case the arbitration agreement is grounded in Article - of contract No. - and of contract No. -; whereas the agreement was thus concluded before the bankruptcy; whereas in addition the agreement sufficiently indicates the possible subject of dispute as well as, by reference to the Arbitration Rules, the manner in which the arbitrators are to be designated;

Whereas the claimants have in no way entered into a new arbitration agreement but have exclusively performed the actions of execution of an arbitral agreement with respect to which they had been bound; whereas the performance of these acts do not require any authorization whatsoever;

Whereas in consequence the Request for Arbitration is receivable; (translation)

In yet another interesting case (ICC Case 5877), the defendant (a Japanese corporation under reorganization) requested the arbitrators to dismiss the claimant's claim on the ground that it could not be maintained against the defendant but only against its trustees (who had not been named in the Request). The trustees had, however, nominated an arbitrator and had appeared in the arbitration before the issue was raised.

The arbitrators in this case, sitting in London and applying English law, decided that the Request had been properly served and that the arbitral proceedings had been properly set in motion. They based this finding upon the following considerations:

If one turns to substantive Japanese law to determine the proper respondent, it seems clear that the Respondent's full and proper title is the 'Trustees of the [Company A]' (namely, Messrs. -).

But this does not end the Tribunal's inquiry or require that the Tribunal dismiss the Request for Arbitration. The Request does not specify any acting executive or person, but is simply addressed instead to the [Company A] without any prefix or suffix. It neither names the current Trustees nor the former President, Mr -, who is still listed in the Corporation Registration Book.

The Claimant did not, however, intend to address its Request to an empty mailbox or the corporation itself as a fictional entity currently authorized to conduct the business of [Company A]. This undoubtedly was the claimant's intent and it
should be interpreted as such.

Indeed, this is precisely the manner in which the Trustees of the [Company A] did interpret the Request for Arbitration. They understood that the heading [Company A] was just one way of addressing the Request to the entity currently responsible for the company. Because the Trustees were (collectively) the responsible party they responded fully to the Request, nominating an arbitrator for the [Company A] after careful thought. We find, therefore, that the proper party (the Trustees of the [Company A]) was effectively named and served with the Request.

... even if one were to find that [Company A] per se had been named in the Request and is the wrong party, the correct party (i.e. 'the Trustees of the [Company A]') answered the demand, named an arbitrator and appeared through counsel before the Tribunal. It may be that, under English law, such a party is estopped from raising the argument that the arbitration may not be maintained against it.

In other words, applying substantive Japanese law to the issue of corporate authority and concluding that the Trustees now represent the entity formerly known simply as [Company A] does not mean that the Trustees are exempt from the effects of the estoppel doctrine under English law. (Unpublished. Emphasis in the original)

ASSIGNMENT

Seven of the awards referred to in this survey presented the arbitrator with the issue of the locus standi of the insolvent party's successor in interest.

In most of the cases, the issue arose out of the assignment of the claims by the insolvent party (through its trustees or receiver) to the party in the arbitration.

Under those circumstances, the arbitrator is normally faced with three different issues: the capacity of the assignor to assign, the validity of the assignment itself, and the assignability of the arbitration agreement.

Of course, in this regard, it is not possible to refer to a trend in international arbitration, the resolution of these issues depend entirely on the wording of the agreement between the parties and on the requirements of the applicable law.

However, two ICC awards rendered within the last five years may provide some guidance about how the issue of assignment has been handled by arbitrators.

In both cases, one of the original contracting parties is declared bankrupt. Its trustee in bankruptcy decides then to assign the claims under the contract to a third party that initiates the arbitral proceedings. The defendant (who had entered into the contract with the now bankrupt party) raises as an issue in limine litis the jurisdiction of the arbitral tribunal by challenging the validity of the assignment (of the claims and of the right to arbitrate) in light of the contractual provisions prohibiting the assignment of the contract without the other party's written consent.

The first case ('the Swiss case', ICC Case 6206)\textsuperscript{22} was decided in Switzerland (Zürich) by an arbitral tribunal composed of two Swiss and one Polish arbitrator. The contract stipulated that Swiss law was applicable to the merits.

Concerning the assignment of the arbitration clause, the majority of the arbitrators (the Swiss co-arbitrator dissenting) held:

\begin{quote}
It is settled in Swiss law that arbitration clauses are transferred by the assignor to the assignee together with the claims, without the need of the consent of the debtor, except if the arbitration clause would have been entered into specifically in view of the person of the assignor, or except if a special agreement or special circumstances suggest that the arbitration clause was intended to be effective only between the original parties (von Tuhr/Esher, Allgemeiner Teil des Schweizerischen Obligationenrechts, 3rd edition, Zürich 1974, p. 357; Ruëde/Hadenfeldt, Schweizerisches Schiedsgerichtsrecht; Zürich 1980, pp. 69/70; Jolidon, Commentaire du Concordat suisse sur Yarbitrage, Berne, 1984, pp. 140/141; Swiss Federal Supreme Court, BGE 1031977 II, pp. 75-80).
\end{quote}

The majority considered that the Agreement between the parties prohibited the assignment of the arbitration clause.\textsuperscript{23}
The purpose of the Article 13.3, which is well reflected in its text, is to prevent the negotiated package of rights and obligations from being exercised (as far as rights are concerned) and performed (as far as obligations are concerned) by a third party without the prior consent of the other party. This covers not only clauses dealing with the substantive obligations of the parties, but also clauses dealing with pure procedural questions.

The arbitration clause constitutes one of these packages of rights and obligations which all together constitute the Agreement. Even if arbitration clauses are quite common in international agreements, they still and always constitute a negotiated exception to the normal jurisdiction where national courts would be otherwise competent, with waiver of procedural rights available in these courts; it is consequently quite understandable that parties may wish to protect themselves against having to arbitrate with third parties unknown to them and which they have not chosen.

The second case (‘the US case’, ICC Case 6259) was decided by three US arbitrators, sitting in Boston, Massachusetts, under the laws of the State of Massachusetts as stipulated in the contract.

Concerning the assignability of arbitration rights, the arbitral tribunal, referring to the contractual clause limiting assignment, construed the contractual prohibition an assignment as barring only the delegation of duties. Indeed, according to the arbitral tribunal, Massachusetts law ‘interprets a general clause prohibiting contract assignment as barring only the delegation of performance and not the assignment of rights’.

The arbitrators were attentive to point out that:

Here, the claimants are not truly strangers to A - in addition to being directors and primary shareholders of B they were the principals who negotiated and signed the . . . Agreement on behalf of B.

In essence, A is not being forced to arbitrate with a new or different party but with the party designated to step in the shoes of B as a result of B's bankruptcy.

(ii) Revocation of the arbitration Agreement

This issue was raised in one of the ICC awards rendered in 1991 (ICC Case 6840, unpublished). There, the claimant filed the Request for Arbitration and, immediately thereafter, requested before the defendant's state courts the judicial liquidation of the defendant. The latter invited the arbitrator to construe such attitude as an expression of the claimant's will to revoke the arbitration agreement.

The French arbitrator applying the laws of Senegal, considering that the revocation must be expressly and clearly enunciated, decided that the claimant had not waived its right to arbitrate. The arbitrator further considered that:

If [the claimant] does not see fit to join its second request [for the judicial liquidation of the defendant] to the first one [for damages for breach of contract before the arbitrator, it is because the liquidation of [the defendant] is within the exclusive competence of national courts; nonetheless, [the claimant] has not waived its right to pursue its demand for damages with interest before the arbitrator; (translation)

(iii) Arbitrability

Authors seem to distinguish between ‘objective’ and ‘subjective’ arbitrability in order to differentiate between matters that may be arbitrated and parties that may arbitrate.26

The issues related to ‘subjective’ arbitrability have been addressed under the *locus standi* Analysis of the present survey.

‘Objective’ arbitrability was not raised as an issue in the cases examined. The arbitrators were never requested to rule upon issues directly concerning the insolvency proceedings (*i.e.* ‘core issues’).

However, one arbitral tribunal in dictum stated that in parallel arbitration and insolvency proceedings 'are excluded [from the arbitration] only those issues that have a direct connection with the insolvency proceedings, that is the issues that arise out of the application of rules particular to these proceedings'.

The above having been said, apart from the issues that affect the conduct of the arbitration, there exist issues that may
influence the substantive decision of the arbitrator.

(b) Issues Material to the Decision on the Merits

(i) Equal treatment of creditors

The aim of insolvency proceedings is to bring under a single authority the control and preservation of the assets of the insolvent in order to permit the insolvent party's rehabilitation or liquidation. At the same time, the rights of both secured and unsecured creditors are to be accorded due respect.

As one of the purposes at which insolvency proceedings are aimed, the principle of equality of the creditors within the same class may not be thwarted by the arbitration without placing the enforceability of the award at risk.27

In this regard, two unpublished awards rendered in 1992 and 1993 deserve particular attention. They address the issues of interim measures, set-off, and interest in light of the above-mentioned principle.

The first of these awards ('the Luxembourg award', ICC Case 6697) concerned a dispute between a Luxembourg claimant (in rehabilitation) and a Canadian defendant. The arbitrators sat in Paris and, pursuant to the agreement of the parties, applied Swiss law to the merits and French law to the arbitral proceedings.

The second award ('the French award', ICC Case 7205) adjudicates a dispute between two French claimants (one of them went bankrupt during the proceedings) and a Saudi Arabian defendant. The place of the arbitration was Paris and the arbitrators decided that French law was applicable to the merits.

INTERIM MEASURES

At the outset of the arbitration in the Luxembourg award,28 the defendant (and counterclaimant) requested the tribunal to order the claimant, as an interim measure, to provide a guaranty to cover the counterclaim and the costs of the arbitration (the defendant having had serious doubts about the claimant's capacity to cover its debts).

After considering the laws of Luxembourg, the arbitral tribunal decided, with respect to the request concerning the counterclaim, that to order such a guaranty would constitute a violation of the principle of equal treatment of creditors. The arbitrator’s reasoning reads:

Clearly, if the measure sought by [the defendant] were implemented, [the claimant] would be required to provide the bank acting as surety with a counter-guaranty either in the form of a frozen bank account, an investment or hypothecation of the goods, or a loan, etc ... all of these being measures that would be undertaken for the benefit of one creditor and to the detriment of others, measures such that the principle of equal treatment of unsecured creditors would be infringed.

With respect to the guaranty to cover the costs of the arbitration, the arbitral tribunal decided to order simultaneous and reciprocal bank guaranties between the parties. Concerning the equal treatment principle, the arbitrators reasoned as follows:

... the principle of such a guaranty would not offend either the principle of provisional suspension of the proceedings or the principle of equal treatment of unsecured creditors, since such...
SET-OFF It is important to distinguish between set-off as a means to extinguish an obligation of payment (i.e. compensation legale) which operates independent of the will of the parties and of the decision of the arbitrator, and set-off as a decision made by the arbitrator to avoid cross-payments of the amounts awarded (i.e. compensation judiciaire).

The set-off that extinguishes an obligation has been found to respect the principle of equal treatment of the creditors. Thus, the arbitrators in the Luxembourg award referred to above have found that such set-off is possible in Swiss law:

Even supposing that article 213 LP were applicable, Swiss jurisprudence (ATF Leclerc 107, III; ATF Weissbank RO 109 III 112, JT 1986 II. 3 ss. 9) holds that the ban on set-off applies only when the cause of action involving the credit with which the set-off is invoked is subsequent to the bankruptcy proceedings. Now, in this case, if [the claimant]'s credit against [the defendant] is subsequent to [the claimant]'s placement under supervised management, since the contract was breached by [the defendant] following the insolvency of [the claimant], its cause of action is to be found, prior to the bankruptcy, in the contract between the parties. (translation)

They also considered that such set-off was allowed under Luxembourg law:

The sole demand of Luxembourg jurisprudence to the effect that the compensation should occur after bankruptcy holds that the action on the debts arises out of the same contract concluded prior to the suspect period (see the discussions of the Tribunal d'arrondissement of Luxembourg of 15 June 1966, 1 April 1977, 23 December 1983, cited by [the defendant], the penultimate decision referring also to a decision of the French Cour de Cassation of 11 May 1960: D. 1960, 573; Sirey, 1961. J.9). (translation)

The arbitrators considered as well that nothing in French law would prohibit this kind of compensation.

With respect to the set-off between amounts awarded by the tribunal, in the second of the awards mentioned ('the French award'), the arbitrators consider that such set-off would be contrary to French public policy. However, they based their reasoning not on the equality among creditors but on the prohibition to issue a condemnation against a party subject to insololvency proceedings:29

For the reasons stated above, and in light of the judicial liquidation of [claimant No. 2], the arbitral tribunal may not order the compensation among the debts yet related, for this compensation would lead to an order for [claimant No. 2] to pay - and even to the enforcement of said condemnation - up to the lowest of the amounts set off. (translation)

INTEREST

In this regard, the Luxembourg award, referring to the Luxembourg Commercial Code, has considered that:

It is equally settled under Luxembourg law that article 451 of the Commercial Code (in the case of bankruptcy) and, analogously, the judicial decision referred to under Article 3 of the Grand Ducal Decree of 24 May 1935 (in the present case the decision of 23 December 1987) work to sever the legal or conventional interests which regard to the estate so as to maintain the quality of the creditors. (translation)

The arbitrators even go on to affirm that the principle of equality among creditors is a principle of 'équité' which, for that reason, is universally accepted in bankruptcy. The suspension of the accrual of legal or contractual interest - in application of said principle - is, as well, widely accepted (see, Art. 55 L. January 25, 1985 in France; Art. 209 LP April 11, 1989 in Switzerland; Idot and St Alary-Houin, J-Cl Europe, Fasc. 870, No. 22 ff, spec. 29; Section 502(b) (2) US Bankruptcy Code, etc . . .) (translation)

(ii) Form of the award

Some jurisdictions consider that, by virtue of the general stay of legal proceedings that accompanies the opening of insolvency proceedings, a condemnation of the insolvent party is no longer possible. The work of the arbitrator being limited to issue a declaration stating that the credit is founded and quantifying it.

In this regard, the arbitrator has the obligation to make 'every effort to make sure that the award is enforceable at law'.30
In five of the awards analysed, the issue of the form of the award (i.e. declaration or condemnation) arose for the arbitrator. It is particularly interesting to note the reasoning provided by the arbitrators in the 1993 'French award' mentioned above. There, the arbitral tribunal lists the mandatory provisions of the French Bankruptcy Law of January 25, 1985, and concludes that it cannot issue a condemnation with respect to the counterdefendant in bankruptcy:

[The defendant]'s counterclaim against [the claimant No. 2 - in bankruptcy - ] concerns the mandatory rules of the French law of 25 January 1985 which have been uniformly interpreted to be part of French international public policy and which, as such, may be effectively invoked against the execution in France of arbitral awards condemning a debtor that is the object of a collective procedure. They include, in particular:

- the principle of the provisional loss of the standing to be sued (Cass. civ. first, 8 March 1988, Rev.

The 'Luxembourg award', following the same reasoning, reads as follows:

Under Luxembourg law, as under the law of a number of other jurisdictions (French, for example: see art 47 L. 25 January 1985), it is well settled that the national jurisdictions, as well as the arbitral tribunals, may not order a company in insolvency to pay a money judgment but may only take note of the credit and fix its amount (translation)

With respect to the mandatory requirements concerning the form of the award and the ICC Court powers to scrutinize the awards, it is important to note that in two of the awards surveyed, the Court laid down modifications as to the form of the award in order to make it compatible with the mandatory provisions applicable.

CONCLUSION

Parallel insolvency proceedings bring to the arbitration new issues that may affect the administration and instruction of the case, as well as the approach to the merits the arbitrators adopt.

The institution, while maintaining its strict neutrality, takes special care to make available all the information within its possession that may assist the parties. However, it remains the parties' responsibility to take all necessary steps within the insolvency proceedings to protect their rights with regard to the estate of the insolvent party.

Arbitrators must be specially careful to state expressly in the award the material circumstances of the insolvency, the representation and participation of the insolvent party, and the steps that were taken in order to afford that party the opportunity to participate in the arbitration.
It is comforting to realize that a great deal of ICC arbitrators, giving priority to the arbitration, are able to reach awards that have been executed or unsuccessfully challenged.

Most of the awards cited and the experience of the ICC in the cases still pending show that it is possible to overcome the difficulties related to the existence of parallel insolvency proceedings in arbitration.

Finally, a common-sense warning: arbitrators should make every effort to respect rules of international public policy of those jurisdictions where proceedings to set aside or enforce the award might be envisioned.

Of course, the arbitral institution will seek to assist the arbitrator in this sometimes difficult task.

However, such a universally challenge-proof award is neither an absolute aim of arbitration, nor should it become the sole quest of the arbitrator to arrive to an award that may resist a challenge in almost every imaginable jurisdiction. For international arbitration may provide several fora in which the award will be enforceable, and the parties may more easily accept a well-reasoned award than an award excessively devoted to merely the formal requirements.

Counsel, International Court of Arbitration of the International Chamber of Commerce (ICC), Paris. The views expressed herein are those of the author alone and are not intended to reflect those of, or bind, the ICC. The author gratefully acknowledges the assistance of Mrs Tahio Requena and Mr William R. Spiegelberger for the research and edition work done as part of the international internship programme of the International Court of Arbitration.

1 Those issues were the subject of a seminar (‘The Effects of Insolvency Procedures on Arbitration’) organized by the International Bar Association (IBA) in Paris on 19-20 September 1994 in which the author presented a short summary of the present article.


3 Article 6.2 states: ‘All notifications or communications and the arbitrator shall be validly made if they are delivered against reception or forwarded by registered post to the address or last known address of the party for whom the same are intended as notified by the party in question or by the other party as appropriate.’

4 Article 7 of the ICC Rules states: ‘Where there is no prima facie agreement between the parties to arbitrate or where there is an agreement but it does not specify the International Chamber of Commerce, and if the defendant does not file an Answer within the period of 30 days provided by paragraph 1 of Article 4 or refuses arbitration by the International Chamber of Commerce, the claimant shall be informed that the arbitration cannot proceed.’ Where there is prima facie agreement to arbitrate, Article 8.2 prescribes that ‘If one of the parties refuses or fails to take part in the arbitration, the arbitration shall proceed notwithstanding such refusal or failure’.

5 Article 8.3 of the ICC Rules states: ‘Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the International Court of Arbitration be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.’

6 In this regard, it is worth mentioning a US Court of Appeals opinion concerning the decision of the ICC Court to set in motion an arbitration - on the basis of Article 8.3 of the ICC Rules - in which the claimants in the arbitration (defendants before the Court of Appeals) alleged they were the assignees of the contracting party - in bankruptcy - claims. The US Court considered that the mere allegations of assignment were enough to warrant the decision of the ICC Court to organize the arbitration. The opinion states: ‘The relevant agreement here is the one between Apollo and Dico [the original contracting parties]. The defendants claim that Dico's right to compel arbitration under that agreement has been assigned to them. We find that they have made the prima facie showing required by Article 8.3 [of the ICC Rules] Apollo Computer, Inc. v. Berg, 886 F.2d 469 (1st Cir. 1989).


8 The Terms of Reference, a distinctive feature of ICC Arbitration (Art. 13 of the ICC Rules), is a neutral document drafted by the arbitrators and the parties in order to determine the scope of the arbitration and of the arbitrators' mandate. For a general overview on the subject, see 'Terms of Reference - A practical guide' in ICC Int'l Ct. of Arb. Bull, V. 3/No. 1, May 1992, at pp. 24-43.
Although, the ICC Rules - which, by means of the arbitration agreement, have become part of the contract between the parties - command the payment of the advance on costs by the parties in equal shares, a party that does not pay its share of a global advance (i.e. by opposition to separate advances) or fails to pay for the advance fixed for its claims (in a separate-advance situation) is always afforded the opportunity to participate in the proceedings and to defend from the claims advanced by the adverse party. This, of course, without prejudice to any possible contractual liability that the non-payment of the advance on costs may entail.

In this regard the arbitrators could rely on the contractual framework stipulated by the parties for the arbitration, i.e., the ICC Rules, particularly Articles 8.2 (see text supra, note 4) and 15.2 (see text, infra, note 17) which provide that the arbitration and the hearing may proceed even if a duly summoned party fails to participate.

Reference is here made to matters of international public policy that may entail the nullification of the award or prevent its enforcement.

One may think of a party who needs to present its institutional insurer with an award in order to obtain reimbursement, or of a party who needs to prove to its auditors that the arbitration has come to an end in order to write the claim off its balance sheet.


This article was upheld by the French Courts in a decision rendered by the Paris Court of Appeals (first chamber, section C) on January 12, 1993, published in [1994] Revue de l’Arbitrage, 685.

For instance, in case 6057 (see, supra, note 2), the arbitrator, referring to Article 65 of the French decree of 27 December 1985 which, in the event of liquidation, allows the arbitration to proceed provided that the credit have been declared, notes that ‘the claimant has declared his credit (on . . .)’.

In a recent unpublished ICC award (rendered in 1994) the arbitrator held in this regard: ‘. . . no situation of litispendence may occur between a state court and an arbitral tribunal. Litispendence requires that the same dispute between the same parties is before two different judicial bodies equally having jurisdiction. However, where a binding arbitration clause applies, a state court has no jurisdiction on the dispute. On the contrary, if the state court has jurisdiction, it is because the arbitral tribunal has no jurisdiction.’ On the issue of lis pendens and for other arbitral decisions, see ICC award 6709 rendered in 1991 (Clunet 1992, p. 998) and the comments by D. Hascher.

Regarding hearings, Article 15.2 of the ICC Rules states: ‘If one of the parties, although duly summoned, fails to appear, the arbitrator, if he is satisfied that the summons was duly received and the party is absent without valid excuse, shall have power to proceed with the arbitration, and such proceedings shall be deemed to have been conducted in the presence of all parties’.

Article 13.2 § 52 of the ICC Rules provides that in those circumstances the ICC Court may approve the Terms of Reference and set a time-limit for signature of the Terms of Reference by the defaulting party, failing which ‘the arbitration shall proceed and the award shall be made’.

Article 13.1(b) of the ICC Rules requires that the Terms of Reference shall include ‘the address of the parties to which notifications or communications arising in the course of the arbitration may validly be made’.

Article 13.1(b) of the ICC Rules is to be read in connection with Article 6.2 (see text, supra, note 3) which provides that notifications and communications must be made to the last known address of the party as notified by the party in question. Moreover, such an unwarranted modification of the Terms of Reference may entail further delay in the arbitration.

Article 6.1 of the ICC Rules states: ‘All pleadings and written statements submitted by the parties, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator and one for the Secretariat.’

Unpublished award. However, this award was unsuccessfully challenged before the Swiss Supreme Court. For a complete transcription of the Swiss judgment and comments on the arbitration case, see, J. Werner, ‘Jurisdiction of Arbitrators in Case of Assignment of an Arbitration Clause - On a recent decision by the Swiss Supreme Court’, 1991, 8 J. Ind. Arb. 2 at p. 13 ff. For the French text and comments by P.Y. Tschanz, see Rev. Arb. 1991, 709.

Article 13.3 of the Agreement read as follows: ‘Neither party shall assign or subcontract this Agreement without prior written permission of the other party.’

Paragraph 14.02 of the contract provided: ‘This Agreement shall inure to the benefit of and be binding upon B and its successors and assigns but shall not be assignable by B without the written consent first obtained of A. In the event B wishes to delegate the performance of any of its obligations hereunder to a third party the written consent of A must first be obtained and A reserves the right to approve all terms of any such delegation. Any such purported assignment or delegation without written consent shall be void and of no effect.’

In this regard, the arbitrators relied on the opinion previously handed down in the present case by the US District Court for the District of Massachusetts. The opinion is mentioned in the decision on appeal cited, supra, note 6.


This is particularly true in those jurisdictions in which the ‘equal treatment principle’ has been considered to be a matter

28 In this regard, see the partial award published in Rev. Arb. 1992, 135.


30 cf. Article 26 of the ICC Rules.

31 Of those, four were rendered in Paris (three with a French Party and one with a Luxembourg party in insolvency proceedings) and the fifth was rendered in Geneva, applying French law, against a French party in insolvency. French jurisdictions have held that the prohibition on issuing a condemnation against a party in insolvency proceedings is a matter of French international public policy (cf. French Cour de Cassation, February 27, 1992, Rev. Arb. 1992, 590).

Referring Principles:

- XIII.3.7 - No suspension in case of bankruptcy of a party