

The Gabriel Moss Memorial Lecture
Effects of Foreign Insolvency Proceedings on Pending Arbitral Proceedings
According to the European Insolvency Regulation

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Abstract

There is no more doubt that the rule contained in Article 18 of the European Regulation on Insolvency Proceedings 2015 (hereinafter referred to as EIR 2015) and in former Article 15 EIR 2000 also refers to pending arbitral proceedings since these proceedings are after the recast of the EIR in 2015 explicitly mentioned in that rule.

This rule, according to which the law of the Member State in which the arbitral tribunal has its seat governs the effects of insolvency proceedings on pending arbitral proceedings, should be interpreted in the following way. That law applies in the first line to the question whether pending arbitral proceedings with the opening of insolvency proceedings and their recognition shall be continued or stayed (suspended), further to the question of effects of such a stay (suspension) as well as to the question of modalities, form and generally of the procedure concerning the initiation of the stayed (suspended) arbitral proceedings.

Having in mind the importance of legal predictability and legal certainty, the European legislator should have explained the term “*pending*” arbitral proceedings at least in one of the Recitals of the Preamble to the EIR 2015.

The words “*and pending arbitral proceedings*” should have been added in Article 7(2)(sent. 2)(f) EIR 2015 at the end of the sentence.

Having in mind the importance of reasons that justify the temporary stay/suspension of pending arbitral proceedings after the opening and recognition of foreign insolvency proceedings, it remains for the consideration whether the introduction of the rule of the automatic stay of pending arbitral proceedings modeled on Article 20 of UNCITRAL Model Law on Cross-Border Insolvency Proceedings would be a better solution for the EIR.

The *lex fori concursus* is the applicable law for the following issues: capacity to be a party in pending arbitral proceedings, the procedural capacity of the insolvent debtor in pending arbitral proceedings, effects on the power of attorney issued by the insolvent debtor before the opening of insolvency proceedings for its representation in pending arbitral proceeding, as well as for the authority/entitlement to initiate the continuation of the stayed/suspended arbitral proceedings (Article 7(1), Article 7(2)(sent. 2)(c, e) EIR 2015). These questions are not covered by Article 18 EIR 2015 and are not governed by the law of the Member State in which the arbitral tribunal has its seat.

As a rule, the *lex fori concursus* also governs the effects of the opening and recognition of foreign insolvency proceedings on arbitration agreements (clauses) (Article 7(1), Article 7(2)(sent. 2)(e) EIR 2015). Since this question is controversial, the European legislator should have elaborated it in more detail in one of the Recitals of the Preamble to the EIR 2015.