Arbitration Agreements Vs. Insolvency

A Report from the XVIth Willem C Vis Moot Court Team

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I. The Moot

For the past fifteen years the University of Bonn has sent a team of between six and eight students to Vienna in April. There, they have to compete against teams from all over the world, representing a client or corporation in an international arbitration setting. This article will discuss how this years team handled one of the legal challenges and the positive experience they gained from the Moot.

II. This years problem explained…

This years Vis Moot Problem was very special as it was so closely related to commercial reality that it may as well have been a real-life case. The full breadth of the problem cannot be discussed at length, so one problem will be focussed on in order to show how the insolvency of a party affects the validity of arbitration agreements.

The Problem centred on a contract for the sale of cars between a car-importer, UAM, and a sole-trader car dealer- Mr Tisk. The delivered cars were defective and it was unsure at the time whether they could be fixed, resulting in the avoidance of contract by Mr Tisk, who wanted to recuperate the down payment made on the delivery through arbitration proceedings. However, Mr Tisk's contract partner, UAM, became insolvent before the proceedings could be initiated.

III. Focus: Insolvency and Arbitration[1]

In the week the Problem was published the English High Court[2] was faced with a case in which an arbitration agreement had been concluded between two parties: a Polish Telecoms company (soon to become insolvent) and a multinational Telecoms company. Arbitration proceedings were commenced against the Polish company- which evoked the defence that under Polish insolvency law the arbitration agreement would be voided[3]. However, it was stipulated in the contract that English law should govern the arbitration agreement. The court had to determine the law that was to govern the effect of insolvency on arbitration agreements.

A very similar situation faced the participants of this years Moot. What arguments can be advanced in order to uphold or void an arbitration agreement when one party is insolvent[4]? The Bonn Team took an 'international private law' approach, to determine that the law of the seat of arbitration (a neutral venue in which neither company was based) should govern the validity of the agreement. This was not as easy as it seemed: the Problem expressly stated that the country of the seat had "no policy" regarding this issue. Now, arguments were needed to support, or defeat, the position taken.

While arguing to uphold the agreement, the thesis was advanced that having no policy meant that there was no policy of voiding arbitration agreements. The Tribunal should have considered this once decisions were reached on jurisdiction. The main arguments were that the predictability of arbitration and the intent of the parties had to be safeguarded; after all, when signing arbitration agreements that is what the parties agree to- arbitrating any claims out of a contract.

To argue for the other side was slightly more difficult. Three members of a panel had to be convinced that they had no authority to hear the dispute. The arguments that convinced the Tribunal in the Final of the competition hinged on aspects of 'capacity' to perform legal acts (such as arbitration) that would be binding on the estate of the insolvent[5]. Here the arguments were expounded concerning creditor protection and the fair distribution of assets of the insolvent would be hindered if parties with arbitration agreements could "skip the queue" of other debtors.

IV. Moot imitating life…

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[1] Some useful articles on this point: Journal of International Arbitration 2001, pp. 417-433. „Insolvency Proceedings & Commercial Arbitration" by *Vesna Lazic*.The effects of insolvency on Arbitration Proceedings by *Foster/ Walsh* available at: http://www.globalarbitrationreview.com/handbooks/14/sections/53/chapters/510/the-effects-insolvency-arbitration-proceedings.

[2] Queen's Bench Division.: Syska vs. Vivendi Universal SA. [2008] EWHC 2155.

[3] As part of pursuing a *vis attractive concursus* for any claims against the insolvent. Cf: Art 142 of the Polish Bankruptcy and Reorganisation Law.

[4] Under the relevant German law, the arbitration agreement is upheld. Cf: BGH Beschluss vom 20.11.2003 III ZB 24/03.

[5] Instructive on this argument: „Insolvency Proceedings & Commercial Arbitration" by *Vesna Lazic* (pp. 36 et seq).

This short overview over one problem encountered during the Vis Moot is aimed primarily at students interested in participating in the competition, but also to highlight a legal problem that will, no doubt, be facing many lawyers, judges and businesses over the next few years. The economic climate has seen an increase in companies filing for insolvency, while arbitration agreements are still increasing in popularity as a means of dispute resolution[6]. It seems certain that insolvency and arbitration will cross paths in the future.

This may prove problematic as the two pursue quite different policies: arbitration aims to be an efficient and neutral way of resolving disputes. Its foundations lie in party autonomy- the parties choose whether to arbitrate, what claims to arbitrate, determine the arbitrators and where to enforce eventual awards.

Insolvency, on the other hand, is a different kettle of fish. Once a company can no longer meet the obligations it has towards its debtors, it will file for insolvency. It therefore loses its right of management, and the dispersion of its estate. The aim is firstly, to protect the estate and then to re-organise the company so that it has no more outstanding debts and can function again, or alternatively to liquidate all of the estate by dividing it among the debtors.

The challenges of finding, perfecting, drafting and then 'pleading' arguments in front of a Tribunal of lawyers, academics or business-people was a task not taken lightly by the Bonn Team this year. In the following section it will be shown which challenges other potential participants may face in next years competition.

V. In the written memoranda

Writing an arresting memorandum is difficult. Each sentence needs an aim and each aim needs to support the position you are taking. Writing a legal document based on legal arguments and facts is also difficult. The facts must be supported by the law you are invoking. Combining these two aspects into 35 pages is the therefore 'doubly' difficult. The hardest part was finding arguments that appeal to the brain and the heart: is an argument logically and legally sound? Does this argument still have the necessary conviction that our standpoint is right?

For the oral pleadings

The demands of the oral pleadings were different. "The language to be used in arbitral proceedings will be English"[7]. As English is a second language for most of the participants, expressing arguments soundly and correctly is the first step. The next step is to do so in front of the lawyers, professors and business-people that form the Tribunal, while the aim is to leave the impression on the Tribunal that your client is right, and whatever the other side advance must be wrong. Admittedly, this sounds easier than it is, as the nerves and tension can leave your hands shaking so much you dare not even drink. But by practicing the oratorical skills and competing in practice rounds against other teams these skills are developed.

The XVIth Willem C Vis Moot Court Team Bonn.

VI. Further Reading

Sadly not all of the problems could be discussed at length in this article. However, the following sources should be helpful for further research into the Willem C Vis Moot Court:

"The Vis Book" by Janet Walker.

The Vis Moot Homepage: http://www.cisg.law.pace.edu/vis.html.

If this article has sparked any interest in the Vis Moot, or even served as the necessary inspiration to participate in this year's competition, please feel free to contact the author at: steven.w.reinhold@web.de.

[6] In a Report by PricewaterhouseCoopers in 2008, 88% of the companies surveyed used arbitration as a dispute resolution mechanism. The Report is available at: http://www.pwc.com/extweb/pwcpublications.nsf/docid/00D10D879C92892A802574630030F7BB.

[7] Part of the arbitration agreement used by the parties. See The Problem p.11/ Claimant's Exhibit no. 1.