Insolvency and international arbitration

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Abstract

This contribution reviews whether arbitration may be an effective dispute resolution method in insolvency cases. It reaches the conclusion that there are indeed benefits in using arbitration rather than court litigation or mediation, if it is used in the right way and in the right situation.

To reach this conclusion, the paper starts by determining which insolvency-related actions may be subject to arbitration, with the result that most actions are arbitrable except for the hard core of insolvency matters, such as the declaration of bankruptcy. The article then goes on discussing solutions to certain procedural problems which arise when insolvency-related disputes are arbitrated. For instance, does a pre-existing arbitration agreement survive the bankruptcy declaration? Can the trustee enter into an arbitration agreement? How to fund the arbitration costs?

Most disputes being arbitrable and procedural difficulties being solved, it remains to be seen whether arbitration makes sense in an insolvency context. The authors thus examine the pros and cons of arbitration in insolvency matters, such as the need to consider public interests, including the need for equal treatment of creditors and the need for transparency; the lack of appellate review; the fact that the effects of certain decisions are limited to given insolvency proceedings; the issues of speed, costs, flexibility, neutrality of the forum, and specialization of the dispute resolver; and matters such as the concentration of disputes in multiparty proceedings. In a nutshell, the objections can largely be overcome and some of the advantages call for serious consideration of arbitration as a dispute resolution method in insolvency matters.

1. Is There Room for Arbitration?

While the possible uses and the benefits of mediation in insolvency cases are obvious at first sight, the same does not hold true of arbitration. Yet, upon closer look, there are a number of situations in which arbitration may constitute the only or the best available dispute resolution method. It is often the only method when arbitration was agreed prior to the insolvency, for instance for contract disputes with third parties. It is the best method when

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1 See ISAAX MEIER, Mediation and negotiation in a reorganization procedure, in these symposium proceedings.
mediation cannot be used for some reason and court proceedings would not be effective.

The purpose of this paper is to identify the situations in which arbitration may be a useful tool in the context of insolvency.² It is therefore necessary to review first what types of disputes arising in connection with insolvency proceedings may be submitted to arbitration (2 below), before looking at certain issues of arbitral procedure which arise when arbitration and insolvency meet (3 below). These issues include the effects of bankruptcy on the enforceability of an arbitration agreement, on standing, on the continuation of the arbitration proceedings, and on the financing of the arbitration. Finally, the authors will reflect upon the pros and cons of arbitration as opposed to mediation and court actions in insolvency matters (4 below), before reaching a conclusion.

The main focus of this paper is on Swiss law, with references to comparative law whenever appropriate. While primarily dealing with existing Swiss law, the paper also considers certain developments de lege ferenda.

2. Arbitrability of Disputes in the Context of Insolvency Proceedings

2.1 The Test of Arbitrability

The term “arbitrability” is used here, unlike in US terminology, to mean the capability of a subject matter to be submitted to dispute resolution by way of arbitration, i.e. subject matter or objective arbitrability.³

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Swiss international arbitration law provides that a matter is arbitrable if it involves an economic interest ("vermögensrechtlicher Anspruch", "cause de nature patrimoniale"); Art. 177(1) Swiss Private International Law Act, hereinafter PILA). This definition encompasses all claims which have a financial value for the parties, whether assets or liabilities, i.e. all rights that, at least for one of the parties, can be financially assessed.4

Hence, Swiss law on international arbitration contains a substantive rule of private international law, which makes it unnecessary to determine which national law governs the subject matter. As soon as an arbitration falls within the scope of Swiss international arbitration law, i.e. as soon as the seat of the arbitration is in Switzerland and at least one of the parties is domiciled abroad (Art. 176(1) PILA), the arbitrability depends exclusively on the economic nature of the dispute. In principle, an arbitrator sitting in an international arbitration in Switzerland will not apply any prohibition or restriction of arbitrability existing under a different legal system. This is true of the law of the country in which the debtor was declared bankrupt or lex concursus. It is also true of the law of the likely place of enforcement, which may or may not coincide with the country of the lex concursus (it will not coincide whenever there are assets located in another jurisdiction which are not part of the estate). Finally, it is true of domestic Swiss law, be it the lex concursus or the law of the place of enforcement, or neither of these.

Although it is accepted that an arbitrator sitting in Switzerland does not have to take into account foreign restrictions to arbitrability, it may be argued that the position is different when the foreign restriction is a rule of international public policy, a so-called loi de police, or loi d'application immédiate.5 Such a foreign rule of international public policy6 might for instance mandate that certain disputes be brought exclusively before a foreign court.7 However, the position under comparative law shows that insolvency is generally not

5 Affirmative: ANDREAS BUCHER/ANDREA BONOMI, Droit international privé, 2nd ed., Basel, Geneva, Munich 2004, p. 332. In the Fincantieri case (cited in fn. 4), the possibility of a public policy restriction to arbitrability was raised. However, the Swiss Supreme Court held that no such restriction applied in that particular case.
6 International public policy is a much narrower concept than (domestic) public policy. It merely comprises gross violations of fundamental legal principles, such as pacta sunt servanda, good faith, the prohibition of discriminatory measures, the prohibition of bribery and corrupt practices, and the prohibition of expropriation without adequate compensation.
7 The mere fact that the dispute bears a connection with public policy is not sufficient per se to bar its arbitrability (ATF 118 II 353, 357).
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considered a bar to arbitrability, except, as will be further discussed below, with respect to matters strictly pertaining to collective enforcement, such as adjudication of bankruptcy or verification and acceptance of creditors' claims, over which bankruptcy authorities have exclusive jurisdiction.\(^8\)

Although the Swiss position is at the most liberal end of the arbitrability spectrum under transnational standards,\(^9\) it is but a reflection of the general trend over the past decades towards an expansion of the scope of arbitrable disputes. As a result, matters such as antitrust and competition law issues,\(^10\) labour\(^11\) and consumer claims,\(^12\) the validity of intellectual property rights such as patents,\(^13\) and claims related to corporate law\(^14\) are all arbitrable in many jurisdictions.

For the sake of completeness, one should mention that Swiss domestic arbitration law provides that a matter is arbitrable if it involves a right of which the parties can freely dispose ("tout droit qui relève de la libre disposition des parties"); Art. 5 Swiss Intercantonal Arbitration Convention, hereinafter IAC). This implies that the matter is not within the exclusive and mandatory ju-

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\(^8\) HANOTIAU, cited in fn. 3, p. 181.
\(^12\) GABRIELLE KAUFMANN-KOHLER/THOMAS SCHULTZ, Online Dispute Resolution, The Hague 2004, pp. 171 ss., and citations therein.
\(^14\) The arbitrability of corporate law claims may vary from one jurisdiction to another and depends on the nature of the claim to be considered by the arbitral tribunal. For instance, actions challenging the validity of the creation of the corporation or incorporation are arbitrable in Switzerland, Sweden and the United States of America, but not in France. However, actions challenging a decision taken by the general meeting of shareholders appear to be generally arbitrable. On this topic, see in particular HANOTIAU, pp. 156 ss.
risdiction of the courts (loc. cit.). The same rule will govern arbitrability in domestic matters if and when the present Bill on Swiss Civil Procedure comes to supersede the IAC (Art. 348).

2.2 Which Actions are Arbitrable?

In international matters, it is only the very core of insolvency issues which cannot be subject to arbitration. The core includes the declaration or adjudication of bankruptcy, the appointment of the trustee, the verification and acceptance of the creditors’ claims. These are in any event not actual disputes over which a court or arbitral tribunal may rule in adversarial proceedings, but matters pertaining to collective enforcement proceedings in which the courts act like enforcement agencies more than like judges resolving a dispute.

By contrast, arbitrators may certainly rule on actions of a substantive nature or, in other words, private law disputes. These encompass for instance contract and tort actions that arose prior to the adjudication of bankruptcy.

The position is more complex when it comes to actions of a mixed nature combining elements of bankruptcy and private law. To properly assess the arbitrability of these mixed actions, one should first emphasize that the only governing text in international matters is Art. 177(1) PILA. The rules on court jurisdiction embodied in the Swiss Debt Collection and Bankruptcy Act as well as in the Swiss Act on Court Jurisdiction in Civil Matters are inapplicable by virtue of their own provisions (Art. 30a DCBA and Art. 1(1) Act on Court Jurisdiction). Hence, the rules of jurisdiction of these latter statutes may only be taken into account when they express concerns of major public interest such as those considered by Art. 19 PILA.

Among the actions of a mixed nature, one first counts the action by which a creditor challenges the schedule of claims, and similarly, the action by which a third party creditor challenges the admission of another creditor into the schedule of claims (Kollokationsklage, action en contestation de l’état de collocation; Art. 250 DCBA).

After the adjudication of bankruptcy, the prohibition of individual actions requires that any claims be filed with the trustee. This allows the trustee to gain an overview of the alleged liabilities of the estate and to decide which claims are admitted and which claims are disputed. Beyond this, the prohibition does...
not appear to impose a specific dispute resolution method when it comes to ruling on the existence and quantum of a claim. Faced with a claim, the trustee may either accept it and enter it into the schedule of claims or reject it. If he rejects it, the creditor may file an action against the trustee for admission of its claim into the schedule (Art. 250(1) DCBA). Similarly, a creditor dissatisfied with the manner in which the claim of another creditor has been entered into the schedule may file an action against that creditor (Art. 250(2) DCBA). Pursuant to Art. 250, these actions must be brought in the bankruptcy court. In domestic matters, this provision is regarded as ruling out different choice of court and arbitration agreements. This rule aims at concentrating the challenge proceedings in one court, which facilitates the work of the trustee and may in certain instances avoid inconsistent decisions. Although they are intended to further reasonable policies of justice administration, these aims do not rise to the level of public policy concerns imposing the mandatory jurisdiction of the courts at the place of the bankruptcy under the meaning of Art. 19 PILA. An additional consideration confirms this view: subject to approval by the creditors’ meeting, such actions may indeed be settled.

Other actions of a mixed character are those seeking to include or exclude assets from the estate (Aussonderungsklage, action en revendication de tiers, Art. 242(2) and Admissionsklage, action en revendication de la masse, Art. 242(3)). If the trustee is the defendant, the claim must be filed in the bankruptcy court. If he acts as plaintiff, then the action must be brought in the courts of the domicile of the defendant or, if the claim seeks to recover immov-
able property, at the location of such property. In other words, jurisdiction for this action is not concentrated in the bankruptcy court. It largely follows the general rules on jurisdiction. This is obvious when the trustee is the plaintiff. It is also true in the reverse situation, the trustee then being deemed to be “domiciled” at the place where the bankruptcy was adjudicated. As a result, there can be no doubt about arbitrability in international matters, since even in domestic cases there is no general mandatory jurisdiction of the bankruptcy courts.

The actio pauliana as provided in insolvency laws, which seeks to void fraudulent transactions or undue preferences (Anfechtungsklage, action révocatoire, Art. 289 DCBA), is regarded as a pure enforcement action as opposed to a mixed or substantive action. In fact, the trustee either resists an action for performance of a contract which allegedly constitutes a fraudulent transaction (exceptio pauliana) or claims refund of the performance under such a contract (actio pauliana). Such defense and action arise under the rules of bankruptcy; they are not contract remedies of the debtor. In spite of this characterization, Art. 289 DCBA does not provide for the jurisdiction of the bankruptcy court, but for that of the courts at the domicile of the defendant. In other words, the actio pauliana is not strictly a bankruptcy proceeding, which conclusion is again further supported by the fact that the parties may settle the action amicably. As a result, there is no ground to assert public policy concerns requiring that the claims be exclusively resolved in the bankruptcy courts, a result that leads to asserting arbitrability under the standard of Art. 177 PILA.

Consequently, a trustee seeking to void fraudulent transfers may certainly enter into an arbitration agreement with respect to a transaction which did

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23 The pertinent provision, which is Art. 242(3) DCBA, does not specify the competent court. As a consequence, Art. 19–20 of the Federal Act on Court Jurisdiction in Civil Matters apply, which provide for the fora mentioned above.

24 Reichert v. Dresdner Bank (Reichert II), ECJ, Case C-261/90, 26 March 1992, European Court Reports, 1992, pp. 1-02149: “[The actio pauliana] is not intended to obtain a decision in proceedings relating to recourse to force, constraint or distraint on movable or immovable property in order to ensure the effective implementation of judgments and authentic instruments”. Hence, it is not subject to Art. 16(5) Brussels/Lugano Conventions, respectively Art. 22(5) Brussels Regulation 44/2001, but to Art. 2 seqq. of the same texts (see also ANDREAS BUCHER, Droit international privé Suisse, T.I/1, Partie générale – Conflits de juridictions, Basel 1998, pp. 94–95). Contra: J.L. CHENAUX, Un survol de l’action révocatoire en droit international privé Suisse, RSDIE 1996, p. 232. For a detailed review, POUDRET/BESSON, cited in note 9, pp. 326–327. Note that the French courts hold a contrary view, see Cour d’appel de Paris, 27 February 1992, Revue de l’arbitrage, 1992, p. 590, comment P. ANCEL.
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not provide for arbitration. If, however, the transaction entered into by the debtor provided for arbitration, would the trustee be bound to arbitrate? This is doubtful, as the trustee does not act out of contract but on the basis of a statutory cause of action under the relevant bankruptcy laws. Several courts have accordingly held that the trustee cannot be compelled to arbitrate. In the absence of any Swiss authority, one may reasonably venture to say that an arbitrator may accept jurisdiction if the arbitration agreement is couched in broad enough terms, such as “all disputes arising out of or in connection with this agreement”. By analogy, one may rely on the theory that, in the presence of a broad clause, an arbitrator has jurisdiction over tort claims linked with the contract, i.e. over statutory, not contract, claims.

Finally, Swiss law does not rule out arbitration to determine the class of creditors to which a claim should be assigned or whether a claim should be paid out of the estate directly rather than included in the schedule of claims. In the latter respect, the Swiss Supreme Court held that the issue of whether a debt binds the estate directly is a matter of substantive rather than bankruptcy law. As such it is undoubtedly arbitrable.

The foregoing discussion relates to the determination of claims after a bankruptcy adjudication. What is the position in Chapter 11-like proceedings, or in Swiss terminology in cases of Nachlassverfahren or concordat? Although less likely in practice, claims arising in the context of proceedings akin to US Chapter 11 proceedings (Art. 314 ss. DCBA Dividendenvergleich, concordat-dividende; Art. 317 ss. Liquidationsvergleich, concordat par abandon d’actifs) may also be arbitrated based on the same rationale as the one set forth above in connection with bankruptcy claims. This may for instance make sense if the reorganization plan involves an actio pauliana or disputed third party claims (Art. 315 DCBA; similarly Art. 319(4) referring to Art. 242 by analogy), which are agreed to be submitted to accelerated arbitration to avoid delaying the implementation of the plan.

As opposed to this, reorganization plans outside insolvency proceedings (aussergerichtlicher Nachlassvertrag, concordat extrajudiciaire), which are often combined with a court decision deferring bankruptcy under Art. 725

26 ATF 106 III 121; see also ICC Award 4415, CLUNET, 1984, p. 952, 954, note S.J.
27 For a comparison between US Chapter 11 and Swiss proceedings, see I. MEIER, Chapter 11 im Vergleich mit dem schweizerischen Nachlassverfahren, in Jürgen Basedow et al. (Eds.), Private Law in the International Arena, Liber Amicorum Kurt Siehr, The Hague 2000, p. 445.
Swiss Code of Obligations (Konkursaufschub, ajournement de faillite), are less amenable to arbitration than to mediation. Mediation is fast and may cover a wide range of issues, including preferences, privileges and priorities, merits of claims against the debtor and of the latter’s claims against third parties, or terms of the continuation of the performance of long term contracts. It may either be a two-party process between the debtor and a creditor or group of creditors, or a multiparty mediation between the debtor and a smaller or larger number of stakeholders.

In this context, the benefits of multiparty mediation are indeed especially striking. Mediation may join all the stakeholders, which may not (easily) be achieved in arbitration or litigation. It may also resort to creative techniques, such as caucusing, which due process requirements would bar in arbitration or litigation. Multiparty mediation is a complex process. Its success will depend to a significant extent on the mediator, on his or her mediation know-how, expertise in bankruptcy laws, communication skills, and leadership. In most jurisdictions, except the US and maybe a few others, there are simply no mediators meeting these demands, and they will not become available unless sophisticated training programs are developed.

3. Procedural Issues Arising When Arbitration and Insolvency Meet

Affirming that certain claims linked to insolvency are arbitrable does not settle each and every problem. There are other issues which emerge from the interaction between insolvency and arbitration that deserve attention.

When the arbitration is already pending at the time of the bankruptcy declaration, the main question is whether the arbitration agreement remains binding despite the bankruptcy proceedings and, if so, whether it is binding on the debtor or the trustee (3.1 below). A further question is whether the pending arbitration must be stayed as a consequence of the commencement of bankruptcy proceedings (3.2 below). When the arbitration is not yet pending at the time at which the bankruptcy proceedings are opened, the primary question is whether the trustee acting on behalf of the estate may act on a pre-existing arbitration agreement or enter into a new one (3.3 below). In ad-
dition, in both situations an issue may arise as to how to fund the arbitration and the consequences of the debtor’s or the estate’s lack of resources to be allocated to the arbitration costs (3.4 below).

3.1 Does the Arbitration Agreement Survive the Declaration of Bankruptcy?

Let us look at the first issue about the survival of the arbitration agreement in spite of the bankruptcy. Due to the dispossession of the debtor, the trustee acquires the right to dispose of and manage the estate. Although its extent may vary depending on the jurisdiction and the insolvency procedure involved, such transfer to the trustee is a core feature of bankruptcy proceedings. Is a pre-existing arbitration agreement included in the transfer to the trustee, i.e. does it become binding on the trustee or does it remain binding on the debtor? This is a question of personal scope of the arbitration agreement, which is governed by the lex arbitri, i.e. by the law which governs the arbitration.

In Switzerland, the relevant rule is Art. 178(2) PILA, which provides in favorem validitatis that the validity and scope of the arbitration agreement are subject to the least demanding of three possible laws, including Swiss law. Assuming thus the application of Swiss law, an old 1907 case held that the declaration of bankruptcy makes the arbitration clause obsolete. More recent decisions, in particular Clearstar of 1991 have consistently held the contrary view, with the result that the arbitration clause survives the adjudication of bankruptcy and passes on to the trustee. Similarly, the arbitration agreement is transferred to the creditors who start an action against a third party on the basis of Art. 260 DCBA.

This solution does not prevail everywhere. For instance, the English Arbitration Act 1996 provides that the arbitration clause only binds the trustee if the latter adopts the contract. If the trustee does not adopt the contract, then the court will decide whether to refer the matter to arbitration “if it thinks fit.

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29 ATF 59 I 177.
31 Brown-Berset/Lévy, pp. 669 s.
in all circumstances of the case".\textsuperscript{32} This solution fails to take full account of the separability of the arbitration agreement. Indeed, an arbitration clause is a contract in and of itself, even if it is embodied in another (main) contract. Thus, the unenforceability of the main contract does not affect the enforceability of the arbitration agreement (Art. 178(3) PILA).

What if the arbitration clause is said not to be transferable, for instance because the contract provides that it cannot be assigned? Unless the parties have manifested a different intent, it seems reasonable to presume that the limitation does not cover the transfer to the trustee.\textsuperscript{33}

In Swiss domestic arbitration, the survival of the arbitration agreement is linked to the funding of the arbitration. Indeed, if the trustee does not settle the advance of arbitration costs and the opponent does not make the payment in the trustee's stead, the arbitration agreement lapses and the parties may file their claim in court.\textsuperscript{34} In international matters, the fate of the arbitration agreement in such a situation remains controversial. It is discussed below.

To the extent the arbitration agreement inures to the benefit of the trustee, the latter must proceed in the arbitration in lieu of the debtor, either as party or as agent for the estate or debtor.\textsuperscript{35}

\section*{3.2 Must the Arbitration Be Stayed Upon the Declaration of Bankruptcy?}

Under the assumption that the arbitration agreement binds the trustee, the question may then be raised whether the arbitral tribunal should \textit{stay the arbitration} upon the declaration of bankruptcy. On what basis may a stay be considered? The first basis is Art. 9 PILA, which deals with the \textit{lis pendens} defense.\textsuperscript{36} The requirement for a stay under such provision will generally not

\begin{footnotesize}
\begin{enumerate}
\item Section 3.4.9 of the 1986 Insolvency Act as amended by the 1996 Arbitration Act (at Section 107(1) N°46). See also Art. 52.1 of the Spanish Insolvency Act (Ley 22/2003, in force since 1 September 2004) which provides that arbitration agreements to which the debtor is a party are ineffective for the duration of the insolvency proceedings.
\item Lévy, pp. 95 ss.
\item Art. 30 Intercantonal Arbitration Convention; Art. 368, Draft Act on Civil Procedure.
\item This will depend on the \textit{lex concursus} at it deals with the powers of the trustee. On such topic under Swiss law, see Gillieron, cited in fn. 17, p. 691, no. 19 and Marc Russenberger, in Basler Kommentar, cited in fn. 17, p. 2220, nos. 10 and 12.
\item Art. 9 PILA reads as follows:
\begin{quote}
"(1) [i]f the same parties are engaged in proceedings abroad based on the same cause of action, the Swiss court shall stay the proceeding if it may be expected that the foreign
\end{quote}
\end{enumerate}
\end{footnotesize}
be met in our circumstances, because the arbitration was brought prior to the bankruptcy proceedings and the subject matter of the two proceedings is not identical.

Absent a stay mandated by Art. 9 PILA, it is within the discretion of the arbitrators whether to stay an arbitration or not. When making such a decision, the tribunal should balance the interests of the parties and consider the requirements of speed and efficiency. In particular, it should take into account that a stay should be granted only in exceptional circumstances. This is so because the stay is contrary to one of the objectives of arbitration, which is to enable the reasonably speedy resolution of the dispute. The discretionary stay is a matter of procedure governed by Art. 182 PILA. Accordingly, procedural matters may be agreed by the parties or, failing an agreement, decided by the arbitrator, subject to compliance with fundamental principles of procedure and international public policy. If these are breached, the award may be set aside (Art. 190 PILA) or refused enforcement (Art. V New York Convention).

As for the determination of arbitrability (2.1 above), one may argue that the tribunal should exercise its discretionary powers, taking into consideration the mandatory rules (so-called lois d’application immédiate ou lois de police) of a foreign legal system. That rule could precisely be one of the lex concursus ordering a mandatory stay of all proceedings as a result of the adjudication of bankruptcy. By analogy, 19 PILA, which allows courts to take such lois d’application immediate into account (under rather stringent conditions), may be looked to for guidance.

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court will, within a reasonable time, render a decision that will be recognizable in Switzerland.

(2) To determine when a court in Switzerland is seized, the date of the first act necessary to institute the action shall be decisive. The initiation of conciliation proceedings shall suffice.

(3) The Swiss court shall dismiss the action as soon as a foreign decision is submitted to it which can be recognized in Switzerland.

According to the Swiss Supreme Court, Art. 9 PILA applies to international arbitral proceedings (Fomento de Construcciones y Contratas S.A. v. Colon Container Terminal S.A., 14 May 2001, ATF 127 III 279). This may be right, provided Art. 9, which is addressed to courts, is adapted to arbitration.

37 ATF 119 II 386, 389.

38 To decide whether to take a foreign mandatory rule into account, the judge or arbitrator must apply a three-pronged test. First, the foreign rule must be intended to govern the situation at hand, i.e. the foreign legislature must have intended, if only by implication, that its mandatory provisions should be applied to international situations such as the one before the court. Second, there must be a close connection between the situation and the foreign mandatory provision. Third, “legitimate and clearly preponderant interests” must call for the reference...
It is a debated issue whether arbitrators should refer at all to *lois d’application immédiate* which belong neither to the *lex arbitri* nor to the *lex causae* and whether, when sitting in Switzerland, they should do so by analogy with Art. 19 PILA.\(^{39}\) Provided the interests at stake are properly assessed, it makes sense for an arbitral tribunal sitting in Switzerland to take account of *lois d’application immédiate* of the *lex concursus*, as this furthers the coordination of the relevant legislations.

Having assessed the legal basis for taking into account a rule of the *lex concursus* which mandates a stay of the proceedings, the next step is to ascertain whether such a rule amounts to international public policy or to a *loi d’application immédiate* which warrants consideration.

French case law, for example, considers that the stay of individual actions is a rule of domestic and international public policy.\(^{40}\) The position is different in Switzerland, where Art. 207 DCBA requires the stay of all pending actions until the second meeting of creditors. The purpose of such a stay is to give the trustee an opportunity to assess the overall situation and review the record in order to make the necessary decisions on an informed basis. This objective does not amount to reasons of international public policy. This is also evident from the following observations. First, the Swiss Supreme Court has left open the question of whether a declaration of bankruptcy in Switzerland requires a stay of actions pending abroad.\(^{41}\) The very fact that the Swiss Supreme Court had hesitations about this issue shows that the stay is not in the realm of international public policy. Second, Art. 207 allows exceptions in urgent cases, and administrative proceedings may be stayed, but this is not an obligation. International public policy concerns would not tolerate these exceptions. Third and last, under the EU Insolvency Règulation, the effects of a bankruptcy on a pending action are exclusively governed by the “law of the Member State in which that lawsuit is pending” (Art. 15 Regulation 1346/2000), not by the *lex concursus*. If the stay were to raise major public policy concerns, the country where the bankruptcy proceedings are opened would not simply defer to another legal system.

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\(^{39}\) Accord: unreported ICC award of April 15, 2002 in case 11028/DK.


\(^{41}\) ATF 93 III 84, 89.
As a result, the pertinent rules of procedure do not require the tribunal to stay the arbitration. However, the arbitrators should nevertheless pay deference to the needs of the bankruptcy proceedings. Hence, they should grant the trustee sufficient time to review the file and decide whether to continue the arbitration or admit or waive the claim (depending on whether the debtor was the defendant or the plaintiff).

3.3 May the Trustee Enter Into an Arbitration Agreement?

The foregoing paragraphs deal with the fate of the arbitration clause and the procedure in the event of a supervening bankruptcy. Another question is whether the trustee has the power to enter into an arbitration agreement. This is not a matter of scope of the arbitration clause, but rather of powers of the trustee. Hence, it is governed by the lex concursus. If Swiss law were the lex concursus, the trustee could enter into an arbitration agreement, subject to the approval of the creditors' committee or of the second meeting of creditors (Art. 237(3) and 253 DCBA).

3.4 What if the Trustee Does not Advance the Costs of Arbitration?

The last aspect to be dealt with in this section relates to the financing of the arbitration. What if the trustee does not pay the advance on arbitration costs? Many institutional rules and general practice are to the effect that the opponent may step in for the defaulting party. What then if the opponent does not step in?

In Swiss domestic arbitration, the rule is that the arbitration agreement lapses (Art. 30(2) Intercantonal Arbitration Convention). In such an event, either party may then start a court action without the other being entitled to raise a defense of lack of jurisdiction on the ground that the parties are bound

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42 An arbitrator would reach this conclusion by reference to Art. 187 PILA which provides for the application of the law with the closest connection, in this respect undoubtedly the lex concursus. For the submission of the powers of the trustee to such law: Art. 18 EU Regulation 1346/2000 on Insolvency Proceedings; Recommendation 31(c) UNCITRAL Legislative Guide on Insolvency Law (2004), Provisional final edition, available on www.uncitral.org.
to arbitrate. The Bill for a Uniform Civil Procedure Act modifies this rule. If the opponent does not advance the share of the costs payable by the trustee, the arbitration is terminated and the other party has the option of either starting a new arbitration at a later stage or initiating court proceedings (Art. 368(2)).

In international arbitration under Swiss law, the arbitral tribunal will apply the most favourable of the three laws mentioned in Art. 178(2) PILA to the question of survival of the arbitration clause. Unless the pertinent institutional rules provide otherwise, the tribunal will not consider the clause null and void. The arbitration clause is a contract and, as a rule under Swiss law, financial difficulties do not release a party from a contractual obligation.\(^\text{43}\) This being said, one may ask whether the arbitrator should not go a step further. Indeed, the arbitration clause is a special contract to the extent it touches upon the fundamental right of access to justice which is guaranteed by Article 6 of the European Convention on Human Rights. If the guarantee is breached under the circumstances, the arbitrator should hold the clause null and void. Be this as it may, in practice the arbitrator will limit him/herself to closing the arbitration proceedings.

The issue may then resurface in front of a court if one of the parties files an action alleging that the arbitration clause has lapsed. The court would then have to rule on an arbitration defense by application of Art. 7 PILA or Art. 2(3) New York Convention. Under these provisions, a court seized of an action covered by an arbitration agreement must decline jurisdiction, unless it finds the agreement null and void, inoperative or incapable of being performed. There are good grounds to argue that the court could then hold the clause incapable of being performed and accept jurisdiction, and a Swiss court may well do so. This is the solution adopted by the German Supreme Court in a decision handed down in 2000 on the basis of §1032(2) ZPO,\(^\text{44}\) which uses the same wording about the clause being null and void, inoperative or incapable of being performed.\(^\text{45}\)


\(^{44}\) BGH, case III ZR 33/00, 14 September 2000, Betriebs-Berater, (55), 46, 2330.

\(^{45}\) The wording was first used in the New York Convention and then adopted by the UNCITRAL Model Law on international commercial arbitration on which the German rules on arbitration, embodied in the Zivilprozessordnung, are modelled.
4. Pros and Cons of Arbitration in Insolvency Disputes

The fact that most disputes linked to insolvency proceedings are arbitrable does not necessarily mean that they should be arbitrated rather than litigated or mediated. To decide whether arbitration may be a suitable option requires weighing the pros and cons of arbitration as a dispute resolution method in insolvency cases.

To weigh the pros and cons, a number of different aspects must be assessed. Among these, one may identify the following: the limited effects of the decision (4.1 below); the principle of equal treatment of creditors (4.2 below); the necessity to protect public interests (4.3); the need for transparency (4.4); appellate review (4.5); speed (4.6); the concentration of the resolution of all disputes arising in connection with a given insolvency proceeding in one forum (4.7); the need to provide resolution of multiparty disputes (4.8); the cost factor (4.9); flexibility of the process (4.10); and trust, specialization, and neutrality (4.11).

Finally, before closing this part of this paper, it may be useful to briefly address court-ordered arbitration (4.11).

4.1 Limited Effects of the Decision

The decisions issued in certain categories of actions related to insolvency have limited effects, to the extent that they apply only to the very insolvency proceedings in the context of which they are rendered. Beyond these proceedings, they are without effect, even if they rule on issues of substantive law as preliminary questions. In other words, they are not vested with res iudicata, except for purposes of the bankruptcy or a similar proceeding in connection with which they have arisen.

Under Swiss law, this limitation applies to the actions under Art. 242, 250, and 285 previously discussed (2.2 above). It shows a strong connection between the action and the bankruptcy proceedings at issue. Such a connection could be seen as a reason for favouring litigation in the bankruptcy court rather than arbitration. Although this view undoubtedly has some merit, in and of itself it is not determinative in the choice between litigation and ar-

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46 E.g. Amonn/Walther, cited in fn. 20, p. 27.
Arbitration. Indeed, arbitrators do not operate in a vacuum. Arbitral tribunals resolve many different types of dispute in many different areas of the law. Doing so, they obviously have to take into consideration the specificities of the area at stake. As a result, when ruling on a dispute linked to insolvency proceedings, they will necessarily have to pay deference to all relevant aspects of bankruptcy law. In particular, to avoid that a limited decision be misunderstood and granted further-reaching effects than those which the applicable bankruptcy law provides, e.g. in enforcement proceedings abroad, it will be an easy task to draft the decision and its operative part in such a manner that the limitation is made perfectly clear.

4.2 Equal Treatment of Creditors

The principle of equal treatment of creditors pervades bankruptcy laws. It is affected by many statutory exceptions, which vary from one national legislation to the other. Thus, it cannot be regarded as a concept of international public policy imposing dispute resolution in the bankruptcy court rather than in other fora.

One may argue though that the application of the principle of equal treatment in an isolated arbitration is insufficient and that the correct implementation of the principle requires a coordination of the resolution of the different cases. This is certainly an argument worth serious consideration, to which one may venture the following answers. First, by allowing litigation in the courts of the domicile of the defendant rather than in the bankruptcy courts, legislators, at least in Switzerland, give no priority to the coordination factor. Further, in all actions to which the trustee is a party, he will be in a position to allege any relevant equal treatment consideration. What about the actions which oppose two creditors and in which the trustee is not represented? These are admittedly more problematic, as they entail a risk of collusion: the dispute may be a sham; the amicable settlement may be fraudulent. Problems of this sort may arise in front of a court as well as before an arbitral tribunal and there is no reason why the former would do better in uncovering them than the latter.
4.3 Public Interests

Insolvency proceedings and ancillary dispute resolution are characterized by the presence of relatively strong public interests which deserve protection. These public interests are manifold. Ensuring equality of treatment between creditors is certainly one expression of public interest, but there are others. The main ones include a public interest in protecting investment and creditor rights or, in the words of Justice Stephen Breyer of the US Supreme Court at a forum of insolvency judges hosted by the World Bank in November 2004, “prosperity is a result of investment, which in turn is secured by commercial rights”. There is a public interest in rescuing insolvent businesses which can return to profitability. There is a public interest in protecting employment. There is also a public interest in ensuring orderly insolvency proceedings, as well as the liquidation of businesses which cannot be rescued under the best possible conditions.

In many situations, these public interest considerations mainly affect the decisions which are in any event reserved for the judiciary and are as such not arbitrable. This is so for the decisions to defer the adjudication of bankruptcy, to allow time for the negotiation of a reorganization plan or to approve such a plan. Still referring to the Swiss categories discussed above, it would apply to Art. 725 Code of Obligations and Art. 314 DCBA. But public interest issues may also arise in other actions which are arbitrable. Here again, arbitral tribunals must take public interest considerations into account as would a court.

There is nothing unusual about arbitrators taking such interests into consideration. As the scope of subject-matter arbitrability continues to expand and covers disputes which exceed the mere private interests of two business partners, arbitral tribunals are increasingly called upon to implement public interest. This is is the case in disputes involving competition or antitrust laws, consumer disputes, tax arbitration, or doping disputes in sports. It is even more striking in investment arbitration based on international treaties which can deal with large infrastructure projects of major geopolitical interest for a nation and its population.48

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4.4 Transparency

The presence of strong public interests generally calls for transparency. This is true in most insolvency matters. In many countries, however, arbitration is confidential, in the sense that the hearings are private and that the record is not accessible to third parties. The arbitrators and the arbitral institution are bound by a confidentiality obligation. Whether the parties are as well depends on the applicable law. Where they are, their obligation is subject to a number of exceptions, including the situation in which one of the parties is under a legal duty to make certain disclosures, e.g. under stock exchange regulations.49

At a pre-bankruptcy stage, confidentiality may be desirable, as the negative effects of publicity may jeopardize the success of a rescue attempt. Accordingly, insolvency laws make some provision for secrecy.50

At a post-bankruptcy stage, the confidential nature of arbitration may conflict with the need for transparency in insolvency proceedings and more specifically with applicable bankruptcy rules. This may certainly be overcome. So for instance, whenever the trustee is a party, he will in any event be privy to the relevant information. If he is bound by a statutory disclosure duty under the lex concursus, this would provide a valid exception to a possible confidentiality obligation in the arbitration. In this context, one should note that, depending on his status and on the laws governing his activity, the trustee may in certain cases be bound to disclosure not only under bankruptcy laws, but also under freedom of information or analogous legislations.51

In addition, especially in those arbitrations in which the trustee is not represented, the parties may obviously agree to waive publicity in whole or in part. As an illustration, one may refer to the Swiss Rules of International Arbitration, which can reasonably be said to reflect transnational practice on this point. They provide for confidentiality, unless the parties agree otherwise and “save and to the extent that a disclosure may be required of a party by a legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a judicial authority” (Art. 43(1)).

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50 IsaaK Meier, Confidentiality and publicity in insolvency law - Is a Secret Court-Based Rescue Procedure Desirable?, infra.

Furthermore, if the trustee is not a party to the arbitration and the parties fail to waive confidentiality, one would have to enquire whether they themselves are under a legal duty of disclosure like the trustee, in which event disclosure would be authorized in spite of the confidential nature of arbitration. Failing this, one would have to ask whether the arbitrators have the power to make an order lifting confidentiality. There are good grounds for answering in the affirmative. This being so, any uncertainties would be overcome if either the relevant insolvency rules or the applicable institutional arbitration rules had express provisions to this end.

In this latter respect, one may point to the present debate in investment arbitration, where strong voices advocate transparency for obvious reasons of public interest. These calls for transparency may lead to a reform of the arbitration rules. In the meantime, even under the existing rules, arbitrators have started allowing third parties to file amicus curiae briefs and opening the hearings to the public.

4.5 Appellate Review

Court decisions are subject to appellate review on one or two levels depending on the local procedure, whereas arbitral awards are only subject to setting aside proceedings based on very narrow and mostly procedural grounds. In short, arbitral awards are final; there is no second try.

The lack of appellate review may be detrimental to the overall consistency of the case law. At the same time, finality is the price to be paid for efficiency. As such, it is directly linked to speed. Finality places a heavy burden on the arbitrator. Because of its effects (no second try), it is essential to select the right arbitrator, a consideration to which we will return below when addressing specialization. Also because of the effects of finality, the arbitrator will be under increased pressure to “get it right”, knowing full well that no one will be there to correct his or her mistakes.

In international commercial arbitration which deals with individual disputes between two private actors, the drawback of having no appeal, i.e. the

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risk of inconsistency of the case law, is easily accepted, because it is clearly outweighed by the gains in terms of efficiency. Reasonable minds may differ whether the same holds true in other socio-economic sectors, such as insolvency. A scientific assessment would imply comparing the quality of judicial and arbitral decision-making, considering not only the intrinsic quality of the decision (correct application of the law, equities of the case, adequacy of the response given to the problem dividing the parties), but equally time, cost, and convenience factors, as well as the contribution to the development of the law. A difficult endeavour, to say the least.

In a more pragmatic fashion, one may note that certain arbitral appellate mechanisms do exist in certain limited specialized sectors, such as commodity arbitration. Such a mechanism could be introduced for insolvency matters by bankruptcy or arbitration legislation, or more simply by arbitration rules. To revert to the parallel of investment arbitration, one may also note that the introduction of an appeal is being considered. The debate in this latter respect demonstrates that it is at best doubtful whether the overall quality of justice would be improved by the introduction of an appeal. The same is certainly true in the area of insolvency. It is submitted that, if the existence of an appellate review is an overriding priority, then it may be preferable to resort to the courts, and that, if it is not, then arbitration should be chosen together with one of its main advantages, which is finality.

4.6 Speed

In assessing the speed of a process, it all depends with what other process one compares it. So for instance, mediation is undoubtedly speedier than arbitration. However, if the mediation fails and no settlement is reached, the parties must necessarily resort to another dispute resolution method and the time devoted to the mediation is lost. In other words, the speed of mediation may turn out to be an illusion.

If one compares arbitration with litigation, then arbitration is generally faster, especially if one rightly includes appellate proceedings. It is true that certain bankruptcy-related actions are dealt with in summary court proceed-

Discussion paper cited in fn. 52.
ings. However, this does not rule out appeals and does not apply to all such actions. In contrast, arbitration can be conducted by way of expedited or fast-track procedures. Some institutional rules contain specific provisions on expedited procedures, so for instance the Swiss Rules of International Arbitration (Art. 42). These may be applied to the actions which in court are dealt with in summary proceedings as well as to all others. Moreover, as was already discussed, arbitration is not subject to appeal, except for a very limited annulment or action to set aside. Under Swiss international arbitration law, this action can even be waived, which may provide additional time savings.

4.7 Concentration of Disputes

One reason for ruling out arbitration might be the intent to concentrate all the disputes connected to one bankruptcy proceeding in one single forum, the bankruptcy court. The benefits of the concentration are easily understood. However, the applicable rules on court jurisdiction do not achieve such concentration. Indeed, they do not consistently call for the jurisdiction of the courts at the place of the bankruptcy (2.2 above). Hence, even disregarding the possibility of arbitration, the concentration is not achieved. It is thus not a valid argument for ruling out arbitration.

A more interesting question is whether it may be possible to achieve the concentration before an arbitral body. One possibility is the consolidation of related arbitrations which are already pending. This solution is provided in certain institutional arbitration rules and is dealt with below (4.8 below). Another possibility would be to join all defendants in one arbitration from the outset. If certain defendants are not bound by the arbitration agreement, such a joinder would deprive them of the right to be sued in their home courts. For this reason, such a solution would require their consent. If the consent is not obtained, it is arguable that this solution could be imposed by way of statutory

55 Beschleunigtes Verfahren, procédure accélérée, Art. 25(1) DCBA, which applies to the action to challenge the schedule of claims (Kollokationsklage, action en contestation de l'état de collocation) and to the action to exclude assets from the estate (Aussonderungsklage, action en revendication), both actions which are arbitrable (2.2 above).
56 On cantonal and federal levels, AMÖNN/WALTHER, cited in fn. 20, p. 30–32.
57 The actio pauliana in particular is subject to ordinary procedure (Art. 285 ss. DCBA).
amendments. The feasibility of such a possibility would need to be further explored, which exploration exceeds the scope of this paper.

4.8 Multiparty Disputes

Disputes with *multiple plaintiffs and multiple defendants* can be handled in arbitration as well as in litigation. The flexibility of arbitration may even allow a better adaptation of the procedure to deal with the specifics of a given multiparty dispute.

When it comes to multiparty issues, the main difference between litigation and arbitration is that in the former the defendant can join non-parties, while such a *joinder* (whatever the terminology) is not admissible in arbitration, where the rule is that the plaintiff identifies the parties without any later additions (subject of course to the consent of all involved). Nowadays there are, however, a number of institutional arbitration rules which have provisions on multiparty proceedings. Again, one may refer to the Swiss Rules of International Arbitration (Art. 4), which allow the defendant to request the joinder of third parties. They also permit third parties to request participation in an action pending between others, and provide for the consolidation of two arbitrations on related matters.59

4.9 Costs

And what about costs? Here again the answer depends on the resolution method with which one compares arbitration and on the viewpoint adopted. For the *state* the courts of which would otherwise be used, arbitration represents a savings, as it helps unburden the courts and outsources the dispute resolution at no cost.

For the *parties*, no general answer can be given. The answer will indeed depend on a number of elements. With respect to the arbitration, these include (1) whether the parties use expedited or full-fledged arbitration; (2) whether the tribunal is composed of one or three arbitrators; (3) which institutional rules are used, if any; and with respect to the court proceedings (4) what the level of the court fees is; (5) whether legal aid is available; (6) what type of

59 MARC BLESSING, Comparison of the Swiss Rules with the UNCITRAL Rules and others, in Kaufmann-Kohler/Stucki (Eds.), cited in fn. 58, pp. 30–32.
procedure applies, summary or ordinary; (7) and what appeals are available and whether they are used. Moreover, for both, the level of legal fees in arbitration and in court, the complexity of the dispute, as well as the existence or not of a rule according to which the "loser pays all" and the prospects of recovery of any award of costs may also play a role.

Whenever the trustee is a defendant in the arbitration, he may choose not to advance his share of the cost of the arbitration, in which case the plaintiff may settle the full advance (3.4 above) if it sees a real benefit in resorting to arbitration rather than court litigation.

4.10 Flexibility

Another consideration which weighs in favour of arbitration as opposed to litigation is the lesser formality of the process. The possibility of expedited proceedings is one reflection of the lack of formal requirements. Another lies in tailor-made case management, including in multiparty disputes. Still another is the parties' freedom with respect to the language of the arbitration, which often allows the parties to dispense with costly translations required in court. Similarly, the parties may choose the venue of the arbitration.

4.11 Trust, Specialization, and Neutrality

The true reasons why parties choose arbitration often lie elsewhere, however. One of the main reasons for such choice is the right to choose one's judge. This right serves different functions. Psychologically, it helps building trust in the process, as parties will be more inclined to trust neutrals they have selected than third persons who are imposed on them. And trust is essential for the smooth conduct of the arbitration and the acceptance of the outcome.

The right to choose one's judge further contributes to the quality of the dispute resolution by allowing the selection of arbitrators with special expertise in the relevant subject matter. Similarly, except in jurisdictions with specialized bankruptcy courts of high competence, arbitration is generally perceived as better suited to deal with complex disputes, raising numerous issues of fact or difficult legal questions. Most courts are ill-equipped to resolve cases of this nature. They do not have the necessary resources, which is often aggravated by the fact that they have a heavy caseload, including a substantial backlog of cases. Because they are overburdened, they will not be able to spend the
necessary time on the case. Arbitrators, who may be more specialized to start with, may also procure the required resources, as they will be funded by the parties.

Another powerful reason why parties prefer arbitration over litigation is the neutrality of the forum. The point here is not that courts lack independence. A court may be perfectly independent, impartial, unbiased, and yet be perceived as lacking neutrality by the mere fact that most often it is the home court of one of the parties, including the trustee, the other one being a "foreigner" in this court. Like football teams, parties much prefer playing at home. Since the advantage of playing at home cannot be granted to both (except in local disputes of course), arbitration does away with it completely and allows parties to play on neutral ground.

4.12 Court-Ordered Arbitration?

When the pros of arbitration outweigh the cons, should a court before which an action is brought be empowered to refer the parties to arbitration? One example of court-ordered arbitration can be found in the rules for the Delaware Bankruptcy Court. The rules provide that “[n]otwithstanding any provision of the law to the contrary, the Court may refer a dispute pending before it to mediation, and, upon consent to arbitration”. They insist on the voluntary nature of arbitration by requiring that “consent be freely and knowingly obtained [rather given]” and that “no party be prejudiced for refusing to participate in arbitration”.60

Obviously, if there is a valid arbitration agreement between the parties to the action, the court will have no choice but to decline its jurisdiction (Art. 7 PILA and Art. 2(2) New York Convention). If there is no pre-existing arbitration agreement, may the court nevertheless order the parties to arbitrate their dispute? If the parties consent, yes. If they are not in agreement, an order would require a statutory basis. The arbitration would then qualify as a forced

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insolvency and international arbitration

Arbitration and be subject to the procedural guarantees of Art. 6 ECHR. The rights guaranteed in this treaty provision are identical to those which are protected under arbitration laws. Hence, the application of Art. 6 ECHR makes no practical difference for the conduct of the arbitration, with one exception which is the publicity of the procedure, a matter which must in any event be solved in the context of insolvency-related arbitrations (4.5 above).

5. Conclusion: Arbitration is an Efficient Tool in Insolvency Proceedings if Used Intelligently

The foregoing discussion leads to the following main conclusions:
- except for the core issues, the disputes related to insolvency proceedings are arbitrable (2 above);
- arbitration of disputes connected to an insolvency proceeding give rise to certain procedural difficulties which can all be overcome with the existing legal tools (3 above);
- arbitration of insolvency-related disputes may be unavoidable with respect to arbitrations started before the bankruptcy adjudication or with respect to disputes subject to a pre-bankruptcy arbitration agreement (2.2 above and 3.1 above);
- arbitration of post-bankruptcy disputes should be favoured whenever it achieves a more effective resolution than litigation, such as when (i) time is of the essence and expedited arbitration is available, (ii) the dispute is highly complex and the required expertise is not available in court; (iii) or there is a fear that the courts will not be neutral or will not be perceived as such;
- In these situations, it may make sense that the court order arbitration (4.12 above);
- The limitation of the effects of the decision to a given insolvency proceeding, the principle of equal treatment of creditors, the need for transparency, and the presence of public interests are not obstacles to arbitration, but they must be taken into account by the arbitrators;


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Adequate procedural rules should provide for expedited procedures, and deal with transparency and the possibility of joinder of parties and consolidation of cases, to allow some concentration of related disputes in one forum;

As a consequence, arbitral institutions may wish to review whether their rules meet the specific needs of insolvency-related disputes, which include primarily expedited procedures, exceptions to confidentiality, and methods of dealing with multiparty arbitrations and with the concentration of related disputes.

These conclusions show that, in the right situations, arbitration may be a useful tool to increase the efficiency of insolvency proceedings. There are two ways of contemplating its use. Either it is used rather sparingly for a few disputes for which it appears particularly adequate under the circumstances (speed, complexity, amount at stake, available resources, etc), or its use is envisaged on a broader scale and special rules for insolvency arbitration are adopted, including a provision for court-ordered arbitration. The second alternative may provide more benefits in terms of efficiency and may thus be worthy of further exploration either by arbitral institutions or by legislators.