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IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF FRANCE

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* For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in France produce on arbitration commitments (foreign as well as national/local) involving the insolvent party.]

Part I: Impact of Insolvency Proceedings on Ability to Commence or Continue Arbitration

1. Does the law of France contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?

1. By way of a general introduction, it is crucial for the better understanding of this report to explain that French insolvency distinguishes three major types of insolvency proceedings, which are (i) safeguard (*"sauvegarde"*), (ii) receivership ("*redressement judiciaire"*), and (iii) liquidation ("*liquidation judiciaire"*). The main difference between these proceedings is that safeguard is voluntary and that the debtor files the application to open such proceedings before it is in a state of insolvency ("*état de cessation de paiement*"). Receivership and liquidation are both compulsory, and they must be opened within 45 days after the date the debtor became insolvent. Receivership is opened when there is still a possibility that the debtor's business will recover—however, there is no guarantee that the debtor will indeed emerge by the end of the proceeding. If there is no such possibility, liquidation proceedings are opened either directly at the time the debtor becomes insolvent or when the recovery plan adopted in the context of the receivership is not successful.

2. Insolvency proceedings aim at (i) preserving jobs, (ii) continuing the operation of the debtor or its business, and (iii) settling creditors' claims. The legislation applicable to each type of proceedings is set out in Book VI of the French Commercial Code and is considered public policy.

3. French law does not contain any provision governing specifically the question of the effect that the opening of insolvency proceedings produces on arbitration. However, several provisions of the French Commercial Code deal with the impact that the opening of insolvency proceedings has (i) on pending judicial proceedings and (ii) the possibility to bring new

proceedings against the debtor.[1] French courts have ruled that such provisions are also applicable to arbitration.[2]

4. Pursuant to Articles L.622-21 (applicable to safeguard proceedings), L.631-14 (applicable to receivership proceedings),[3] and L.641-3 (applicable to liquidation proceedings) of the Commercial Code, the ruling by which the court opens insolvency proceedings (the "opening judgment") has a double effect on claims that pre-date the opening judgment (ie, pre-petition claims):

   (i) it stays all the pending judicial or enforcement proceedings concerning both moveable and immoveable property ("pending proceedings") until the creditor has filed its submission of claim with the court-appointed insolvency practitioner and has called the insolvency practitioners to join the proceedings;

   (ii) it prohibits creditors from bringing any new enforcement proceedings and new judicial proceedings seeking to obtain (1) an order against the debtor to pay a sum of money or (2) the termination of a contract on the grounds of non-payment of a sum of money (together, "new proceedings").

5. This double effect is known in French law under the name of "the principle of suspension of individual claims" ("*principe de l'arrêt des poursuites individuelles*") and encompasses both the principle of prohibition of new proceedings and the principle of stay of pending proceedings.

6. In a ruling of 2 June 2004, the French Highest Civil Court ("*Cour de cassation*") expressly acknowledged that the principle of suspension of individual claims also applies to arbitration proceedings.[4] The Court stated that "the public-policy principle of the suspension of individual proceedings forbids, after the opening of the insolvency proceedings, initiating an action before the arbitral tribunal by a creditor whose claim originates before the opening judgment, without such claim being subject to the claims verification procedure first".[5]

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[1] French Commercial Code, arts L. 622-21, L.631-14, and L.641-3. For the full text, please click the links here: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000019983976; https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000028724122; https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038587562.

[2] French Cour de Cassation, Commercial Division, 2 June 2004, no 02-13.940: « le principe d'ordre public de l'arrêt des poursuites individuelles interdit, après l'ouverture de la procédure collective, la saisine du tribunal arbitral par un créancier dont la créance a son origine antérieurement au jugement d'ouverture, sans qu'il se soit soumis au préalable à la procédure de vérification des créances ». Translation by the authors: "the public-policy principle of the suspension of individual proceedings forbids, after the opening of the insolvency proceedings, initiating an action before the arbitral tribunal by a creditor whose claim originates before the opening judgment, without such claim being subject to the claims verification procedure first".

[3] Article L. 631-14 of the Commercial Code directly refers to Article L. 622-21 of the Commercial Code.

[4] French Cour de cassation, Commercial Division, 2 June 2004, no 02-13.940.

[5] Translation by the authors. Original: « Le principe d'ordre public de l'arrêt des poursuites individuelles interdit, après l'ouverture de la procédure collective, la saisine du tribunal arbitral par un créancier dont la créance a son origine antérieurement au jugement d'ouverture, sans qu'il se soit soumis au préalable à la procédure de vérification des créances ».

7. The same solution had already been adopted by the Paris Court of Appeals, which previously stated that "if the arbitration did not start before the opening of the insolvency proceedings, the creditor . . . cannot initiate a new action before the arbitral tribunal, as it can only submit its claims to the insolvency practitioner and wait for the claim to be verified".[6]

8. However, the law does allow a new arbitration to be pursued in the circumstances where there is a dispute over the claim and the arbitral tribunal has jurisdiction over the claim. Please see the answer to Question 9.

2. Does the insolvency legislation in France provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,

a. Which disputes fall under the rules on *vis attractiva concursus*?

b. Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?

9. (a) There is no general rule for the concentration of disputes pertaining to the insolvent debtor under French law. Therefore, the traditional rules of French Civil Procedure fully apply. However, Article R. 662-3 of the French Commercial Code provides that the insolvency court before which a safeguard, a receivership, or a liquidation proceeding is brought has jurisdiction to hear all matters related to the safeguard, the receivership, and the liquidation.

10. This has been construed by case law and by authors as to provide for an exception: insolvency courts have jurisdiction to hear all disputes which (i) arise out of the insolvency proceedings or (ii) are affected or influenced by the insolvency proceedings.[7] These criteria have been illustrated further by case law.

For instance, insolvency courts will have jurisdiction over disputes:

(i) arising out of the activity of the insolvency proceeding's origins, such as disputes stemming from the performance of a current contract;[8]

(ii) which would not exist without the insolvency proceeding, such as for instance disputes relating to the nullities of the suspect period[9] or disputes arising out of the lawsuits of pre-petition creditors;

[6] Paris Court of Appeals, 8 September 1998, no 95/80373. Translation by the authors. Original: « lorsque la procédure d'arbitrage n'avait pas commencé avant l'ouverture de la procédure collective, le créancier . . . ne peut plus saisir le tribunal arbitral mais seulement déclarer sa créance et attendre sa vérification ».

[7] See, for instance, French Cour de Cassation, April 14 1992, no 90-15.901; see also: P. M. Le Corre, "*Droit et pratique des procédures collectives*", para 312.211 et seq.

[8] French Cour de Cassation, Commercial Division, February 6 1996, RJDA 6/1996, no 828.

[9] Under French Insolvency Law, certain actions carried out between the date of the state of insolvency of the debtor and the opening of the insolvency proceeding may be void (see, for instance, French Cour de Cassation, Social Division, June 12, 2019, no 17-26.197 for a settlement with an employee, or French Cour de Cassation, Commercial Division, May 18, 2017, no 15-23.973 for the sale of real property).

(iii) for which the outcomes will be different in light of the opening of an insolvency proceeding, such as for instance the judicial attribution of a pledge ("*gage*").[10]

11. (b) The jurisdiction of insolvency courts as described above is exclusive, and authors agree that arbitration may not be conducted on issues falling within the scope of that jurisdiction.[11] It is therefore irrelevant whether the matter has already been sent to arbitration or is covered by an arbitration agreement. All other disputes may be referred to an arbitral tribunal, provided that they do not fall within the definition of new proceedings, as defined in Question 1.

12. The arbitral tribunal may also rule on the nature or the amount of the claims submitted by creditors in the course of the process of admission of claims (see the response to Question 9 below for more details).

3. What are the effects (if any) of the opening of insolvency proceedings in France on the possibility to commence or continue arbitration proceedings?

In answering this question, please address separately each of the following points:

a. Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?

13. Yes. Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code only apply to judicial proceedings where the insolvent party acts as defendant and that were initiated by a creditor with respect to a pre-petition claim, before the opening judgment, or that a creditor seeks to bring after such judgment. They do not apply to proceedings where the insolvent party acts as claimant.

14. However, it should be noted that according to French case law, a counterclaim filed by a creditor (ie, the defendant) in the scope of pending judicial proceedings that were initiated by the insolvent party (ie, the claimant) before the opening judgment should be considered as "judicial proceedings" within the meaning of Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code.

15. Indeed, in a decision of 14 March 2000, the Paris Court of Appeals ruled that "pending judicial proceedings" encompass both (i) the main claim brought by a creditor against the debtor before the opening judgment and (ii) the counterclaim brought by a creditor before the opening judgment in the scope of pending proceedings initiated by the debtor against that creditor before the opening judgment.[12]

16. In another decision of 17 July 2001, the *Cour de cassation* ruled that a counterclaim brought by a creditor against the debtor after the opening judgment in the scope of pending

[10] French Cour de Cassation, Commercial Division, May 6, 1986, no 85-10.733.
[11] G. Bord, *Répertoire de droit commercial—Faillites*, (2nd edn, Dalloz) no 231.
[12] Paris Court of Appeals, 14 March 2000: RPC 2001.251.

proceedings initiated by the debtor against that creditor before the opening judgment shall be considered as "new judicial proceedings".[13]

17. Thus, a distinction shall be made, depending on the moment the counterclaim is brought by the creditor. It appears from these court decisions that:

    (i) if the counterclaim is filed before the opening judgment, such counterclaim will be considered as "pending proceedings" against the debtor at the date of the opening judgment. In such case, the arbitral proceedings shall be stayed until the creditor has filed its submission of claim with the court-appointed insolvency practitioner (ie, the liquidator in such case) in France and has called the insolvency practitioners (the administrator and the liquidator, in such case) to join the proceedings; or

    (ii) if the counterclaim is filed after the opening judgment, such counterclaim will be considered as "new judicial proceedings" and is prohibited if this counterclaim seeks to obtain (1) an order against the debtor to pay a sum of money or (2) the termination of a contract on the grounds of non-payment of a sum of money.

b. Does the law draw any distinction between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company?

18. There are three distinct articles which each apply to the three types of insolvency proceedings, namely safeguard, receivership, and liquidation, further described in Question 1. The opening of any of these proceedings roughly has the same effects on the debtor, but there are some specificities in the conduct of the proceeding, depending on the prospects of recovery of the debtor. It is also specified that safeguard and receivership are both restructuring processes.

c. Does the law draw any distinction based on the subject matter or relief sought in the arbitration?

19. Yes. Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code provide that the opening judgment stays pending judicial proceedings and prohibits new judicial proceedings that seek to obtain (i) an order against the debtor to pay a sum of money or (ii) termination of a contract on the grounds of non-payment of a sum of money. Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code also apply to enforcement proceedings.

20. It will, for instance, be possible for a creditor to bring an action to obtain recognition of an obligation and to determine the amount of damages to which a creditor may be entitled but never an order to pay that sum.[14]

[13] French *Cour de Cassation*, Commercial Division, 17 July 2001, no 98-19.258.

[14] For an action to establish that the termination of a contract was abusive (*Cour de cassation*, Commercial Division, 4 November 1980); for an action in counterfeiting and unfair competition which ascertains the loss suffered without convicting the debtor (Paris Court of Appeals, 10 June 1981).

d. Do these effects (if any) also extend to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency?

21. These effects also apply to safeguard proceedings which are opened on a voluntary basis by the debtor himself before he becomes insolvent.

22. However, these effects do not apply to preventive restructuring frameworks (ie, *mandat ad hoc* and conciliation). Such preventive proceedings have no impact on pending arbitration proceedings.

23. *Mandat ad hoc* and conciliation proceedings may be opened while the debtor is not yet in a state of insolvency, and they aim at giving both the debtor and its creditors a frame to conduct negotiations regarding their contractual relationships. The purpose of these proceedings is mainly to avoid the opening of a subsequent collective proceeding (ie, *sauvegarde*, *redressement judiciaire* or *liquidation judiciaire*) by finding a middle ground among all interested parties.

e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?

24. Yes. Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code distinguish between the effects that the opening of insolvency proceedings have on pending judicial proceedings and new judicial proceedings. As the result of the opening judgment, pending judicial proceedings are only stayed for a short period to allow the participation of the insolvency professionals. New judicial proceedings are prohibited if they seek to obtain (i) an order against the debtor to pay a sum of money or (ii) termination of a contract on the grounds of non-payment of a sum of money.

f. Does the law regulating the effect of insolvency on arbitration make any distinction between voluntary and compulsory insolvency proceedings?

25. No. The principle of suspension of individual claims applies to both voluntary (safeguard) and compulsory (receivership and liquidation) proceedings.

g. Do those effects intend to apply extraterritorially, ie to every arbitration regardless of the location of the seat in France or abroad?

26. Yes. Even though Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code do not specify that they apply extraterritorially, French courts expressly acknowledge that this is the case. Indeed, the *Cour de cassation* has ruled on several occasions that the principle of

suspension of individual claims forms part of the French and international public policy.[15] Indeed, this principle is one of the cornerstones of French insolvency law.

27. An arbitral award rendered in international arbitration proceedings seated in France that ignores this principle is very likely to be set aside on the ground that it violates international public policy, pursuant to Article 1520, 5° of the French Code of Civil Procedure. Likewise, a foreign award rendered in arbitration proceedings seated outside France could be refused recognition and enforcement in France on the same ground, pursuant to Article 1525 of the French Code of Civil Procedure.

h. When do the effects (if any) of insolvency on arbitration become operative (eg, from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?

28. According to Articles L.622-21, L.631-14, and L.641-3 of the Commercial Code, the above-described effects of insolvency proceedings on judicial proceedings, including arbitration, start to operate from the date of the opening judgment. The opening judgment will be published but its effects start from the judgment itself and shall not wait until its publication.

4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?

a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?

b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?

29. (a) No. It is not possible for third parties to intervene in the insolvency proceeding to compel arbitration. Indeed, intervention of third parties within the insolvency proceeding is strictly limited to matters directly related to the insolvency proceeding (eg, filing of a submission of claim, action for recovery of property, or claim for termination of a current contract).

30. (b) When an arbitration proceeding is pending before the opening judgment, the creditor may seek relief from the effects of the suspension of individual claims by filing a submission of claim ("*déclaration de créance*"), in accordance with the process described by Articles L. 622-24 et seq. of the French Commercial Code (see Paragraph 4 above).

31. This process is otherwise a prerequisite for the creditor who wishes to be *in fine* paid by the insolvent party: if the creditor does not appropriately file a submission of claim, such claim

[15] French Cour de Cassation, 1st Civil Division, 6 May 2009, no 08-10.281.

will be deemed unenforceable to the insolvent party and more broadly to the insolvency proceeding during the recovery plan.[16]

32. When the insolvency judge finds that the debt is challenged by the insolvency practitioner, or that it is the subject of an ongoing proceeding, he will, as the case may be, refer the parties to the competent forum and postpone his decision or declare that he has no jurisdiction over the matter and let the pending proceeding end its course.[17]

5. Can the insolvency courts give an order to stop arbitration proceedings (eg, an anti-arbitration injunction)? If so, does it depend on the seat of the arbitration being in the jurisdiction or abroad?

33. No. Unlike in other legal systems, French courts may not issue injunctions to order, prevent, or stay arbitration proceedings. According to an author,[18] this is a general rule which affects all types of courts and which has been confirmed in 2010 with regard to the powers of the judge for interim relief ("*juge des référés*"), despite his large jurisdiction to order any interim measure necessary to preserve or safeguard the interests of the parties.[19]

34. Without resorting to the mechanism of injunctions, the natural effect of the opening judgment of an insolvency proceeding (suspension of individual claims—see the response to Question 1—and authorization of the insolvency judge to enter into a new arbitration agreement—see the response to Question 11) may also constitute an obstacle to the continuation of arbitration proceedings.

35. In any event, the debtor or the insolvency practitioner (as the case may be) may choose, regarding the specificities of the situation and subject to the rules of arbitration, to discontinue the pending arbitration proceeding when that is an option (eg, when the insolvent party was a claimant in the proceeding).

6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?

36. The opening of an insolvency proceeding can never result in the automatic termination or suspension of the effectiveness of a contract, regardless of whether this contract contains an arbitration agreement.[20]

[16] French Commercial Code, art L.622-26.
[17] ibid, art L. 624-2.
[18] J. Ortscheidt, "*Droit de l'arbitrage - Chronique*" (2010), JCP E, no 25.
[19] TGI Paris, 29 March 2010, *Rép. de Guinée Équatoriale c/ Sté Fitzpatrick et a.*: « [le juge des référés] ne peut donner injonction à cette juridiction de suspendre la procédure arbitrale en cours ». Translation by the authors: ["the judge for interim relief] cannot enjoin this forum to stay the ongoing arbitration proceeding".
[20] French Commercial Code, arts L. 622-13 (safeguard), L. 631-14 (receivership), and L. 641-11-1 (liquidation).

37. However, the opening of a proceeding gives the insolvency administrator, when appointed, or to the liquidator, as the case may be, the power to discretionarily choose whether to terminate a current contract (ie, a contract which was entered into by the debtor before the opening judgment and which is still ongoing as of the day the insolvency practitioner has to decide on its continuation).

38. As explained below, in all safeguard, receivership, and liquidation, the procedure which must be followed by the insolvency practitioner differs when the contract is a lease of premises used for the business of the debtor.

39. **Regarding safeguard and receivership**. Under the general rules set out in Article L. 622-13 III. and IV. of the Commercial code, a current contract is terminated by either:

    (i) the failure of the insolvency administrator to respond within a month of the co-contractor's notice ("*mise en demeure*") to opt-in for the continuation of the contract. Indeed, as soon as the proceeding has been opened, a co-contractor may send a notice to the insolvency administrator to ask him to decide whether he wishes to continue the execution of the current contract; or

    (ii) the lack of payment by the insolvent party of due debts (post opening judgement debts) under the current contract, followed by the lack of authorization by the co-contractor to continue the contractual relationship, despite the payment default.

40. The contract may also be terminated by the insolvency judge upon the request of the administrator if the termination is necessary to safeguard the situation of the debtor and if it does not excessively harm the co-contractor's interests.

41. By way of exception, Article L. 622-14 of the Commercial Code provides that the lease of premises used for the business of the debtor is terminated upon:

    (i) notification to the landlord of the intent of the insolvency administrator not to continue the contract;

    (ii) a request for termination or a declaration of termination of the lease based on the default of payment of the rent post-opening of the proceeding, after a period of three months from the opening judgment.

42. **Regarding liquidation**. The general rules of Article L. 641-11-1 III. and IV. of the Commercial Code are fairly identical to those of Article L. 622-13, except that they provide for a third case of termination of the contract: the contract may also be terminated by notifying the co-contractor of the decision of the liquidator not to continue with the contract when the performance of the debtor is the payment of a sum of money.

43. The contract may also be terminated by the insolvency judge, upon the request of the liquidator, if it is necessary for the liquidation operations and it does not excessively harm the co-contractor's interests.

44. Regarding leases of premises used for the business of the debtor, Article L. 641-12 of the Commercial Code is also modelled after Article L. 622-14 but provides for a third possibility: the lease may be terminated by a request for termination or a declaration of termination of

the lease for reasons which occurred prior to the opening of the proceeding, or when the liquidation proceeding follows a safeguard or a receivership for reasons which occurred prior to the opening of the previous proceeding. Those claims or ascertainments must then be made within three months of the opening judgment.

7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?

45. The decision of the insolvency administrator not to continue a contract in the conditions set out above (see the response to Question 6) automatically terminates the contract by operation of the law. There is no published case law whereby an insolvency practitioner terminated an on-going contract pursuant to Article L. 622-13 or L. 641-11-1 of the Commercial code and which specifies whether such termination had an impact on the arbitration agreement. Authors disagree on the question whether this affects the binding effects of the arbitration agreement that the contract contains, and whether the debtor, the insolvency practitioner (administrator or liquidator), or the creditor will be able to refer an issue to arbitration on the basis of the clause.[21]

46. Should the arbitration agreement remain effective, the co-contractor of the debtor would only be able to rely on it under the restrictions presented above at Question 3 and below at Question 9, given the fact that his claim would be considered a pre-petition claim and would therefore be affected by the principle of prohibition of new individual proceedings.[22] In other words, even if the arbitration agreement survives the discontinuation of the contract, the creditor would not be able to refer his claim to the arbitral tribunal if he sought any form of payment. In contrast, the debtor would be able to rely on the arbitration agreement.

47. In addition, the effects of the arbitration agreement would be limited to matters which are outside the scope of the insolvency court's exclusive jurisdiction (see the response to Question 2).

48. There is no decision either on the effectiveness of an arbitration agreement when the contracting party challenges the decision by the insolvency practitioner to terminate a contract. We believe nevertheless that such challenge should be submitted to the Commercial Court (insolvency judge) as it arises out of the insolvency proceedings. It therefore could be that without terminating the arbitration agreement per se (see Question 8 below), all disputes arising in such circumstances will be referred to the Commercial Court as they arise out of the insolvency proceedings.

[21] F.-X. Lucas, « Arbitrage et procédure collective », *Essentiel—Droit des entreprises en difficulté* [2015] no 5, 1 ; L. Weiller, « Opposabilité de la clause compromissoire au liquidateur », *Procédures*, no 6, June 2015, comm. 195. on French Cour de cassation, 1st Civil Division, 1 April 2015, no 14-14.552 and L. Weiller, « La force obligatoire de la convention d'arbitrage à l'épreuve des options du liquidateur », *JCP G*, no 24, 15 June 2015, 691.

[22] A. Kalaani, "*Revue Lamy droit des affaires*" [2017] no 123.

8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect of such decision on pending arbitration proceedings derived from the arbitration agreement in question?

49. There is case law preventing the insolvency practitioner or the insolvency court from terminating or suspending the effectiveness of arbitration agreements entered into before the start of the insolvency proceeding when there exists a dispute on the performance of an on-going contract, so long as it is not a dispute that cannot be referred to arbitration as explained above (see the response to Question 2) or so long as the insolvency practitioner acts as a substitute for the debtor.[23] The insolvency administrator who chooses to opt for the continuation of a current contract is under the obligation to respect its terms as of the day of the opening judgment, including the arbitration agreement that it may contain.[24]

50. In the specific situation where the debtor and one of its creditors have entered before the opening judgement into an arbitration agreement, the sole purpose of which is to submit disputes to the jurisdiction of an arbitral tribunal, the issue is slightly different and revolves around the question of whether such a contract might be a current contract in itself. To this day, neither the law nor the courts have addressed the issue, but an author has raised this question without however giving a clear answer on the topic.[25]

9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/ proof)?

a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?

b. Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?

51. Yes. The steps that need to be taken by the alleged creditor depend on whether the arbitration was pending at the date of the opening judgment or whether the creditor wishes to bring new arbitration proceedings after the opening judgment.

52. **Pending arbitration proceedings**: Article L.622-22 of the Commercial Code, which is applicable to all three types of insolvency proceedings, provides that any pending judicial proceedings shall be stayed until the creditor who initiated them has filed a submission of

[23] For example, French Cour de cassation, commercial Division, 26 February 2020, no 18-21.810.
[24] French Cour de cassation, commercial Division, 27 March 1990, JCP E 1990, IV, 203.
[25] F.-X. Lucas, « Arbitrage et procédure collective », *Essentiel—Droit des entreprises en difficulté* [2015] no 5, 1.

claim ("*declaration de créance*"). This article further provides that proceedings that were stayed as a result of the opening judgment shall be resumed after the creditor has called the court-appointed insolvency practitioner (administrator or liquidator) to participate in the pending proceedings.

53. It stems from these rules that in order for the proceedings to be resumed, the creditor has to (i) file a submission of claim to the insolvency practitioner appointed by the court and (ii) call the insolvency practitioner to participate in the pending proceedings. Once these two conditions are fulfilled, the proceedings can resume.

54. French courts have clarified in various decisions, which were rendered with respect to pending court proceedings but are also applicable to arbitration proceedings, that proceedings can only validly resume if the creditor filed a valid submission of claim (ie, within the legal period of time that was given to creditors to file their claims).[26] If it turns out that the submission was belated but that the arbitration proceedings were resumed, the future award will not be accepted in the insolvency proceedings as a valid proof of claim.[27] Likewise, it has been ruled that proceedings can only be pursued if the creditor is able to produce evidence to the arbitral tribunal of (i) filing his claim to the insolvency practitioner and (ii) calling the insolvency practitioner to participate in the proceedings. In the absence of such proof, the proceedings cannot resume.[28] Case law has specified that service by a bailiff is not required when the creditor informs the insolvency practitioner about the pending arbitration proceedings and invites the insolvency practitioner to participate in such proceedings.[29]

55. The debtor, who is a party to the pending proceedings, shall inform the pursuing creditor of the opening of insolvency proceedings within 10 days from the opening judgment.[30]

56. Article L.622-22 of the Commercial Code specifies that once the pending proceedings are resumed, they can only seek to (i) verify if the claim is justified and (ii) determine its amount. This means that the arbitral tribunal can only acknowledge the existence of the claim and its amount but it cannot order the debtor to pay any monies to the creditor. Indeed, once the award is rendered, the creditor must submit it to the court-appointed insolvency practitioner as a proof of his claim. A breach of this requirement would be considered by French courts as a violation of international public policy and is likely to be a ground to set aside the award in France or refuse its recognition and enforcement (see the response to Question 34).

57. **New arbitration proceedings**: There are no legal provisions governing the specific question of the steps that a creditor shall take to commence new arbitration proceedings after the opening judgment. However, such hypothesis was analysed by the *Cour de cassation* in two decisions dated 2 June 2004. In its first decision, the *Cour* ruled that before a pre-petition creditor is allowed to refer the question of the existence and amount of his claim to an arbitral

[26] Paris Court of Appeals, 24 March 1987: D. 1987. IR 113.
[27] Reported in Philippe Fouchard, Paris Court of Appeal, 28 February 2002, [Revue de l'Arbitrage, 224-226, 2003].
[28] Paris Court of Appeals, 2 December 1986.
[29] French Cour de Cassation, 1st Civil Division, 6 May 2009, no 08-10.281.
[30] Commercial Code, art L.622-22.

tribunal, such creditor must subject his claim to the claims' verification process.[31] In other words, the creditor may not initiate arbitration on this matter without the insolvency judge ruling that he does not have jurisdiction to decide the dispute.

58. In its second decision, the *Cour* specified that if the arbitration proceedings were not pending at the date of the opening judgment and if there is a dispute over the admissibility of the claim that is subject to an arbitration agreement, the insolvency court shall decline jurisdiction unless the arbitration agreement is manifestly inapplicable or manifestly void after having verified that the creditor has formally filed the claim with the insolvency proceeding.[32]

59. It stems from these two decisions that the following steps should be followed by the creditor to launch new arbitration proceedings after the opening judgment:

(i) the creditor shall file its claim with the court-appointed insolvency practitioner and wait to see if the latter challenges the existence or the amount of the claim in the context of the claims' verification process. If not, the claim is admitted and there is no need that the dispute be resolved by the arbitral tribunal;

(ii) in a more likely hypothesis that the court-appointed insolvency practitioner challenges the existence or the amount of the claim, the practitioner will recommend the insolvency court to refuse the claim or to reduce its quantum to a certain amount;

(iii) the insolvency judge can then either follow the recommendation from the court-appointed insolvency practitioner or not. If it follows such recommendation and refuses the existence or the amount of the claim, the creditor then shall in turn challenge the jurisdiction of the insolvency judge to decide over the claim on the ground that the dispute is subject to an arbitration agreement; and

(iv) unless the arbitration agreement is manifestly inapplicable or manifestly void, the insolvency judge will render a decision acknowledging that it lacks jurisdiction to hear the dispute over the claim. It is only after the insolvency judge has denied jurisdiction that the creditor can bring arbitration proceedings against the creditor and submit the dispute over the claim to an arbitral tribunal.

60. It follows from the above that the fact that the creditor files his claim to the court-appointed insolvency practitioner does not automatically amount to a waiver of the arbitration agreement. However, as a precautionary measure, the creditor should specify in its

[31] French Cour de Cassation, Commercial Division, 2 June 2004, no 02-13.940.

[32] « Mais attendu que, lorsque l'instance arbitrale n'est pas en cours au jour du jugement d'ouverture, le juge-commissaire, saisi d'une contestation et devant lequel est invoquée une clause compromissoire, doit, après avoir, le cas échéant, vérifié la régularité de la déclaration de créance, se déclarer incompétent à moins que la convention d'arbitrage ne soit manifestement nulle ou inapplicable », French Cour de Cassation, Commercial Division, 2 June 2004, no 02-18.700. Translation by the authors: "However taking into account that if the arbitration proceedings were not pending at the date of the opening judgment, the insolvency court seized of a dispute in the course of which an arbitration agreement is invoked, shall, after having verified the formal regularity of the claim submission, decline jurisdiction unless the arbitration agreement is manifestly inapplicable or manifestly void".

submission of claim that the claim is subject to an arbitration agreement and, if applicable, that the arbitration proceedings are ongoing.

10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?

61. Under Article R. 662-3 of the Commercial Code and as a general rule, the insolvency court has exclusive jurisdiction to hear all disputes relating to the insolvency proceedings. French courts have clarified that such exclusive jurisdiction also applies to actions for the nullity of transactions concluded in the so-called "suspicious period" (ie, claw-back actions), which is the period between the date when the debtor becomes insolvent and the date of the opening judgment.[33]

62. With regards to the enforceability of an arbitration agreement contained in an act concluded between the insolvent party and a creditor to the insolvency administration in the context of actions initiated by the insolvency administrator, French courts have ruled that:

(i) if the action brought by the insolvency administrator is specific to insolvency proceedings and the action is brought on behalf of the creditors, the arbitration agreement is not enforceable against the insolvency administrator—for example, in case of a claw-back action;[34] and

(ii) if the action brought by the insolvency administrator is not specific to insolvency proceedings, the arbitration agreement will be applicable to the insolvency administrator.[35] This is most notably the case where the insolvency administrator seeks damages from parties which have contracted with the debtor on the basis of alleged contractual breaches occurring before the opening judgment.[36] Surprisingly, the *Cour de cassation* ruled that an *actio pauliana* initiated by the insolvency

[33] French Cour de Cassation, Commercial Division, 18 May 2017, no 15-23.973 ; French Cour de Cassation, Commercial Division, 4 October 2005, no 04-12.610.

[34] « Le liquidateur qui demande, à titre principal, la nullité d'un acte sur le fondement des dispositions de l'article L. 632-1, I, 2° du code de commerce ne se substitue pas au débiteur dessaisi pour agir en son nom mais exerce une action au nom et dans l'intérêt collectif des créanciers de sorte qu'une clause compromissoire stipulée à l'acte litigieux est manifestement inapplicable au litige », French Cour de Cassation, Commercial Division, 17 November 2015, no 14-16.012. Translation by the authors: "A liquidator who seeks, principally, the nullity of a deed on the basis of the provisions of Article L. 632-1, I, 2° of the French Commercial Code, does not replace the debtor to act in his name but brings an action in the name and in the collective interest of the creditors in such a way that an arbitration clause stipulated in the disputed deed is manifestly inapplicable to the dispute".

[35] French Cour de Cassation, Commercial Division, 14 January 2004, no 02-15.541.

[36] French Cour de Cassation, 1st Civil Division, 3 February 2010, no 09-12.669; French Cour de Cassation, Commercial Division, 3 May 2016, no 14-28.982.

practitioner was not an action specific to the insolvency proceedings and that the insolvency court had no jurisdiction to hear such dispute.[37]

11. Can the insolvency administrator conclude new arbitration agreements after the opening of insolvency proceedings?

63. Yes. The insolvency practitioner (administrator or liquidator) may conclude new arbitration agreements after the opening of the insolvency proceeding, subject to the prior authorization of the insolvency judge. Pursuant to Article L. 622-7 of the Commercial Code, entering into an arbitration agreement (irrespective of whether the dispute has already arisen or not)[38] must be authorized by the insolvency judge. This limitation does not, however, apply to arbitration agreements already included in contracts existing before the opening of the insolvency proceeding.[39]

12. Do the effects of insolvency on arbitration (if any) operate after a creditors' arrangement has been agreed and approved by the competent authority?

64. The effects of insolvency proceedings operate as soon as the proceeding is opened. It is not subject to any agreement on a creditors' arrangement ("*plan*") or any approval by the court of such recovery plan.

65. However, those effects do not cease when the creditors' arrangement is approved. The *Cour de cassation* ruled that the adoption of a creditor's arrangement does not put an end to the suspension of individual claims[40] and that the concerned creditors must wait for the end of the creditors' arrangement to recover their claims, with respect to the claims included in the creditors' arrangement.

66. Under French law, the process of verification of claims and the adoption of a creditors' arrangement are conducted simultaneously but as two parallel paths. It is therefore very likely that the creditors' arrangement will be adopted before the insolvency practitioner has completed the verification of the debtor's liabilities.

67. If an arbitration proceeding relating to a debt incurred before the opening judgement was commenced before the adoption of a creditors' arrangement, the effects of the insolvency proceeding will continue after such adoption and will last until the end of the proceeding. In the event that this proceeding results in a ruling against the insolvent party, the claim will be

[37] French Cour de Cassation, Commercial Division, 16 June 2015, no 14-13.970.
[38] Article L. 622-7 of the French Commercial Code only refers to submission agreements. However, some authors consider that the prior authorization of the insolvency judge would also be required for arbitration provisions in contracts entered into after the opening judgment (see E. Caen, *Arbitrage et procédures collectives* : Réseaux du droit [2002] no 17, 18).
[39] P. M. Le Corre, "*Droit et pratique des procédures collectives*", para 422.331, 950.
[40] French Cour de cassation, Commercial Division, 29 April 2014, no 12-24.628.

included in the creditors' arrangement and be treated in the same way as all the other claims: the claim is then included in the creditors' arrangement approved by the insolvency court, with a retroactive effect as if the claim was included in the creditors' arrangement since the day of its approval by the insolvency court.

68. Should a claim arise after the creditors' arrangement, it will be paid when due, given that the debtor is deemed as *in bonis* again (ie, out of an insolvency proceeding) as of the approval of the creditors' arrangement by the insolvency court. It is therefore key to determine the date on which a debt was incurred and to determine whether it meets the criteria set out in Article L. 622-17 (applicable to the receivership by application of Article L. 631-14) and Article L. 641-13 of the Commercial Code.

13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?

69. Yes, all the rules regulating the effects of insolvency on arbitration are mandatory. Considering that the rules of insolvency are construed as falling under public policy (see the response to Question 27 for more details), an agreement between the insolvent party and one or more of its creditors may not set them aside and exclude their application.

14. Are arbitrators seated in the jurisdiction bound by the rules discussed above in considering whether to proceed with an arbitration?

70. Arbitrators seated in France are bound to respect either public policy for internal matters or international public policy for international matters (Articles 11492 (5°) and 1520 (5°) of the Code of Civil Procedure).

71. As the above-mentioned principles are part of public policy (detailed below at Question 27), a French judge will annul awards which disregard the fundamental principles of insolvency law, including the considerations to be taken into account to proceed with an arbitration after the opening of insolvency proceedings.

72. If the party to the arbitration that is not in insolvency is foreign, it is very likely that the arbitration will be an "international arbitration", which is governed by Articles 1504 et seq. of the Code of Civil Procedure. In such case, the requirement is to comply only with principles that are considered to be of "international public policy" (see the response to Question 27).

15. Does the court's personal jurisdiction over the party to the arbitration that is *not* in insolvency make any difference with respect to the effectiveness of the insolvency court's position on the arbitration?

73. No, we are not aware of any such difference.

Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings

16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?

a. If the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]

74. The extent of the insolvency practitioner's (insolvency administrator or liquidator as the case may be) powers of representation of the debtor depends on the type of proceeding.

75. In a **safeguard** or in a **receivership** proceeding, the insolvency court defines the scope of the insolvency administrator's mission, which may be of three types:

(i) the administrator can have a mission of surveillance of the debtor and of the management of the business;

(ii) the administrator can then be appointed with a mission of assistance, which means that all the prerogatives which are that of the debtor in application of Articles L. 622-7 II. and L. 622-8 al. 4 of the Commercial Code are exercised by the debtor in a safeguard proceeding but must be exercised jointly by the debtor and the insolvency administrator in a receivership; or

(iii) the administrator can be appointed with a mission of representation, in which case he alone exercises the above-mentioned prerogatives. The debtor is no longer in possession, and the insolvent party shall be solely represented by the administrator.

76. When the insolvency administrator's mission is of surveillance or assistance, the debtor is still in possession. However, when his mission is of representation, and depending on its scope, the administrator will assume all of the management's prerogatives. It should be noted that it is not mandatory for the insolvency court to appoint an administrator, and it will only be obligated to do so when some thresholds pertaining to the number of employees and the turnover of the company are met.[41]

[41] French Commercial Code, art L. 621-4 for the safeguard (applicable to the receivership by reference of art. L. 631-9).

77. As a consequence, and in any event, the insolvency administrator will have to be included in all pending proceedings in order for them to resume[42] (regardless of whether they were stayed by application of the principle of suspension of individual claims) and for him to be able to submit his observations on the disputes. The administrator resumes the proceedings by himself if his mission is of representation or jointly with the debtor if his mission is of surveillance or assistance.[43]

78. In a liquidation proceeding, Article L. 641-9 of the Commercial Code sets out that the opening of the proceeding automatically entails divestment by operation of law of the debtor's rights as to the administration and the disposal of his property. Therefore, the liquidator fully represents the insolvent company and will replace the debtor in possession and/or the administrator in any pending proceeding. Moreover, the liquidator will have exclusive power to initiate any new proceeding on behalf of the insolvent company. From a procedural point of view, the liquidator must also be called in all pending proceedings.[44]

17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?

79. There are no specific rules as to how the considerations of confidentiality that would usually apply in a non-insolvency scenario may vary because of the opening of insolvency proceedings against one of the parties to the arbitration.

80. Nevertheless, the insolvency practitioner will substitute or at least join the debtor (see the response to Question 16) and will therefore be privy to the contents of the arbitration. This is usually in the counterparty's interest as it allows the arbitration to carry on.

81. Since the insolvency practitioner is bound by professional secrecy, he may not reveal to third parties the contents of the information provided to him in the context of his mandate.

82. However, the insolvency practitioner shall report to the insolvency court, in the course of his mandate, any material proceedings to which the insolvent company is a party and any potential impact of such proceeding on the debtor's situation.

83. Such report shall be addressed to the insolvency court and made available to the debtor and to supervisors (see Paragraph 87 below).

84. The insolvency practitioner shall adapt the level of information disclosed to the best interests of the insolvent party.

[42] ibid, arts L. 622-22 and L. 622-23.
[43] French Cour de cassation, 18 April 1989 : Bull. civ. 1989 ; IV, no 119.
[44] French Commercial Code, art L. 641-4.

85. Therefore, even though there are no specific rules to this effect, confidentiality is usually preserved although with the notable addition of the insolvency practitioner and court.

86. The creditors are represented by the insolvency practitioner and will therefore not appear in the arbitration proceedings.

87. However, it shall be noted that a creditor may be appointed as a supervisor ("*contrôleur*") in the insolvency proceeding.[45] As a consequence, the supervisor will be entitled to have access to the same level of information as the insolvency practitioner (eg, including the content of the arbitration proceeding). In this event, the insolvency judge shall specify, when appointing the supervisor, that the latter shall not be entitled to access any information regarding the arbitration proceeding if there is a risk of conflict of interest (eg, if the supervisor is a party to the arbitration proceeding).

18. Does the name of a party change as a consequence of the opening of insolvency proceedings over it?

88. The name of the party that becomes insolvent does not in itself change. However, and as explained in Question 1 after the opening of the proceeding, the insolvent party may be represented by an insolvency practitioner and will then appear as "duly represented" by that insolvency practitioner, which means that this shall be added for the institution that administers the arbitration.

19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?

89. Regardless of the type of insolvency proceeding, no settlement ("transaction") may be entered into and bind the insolvent party without being authorized by the insolvency judge[46] and executed by the relevant insolvency practitioner as the case may be.

90. Furthermore, when the settlement is contemplated during a liquidation proceeding, prior approval of the insolvency court is required when the settlement concerns an amount exceeding EUR 4,000.00 or an amount that is not determined.[47]

[45] French Commercial Code, art L. 621-10 : « Le juge-commissaire désigne un à cinq contrôleurs parmi les créanciers qui lui en font la demande. » Translation by the authors: " The insolvency judge appoints one to five supervisors among the creditors who request it.".
[46] French Commercial Code, arts L. 622-7 (safeguard), L. 631-14 (receivership), and L. 641-3 (liquidation).
[47] ibid, art L. 642-24.

20. Can an arbitral tribunal adopt interim measures concerning a party subject to insolvency proceedings?

91. An arbitral tribunal can adopt interim measures concerning a party subject to insolvency proceedings but only to a limited extent.

92. As specified above (see the response to Question 10), the insolvency court has exclusive jurisdiction to hear all disputes relating to the insolvency proceedings, including disputes on liability for insufficient assets and actions for the nullity of transactions concluded in the so-called "suspicious period"[48] (ie, claw-back actions).

93. The insolvency court may order interim measures in the specific context of safeguard, administration, or liquidation proceedings to allow protective measures in the context of the extension of the proceedings to other legal entities when there is a mixing of assets ("*confusion de patrimoine*").[49]

94. It would logically follow that the insolvency court has exclusive jurisdiction for interim measures on these specific issues and that the ordering of the same by the arbitral tribunal is precluded. That is, no interim measures may be granted after the opening of the insolvency proceeding when such measures are related to debts incurred before the opening judgment and the arbitral tribunal may not order a measure to seize or freeze assets (conservatory attachment or judicial security), and it may not infringe upon the exclusive jurisdiction of the court hearing "safeguard, receivership and liquidation proceedings, actions for liability for insufficient assets or personal bankruptcy", which is considered public policy.[50]

95. There would however be no obstacle for the arbitral tribunal to order interim measures outside these issues as long as the measures taken do not result in favoring one creditor over the other and more generally do not result in a contravention of public policy. We could therefore consider that a measure to preserve evidence could very well be ordered—unless it is directly linked to the insolvency process itself or the liability for insufficient assets.[51]

[48] French Cour de Cassation, Commercial Division, 18 May 2017, no 15-23.973 ; French Cour de Cassation, Commercial Division, 4 October 2005, no 04-12.610.

[49] Article L621-2 paragraph 4 of the Commercial Code provides that the court may order interim measures. Translation by the authors: "For the application of the second and third paragraphs of this article, the president of the court may order any useful precautionary measure with regard to the property of the defendant in the action mentioned in those same paragraphs, at the request of the administrator, the judicial representative, the public prosecutor's office or ex officio." French version: « Pour l'application des deuxième et troisième alinéas du présent article, le président du tribunal peut ordonner toute mesure conservatoire utile à l'égard des biens du défendeur à l'action mentionnée à ces mêmes alinéas, à la demande de l'administrateur, du mandataire judiciaire, du ministère public ou d'office. »; see Article L. 631-10-1 for the judicial settlement and Article L. 651-4 paragraphs 2 and 3 for the liquidation.

[50] French Civil Procedure Code, art 1468 and French Commercial Code, art R. 662-3; Court of Cassation, 7 April 2009, no 08-16.884; Court of Cassation, 18 May 2017, no 15-23.973; Court of Cassation, 12 June 2019, no 17-26.197.

[51] An action for liability for insufficient assets is a legal action which may be brought against the management or, more frequently, the former management of the insolvent party when the amount of liabilities of the insolvent party overcomes the amount of its assets. Such action may only be initiated in the context of a liquidation proceeding. Such action is under the exclusive jurisdiction of the court which has opened the

21. Does the opening of insolvency proceedings in France affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings?

96. Under French law, there are no specific provisions regarding the effects of the opening of an insolvency proceeding on the validity of interim measures ("*mesures conservatoires*") adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings.

97. However, by analogy, with the treatment of interim measures ordered by a judicial court under French Insolvency law, two points are worth emphasizing:

(i) First, if the interim measure is granted after the debtor's state of insolvency but before the opening of the insolvency proceeding, it falls during the suspicious period and is therefore within the reach of claw-back actions. In particular, Article L.632-1 7° of the Commercial Code provides that interim measures granted during that period are null and void unless the subsequent registration or conversion into an attributive seizure ("saisie-attribution") has occurred before the opening judgment of the proceeding. In the event that such registration or conversion has not occurred, it may no longer happen after the opening judgment. The interim measure is then deprived of all its effects, and its release ("mainlevée") must be automatic.

(ii) Second, and as developed in Question 23 below, the opening judgment may prohibit or stay enforcement proceedings initiated by a creditor, depending on the date of the operative event of his claim. This does not in itself affect the validity of the interim measure, but it can deprive it of all its effects.

22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?

98. Regardless of the type of insolvency proceeding, no settlement ("transaction") may be entered into and bind the insolvent party without being authorized by the insolvency judge[52] and executed by the relevant insolvency practitioner as the case may be.

99. Furthermore, as mentioned in Question 19 above, when the settlement is contemplated during a liquidation proceeding, prior approval of the insolvency court is required when the settlement concerns an amount exceeding EUR 4,000.00 or an amount that is not determined.[53]

liquidation or ruled on the liquidation proceeding (French Commercial Code, art R. 651-1), hence the limitation mentioned.

[52] French Commercial Code, arts L. 622-7 (safeguard), L. 631-14 (receivership), and L. 641-3 (liquidation).

[53] ibid, art L. 642-24.

Part III: Ability to Enforce an Arbitration Award in Insolvency Proceedings

23. Does the opening of insolvency trigger a general prohibition of individual enforcement actions by creditors against the insolvent estate?

100. Yes. Article L. 622-21 II. of the Commercial Code explicitly provides for the prohibition or the stay of all enforcement proceedings directed at movable or immovable property and led by creditors whose debt has been incurred before the opening judgment or after the opening judgment but without meeting the conditions set out in Article L. 622-17 of the French Commercial Code (ie, debts incurred in the conduct of the proceeding, or as consideration for performance provided to the debtor during that period).

101. The notion of enforcement proceedings notably includes (i) property foreclosure ("*saisie-immobilière*") when the immovable property has not been definitively adjudicated before the opening judgement,[54] (ii) attributive seizure[55] ("*saisie attribution*"), (iii) seizure for sale[56] ("*saisie-vente*"), and (iv) interim seizures[57] ("*saisies conservatoires*").

24. What is the status of a claim that is being pursued in arbitration but has not yet reached a final award? Will that claim be converted to a different status once the arbitration award has been rendered and/or becomes enforceable?

102. A claim that is being pursued in arbitration when the opening judgment occurs is a pre-petition claim within the insolvency proceeding of the debtor. As a consequence, the automatic stay applies to such claim (due to the principle of suspension of individual claims—see the response to Question 3 for more details), and the creditor shall file a submission of claim.

103. After the process of filing of claims is complete, the insolvency judge, who is in charge of the verification of the pre-petition debts of the insolvent company, will find that the claim is the object of a pending proceeding (eg, an arbitration proceeding).[58] The pending proceeding, which would have been stayed because of the opening of the insolvency proceeding, will resume once the creditor has filed its claim and has called the insolvency practitioner in the dispute (see the response to Question 9). Once the arbitration ends and a decision is made against the debtor regarding the claim, such decision will directly be sent to the insolvency court's registry to be admitted on the list of claims of the insolvent party.

[54] French Cour de cassation, commercial Division, March 2014, no 13-17.216.
[55] P.M. Le Corre, "*Droit et pratique des procédures collectives*", para 622.211, 2119.
[56] French Cour de cassation, commercial Division, 21 September 2010, no 09-15.117.
[57] P.M. Le Corre, "*Droit et pratique des procédures collectives*", para 622.311, 2119.
[58] French Commercial Code, art L. 624-2.

25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?

104. Article L622-24 of the French Commercial Code provides that all creditors must submit their claims for them to be admissible (see the response to Question 9). Paragraph 4 of this article provides that this submission must be done even when these claims are not established by a document: "The submission of a claim must be made even if it is not established by a document".[59]

105. An arbitral award is considered in France as producing *res judicata* effect as soon as it is rendered.[60] Therefore, even without it being submitted to an exequatur procedure, it already has a strong evidentiary value under French law.

106. An arbitral award will therefore be a valid proof of credit for the purposes of submitting the claim even without exequatur.

107. It should be kept in mind that if the claim does not result from an enforceable title (ie, it has not received exequatur yet), Article L622-25 of the Commercial Code provides that the claim must be certified as genuine by the creditor.[61] The insolvency practitioner, who represents the interests of the creditors, may then challenge the claim before the insolvency judge who will rule on whether such claim should be admitted.

26. Are any or all the rules regulating the effect of insolvency on arbitration considered part of public policy?

108. The public-policy nature of French insolvency law provisions has been acknowledged, *inter alia*, with respect to (i) the principle of prohibition of new proceedings after the opening

[59] « A partir de la publication du jugement, tous les créanciers dont la créance est née antérieurement au jugement d'ouverture, à l'exception des salariés, adressent la déclaration de leurs créances au mandataire judiciaire dans des délais fixés par décret en Conseil d'Etat. . . . La déclaration des créances doit être faite alors même qu'elles ne sont pas établies par un titre. Celles dont le montant n'est pas encore définitivement fixé sont déclarées sur la base d'une évaluation. . . . ». Translation by the authors: " As from the publication of the opening judgment, all creditors whose claims arose prior to the opening judgment, with the exception of employees,, shall file for a submission of claim with the insolvency practitioner within the time limits set by decree of the Conseil d'Etat. . . . The submission of claim mut be made even if it is not established by a document. Those whose amount has not yet been definitively established are submitted on the basis of a valuation. . . .".

[60] French Civil Procedure Code, Article 1484 (applicable to international arbitration by reference of Article. 1506): « La sentence arbitrale a, dès qu'elle est rendue, l'autorité de la chose jugée relativement à la contestation qu'elle tranche. » Translation by the authors: "The arbitral award shall, as soon as it is rendered, have the force of res judicata with respect to the dispute which it settles.".

[61] « Sauf si elle résulte d'un titre exécutoire, la créance déclarée est certifiée sincère par le créancier. ». Translation by the authors: "Unless it results from an enforceable title, the claim submitted is certified as genuine by the creditor.".

judgment,[62] (ii) the principle of equality of creditors,[63] (iii) the principle of stay of pending proceedings at the date of the opening judgment,[64] (iv) the principle of the divestiture of the debtor in case of liquidation proceedings (the fact that the liquidator takes over the administration of assets),[65] or (v) the principle whereby all creditors must submit their claims after the opening judgment.[66] This includes the rule that awards must be limited to declaratory relief and cannot contain condemnatory orders.

109. As mentioned above, the principle of suspension of individual claims, which encompasses both (i) the principle of prohibition of new proceedings and (ii) the principle of stay of pending proceedings, has also been considered by French Courts to be part of public policy.

27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?

110. Yes. The principle of *par conditio creditorum* exists under French law as the principle of equal treatment of unsecured creditors (ie, those who have no specific security or priority right against the debtor). As described above, this principle implies, most notably, that all the creditors must submit their claims to the insolvency administrator once the opening judgment is rendered and that they cannot bring new judicial actions against the debtor after such opening judgment. The *Cour de cassation* held that the principle of equal treatment of creditors implies that French insolvency law provisions must be applied to all the claims originated before the opening judgment and that such principle forms part of both French and international public policy.[67]

28. Are there any other provisions or case law of France concerning the effect of national insolvency on arbitration that have not been mentioned in the previous answers?

111. No.

[62] French Cour de Cassation, 1st Civil Division, 5 February 1991, no 89-14.382.
[63] French Cour de Cassation, 1st Civil Division, 4 February 1992, no 90-12.569.
[64] French Cour de Cassation, 1st Civil Division, 5 February 1991, no 89-14.382.
[65] ibid.
[66] French Cour de Cassation, 1st Civil Division, 28 September 2011, no 10-18.320.
[67] French Cour de Cassation, 1st Civil Division, 4 February 1992, no 90-12.569.

IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

[These questions focus on the effects that foreign insolvency proceedings produce on arbitration seated in France concerning the insolvent party.]

29. Do foreign insolvency proceedings need to be recognised under any formal procedure to produce effects in France?

112. Given the fact that France is part of the European Union, two sets of rules coexist regarding the recognition of insolvency proceedings opened outside of France ("Foreign Insolvencies"):

(i) the European rules, applicable when the Foreign Insolvency was opened in a Member State of the European Union;

(ii) the French rules, applicable when the Foreign Insolvency was opened outside of the European Union.

113. Under European law, and more specifically, by application of the Regulation (EU) 2015/848 of May 2015, an insolvency proceeding opened in a Member State of the European Union is automatically recognized in other Member States and does not require any other formal steps.[68] The insolvency proceeding therefore produces in all EU Member States the same effects provided by the law of the State in which it was opened.

114. It is, however, important to note that European Insolvency law is only applicable to cross-border proceedings and has been held inapplicable to purely national legal issues.[69]

115. Under the general French rules, the recognition in France of a Foreign Insolvency requires that the opening judgment be granted *exequatur* by French courts.[70] The criteria to grant exequatur are the following: (i) jurisdiction of the foreign court opening the proceeding, (ii) regularity of the proceedings, (iii) applicability of the law applied by the foreign judge, (iv) absence of fraud, and (v) compatibility of the judgment with the French international public policy.[71] It is also required that no insolvency proceeding was opened in France with respect to the debtor.[72]

116. Once granted, the foreign judgment will be enforceable in France without it being considered as a French judgment in itself.

[68] Regulation (EU) 2015/848 on insolvency proceedings, art 19.1.
[69] French Cour de cassation, Commercial Division, 21 February 2012, no 11-18.027.
[70] This rule is valid for all judgments rendered outside the EU, but French Cour de cassation, 1st Civil 28 March 2012, no 11-10.639, lays down the principle in the context of a liquidation: « en l'absence d'exequatur, une décision de mise en liquidation judiciaire prononcée à l'étranger, ne peut produire, en France, aucun effet de suspension des poursuites individuelles ». Translation by the authors: "In the absence of exequatur, the foreign decision to wind up a company cannot suspend individual claims".
[71] French Cour de cassation, 1st Civil Division, 7 January 1964, no 62-12.438.
[72] French Cour de cassation, Commercial Division, 19 January 1988, no 86-11.080.

30. Has the jurisdiction adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency? If so, does that legislation adopt the Model Law in full, or does it amend any provision of the Model Law related to the effect of insolvency on arbitration?

117. No. France has not enacted a law implementing the UNCITRAL Model Law on Cross-Border Insolvency.

31. Does the opening of insolvency proceedings outside of the territory of France produce any effect on arbitrations seated in jurisdiction? What is the source of the rule or legislation providing for such effects?

118. As explained above at Question 29, two situations should be distinguished:

(i) Foreign Insolvencies opened in a Member State are subject to Regulation (EU) 2015/848 on Insolvency Proceedings. By virtue of Article 18, the *lex loci arbitri* (or the law of the Member State in which the arbitral tribunal has its seat) governs the effects of insolvency proceedings on pending arbitral proceedings regarding assets or rights which form part of the debtor's insolvency estate. Hence, French law would apply to the effects the insolvency proceedings opened in another EU Member State might have on pending arbitrations seated in France.[73] This article applies only if:

1. the arbitral proceedings seated in France are pending at the time insolvency proceedings commence; and
2. the arbitral proceedings are engaged against the debtor and concern assets or rights which form part of the debtor's insolvency estate.

Article 18 will then lead to the application of French insolvency law to determine the effects the Foreign Insolvency will have on the pending arbitration proceedings.[74] As mentioned above, this implies that arbitration proceedings are stayed (Article L. 622-21 of the Commercial Code and Article 369/370 of the Code of Civil Procedure). Although the stay is supposed to be automatic, in practice, there is an exchange of correspondence with the arbitral tribunal acknowledging the situation.

[73] Article 18 unified at the European level the English decision held in the *Elektrim/Vivendi* case ([2009] EWCA Civ 677). Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, Commentary of Article 18 by Philippe Duprat in Commentary under the direction and coordination of Laura Sautonie-Laguionie and Cécile Lisanti, Société de legislation comparée (Paris), DL 2015, cop. 2015, 149.
"The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat.".

[74] Marc Sénéchal, Reinhard Dammann, « *Le droit international de l'insolvabilité* » [2018] Lextenso, §1683.

(ii) Foreign Insolvencies opened outside of the European Union can produce an effect on French seated arbitrations, although it is not automatic, as there do not exist any specific provisions to this effect under French law.

119. Depending on the circumstances, arbitral tribunals may find that taking into consideration such foreign insolvency is necessary to comply with international public policy either (i) to avoid annulment of the award under the limitative grounds of Article 1520, 5° of the French Code of Civil Procedure or (ii) for the purpose of enforcement of the award in another forum.

120. Very concretely, this means that the arbitral tribunal should consider all potentially applicable laws (of the opening State, of the seat, and where enforcement might be sought) to consider whether a stay of the arbitration proceedings or any other steps are required to conform with public policy.[75]

121. In one notable case,[76] the French seated arbitral tribunal did not take into account the Foreign Insolvency and found that it was not bound by the provisions of the French Code of Civil Procedure regarding the stay of pending proceedings.

122. This analysis may be justified by the fact that according to the tribunal, the insolvent party wrongly invoked Article 370 of the French Code of Civil Procedure[77] which does not refer to arbitration. In any case, it is worth noting that the arbitral tribunal had noticed some

[75] Paris Court of Appeals, 7 April 2011 ; Reported in *Revue de arbitrage* 2011, 747. See commentary of S. Bollée and B. Haftel.

[76] ICC Award no 5954 of 1991 (unpublished), confirmed by a Paris Court of Appeals decision of 12 January 1993, République de Côte d'Ivoire v. Norbert Beyrard: « Alors qu'il y a lieu de souligner à cet égard que, contrairement aux allégations des défendeurs, le tribunal ne se considère pas tenu de suspendre la procédure au sens de l'article 370 du Code de Procédure Civile français, et alors que le tribunal a conclu que les dispositions de ce code sont inapplicables à la présente procédure, et alors que les termes de l'article 370, même à supposer qu'ils soient applicables, exigent nécessairement que le jugement aboutissant à soustraire le débiteur de la gestion soit français, ou, s'il est étranger, que le jugement bénéficie de l'autorité de la chose jugée en France une fois que sa régularité a été déterminée. » Translation by the authors: "Whereas there is reason to emphasize in this respect that contrary to the allegations of the respondents the tribunal does not find itself called upon to suspend the proceedings in the sense of Article 370 of the French Code of Civil Procedure, and whereas the tribunal has concluded that the provisions of that code are inapplicable to the present proceedings, and whereas the terms of Article 370, even supposing that they are applicable, necessarily require that the judgment resulting in the removal of the debtor from the management should be French, or, if it is foreign, that the judgment should benefit from the res judicata in France once its regularity has been determined . . .".

[77] The former version of this article provided that: « A compter de la notification qui en est faite à l'autre partie, l'instance est interrompue par:
- le décès d'une partie dans les cas où l'action est transmissible;
- la cessation de fonctions du représentant légal d'un mineur et de la personne chargée de la protection juridique d'un majeur;
- le recouvrement ou la perte par une partie de la capacité d'ester en justice). ».
Translation by the authors: "As from the time of the notification to the other party, the proceeding will be abated by:
- the death of a party in cases where the action is transmissible;
- the suspension of the functions of the legal representative of an incapable person;
- the recovery or loss by a party of the legal capacity to sue and to be sued.".

irregularities in the insolvency proceedings itself which questioned the integrity of the process.[78]

123. In another ICC unpublished award, the arbitral tribunal seated in Paris decided not to stay the arbitral proceedings, despite the opening of US insolvency proceedings concerning the defendant. After inviting each party to submit a memorandum discussing its respective position regarding whether the arbitration should continue, the arbitral tribunal considered that there did not exist a "fundamental and essential principle of French international public policy according to which an arbitration proceeding shall be automatically stayed solely because it is taking place in France". It is worth pointing out (i) that the law of the opening judgment in that case was interpreted as not requiring a stay of proceedings when such proceedings were seated outside of the State of the opening judgment, (ii) that the insolvent party had not requested exequatur of the opening judgment in France which was interpreted as depriving it from territorial effect in France, and (iii) that the claimant had requested the arbitration to proceed. Nevertheless, the arbitral tribunal apparently decided to apply the principle of equal treatment of creditors as it implied in its order "that the award would be limited to determining the validity of the claim and quantifying it, rather than ordering its payment".[79] This would suggest that a stay will not be ordered if the opening State's law does not require it and exequatur was not requested in France, but that a tribunal may nevertheless "decide to limit its award to determining the validity of the claim and quantifying it, in the belief that such an award would be less vulnerable to attack on public policy grounds". [80]

32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?

124. Yes, the rules on the recognition of foreign insolvencies must be taken into account by arbitrators seated in France.

125. Foreign insolvencies opened within the European Union will require arbitrators to look into the *lex loci arbitri* by virtue of Article 18 of European Insolvency Regulation 2015/848 (see the response to Question 31).

126. Foreign Insolvencies opened outside of the European Union require arbitrators to look into whether opening judgments were converted in an enforceable title and, in any case, determine if international public policy requires the taking into consideration of the foreign

[78] The tribunal stated that the purpose of the foreign insolvency judgement was to appoint a trustee belonging to the foreign State to represent the plaintiff in the arbitration proceedings engaged against the foreign State government. Horacio A. Grigera Naon, Paul E. Mason, "*International Commercial Arbitration Practise: 21st Century Perspective"* [2019] LexisNexis.
[79] José Rosell and Harvey Prager, "International Arbitration and Bankruptcy: United States, France and the ICC" [2001] 18 (4) JIA, 424-425.
[80] ibid.

insolvency, bearing in mind other considerations that could also be considered as part of international public policy, such as due process.[81]

33. Are the rules that regulate the effects on arbitration of foreign insolvency proceedings of mandatory application for arbitral tribunals seated in the jurisdiction?

127. Yes, the rules that regulate the effects on arbitration of foreign insolvency proceedings are of mandatory application for arbitral tribunals seated in France.

128. As per Article 18 European Insolvency Regulation 2015/848, foreign insolvencies opened within the European Union are to be governed "solely by the law of the Member State in which . . . the arbitral tribunal has its seat".

129. Where foreign insolvencies are opened outside of the European Union, rules that regulate their effect as provided by the law of the State where the insolvency proceedings are open will apply mandatorily insofar as they are considered French international public policy.[82]

34. Will an award which does not respect the effects of insolvency provided by the relevant regime in the jurisdiction be set aside?

130. Yes, an award which does not respect the effects of insolvency provided by the relevant regime on the jurisdiction of the arbitral tribunal will be set aside insofar as such non-compliance can be considered a violation of international public policy.

131. In any event, French courts will rule on annulment claims from a French international public policy perspective. French courts have found that except where the opening of insolvency proceedings itself breached international public policy, arbitral awards would be set aside if "the principles of suspension of individual claims by creditors, debtor divestment and stay of proceedings" were not observed.[83]

[81] See supra. Question 31 and Paris Court of Appeals*, 7 April 2011, Reported in Revue de arbitrage 2011, 747.*

[82] Paris Court of Appeals, 7 April 2011, *Reported in Revue de arbitrage 2011,* 747: « Il incombe aux arbitres, sous le contrôle du juge de l'annulation, de faire application de l'ordre public international aux différends dont ils sont saisis et de sanctionner sa méconnaissance éventuelle ». Translation by the authors: "arbitrators are expected, subject to the control of the annulment judge, to apply rules of international public policy to the disputes it ruling upon and sanction any breaches".

[83] Paris Court of Appeals*, 7 April 2011, Reported in Revue de arbitrage 2011,* 747. For similar examples of court decisions applying international public policy to insolvency, see French Cour de Cassation, 1st Civil Division, 8 March 1988, no 86-12.015, French Cour de Cassation, 1st Civil Division, 5 February 1991, no 89-14.382, French Cour de Cassation, 1st Civil Division, 28 September 2011, no 10-18.320.

35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated that have not been mentioned in the previous answers?

132. We believe that it should be added that arbitrators seated in France will generally be mindful of the enforcement of the award they are rendering and will therefore ensure that public policy of the place where enforcement is sought is duly complied with.