JUDGMENT : MR JUSTICE CHRISTOPHER CLARKE : Commercial Court. 2nd October 2008

1. Elektrim S.A., the second claimant, ("Elektrim") is a Polish company. It at one time owned a substantial shareholding in PTC, a Polish mobile telephone company. On 3rd September 2001 Elektrim entered into an agreement known as the Third Investment Agreement ("TIA") with Vivendi Universal S.A. and Vivendi Telecom International S.A., the first and second defendants, (together "*Vivendi*"). This was one of a series of agreements by which Vivendi was intended to acquire an interest in PTC.

2. Article 5.11(c) of the TIA contains an agreement to arbitrate ("*the arbitration agreement*"), which provides for arbitration in London under LCIA rules. It is common ground that the arbitration agreement is governed by English law (although the rest of the TIA is governed by Polish law).

3. On 22nd August 2003 Vivendi commenced an arbitration pursuant to the arbitration agreement. In the arbitration Vivendi advanced claims that Elektrim had breached its obligations under the TIA by interfering with, or failing to secure, the interest that Vivendi was supposed to obtain in PTC. In early 2007, the LCIA arbitral tribunal (Dr Wolfgang Peter, Professor Jerzy Rajski and Mr Alan Redfern, hereafter "*the Tribunal*") fixed a hearing on liability issues for 15-19 October 2007. The claims made are of the order of € 1.9 billion.

4. On 21 August 2007, Elektrim was declared bankrupt by an order of the Warsaw District Court pursuant to its own petition of 9th August 2007. As a result of that order, Elektrim became a '*bankrupt*' for the purposes of the Polish Bankruptcy and Reorganisation Law ("*the Law*").

5. The order of 21 August 2007 of the Warsaw District Court (a) declared Elektrim bankrupt; (b) appointed Jósef Syska, the first claimant, as Court Supervisor; and (c) provided for Elektrim's own management to retain control over all of Elektrim's assets, and to take any actions within the ordinary scope of its business. On 5 February 2008, about 4 months after the proceedings before the Tribunal were closed; the Warsaw Court revoked Elektrim's self-administration, and appointed Mr Syska as the administrator over Elektrim's assets.

6. Article 142 of the Law provides:
"Art 142 [Arbitration clause]. Any arbitration clause concluded by the bankrupt shall lose its legal effect as at the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued."

7. It is common ground that, if Article 142 of the Law is applicable, it has the effect of annulling the arbitration agreement. On 22 August 2007, Elektrim wrote to the Tribunal and Vivendi saying that, as a result of the bankruptcy, the arbitration agreement had been annulled.

8. On 15 October 2007, a hearing began in London. At that hearing, the Tribunal heard argument from both parties as to whether the arbitration agreement had been annulled and from Vivendi on the liability issues. On 20 March 2008, the Tribunal issued its Interim Partial Award ("the Award") on these issues. The Tribunal by a majority (Dr Wolfgang Peter and Mr Alan Redfern, Professor Jerzy Rajski dissenting) rejected Elektrim's objections to the Tribunal's jurisdiction and declared that Elektrim had breached the terms of the TIA. Questions relating to remedy were left for later consideration.

9. On 16th April 2008 the claimants issued an application under section 67 of the Arbitration Act 1996 whereby they sought an order setting aside the Award on the grounds that the arbitration agreement ceased to have effect as from 21st August 2007.[1]

The issue

The critical question is: what law governs the effects of the Polish bankruptcy order? If, as Elektrim contends, the law is that of Poland, the arbitration agreement was from 21st August 2007 at an end and the Tribunal ceased to have any jurisdiction to make an award. If, as Vivendi contends, the applicable law is that of England and Wales, the arbitrators retained and retain jurisdiction.

The Insolvency Regulation

10. Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings ("the Regulation") is a piece of subordinate Community legislation which forms part of English Law. It was introduced in order to lay down mandatory rules for choice of law, jurisdiction, recognition, enforcement and co-operation applicable to cross-border insolvencies within the European Union.

Article 4

11. Article 4 of the Regulation provides:

"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'.

2 The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular: .....

(e) the effects of insolvency proceedings on current contracts to which the debtor is party;

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;"

Article 15

12. Article 15 of the Regulation provides

[1] The arbitrators were originally parties to the application but the claim against them has been withdrawn.

"Effects of insolvency proceedings on lawsuits pending

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".

13. The effect of these Articles is that, unless the exception in Article 4. 2 (f) for "*lawsuits pending*" and/or the provisions of Article 15 have a contrary effect, it is Polish law, as the law of the State of the opening of proceedings, which determines the effects of the bankruptcy order. At the date of the bankruptcy the arbitration agreement was, Elektrim submits, a "*current contract*" within the meaning of Article 4.2 (e). By that Article Polish law governs the effect of the bankruptcy on it. Even if the arbitration agreement was not a "*current contract*" within Article 4.2 (e), Article 4.1 applies Polish law to the effects of the bankruptcy in the absence of some other provision.

14. This raises two questions. The first is whether the phrase "*lawsuit pending*" is apt to cover the reference. If it is, a second question arises as to whether the effect of Article 4.2 (e) is that the arbitration agreement, being a "*current contract*", has been brought to an end, and, hence, the reference as well.

Interpreting the Regulation

15. The Regulation is intended to lay down common rules to be uniformly applied throughout the territories of the Union (with the exception of Denmark) which constitutes a single legal order. It exists in texts in each of the languages of the Union, all of which are equally authentic.

16. The correct approach to the interpretation of the Regulation was accurately summarized by the Tribunal when it observed that: *"the interpretation of the EC Regulation should strive to establish an autonomous (European) meaning, based on the different language versions of the Regulation, considering (i) the overall scheme and purpose of the Regulation (teleological method of construction) and (ii) taking into account interpretative sources, such as the Preamble of the Regulation and the Virgos-Schmit Report, but also the available authorities, such as Court decisions – in first line, those of the ECJ – and the opinions of legal commentators.".*[2]

17. A similar view is expressed in the Virgós-Schmit report ("the Report")[3] at paragraph 43:

"The Convention is a self-contained legal structure, and its concepts cannot be placed in the same category as concepts belonging to a national law. The Convention must retain the same meaning within different national systems. Its concepts may not be interpreted simply as referring to the national law of one or other of the States concerned.

When the substance of a problem is directly governed by the Convention, the international character of the Convention requires an autonomous interpretation of its concepts. An autonomous interpretation implies that the meaning of its concepts should be determined by reference to the objectives and system of the Convention, taking into account the specific function of those concepts within this system and the general principles which can be inferred from all the national laws of the Contracting States.

… Uniformity of interpretation is required in order to ensure equality in the rights and obligations derived from the Convention for the Contracting States and for the persons concerned irrespective of the Contracting State in which they are located."

18. The main objectives of the Regulation are set out in Preambles (1) - (4) and (8). Preambles (2) and (4) show that the Regulation is designed to promote the proper functioning of the European internal market by ensuring that cross-border insolvency proceedings operate efficiently and effectively, and by avoiding *"incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)";* or (see the Report, para 7.) *"to realise individual claims independently of the costs which this may entail for the creditors as a whole or to the going-concern value of the debtor's firm."*

19. In order to attain these objectives, the Regulation contains a number of uniform private international law rules on insolvency relating to: (a) jurisdiction (Article 3); (b) conflict of laws (Articles 4 ff); and (c) recognition of insolvency judgments (Chapter II). These rules are designed to secure:

    (a) A single, exclusive, form of insolvency proceedings taking place in one jurisdiction, being the territory of the centre of the debtor's main interests. These are referred to as "*the main insolvency proceedings*": see Preambles (12) - (16) and Article 3; and paragraphs 15 ff of the Report.

    (b) A single governing law determining the intra-Community effects of the insolvency, being the law governing the main insolvency proceedings, or the "*lex concursus*". See Preamble (23) and Articles 4.1 and 4.2. Preamble (23) provides:

    "This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of proceedings should be applicable (lex concursus). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings."

20. The Regulation also recognises that exceptions should be made to the general rules in order to protect the legitimate expectations of those who carry out transactions and to promote certainty. Preamble 24 provides that:

[2] March 2008 Award, para 253

[3] Bankruptcy proceedings were excluded from the Brussels Convention. A separate Convention on bankruptcy was negotiated, but lapsed when the UK failed to sign it. The Virgos-Schmit report was to have been the Official Report of the Convention. The draftsman took parts of the Report and placed them in the Recitals. Although not prescribed as a guide to interpretation it is generally regarded as one.

"Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule"

21. Paragraphs 92 and 93 of the Report provide:

92. "Exceptions to the general rule on conflicts of law of Article 4

The application, by the courts in the State of the opening of proceedings, of their national insolvency law and the automatic extension of its effects to all the Contracting States (see Articles 16 and 25) may interfere with the rules under which transactions are carried out in these States.

To protect legitimate expectations and the certainty of transactions in States other than that in which proceedings are opened (for in the latter State all the operators have to count on the application of its laws) the Convention provides for a number of exceptions to the general rule:

1. in certain cases, the Convention excludes some rights over assets located abroad from the effects of the insolvency proceedings (as in Articles 5, 6 and 7).

2. In other cases, it ensures that certain effects of the insolvency proceedings are governed not only by the law of the State of the opening (F1), but by the law of the State concerned (see Articles 8, 9, 10, 11, 14 and 15). In such cases, the effects to be given to the proceedings opened in other Contracting States are the same effects attributed to a domestic proceedings of equivalent nature (liquidation, composition or reorganisation proceedings) by the law of the State concerned.

93 The exceptions to the application of the law of the State of the opening (Article 4) are referred to in Articles 5 to 15 of the Convention. Apart from Articles 6 and 14, which by systemic arguments must be interpreted in the same way, the exception is made in favour of the law of a 'Contracting State'……"

22. The Regulation provides that the opening of insolvency proceedings shall not affect creditors or third parties' rights in rem in respect of assets situated within the territory of a Member State other than the opening State ("*another State*") - Article 5; creditors' rights of set-off under the law applicable to the insolvent debtor's claim - Article 6; a seller's reservation of title in respect of an asset situated within another State - Article 7; contracts relating to immoveable property situated in another State - Article 8; rights of parties to payment or settlement systems or financial markets - Article 9; employment contracts and relationships - Article 10; rights subject to registration – Article 11; acts detrimental to all the creditors which are subject to the law of another State whose law does not allow any means of challenging the relevant act - Article 13; third party purchasers of immoveable assets or assets subject to registration - Article 14; lawsuits pending concerning an asset or a right of which the debtor has been divested – Article 15.

"With the exception of lawsuits pending"

23. Elektrim contends that the phrase "*lawsuit(s) pending*" in Articles 4.2 (f) and 15 is limited to individual execution actions against the debtor's assets. In particular Article 4.2 (f) refers to:

i. A principal category being "*proceedings brought by individual creditors*", which means proceedings by way of execution or enforcement against the debtor's assets either with or without the assistance of the court;

ii. A sub-category of such proceedings, being "*lawsuits pending*", which means proceedings by way of execution in which the assistance of the court is required.

24. I accept that the phrase "*with the exception of lawsuits pending*" (and other similar language in the other versions of the text) indicates that lawsuits are to be regarded as within the category of "*proceedings brought by individual creditors*" but for the exception. All the languages use some variant of exception apart from Greek, which uses (as translated) "*unless*" (ΕΚΤΌΣ), which appears to have the same meaning. It is not however evident that *"proceedings brought by individual creditors"* are to be limited to proceedings by way of execution. In submitting that they are so limited Elektrim relies on (a) the Report and (b) Article 15.

25. As to the former, paragraph 91 of the Report reads:

"91 To facilitate its interpretation, Article 4 (2) contains a non-exhaustive list of questions that are governed by the law of the State of the opening.

*(f) the effects of the insolvency proceedings on **executions** brought by individual creditors, their suspension or prohibition after the opening of collective insolvency proceedings. However, the effects of the proceedings on **lawsuits** pending remain subject to the law of the Contracting State, where the lawsuit is pending, ex Article 15 (see point 142);"* [Bold added in this and all other citations with bold characters]

26. "Executions" embraces, Elektrim contends, both execution in court proceedings after judgment and, where permitted, seizure of the debtor's assets without court order before trial (such as, in England, distress). But it cannot extend to arbitrations. If, as the Report suggests, "*proceedings brought by individual creditors*" refers to executions, the exception of "lawsuits pending" cannot apply to something which is not an execution.

27. As to the latter, Elektrim submits that the exception of "*lawsuits pending*" ties in with Article 15 and that the phrase must mean the same in both Articles. Article 15 is directed towards proceedings by way of execution against assets which require the assistance of the court. The combined effect of the two Articles is that executions by individual creditors are subject to the lex concursus unless the claim to execute is made in an action pending at the date of the bankruptcy.

28. Paragraph 142 of the Report provides:

Article 15

Effects of the insolvency procedure on lawsuits pending

142 The Convention distinguishes between the effects of insolvency on individual enforcement proceedings and those on lawsuits pending.

The effects on individual enforcement actions are governed by the law of the State of the opening (see Article 4 (2) (f)) so that the collective insolvency proceedings may stay or prevent any individual enforcement action brought by creditors against the debtor's assets.

*Effects of the insolvency proceedings on **other legal proceedings** concerning the assets or rights of the estate are governed (ex Article 15) by the law of the Contracting State where these proceedings are under way. The procedural law of this State shall decide whether or not the proceedings are to be suspended , how they are to be continued and whether any appropriate procedural modifications are needed in order to reflect the loss or the restriction of the powers of disposal and administration of the debtor and the intervention of the liquidator in his place."*

29. It is not immediately clear from that passage whether the author regarded the subject matter of Article 15 as an excluded subset of "*proceedings brought by individual creditors*" in Article 4. 2 (f) or a separate category, nor what exactly were the *"other legal proceedings*" which they had in mind.[4] Vivendi contends that this passage marks a distinction between executions, to which Article 4 (2) (f) applies (as paragraph 91(f) of the Report indicates) and other legal proceedings concerning the assets or rights of the estate (as provided for in Article 15), to which it does not.

Virgós and Garcimartín

30. Professor Virgós has written a book, originally in Spanish, with Professor Francisco Garcimartín entitled *"The European Insolvency Regulation: Law and Practice",* Kluwer 2004. In it the authors say of Article 4.2 (f): *"121*

*(g) .....Insolvency proceedings are designed to provide a collective forum, a solution that avoids competition by creditors for the debtor's assets and allows for the orderly examination of the debtor's and the creditor's rights. Article 4.2.f protects this function. The lex fori concursus will therefore decide to which extent individual actions by creditors to enforce their claims through collection efforts, adjudication, execution or otherwise are to be suspended or enjoined. The term "proceedings" is broad enough to encompass all kinds of procedures brought about by individual creditors, **including arbitration proceedings** and enforcement measures initiated by creditors outside the court system, where allowed. .....*

*To understand this provision and its exceptions (Article 15 IR) a distinction must be made between individual enforcement actions and lawsuits. Examples of the former are measures such as the realisation of an asset or the foreclosure of a security right. Examples of the latter are **actions which seek to determine the existence, validity, content or amount of a claim.** Accordingly:*

(i) The effects on individual enforcement actions, both pending and future, are always determined by the lex fori concursus ...

(ii) The effects on the continuation of lawsuits pending at the moment of the opening of the insolvency proceedings, are by way of exception, determined by the law of the State where the lawsuit is pending (Article 15).

31. The statement that: *"The lex fori concursus will therefore decide to which extent individual actions by creditors to **enforce** their claims through collection efforts, **adjudication**, execution or otherwise are to be suspended or enjoined".* might be read as indicating that "*proceedings brought by individual creditors*" are not limited to executions but embrace a claim for an adjudication i.e. a ruling on the validity of a claim. But I do not feel confident that that is what the authors intended. The reference to actions "*to enforce ... claims*" may indicate that what they had in mind was executions and that the form of adjudication to which they referred was a decision of the court which put the execution into effect. I bear in mind that the book was not originally written in English but in Spanish, and that the original Spanish word for adjudication may have some sense of execution.

32. The statement that: *"The term "proceedings" is broad enough to encompass all kinds of procedures brought about by individual creditors by individual creditors, **including arbitration proceedings** and enforcement measures initiated by creditors outside the court system"* appears to indicate that "*proceedings brought by individual creditors*" are not limited to executions, since an arbitration is not a form of execution. Mr Toby Landau, Q.C., suggested that the authors were referring to a type of arbitration process which amounted to a collection. He gave as an example a claim for a direction that something should happen, which would lead to summary enforcement under the New York Convention. Such arbitration proceedings would, he suggested, fall within "*proceedings brought by individual creditors*" whereas other proceedings would not. That seems to me a difficult distinction. Most arbitration proceedings are designed to lead to a direction that something shall happen, even if is only that one party shall pay the other. It is possible that what the authors had in mind were proceedings by way of execution of an award e.g. an order giving leave to enforce the award as a judgment or judgment in terms of the award; but "*arbitration proceedings"* seems a somewhat inapt description for that purpose and, in any event, cannot readily be limited to proceedings by way of execution.

[4] Although the likelihood is that the reference was to proceedings other than the collective insolvency proceedings previously referred to. The word "*other*" only appears in the Spanish version of Article 15 ("*Los efectos del procedimiento de insolvencia con respecto a otros procedimientos en curso*") where it appears to have that meaning. The author of the Report was Spanish.

33. The statement that: *"To understand this provision and its exceptions (Article 15 IR) a distinction must be made between individual enforcement actions and lawsuits…… Examples of the latter are* ***actions which seek to determine the existence, validity, content or amount of a claim"*** shows that the authors treated "*lawsuits*" as extending to actions and arbitrations "*which seek to determine the existence, validity, content or amount of a claim*" and that, contrary to Elektrim's submissions, individual enforcement actions, even if pending, are not within the exception.

34. The matter is taken further in the section of the book dealing with Article 15, which reads:

" 10 EFFECT ON LAWSUITS PENDING (ARTICLE 15)

254 The effects of the opening of insolvency proceedings on individual enforcement actions by creditors (such as distress, execution, attachment or sequestration) are governed by the law of the State of the opening, according to Article 4.2.f. The main insolvency proceedings can stay (if they have already started) or prevent (if not yet started) any individual enforcement actions brought by the creditors against the debtor's assets in other States (see No. 121).

255 However, the effects of the insolvency proceedings on lawsuits pending regarding assets or rights of which the debtor has been divested are subject to the law of the State where the lawsuit is pending (lex fori processus). This exception has a twofold explanation: the fact that, as no enforcement action is involved, the principle of collective action inherent in the insolvency proceedings is not impaired; and the close link with the procedural laws of each state resulting from the fact that the lawsuit is already in course.

Further explanation. The difference between subjecting individual enforcements to the lex fori concursus and subjecting ordinary processes to the lex fori processus is sufficiently explained if we consider the different consequences of each on the insolvent debtor's estate. In the first case, the creditor satisfies his interest directly, in the second case, he obtains a decision on the merits which does no more than allow him to join the body of creditors with an established claim.

261 The Insolvency Regulation does not make any express reference to the effects of the insolvency proceedings on lawsuits pending before arbitral tribunals in member States. ***Arbitration is not excluded from the general effects of the lex concursus under Article 4 and the literal wording of Article 15 is broad enough to include them in its exception to the application of that law.*** *Arbitration proceedings are equivalent substitutes to ordinary legal proceedings in all Member states, and there is no substantive or procedural reason justifying a different solution.*

35. Thus, if one takes the whole of Professor Virgos' writings it becomes apparent that, far from contending that the exception to Article 4.2 (f) and Article 15 relate to execution against the debtor's assets for which the assistance of the court is required, he takes the view that they extend to actions and arbitrations brought to establish claims and do not extend to executions.

"concerning an asset or a right of which the debtor has been divested"

36. There remains for consideration the meaning of the words "*concerning an asset or a right of which the debtor has been divested*". These words might be taken to signify that the lawsuit must involve

i. a claim by *the debtor* to a particular asset or a claim asserting any other right e.g. in contract; and/or

ii. a proprietary claim by *a third party* to the assets or rights of the debtor;

iii. a claim by a *third party* which, if successful, would fall to be satisfied out of the assets the subject of the insolvency proceedings.

37. It seems to me unlikely that the draftsman intended to limit the phrase to any or any two of those categories. As to (i) Article 15 ties in with Article 4.2 (f), which deals with proceedings brought by individual creditors. As to (ii), it would seem unlikely that the draftsman was only concerned with creditors' proprietary claims. If he was, he could no doubt have used specific language (as he did in Article 5 in relation to rights in rem; Article 7 in relation to reservation of title; Article 8 in relation to contracts relating to immoveable property and Article 11 in relation to rights subject to registration). Not giving the phrase a restricted meaning is also consistent with the generality of the words "*lawsuit(s) pending*". As to (iii) there is no intelligible rationale for including (ii) but not (iii).

38. In my judgment the phrase extends to all three categories. The purpose of the Article is to deal with claims against, or relating to, such of the estate of the debtor as is affected by the insolvency. The "divestment" in question is that which takes place by reason of the insolvency proceedings. The expression is not intended to refer to the type of action that is brought by the creditor. That that is so is confirmed by the other language versions. Thus:

a. The German and Danish texts refer to a lawsuit pending concerning "*an asset or right in the debtor's estate*";

b. The Czech text refers to a lawsuit concerning "*assets or rights belonging to the debtor's estate*";

c. The Greek text refers to a pending lawsuit regarding "*an item or right of bankruptcy property*";

d. The Hungarian text refers to ongoing proceedings concerning "*an asset or right withdrawn from the debtor's disposal*";

e. The Polish text refers to legal proceedings pending concerning "*an asset or right being a part of the bankruptcy estate*";

f. The Portuguese text refers to a pending lawsuit relating to "*an asset or right the administration or possession of which the debtor has been divested*";

g. The Swedish text refers to a lawsuit pending concerning "*assets or rights of which the debt no longer has a right of disposition*";

h. The Spanish text refers to other proceedings in progress concerning "*an asset or right belonging to the estate*";

i. The Bulgarian text makes reference to pending legal disputes over "*property or rights of the insolvency mass*".

39. Such divestment may be partial or total. Article 1 headed "Scope" states:

"1. This Regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."

Thus, it is necessary to verify that the pending action relates to a subject-matter that is covered by the insolvency proceedings.

40. The Report explains at Paragraph 49 (c) what is meant by partial or total divestment of a debtor in the context of Article 1(1):

"the proceedings must entail the total or partial divestment of the debtor, that is to say the transfer to another person, the liquidator, of the powers of administration and of disposal over all or part of his assets, or the limitation of these powers through the intervention and control of his actions. It should be remembered that partial divestment, whether of his assets or his power of administration, is sufficient."

41. The Tribunal reached much the same conclusion when it held that the language was intended to make clear that the pending merits action must concern *"the subject matter of the insolvency as determined by the lex concursus i.e. an area of activity covered by the insolvency proceedings and thus part of the estate"*[5] and that, since the Polish bankruptcy order concerned Elektrim's entire estate, Vivendi's claims in the LCIA arbitral proceedings concerned the subject matter of the insolvency proceedings.[6]

42. The only Member State whose highest court has ruled on the issue is that of Austria, where three cases support Vivendi's position:

(a) Austrian Supreme Court, March 17, 2005, 8 Ob 131/04d. The Court, applying Article 15, held that Austrian law applied to the Austrian proceedings brought by a creditor concerning the payment for products sold, in respect of which insolvency proceedings were subsequently opened in Germany on the basis that Article 15 provided that a pending legal dispute about an "*object or asset right*" (corresponding to the translation of the German version of Article 15 "*einen Gegenstand oder ein Recht der Masse*") was governed by the law of the State where the dispute was pending and that the creditor's claim concerned assets the subject of the insolvency. It pointed out that a claim might not necessarily do so if it concerned "*insolvency-free assets of the debtor (e.g. unseizable part of employment incomes), disputes of non-asset law nature…The insolvency assets must be affected by the proceedings ….*"

(b) Austrian Supreme Court, January 24, 2006, 10 Ob 80/05w. The Court applying Article 15, held that Austrian law applied to Austrian proceedings brought by the petitioner for remuneration under a contract of work against a company in respect of which insolvency proceedings were subsequently opened in Italy, on the basis that "*All procedures concerning in particular assets in bankruptcy … and claims of creditors in bankruptcy .. are considered as proceedings …… The effects of the insolvency of the petitioner on the objective legal case are determined exclusively in according to lex fori processus, therefore Austrian law*".

(c) Austrian Supreme Court, February 23. 2006, 9 Ob 135/04z. Applying Article 15, the Court held that Austrian law applied to Austrian proceedings brought by the insolvent company, in respect of which insolvency proceedings were subsequently opened in Germany, concerning the repayment of a loan.

"Lawsuit"

43. Elektrim submits that the expression "*lawsuit*" suggests that what the draftsman had in mind was an action in court; and that this conclusion is supported by some of the language of the non-English texts. Vivendi has obtained translations of the 21 different language versions of the Regulation.

44. In the Danish, Swedish, Hungarian, Estonian, Czech, Bulgarian, Slovenian, Romanian, Slovak, Portuguese, French, Greek, Maltese and Lithuanian versions, the word translated into English in Articles 4.2 (f) and 15 is "*lawsuit*", save that:

a) in the Hungarian version Article 15 is translated, under the heading *"Effects of insolvency proceedings on ongoing lawsuits"* as "*The effects of insolvency proceedings on ongoing proceedings concerning an asset etc..";*

b) in the Bulgarian version Article 15 is *headed "Consequences of insolvency proceedings on pending legal disputes"* followed by *"The consequences of insolvency proceedings on pending legal disputes…";*

c) in the French version the words "*Les effets de la procedure d'insolvabilite sur les poursuites individuelles, a l'exception des instances en cours",* may designate either court or arbitral proceedings;

d) in the Portuguese version Article 4.2. (f) refers to the exception of *"pending proceedings"* .

The Dutch "*ongoing legal claims*" is said by the translator to have the same meaning as "*lawsuits pending*".

45. The Finnish translation refers to "*judicial proceedings*" and the Latvian to "*cases pending in court*", phrases only consistent with Article 15 referring to court proceedings. The Polish translation refers to the exception in Article 4.2. (f) of "*legal proceedings in progress*"; in the heading of Article 15 to "*Effects of insolvency proceedings on lawsuits pending*" and in the body to "*The effects of insolvency proceedings on a legal proceeding pending ….*"

46. The German "*legal dispute[s]*", Spanish "*legal proceedings/proceedings in progress*", and Italian "*pending proceedings*" are capable of referring to court and arbitral proceedings.

[5] March 2008 Award, para 325
[6] March 2008 Award, para 337

Discussion

47. I see no reason to limit the expression "*proceedings brought by individual creditors"* in Article 4.2 (f) to proceedings by way of execution. There is no such limitation in the phrase itself which is entirely general in terms. The effect of Elektrim's interpretation is that the law of the State of the opening of proceedings governs the effect of the insolvency on execution proceedings that have not been commenced; but the law of the forum of the lawsuit governs the effect of the insolvency on execution proceedings that have been commenced. There is no principled reason why the draftsman should have chosen to make such a distinction, and it is contrary to the purpose of the Regulation (see paragraph 50 below) and paragraph 255 of the Virgós and Garcimartín book (cited at paragraph 34 above).

48. Support for this conclusion may be found in **Commission v AMI Semiconductor Belgium and others**, 17 March 2005, case C-294/02. The ECJ was concerned with an arbitration clause in a contract providing for the European Court of First Instance to have jurisdiction over disputes under the contract. The question for decision was whether the action by the Commission was admissible against two of the defendant companies (a German and Austrian company) in circumstances where those companies had been the subject of insolvency proceedings in their respective countries prior to the Commission lodging its contractual claim for reimbursement of overpayment under the contract.

49. The ECJ applied the principles of the Regulation by analogy, and referred to Article 4.2 (f) when considering - and declaring inadmissible - the arbitral proceedings brought by the Commission against the Austrian and German company applying their respective national laws – as the lex concursus - to the question since the arbitral proceedings had not been "*pending"* at the relevant time. It appears to have proceeded on the basis that *"proceedings brought by individual creditors"* covered the Commission's arbitration claim. Mr Moss observed that no question as to whether Article 4.2. (f) applied only to executions or as to the meaning of lawsuits appears to have been raised. Even so, the Court's assumption provides significant support for the conclusion that I have reached. The cases in the Austrian Supreme Court to which I have referred do likewise.

Teleology

50. The purposes of the Regulation include (a) ensuring the effective and efficient administration of the insolvency and avoiding one creditor gaining an advantage over others; and (b) protecting the legitimate expectations of parties and the certainty of transactions. To have all execution actions subject, in the event of insolvency proceedings, to the law of the State of the opening of those proceedings would promote, and allowing individual creditors to continue with executions they have started (and thus obtain direct satisfaction against the insolvent's estate) would impede, the achievement of the first objective. To allow actions that have already commenced to continue would promote the second objective without prejudicing the effective and efficient administration of the insolvency. A litigant who may (as here) have spent very large sums in pursuing, or defending, a claim may legitimately expect that it should proceed to adjudication. If it does so, and the claim is successful, it will then rank with the other claims in the insolvency.

51. In the light of (a) the general wording of Article 4.2 (f); (b) the purpose behind the Regulation; (c) the Report; and (d) the Virgós and Garcimartín book, I regard the phrase in Article 4. 2. (f) "*proceedings brought by individual creditors*" as referring to proceedings brought by individual creditors of whatever nature i.e. including both proceedings by way of execution (whether with or without court orders) and actions insofar as they are brought to establish the validity of a claim[7]; and the phrase "*with the exception of lawsuits pending*" as extending to actions insofar as they are of the latter type which, if successful, will give rise to a claim against the insolvent's estate, but not to execution.

52. That being so, I can see no good reason why *"lawsuit"* should not be regarded as including a reference to arbitration. If the draftsman intended only to exclude lawsuits pending in court, he could easily have used phraseology which was unequivocally clear when translated into each of the languages of the Community.[8] Moreover, if he intended to exempt pending actions from the operation of the law of the opening State there is no sensible reason why he should have left arbitrations out of the exception. The Regulation is part of the legal framework of the Community designed to establish a common internal market. Thousands of commercial transactions within that market will be the subject of arbitration agreements. It would border on the irrational to protect the legitimate expectations of those who had commenced an action against the insolvent but not those who had initiated a reference.

53. It was suggested that the reason for such a distinction lies in the fact that it would be an unacceptable infringement of the sovereignty of the Member States if the Regulation were to require actions before the courts of a Member State to cease, in circumstances where the insolvency would not have that effect under the law of the court's State; whereas no such considerations would affect arbitrations, which are based on contract and do not represent an exercise of the judicial power of the State. To the charge that this submission, which places arbitrations in an inferior position to actions, was old fashioned and archaic, Elektrim retorted that the Regulation is itself, a dated instrument, having had a gestation period of over 25 years, and that sovereignty is a continuing issue.

54. I do not regard this as an acceptable basis for distinction. The expectation of those who agree to have their disputes resolved by arbitration that the dispute will be resolved by the arbitral tribunal to which they have agreed under

[7] An action may be regarded as covering a spectrum of activity including (a) the making of a claim; (b) the adjudication of its validity by the court; and (c) execution by court process to ensure its satisfaction.

[8] See, for instance Article 28.1 of the Judgments Regulation ("*Where related actions are pending in the courts of different Member States...*").

the supervision of the relevant court is no less legitimate than that of those who expect their disputes to be resolved in and by a court. International arbitration is protected by international treaty in the form of the New York Convention of (be it noted) 1958, to which the Member States are parties, and which obliges the courts of Contracting States to uphold the arbitral process by staying legal proceedings brought in breach of an arbitration agreement. Arbitration is not to be regarded as the poor relation for which no saving provision need be made, whereas the court, because it exercises the judicial power of the State, should enjoy a privileged position.

55. It is, also, noticeable that European instruments, if they intend to exclude arbitration, do so expressly: e.g. Article 1(2)(d) of EC Regulation No. 44/2001; Article 1(2)(d) of the Rome Convention on the Law Applicable to Contractual Obligations. See similarly: Article 2(4) of the Convention on Choice of Courts Agreement (the Hague Convention).

56. I do not regard the non-English versions of the Regulation as pointing to a different conclusion. Any analysis of 21 equally authentic versions of the same instrument which, when reduced to a common language, do not say exactly the same thing, faces the problem of where to begin. If there was one authentic text of which all other versions were copies, or to which they were inferior, it would be necessary only to secure the best translation possible of the authentic text. Here all texts are equally authentic so that it is not possible by any specified order of preference to determine whether e.g. the Latvian reference to "*proceedings in court" i*s a translator's gloss from the *"true"* version of "*legal proceedings*" or vice versa.

57. In those circumstances, as it seems to me, it is necessary to look at the corpus of different versions to see whether it reveals any substantial common ground which points to a particular conclusion which is consistent with the underlying policy of the Regulation. When, in the present case, I look at the several versions it seems to me that, broadly speaking, they point away from an interpretation which limits the exception to Article 4.2 (f) and Article 15 to actions in court. Only two of the translations make specific reference to court or judicial proceedings. The others refer either to a lawsuit or proceedings/legal proceedings/legal dispute – terms which extend, or are, at the lowest, capable of extending, beyond a court action, and which do not suggest a limitation to proceedings in court.

58. My conclusion that *"lawsuit"* includes arbitral proceedings is supported by the following academic writings:

(a) Professors Virgós and Garcimartin: see paragraph 34 above;

(b) Arbitrage et droit europeen des faillites, Giorgini :

Paragraphs 12 – 14:

"Pursuant to the provisions of Article 4[(2)] (f) cited above, the lex fori concursus is competent to determine the nature and scope of the consequences of the stay of individual claims on a possible arbitral instance.[9] *The solution, a simple one in appearance, needs however to be clarified. The law of the opening being only competent if the instance is not pending requires that the notion of instance be defined.*

However, the Regulation gives no guidance. Thus, the Member States jurisdictions will have to fill this lacuna. But such a definition gives rise to some difficulties. It seems that the simple presentation of a request for arbitration is not sufficient to consider that the lawsuit is pending (l'instance est déjà en cours). For Philippe Fouchard, the tribunal would be constituted, "namely that all the arbitrators have accepted their mission". In France, this interpretation has been recently confirmed by the French Supreme Court (Cour de Cassation) which considered that an arbitration proceeding is pending from the day when the Arbitral Tribunal was definitively constituted, which means from the acceptance by all the arbitrators of their mandate. (Cass.Civ. 1ère, 30 mars 2004, R. c/ Sté Frabalex, Dalloz 2004, IR, n° 20, p. 1425)."

Paragraph 16:

"The qualification of proceedings[10] *in the meaning of the EU regulation n°1346/2000 does not seem to give rise to any insurmountable difficulties. In fact, the activity of arbitration is sufficiently analogous to the activity of the courts of the Member States. Arbitration is organized in a legal context and the arbitrator is required to decide pursuant to the law. Moreover, an arbitral award has a res judicata effect between the parties, and can constitute an executory decision under certain circumstances, in particular in recognition proceedings.*"

(b) Extract from Internationales Zivilverfahrensrecht by Univ-Prof. Dr. Alfred Burgstaller, LexisNexis Feb 2003:

"If there is an arbitration proceeding pending in a member state, the question whether this proceeding has to be suspended depends on the law of the member state (possibly also including the Rules of Arbitration). Prior to the introduction of the European Insolvency Regulation this question would have rather been determined on the basis of the law of the state of insolvency".

(c) Extract from Kommentar zu den Insolvenzgesetzen by Dr Andreas Konecny and Dr Günter Schubert, Wein 2007 and translation which states:

"As a consequence, according to Article 15 the legal effects which the opening of the [insolvency] proceedings has towards pending arbitration proceedings depend on the law of the member state in which the arbitration proceedings are pending …"

59. Such a conclusion also interprets the references in the Regulation to *"proceedings*" consistently with the reference to *"proceedings*" in the *UNCITRAL Model Law on Cross-Border Insolvency* published in 1997 ("*the Model law*"). Article 20 of the Model Law provides:

1. Upon recognition of a foreign proceeding that is a foreign main proceeding:

[9] *Une possible instance arbitrale.*

[10] "*instance*"

a. Commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

b. Execution against the debtor's assets is stayed;

c. The right to transfer, encumber, or otherwise dispose of any assets is suspended."

That law is intended to apply to arbitration: see The Guide to the Enactment of the Model Law, produced by UNCITRAL, para 145. As is apparent, the provision for an automatic stay of proceedings is the opposite result to that which, in Vivendi's submission, applies in the case of the Regulation.

Other decisions

60. In ***In re Flightlease*** [2005] IEHC 274 the Irish High Court was concerned with a claim by a company abbreviated to "Air Lib" against Flightlease. Air Lib commenced proceedings in France. Flightlease went into liquidation in Ireland. Murphy, J, held that:

"The reservation of lawsuits pending in article 4 (2) (f) is in the context of the limited scope of article 15 which refers to a lawsuit concerning an asset or right of which the debtor had been divested being governed solely by the law of the Member State in which that lawsuit is pending. Litigation in France is in respect of a money claim and does not concern an asset of which the debtor has been divested…Article 15 only deals with lawsuits pending "concerning an asset or a right of which the debtor has been divested. Article 15 does not have general application to lawsuits pending."

61. For the reasons stated I respectfully disagree. Such a conclusion seems to me inconsistent with the views expressed in the Report and by Professors Virgós and Garcimartín in their book and not to give effect to one of the underlying purposes of the Regulation. It is not entirely clear what meaning the judge ascribed to *"concerning an asset or a right of which the debtor has been divested"*. The decision appears to treat the phase as referring to a proprietary claim to the company's assets rather than to the scope of the claim and whether it affects the insolvent's estate. I regard this as an erroneous interpretation.

62. In ***Mazur Media*** [2004] EWHC 1566 the Court applied English law to decide whether proceedings commenced in England against a German company in respect of which insolvency proceedings were subsequently commenced in Germany should be stayed. The action against the German company involved a claim to title in and delivery of recordings. Lawrence Collins, J, as he then was, also considered the stay application in relation to certain conversion claims (in case he was wrong to conclude, as he did, that there was no jurisdiction to determine them). Pursuant to Article 15 he applied English law to the question of whether or not the action should be stayed. There is thus no basis to infer from this decision that Article 15 is restricted to proprietary claims. On the contrary it proceeds upon the basis that it is not.

The second issue

Elektrim's submissions

63. Elektrim contends that there is a second, and logically anterior, reason why the Tribunal had no jurisdiction. Article 4 provides:

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(e) the effects of insolvency proceedings on current contracts to which the debtor is party'

64. The arbitration agreement was, at the date of the bankruptcy, a current contract. The law of Poland, as the law of the State of the opening of proceedings, determined the effect of the Polish bankruptcy on the arbitration agreement, and, by that law, the arbitration agreement was annulled. Accordingly the Tribunal ceased to have jurisdiction. This so, even if a reference may be regarded as a "*lawsuit pending*".

The view of the Tribunal

65. The Tribunal took the view that the reference was a "*lawsuit pending*" and that Article 15 required it to apply English law to determine the effect of the bankruptcy on the reference. It went on to assume that, taken by itself, Article 4.2 (e) would apply Polish law to the question of whether the arbitration agreement remained valid or not. But that would give rise to a conflict between Article 4. 2 (e) and Article 4.2 (f). In paragraph 355 the Tribunal said:

"The case at hand shows that subparagraphs (e) and (f) of Article 4 (2) cannot apply simultaneously, even assuming that arbitration agreements are to be considered "current contracts". The typical effects of insolvency proceedings with regard to arbitration must be the same, whether they are analysed as effects on a "current contract" or as effects on "lawsuits pending". In order to avoid contradictory results, the effects of insolvency proceedings on pending arbitral proceedings can only be governed by one set of rules. This is actually emphasized by the wording of Article 15, which require that "the effects of the insolvency proceedings on a lawsuit shall be governed <u>solely</u> by the law of the member state in which that lawsuit is pending". (Emphasis added)".

66. In respect of that conflict the Article 4.2 (f) exception, the Tribunal held, must prevail because:

"…. [it] is more specific as it concerns pending proceedings, the very subject matter of arbitral agreement. Moreover, the countervailing policy of the Regulation regarding the protection of legitimate expectation and security of transactions warrants the equal treatment of court proceeding and arbitral proceeding, and thus the application of lex fori processus in accordance with the exception of Article 4 (2) (f) also in the case of arbitration…An application of Article 4 (2) (e) would not only denude the exception of Article 4 (2) (f) in the case of arbitration. It would also

not be in line with the policy objective of the Regulation. Consequently, with regard to arbitration, Article 4 (2) (f) must be considered as the lex specialis in relation to Article 4 (2) (e)".[11]

Elektrim's criticism of the Tribunal's reasoning

67. Elektrim contends that in reaching this conclusion the Tribunal fell into error. Even if, contrary to its submission, "*lawsuit*" includes arbitration, still Article 4. (2) (e) and Articles 4.2 (f) and 15 are dealing with two separate matters – (a) the arbitration agreement and (b) the reference i.e. the proceedings that result from the submission of a particular dispute to arbitration.

68. Elektrim points out that the arbitration agreement may have a law which is not the same as the curial law of the arbitration; and that the effects of the arbitration agreement extend beyond any particular set of proceedings. The arbitration agreement will (usually, as here) be a continuing obligation not only including the instant dispute but also extending to all future ones; and will impose an obligation on the parties to comply with the arbitrators' award once it has been delivered. The agreement to arbitrate confers on a party a continuing right not to face proceedings before national courts, and a continuing correlative negative covenant not to sue in a national court: *The Angelic Grace* [1995] 1 Lloyd's Rep. 87 . Such an agreement is quite distinct from a reference. Even if "*lawsuit*" includes a reference i.e. the arbitral proceedings, it cannot be apt to describe the arbitration agreement.

69. Given the clear distinction between an arbitration agreement and a reference, there is no conflict between Article 4.2 (e) and Article 4.2 (f) / Article 15. The former is concerned with contracts; the latter is concerned with proceedings. The majority have silently and impermissibly widened Article 15 so as to say "*lawsuits and contracts relating to lawsuits*". If the draftsman had meant that he would have said so. He specifically exempted other contracts but not arbitration agreements.

70. The majority's approach is also inconsistent with the general scheme of the Regulation, under which the *lex concursus* governs, subject only to specific exceptions identified in express terms. Where the exceptions relate to contracts, the excluded types of contract are specified, as in Arts 8 and 10.

71. The majority's conclusions that the choice of law rule in Article 15 represents the *lex specialis* and, thus, takes priority over the choice of law rule in Article 4.2 (e) could only be legitimate if Article 15 and Article 4.2 (e) give rise to conflicting choice of law rules *for the same choice of law problem*. They cannot be so interpreted because they are dealing with two different questions: (i) the law which determines the effects of the bankruptcy on the reference and (ii) the law which determines its effects on the arbitration agreement.

Serial application

72. Elektrim submits that, where there is a series of distinct choice of law problems, the choice of law rules in the Regulation have to be applied "*serially*" i.e. at different times. Different Articles will apply to different questions; and the result may be that an action which has been commenced comes to an end, because the underlying contract terminates. They put forward the following example:

    (a) A is a party to an English law contract and, being registered in and having its "*centre of main interests*" in Poland, becomes bankrupt in that country by way of the opening of a main proceeding.

    (b) Proceedings are pending in England relating to that contract, in which A's counterparty, B, is seeking a declaration that the contract is valid and continuing.

    (c) Applying Article 4(2)(e), one may find that the *lex concursus* – Polish law – gives the Polish liquidator a right to disclaim the English law contract (which he exercises) and A is no longer to be bound by, or to have to perform, it.

    (d) Applying Article 15, it is clear that English law determines the effect of the bankruptcy on the English proceedings (for example, typically, whether or not there is a stay of proceedings).

    (e) However the application of the *lex concursus* in accordance with Article 4.2 (e) allows the bankrupt to raise a new and conclusive defence in the English proceedings.

    (f) Therefore, although under Article 15, English law determines whether or not the proceedings are stayed, nevertheless the application of Article 4.2. (e) has the indirect effect that those proceedings come to an end because their substantive subject- matter has (under the *lex concursus*) disappeared or become susceptible of only one answer.

73. Further examples can be given in which the provisions of the Regulation may be applied serially. Thus there may be a current lawsuit in which a question of setoff arises. Article 4.2 (d) provides for the law of the State of the opening to determine which set-offs may be invoked. Although Article 4.2. (f) may preserve the lawsuit it cannot impair the application in that lawsuit of Article 4.2. (d).

74. Further, even if Article 15 did apply to references, it would only affect them in their capacity as a "*lawsuit*" – so that, for instance they might be subject to a stay. But Article 15 would not apply to the arbitration agreement. Article 15 would make the law of the Member State in which the lawsuit is pending the law which determined what happened to the reference upon the insolvency. But thereafter the liquidator might wish to disclaim the arbitration clause on the ground that it was prejudicial to the company to have to expend money on a foreign arbitration as opposed to dealing with the claim in the same manner as any other proof; or to assert that it amounted to a preference e.g. because it would secure the arbitrating creditor a more ample recovery than that

[11] March 2008 Award, para 358.

available to other creditors. Whether he could do so would be determined by the law of the State of the opening.

75. Lastly, Elektrim submits, the majority's approach also leads to an additional problem. Article 15 applies '*the law of the member state in which that lawsuit is pending*'. If, as the majority arbitrators would appear to hold, that means the curial law, how is that rule to apply if the proper law of the arbitration agreement is not the same as the curial law? Suppose the parties in this case not only agreed that the seat of the arbitration should be England but also that the proper law of the agreement to arbitrate should be (say) Greek law. Which law is Article 15 supposed to apply? Does it apply English law to a contract whose proper law is Greek law? Or is one supposed to read the phrase '*the law of the member state in which that lawsuit is pending*' as if it said '*the proper law of the relevant arbitration agreement*'?

76. This latter submission appears to me to involve a confusion of thought. Article 15 is not concerned with the law of the arbitration agreement but with the law of the Member State in which the lawsuit is pending. In the present case that is England. It is not necessary to determine where the lawsuit is to be regarded as pending in a case where the seat of the arbitration is in one country and the place of the hearing is in another, although it would seem to me that the seat should be regarded as the place where the arbitration is pending since it is the law of the seat which is to govern the conduct and continuation of the arbitration.

Vivendi's submissions

77. Vivendi submits that the majority arbitrators were right. The relevant question is: what law governs the effect of the Polish bankruptcy order *on the pending LCIA proceedings*? The question is not: what is the validity of the arbitration agreement itself, without any concern for the LCIA proceedings or the March 2008 Award? Article 4.2 (f) makes separate and specific provision as to the effect of bankruptcy on pending proceedings. To the extent that there is any overlap between the application of Article 4.2 (e) and Article 4. 2 (f), (as to which see paragraphs 81ff below), the latter should be applied because it is more specific and relates to pending proceedings, which are both the subject matter of the arbitral agreement and the matter whose fate is presently in issue. Article 4. 2 (f) should be treated as a *lex specialis* in relation to Article 4. 2 (e).

78. Vivendi relies on the well-established principle of interpretation that a general provision should not be construed to override a more specific provision. Thus in ***Allders Department Stores Ltd (in Administration)*** [2005] EWHC 172 (Ch) Lawrence Collins J held, in the context of the Insolvency Act 1986, that the general provisions of Rule 2.67 of the Insolvency Rules should not be construed so as to override the *lex specialis* of paragraph 99 in Schedule B1 of the 1986 Act, notwithstanding an apparent overlap.

79. Vivendi also refer to Judicial Protection in the European Union (6th Ed), Schermers and Waelbroeck at para 38 (p.19): *"Where a legal system contains two contradictory provisions, it is generally accepted that the lex specialis principle applies ("lex specialis generalibus derogat"). In other words, the more specific provision will apply by derogation to the general principle."*

referring to the ***Scotch Whisky Association Case*** (C-136/96) and the opinion of Advocate General Mischo of 19 March 1998, at para 33, [1998] ECR I-4571

"As I have mentioned above, La Martiniquaise also relies on the Directive, more particularly on Articles 5 and 7 thereof, to support its interpretation of Article 5. In principle, there is no objection, in my opinion, to such an approach, given that as stated in the fourth recital in its preamble, the Regulation lays down rules that are additional to those set out in the Directive. However, it must be borne in mind that those rules are also described as "specific", with the inevitable consequence that, in the event of conflict between the Directive and the Regulation, the principle lex specialis generalibus derogat will apply."

80. Elektrim's proposition that there is no conflict between the two provisions is illusory. In the case of arbitrations there is only a potential conflict between Article 4.2 (e) and Articles 4.2 (f) and 15 if the application of the law of the State of the opening would bring the proceedings to a close because the arbitration agreement would cease to be effective, whereas the application of the law of the State in which the lawsuit is pending would not have that effect. But in the case of every such conflict the latter two Articles will always be a dead letter, since the validity of an arbitration agreement is a necessary precondition to the continuance of the reference and the making of any award. Article 4.2 (e) always wins; or, more accurately, Articles 4.2 (f) and 15 are redundant since, with the failure of the arbitration agreement, they are never reached. The lawsuit consisting of the reference falls away with the annulment of the arbitration agreement. It makes no difference whether or not the arbitration was pending at the time of the opening of the insolvency proceedings. The arbitration will fail in either case.

Vivendi's solution.

81. Vivendi submits that there is a means of reconciling Article 4.2 (e) and Articles 4.2 (f)/15. Separation between the two is achieved by recognising that an arbitration agreement is not a "*current contract*" within the meaning of Article 4.2 (e). Article 4.2 (f) is to be regarded as a complete code for *procedural* contracts - such as arbitration agreements or agreements as to choice of court. Article 4. 2 (e) does not apply to such agreements but only to *substantive* contracts e.g. for the supply of goods and services.

82. Such a construction is, it is submitted, consistent with the underlying purpose of Article 4.2 (e). Insolvency law often interferes with current contracts, e.g. for the supply or purchase of goods and services, which may be too burdensome in the light of the insolvency. The relevant law may permit the termination of those contracts (or their continuation at the behest of the liquidator). The function of Article 4.2. (e) is to provide that the *lex concursus* and

not the law of the relevant contract shall determine the extent of such interference. This is consistent with the overall objective of the Regulation to promote the efficient and effective administration of the insolvency proceedings and to ensure equal treatment of creditors. For that purpose a single uniform law is required.

83. As Professors Virgós and Garcimartin put it in their book at paras 196-7:

"Rationale. There is an inherent tension between achieving insolvency objectives (e.g. promoting the survival of the debtor when its value as a going concern exceeds its liquidation value) and supporting certainty in commercial and non-commercial transactions (e.g. having contracts enforced according to their terms). Both policies must be balanced against each other. Article 4.1.e [sic] *of the Insolvency Regulation implies that the competence to decide on the balance corresponds to the lex fori concursus – with, however, an implicit limitation: the interference of insolvency law with the ordinary contractual regime is only allowed to the extent needed to fulfil an insolvency policy (i.e. to achieve an objective of the insolvency proceedings) and not for other reasons."*

84. This rationale, which relates to the competing interests involved in running the business of an insolvent company, applies, Vivendi submits, to substantive contracts, not procedural ones. Policy issues will only arise in relation to procedural contracts if and when proceedings are actually initiated, at which time Articles 4. 2 (f) and 15 apply. Mr Gabriel Moss, QC, for Elektrim submits that the question whether an arbitration agreement is binding on a company which has become insolvent may be highly material in an insolvency context, since, if an arbitration agreement is void, that may put all creditors upon an equal footing. Further the supposed underlying rationale cannot alter the clear words of the instrument.

85. That Article 4.2 (e) is concerned only with substantive contracts, and not procedural ones, is reinforced, Vivendi submits, by the fact that the exceptions to the application of that Article are types of substantive contracts, in respect of which the Regulation provides that there should be a different choice of law rule, having regard to different policy considerations. Thus Article 8 provides:

"Contracts relating to immoveable property

The effect of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated."

And Article 10 provides:

"Contracts of employment

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment"

86. Mr Moss observes that, where the draftsman intended to make an exception of a particular contract, he took care to do so specifically. He made no such exception in relation to arbitration agreements.

87. Mr Landau draws attention to a number of relevant paragraphs of the Report:

"91(e) The effects of the proceedings on current contracts to which the debtor is party (paragraph (e)). To the extent necessary, the law of the State of the opening ***displaces the law of the contract determined in accordance with the 1980 Rome Convention****. This paragraph is linked to Articles 8 and 10 (see points 116-119, 125 et seq.)*

116. Insolvency law may have an impact on current contracts. Thus for instance in the case of mutual obligations pending fulfilment, the liquidator may be empowered to decide either on the performance or termination of the contract. The aim of the rules of this kind is to protect the estate from the obligations to perform contracts which may be disadvantageous in the new circumstances.

117. The general rule on conflicts of law is that it falls to the law of the Contracting State of the opening of proceedings to regulate the effects of the proceedings on current contracts to which the debtor is a party (Article 4(2)(e).

To this extent, the applicable national insolvency law interferes with and displaces the rules applicable to contracts, ***which derive from the law applicable under the 1980 Rome Convention****.*

118. This rule, which overall is positive for the general interests of the creditors may be detrimental to other interests. In all the Contracting States, contracts covering immovable property are subject to special rules, both of conflict of laws as well as of international jurisdiction, in order to take into account several interests: those of the parties to the contract (eg tenants) and the general interests protected by the State in which the immovable property is to be found.

Protection of these specific interests justify an exception to the application of the law of the State of the opening of proceedings. Hence Article 8 makes the effects of the insolvency proceedings exclusively subject to the law of the Contracting State where the immovable property is located. …

125. Article 10 derogates from the general application of the law of the State of the opening of proceedings (Article 4) and makes the effects of the proceedings on employment contracts and on labour relations subject to the law of the Contracting State applicable to the contract of employment, including its law on insolvency.

This Article aims to protect employees and labour relations from the application of a foreign law, different from that which governs the contractual relations between employer and employees. For this reason, effects of the insolvency proceedings on the continuation or termination of the employment relationship and on the rights and obligations of each party under such relationship are to be determined by the law applicable to the contract under the general conflict of laws rules.

*126. **The 1980 Rome Convention** will determine the law applicable to employment contracts (see in particular, its Articles 6 and 7) …"*

88. These passages show, he submits, that the rule in Article 4.2 (e) is considered, overall, to be in the general interests of the creditors; that Articles 8 and 10 are the specific exceptions to it; and that the rule displaces the law applicable to the contract that would otherwise be applied under the Rome Convention 1980. That Convention addresses substantive contracts, and arbitration agreements and choice of court agreements are expressly excluded.

89. Vivendi submits that their approach is further supported by ***Commission v AMI Semiconductor Belgium BVBA***. There the court referred without hesitation to Article 4.2 (f) of the EC Regulation when examining the effect of the insolvency proceedings on the arbitration. It did not refer to or apply Article 4.2 (e). In the event, Article 15 was not applied, because the insolvency proceedings had already been commenced under their respective national laws at the time the arbitral proceedings brought by the Commission against the Austrian and German companies were initiated. Elektrim submits that this shows that the Court did not have to resolve the issue of any conflict between the relevant Articles and that the reach of Article 4. 2 (e) was simply never addressed

90. Vivendi also cite the following academic writings and commentaries:

(a) Professors *Virgos & Garcimartin'* work paras 196-210 (pp.120-126), which analyses the purpose of Article 4(2)(e) and the exceptions to its application.

(b) Alexis Mourre's article (*Arbitrage et droit de la faillite, reflexions sur l'office du Juge et de l'arbire),* which expressly recognises the distinction between substantive and procedural contracts in the insolvency context:

*"[T]he administrator's power to terminate contracts still being performed, when it exists, does not apply to **agreements that are procedural in nature**. Swiss[12] and French case law concur on this point. In arbitration law, the principle of the severability of the arbitration agreement protects it from the potential causes of invalidity of the principal agreement, the consequence being that the decision by the receiver (curateur) or judicial administrator to put an end to the principal contract containing it will not have any effect on the arbitration agreement itself."*

Vivendi's conclusion

91. The result is that Article 4.2 (e) does not apply to arbitration agreements. Where arbitration proceedings have been commenced, Article 4.2 (f) and 15 govern the position. The procedural law of the arbitral seat applies (i.e. "*the law of the Member State in which that lawsuit is pending*"). Where arbitration proceedings have not been commenced, Articles 4.2 (f) and 15 do not apply. This leaves the general choice of law rule in 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....*"), there being no specific exception in Article 4.2 that applies.

92. The fact that this leads to the application of a different choice of law rule to a given arbitration agreement depending upon whether or not arbitration proceedings have been commenced is entirely consistent with the policy of the Regulation (*i.e.* to ensure uniformity, but also to safeguard pending proceedings).

93. This analysis is also consonant with the well-established English law doctrine of "double-separability", whereby the "*continuous"* arbitration agreement and the individual reference to arbitration in a particular case constitute separate contracts, and may be governed by different laws so that the former contract may fail when the latter does not. See e.g.: ***Black-Clawson International Ltd v Papierweke Wladhof-Aschaffenburg AG*** [1981] 2 Lloyd's Rep 446, at p.455 (Mustill J); ***Unisys International Services Ltd v Eastern Counties Newspapers Ltd*** [1991] 1 Lloyds Rep 538 (CA), at p.562; **Mustill & Boyd**, **Commercial Arbitration**, 2nd Ed, at pp 60-62:

"It is now established that when a dispute arises within the scope of an agreement to arbitrate future disputes, and when that agreement is put into effect by the giving of a notice of arbitration, a new set of contractual relationships comes into existence, requiring the parties to arbitrate the individual dispute. Although this obligation springs from the continuous agreement to arbitrate future disputes, it is distinct from it, at least in the sense that events which terminate one group of relationships do not necessarily terminate the other. Thus, the question – 'Has something happened which means that the parties are no longer obliged to submit any of their disputes to arbitration?' is to be answered by reference to different contractual terms from those which govern the question – 'Has something happened which means that the parties are no longer obliged to submit this dispute to this reference?'. Since the questions are different, it would appear to follow that in theory they may have to be answered by reference to different laws."

The principle of double-severability is foreign to most systems of law. But it serves as an example of how the reference can have a life of its own unaffected by the fact that the arbitration agreement is invalid for the purpose of any future proceedings.

Conclusion

94. There is a conflict, in cases such as the present, between Article 4.2 (e) and Articles 4.2 (f) and 15. If Article 4.2 (e) governs the arbitration agreement and the contract requiring the parties to arbitrate the instant dispute ("the reference contract"), the arbitration pending in August 2007 came to an end on the bankruptcy of Elektrim. If Articles 4.2 (f) and 15 govern, it did not. The conflict is no less a conflict because it is one of effect. Part I of the Regulation is concerned with effects.

[12] ATF 41 II 537 (decision of principle); ATF 103 II, 176, J.T., 1978, p.71. Pursuant to Swiss case law, the arbitration clause is of a procedural nature.

95. The Community legislator cannot have intended that the exemption contained in Articles 4.2 (f) and 15 should be rendered practically redundant. If Elektrim's submissions are well founded, that would be the result.

96. Elektrim suggests that the provisions of Polish law providing for the annulment of the arbitration agreement are unusual, and possibly unique, and that, in the case of the laws of other States, which do not have the Polish law provision, Article 15 may operate so as to preserve the arbitration rather than stay it, if that is what the law of the place where the arbitration is pending so provides. But the liquidator may be able, later, to disclaim the arbitration agreement or claim to avoid it on the ground that it constitutes a preference, if the law of the State of the opening so permits. Article 4.2 (e) preserves that entitlement. But, in such a case, Article 15 would not in truth preserve the arbitration. Until the liquidator elected to avail himself of the remedy of disclaimer or avoidance for preference, there would be no call for the arbitration to cease and no question of conflict would arise. If he did so elect, the law of the State of the opening would, if Elektrim are right, inevitably prevail, with the effect that the arbitration was at an end. But Article 15 provides that it is the law of the Member State in which the arbitration is pending which shall *alone* determine the effect of the insolvency proceedings on the arbitration. Elektrim's analysis would thus render a specific exempting provision ineffective for its purpose and would be inconsistent with the policy underlying the exception of protecting legitimate expectation and certainty of transactions. It should be rejected on both counts.

97. Mr Moss submits that parties who have commenced an arbitration may have a legitimate expectation that the proceedings will not cease upon the insolvency of one of them; but that they can have no such expectation in relation to the underlying arbitration agreement insofar as it applies to the pending reference. I regard this as too fine a distinction. Parties to a commercial arbitration have a legitimate expectation that the reference will not grind to a halt upon an insolvency, whether that be because the arbitration agreement or the reference contract or the proceedings, or any combination of them, are annulled, if the law of the place where the arbitration is pending would not have that effect.[13] Protection of commercial certainty is best served by ensuring that the arbitration continues unless that law otherwise provides.

98. In my view the Tribunal was essentially correct for the reasons it stated – see paragraph 66 above. I accept, however, Mr Moss' submission that it is insufficient simply to say that the arbitration continued after 21 August 2007 without deciding what is the effect of the insolvency on the arbitration agreement, the reference contract, and any relevant substantive contract.

99. As to that, it seems to me that, when arbitration proceedings have not been commenced, the general choice of law rule in Article 4.1, together with Article 4.2 (e), applies. I do not accept that Article 4.2 (e) should be confined to *procedural* as opposed to *substantive* contracts – a distinction itself not without difficulty. So to hold would introduce a qualification to the words that the draftsman has not seen fit to include and which is not necessary in order to give effect to the policy of the Regulation. The fact that the Report refers to Article 4.2 (e) as displacing the law of the contract determined in accordance with the Rome Convention and that the Rome Convention does not apply to arbitration, does not signify that Article 4.2 (e) does not apply to arbitrations. Nor does the fact that civil law countries, such as France and Switzerland, may distinguish between substantive and procedural contracts. I note that neither proposition finds any place in Professor Virgós' writings.

100. Where, as here, arbitration proceedings are pending at the date of the insolvency, Articles 4.2 (f) and 15 apply, so that the effects of the insolvency on the reference contract, and on the arbitration agreement insofar as it concerns the pending reference, are governed by the "*law of the Member State in which the lawsuit* [i.e. the arbitration] *is pending*". Were it otherwise the effects of the Polish insolvency proceedings on the English arbitration would in fact be determined by the law of the State of the opening and not by the law specified in Article 15. This is because the annulment of the arbitration agreement would inevitably and necessarily bring with it the cessation of the arbitration.

101. Mr Moss submits that Article 15 is only concerned with the question of whether there should be a stay (or the operation of the *vis attractiva concursus* i.e. the taking away of jurisdiction from the Tribunal in favour of the bankruptcy court) and has nothing to do with contractual questions. But I see no reason why it does not also apply to provide that the law of the State in which the arbitration is pending shall determine all questions which affect whether the arbitration shall remain pending, including any question as to whether the effect of the insolvency is to annul the arbitration agreement, or the reference contract, and hence the reference.[14]

102. Such a conclusion resolves the conflict referred to in paragraph 94 above and gives effect to the policy of the Convention. It is also consistent with the wording of Article 4, taken as a whole. Article 4.1 makes the law of the State of the opening of the proceedings the law applicable to the effects of insolvency proceedings "*save as otherwise provided in this Regulation*". Articles 4.2 (a) – (m) provide non-exhaustive examples of such effects. Those examples must themselves be regarded as applicable "*save as otherwise provided in this Regulation*" so that, in the event of conflict between one sub-Article, expressed in general terms, and another sub-Article or Article containing a specific exception, the latter must, in cases falling within the exception, be the governing provision. The exception of "*lawsuits pending*" in Article 4.2. (f), together with Article 15, provides otherwise than Article 4.2 (e). That exception must be applied so as to make it effective rather than illusory. In the case of lawsuits, which,

[13] That is not to say that they have a legitimate expectation that the arbitration agreement will apply to disputes which were not the subject of any reference at the date of the insolvency.

[14] This does not, of course, mean that the proceedings will always remain pending; only that the effect of the insolvency proceedings on their pendency shall be determined by the law of the State in which the arbitration is pending

for the reasons stated, include arbitrations, the exception must apply to the extent necessary to permit the continuation of the pending arbitration rather than its premature end, if that is what the law of the place where the arbitration is pending so provides.

103. That will also be the case if as contended for by Vivendi in part of their submissions, (i) "*proceedings brought by individual creditors*" is limited to execution actions; (ii) "*lawsuits pending*" does not refer only to executions; (iii) Article 4. 2 (e) applies only to *procedural* contracts; but (iv) Article 4.1 would cause the lex concursus to govern the effect of insolvency on procedural contracts, but for the "*lawsuits pending*" exception. As is apparent I do not accept propositions (i) and (iii).

104. Article 4.2 (e) will, however apply to the arbitration agreement insofar as it relates to any future i.e. non pending proceedings.

105. That leaves for consideration the effect of the insolvency on any substantive contract which is the subject of the arbitration e.g. for the supply of goods or services. The effects of the insolvency proceedings on such a contract are determined by the law of the State of the opening. As I understand it, it is not suggested that Polish law has any relevant effect on the Third Investment Agreement.

106. Accordingly I decline to set aside the Award.

Gabriel Moss QC, Richard Millett QC & Julian Kenny (instructed by Barlow Lyde & Gilbert) for the Claimants
Toby Landau QC, Antony Zacharoli QC & Ricky Diwan (instructed by O'Melveny & Myers) for the Defendants