Arbitration Beyond Borders

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Essays in Memory of Guillermo Aguilar Álvarez

Edited by

Nigel Blackaby KC

W. Michael Reisman

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Editors

Nigel Blackaby KC is a partner in the international arbitration group of Freshfields Bruckhaus Deringer, which he led for eight years (2014-2022) in addition to his continued coleadership of the firm's Latin America practice. He was admitted as King's Counsel in 2020. He is Adjunct Professor of International Investment Law at the Washington College of Law, American University in Washington, D.C. and coauthor of the last four editions of *Redfern and Hunter on International Arbitration* (Oxford University Press 7th ed., 2022) and member of the editorial board of *Arbitration International*. He is a member of the Court of the Singapore International Arbitration Centre (SIAC) and formerly led the IBA subcommittee on investment arbitration. Nigel has appeared as counsel or arbitrator in over 100 international arbitration proceedings in English, Spanish, French and Portuguese under the auspices of the ICC, ICSID, LCIA, the AAA-ICDR and the Stockholm Chamber of Commerce with a particular focus on energy and natural resources (including as counsel in over fifty investment arbitrations).

W. Michael Reisman is Myres McDougal Professor Emeritus of Law at the Yale Law School (Connecticut) and has been Visiting Professor in Tokyo, Hong Kong, Berlin, Basel, Paris, Tel Aviv and Geneva. He has been elected to the Institut de Droit International and is a fellow of the World Academy of Art and Science and a board member of the Foreign Policy Association. He was President of the Arbitration Tribunal of the Bank for International Settlements, President of the Inter-American Commission on Human Rights of the Organization of American States, Honorary President of the American Society of International Law and Editor-in-Chief of the *American Journal of International Law*. He has served as arbitrator and counsel in many international cases and was presiding arbitrator in the OSPAR arbitration (*Ireland v. UK*) and arbitrator in the Eritrea/Ethiopia Boundary Dispute and in the Abyei (Sudan) Boundary Dispute.

Contributors

David Arias is a partner at Arias SLP. He was Chair of the IBA Arbitration Committee in 2016-2017 and, previously, chaired the Subcommittee on Conflicts of Interest that published the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration. He was also President of the Spanish Arbitration Club in 2013-2017 and is currently Honorary President. David is a Professor of Procedural Law and Arbitration. He obtained his B.A. in Law, with Honors, and his Ph.D., also with Honors, from Universidad Complutense de Madrid (Spain).

Julien Cantegreil, Ph.D., a graduate of the Ecole normale supérieure, Yale Law School (Connecticut) and Sorbonne, is an educator, lawyer and entrepreneur. He is a former member of the Cabinet of the French Minister of Economics and Finance and Deputy General Counsel of KERING. He founded and manages the Space Situational Awareness company, SpaceAble, to help promote sustainability and efficiency in Low Earth Orbit operations.

Oliver Cojo is a partner at Arias SLP. He was Cochair of the young practitioners' group of the Spanish Arbitration Club in 2019-2020. Oliver is an Associate Professor of Arbitration at IE University (Spain). He holds a B.A. in Law and Business Management from Universidad de Valladolid (Spain) and an LL.M. from Maastricht University (the Netherlands).

María Inés Corrá is Cohead of the International Arbitration, Administrative Law and Economic Regulation areas at Bomchil, Argentina. She acts as counsel and international arbitrator. She is the President of the Arbitration & ADR Commission of ICC Argentina, member of the board of the Latin American Arbitration Association (ALArb), cofounder and leader of Women Way in Arbitration LatAm (WWA). She has an LL.M. in Administrative Law and is Professor of Arbitration and Mediation at the Universidad Torcuato Di Tella (Argentina) of Administrative Law at the Universidad de Buenos Aires and of Economic Regulation at the Argentine Catholic University (Argentina).

Yves Derains is a founding partner of Derains & Gharavi. He is the former secretary-general of the ICC Court, and honorary Chairman of the ICC Institute of World Business Law. He is coauthor of the celebrated work, *A Guide to the ICC Rules of Arbitration*, with Eric Schwartz, published by Kluwer Law International.

Rocío Digón is a legal consultant at White & Case LLP and holds a J.D. from Yale Law School (Connecticut) and an LL.M. from Leiden University (the Netherlands) in Public International Law. She has served as counsel in commercial and investment treaty arbitration under the rules of leading arbitral institutions, including ICSID, ICC and ICDR/AAA and has acted as sole arbitrator under the rules of the CAM.

Georgios Dimitropoulos is Associate Professor of Law and Associate Dean for Academic Affairs at HBKU College of Law. He holds an LL.M. and J.S.D. from Yale Law School (Connecticut), and has previously held positions at the University of Heidelberg (Germany), New York University School of Law and the Max Planck Institute Luxembourg. His publications have appeared, among others, in the *University of Pennsylvania Journal of International Law*, the *Washington Law Review*, the *Journal of International Economic Law*, and the *Journal of International Dispute Settlement*.

Juan Fernández-Armesto is a professional arbitrator. He was formerly Chairman of the Spanish SEC, Professor of Commercial Law at ICADE University (Spain) and partner of the law firm Uría Menéndez.

Horacio A. Grigera Naón is an independent international arbitrator and consultant on arbitration, business and international law matters. He is a former secretary-general of the International Court of Arbitration of the International Chamber of Commerce and the Director of the International Commercial Arbitration Center of the Washington College of Law, American University, Washington, D.C.

Juan Pablo Hugues is an international associate at Foley Hoag LLP, focused on litigious and advisory work on public international law matters for States. He also serves as Officer of the IBA. He holds a law degree from Mexico's CIDE and an LL.M. from Harvard Law School (Massachusetts).

Brian Jacobi is a lecturer in U.S. law at Université Clermont Auvergne. He was previously an associate in King & Spalding's International Arbitration team in the Houston office. Brian's practice focuses on complex investment disputes and commercial matters worldwide. He holds a law degree from Columbia University (New York) and a B.A. in Russian and Eastern European Studies from the University of Texas (Austin).

Nartnirun Junngam is Associate Professor of Law at the Faculty of Law, Thammasat University (Thailand), where he served as the Director of the International Law Centre from 2014 to 2016. He received his LL.B. (Hons) from Thammasat University (Thailand), and received his LL.M. and J.S.D. from Yale Law School (Connecticut). He has been a member of the Executive Council of the Asian Society of International Law and is also a reviewer of the *Asian Journal of International Law*. In 2019, Professor

Junngam was a visiting fellow at the Lauterpacht Centre for International Law at the University of Cambridge (England).

Edward G. Kehoe is the Managing Partner of King & Spalding's New York office, specializing in business arbitration and litigation. He is Cohead of its International Arbitration practice, and a member of the firm's ten-person management committee. Since 2007, Edward has been recognized in *Chambers USA* as one of the top lawyers in the field. A frequent writer and lecturer on international arbitration issues, Edward is a member of the Board of Editors of *Global Arbitration Review* and the Advisory Board of the Institute for Transnational Arbitration.

Aloysius (Louie) Llamzon is a partner at King & Spalding's international arbitration practice in Washington, D.C. and New York. He is Research Professor of Law at the Ateneo de Manila University School of Law (the Philippines), and was formerly Senior Legal Counsel at the Permanent Court of Arbitration in The Hague. He obtained A.B. and J.D. degrees from the Ateneo de Manila University (the Philippines), and LL.M. and J.S.D. degrees from Yale Law School (Connecticut). Guillermo Aguilar Álvarez was Louie's professor at Yale and colleague at K&S.

Fernando Mantilla-Serrano is a partner at Latham & Watkins. He is a member of the commission created by the Spanish Minister of Justice to draft Spain's arbitration act (Law 60 of 2003). He is a Fellow of the Chartered Institute of Arbitrators (CIArb) and member of the International Law Association (ILA), the Court of Arbitration of SIAC and the Governing Board of ICCA. He is admitted to the bars of Colombia, New York, Paris and Madrid. He holds a J.D. in Law and Economics—Pontificia Universidad Javeriana (Bogota); MCJ (LL.M.)—New York University (Fulbright Scholar); DEA in International Private Law and International Trade and DSU in EU Law—Université de Paris II.

Sara McBrearty is a senior associate on King & Spalding's International Arbitration team in the Houston office. She has acted as counsel in international and domestic arbitration proceedings held under the auspices of ICSID, ICC, AAA/ICDR, SIAC, HKIAC, ECT, CRCICA, JAMS and ad hoc cases under the Permanent Court of Arbitration and UNCITRAL Rules. Sara holds a law degree from the University of Texas School of Law.

Santiago Montt is CEO of Los Andes Copper Ltd and President of Minera Vizcachitas. He worked for BHP (2011-2021) as Vice President of Corporate Affairs for the Americas, VP Litigation (Global), VP Legal Brazil, and VP Legal Copper. He is Assistant Professor at Universidad de Chile Law School. He obtained his B.A.A. (Law) from Universidad de Chile, LL.M. and J.S.D. from Yale University (Connecticut), and M.P.P. from Princeton University (New Jersey).

Alexis Mourre is a member of the Paris Bar and an international arbitrator. He has served in more than 300 international arbitrations, both ad hoc and before most international arbitral institutions. Alexis is a past president of the ICC International

Court of Arbitration and the author of numerous books and publications in the field of international business law, private international law and arbitration law.

Jaime Olaiz-González is Professor of International Law, Constitutional Theory and American Jurisprudence at Universidad Panamericana Law School in Mexico City. Professor Olaiz received his law degree from Universidad Panamericana and his J.S.D.'15 and LL.M.'09 from Yale Law School (Connecticut). He was a Fulbright-García Robles Grantee. Professor Olaiz was Dean for the J.D. program at Universidad Panamericana (México) where he currently serves as Vice Dean for International Programs. He teaches, researches, and publishes on constitutional change, political transformations, international law, human rights, legal education, transitional justice, and constitutional adjudication.

Dirk Pulkowski is the Deputy Legal Adviser and Deputy Director of the Office of Legal Affairs at NATO Headquarters in Brussels. He previously acted as Senior Legal Counsel of the Permanent Court of Arbitration in The Hague. He holds a Doctorate in Law from Ludwig-Maximilians-Universität (Munich) and an LL.M. degree from Yale Law School (Connecticut). He has published widely in the fields of public international law, trade and investment law, and legal theory.

Brian M. Richardson is an assistant professor and the Jia Jonathan Zhu & Ruyin Ruby Ye Sesquicentennial Faculty Fellow at Cornell Law School (New York). At Cornell, Professor Richardson teaches Public International Law, Conflicts of Law, and Constitutional Law. His research concerns public and private international law and American public law.

Mikaël Schinazi is an associate at Gaillard Banifatemi Shelbaya Disputes and a visiting lecturer at Sciences Po Law School (Paris). A member of the New York Bar, he holds a B.A. *magna cum laude* with highest honors from Harvard University (Massachusetts), an LL.B. from the University of Cambridge (England), an LL.M. from Columbia Law School (New York), and a Ph.D. in Law from the Institut d'Études Politiques de Paris (Sciences Po). His book, *The Three Ages of International Commercial Arbitration*, was published by Cambridge University Press in 2022.

Eduardo Silva Romero is Professor Emeritus at Rosario University (Bogotá) and Professor of International Arbitration at Panthéon-Assas, Sciences Po, MIDS and Paris-Dauphine. He is the Chairman of the ICC Institute of World Business Law. He is an International Arbitration Partner at Dechert LLP.

Chan Leng Sun is Chartered Arbitrator and Senior Counsel at Duxton Hill Chambers, Member of SIAC Court of Arbitration and Member of ICC Commission on Arbitration and ADR.

Amnart Tangkiriphimarn is a faculty member at the Faculty of Law, Thammasat University (Thailand), where he teaches Arbitration Law and International Investment Law. He was a teaching assistant for the International Investment Law course co-taught by Professor Guillermo Aguilar Álvarez and Professor W. Michael Reisman at Yale Law

School (Connecticut) in 2016. Amnart was awarded the YLS Permanent Court of Arbitration Fellowship in 2017.

Albert Jan van den Berg is a partner at Hanotiau & van den Berg, Brussels. He also serves as Visiting Professor at Georgetown University Law Center (Washington, D.C.), and Tsinghua University School of Law (DPR China); Emeritus Professor, Erasmus University (the Netherlands); former President, International Council for Commercial Arbitration (ICCA) and Netherlands Arbitration Institute (NAI).

Scott Vesel is a partner at Three Crowns LLP, where he practices international commercial and investment arbitration. He is an adjunct professor at Georgetown University Law Center (Washington, D.C.) and previously served as an Attorney-Adviser at the U.S. Department of State.

Matteo M. Winkler is Associate Professor of Law at HEC Paris. He obtained a Ph.D. from Bocconi University (Italy) and an LL.M. from Yale Law School (Connecticut). Before joining HEC, he worked as a lawyer in Milan (Italy), specializing in international business transactions, litigation and arbitration. He has published, *inter alia*, in the *Business Law Review*; the *Journal of Law, Medicine and Ethics*; the *International & Comparative Law Quarterly*; and the *International Lawyer*. At HEC, he acts as Academic Director of CEMS and Cochair of the Diversity Committee.

Karim A. Youssef is the Founder, Chairman, and CEO of Youssef & Partners Attorneys, a prominent GAR 100 firm and a regional MENA leader in dispute resolution and international arbitration. He leads the international arbitration and international law practices at the firm. He has been ranked as a Star Individual in *Chambers & Partners* since 2016 and recognized as a Thought Leader in arbitration by *Who's Who Legal*. Karim is a prolific writer and speaker about contemporary issues in arbitration. Karim was educated at Yale Law School (Connecticut), Paris 1 (Sorbonne) and Cairo University Law School (Egypt).

Romain Zamour is a senior associate at Debevoise & Plimpton LLP, based in New York. His practice focuses on the resolution of international disputes, including through international commercial and investment arbitration, international litigation, and public international law processes. He is admitted to practice in New York and Paris.

Eduardo Zuleta is an independent arbitrator who has served as an arbitrator in commercial and investment treaty cases under the rules of the ICC, ICSID, UNCITRAL, LCIA, and ICDR, among others. He is Adjunct Professor of International Arbitration at Georgetown Law (Washington, D.C.), codirector of the ICC Alumni Group and member of the World Bank Sanctions Board. Mr. Zuleta formerly served as Vice President of the ICC Court of Arbitration and Copresident of the Arbitration Committee of the International Bar Association.

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CHAPTER 8

Arbitration and Insolvency: Important Aspects for Tribunals to Consider

Fernando Mantilla-Serrano[*]

I had the opportunity to meet Guillermo Aguilar Álvarez when he was General Counsel at the International Chamber of Commerce (ICC) International Court of Arbitration. A man of legendary generosity, Guillermo opened the doors of the ICC to me and, by the same token, introduced me to what would become my professional career —international arbitration. But Guillermo's privileged legal mind transcended dispute resolution. He was a true specialist in corporate law, which was the subject of his Juris Doctor graduation paper in Mexico. On many occasions, I benefited from his encyclopedic knowledge of comparative corporate law, and at least once we discussed the challenges that corporate insolvency presented to international arbitrators. This discussion remains vivid in my mind and immediately provided the subject matter for this modest tribute to Guillermo.

International arbitration has undeniably become an increasingly popular means of resolving cross-border commercial disputes. In 1997, a total of 1,290 parties from 103 countries were involved in arbitration cases filed with the ICC.[1] More than two decades later, in 2020, the number of parties had almost doubled to 2,507 parties from 145 countries.[2] Parties choose international arbitration because of its efficiency, neutrality and adaptability to their needs, and because—as the statistics demonstrate—international arbitration is becoming the standard dispute resolution mechanism in global business.

* The author would like to thank the ICC for the opportunity to review unpublished awards for the purpose of drafting the present chapter. The author would also like to acknowledge the contribution of Kevin Cubeddu (associate at Latham & Watkins, Paris) and Aija Lejniece in the preparation of the present chapter.

1. ICC Statistical Report (1997), p. 4.
2. ICC Statistical Report (2020), pp. 9-10.

As globalization leads to more and more cross-border business relationships and their associated disputes, interactions between international arbitrations and insolvency proceedings affecting parties to an arbitration (or "parallel insolvency proceedings") are becoming increasingly common. However, while international arbitration is fundamentally a private dispute resolution mechanism—the cornerstones of which are party autonomy and detachment from national legal systems (or "delocalization") [3]—insolvency is a centralized and inherently public process governed by specific and often mandatory national rules.

As such, when one of the parties to an international arbitration is subject to parallel insolvency proceedings, the arbitral tribunal will necessarily face complex questions regarding the effects of such insolvency proceedings on the arbitration, which inevitably creates a strain between a very private procedure on the one hand and a very public procedure on the other. These questions concern, among other factors, the legal capacity of the insolvent party, the ongoing validity of the arbitration agreement, the obligation to stay the proceedings and the limits on the relief the tribunal is empowered to award.

The task of international arbitral tribunals is further complicated by the absence of global conflict of law rules or principles, both generally[4] and in relation to the effects of insolvency on arbitral proceedings.

Arbitrating disputes involving parallel insolvency proceedings is an intricate task that requires tribunals to be sensitive to both the conflicting interests that underpin arbitration as a private method of international dispute settlement and the public interests and priorities of state-centric insolvency proceedings.

This chapter first addresses the nature of international arbitral tribunals and the rules and principles they are bound to apply when faced with parallel insolvency proceedings—how an arbitral tribunal's "duty" to render an enforceable award may affect the legal principles it should take into account, and whether insolvency-specific conflict of law rules provide any guidance. The chapter then examines in more detail what principles tribunals and national courts have found to be relevant in the context of international arbitration and insolvency, and identifies several practical issues that an arbitral tribunal may face in a parallel insolvency context.

I LAW APPLICABLE TO THE EFFECTS OF PARALLEL INSOLVENCY PROCEEDINGS ON AN INTERNATIONAL ARBITRATION

Insolvency proceedings are almost entirely based on national laws, with each state taking different procedural and substantive approaches. No universal approach has ever been adopted despite regional attempts at harmonization and cooperation in

3. Gaillard, E. (2010) *Legal Theory of International Arbitration*. Leiden/Boston: Martinus Nijhoff Publishers.
4. Most arbitration rules and national laws simply defer to the parties' agreement when dealing with the law applicable to the merits of the dispute.

cross-border insolvency matters.[5] The 1997 UNCITRAL Model Law on Cross-Border Insolvency has been by far the most successful attempt but, even so, only fifty States have implemented (to varying degrees) the Model Law in their legislation.[6]

Further, there are no international instruments that directly guide international arbitral tribunals in the complex task of arbitrating a dispute involving parallel insolvency proceedings. Tribunals are nevertheless not left entirely to their own devices—as this chapter explores below, arbitrators are circumscribed by the parties' choice of law, international public policy, the tribunal's duty to ensure that the award it renders is enforceable and, in certain circumstances, mandatory rules of the seat of the arbitration and/or the place of insolvency proceedings.

A The Delocalized International Arbitral Tribunal

The first question that arises for an arbitral tribunal facing parallel insolvency proceedings is which law to apply when deciding on the recognition of such insolvency proceedings and their effect on the arbitration. An arbitral tribunal may be confronted with the possible application of at least five laws:

(1) the law applicable to the underlying contract;
(2) the law applicable to the merits of the dispute (either chosen by the parties or determined by the arbitral tribunal);
(3) the law of the seat of the arbitration;
(4) the law of the place where insolvency proceedings have been opened; and
(5) the law of the place of enforcement.

Strictly speaking, when recognizing an insolvency proceeding and assessing its effect on the arbitration, an arbitral tribunal is only bound to apply the law that the parties choose and to ensure that the application of that law is compatible with international public policy.

The fundamental difference between international arbitral tribunals and national courts is that the former are untethered to, and are not an institution of, the legal system of any state.[7] Unlike national court judges, international tribunals do not have a *lex fori*, and are detached from the substantive and procedural rules of any specific national law, including the seat of the arbitration. Awards rendered by such tribunals are therefore "delocalized" and "float" on the surface of national legal systems.[8]

5. *See, e.g.*, The Treaties of Montevideo of 1889 between Argentina, Bolivia, Paraguay, Peru and Uruguay, and the Nordic Bankruptcy Convention of November 7, 1933, between Denmark, Finland, Iceland, Norway and Sweden.
6. UNCITRAL Model Law on Cross-Border Insolvency (1997).
7. ICC Case No. 6379, Final Award of 1990 in van den Berg, A.J. (ed.) (1992) *Yearbook Commercial Arbitration* 17, pp. 212-220 ("ICC Case No. 6379"), at ¶ 21: "In international arbitration, an Arbitral Tribunal is not an institution under the legal system of a State."
8. *See* Gaillard, E. (2010) *Legal Theory of International Arbitration*. Leiden/Boston: Martinus Nijhoff Publishers, Chapter I(C); Fouchard, P. (1999). *Fouchard, Gaillard, Goldman on International Commercial Arbitration*. The Hague; Boston: Kluwer Law International ("Fouchard Gaillard

Nowhere is the delocalization of arbitration as strongly manifested as in France, where arbitral awards are considered to be so completely detached from the legal system of the seat of the arbitration that the French judicial system recognizes the existence of an *ordre juridique arbitral*.[9] French courts have expressly held that "[t]he place of the arbitral proceedings, chosen only in order to assure their neutrality, is not significant."[10] Most recently, the principle of delocalized arbitration was confirmed by the Paris Court of Appeal in *EGPC v. NATGAS*. In that case, the court found that the French legal system's approach to delocalization was applicable not just to foreign international arbitral awards that are recognized and enforced in France but also to foreign domestic arbitral awards (that is, awards that are considered domestic by the local jurisdiction in which the award was rendered).[11]

In *EGPC v. NATGAS*, an arbitration between two Egyptian parties, an award was rendered in Egypt in 2009 and granted recognition in France in 2010. The award was then annulled in Egypt later that year. Arguing before the Paris Court of Appeal, the parties disagreed as to whether or not the award was international. According to EGPC, the arbitration was a purely domestic Egyptian arbitration governed by Egyptian law. The annulment of the resulting award in Egypt was therefore justified, and the annulled award could not be enforced in France without violating international public policy. For NATGAS, the arbitration was international, and as a result, the annulment of the award in Egypt did not affect the validity of the award's recognition in France. The court ruled that regardless of whether Egyptian law considered the arbitration to be domestic or international, the rules of French law on the recognition of foreign arbitral awards applied uniformly.[12] The court thus confirmed that French courts will consider recognizing and enforcing foreign arbitral awards that have been annulled at the seat

Goldman"), 95-97; Lazić, V. (1998) *Insolvency Proceedings and Commercial Arbitration*. Kluwer Law International / T.M.C. Asser Instituut ("Lazić (1998)"), pp. 76, 80.

9. Gaillard, E. *Dialogue des ordres juridiques: ordre juridique arbitral et ordres juridiques étatiques* (2018) Revue de l'Arbitrage, p. 493. *See Société Ryanair et autre v. Syndicat mixte des aéroports de Charente (SMAC)*, July 8, 2015, Civ. 1, Cour de Cassation, Case No. 13-25.846 mentioning an "*ordre arbitral international.*" *See also Société PT Putrabali Adyamulia v. SA Rena Holding*, June 29, 2007, Case 1, Cour de Cassation, Case No. 05-18.053: "The international award, which is not attached to any state legal order, is a decision of international justice whose validity is only examined in light of the rules applicable in the country where its recognition and enforcement are requested" (translation) confirmed in *Société Ryanair et autre v. Syndicat mixte des aéroports de Charente (SMAC)*, July 8, 2015, Civ. 1, Cour de Cassation, Case No. 13-25.846. *See also Hilmarton v. OTV*, March 23, 1994, Civ. 1, Cour de Cassation, Case No. 92-15.137: "The award rendered in Switzerland was an international award that was not integrated into the legal order of this State, in the sense that it continued to exist even despite its annulment and its recognition in France was not contrary to international public policy […]" (translation). *See also Norsolor v. Pabalk*, October 9, 1984, Civ. 1, Cour de Cassation, Case No. 83-11.355; *Polish Ocean Line v. Jolasry*, March 10, 1993, Cour de Cassation, Case No. 91-16.041.
10. *Société PT Putrabali Adyamulia v. SA Rena Holding*, June 29, 2007, Case 1, Cour de Cassation, Case No. 05-18.053.
11. *EGPC v. NATGAS*, May 21, 2019, Pôle 01 ch. 01, Cour d'Appel de Paris, Case No. 17/19850. *See also*, previously, *EGPC v. NATGAS*, November 24, 2011, Pôle 01 ch. 01, Cour d'Appel de Paris, Case No. 10/16525.
12. *EGPC v. NATGAS*, May 21, 2019, Pôle 01 ch. 01, Cour d'Appel de Paris, Case No. 17/19850: "[T]he provisions of Article 1498 and the following articles, which have now become Article 1514 and the following articles, on the recognition and enforcement of arbitral awards, are

of arbitration (whether domestic or international) and that, under French law, even foreign domestic arbitral awards are seen as unattached to the legal order from which they originated.

Canadian courts have also adopted a delocalized understanding of international arbitration. In *Dell Computer Corp*, the Supreme Court of Canada held that:

> Arbitration is an institution without a forum and without a geographic basis. Arbitration is part of no state's judicial system. The arbitrator has no allegiance or connection to any single country. In short, arbitration is a creature that owes its existence to the will of the parties alone.[13]

In contrast, courts in other jurisdictions still consider that a connection exists with the national jurisdiction in which the arbitration is seated and that the law of the seat plays a role in the proceedings. For example, English courts have found that:

> English law does not recognize the concept of a delocalized arbitration […]. Accordingly, every arbitration process must have a seat or *locus arbitri* or forum which subjects its procedural rules to the municipal law which is there in force.[14]

And, even more stridently:

> Despite suggestions to the contrary by some learned writers under other systems, [English] jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.[15]

The Singapore Court of Appeal has also rejected a delocalized view of international arbitration, holding that:

> The significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in the state or territory. It identifies a state or territory whose laws will govern the arbitral process.[16]

In some instances, the U.S. courts' position has appeared receptive to a sort of "delocalized" view of international arbitration. Thus, in a 1996 decision, the U.S. District Court for the District of Columbia found that an award was valid as a matter of U.S. law, even though the award had been set aside at the seat.[17] While only a few years later, other U.S. courts had taken a different approach and refused to enforce arbitral

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applicable to both international arbitral awards and foreign domestic arbitral awards, irrespective of whether the latter are considered as internal or international" (translation). *See also*, previously, *EGPC v. NATGAS*, November 24, 2011, Pôle 01 ch. 01, Cour d'Appel de Paris, Case No. 10/16525.

13. *Dell Computer Corp v. Union des consommateurs*, [2007] 2 SCR 801, at ¶ 51.
14. *Naviera Amazonica Peruano S.A. v. Compania Internacional de Seguros de Peru* [1988] 1 Lloyd's Rep 116.
15. *Bank Mellat v. HellinkiTechniki SA*, [1984] 1 QB 291, at p. 301. *See also SA Coppée-Lavalin NV v. Ken-Ren Chemicals and Fertilizers Ltd.*, [1995] 1 AC 38, at p. 52.
16. *PT Garuda Indonesia v. Birgen Air*, [2002] 1 SLR(R) 401 at ¶ 24.
17. *Matter of Chromalloy Aeroservices (Arab Republic)*, U.S. District Court for the District of Columbia, 939 F.Supp. 907 (1996).

awards set aside at the seat,[18] in 2016, in *COMMISA v. Pemex*, the U.S. Court of Appeals for the Second Circuit confirmed this position by recognizing an arbitral award that had been set aside by a court in Mexico, where the arbitration was seated.[19] This decision is the second in which a U.S. court recognized an arbitral award that had been annulled in the seat of arbitration.

The concept of delocalized arbitration is an ideal way to efficiently guarantee neutrality of forum, limit interference from national courts in the proceedings, eliminate national conflict of law problems and enable parties to create procedural rules that best fit their interests and the specific aspects of the dispute at hand. Indeed, it is difficult to see any reason why an international arbitral tribunal should be attached to the law of the seat, especially in light of the fact that "[p]arties frequently choose a seat of arbitration in a country where neither party's business interests are located" for convenience.[20]

Parties appear to have recognized the value of a delocalized approach to international arbitration. Notably, according to the 2020 ICC Dispute Resolution Statistics, France has remained one of the top four countries frequently selected for ICC arbitrations in the past several years.[21] Significantly, the ICC Rules, which do not contain a reference to the law of the seat as applicable to the arbitration,[22] are by far the most popular choice for arbitrating commercial disputes globally.[23] ICC tribunals have recognized the principle of delocalized arbitration,[24] including in an insolvency context. For example, an arbitral tribunal in a 2001 interim award rendered in ICC Case No. 10973 held that the ICC Rules "authorize[] […] the parties and the arbitrators to conduct the arbitral proceedings outside any specific national procedural law."[25]

18. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd*, U.S. Court of Appeals for the Second Circuit, 191 F.3d 194 (2d Cir. 1999) and *Spier v. Calzaturificio Tecnica, S.p.A.*, U.S. District Court for the Southern District of New York, 71 F. Supp. 2d 279 (S.D.N.Y. 1999), *Termorío S.A. E.S.P. v. Electranta S.P.*, U.S. District Court for the District of Columbia, 487 F.3d 928 (D.C. Cir. 2007). *See also*: Mantilla-Serrano, F. *Case Note: Termorío S.A. E.S.P. et al. v. Electranta S.P.* (2008) 25 J. Int. Arb. 3, pp. 397-405.
19. *Corporación Mexicana de Mantenimiento Integral, S De RL De CV v. Pemex-Exploración y Producción*, U.S. Court of Appeals for the Second Circuit, 832 F.3d 92 (2d Cir. 2016).
20. Moses, M.L. (2008) *The Principles and Practice of International Commercial Arbitration*. Cambridge: Cambridge University Press, p. 56.
21. ICC Dispute Resolution Statistics (2020), p. 16.
22. Such a reference was contained in Article 16 of the 1955 ICC Rules, which provided: "The rules by which the arbitration proceedings shall be governed shall be these Rules and, in the event of no provision being made in these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings."
23. *See* Queen Mary University of London, White & Case, 2021 International Arbitration Survey: Adapting arbitration to a changing world (2021), p. 9.
24. *See, e.g.*, ICC Case No. 6379, ¶ 21; ICC Case No. 11333, Interim Award of 2002, in van den Berg, A.J. (Ed.) (2006) *Yearbook Commercial Arbitration* 31, pp. 117-126 ("ICC Case No. 11333"), ¶ 6; ICC Case No. 13774, Partial Award of 2006, in van den Berg, A.J. (Ed.) (2014) *Yearbook Commercial Arbitration* 39, pp. 141-158, ¶ 29.
25. ICC Case No. 10973, Interim Award of 2001, in van den Berg, A.J. (Ed.) (2005) *Yearbook Commercial Arbitration* 30, pp. 77-84 ("ICC Case No. 10973"), ¶ 9. However, the tribunal also opined that "any mandatory provision" of the law of the seat still applies. *See also* ICC Case No. 5996, Final Award of 1991 in Jolivet. E. (2006) *Chronique de jurisprudence arbitrale de la Chambre de commerce international (CCI): Quelques exemples de traitement du droit des*

Indeed, because international arbitral tribunals are not attached to any specific local legal system, arbitrators must resolve disputes submitted to them in accordance with the terms of the arbitration agreement (which may include a choice of law by the parties) and the relevant contract. The only additional limit imposed on a tribunal is international public policy. However, while an international arbitral tribunal may only be bound to apply the law chosen by the parties and international public policy, it does have good reason to pay heed to the mandatory rules of the seat as well as the place of enforcement.

B Arbitral Tribunals' "Duty" to Render an Enforceable Award

An international arbitral tribunal's primary task is to resolve the dispute the parties have entrusted to it. Part of this task is to render an award that the parties may enforce—usually, this means rendering an award that will, ideally, not be set aside by the courts of the seat, and that will ultimately be enforceable in those courts and elsewhere. Considering that insolvency is one of the pillars of any national economic order, national insolvency laws are replete with mandatory rules and invoke national public policy principles.

Under Article 34(2)(b)(ii) of the 1985 UNCITRAL Model Law on International Commercial Arbitration, the violation of the public policy of the seat of the arbitration is a ground for setting aside an arbitral award.[26] Similarly, under Article V(2)(b) of the New York Convention, recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement are sought finds that recognition or enforcement of the award would be contrary to the public policy of that country.[27] However, not all national public policy principles form part of international public policy.[28] Nevertheless, an international arbitral tribunal (which, in principle, is only bound by international public policy) should consider national public policy, or at least try not to render awards that are incompatible with it.

While an international arbitral tribunal may not be tethered to a particular national jurisdiction, the courts of a national jurisdiction may ultimately have to recognize and enforce the arbitral award (and, potentially, set it aside). For example, the enforcement of an arbitral award in a jurisdiction where the debtor is insolvent may

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procédures collectives dans l'arbitrage in Cahiers de l'arbitrage, Gazette du Palais No. 347-348 ("Jolivet"), p. 3762; ICC Case No. 5996, Final Award of 1997 in Jolivet, p. 3770.

26. 1985 UNCITRAL Model Law on Commercial Arbitration, Article 34(2)(b)(ii): "An arbitral award may be set aside by the court specified in Article 6 only if […] the court finds that […] the award is in conflict with the public policy of this State."

27. 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), Article V(2)(b): "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: […] The recognition or enforcement of the award would be contrary to the public policy of that country."

28. *See* International Law Association, Committee on International Commercial Arbitration (2000) *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, p. 6; International Law Association, Committee on International Commercial Arbitration (2002) *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, ¶ 11.

be subject to specific procedural rules for creditor claims based on an arbitral award.[29] Arguably, irrespective of which law the tribunal is bound to apply, the tribunal is, in any event, also bound to ensure that its award is compatible with the public policy of the seat and the likely place of enforcement, in order to guarantee the award's enforceability.[30]

An arbitral tribunal's "duty" to render an enforceable award is included in many arbitration rules. For example, the ICC Rules provide that an arbitral tribunal shall make "every effort to make sure that the award is enforceable at law";[31] the Stockholm Chamber of Commerce (SCC) Rules refer to a duty to make "every reasonable effort to ensure that any award is legally enforceable";[32] the London Court of International Arbitration (LCIA) Rules provide that a tribunal must make "every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat";[33] and the Singapore International Arbitration Centre (SIAC) Rules oblige a tribunal to make "every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of any Award."[34]

International arbitral tribunals have also recognized the duty to render an enforceable award when deciding disputes that involve parallel insolvency proceedings. The tribunal in ICC Case No. 6697 (in its award rendered in 1990) considered the eventual enforceability of the award in the country in which the award was likely to be enforced when assessing whether to recognize a foreign insolvency proceeding. The tribunal held:

> Arbitrators must not render an award that would violate the fundamental principles considered by the enforcement judge as international public policy, otherwise there is a risk that their award may be deprived of recognition or enforcement. The Arbitral Tribunal is therefore required under Article [42] of the ICC Rules to consider whether an award granting [the Claimant's] claim would be inconsistent with the 'stay of proceedings' rule which is one of the fundamental principles of insolvency law, widely recognized to be 'both national and international.[35]

While this award referred to international public policy (which an international arbitral tribunal is, in any event, bound to abide by), other tribunals have referred to national public policy and mandatory rules. For example, in an unpublished 2014 ICC award[36], the insolvent European Union (EU) respondent argued before a Swiss-seated tribunal that because the law of the state where the insolvency proceedings had been

29. For a comparative overview of such rules in major jurisdictions, *see* Vorburger, S. (2014). *International Arbitration and Cross-Border Insolvency: Comparative Perspectives*. Kluwer Law International ("Vorburger (2014)"), ¶¶ 689-720.
30. Fouchard, P. (1998) *Arbitrage et faillite*. Revue de l'Arbitrage, p. 471 ("Fouchard (1998)"), ¶¶ 20-22.
31. ICC Arbitration Rules, Article 42.
32. SCC Arbitration Rules, Article 2(2).
33. LCIA Arbitration Rules, Article 32(2).
34. SIAC Arbitration Rules, Rule 41(2).
35. ICC Case No. 6697, Award of December 26, 1990, in (1992) Revue de l'Arbitrage, p. 135 ("ICC Case No. 6697"), p. 142.
36. ICC Reference No. ICC-FA-2020-254.

commenced provided that the dispute was not arbitrable, the resulting award would breach that state's public policy, and would therefore be unenforceable in the EU. The respondent referred to Article V of the New York Convention and Article 42 of the 2012 ICC Rules.

In contrast, under Article 177 of the Swiss Private International Law Act (PILA), any dispute that relates to an "economic interest" may be the subject matter of an arbitration, including insolvency. The tribunal declined to apply the national law of the jurisdiction in which the insolvency proceedings had been brought, on the grounds that the dispute was arbitrable under the PILA. The tribunal nevertheless observed that "an international arbitral tribunal does not operate in a fictional world where national policies and public interest are neutralized and may be ignored." The tribunal referred to the practice of the Swiss Federal Supreme Court, which recognizes that public policy considerations may justify the application of the law of a different jurisdiction instead of the PILA. The tribunal noted that an arbitral tribunal's duty to render an enforceable award may also lead to a similar conclusion.

The sole arbitrator in an unpublished 2013 ICC case[37] involving parallel insolvency proceedings took a more drastic approach, holding that the arbitral proceedings should be terminated if the arbitration would result in an "inefficient award" in the country of the insolvency proceedings where enforcement was envisaged.

In practice, defining what constitutes an enforceable award is a daunting task. Demanding that arbitral tribunals render universally enforceable awards would be neither practicable nor possible because "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."[38] In fact, the language used in the various arbitration rules denotes, at most, a "best efforts" obligation or an obligation of conduct, not an obligation of result.[39] A tribunal cannot be expected to be aware of all potential places in which enforcement may occur, as now more than ever, parties may have a presence or relevant assets in a large number of jurisdictions and readily and easily move those assets. Tribunals are circumscribed by the arguments the parties present, and are required to decide the dispute based on the law and facts argued before them, not the law and public policy rules of all possible enforcement jurisdictions (which can be wide-ranging).

Tribunals should not be responsible for examining possible enforcement jurisdictions *sua sponte*, rather only if the parties have made arguments in this regard, thus fulfilling the tribunal's duty to allow both parties to express their views. The tribunal

37. ICC Reference No. ICC-FA-2020-256.
38. Mantilla-Serrano, F. (1995). *International Arbitration and Insolvency Proceedings*. Arbitration International 11(1) ("Mantilla-Serrano (1995)"), p. 74.
39. *See, e.g.*, Vorburger (2014), ¶¶ 176, 180; Derains, Y. & Schwartz, E. (2005). *A Guide to the ICC Rules of Arbitration* (2nd ed.). The Netherlands: Kluwer Law International ("Derains & Schwartz (2005)"), p. 385; Poudret, J.F. & Besson, S. (2007). *Comparative Law of International Arbitration* (2nd ed.). London, United Kingdom: Sweet & Maxwell, ¶ 147.

took this approach in ICC Case 10507,[40] in which a Dutch claimant commenced an arbitration against an Italian respondent who had been declared bankrupt in Italy. The respondent counterclaimed. The tribunal recalled its duty to "make every effort to make sure that the Award is enforceable at law" in accordance with the ICC Rules, and noted that both parties would only wish to seek enforcement of the award in the Netherlands. Accordingly, the tribunal did not have to ensure that the award would be enforceable in Italy.

Importantly, a party may not need to initiate enforcement proceedings to obtain the benefit of the award: rather, it may use the award as proof of debt as a creditor in insolvency proceedings, present it to its insurer in order to obtain compensation under a relevant policy or prove to its auditors that the arbitration has come to an end in order to write the claim off its balance sheet.[41]

C No Universal Conflict of Law Rules Applicable to Insolvency and Arbitration

If one is to assume that international arbitrators have no forum and are not bound to apply the national rules of the seat, "[i]t follows from this premise that arbitrators are not bound by the conflict of laws rules of a forum to choose the law applicable to the substance of the dispute."[42] Should the tribunal nevertheless consider any conflict of law rules?

At present, no universal international law rules or principles explicitly regulate which law an international arbitral tribunal should apply to the recognition of parallel insolvency proceedings or to the determination of the effect of such proceedings on the arbitration. The closest thing to an international—albeit regional—conflict of laws regime as regards insolvency may be found in the EU legal framework.

EC Regulation 1346/2000 ("Insolvency Regulation") was the first EU-wide instrument that established conflict of law rules for insolvency proceedings concerning EU debtors with operations in more than one EU Member State. The objective of the Insolvency Regulation was thus not to harmonize insolvency laws across different EU Member States, but rather to create a common framework for the commencement of insolvency proceedings and for the automatic recognition and cooperation between EU Member States in insolvency matters.

Article 4 provided that, in general, insolvency proceedings and their effects are governed by the law of the EU Member State where the insolvency proceedings are commenced.[43] Article 15 of the Insolvency Regulation contained an exception to this general rule, and provided that the effects of insolvency proceedings on a "lawsuit

40. ICC Case No. 10507, Interim Award in (2009) ICC Bulletin 20(1), p. 71 ("ICC Case No. 10507"), at ¶ 9.2.
41. Mantilla-Serrano (1995), footnote 12.
42. ICC Case No. 11333, ¶ 6.
43. EC Regulation 1346/2000, Article 4(1): "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the 'State of the opening of proceedings.'"

pending" concerning an asset or a right that is the subject of insolvency "shall be governed solely by the law of the EU Member State in which that lawsuit is pending."[44] Given that the Insolvency Regulation did not explicitly refer to arbitration, its applicability was often debated by parties to international arbitrations and before national courts.[45] Several arbitral tribunals interpreted the term "lawsuit pending" in Article 15 of the Insolvency Regulation to include pending arbitral proceedings.[46] Other arbitral tribunals applied the Insolvency Regulation, but relied on Article 4, not Article 15, to determine the applicable law.[47] Interestingly, one tribunal seems to have preferred Article 4 because the law applicable on that basis was more favorable to the arbitral proceedings.[48]

44. EC Regulation 1346/2000, Article 15: "The effects of insolvency proceedings on a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending."
45. *See* Vorburger (2014), ¶ 396.
46. *See, e.g.*, ICC Case No. 12421, Final Award of 2005 in (2013) Arnaldez, J.J., Derains, Y. & Hascher, D. *Collection of ICC Arbitral Awards 2008-2011*. Wolters Kluwer Law & Business / International Chamber of Commerce, p. 79 (Barbadian and Italian parties, tribunal seated in the UK. The tribunal found that it was possible to regard the arbitration proceedings as a "lawsuit" within the meaning of the Regulation); VIAC Case No. SCH-5130, Final Award of 2011 in Vienna International Arbitral Centre of the Austrian Federal Economic Chamber (2015). *Selected Arbitral Awards* 1, pp. 207-210 (German and Ukrainian parties, insolvency initiated in Germany, tribunal seated in Austria. Tribunal found that the Regulation applied); ICC Case No. 10507 (Italian and Dutch Parties. Tribunal seated in Geneva, but referred to Regulation 1346 when concluding that Swiss law was applicable to the effects of a foreign insolvency on an arbitration seated in Geneva); two unpublished ICC awards from 2011, one by a tribunal seated in France (ICC Reference No. ICC-FA-2020-258), one by a tribunal seated in Austria (ICC Reference No. ICC-PA-2020-257).
47. *See, e.g.*, ICC Case No. 12553, Partial Award in (2013) Journal du droit international (Clunet) 1 Chron. 1; unpublished 2010 ICC award (ICC Reference No. ICC-FA-2020-260); unpublished 2011 ICC award (ICC Reference No. ICC-FA-2020-259).
48. In the unpublished 2010 ICC award mentioned in the preceding footnote, both parties were EU nationals and the tribunal was seated in France; French law applied to the contract. Insolvency proceedings had begun against the respondent in its country of origin. The tribunal found that the Insolvency Regulation applied by virtue of Article 4. By applying the law of the state where the insolvency proceedings took place, the tribunal noted that it would not be faced with the French law restriction on the scope of the arbitral award and would therefore be able to award payment. In another unpublished 2011 ICC case mentioned in the preceding footnote, both parties were EU nationals and the tribunal was seated in Poland where, at the time, any arbitration parallel to insolvency proceedings had to be terminated. Insolvency proceedings were commenced against the claimant in its state of origin (not Poland). The respondent argued that the arbitration should be terminated in line with the law of the seat in accordance with Article 15 of the Insolvency Regulation. While the tribunal did consider that Article 15 applied to international arbitrations, it also referred to Recital 24 of the Insolvency Regulation which referred to the protection of legitimate expectations and the certainty of transactions. The tribunal considered that this was the objective of Article 15, and that in the present case, applying the law of the seat of arbitration would run contrary to the protection of such legitimate expectations. The tribunal therefore held that the arbitration agreement was governed by Article 4 of the Insolvency Regulation, and the law of the state where insolvency proceedings had been opened should apply. The tribunal thus avoided the application of Polish law, which would have required termination of the proceedings (the tribunal nevertheless noted that this Polish law requirement was not a mandatory rule in relation to non-Polish insolvency proceedings).

The Insolvency Regulation provided for a review of its operation after 10 years, and in December 2012, the European Commission proposed updates to the Regulation.[49] On May 20, 2015, the European Parliament approved Regulation (EU) No. 2015/848 ("Recast Insolvency Regulation"), which entered into force on June 26, 2015, and applies to insolvency proceedings commenced on or after June 26, 2017.

The Recast Insolvency Regulation now explicitly refers to international arbitration, specifically instances in which an arbitral tribunal is seated within the EU, and parallel insolvency proceedings have been commenced in another EU Member State.[50] Article 18 provides that the effects of insolvency proceedings on pending arbitral proceedings concerning an asset or a right that forms part of a debtor's insolvency estate are governed by the law of the EU Member State where the arbitral tribunal is seated.[51]

One cannot conclude, however, that the Recast Insolvency Regulation is addressed to and binding on EU-seated arbitral tribunals.

Article 18 of the Recast Insolvency Regulation is essentially a conflict of laws rule that designates the seat of an arbitral tribunal as the connecting factor that leads to the application of the law of a specific EU Member State. As previously discussed, unlike national courts, international arbitral tribunals do not have a *lex fori* and are not attached to any national jurisdiction, be it in the EU or otherwise. International tribunals are bound only by the parties' agreement and international public policy. Accordingly, an international arbitral tribunal cannot be obliged to apply the Recast Insolvency Regulation merely on the grounds that the tribunal's seat is in an EU Member State.

Nor will an international arbitral tribunal be bound to apply the Recast Insolvency Regulation by virtue of the fact that the parties have chosen the law of an EU Member State as the law applicable to the contract and/or the merits of the dispute. A well-established principle of international arbitration law is that a reference to a law applicable to the merits of a dispute does not include the application of conflicts of law provisions in the applicable law.[52] This principle applies equally to EU regulations as it does to the national laws of a state. The conflict of laws provision enshrined in Article 18 therefore cannot bind an international arbitral tribunal. From the perspective of international arbitration, the Recast Insolvency Regulation is not addressed to international arbitral tribunals but rather to national EU Member State judges who may face an arbitral award that touches upon issues of an EU-based insolvency.

49. EC Regulation 1346/2000, Article 46.
50. Note that the United Kingdom is now considered a third state in newly initiated EU insolvency proceedings. *See* European Commission, *Notice to Stakeholders: Withdrawal of the United Kingdom and EU Rules in the Field of Civil Justice and Private International Law*, August 27, 2020, p. 11.
51. Regulation (EU) 2015/848, Article 18: "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat."
52. *See* Mayer, P. (1998) *Droit international privé*. Paris: Montchrestien, ¶ 706; Fouchard Gaillard Goldman, ¶ 1429.

However, while arbitral tribunals are not bound by the conflict of laws rules in the Recast Insolvency Regulation, arbitrators would be ill-advised to dismiss them without careful analysis of the possible repercussions of its non-application. As discussed, arbitral tribunals should strive to ensure that their awards will be enforced and not be set aside (notably on the basis of public policy). An arbitral tribunal's approach to the Recast Insolvency Regulation may, in certain circumstances, either strengthen or weaken the position of its award vis-à-vis national EU judges in matters of enforcement and set-aside proceedings.

As a general matter, despite some harmonization of the approach to insolvency in EU Member States,[53] the insolvency legislation of each EU Member State remains different, with no guaranteed uniformity in the EU Member States' approach to arbitration and insolvency. Thus, the application of one EU Member State's law instead of another (whether on the basis of Article 18 of the Recast Insolvency Regulation or not) may lead to conflicting results. Such a situation may arise if the law of the seat and the law of the state of insolvency proceedings differ substantially (e.g., one deprives the debtor of legal capacity while the other does not; or one invalidates the arbitral agreement while the other does not).[54]

On the one hand, an arbitral tribunal's choice to follow the conflict of laws rule in Article 18 may be a safe option in terms of ensuring the enforceability of the award. The Recast Insolvency Regulation has been adopted under the umbrella of judicial cooperation in civil matters, which is enshrined in Article 81 of the Treaty on the Functioning of the European Union.[55] Accordingly, one may posit that even if the conflict of laws rule in Article 18 of the Recast Insolvency Regulation leads to the application of an EU Member State's law that is diametrically opposed to the law of the EU State where enforcement is being sought, the enforcement judge will nevertheless recognize and enforce the award; as indeed, the EU Member State judge is bound by the Recast Insolvency Regulation. However, the enforcement judge may refuse recognition and enforcement in order to protect the enforcing state's legal order if such recognition and enforcement would go against the international public policy of that state.

On the other hand, the mere fact that an arbitral tribunal has refused to follow the Recast Insolvency Regulation and not apply the law identified by Article 18 does not

53. *See, e.g.*, Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.
54. In principle, the primacy of EU law should guarantee that the Recast Insolvency Regulation would trump any conflicting national law. Nevertheless, the national judge enforcing such an award may consider that the application of the Recast Insolvency Regulation in the specific arbitral award conflicts with a national law or public policy to such an extent that it would warrant a refusal to apply EU law, or a referral of the issue for a preliminary ruling. Notably, while the Recast Insolvency Regulation points to the application of a certain national law in the context of insolvency and arbitration, it says nothing of the resulting award or its recognition and enforcement.
55. Recast Insolvency Regulation, Preamble and Recital 3.

automatically entail the set-aside and nonenforcement of the arbitral award.[56] While an EU Member State judge may be tempted to set aside or refuse the recognition and enforcement of an award that does not apply the law indicated by the conflict of laws rule in the Recast Insolvency Regulation, the judge will only do so if the law applied in contravention to Article 18 results in an award that conflicts with the public policy of the state of the seat or enforcement.

In terms of ensuring the enforceability of an award, the safer approach to the Recast Insolvency Regulation is difficult to predict. As yet, no decisions on the application of the Recast Insolvency Regulation have become publicly available, so there are no examples of how arbitral tribunals have ruled on its applicability.

Nevertheless, tribunals evidently must keep in mind that the EU Member State judge deciding on set-aside and enforcement will examine the award through the prism of the Recast Insolvency Regulation. For example, in a 2019 judgment, the Commercial Court of Santander (Spain) was seized pursuant to then Article 53(1) of the Spanish Insolvency Law with a request by an insolvent Spanish company to suspend the effects of a clause providing for international arbitration in London and had to determine whether Spanish law would apply[57]. The Commercial Court applied Article 18 of the Recast Insolvency Regulation, as well as its Article 7 (which succeeded to Article 4 of the Insolvency Regulation) and considered that, since no request for arbitration had been filed by either party, no arbitral proceeding was pending, and that Spanish law (*lex concursus*) thus applied to determine the effects of the insolvency on the arbitration agreement.[58] Tribunals must carefully analyze all facts and applicable laws in any given case as a thorough and detailed analysis of all eventualities will only strengthen the arbitral award in the eyes of the EU Member State judges who are ultimately tasked with enforcing it.

II PARALLEL INSOLVENCY PROCEEDINGS IN PRACTICE

As discussed above, parallel insolvency proceedings may substantially complicate the tribunal's task. While an arbitral tribunal is only obliged to apply the law that the parties choose and to abide by international public policy, some jurisdictions do not distinguish between national and international public policy. In these jurisdictions, violating mandatory local rules of the law of the seat may be grounds for setting aside the arbitral award[59] or refusing enforcement of the award.[60]

56. Note that Recital 73 of the Recast Insolvency Regulation provides that the rule contained in Article 18 "should not affect national rules on recognition and enforcement of arbitral awards." This presumably also includes the New York Convention, to which the EU Member States are party.
57. *Application of Delfuego Booking S.L.*, Judgment of September 30, 2019, Juzgado de lo Mercantil No. 1 de Santander, Case No, 427/2018, Judgment No. 266/2019.
58. *Ibid.*, ¶¶ 12-23.
59. *See* 1985 UNCITRAL Model Law on International Commercial Arbitration, Article 34(2)(b)(ii).
60. New York Convention, Article V(2)(b).

In many respects, arbitrating disputes that are affected by parallel insolvency proceedings is like arbitrating under the sword of Damocles—with many potentially dangerous pitfalls and almost no formal guidance for an arbitral tribunal to follow.

The following sections review which insolvency law principles have been found to constitute public policy (whether international or national), and the different types of situations in which the tribunal should take special care to consider the effects of a parallel insolvency proceeding on the arbitral proceedings.

A Public Policy and Mandatory Rules in the Context of Insolvency

International or transnational public policy can be described as a body of principles and rules recognized by the international community. A violation of international public policy on account of either the procedure pursuant to which the award was rendered or the award's contents may bar the recognition or enforcement of an arbitral award.[61] National public policy or mandatory norms will not always amount to international public policy.[62] International arbitral tribunals have the difficult task of identifying these principles. At the same time, they may also have to give due regard to national public policy and mandatory norms of the seat and other jurisdictions in order to ensure the enforceability of the award.

Insolvency proceedings are based on the protection of public interests and involve the intervention of the state in matters that, at their core, arise out of private law relationships. Inevitably, parallel insolvency proceedings may severely heighten the risk of set-aside or nonrecognition of an award since most insolvency laws are mandatory at the national level. There is no universally accepted list of which insolvency law principles have achieved the status of international public policy, and arbitral tribunals must thus make a case-by-case examination.

Although insolvency laws are by no means identical across all jurisdictions, certain principles are universal. Generally, insolvency entails the centralization of all claims under the supervision of a single bankruptcy court, and a limitation of the insolvent party's power to manage and dispose of its assets and assert its rights, which vest with a trustee appointed by the bankruptcy court to prevent further economic harm. The insolvency proceedings are designed to adjudicate in a collective and orderly manner the claims of competing categories of creditors against the insolvent debtor, and to distribute the proceeds of the insolvent estate in accordance with the principle of equality of creditors, or *pari passu*. This principle is one of the most

61. Mayer, P., Sheppard, A., *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (2003) Arbitration International 19(2), Recommendations 1(c) and 2(b).

62. *See, e.g., Tampico Beverages Inc. v. Productos Naturales de la Sabans S.Z. Alqueria*, SC9909-2017, Case No. 11001-02-03-000-2014-01927-00. During the enforcement proceedings of an ICC award that had been challenged for violating public policy on the basis of an arbitrator's conflict of interest, the Supreme Court of Colombia acknowledged that this might violate Colombia's national, but not international public policy, and that the Supreme Court should turn to international authorities to make a determination. The Supreme Court referred to the 2014 IBA Guidelines on Conflicts of Interest to conclude that international public policy would be violated.

fundamental principles of insolvency laws around the world. An ICC arbitral tribunal went so far as calling it "a principle of equity which, for this reason, is universally known in insolvency law."[63] Under the principle of *pari passu*, creditors of the same category must be treated in the same manner with respect to their rights to the assets of the insolvent estate.

Certain insolvency law principles are so fundamental to insolvency proceedings that they may be considered to form part of international public policy. Such principles include:

- the validity, applicability and effectiveness of the arbitration agreement (notwithstanding the existence of insolvency proceedings);
- the need to bring under a single authority the control and preservation of the assets of the debtor in order to permit the insolvent party's rehabilitation or liquidation while respecting the rights of both unsecured and secured creditors;
- the principle of equal treatment of creditors belonging to the same class; and
- the need to properly notify the institution or individuals in charge of representing the insolvent party, and to grant sufficient opportunity to these individuals or institutions to appear and defend the interests of the insolvent party in the arbitration.[64]

As previously discussed, in addition to international public policy, arbitral tribunals should likewise be conscious of the pronouncements of national courts. From the perspective of national courts called upon to rule on set-aside or enforcement applications, no uniform approach has emerged as to which insolvency law principles form part of international public policy. For example, French courts have consistently held that insolvency law forms part of international public policy, in particular the principle of suspension of proceedings, the need to file a claim with the trustee and the principle of equality of creditors.[65] U.S. courts have also held that the "equitable and orderly distribution of local assets" that "requires assembling all claims against the limited assets in a single proceeding" is part of public policy in the U.S.[66] Conversely,

63. ICC Case No. 6697, p. 144: "Additionally, the arbitral tribunal considers that the principle of equality of non-privileged creditors is a principle of equity that […] is universally known in insolvency law."
64. French courts have recognized many of these principles as part of international public policy. *See* Seraglini, C., Ortscheidt, J. (2019) *Droit de l'arbitrage interne et international* (2nd ed.). LGDJ: Issy-les-Moulineaux, ¶ 665. *See also* ICC Case No. 7289, Final Award of 1998 in Jolivet, p. 3767 where the tribunal considered that the equality of creditors and the need to preserve the assets of the debtor are fundamental principles that underpin insolvency proceedings.
65. *See Société Thinet v. Labrely ès-qualites*, March 8, 1988, Civ. 1, Cour de Cassation, Case No. 86-12015; *Société SARET v. SBBM*, February 4, 1992, Civ. 1, Cour de Cassation, Case No. 90-12569; *SAS IPSA Holding v. SCP Brouard Daude*, May 14, 2019, Cour d'Appel de Paris, Case No. 17/09133.
66. *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709 (2d Cir. 1987), p. 714.

in Germany, a breach of the principle that a claim must be filed with the trustee does not violate international public policy.[67]

B Navigating Treacherous Waters

A tribunal faced with an arbitration in which one or both of the parties have been declared insolvent needs to be especially vigilant in order to maximize the enforceability of the award. An arbitral tribunal may face a range of complex issues, some of which are explored below.

1 Legal Capacity and Representation of the Insolvent Party

The legal status and capacity of a company are determined by the law of the country of incorporation, which, in the vast majority of cases, is also the place of the insolvency proceedings.

The extent to which the commencement of insolvency proceedings against a party affects that party's capacity varies around the world, and according to each specific procedure under national laws. Most insolvency laws—such as Chapter 11 of the U.S. Bankruptcy Code relating to reorganization proceedings—uphold the debtor's capacity to a significant extent.

If the national law in question strips the insolvent party of legal capacity, that party may no longer be able to participate in the arbitral proceedings, and the tribunal may be compelled to dismiss the arbitration.[68]

In most cases, when an insolvent party loses the power to exercise its rights and obligations, and its capacity to participate as a party in arbitration proceedings, such power does not simply disappear—it vests *ex lege* with the trustee appointed to oversee the insolvency proceedings.[69] Accordingly, the arbitral tribunal should not discontinue the arbitration for want of a capable party, as the trustee can participate in the arbitration proceedings on behalf of the insolvent party and may intervene in the arbitral proceedings voluntarily. The participation of the trustee should cure any capacity/representation issues under most applicable laws.[70] If, after being duly called and served, the trustee does not participate, an award may still be rendered.

However, whichever principles the national jurisdiction has adopted in this regard, parties and arbitrators should always inform the trustee of the ongoing proceedings.[71]

67. Judgment of January 4, 2012, Higher Regional Court of Karlsruhe, Case No. 9 Sch 02/09. However, German courts consider that in a domestic arbitration, failing to file a claim with the trustee violates German national public policy. Judgment of January 29, 2009, Bundesgerichtshof, BGH III ZB 88/07.
68. Lazić (1998), pp. 36, 109-112; Vorburger (2014), ¶ 448.
69. Lazić (1998), pp. 109-112; Vorburger (2014), ¶ 488.
70. Vorburger (2014), ¶ 488.
71. *See* Mantilla-Serrano (1995), p. 62.

2 Validity of the Arbitration Agreement

The existence of parallel insolvency proceedings may affect the validity of the arbitration agreement from a domestic law perspective. The vast majority of laws, including French law, do not render an arbitration agreement void because of insolvency proceedings.[72] However, certain national insolvency laws do contain restrictive provisions.

For example, the former Polish Insolvency Law used to provide that "any arbitration clause concluded by the bankrupt party shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."[73] This provision was widely considered to affect the validity of an arbitration agreement involving a Polish insolvent party[74] and led to contradictory parallel decisions by the English Court of Appeal and the Swiss Supreme Federal Court.[75] Poland amended its insolvency laws in 2016, and such provisions are becoming increasingly rare. Nevertheless, there are exceptions—for example, under Article 5(1)(8) of the Latvian Law on Arbitration, arbitral tribunals may not resolve disputes "relating to the rights and duties of persons with respect to whom insolvency or bankruptcy proceedings have been initiated."

The Spanish Recast Insolvency Law also deserves a mention. Although Spanish law does not automatically invalidate an arbitration agreement upon insolvency, pursuant to Article 140(3) of the Spanish Recast Insolvency Law the competent court may "grant a suspension of the effects of" arbitration agreements if it is satisfied that such agreements "would bring prejudice to the insolvency proceeding." This provision used to be Article 52(1) of the Insolvency Law that was applied in the most recent case law[76] in a very liberal manner in a judgment by the Commercial Court of Santander, cited above.[77] The Commercial Court determined that enforcing the arbitration agreement "would bring prejudice to the insolvency proceeding" and granted the suspension, thereby authorizing the insolvent party to pursue its claims before Spanish courts.[78] According to the Commercial Court, the vagueness of the arbitration clause, which provided for a seat in London but no institution or applicable rules, would have

72. This is also the case under German, English and U.S. laws. *See Société Soules v. Société Henry*, February 4, 1986, Com., Cour de Cassation, Case No. 84-16565; *T.A.G. v. B.M.P.C. et al.*, February 12, 1985, Com., Cour de Cassation, Case No. 83-14282; *Courrèges Homme v. Fleurot-Charvet et Fils*, October 19, 1982, Cour d'appel de Grenoble, Rev. Arb. 1983, pp. 321 et seq. *See* Fouchard (1998), ¶ 35; Lazić (1998), p. 231; Mourre, A. (2007) Arbitrage et droit de la faillite: Réflexions sur l'office du juge et de l'arbitre in Affaki, G. (Ed.) (2014) *Cross-Border Insolvency and Conflict of Jurisdictions: A US-EU Experience*. Bruylant, Brussels, ¶ 9; Vorburger ¶ 309.
73. Previous Polish Insolvency Law, Article 142 (translation).
74. Vorburger (2014), ¶ 306; Aslanowicz, M. & Jasiewicz, J. (2011). Report on Poland. In Thevenin, N. *Baker & McKenzie international arbitration yearbook: 2010-2011*, p. 333; minority in *Vivendi SA and others v. Deutsche Telekom AG and others*, Case No. 4A_428/2008, Swiss Supreme Court, March 31, 2009.
75. *Elektrim SA v. Vivendi Holdings* 1 Corp [2009] 2 All ER (Comm) 213; *Vivendi SA and others v Deutsche Telekom AG and others*, Case N° 4A_428/2008, Swiss Supreme Court.
76. *IBA Toolkit on Insolvency and Arbitration*, Questionnaire, National Report of Spain, p. 5.
77. *Application of Delfuego Booking S.L.*, Judgment of September 30, 2019, Juzgado de lo Mercantil No. 1 de Santander, Case No. 427/2018, Judgment No. 266/2019.
78. *Ibid.*, ¶¶ 35, 37.

entailed more delay in resolving the dispute, particularly in the initiation phase of the arbitration, than judicial proceedings in the Spanish courts.[79] The insolvent party would have likewise incurred substantial costs it would not have been able to assume, aggravating its insolvency and diminishing the value of its only asset, jeopardizing its creditors' ability to recover their claims.[80]

3 Stay of Proceedings

The vast majority of national insolvency laws provide for a stay of all pending proceedings upon the opening of insolvency proceedings.[81] Under French law, for example, pending proceedings are automatically suspended upon the insolvency of one of the parties, but can automatically resume when the creditor files its claim with, and duly summons, the trustee.[82]

In France, the principle is part of both domestic and international public policy, as has been settled in case law.[83] An arbitral tribunal that does not abide by such principles, when faced with a French insolvent party, would have its award set aside or denied recognition in France.[84] Nevertheless, in most circumstances, Article L. 622-22 allows arbitral proceedings to continue, as long as the claim is filed with the insolvent estate and the trustee is properly summoned—conditions that are not burdensome. Arbitral tribunals, particularly French-seated tribunals, have applied these principles when faced with the insolvency of a French party.[85] Nevertheless, not all tribunals with

79. *Ibid.*, ¶ 36.
80. *Ibid.*, ¶¶ 36-37.
81. *See, e.g.*, Swiss Federal Law on Bankruptcy, Article 207; U.S. Bankruptcy Code, § 362(a); German Code of Civil Procedure, § 240; U.K. Insolvency Act 1986, section 285.
82. Article L. 622-22 of the French Commercial Code: "Save for the provisions of Article L. 625-3, any pending proceedings shall be stayed until the creditor initiating the proceedings has filed its submission of claim. Such proceedings shall then be resumed *ipso jure* for the sole purpose of verifying the claims and determining their amount after having duly summoned the court-appointed receiver and, as the case may be, the administrator or the plan performance supervisor appointed in compliance with Article L. 626-25. […]" (translation).
83. *See Société Thinet v. Labrely ès-qualites*, March 8, 1988, Civ. 1, Cour de Cassation, Case No. 86-12015; *Société SARET v. SBBM*, February 4, 1992, Civ. 1, Cour de Cassation, Case No. 90-12569; *SAS IPSA Holding v. SCP Brouard Daude*, May 14, 2019, Cour d'Appel de Paris, Case No. 17/09133.
84. IBA Toolkit on Insolvency and Arbitration (2021), National Report of France, pp. 7-8.
85. *See, e.g.*, ICC Case No. 10687, Final Award in (2010) ICC Bulletin 20(1) ("ICC Case No. 10687"), where the tribunal scrupulously applied Article 621-41 of the French Commercial Code (now Article L. 622-22) and the conditions set out therein: "It should first be determined whether the conditions for the resumption of the arbitration proceedings as set out above were fulfilled, namely the declaration by [the plaintiff] of his claim against [the defendant], and the joinder of the organs of the collective procedure to the proceedings" (translation). It found that such conditions were fulfilled since the claimant had effectively filed its claim with the French trustee who voluntarily intervened in the proceedings, although they were not summoned by the claimant. *See also* ICC Case No. 13845, Final Award in (2009) ICC Bulletin 20(1), where the appointed trustee decided to discontinue a contract with the claimant who filed its claim with the trustee and initiated arbitration. The tribunal applied French law, considering that for arbitration initiated after the commencement of insolvency proceedings, the arbitral tribunal's jurisdiction is dependent not only on the filing of the claim with the trustee but also on the end of the claim's admission procedure ("*procédure de vérification*").

seats outside France have applied these principles when invoked by an insolvent French respondent.[86]

The U.S. Bankruptcy Code provides for an automatic stay of proceedings when a debtor files for bankruptcy.[87] An automatic stay is meant to protect the debtor's estate by prohibiting new claims against it. This stay applies to arbitral tribunals seated in the U.S.,[88] but may also apply to arbitral tribunals seated outside the U.S. in proceedings involving U.S. parties (though the exact scope of this extraterritorial application is uncertain).[89]

Conversely, under Swiss law, most commentators consider the principle of suspension of proceedings as exclusive of arbitration, as the Swiss Supreme Federal Court decided in 2011 that the principle only binds national courts and authorities.[90]

Regardless of whether the law of the seat or the place of insolvency provides for a stay of pending arbitral proceedings, it may still be incumbent upon the arbitral tribunal to stay the proceedings at the tribunal's discretion to ensure procedural fairness, and in particular to ensure that the trustee be given sufficient time to prepare and to present its case.[91]

The arbitral tribunal must determine if and how long the arbitral proceedings should be suspended on a case-by-case basis, taking into consideration all relevant circumstances.

4 Scope of Award

The existence of parallel insolvency proceedings may limit the scope of the arbitral award or order that a tribunal may render. Accordingly, arbitral tribunals should consider carefully the parties' respective requests for relief.

Certain insolvency laws restrict the permissible scope of an arbitral award and the type of relief that an arbitral tribunal can grant against an insolvent party. French law in particular provides that an award against an insolvent party may only determine that a valid claim exists and quantify it, but may not order payment of the claim.[92] This

86. *See* Mantilla-Serrano (1995), p. 58, referring to ICC Cases No. 6057 and 5996.
87. U.S. Bankruptcy Code, § 362(a).
88. *In re U.S. Lines, Inc.*, 197 F.3d 631 (2d Cir. 1999); *In re Braniff Airways, Inc.*, 33 B.R. 33, Bankr. L. Rep. (CCH) P 69377 (Bankr. N.D. Tex. 1983).
89. *See In re Gucci*, 309 B.R. 679 (S.D.N.Y. 2004). *See also In re JSC BTA Bank*, 434 B.R. 334 (Bankr. S.D.N.Y. 2010); IBA Toolkit on Insolvency and Arbitration (2021), National Report of the United States, pp. 5-6.
90. Decision of the Swiss Federal Supreme Court of October 21, 2011, Case No. 2C_303/2010. *See*, Vorburger (2014), ¶¶ 568-569; Kaufmann-Kohler, G. & Lévy, L. (2006). Insolvency and International Arbitration, in: Peter, H., Jeandin, N. & Kilborn, J. (Eds.) *The Challenges of Insolvency Law Reform in the 21st Century*. Zurich, Switzerland: Schulthess, pp. 270-271; IBA Toolkit on Insolvency and Arbitration (2021), National Report of Switzerland, pp. 9-10.
91. *See* Nessi, S. (2018). Insolvency and Arbitration, in: Arroyo, M. (Ed.), *Arbitration in Switzerland: The Practitioner's Guide* (2nd ed.). The Netherlands: Kluwer Law International, ¶ 73; Vorburger (2014), ¶ 747; Lazić (1998), p. 317.
92. Article L. 622-22 of the French Commercial Code.

principle is considered part of French international public policy[93] and has been applied by arbitral tribunals.[94]

Generally, French courts will deny recognition of an award if the arbitral tribunal orders payment.[95] However, in 2019, the Paris Court of Appeal seems to have adopted a more nuanced approach. A Swiss arbitral tribunal had rendered an award ordering payment against a French respondent. Insolvency proceedings were initiated shortly thereafter in France. The claimant successfully obtained an exequatur from the *Tribunal de Grande Instance*. The insolvent respondent challenged the exequatur on the grounds that it contravened international public policy because the underlying award ordered payment. Instead of reversing the entirety of the lower court's decision, the Court of Appeal only reversed the part that ordered payment from the insolvent party, and upheld the tribunal's finding on the validity and quantum of the claim.[96] This decision may reflect a new approach in France to the permissible scope of an award, and arbitral tribunals faced with an insolvent French party may no longer need to limit their award to declaratory relief, as the national judge could impose such a limitation. In Germany, where insolvency law similarly limits the scope of an award when insolvency proceedings are involved, the German Federal Court of Justice has already adopted such a flexible approach by holding that an arbitral award ordering payment by the insolvent estate implicitly contains the declaration that the underlying claim is valid and existent and that declaration may be enforced—but that actual enforcement of the award can happen only in the insolvency proceedings.[97]

5 Setoff

Arbitral tribunals are normally entitled to set off successful claims brought by each party to a dispute if those claims fall within the tribunal's jurisdiction. However, the declaration of insolvency of one of the parties may limit this power. Under most insolvency laws, just as pending proceedings against the insolvent debtor are suspended, payment and performance of contracts entered into by the debtor are also

93. *See*, *e.g.*, *SAS IPSA Holding v. SCP Brouard Daude*, May 14, 2019, Cour d'Appel de Paris, Case No. 17/09133.
94. In ICC Case No. 10687, the arbitral tribunal limited the scope of claimant's requests for relief in accordance with French law: "The above provision of the Commercial Code further specifies that the proceedings, once resumed, can only concern the recognition of the claims and the fixing of their amount, not the payment. The claims of [the plaintiff] are modified accordingly" (translation).
95. *Société SARET v. SBBM*, February 4, 1992, Civ. 1, Cour de Cassation, Case No. 90-12569 quashing *SARET v. SBBM*, February 5, 1991, Cour d'appel de Paris, Case No. 90-12569. *See also Société Thinet v. Labrely ès-qualites*, March 8, 1988, Civ. 1, Cour de Cassation, Case No. 86-12015; and most recently, *SAS IPSA Holding v. SCP Brouard Daude*, May 14, 2019, Cour d'Appel de Paris, Case No. 17/09133.
96. *SAS IPSA Holding v. SCP Brouard Daude*, May 14, 2019, Cour d'Appel de Paris, Case No. 17/09133.
97. Kroll, S.M. (2015). Part IV: Selected Areas and Issues of Arbitration in Germany, Insolvency and Arbitration—Effects of Party Insolvency on Arbitral Proceedings in Germany. In Nacimiento P., et al. (Eds.), *Arbitration in Germany: The Model Law in Practice* (2d ed.) Wolters Kluwer, ¶¶ 80-83.

suspended. For example, under Article L. 622-7 of the French *Code de Commerce*, the commencement of insolvency proceedings against the debtor prohibits the payment of all prior debts, unless authorized by the supervising judge on certain conditions.[98]

Setoff as a means of extinguishing a payment obligation (*compensation légale*) and as a means of avoiding cross-payments of the amounts awarded (*compensation judiciaire*) need to be distinguished in an insolvency context.[99] While tribunals have found that they can order setoff as a means of extinguishing a debt, several others have concluded that setoff to avoid cross-payments would contravene public policy. In ICC Case No. 6697, an arbitral tribunal considered that an order of setoff would violate French public policy as it would be tantamount to ordering payment, in violation of the principle that the arbitral award should only grant declaratory relief to validate and quantify the debt.[100] In an unpublished 2013 ICC case,[101] a solvent respondent raised a counterclaim against an insolvent claimant, to be set off against the claimant's claims. The tribunal held that while it had jurisdiction to decide on the claimant's claims, the respondent's counterclaim was subject to the relevant national insolvency law, which provided for a stay of all proceedings against the insolvent estate. The tribunal therefore decided that the setoff could not be pursued in arbitration.

6 Security for Costs

In most instances, the respondent will request security for costs orders against an insolvent claimant; more rarely, they will be requested by a claimant against an insolvent respondent who has raised a counterclaim. While the power of arbitral tribunals to order security for costs is now relatively undisputed, the criteria according to which security for costs should be granted still generate debate—in particular, to what extent the insolvency of the party against whom an order is sought should come into play. Is the mere fact that a party is insolvent sufficient to justify a security for costs order or, to the contrary, does it prohibit such an order?

In the case of an insolvent claimant, national courts have been cautious when ordering security for costs, for fear of stifling a genuine and serious claim by the claimant.[102] Likewise, arbitral tribunals have acknowledged the need to protect genuine claims by insolvent parties. As noted by the tribunal in ICC Case No. 15218:[103]

> [S]ecurity for costs in international arbitration is first and foremost an issue about the conflict between the (insolvent) plaintiff's right to have access to arbitral justice on the one hand and the defendant's interest to have a reasonable chance of being able to enforce a future cost award issued in its favour on the other. Deciding on an application for security for costs is therefore about the task of

98. French Commercial Code, Article L. 622-7.
99. Mantilla-Serrano (1995), p. 71.
100. ICC Case No. 6697, as described in Mantilla-Serrano (1995), pp. 70-71.
101. ICC Reference No. ICC-PA-2020-255.
102. *See, e.g.*, English High Court decision in *Absolute Living Developments Ltd v. DS7 Ltd and others* [2018] EWHC 1432 (Ch).
103. ICC Case No. 15218, Procedural Order of July 2008 in (2014) ICC Special Supplement 2014: Procedural Decisions in ICC Arbitration ("ICC Case No. 15218"), ¶ 17.

> arbitral tribunals to balance these two conflicting interests against each other and about determining, on the basis of all relevant circumstances of the case, which of them shall prevail over the other.

No uniform test exists for assessing security for costs applications, and arbitral tribunals "have to decide security for costs applications on the basis of the relevant standards under the applicable national law."[104] The Chartered Institute of Arbitrators' 2016 International Arbitration Practice Guidelines on Applications for Security for Costs that assess the "current best practice in international commercial arbitration in relation to applications for security for costs" recommends the following:[105]

> When deciding whether to make an order for security for costs, arbitrators should take into account the following matters: (i) the prospects of success of the claim(s) and defense(s) […]; (ii) the claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award […]; and (iii) whether it is fair in all of the circumstances to require one party to provide security for the other party's costs […]. [A]rbitrators should also take into account any other additional considerations they may consider relevant to the particular situation of the parties and the circumstances of the arbitration.

The SCC Rules have adopted a similar position.[106]

When a tribunal faces an application for security for costs, the tribunal should first examine whether there is at least prima facie evidence that the claimant is unlikely to be able to pay an adverse costs award.[107] In principle, that initial step is satisfied in the case of an insolvent party. However, the insolvency of a party is a commercial risk inherent to business relationships and, on its own, will not be a sufficient basis for a security for costs order.[108]

Some authors have suggested that exceptional circumstances need to be established for a security for costs order to be made against an insolvent party,[109] for example, when "a party appears to have deliberately organized its insolvency while commencing what may prove to be lengthy and expensive arbitral proceedings."[110]

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104. *Chapter 6: Costs and Security for Costs*, 2018 ICCA Reports No. 4: Report of the ICCA-Queen Mary Task Force on Third-Party Funding in International Arbitration 4, p. 145 ("ICCA Report") at p. 165.
105. Chartered Institute of Arbitrators (2016), *International Arbitration Practice Guideline: Applications for Security for Costs*, Introduction and Article 1. Retrieved from: https://www.ciarb.org/media/4196/guideline-5-security-for-costs-2015.pdf, last visited February 10, 2023.
106. SCC Arbitration Rules, Article 38(2).
107. ICCA Report, p. 168.
108. *See, e.g.*, ICC Case No. 15218, ¶ 17 ("The opening of bankruptcy would not be sufficient grounds as long as the estate of the bankrupt party has sufficient realizable assets in order to finance the arbitration and to honour a future cost award issued against it"); ICC Case No. 13359, Procedural Order of February 2006 in (2014) ICC Special Supplement 2014: Procedural Decisions in ICC Arbitration ("The Tribunal has concluded that financial weakness by itself is not a sufficient ground for granting security for costs[.]"); ICC Case No. 14355, Procedural Order of January 2007 in (2014) ICC Special Supplement 2014: Procedural Decisions in ICC Arbitration ("[T]here is no unanimous view as to whether financial difficulties of a claimant (with or without opening of insolvency proceedings) always justify the granting of security for costs").
109. Derains and Schwartz (2005), p. 297.
110. Fouchard Gaillard Goldman, ¶ 1256.

However, the tribunal in ICC Case No. 15218 held that while the behavior of the insolvent party "may well have an impact on whether security for costs should be granted or not […], making an order for security for costs dependent on the condition that the insolvent party has deliberately and in view of the arbitration taken steps to deprive the other party from recovering its costs would be inappropriate."[111] According to the tribunal, such an approach would be "*one*-sided, putting all the weight of the decision on the (insolvent) plaintiff's interest to have access to arbitral justice (emphasis added)."[112] Consequently, the tribunal held that an objective analysis should prevail—if the respondent cannot reasonably enforce a future cost award in its favor, an order for security for costs should be granted, unless the insolvent claimant can prove that its financial troubles are directly connected to conduct by the defendant that is contrary to the principle of good faith.[113] According to the tribunal, this approach would not violate the claimant's right of access to arbitral justice.[114]

The tribunal likewise implied that a security for costs application against an insolvent party should be granted if there is a third-party funder—"the [claimant's] right to have access to arbitral justice can only be granted under the condition that [the third parties financing the claimant's arbitration costs] are also ready and willing to secure the other party's reasonable costs to be incurred."[115]

III CONCLUSION

International arbitral tribunals do not derive their powers and duties from any particular national legal order, and are bound only by the terms of the contract, the agreement of the parties and international public policy. Nevertheless, regardless of which rules an arbitral tribunal is *bound* to apply in the context of parallel insolvency proceedings, in order to fulfill its purpose and its best efforts obligation to resolve an arbitral dispute by rendering an enforceable award, the tribunal should carefully consider other factors, including the national public policy and mandatory rules of the seat and any other likely place of enforcement.

Nonuniform national insolvency laws and different approaches by national courts to public policy and mandatory rules in an insolvency context make the arbitrator's task particularly difficult. While most tribunals make an honest effort to preempt any possible set-aside or enforcement issues, without substantive insolvency principles in place, tribunals find it challenging to anticipate all of the possible standards against which an award will be tested when national courts are called upon to set it aside or enforce it.

While the globalization of business relationships in recent years has led to more and more interactions between international arbitration and insolvency proceedings, little has been done to help guide tribunals in arbitrating such cases, or to ensure a

111. ICC Case No. 15218, ¶ 18.
112. *Ibid*.
113. *Ibid*.
114. *Ibid*., ¶ 20.
115. *Ibid*., ¶ 21.

coherent and predictable approach is adopted universally. None of the major international instruments currently in place, such as the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Model Law on International Commercial Arbitration or the New York Convention, provide substantive guidance to tribunals or contain uniform rules regarding the relationship between insolvency and arbitration proceedings. Although not applicable to international arbitral tribunals, the Recast Insolvency Regulation has been a valuable attempt to bring more clarity regarding applicable law on an EU level.

Arbitrating cases that are affected by insolvency would be easier if the parties to an arbitration agreement considered the possible ramifications of future insolvency proceedings when choosing the seat or the law applicable to the dispute. Nevertheless, such a gargantuan task should not be put on the shoulders of private parties that are often not in a position to take into account such considerations, at a time when they do not yet contemplate a dispute, let alone their own or their counterparty's potential insolvency.

The wider arbitration community has recognized the growing importance of the interplay between international arbitration and insolvency—UNCITRAL has a Working Group on Insolvency, and in September 2019, the Arbitration Committee of the International Bar Association established a new subcommittee on insolvency which, in 2021, published the IBA Toolkit on Insolvency and Arbitration with the goal of providing guidance to both counsel and arbitrators.[116]

Although Guillermo would admonish us against overregulation, no doubt he would be supportive of further research on the interaction of insolvency and international arbitration to foster arbitrators' awareness of crucial insolvency-related issues and help ensure consistent and predictable arbitral decisions in this regard.

116. IBA Toolkit on Insolvency and Arbitration (2021).