

Table of Contents

Chapter I

Some Effects of Insolvency Proceedings and their Importance in Arbitration – A Comparative View

1.	Insolvency and Arbitration – Introductory Remarks	1
2.	Commercial Arbitration	3
2.1	<i>Main Features of Arbitration as a Dispute Settlement Mechanism</i>	3
2.2	<i>Limitation of Court Interference with Arbitration in National Arbitration Law</i>	5
2.3	<i>International Commercial Arbitration – Meaning of the Expression ‘International’</i>	9
3.	Insolvency Law	11
3.1	<i>Private or Public Nature of Insolvency Laws</i>	11
3.2	<i>Terminology</i>	12
3.3	<i>Liquidation Proceedings and Reorganization – Characteristics and Objectives</i>	13
3.4	<i>National Insolvency Laws – Types of Proceedings and Sources of Law</i>	15
3.4.1	England	15
3.4.1.1	Individual Bankruptcy	16
3.4.1.2	Individual Voluntary Arrangement	16
3.4.1.3	Liquidation	17
3.4.1.3.1	Voluntary liquidations	18
3.4.1.3.2	Compulsory Liquidation (Winding up by court)	19
3.4.1.4	Company Voluntary Arrangements	19
3.4.1.5	Administration	20
3.4.1.6	Administrative Receivership	20
3.4.2	France	21
3.4.2.1	Historical Background	21
3.4.2.2	Insolvency Proceedings under the Law of 1984 and the Law of 1985	22
3.4.2.3	The Law of 1994	24
3.4.3	Germany	25
3.4.3.1	<i>Konkursordnung</i> and <i>Vergleichsordnung</i>	25
3.4.3.1.1	Composition (<i>Vergleich</i>)	26
3.4.3.1.2	Compulsory Liquidation (<i>Konkurs</i>)	27
3.4.3.2	<i>Insolvenzordnung</i>	27

3.4.4 The Netherlands	28
3.4.4.1 <i>Faillissement</i>	29
3.4.4.2 <i>Surséance van betaling</i>	31
3.4.4.3 Voluntary Liquidation	32
3.4.5 United States	32
4. Points of Interaction between Arbitration and Insolvency	35
4.1 <i>Legal Consequences of the Commencement of Insolvency Proceedings Considered in this Study</i>	36
4.1.1 The Right of Management and Disposal of the Estate	36
4.1.2 Jurisdiction of Courts in Liquidation and the Jurisdiction of an Arbitrator – Is There any Point of Conflict?	37
4.1.3 Preclusion of Individual Actions of Creditors	38
4.1.4 Power of the Trustee to Avoid Certain Transactions	38
4.1.5 Executory Contracts	38
4.2 <i>Scope of the Study</i>	39
4.2.1 Cross-Border Insolvency Remains Outside the Scope of the Study	41
4.2.2 Arbitration Agreements to be Concluded after the Commencement of Insolvency Proceedings	41
4.2.3 Arbitrability	42
4.2.4 Enforcement of Arbitration Agreements Previously Concluded by the Debtor	44
4.2.5 Conduct of Proceedings and the Content of the Award	44
Chapter II	
National Courts and Arbitration	47
1. Introduction	47
2. Stay of Court Proceedings and Referral to Arbitration ('Indirect Enforcement' of Arbitration Agreements)	49
2.1 <i>Arbitration Clause and Submission Agreement</i>	49
2.2 <i>'Indirect Enforcement' and Referral to Arbitration</i>	52
2.2.1 National Arbitration Laws	53
2.2.1.1 France, Germany, the Netherlands	53
2.2.1.2 England	55
2.2.1.3 United States	56
2.2.2 The 1923 Geneva Protocol and the 1958 New York Convention	58
2.2.2.1 Scope of Application of the New York Convention ...	58

2.2.2.2	Enforcement Provisions of National Laws and Art. II of the New York Convention – Relevance of Their Scope of Application	65
2.3	<i>Separability of the Arbitration Clause</i>	69
3.	Supervisory Role of National Courts in the Post-Arbitral Phase ...	73
3.1	<i>‘Delocalized’ Arbitration – Basic Concepts, Its Critics and the Extent of Its Acceptance in Modern Arbitration Law and Practice</i>	74
3.1.1	Concept of ‘Delocalized’ Arbitration	74
3.1.2	Detachment of Arbitral Proceedings	76
3.1.3	Detachment of Arbitral Awards	80
3.2	<i>Challenge of Awards</i>	85
3.2.1	General Remarks	85
3.2.2	Meaning, Methods and Grounds of Challenge	87
3.2.2.1	England	90
3.2.2.2	France	92
3.2.2.3	Germany	95
3.2.2.4	The Netherlands	98
3.2.2.5	United States	99
3.2.3	Grounds for Annulment of an Award – A Summary	100
3.2.4	Consequences of Annulment	103
3.3	<i>Enforcement and Recognition of Arbitral Awards</i>	103
 Chapter III		
	Conclusion of Arbitration Agreements in Insolvency Proceedings	107
1.	Introduction	107
2.	Capacity of the Party and Validity of the Arbitration Agreement	108
2.1	<i>The Right of Disposal and Management in Liquidation Proceedings</i>	109
2.2	<i>The Right of the Trustee to Conclude Arbitration Agreements</i>	112
2.2.1	Express Provisions in Insolvency Law	113
2.2.1.1	Individual Bankruptcy (England)	113
2.2.1.2	<i>Liquidation Judiciaire</i> (France)	115
2.2.1.3	<i>Konkursverfahren</i> (Germany)	117
2.2.1.4	The Judicial Improvements and Access to Justice Act (US)	120
2.2.2	Provisions on the Right to Contract	122
2.2.2.1	Liquidators in Winding up Proceedings (England)	122
2.2.2.2	<i>Faillissement</i> (the Netherlands)	126

2.2.3 Conclusion of Arbitration Agreements in Reorganization Proceedings	126
2.2.3.1 Reorganization (United States)	127
2.2.3.2 <i>Redressement judiciaire</i> (France)	127
2.2.3.3 Administration and Administrative Receivership (England and Wales)	129
2.2.3.4 <i>Vergleichsverfahren</i> (Germany)	132
 3. Conclusions	 134
 Chapter IV	
Subject-Matter Arbitrability	133
 1. Arbitrability in International Treaties and Municipal Laws	135
1.1 <i>Criteria for Determination of Arbitrability</i>	143
1.1.1 Matters with respect to which parties may enter into a settlement	143
1.1.2 Exclusive Jurisdiction of National Courts	146
1.1.3 Arbitrability and public policy	148
1.1.3.1 Balance of Underlying Policies	151
 2. Arbitrability of matters in insolvency proceedings	154
2.1 <i>Nature of claims</i>	157
2.2 <i>Jurisdiction of Bankruptcy Courts and vis attractiva concursus</i> ..	159
2.2.1 France	160
2.2.2 Germany	163
2.2.3 The Netherlands	164
2.2.4.1 Jurisdiction under the Bankruptcy Reform Act of 1978	167
2.2.4.2 Jurisdiction under the Bankruptcy Amendments and Federal Judgeship Act of 1984	171
 3. Conclusions	175
 Chapter V	
Effectiveness of Arbitration Agreements in Insolvency Proceedings	179
 1. Introduction	179
 2. Insolvency Proceedings and Enforcement of Arbitration Agreements	181
2.1 <i>Is the Trustee Bound by an Arbitration Agreement?</i>	183
2.1.1 Continuous Validity of an Arbitration Agreement	183

2.1.1.1	<i>Locus standi</i> of the Debtor	183
2.1.1.2	<i>Locus Standi</i> of the Trustee	187
2.1.1.3	A Comparative View	188
2.1.2	Possible Exceptions to and Limitations on the Effectiveness of Arbitration Agreements	193
2.1.2.1	Executory Contracts	193
2.1.2.2	Avoidance Powers of the Trustee	199
2.1.2.3	Nature of Claims and Arbitrability	203
3.	Enforcement of Arbitration Agreements in Bankruptcy Proceedings in the United States	205
3.1	<i>Right of the Trustee to Insist on a Debtor's Pre-petition Arbitration Agreement</i>	207
3.2	<i>The Trustee or a Debtor-in-possession Unwilling to Arbitrate</i> ...	209
3.2.1	Decisions under the Bankruptcy Act 1898	210
3.2.1.1	Nature of Claims	210
3.2.1.2	'Qualitative Approach'	213
3.2.2	The 1978 Bankruptcy Reform Act	216
3.2.2.1	Jurisdiction of Bankruptcy Courts	216
3.2.2.2	<i>Zimmerman v. Continental Airlines</i>	218
3.2.2.3	Decisions Enforcing Arbitration Agreements	220
3.2.3	Bankruptcy Amendments and Federal Judgeship Act of 1984	221
3.2.3.1	Relevance of the BAFJA for Enforcement of Arbitration Agreements in Bankruptcy Proceedings ...	223
3.2.3.2	<i>Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i>	224
3.2.3.3	Post-Hays Decisions	226
4.	Conclusions	231
 Chapter VI		
	Arbitration and Claims of Ordinary Bankruptcy Creditors	235
1.	Introductory Remarks	235
2.	Individual Actions of Bankruptcy Creditors	236
2.1	<i>Preclusion of Individual Actions</i>	237
2.1.1	France	237
2.1.2	Germany	240
2.1.3	The Netherlands	242
2.2	<i>Automatic Stay (England and the United States)</i>	243
2.2.1	United States	243

2.2.2 England	244
2.3 <i>Underlying Purpose</i>	245
3. Stay of Individual Action of Creditors and Arbitration	247
3.1 <i>Does the Preclusion of Individual Action Extend to Arbitration?</i>	248
3.2 <i>Implications of the Stay of Individual Actions In Arbitration</i>	258
3.2.1 Admitted Claims	259
3.2.2 Contested Claims	260
3.2.2.1 Pending arbitrations	260
3.2.2.2 No Arbitration Commenced before Declaration of Bankruptcy	263
4. Effect of Arbitration Agreements as to the Claims Contested in Bankruptcy Proceedings	264
4.1 <i>Non-Arbitrability of Contested Claims</i>	264
4.2 <i>Modalities of Enforcement – Compliance with Provisions of Insolvency Law and its Importance in Subsequent Control over Arbitral Awards</i>	265
4.3 <i>Discretion of Bankruptcy Courts (United States)</i>	267
4.3.1 Relief from Automatic Stay	269
4.3.2 International Commercial Arbitration	270
5. Conclusions	275
 Chapter VII	
The Effects of Insolvency Proceedings on the Conduct of Arbitration and the Arbitral Award	277
1. Introduction	277
2. Public Policy as Ground for Challenge and for Refusal of Recognition and Enforcement	278
3. Insolvency Proceedings and the Conduct of Arbitration	283
3.1 <i>Locus Standi of the Debtor</i>	283
3.2 <i>Locus standi of the trustee</i>	283
3.3 <i>Provisions on Pending Proceedings</i>	287
3.4 <i>Suspension of Arbitral Proceedings?</i>	290
3.4.1 Interruption Provided by Arbitration Law	290
3.4.2 Suspension under the National Laws of Civil Procedure ...	291
3.4.3 Suspension under Insolvency Law	293
3.5 <i>Possible consequences of non-application of provisions on</i>	

<i>suspension</i>	296
3.5.1 Continuation of Pending Proceedings by Leave of the Court	296
3.5.2 Continuance of Pending Proceedings when no Leave of the Court is Needed	300
4. Influence of Insolvency Proceedings on Arbitral Awards	305
4.1 <i>An Award Violating Public Policy (Form of the Award)</i>	305
4.2 <i>The Content of the Award – Decision of French Courts</i>	307
4.2.1 Uncertainties in the application of non-arbitrability criteria	307
4.2.1.1 Uncertainties of the Additional Jurisdictional Rules Adopted by the Judiciary	308
4.2.1.2 Is the Basic Approach Complementary with Additionally Formulated Criteria?	309
4.2.2 Consistency in Application by the Judiciary	311
4.2.3 The Extent of Court Control over Arbitral Awards – Review of the Award on Merit?	312
4.2.3.1 Insolvency Law and a Decision on the Substance of a Dispute	312
4.2.3.2 Second Look Doctrine	314
5. Conclusions	316
<i>Summary and Conclusion</i>	319
<i>Samenvatting en Conclusie</i>	333
<i>Bibliography</i>	349
<i>Table of Cases</i>	361
<i>Index</i>	371