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Arbitration in Insolvency

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Abstract

The present article highlights the relationship between arbitration and insolvency proceedings. It examines from a comparative law perspective the questions of whether the arbitration agreement remains effective when the insolvency proceedings are opened, whether it binds the insolvency administrator, whether the latter can disengage from it under the rules on executory contracts, and which insolvency-related disputes are covered by it. In particular, it is discussed whether avoidance actions are arbitrable and whether the insolvency practitioner can conclude an arbitration agreement with the opposing party.

I. Introduction*

The relationship between arbitration and insolvency is coined by significant turbulences. Arbitration hates interference from other fields of law and this holds conversely true for insolvency law. Both areas of law consider themselves superior to all others and it is not easy to reconcile them. However, before starting with developing some solutions, a brief introduction to both fields is recommendable. In a nutshell, the following can be said.

First, arbitration. Arbitration is an alternative to regular litigation before state courts. It needs an agreement between the parties involved by which both wave their right to bring their case to a state court.[1] Instead, they submit themselves to a private court, the judges of which, i.e. the arbitrators, are picked by the parties themselves. Regularly, an arbitration tribunal consists of three arbitrators. Each party appoints one and the two appointed arbitrators agree on a third one who chairs the proceedings as president of the tribunal. Such arbitration agreements are recognised in nearly all jurisdictions. In principle, national procedural laws allow the parties to exclude state jurisdiction in favour of a private one, and they accept the compulsory enforcement of the arbitral tribunal's decisions by the state enforcement bodies. It follows from this brief description that the main pillar of arbitration is the procedural party autonomy.

* This article is based on the inaugural lecture given by the author on 10 June 2022 as Professor of International Insolvency Law at Radboud University, Nijmegen, The Netherlands.

[1] In many jurisdictions, this right is anchored in the respective constitution, being by expressly granting the right to access to state courts, being by including this in the right to be heard or the right to a fair trial.

Second, insolvency. Where a debtor is unable to pay his or her mature debts, insolvency proceedings can be opened on application of the debtor or a creditor. Typically, an Insolvency Practitioner is appointed who is now in charge of the debtor's affairs. His or her task is to collect and administrate the debtor' estate, to dispose of the debtor's assets belonging to this estate and to pay the proceeds to the creditors on a pro rata basis.

These very rough and superficial description – which concentrates on insolvency regimes which vest most powers in the Insolvency Practitioner, ignores, *inter alia*, the distinction between liquidation and restructuring proceedings, and excludes debtor-in-possession proceedings – already show some essential differences between arbitration and insolvency.[2] First, arbitration is an individual, bilateral procedure between plaintiff (who is called "claimant" in arbitration) and defendant (who is labelled "respondent") concerning one single claim whereas insolvency proceedings are collective proceedings concerning the debtor and the claims of all creditors; hence, insolvency is centralised / multipolar, arbitration is decentralised / bipolar. Second, the proceedings pursue different objectives, regularly best possible satisfaction of the creditors' claims in the case of insolvency, dispute resolution in the case of arbitration. Third, arbitration rests on the parties' bilateral agreement and thus on private autonomy whereas insolvency proceedings are state ordered collective enforcement proceedings with the main powers assigned to the Insolvency Practitioner. The latter in particular is one of the origins of the difficult relationship between arbitration and insolvency, since Insolvency Practitioners want to decide for themselves whether to bring a case before a state court or an arbitral tribunal, and they do not want to have this decision dictated to them by the debtor.

Seen from a procedural angle, the problems described mostly occur when the plaintiff either approaches a state court and the defendant objects that arbitration has been agreed upon or starts arbitration and the defendant objects that arbitration proceedings are not admissible. In both cases, the judges or arbitrators will check whether an arbitration agreement has been validly concluded, is binding on the parties of the proceedings (personal scope) and covers the subject matter in dispute (substantive scope). They will then examine the arbitrability of this subject matter from two perspectives: is it objectively arbitrable, i. e. can it be brought before an arbitral tribunal, and is it subjectively arbitrable, i. e. do the parties have the power to include the subject matter in dispute in their arbitration agreement.[3]

Starting with the arbitration agreement, two questions need answers: First, is an existing arbitration agreement, concluded by the debtor, binding on the estate or the Insolvency Practitioner respectively? And second, is the Insolvency Practitioner entitled to conclude new arbitration agreements?

II. Binding force of pre-insolvency arbitration agreements

To begin with the first question (Is an estate or Insolvency Practitioner respectively bound by an arbitration agreement concluded between the debtor and one of his or her contractual partners?), the problem can be explained with a practical example: debtor D bought a production machine from vendor V and has paid the purchase price. The sales contract contains an arbitration clause according to which all disputes between the parties arising from – or in connection with – this contract shall be decided by an arbitral tribunal. After the opening of insolvency proceedings against D, the machine shows a

[2] For the following text, see *Larsen Oil and Gas Pte Ltd v. Petroprod Ltd* [2011] SGCA 21.
[3] The terms „objectively" and „subjetively" are commonly used in this contect, "objectively" referring to te dispute matter as such, "subjectively" referring not to the parties' view or perspective but to their ability to dispose of the matter.

serious defect which entitles the buyer – and the Insolvency Practitioner IP now takes his or her position under the insolvency law of the relevant state – to compensation. Since V does not pay the damages voluntarily, IP intends to initiate litigation and the question arises as to whether IP can approach the regular state courts or whether he or she is bound to the arbitration clause and must start arbitration by appointing an arbitrator.

1. National solutions

The answer to this question varies depending on the jurisdiction in which the insolvency proceedings were opened. Generally speaking, pre-insolvency arbitration agreements are binding on the Insolvency Practitioner in most jurisdictions. This is the consequence of the fact that the Insolvency Practitioner takes over the debtor's affairs in their entirety; he or she takes up the legal position of the debtor as it stands. For example, this is expressly stated in sec. 6 § 9 Brazilian Insolvency Act and holds also true for many other jurisdictions, for example Germany,[4] France,[5] The Netherlands,[6] Spain,[7] the UK,[8] and the USA.[9] In all these countries, the Insolvency Practitioner, in our example case, would be bound by the pre-insolvency arbitration agreement

However, there are also counter-examples. For example, in Latvia, sec. 5 para. 1 No. 8 Arbitration Act denies the arbitrability of rights and obligations of persons who have entered into insolvency proceedings. The same holds true for Portugal. Here, Art. 87 Insolvency Act[10] provides that "arbitration agreements to which the insolvent is a party concerning disputes the outcome of which may influence the value of the insolvency estate shall be suspended", provided that the arbitral proceedings are not yet pending at the date of the commencement of the insolvency proceedings. Similar rules are available in Argentina, Chile, and Uruguay.[11] In Poland, however, Art. 147a of the Polish Bankruptcy Act entitles the Insolvency Practitioner to withdraw from any arbitration agreement under certain conditions provided that the arbitration has not yet been initiated. The Insolvency Practitioner therefore has the choice whether or not to adhere to the arbitration clause.

2. Right to reject executory contracts

Where the binding effect of pre-insolvency arbitration agreements is established, another instrument of insolvency law comes into play: the right of Insolvency Practitioners to withdraw from executory contracts. Many national laws have special rules, granting an Insolvency Practitioner an election right to reject or assume executory contracts, these being defined as contracts under which the obligations of both the debtor and the counterparty are so far unperformed.[12]

Arbitration agreements as such do not meet these prerequisites, since no mutual obligations exist. Arbitration agreements are procedural contracts with the immediate effect that proceedings covered by the agreement before a state court are inadmissible. They are not contracts under the substantive law of obligations creating mutual obligations to deliver a performance in exchange for a counter-performance. Hence, the rules on executory contracts do not apply and the Insolvency Practitioner is not entitled under these rules to withdraw from the arbitration agreement, unless national law

[4] See below at III.2.b.aa.
[5] Cours de Cassation (Civ.), 6.5.2009, n° 08-10.281, Bulletin 2009, I, n° 86; *Le Corre*, Droit et Pratique des Procédures Colletives, 11th ed., Dalloz, 2020, para. 623.241.
[6] Cf. Rechtbank Zutphen, 17.10.2007, LJN: BC0953; *van Mierlo/van de Hel-Koedoot*, Faillissement en Arbitrage, Ondernemingsrecht 2010, 6 et seq.
[7] Cf. *Société Pirelli & SpA v. Société Licensing Projects and Others,* Cours de Cassation (Civ.), 28.03.2013, ECLI:FR:CCASS:2013:C100392, Bulletin 2013, I, n° 59.
[8] Cf. at III.2.b.bb.
[9] *In re Anderson* 884 F.3d. 382, 387 (2d Cir. 2018).
[10] Código da Insolvência e da Recuperação de Empresas, Decreto-Lei n.º 53/2004.
[11] Argentina: Art. 134 Insolvency Act – Law 24,522/1995; Chile: Art. 143 Insolvency Act – Law 20,720/2014; Uruguay: Art. 56, 57 Insolvency Act – Law 18,387/2008.
[12] See for US law *Countryman*, Executory Contracts in Bankruptcy, 58 (1973) Minn. L. Rev. 439, 460 and *Tabb* , Law of Bankruptcy, § 8.2. – *Countryman' s* definition has also coined English law, cf. *van Zwieten* , Principles of Corporate Insolvency Law, para. 6-22. German § 103 Insolvenzordnung is construed accordingly, cf. BGH, Urt. v. 21.10.2015 – I ZR 173/14, NZI 2016, 97; BGH, Urt. v. 15.11.1999 – II ZR 98/98, NZI 2000, 126.

provides expressly for such a right as is the case in Poland.

An entirely different topic is the validity of an arbitration clause contained in an executory contract which is rejected on its part by the Insolvency Practitioner: does this rejection also render the arbitration clause inapplicable? The answer is more complicated than expected, due to the arbitration law doctrine of separability. According to this doctrine, an arbitration clause which covers not only disputes arising from a contract but also disputes arising in connection with a contract survives the nullity or voidability of this contract and entitles the arbitrators to decide on all claims stemming from the contractual relationship. This can be relevant in insolvency proceedings, since, in many jurisdictions, a contractual partner is entitled to damages if the Insolvency Practitioner rejects the executory contract. If litigation becomes necessary over this claim for damages, does it have to go to arbitration? This depends on whether the rejection of the contract affects the arbitration agreement or whether the arbitration agreement remains valid under the doctrine of separability. In many jurisdictions, insolvency law trumps the doctrine of separability and the arbitration clause expires together with the contract.[13] In England and Wales, however, sec. 349A(3) IA 1986 provides, albeit for personal bankruptcies only, that the court, at the request of either party, has discretion to declare the arbitration agreement applicable. Vice versa, where the Insolvency Practitioner assumes the executory contract, he or she is also bound to the arbitration agreement. Hence, cherry picking is not possible. This is nicely put in sec. 349A(2) IA 1986 according to which the arbitration agreement is enforceable by or against the trustee if he or she adopts the contract.

However, under Canadian law, the Court of Appeal for British Columbia held in the *Petrowest* case[14] that an Insolvency Practitioner who has assumed an executory contract is not bound by the arbitration agreement, since the party which initiated the proceedings was not the debtor but the Insolvency Practitioner who is not an agent of the debtor but an officer of the court. The Court of Appeal concluded: "…it is open to the receiver to disclaim the arbitration agreements notwithstanding that it has adopted the containing contracts for the purpose of suing on them. This flows from the receiver's particular powers and position, and the separability of the arbitration agreements." However, this does not only misunderstand the doctrine of separability which refers to the continuity of arbitration clauses despite the nullity of the underlying contract rather than providing a party to the arbitration agreement with the right to invalidate the arbitration clause separately. It also misunderstands the legal position of an Insolvency Practitioner who takes up the legal position of the debtor as legal successor and is as such neither better nor worse off than the debtor him- or herself. Hence, where the Insolvency Practitioner assumes the executory contract, he or she also ought to be bound to the arbitration clause contained in (or accompanying) this contract.[15]

III. Arbitration agreements concluded by the Insolvency Practitioner

The next question is whether an Insolvency Practitioner may conclude new arbitration agreements. Let's assume that, in our example case, the sales contract does not contain an arbitration clause yet IP prefers arbitration to litigation before state courts. May he or she conclude an arbitration agreement with V?

[13] Expressly in Italy Art. 192 Codice della crisi d'impresa e dell'insolvenza. For the exact point in time, see the debate in Corte die cassazione, Seconda Sezione, ordinanza interlocutoria No. 8591 of 16 March 2022.

[14] *Petrowest Corporation v Peace River Hydro Partners* [2020] BCCA 339(CanLII)

[15] For Italy, see Corte di cassazione, Sezioni Unite, sentenza no. 15200 of 21 July 2015.

1. Advantages and disadvantages of arbitration

The first question to be answered in this context is: why should IP make such a decision? Considering the advantages and disadvantages of arbitration, the following can be said:

The main advantage of arbitration compared to state litigation is that the parties have the right to choose not only the arbitration rules and an institution managing the arbitration (such as the London Court of Arbitration, the International Chamber of Commerce, the Dutch Arbitration Association or the German Arbitration Organisation (DIS) but also – and most importantly – competent and experienced arbitrators who are not generalists, but experts in the relevant area of law or the subject matter in dispute. Further, the composition of arbitral tribunals, once they are established, cannot be changed whereas in state courts an exchange of judges during the proceedings may occur, for example where a judge is retired, promoted, assigned to a different task, or a different court. Beyond, arbitral tribunals are mostly better equipped, less burdened with additional cases, communication is easier, and proceedings are both confidential and shorter. Finally, there is only one instance, since the tribunal's decisions cannot be appealed, and enforcement is internationally recognised and harmonised, since most states have signed the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of 1958.

However, there are also disadvantages. First, the advantage "only one instance" can also prove to be a disadvantage, in particular where a party is not content with the tribunal's decision and has no possibility to appeal. Second, no legal cost aid exists, and this can become serious, since, third, arbitration tends to be more expensive, at least if the costs of the first instance in state litigation are compared to the costs of arbitration. However, this disadvantage vanishes if the costs of arbitration are compared to the costs of the three instances typically available in state court proceedings. For example, if one takes the court costs only, leaving aside the lawyers' fees, then, with an amount in dispute of € 5 million, in German DIS proceedings, gross fees of € 105,059.15 are incurred for a sole arbitrator and the DIS together, and € 210,850.15 for an arbitral tribunal with three arbitrators. The state court fees according to German law, on the other hand, amount to € 65,163 for the first instance, € 86,884 for the second instance, and € 108,605 for the third instance, thus € 260,652 for all three instances.

Furthermore, there are additional disadvantages especially in insolvency proceedings, since Insolvency Practitioners "inherit" – as explained earlier in this paper – unpleasant arbitration agreements they would not have concluded, and they may also "inherit" unpleasant current arbitration proceedings they would not have started with possibly unpleasant arbitrators they would not have chosen.

In all, there are good reasons to prefer arbitration to state court litigation, but it depends very much on the case at hand whether excluding state jurisdiction is a good idea or not.

2. Admissibility of post-commencement arbitration agreements

Against this background, an Insolvency Practitioner may be interested in entering into new arbitration agreements after the commencement of insolvency proceedings and the question is whether he is entitled to do so. This, again, depends on national laws and the situation is similar to pre-insolvency arbitration agreements. In some jurisdictions, arbitration in insolvencies is generally prohibited, Latvia and Portugal being vivid examples.[16] In both countries, the respective rule is construed narrowly and does exclude not only the continuance of arbitration

[16] Cf. above at fn. 10.

agreements concluded by the debtor but also arbitration agreements concluded by the Insolvency Practitioner. In most others, however, the Insolvency Practitioner is generally free to conclude arbitration agreements. In some national laws – examples are Germany, Italy, and Poland –, this follows from provisions which require the consent of a creditors' committee for submitting a dispute to an arbitral tribunal,[17] which implies that such a submission is admissible in general.

IV. The arbitrability of insolvency-related claims

However, as discussed earlier, that an Insolvency Practitioner is entitled to conclude post-commencement arbitration agreements does not suffice. Rather, the arbitrability of the subject matter in dispute must also be examined. Arbitrability is a particular issue with insolvency-related claims which deserves a closer look.[18]

1. Definitions

At the beginning, two definitions are due: one needs to be clear about the meaning of the terms "arbitrability" and "insolvency related claims".

a) Arbitrability

The term "arbitrability" is easy to define: it means that the subject matter of the dispute can be brought before an arbitral tribunal (provided, of course, there is a valid arbitration agreement covering this subject matter). "Arbitrability", also referred to as "objective arbitrability" or "arbitrability *ratione materiae*", is a substantive characteristic of the subject matter in dispute and must be neatly separated from the arbitration agreement, the parties' power to dispose of this subject matter (also referred to as "subjective arbitrability") and other prerequisites of the tribunal's jurisdiction. For example, as will be shown below, transactions avoidance law is objectively arbitrable in many jurisdictions, but subjectively the arbitration agreement must be entered into by the Insolvency Practitioner.[19]

b) Insolvency related claims

Since it is far from clear what insolvency related claims are, this approach needs clarification, too, even if we must be clear that "insolvency related claims" is not a legal term, but only the exact delimitation of the present topic. In a recent paper of INSOL International,[20] Paul Heath and Anna Kirk have suggested that the key feature of determining "insolvency related claims" is the fact that the debtor was not able to bring the claim before he or she entered insolvency proceedings. This definition is not a hard and fast rule. However, at least it allows to separate the clear cases from the less clear ones. In this respect, the following can be said:

First, it is generally agreed that decisions managing the insolvency proceedings themselves are not arbitrable at all.[21] This

[17] Germany: § 160(2)No. 3 Insolvency Regulation; Italy: Art. 132(1) Codice della crisi d'impresa e dell'insolvenza; Poland: Art. 206(1)No. 6 Bankruptcy Act. – In Italy, arbitrators are appointed by the Insolvency Court on proposal of the Insolvency Practitioner, Art. 123(1) lit. g) Codice della crisi d'impresa e dell'insolvenza.

[18] The following text builds partly on *Bork*, The arbitrability of insolvency related claims, [2022] Lloyd's Maritime and Commercial Law Quarterly, 356 et seq.

[19] Cf. *Madaus*, The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings, Journal of International Arbitration 37 (2020), 449, 456, 458.

[20] *Heath/Kirk*, INSOL International, Arbitration and insolvency disputes: A question of arbitrability, INSOL SPECIAL REPORT, 2020, p. 26.

[21] See *Re Southern Materials Holding (HK) Co. Ltd* [2008] HKCFI 98 para. 7; Bantekas in: Bantekas/Ortolani/Ali/Gomez/Polkinghorne, UNCITRAL Model Law on International Commercial Arbitration, Cambridge (Cambridge University Press), 2020, p. 144; *Born*, International Commercial Arbitration, 3rd ed., Alphen aan den Rijn (Wolters Kluwer International), 2021, p.1084 with further references; for the Netherlands *van Mierlo/van de Hel-Koedoot*, Faillissement en Arbitrage, Ondernemingsrecht 2010, 6. – However, under English law, preliminary questions on the opening of insolvency proceedings are very much arbitrable; cf. *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 and in its lead *Bridgehouse (Bradford No. 2) Limited v Bae Systems Plc* [2020] EWCA Civ 759; *Re CVS China (Cayman Islands) Holding Corp.* [2019 (1) CILR 266, 271; *Nori Holding Ltd and ors v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm); *Riverrock Securities Ltd v International Bank of St Petersburg (JSC)* [2020] EWHC 2483 (Comm).

concerns, among others, the decision to open such proceedings, to appoint an Insolvency Practitioner, to give directions to the Insolvency Practitioner, to decide on insolvency and restructuring plans, and to terminate the proceedings.

Second, in most jurisdictions, claims stemming from the underlying contract are not insolvency related claims. Where, for example, the debtor has already delivered the goods purchased by the counter-party and the Insolvency Practitioner demands payment, this claim is a pre-insolvency claim. If it was arbitrable before the opening of the insolvency proceedings, it does not lose its arbitrability upon the opening of the insolvency proceedings. A different question is whether the arbitration agreement continues to exist and binds the Insolvency Practitioner, but this is not a problem of the arbitrability of the contractual claim. The same holds true for the reverse constellation. If the counter-party has delivered and demands payment from the Insolvency Practitioner, this claim is arbitrable before the commencement of the proceedings just as it is arbitrable after the commencement of the proceedings. There may be other obstacles resulting from the respective national insolvency law. For example, in many jurisdictions, creditor-claims must be filed with the Insolvency Practitioner or the court and creditors must wait with a lawsuit, including arbitration, until it is clarified whether this filing is objected. Whether this lawsuit can be arbitration, depends on national law.[22] In some jurisdictions, decisions on disputed creditor-claims are binding not only on the procedural parties but also on the debtor and all other creditors.[23] In the case of arbitration, this might be an obstacle, since the award would be binding on persons who are a party neither to the arbitration agreement nor to the arbitral proceedings. However, this is a possible hurdle on the road to an arbitral award but it is not a problem of arbitrability.

Third, typical insolvency related claims are those which are triggered by the opening of the insolvency proceedings. The most important example are claims for restitution or compensation stemming from transactions avoidance law. Rules on transactions avoidance are aimed at the rescission of, or the compensation for, transactions that are detrimental to creditors and have been performed prior to the opening of insolvency proceedings. Such transactions are normally not affected by the insolvency proceedings, since the estate is not seized retroactively. This leaves performances of the debtor, e.g. gifts to the spouse or payments to creditors, untouched. However, in almost all national laws, under certain conditions, this might be contrary to foundational principles of insolvency law. They therefore mitigate the harsh consequences of the clear cut-off date (opening of the proceedings)[24] and allow for certain transactions to be challenged in order to tackle unacceptable displacements of assets benefitting the recipient. This is to ensure (*inter alia*) the equal treatment of creditors.

2. Legal analysis

Against this background, we can now turn to the legal analysis of insolvency related claims pursued in arbitration proceedings. The picture is quite colourful. Under the heading of "arbitrability", the question is whether arbitral tribunals have jurisdiction to deal with insolvency related claims. Again, it can be shown that national laws take very different approaches here and they find solutions on different levels, be it by prohibiting arbitration in insolvencies completely, be it by not extending an existing arbitration clause to avoidance claims, be it by denying either the (objective) arbitrability of insolvency related

[22] Arbitration on disputed creditor claims is possible (e.g.) in Germany (BGH, 25 4.2013 – IX ZR 49/12 = NZI 2013, 394 para. 8) and the Netherlands (Rechtbank 's-Gravenhage, 15.12.2010 – ECLI:NL:RBSGR:2010:BO8353; Rechtbank Utrecht, 4.9.2002, TvA 2004, 14).

[23] E.g. § 183(1) German Insolvency Regulation (Insolvenzordnung).

[24] Cf. *Angove's Pty Ltd v. Bailey* [2016] UKSC 47.

claims or the (subjective) parties' power to include them in arbitration agreements.

a) Explicit provisions

In jurisdictions like Argentina, Chile, Latvia, Portugal, and Uruguay, which interdict any new arbitration after the opening of insolvency proceedings expressly, insolvency-related claims are also excluded from arbitration. However, these are exceptions.

Before this can be explained in more detail, one should address, very briefly though, provisions that assign disputes over insolvency related claims to the exclusive jurisdiction of the insolvency court, frequently under the principle of *vis attractiva concursus*. It is widely held that such provisions only regulate the jurisdiction of state courts and do not exclude arbitration proceedings. However, French law is an exception. Here, Art. R 600-1 Code de commerce provides that it is for the insolvency court to hear cases on matters regulated in Book VI Code de Commerce which includes transactions avoidance law. This is considered mandatory and not amenable to arbitration agreements.[25] Hence, in France, avoidance claims are not arbitrable due to a provision on exclusive jurisdiction and the courts in Lithuania[26] and Italy[27] see it the same way.

b) Case law

Most national insolvency and arbitration laws are silent on the relationship between arbitration and insolvency. Hence, it is for the courts to decide on this matter. However, as *Gary B. Born* puts it, "different national legislative regimes and judicial decisions have reached different conclusions about these types of disputes."[28] This shall be illustrated by two selected examples, namely Germany and the UK.

aa) Germany

According to the case law of the Bundesgerichtshof (Federal Court of Justice), the legal situation in Germany can be summarised as follows:[29] First, arbitration agreements concluded by the debtor are principally binding on the Insolvency Practitioner who is not entitled to terminate the agreement under the rules on executory contracts. Second, this does not include arbitration if the subject matter of the dispute is an independent right of the Insolvency Practitioner which is beyond the debtor's power of disposal. Typical examples are transactions avoidance claims[30] and the Insolvency Practitioner's right to choose non-performance of executory contracts.[31] However, since the Insolvency Practitioner has the power of disposal of these subject matters, it is generally agreed that he or she may accept arbitration independently from the debtor's decisions. It follows from this that, under German law, arbitration regarding insolvency related claims is a matter of the parties' subjective power to conclude an arbitration agreement rather than of the objective arbitrability of these subject matters.[32]

bb) United Kingdom

As regards Common Law, case law on the arbitrability of insolvency related claims is under development. In *Larsen v Petroprod*[33],

[25] See *Le Corre* (fn. 5), para. 422.331.
[26] See Kaunas Regional Court, 27.12.2012 – Case No. 2-1779-601/2012, [2012] EIRCR(A) 777; Vilnius Regional Court, 27.6.2011 – Case No. 2-4104-520/2011, [2011] EIRCR(A) 834.
[27] Corte di cassazione, Sezioni Unite, sentenza no. 15200 of 21 July 2015. – Differently, though, where the court entitles the debtor in a pre-insolvency crisis to reject executory contracts. This leaves the arbitration clauses unaffected (Art. 97 No. 8 Codice della crisi d'impresa e dell'insolvenza).
[28] B. Born (fn. 21), p. 1085.
[29] Cf. BGH, 27.7.2017 – I ZB 93/16 = NZI 2018, 106 para. 11; BGH, 29.6.2017 – I ZB 60/16 = NZI 2018, 62 para. 13; BGH, 25.4.2013 – IX ZR 49/12 = NZI 2013, 934 para. 8; BGH, 20.6.2011 – III ZB 59/10 = NZI 2011, 634 para. 14; BGH, 17.1.2008 – III ZB 11/07 = NJW-RR 2008, 558 para. 17; BGH, 20.11.2003 – III ZB 24/03 = ZInsO 2004, 88. Extensively *Bork*, Schiedsverfahren mit insolventen Parteien, SchiedsVZ 2022, 139 et seq.
[30] BGH, 29.6.2017 – I ZB 60/16 = NZI 2018, 62 para. 18; BGH, 25.4.2013 – IX ZR 49/12 = NZI 2013, 934 para. 9; BGH, 20.6.2011 – III ZB 59/10 = NZI 2011, 634 para. 14; BGH, 17.1.2008 – III ZB 11/07 = NJW-RR 2008, 558 para. 17; BGH, 20.11.2003 – III ZB 24/03 = ZInsO 2004, 88. – The same holds true for France, cf. Cour de Cassation, Cass. com. 17.11.2015 – no. 14-16.012, Bull. civ. 2015, IV, No. 157.
[31] BGH, 27.7.2017 – I ZB 93/16 = NZI 2018, 106 para. 11; BGH, 29.6.2017 – I ZB 60/16 = NZI 2018, 62 para. 18; BGH, 20.6.2011 – III ZB 59/10 = NZI 2011, 634 para. 14.
[32] BGH, 20.6.2011 – III ZB 59/10 = NZI 2011, 634 para. 14.
[33] *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21.

the Singapore Court of Appeal held that (1) the phrase "all disputes" in an arbitration clause did not extend to the transactions avoidance claims resulting from a transaction at an undervalue, as it could not be assumed that the parties would have intended claims by a liquidator post-insolvency to be within the clause; and (2) in any event the claims were not arbitrable on public policy grounds because they affected not just the parties but also other unsecured creditors; and (3) that the insolvency regime overrides the freedom of the company's pre-insolvency management to choose the forum where disputes on insolvency related claims are to be heard. This reasoning is partly surprising. Firstly, it is a principle of English law to construe arbitration clauses liberally.[34] And secondly, it is difficult to see how a transactions avoidance claim could affect the rights of other creditors. However, the judgment addresses at least the really important point, namely the debtor's power of disposition.

It does not come as a surprise that the High Court of England and Wales refused to follow this decision. In *Nori Holding*[35]*,* the High Court stated that the decision in *Larsen* was irreconcilable with the decision of the House of Lords in *Fiona Trust* and did therefore "not form part of English law". Instead, the court held that transactions avoidance claims resulting from a transaction at an undervalue were caught by an arbitration clause which refers to "any dispute or disagreement arising under, or in connection with" the underlying contract. The court also assessed the respective claim as being arbitrable, regardless of whether the claim is properly characterised as an insolvency claim or not. What mattered to the judge was that the claim was based on the claimant's allegation that valuable security rights were fraudulently replaced by worthless security rights, a dispute which, according to the judge, "arbitrators can determine". However, it is respectfully submitted that this view misses the real point. Ultimately, it is not a question of the objective arbitrability of the avoidance claims, but of the debtor's subjective legal power to dispose of them in advance, i.e. prior to the opening of insolvency proceedings.

The same must be said against the decision in *Riverrock*[36]*.* Here, again, the court declared the decision in *Larsen* to be "not part of English law". As regards arbitrability, the court found that transactions avoidance claims are within the ambit of the arbitration clause and arbitrable despite their nature of insolvency related claims, since this characterisation did not render the claims automatically non-arbitrable. The judge also addressed the question of power of disposal by saying: "I find the suggestion that the court should not allow the pre-insolvency management to determine the forum in which a liquidator could bring post-insolvency claims on the company's behalf less persuasive on this issue than the Singapore Court of Appeal did. In particular, it would seem to be limited to those cases in which the arbitration clause appears in a contract between the company and its management or vehicles associated with them, and in which the circumstances in which the arbitration agreement had been concluded did not themselves provide a basis for impugning that agreement." However, this is beside the point and anything but convincing, because it is difficult to see how an arbitration agreement between the company and its management could impact transactions avoidance claims against a satisfied creditor. Again, the decisive question is not whether insolvency related claims are (objectively) arbitrable but whether the debtor can (subjectively) include such claims in a pre-insolvency arbitration agreement binding on the Insolvency Practitioner.

[34] *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 para. 26.
[35] *Nori Holding Ltd and ors v Public Joint-Stock Company Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm) and on this judgment *Wilkins*, Arbitration Agreements and Insolvency Claims: The Developing Principles, (2020), 33 Insolv. Int., 50 et seq. See also *Bridgehouse (Bradford No. 2) Limited v Bae Systems Plc* [2020] EWCA Civ 759.
[36] *Riverrock Securities Ltd v International Bank of St Petersburg (JSC)* [2020] EWHC 2483 (Comm).

V. Conclusion

In summing up then, the following can be said, subject to deviating regulations of the applicable national law. First, insolvency related claims are objectively arbitrable. Second, the Insolvency Practitioner may conclude an *ad hoc* arbitration agreement regarding such claims. Third, pre-insolvency arbitration agreements concluded by the debtor, provided they survive the opening of insolvency proceedings, cover insolvency related claims if their wording is wide enough. Fourth, it is doubtful whether the debtor has subjectively the legal power to dispose of post-insolvency claims and rights by including them in a pre-insolvency arbitration agreement.Regarding the relationship between arbitration and insolvency, there are many other topics to discuss. For example, when explaining the national laws on this issue above, the crucial question as to *which* national law is applicable has been omitted. This is a matter of conflict of laws and sometimes difficult to decide. For example, where a Polish company sells shares in another Polish company to a French investor, enters into an arbitration agreement with the buyer which is governed by English law and refers to the London Court of International Arbitration, and insolvency proceedings are opened in Poland over the estate of the Polish vendor: which law governs the effects of the insolvency proceedings on the arbitration agreement? The English Court of Appeal, in the world-famous *Vivendi* case,[37] decided in favour of English law, referring to (what is now) Art. 18 of the European Insolvency Regulation. However, this is subject to intensive debate and must be left for another time.

[37] *Syska & Elektrim v. Vivendi* [2009] EWCA 677; see also Swiss Supreme Court, *Elektrim v. Vivendi* (31.3.2009 – 4A_428/2008), English translation at https://www.swissarbitrationdecisions.com/sites/default/files/31%20mars%202009%204A%20428%202008.pdf (last accessed 20 August 2022).