

International Perspectives: Arbitration Agreements and Bankruptcy

By Edna Sussman

As arbitration is of special importance for international commerce, we briefly review the relevant authorities on arbitration agreements in bankruptcy.

U.S. Bankruptcy and International Arbitration Clauses

The Supreme Court has emphasized that the deference to arbitration is particularly strong in the context of international agreements.¹ However, in deciding whether a U.S. bankruptcy court should defer to an arbitration agreement, the U.S. courts have not differentiated between agreements that are wholly domestic and those that are international.² As the court said in *In re United States Lines*, in addressing the question of arbitration in the context of a bankruptcy, “the Arbitration Act’s mandate may be overridden by a contrary congressional command . . . even where arbitration is sought subject to an international arbitration agreement.”³ Query whether special deference should be given by the courts to the arbitration forum in the international context as there is no express Congressional command in favor of the bankruptcy court forum over arbitration and arbitration has additional unique benefits over court proceedings in international transactions.⁴

European Case Developments

Two recent cases decided in Europe reached different results in two arbitrations concerning the same debtor. The debtor, which was party to both arbitrations, was Elektrim S.A., a Polish company that was declared bankrupt in Poland after the two arbitrations were commenced. The issue in both forums was whether the impact of bankruptcy on a pending arbitration is governed by the law of the state in which the bankruptcy was declared or the law of the state in which the arbitration has its seat. It was undisputed that Polish law provides that “any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date the bankrupt is declared and any pending arbitration proceedings shall be discontinued.”

The first arbitration was an ICC arbitration that designated Switzerland, which is not a member of the EU, as the place of arbitration. Applying Swiss general conflict of law principles, the Swiss court held that Polish law determines the effect of the bankruptcy on a Polish company and that Polish law is applicable to determine legal capacity to be a party to arbitration proceedings. As under Polish law upon bankruptcy Elektrim lost its capacity to be a party to an arbitration agreement, the court affirmed the arbitral tribunal’s decision that it had no jurisdiction over Elektrim.⁵

The second arbitration was an LCIA arbitration that designated England, which is a member of the EU, as the seat of the arbitration. The English High Court decided the matter by reference to the EU Insolvency Regulation (Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings) which is applicable to both England and Poland. The court looked to the EU provision that dealt with “lawsuits pending,” such as the pending LCIA arbitration. That provision directed the application of “the law of the Member State in which that lawsuit is pending” (Art. 15 of the Regulation), which in this case was English law, and not Polish law.⁶ As under English law there is no provision annulling an arbitration agreement, the court affirmed the award of the Tribunal allowing the arbitration to proceed.

Conclusion

The divergence in the viability of an arbitration agreement based on the law found to be applicable suggests that the practitioner would be wise to consider the applicable laws in selecting the seat of the arbitration and the jurisdiction for filing for bankruptcy if contracts containing arbitration clauses are of significance to the debtor’s affairs.

Endnotes

1. *Scherk v. Alberto-Culver*, 417 U.S. 506, 520 (1974); *Mitsubishi v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 639 (1985).
2. For a discussion of U.S. law on the interplay between the Federal Arbitration Act and the Bankruptcy Code, see Edna Sussman, *Arbitration Agreements and Bankruptcy—Which Law Trumps When?*, New York Dispute Resolution Lawyer, Fall 2009, a publication of the New York State Bar Association.
3. *In re United States Lines*, 197 F. 3d 631, 639 (1999); see also Lindsay Besterfield, *Parties to International Commercial Arbitration Agreements Beware: Bankruptcy Trumps Supreme Court Precedent Favoring Arbitration of International Disputes*, 2006 J. Disp. Resol. 273.
4. For a discussion of the importance of arbitration in the context of international transactions, see Edna Sussman, *The Proposed U.S. Arbitration Fairness Act: A Threat to U.S. Business*, 18 Am. Rev. of Intl. Arb. 455 (2009).
5. *Vivendi and Elektrim v. Deutsche Telekom AG*, First Civil Law Department, Zurich, decided on March 31, 2009 Docket No. 4A_428.2008.
6. *Jozef Syska, as Administrator of Elektrim S.A. and Vivendi Universal* [2009]EWCA Civ. 677 decided on July 9, 2009.

Edna Sussman is the Chair-Elect of the Dispute Resolution Section of the New York State Bar Association. She can be reached at esussman@sussmanADR.com or through her Web site www.SussmanADR.com.