



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
**NATIONAL REPORT OF GERMANY**

**Dr. Philipp K. Wagner**

Partner, WAGNER Arbitration

[pw@wagner-arbitration.com](mailto:pw@wagner-arbitration.com)

**Carl-Christian Kramer**

Partner, KJK Kolmann Jakobs Kramer

[c.kramer@kjk-law.com](mailto:c.kramer@kjk-law.com)\*

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## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Germany 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 Germany 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. No, there is no such express provision for arbitration, but only for state court proceedings.
2. The relevant rules which influence arbitration proceedings in cases of insolvency arise out of the German arbitration law, which is contained in Sections 1025-1066 of the German Code of Civil Procedure (*Zivilprozessordnung*, “ZPO”).<sup>1</sup> Under German arbitration law, a central provision for the tribunal is Section 1042 ZPO, which sets out the general procedural rules and provides broad discretionary powers to the arbitral tribunal to conduct the proceedings. These considerations are, in turn, influenced and concretised by the provisions of the InsO (*Insolvenzordnung*, “InsO” or “Insolvency Code”) which determine the insolvency administrator’s rights and duties and the general rules of the insolvency procedure. However, the InsO contains no special provisions for arbitration proceedings.
3. An express rule concerning state court proceedings can be found in s. 240 ZPO. It provides that, in the event of insolvency proceedings being opened against a party, any proceedings shall be stayed to the extent that they concern the insolvent estate. The provision is not contained within the German arbitration law and only speaks of “proceedings” (*Verfahren*) in the sense that the term is used to describe court proceedings, but not arbitration proceedings. There is no such express rule for the stay of arbitration procedures in cases of insolvency, particularly not in the German arbitration law.
4. While Section 240 ZPO does apply to arbitration-related court proceedings, it is the prevailing view in jurisprudence and among scholars that the provision does not apply to arbitration proceedings.<sup>2</sup> Hence, statutory law does not provide for an automatic stay of an arbitration proceeding.

<sup>1</sup> For an English translation, see <[https://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_zpo.pdf](https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.pdf)>.

<sup>2</sup> BGH, order dated 29 January 2009, case no III ZB 88/07, published in *SchiedsVZ* 2009, 176; Astrid Stadler in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (17th edn, Vahlen 2020), s 240, para 6; Stefan Kröll, “Part IV: Selected Areas and Issues of Arbitration in Germany, Insolvency and Arbitration—Effects

5. However, the arbitral tribunal has a duty to react in order to guarantee an orderly and fair procedure and to provide equality of arms as mandated by Section 1042 ZPO. Most notably, with respect to claims involving the estate, the insolvency administrator must be given the opportunity to familiarise themselves with any proceedings involving the insolvent debtor, which will usually necessitate a reasonable extension of deadlines or the order of a temporary stay by the arbitral tribunal. This is specifically relevant in cases concerning claims that must be reported to the central insolvency schedule under Section 174 InsO, as here it is necessary to await the verification meeting (Section 176 InsO), during which these claims are verified. There is debate over whether a violation of this principle is sufficient grounds for setting aside the arbitral award under Section 1059(2) no. 1b, no. 2b ZPO or declaring it unenforceable (Section 1061(1) sentence 1, 1061(2) ZPO, Art. V(2)(b) New York Convention).<sup>3</sup> The jurisprudence of the German Federal Court of Justice (*Bundesgerichtshof*, “BGH”)<sup>4</sup>, however, suggests that a temporary stay will be the correct reaction of the tribunal with regard to their duty under Section 1042 ZPO.

2. **Does the insolvency legislation in Germany 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*?**

6. The *vis attractiva concursus* rule does not apply in Germany. Therefore, disputes in arbitration or disputes subject to an arbitration agreement cannot be covered by the *vis attractiva concursus* rule as may be the case in other jurisdictions.
7. However, Article 6 of the EU-Regulation on Insolvency Proceedings<sup>5</sup> (“EU Insolvency Regulation”) mandates that when insolvency proceedings have been opened in Germany in accordance with Article 3, the German courts shall have jurisdiction for “any action which derives directly from the insolvency proceedings and is closely linked with them”. Broadly speaking, this means that the dispute, to fall within this definition, must concern “typical insolvency purposes”.<sup>6</sup>

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of Party Insolvency on Arbitral Proceedings in Germany” in Patricia Nacimiento, Stefan Michael Kroll et al (eds), *Arbitration in Germany: The Model Law in Practice* (2nd edn, Kluwer Law International 2015), 1002. Arguing, however, that Section 240 ZPO applies by analogy: Sebastian Mock in Uhlenbruck (ed), *Insolvenzordnung* (15th edn, C.H. Beck 2019), s 80, para 184.

<sup>3</sup> Joachim Münch in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2017), vol 3, s 1059 para 46.

<sup>4</sup> BGH, see n 2.

<sup>5</sup> Regulation (EU) 2015/848; an English version is available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32015R0848&from=DE>>.

<sup>6</sup> Peter Kindler in Jan Hein (ed), *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (7th edn, C.H. Beck 2018), vol 12, EUInsVO art 6, para 5.

8. As pending arbitration proceedings seated in Germany are not subject to an automatic stay (see above Paragraphs 3-5), the jurisdiction of the tribunal will not be suspended by the opening of the insolvency proceedings. If the tribunal has its seat in another Member State, Article 18 EU Insolvency Regulation mandates that the law of that State will determine the effects of the insolvency proceedings on the arbitration.
9. Further, any existing arbitration agreements will, in principle, remain valid, subject to the insolvency administrator's rights (see Paragraph 43 et seq. below).

**3. What are the effects (if any) of the opening of insolvency proceedings in Germany 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?**

10. The law does not draw any distinction based on whether the insolvency party is acting as defendant or claimant.
11. However, the insolvency administrator replaces the insolvent party irrespective of its role of claimant or defendant.<sup>7</sup> The insolvency administrator takes part in the proceedings for the insolvent party after assuming their position as a general successor (Section 80 InsO). He partakes in proceedings as a party by virtue of his office (*Partei kraft Amtes*, cf. s. 116 ZPO).
12. When regular creditors of the insolvency estate in the sense of Section 38 InsO bring proceedings against the insolvency estate with the estate as respondent, they must adhere to the mandatory procedure of the InsO (Section 87 InsO). This applies to arbitration as well as litigation.<sup>8</sup> Therefore, creditors cannot simply commence new proceedings. They must first report their claims to the insolvency schedule (Sections 174 et seq. InsO)<sup>9</sup> and await the outcome of that procedure, as explained below in Paragraphs 49-54, before any arbitral proceedings, in case they were stayed, can be continued again.

**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?**

13. No. The law does not draw any distinction between the two in terms of how arbitration proceedings are affected. However, the difference between the types of insolvency

<sup>7</sup> InsO, s 80.

<sup>8</sup> BGH, see n 2; Jörn Hombeck and Viktoria Schneider, "Das Schiedsverfahren in der Insolvenz", *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* 2020, 449, 451.

<sup>9</sup> Nima Ghassemi-Tabar and Jan Delaveaux in Manfred Born et al (eds), *Münchener Handbuch des Gesellschaftsrechts* (5th edn, C.H. Beck 2016), vol 7, part 1, ch 2, s 22, paras 43-47.

proceedings under the InsO will substantially affect the proceedings, as under the insolvency plan, the insolvent party may potentially become solvent again.

14. With regard to preventive restructuring procedures, it is to be noted that Germany must comply with the Directive (EU) 2019/1023<sup>10</sup> on preventive restructuring frameworks, discharge of debt and disqualifications, and measures to increase efficiency (Preventive Restructuring Frameworks Directive) by passing an according law by 16 July 2021. Similar to the English Scheme of Arrangement, there will be the possibility to implement a restructuring plan outside formal insolvency proceedings and under creditor protection. Therefore, German insolvency law will likely see some change in this area soon.

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

15. Yes. Statutory law itself does not draw any explicit distinctions: while the ZPO knows different types of actions or judgments for state court proceedings (Sections 300 et seq.), no such specifications are made for arbitration proceedings. Pursuant to the German arbitration law, any “claim involving an economic interest” (*vermögensrechtlicher Anspruch*) is arbitrable (Section 1030(1) ZPO). However, generally, specific insolvency-related disputes are not automatically covered by arbitration agreements (see Paragraphs 43-45 below). Rather, the insolvency administrator may accept the jurisdiction of an arbitral tribunal over these claims based on an arbitration agreement concluded post insolvency.<sup>11</sup>
16. But practically speaking, different types of claims in terms of subject matter or relief sought will pose different kinds of questions (see answer to Question 10, Paragraphs 57-58 below).
17. Problems may arise if the relief sought in the arbitration is the confirmation of a claim obliging the insolvent party to pay a monetary amount to the other party in cases where that claim has not been filed with the debtor’s insolvency schedule. This required filing of claims is a central feature of the InsO (Sections 174 et seq.) and an embodiment of the principle of equal treatment of creditors in insolvency under the German *ordre public interne*. To reconcile these conflicting positions, the German Federal Court of Justice has confirmed that in such cases, the arbitration award confirming the insolvent party’s payment obligation will be construed as a determination that the claim is to be filed with the insolvency schedule.<sup>12</sup> In other words, a condemnatory award against a party subject to German insolvency proceedings and concerning claims not filed with the schedule will be considered by German courts exclusively as a declaratory award for the purposes of including it in the insolvency schedule.

<sup>10</sup> An English version is available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1023&from=de>>.

<sup>11</sup> Joachim Münch, see n 3, vol 3, s 1030, para 34; Stefan Kröll, see n 2, 989.

<sup>12</sup> BGH, see n 2, para 28; Philipp Wagner, “Insolvency and Arbitration: A Pleading for International Insolvency Law”, *Dispute Resolution International*, vol 5, no 2, November 2011, 189-201, 198.

18. Where claims for performance under executory contracts are concerned, Section 103(1) InsO comes into play, which mandates the insolvency administrator's position with regard to performance of mutual contracts. Under Section 103(1) InsO, he will make a decision of whether or not to perform the contract, thereby affecting the further course of the proceedings over the performance claim (see Paragraphs 39 et seq. below). In case he decides not to perform, the other party retains the right to claim performance as an unsecured insolvency creditor under Section 103(2) InsO. However, if arbitration proceedings were already pending, the creditor's action must be changed from a claim for performance to a claim for declaratory judgment (see Paragraph 17).<sup>13</sup> In any case, the creditor who wishes to claim performance must adhere to the insolvency schedule process.
19. The InsO distinguishes between different levels of creditors and provides for higher-ranking rights of separation from the estate (*Aussonderung*)<sup>14</sup> and separate satisfaction for security rights (*Absonderung*).<sup>15</sup> Both of these are generally to be brought in front of arbitration if covered by an arbitration agreement.<sup>16</sup> The German Federal Court of Justice has stated an exception to this in a case where the claim, at least as a preliminary matter, concerned the right of the insolvency administrator under Section 103 InsO to choose whether to perform a contract, as this right is considered not to be covered by an arbitration agreement.<sup>17</sup>
20. In regard to the insolvency administrator's right to challenge detrimental transactions under Sections 129 et seq. InsO, the arbitration agreement is also not binding with respect to these matters (see also Paragraphs 43-45 below).<sup>18</sup> Such matters are therefore not arbitrable.
21. The opposite is true for the insolvency administrator's right to enforce claims assigned as security under Section 166(2) InsO, which according to the German Federal Court of Justice, falls within the scope of the arbitration agreement.<sup>19</sup>

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

22. There is no statutory pre-insolvency restructuring procedure under German law. This is likely to change with the implementation of the EU Directive on preventive restructuring mentioned above under Paragraph 14.

<sup>13</sup> Cf Sebastian Longrée and Matthias Gantenbrink, "Insolvenz des Beklagten im Schiedsverfahren", *SchiedsVZ* 2014, 21, 22; an application for a determination of the claim is not possible in the procedure for a declaration of enforceability, BGH, order dated 26 April 2017, case no I ZB 119/15, published in *NJW-RR* 2017, 1327.

<sup>14</sup> InsO, s 47.

<sup>15</sup> *ibid*, ss 49 et seq.

<sup>16</sup> Stefan Kröll, see n 2, 997.

<sup>17</sup> BGH, order dated 30 June 2011, case no III ZB 59/10, published in *SchiedsVZ* 2011, 281.

<sup>18</sup> BGH, judgment dated 17 October 1956, case no IV ZR 137/56; BGH, order dated 27 October 2003, case no II ZA 09/02; BGH, order dated 17 January 2008, case no III ZB 11/07; see also Truiken Heydn, "Bindung des Insolvenzverwalters an eine Schiedsvereinbarung bei der Geltendmachung insolvenzspezifischer Rechte?", *SchiedsVZ* 2010, 182; Stefan Kröll, see n 2, 997.

<sup>19</sup> BGH, judgment dated 25 April 2013, case no IX RZ 49/12, *ZIP* 2013, 1539; Kröll, see n 2, 999.

23. The only “pre-insolvency” proceeding worth noting may be the “preliminary insolvency proceedings” (*vorläufiges Insolvenzverfahren*). This is simply the phase between the request to open insolvency proceedings (Section 13 InsO) and the actual opening of the insolvency proceedings by the insolvency court (Sections 80 et seq. InsO). During this time, some first measures are taken by a preliminary insolvency administrator, such as to confer with the requesting party and also with its staff and its creditors. This first phase will lead directly into the opening of proceedings.

**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. When it comes to pending arbitration proceedings, there is no automatic stay, but a temporary stay may be ordered by a tribunal to allow for the proper integration of an insolvency administrator into the proceedings (see Paragraph 5 above). A debtor asserting a claim against the insolvent party in arbitration must refer to the insolvency schedule and await the verification meeting (Sections 174 et seq. InsO). Thereafter, the continuation of the arbitration depends on whether the claims are contested (see Paragraph 12 above).
25. Where arbitration has not yet commenced, any already existing arbitration agreement will bind the insolvency administrator (see Paragraphs 43-45 below), whether it is invoked against him or he wishes to invoke it himself. Hence, generally, such arbitration proceedings can commence without any limitations other than the insolvency administrator’s powers (see Paragraph 43 below and Paragraph 20 above).
26. On a more practical note, the fact that the insolvent party may lack sufficient financial means to partake in arbitration proceedings to pay necessary deposits, for example, may influence the arbitrability of disputes. Such impecuniosity may bar the arbitration under Section 1032(1) ZPO if it makes the arbitration agreement inoperative, meaning that a matter may successfully be brought before a state court despite the existence of an arbitration agreement.<sup>20</sup>

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

27. German insolvency law does not differentiate between voluntary and compulsory insolvency. Insolvency proceedings are opened upon application (Sections 13-15a InsO), whereby in case of illiquidity or indebtedness of a corporation the application becomes compulsory (Section 15a InsO). Regardless of this, the insolvency procedure itself is the same.

<sup>20</sup> BGH, judgment dated 14 September 2000, case no III ZR 33/00.

28. In terms of the procedure, there is the option of self-administration management (*Eigenverwaltung*) of the insolvency, Sections 270 et seq. InsO, during which there is no insolvency administrator and the insolvent company manages its own proceedings together with the insolvency custodian (*Sachwalter*). Under Section 274 InsO, the insolvency custodian's role is defined as giving him less rights than the insolvency administrator. In particular, he does not—unlike the insolvency administrator according to Section 80 InsO—replace the insolvent party. This means that the insolvent party itself remains the acting party. The procedure itself under the InsO, such as that regarding the insolvency schedule (Sections 174 et seq.), is the same.

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

29. Generally, yes. Germany follows the principle of universality, as opposed to the principle of territoriality. Within the EU, however, this is limited by the choice of law rule in Article 18 EU Insolvency Regulation, according to which the effects of a German insolvency on pending arbitrations are governed by the law of that Member State in which the arbitration is seated.

**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.)?**

30. The effects of the insolvency become operative with the opening of the insolvency proceedings by way of an opening order of the insolvency court, Section 27 InsO. The effects of the opening are stipulated in Sections 80 et seq. InsO, starting with the passing of the rights and obligations of the insolvent party onto the insolvency administrator as a general successor, Section 80 InsO. Hereby, from this point onward, the insolvent party's right to manage and transfer the assets of the estate are vested in the insolvency administrator. This includes any and all rights and obligations, such as arbitration agreements, which henceforth bind the administrator. While the insolvent party remains party to the original contract, they are no more entitled to dispose of their assets.
31. Another critical point in time is the verification meeting (Section 176 InsO) during which the claims filed in the insolvency schedule are examined, and any contentions against them must be brought up. This will materially influence the next steps with regard to any claims that are subject to pending or potential future proceedings.



- 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?**

32. If parties wish to continue with an arbitration, the insolvency creditor or claimant must comply with the mandatory provisions of the InsO, namely to declare their claims to the insolvency schedule under Sections 174 et seq. InsO. This is because this insolvency procedure and the principle of equal treatment of creditors form part of the German *ordre public*.<sup>21</sup> As explained above in the answer to Question 1, Paragraph 5, to enable the creditor to do so and to give the insolvency administrator time to familiarise himself with the proceedings, the tribunal is likely to temporarily stay the proceedings. This is based on the tribunal's duty to guarantee equality of arms under Section 1042 ZPO. Failure to do so may constitute a violation of this principle result in a challengeable and/or unenforceable award. As the arbitration proceedings are not automatically terminated or stayed by law, parties retain their previously existing remedies against measures under the applicable (procedural and substantive) law.
33. In approaching the insolvency schedule, it must also be examined whether the claims in question are raised in the capacity as a regular insolvency creditor under Section 38 InsO or whether the creditor may have senior level claims and is therefore entitled to separation of an object from the insolvency estate under a right *in rem* or *in personam* under Section 47 InsO or other types of separate satisfaction under Sections 49 et seq. InsO. If the creditor is entitled to separation under Section 47 InsO, the relevant object will be separated from the estate and will not be subject to the insolvency procedure or schedule. The right to separate satisfaction still subjects the creditor to the insolvency procedure but grants preferential treatment when it comes to the proceeds of the disposition.
34. As the German Federal Court of Justice has confirmed, awards rendered after the opening of the insolvency proceedings which confirm the insolvent party's payment obligation will be construed as a determination that the claim is to be filed with the insolvency schedule.<sup>22</sup> Therefore, an adjustment of the request for relief in such cases is not strictly necessary in order to still achieve the desired outcome.
35. As the opening of the insolvency proceedings does not automatically stay the arbitration proceedings (see Paragraph 4 above), no intervention in that sense is necessary or possible. An indirect yet substantial effect on the arbitration proceedings stems from the InsO-procedure regarding the insolvency schedule, resulting most likely in a delay of pending

<sup>21</sup> BGH, see n 2, para 28; Philipp Wagner, see n 15.

<sup>22</sup> BGH, see n 2, para 28.

proceedings. However, this procedure is a core feature of the Insolvency Code and non-derogable.<sup>23</sup> Thus, it is to be followed and its outcome to be awaited.

36. It is not within the insolvency court's discretion to decide whether matters are arbitrated or not. The right to initiate or continue any arbitral proceeding is solely with the parties to the arbitration agreement and/or the already pending arbitration. The insolvency administrator who assumes all the rights and obligations of the insolvent party (Section 80 InsO), including any arbitration agreements, will decide with the estate's economic best interests in mind and may invoke certain arbitration agreements.

**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?**

37. While German law provides for a procedure in which the competent state courts determine the validity of an arbitration agreement,<sup>24</sup> insolvency courts do not have the power to determine the validity of an arbitration agreement or grant anti-arbitration injunctions. Whether or not arbitration proceedings are continued is not within the discretion of the insolvency court.

**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?**

38. Under German law, the insolvency court is only responsible for supervising the insolvency administrator and for guiding the proceedings. Only the insolvency administrator has the right to administer the debtor's assets forming part of the insolvency estate (Section 80 InsO). In particular, the insolvency court has no right to terminate or to suspend the effectiveness of any contracts. This applies irrespective of whether or not they contain arbitration agreements.
39. There are two ways for the insolvency administrator to suspend contracts concluded by the insolvent party prior to the insolvency:
40. First, according to Section 103(2) InsO, the insolvency administrator may refuse to perform the contract containing the arbitration agreement if neither of the parties have fully performed at the date of the opening of the insolvency proceedings.<sup>25</sup> In this case, the

<sup>23</sup> Ralf Sinz in Heribert Hirte and Heinz Vallender (eds), *Uhlenbruck, Insolvenzordnung*, (15th edn, Vahlen 2019), s 174, para 1.

<sup>24</sup> Cf ZPO, s 1032(2).

<sup>25</sup> BGH, judgment dated 7 February 2013, case no IX ZR 218/11; Markus Gehrlein, "Die Rechtsprechung des BGH zu gegenseitigen Verträgen in der Insolvenz", NZI 2015, 97, 106.

contract remains valid, but “the other party shall be entitled to its claims for non-performance only as an insolvency creditor”<sup>26</sup>.

41. Second, according to Sections 129 et seq. InsO, the insolvency administrator may challenge a transaction made prior to the insolvency (*Insolvenzanfechtung*, the German form of *actio pauliana*). However, this is only possible if the transaction directly or indirectly harmed the position of the other creditors. The insolvency administrator may, for instance, challenge a transaction if it was in favour of the creditor and took place in the last three months prior to the opening of the insolvency proceedings, and the creditor was aware of the illiquidity of the later insolvent party (Section 130(1) InsO). If the insolvency administrator challenges the transaction, it is void, and the other party has to return the amount or the object gained in the challenged transaction to the insolvency estate.<sup>27</sup>
42. The insolvency court, on the other hand, is not directly involved in these matters.

**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?**

43. Arbitration agreements concluded by the insolvent party before the opening of the insolvency proceedings are, in principle, binding on both the insolvency court and the insolvency administrator.<sup>28</sup> Furthermore, German arbitration law follows the doctrine of separability, meaning that the validity of an arbitration agreement is generally not affected by the invalidity of the underlying contract.<sup>29</sup> However, the insolvency administrator’s powers regarding the contract outlined above in Paragraphs 38-41 limit the scope of the arbitration agreement in the following ways:
44. If the insolvency administrator refuses to perform a contract in accordance with Section 103(1) InsO, as described above in Paragraph 18, the arbitration agreement contained therein is not binding in this respect.<sup>30</sup> The rationale behind this is that the insolvency administrator’s power of refusal is rooted in mandatory insolvency law and not in a contractual agreement, putting it outside the scope of the arbitration agreement.<sup>31</sup>
45. Furthermore, the arbitration agreement is not binding with respect to the insolvency administrator’s right to challenge in accordance with Section 129 InsO under the conditions

<sup>26</sup> InsO, s 103(2).

<sup>27</sup> *ibid*, s 143(1).

<sup>28</sup> BGH, judgment dated 19 July 2004, case no II ZR 65/03; Philipp Wagner, “When two worlds collide—the dilemma between insolvency and arbitration” in Marianna Roth, Michael Geistlinger (eds), *Yearbook on International Arbitration, Volume II* (Dike 2012), 119-129, 121.

<sup>29</sup> Wolfgang Voit in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (17th edn, Vahlen 2020), s 1032, para 13.

<sup>30</sup> BGH, see n 17.

<sup>31</sup> Markus Gehrlein, see n 25.

outlined above in Paragraph 41.<sup>32</sup> Thus, the insolvency administrator may bring a claim under Section 143(1) InsO directly to the state courts, and the other party is unable to apply for a stay in favour of arbitration proceedings.<sup>33</sup>

**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?**

46. The insolvency administrator may not refuse to perform the arbitration agreement itself because it does not qualify as an obligation in the sense of Section 103(2) InsO.<sup>34</sup> The provision only concerns contracts with mutual performance obligations (*gegenseitiger Vertrag*), whereas an arbitration agreement, under German law, is a procedural agreement (*Prozessvertrag*).<sup>35</sup> Furthermore, the insolvency administrator cannot challenge an arbitration agreement pursuant to Section 129 InsO because an arbitration agreement is most likely not to be considered a transaction to the detriment of other creditors.<sup>36</sup> As a procedural agreement, it merely has procedural consequences and does not favour the other party financially over other creditors.
47. However, if the insolvent party does not have the necessary funds to implement the arbitration agreement, ie if it is unable to pay the advance on costs and the other party is unwilling to cover the advance of the insolvent party, the arbitration agreement is no longer binding.<sup>37</sup> In this case, the insolvency administrator does not have to terminate the arbitration agreement. Instead, the arbitration agreement becomes impossible to implement as a matter of law.<sup>38</sup> In this scenario, the insolvency administrator can bring a claim directly to the state courts, and the other party cannot successfully file an application for a stay in favour of the arbitration proceedings. In the event that the other party initiates an arbitration claim against the insolvent party, the insolvency administrator may file for a judgment declaring the arbitration agreement impossible to implement.<sup>39</sup> If, however, the other party agrees to pay

<sup>32</sup> BGH, judgment dated 17 October 1956, see n 18; BGH, order dated 27 October 2003, case no II ZA 09/02; BGH, order dated 17 January 2008, case no III ZB 11/07; see also Truiken Heydn, “Bindung des Insolvenzverwalters an eine Schiedsvereinbarung bei der Geltendmachung insolvenzspezifischer Rechte?”, *SchiedsVZ* 2010, 182.

<sup>33</sup> Alfred Heidbrink, “Die Insolvenzanfechtung im Schiedsverfahren”, *SchiedsVZ* 2009, 258, 259.

<sup>34</sup> Jörn Hombeck and Viktoria Schneider, see n 8.

<sup>35</sup> Karl-Heinz Schwab and Gerhard Walter, *Schiedsgerichtsbarkeit* (C.H. Beck, 7th edn 2005), part 1, ch 7, para 37.

<sup>36</sup> Cf Jörn Hombeck and Viktoria Schneider, see n 8.

<sup>37</sup> BGH, see n 23; OLG Nürnberg (Higher Regional Court Nuremberg), order dated 21 January 2013, case no 1 U 316/12; OLG Köln (Higher Regional Court Cologne), order dated 5 June 2013, case no 18 W 32/13.

<sup>38</sup> According to the BGH (*ibid*), this follows from s 1032(1) ZPO, although it is not explicitly stated in the provision.

<sup>39</sup> Wolfgang Voit, see n 29.

the full advance on costs, it can avoid the impossibility of implementation, and the arbitration agreement remains valid.<sup>40</sup>

48. The insolvency court is unable to terminate or suspend the effectiveness of arbitration agreements. This competence rests with the state courts (see Paragraph 37 above).

**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?**

49. Pursuant to Section 87 InsO, claims of creditors which already existed at the time of the opening of the insolvency proceedings can only be pursued within the insolvency proceedings.

50. All creditors requesting payment from the distribution of the insolvency estate must register the claim with the insolvency administrator for the central insolvency schedule<sup>41</sup> by enclosing copies of the documents evidencing the claim (Section 174(1) InsO).

51. If the insolvency administrator contests the claim, the creditor must initiate arbitration proceedings to determine the claim (Section 179(1) InsO).<sup>42</sup> If another creditor contests the claim, he must initiate state court proceedings. The arbitration agreement does not bind that other creditor because this would constitute a contract to the detriment of a third party, which is impermissible under German law.<sup>43</sup>

52. If arbitration proceedings are already pending, the creditor's claim is changed from a claim for performance to a claim for declaratory judgment upon request or in any event by way of interpretation (for the determination of the claim within the arbitration proceedings; see Section 180(2) InsO).<sup>44</sup>

<sup>40</sup> Jens-Peter Lachmann, "Klippen für die Schiedsvereinbarung", *SchiedsVZ* 2003, 28, 31; Gerhard Wagner, "Impecunious Parties and Arbitration Agreements", *SchiedsVZ* 2003, 206, 215.

<sup>41</sup> Prior notification is mandatory and cannot be replaced by an arbitration award establishing the claim, BGH, see n 2.

<sup>42</sup> Stefan Kröll, see n 2; Gustav Flecke-Giammarco and Cristoph Keller, "Die Auswirkung der Wahl des Schiedsorts auf den Fortgang des Schiedsverfahrens in der Insolvenz", *NZI* 2012, 529; Jörg Hombeck and Viktoria Schneider, see n 8, 451.

<sup>43</sup> Jörn Hombeck and Viktoria Schneider, see n 9, 451.

<sup>44</sup> BGH, see n 2; cf Sebastian Longrée and Matthias Gantenbrink, see n 13; an application for a determination of the claim is not possible in the procedure for a declaration of enforceability according to BGH, see n 13.

53. The decisions of the insolvency administrator with regard to the claims, once entered into the schedule, have the legal effect of a final judgment with respect to the insolvency administrator and all insolvency creditors (Section 178(3) InsO).
54. If the contract is concluded after the opening of the insolvency proceedings, no further measures for the opening of the arbitration proceedings are to be taken since the creditor cannot satisfy himself from the insolvency estate.<sup>45</sup>
55. In German law, the principle *vis attractiva concursus* (according to which the insolvency court alone is competent to determine the claims) does not apply, but the claims are determined separately from the insolvency proceedings.<sup>46</sup> The insolvency administrator is bound by an arbitration agreement concluded by the debtor before the insolvency proceedings were opened insofar as rights are involved which arise directly from the contract and not from the Insolvency Code (see above Paragraph 43).<sup>47</sup>
56. The filing of the claim with the insolvency proceedings does not amount to a submission of the jurisdiction of the insolvency court or a waiver of the arbitration agreement.

**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)?**

57. No. The insolvency administrator is bound by an arbitration clause concluded by the insolvent party only in so far as it concerns rights which are subject to the insolvent party's authority of disposition. As explained under Paragraphs 38-45 above, this is not the case with rights to which the insolvency administrator is entitled by virtue of his office, such as right to refuse performance and to challenge a transaction.<sup>48</sup> This is also in line with Article 6(1) EU Insolvency Regulation applicable to European cross-border cases.
58. Additionally, the insolvency administrator may bring challenges before the state court, despite the existence of an arbitration agreement challenge. This is the case in some instances regarding certain "detrimental" transactions made prior to the opening of the insolvency proceedings under Sections 129 et seq. InsO (see Paragraph 41 above). In such cases, the counterpart of the challenged transaction will have all the remedies available under the ZPO for litigation proceedings.

<sup>45</sup> Sebastian Mock in *Uhlenbruck, Insolvenzordnung* (15th edn, 2019), s 80, para 14.

<sup>46</sup> Cf InsO, s 180(1), sentence 1; Ralf Sinz, see n 23, s 180(1), para 1.

<sup>47</sup> Most recently BGH, order dated 29 June 2017, case no I ZB 60/16. With regard to the binding nature of the arbitration agreement, one may also ask whether the administrator is bound to respect the constitution of an arbitral tribunal that was constituted prior to the commencement of insolvency proceedings. This has been held to be the case by the KG Berlin (Higher Regional Court of Berlin), SchiedsVZ 2005, 100 et seq., cf Philipp Wagner, see n 12, 191.

<sup>48</sup> BGH, *ibid*; BGH, order dated 20 November 2003, case no III ZB 24/03.

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

59. Yes. Section 1030 ZPO stipulates that “any claim involving an economic interest” may become the subject of an arbitration agreement, which is interpreted to include titles in an ongoing insolvency proceeding. If the arbitration agreement potentially involves a claim of “considerable value”, the insolvency administrator is required to obtain the consent of the creditors’ committee (Section 160(3) InsO), although failure to do so will not invalidate the agreement (Section 164 InsO).<sup>49</sup> The value of the claim depends on its significance for the rest of the estate (not merely its percentage thereof), taking into account the circumstances of the individual case.

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

60. Presently, there is no equivalent to a creditors’ arrangement in German insolvency law (cf. response to Question 3(b), Paragraphs 13-14 ). However, prior to the opening of the insolvency proceedings, the creditors are free to conclude an agreement with the insolvent party to avoid the opening of proceedings and thus the effects of insolvency on any pending arbitration.

**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?**

61. According to Article 18 EU Insolvency Regulation, German insolvency law will apply when the seat of a pending arbitral proceeding<sup>50</sup> is located in Germany. However, parties may agree on a different procedural law to govern the arbitration in Germany, which would in turn lead to the inapplicability of German insolvency law.<sup>51</sup> Or, if the seat of the arbitration is in another EU Member State, then the law of that Member State will determine the effects, even if the insolvency proceedings have been opened in Germany. This is explained in further detail in the answer to Question 33, Paragraph 106 below.

<sup>49</sup> Wolfgang Voit in Hans-Joachim Musielak and Wolfgang Voit (eds), *Zivilprozessordnung* (17th edn, Vahlen 2020), s 1029, para 5; Ingo Saenger in Ingo Saenger (ed), *Zivilprozessordnung* (8th edn, Nomos 2019), s 1030, para 9; Joachim Münch, see n 11, vol 3, s 1030 para 34.

<sup>50</sup> See ZPO, s 1025(1).

<sup>51</sup> Reinhard Bork in Bruno Kübler, Hanns Prütting and Reinhard Bork (eds), *Insolvenzordnung* (83th edn, RWS 2020), EUInsVO art 18, para 16; Stefan Reinhart in Rolf Stürner et al (eds), *Münchener Kommentar zur Insolvenzordnung* (3rd edn, C.H. Beck 2016), vol 4, EUInsVO art 18, para 3.

62. If German insolvency law applies, the effects of insolvency proceedings on arbitration regulated therein are not subject to party autonomy prior to the insolvency; that is, parties cannot contract around the relevant provisions of German insolvency law regarding its effects on arbitration (see answer to Question 7, Paragraphs 43 et seq. above). After the opening of the insolvency proceedings, the insolvency administrator and the other party may agree to settle insolvency related claims that do not fall under the arbitration agreement (such as the claim pursuant to Section 143(1) InsO) in arbitration, as well (see answer to Question 7, Paragraph 45 above).<sup>52</sup> However, this is a highly unlikely scenario, and there are no reported cases where this has occurred.

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

63. Yes. If a German-seated tribunal ignores the effects of the insolvency on the arbitration, this leads to the risk of the annulment of the award or its non-enforceability according to Section 1059(2) no. 2 lit. b ZPO.<sup>53</sup> This is not the case, however, if the tribunal in a pending arbitral proceeding is seated in Germany, but the parties have chosen a different procedural law (see answer to Question 13, Paragraphs 61 et seq. above).

**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?**

64. No. If an award is rendered in violation of German insolvency law, it may be declared unenforceable regardless of the nationality of the counterparty (see Paragraph 94 below).

<sup>52</sup> Alfred Heidbrink, "Die Insolvenzanfechtung im Schiedsverfahren", *SchiedsVZ* 2009, 258, 259.

<sup>53</sup> Patricia Nacimiento and Biner Bähr, "Insolvenz in nationalen und internationalen Schiedsverfahren", *NJOZ* 2009, 4752, 4755; see also para 94 below.



**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?]**

65. Upon the opening of the insolvency proceedings, the insolvency administrator becomes a party to the arbitration proceedings *ex officio* (*Partei kraft Amtes*).<sup>54</sup> The insolvent party thus lacks the capacity to be a party and the authority to conduct proceedings. However, this may not preclude the insolvency administrator from authorising the insolvent party to conduct the proceedings.<sup>55</sup>

66. This does not apply if the arbitration proceedings relate to objects and rights not subject to the insolvency proceedings. The insolvency estate includes all assets owned by the debtor at the time of the opening of the insolvency proceedings and acquired by him during the proceedings (Section 35(1) InsO). The insolvency estate does not include unseizable objects and rights, as well as personal rights (*höchstpersönliche Rechte*). It is also possible for an insolvency administrator to release objects or rights from the insolvency (*Freigabe*). In such cases, the debtor himself would remain a party to the arbitral proceedings (or would become one again).

67. The insolvency administrator replaces the insolvent party (Section 80 InsO). The insolvent party can no longer conduct the arbitration proceedings in its own name (see Paragraph 65 above).

68. The insolvency administrator takes over the arbitration proceedings at the status as they were. He must be granted an appropriate period of time to familiarise himself with the proceedings and a fair hearing, otherwise the arbitration award may be set aside.<sup>56</sup>

<sup>54</sup> Sebastian Mock in Heribert Hirte and Heinz Vallender (eds), *Uhlenbruck, Insolvenzordnung* (15th edn, Vahlen 2019), s 80, para 184.

<sup>55</sup> Rolf Schütze in Bernhard Wieczorek and Rolf Schütze (eds), *Zivilprozessordnung* (5th edn, De Gruyter 2020), s 1042, para 93a; see also Thomas Pfeiffer, “Gewillkürte Prozesstandschaft im Schiedsverfahren”, *SchiedsVZ* 2017, 135 and BGH, judgment dated 19 March 1987, case no III ZR 2/86.

<sup>56</sup> Sebastian Mock, see n 45, s 80, para 184; Sebastian Longrée and Matthias Gantenbrink, see n 13, 21.

**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?**

69. As confidentiality is usually a contractual rather than a legal obligation, the effects of insolvency proceedings in this respect are not regulated explicitly under German law. Certain obligations placed on the insolvency creditors or insolvency administrator by the InsO, however, might, under certain circumstances, conflict with the confidentiality obligation<sup>57</sup>; Section 174 InsO, eg, requires insolvency creditors to file their claims with the insolvency administrator in writing and accompanied by copies of relevant documents. One may also argue that if one of the parties is a state or a public player, the opening of the insolvency proceedings might also lead the arbitral tribunal to assume an exception to the confidentiality obligation due to predominant public interest.<sup>58</sup>
70. The insolvency administrator is subject to the supervision of the insolvency court and is obliged to report to it at any time without restriction (Section 58(1) InsO). On the other hand, efficiency of the insolvency proceedings requires the insolvency administrator to act largely on his own responsibility, which should not be curtailed by small-scale monitoring. In practice, reporting is carried out via regular written reports submitted to the court by the insolvency administrator. Such a report would also include a record of pending arbitration proceedings, their status, and prospects.
71. Creditors with proven claims may inspect the insolvency file and the insolvency administrator's reports kept at the insolvency court. They do not have their own right to information from the insolvency administrator. In particular, they have no right to receive specific information on individual proceedings conducted by the insolvency administrator or even to inspect files.
72. If a creditors' committee (*Gläubigerausschuss*) has been appointed, the insolvency administrator is obliged to provide information to it. Members of the creditors' committee may also inspect the files kept by the insolvency administrator (Section 69 InsO) and thus also any file on ongoing arbitration proceedings.
73. Under no circumstances can the creditors take part in the arbitration as parties interested in the outcome of the proceedings.

<sup>57</sup> Christian Leisinger, *Vertraulichkeit in internationalen Schiedsverfahren* (Nomos 2012), 194 et seq.

<sup>58</sup> *ibid*, 195.

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

74. Yes, after the opening of the insolvency proceedings, the insolvency administrator is party by virtue of office (see Paragraph 65 above). The formal designation is thus: AB as insolvency administrator over the assets of XY (*AB als Insolvenzverwalter über das Vermögen der XY*).

**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?**

75. In general, the insolvency administrator may settle any filed claim<sup>59</sup> and does not require the consent of the insolvency court. The insolvency court merely exercises supervision over the insolvency administrator. Consent is only required in exceptional cases prescribed by law<sup>60</sup> (eg the final distribution at the termination of the insolvency proceedings is only permitted with the consent of the court according to Section 196 InsO; the temporary insolvency administrator may shut down an enterprise of the debtor only with the consent of the court according to Section 22(1) sentence 2 no. 2 InsO).
76. However, legal transactions of considerable importance require the approval of the creditors' assembly or the creditors' committee (Section 160 InsO). This also includes settlements of legal disputes with significant amounts in dispute (Section 160(2) no. 3 InsO). As the provision only refers to "legal dispute", it can be assumed that it also applies to arbitration proceedings.

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

77. Pursuant to Section 1041(1) ZPO, the arbitral tribunal may, at the request of a party, issue interim measures that the tribunal considers necessary in respect of the subject-matter of the dispute. Neither this provision nor the case law impose limitations of this competence in cases of initiated insolvency proceedings.
78. As with other arbitration awards, pursuant to Section 1041(2) ZPO, interim measures may be approved by a state court in order for them to be enforced. To grant leave of enforcement of an interim measure, the state court reviews whether a valid arbitration agreement exists and summarily reviews the content of the award with regard to its compatibility with the *ordre public* (Section 1060(2) sentence 1 ZPO in conjunction with Section 1059(2) no. 2 ZPO) and its

<sup>59</sup> BGH, judgment dated 17 December 2015, case no IX ZR 143/13, published in NJW 2016, 1592, 1594 et seq, para 25.

<sup>60</sup> Cf Heinz Vallender and Helmut Zipperer in Heribert Hirte and Heinz Vallender (eds), *Uhlenbruck, Insolvenzordnung* (15th edn, Vahlen 2019), s 58, para 1.

proportionality according to its due discretion.<sup>61</sup> In general, the review of the state court is limited to the suitability of the interim measure on the basis of the given arbitration order.<sup>62</sup> In theory, the state court could deny the enforcement on the basis of a breach of the principle of equal treatment of creditors. Namely, after the initiation and for the duration of the insolvency proceedings, individual enforcement is prohibited pursuant to Section 89 InsO.<sup>63</sup> The insolvency procedure as full enforcement replaces the individual enforcement and thus also the enforcement of the interim measure.<sup>64</sup>

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

79. Provisional measures taken before the opening of the insolvency proceedings should be subject to essentially the same rules as interim measures contained in arbitration awards taken after the opening of the insolvency proceedings.
80. In the context of state proceedings, pursuant to Section 927 ZPO, interim measures can be set aside due to a change in circumstances. Interim measures that have not yet been enforced are barred from being enforced once insolvency proceedings have been initiated, pursuant to Section 89 InsO, as stated above. In that case, the opening of the insolvency proceeding constitutes a change in circumstances because the enforcement term of Section 929(2) ZPO (one month since the issuing of the interim measure) can no longer be met.<sup>65</sup> These circumstances allow the issuing state court to revoke the interim measure.<sup>66</sup> The opening of insolvency on the debtor's assets does not affect the interim measure if it has already been enforced and the creditor thus has a right of separate satisfaction for security rights (*Absonderungsrecht*, see also Paragraph 20 above).<sup>67</sup>
81. In the context of arbitral proceedings, Section 1041(3) ZPO applies, which provides that the state court may, upon request, repeal or amend the decision to grant leave of enforcement of the interim measure. This revocation competence essentially corresponds to the competence pursuant to Section 927 ZPO<sup>68</sup> without, however, formally requiring a change in circumstances. Since the court is unlikely to grant leave of enforcement in the event of

<sup>61</sup> Saarländisches OLG (Higher Regional Court of Saarland), order dated 27 February 2007, case no 4 Sch 1/07, published in *SchiedsVZ* 2007, 323, 325; Joachim Münch, see n 3, vol 3, s 1041, para 37.

<sup>62</sup> Joachim Münch, see n 3, vol 3, s 1041, para 40.

<sup>63</sup> Sebastian Mock, see n 45, s 89, para 33.

<sup>64</sup> *ibid.*

<sup>65</sup> Ingo Drescher in Thomas Rauscher and Wolfgang Krüger (eds), *Münchener Kommentar zur Zivilprozessordnung* (5th edn, C.H. Beck 2016), vol 2, s 927, para 6.

<sup>66</sup> KG (Higher Regional Court of Berlin), order dated 6 July 2005, case no 5 Ws 299-307 and 334/05.

<sup>67</sup> BFH (Federal Tax Court), judgment dated 17 December 2003, case no I R 1/02, NJW 2004, 2183, 2184; OLG Köln (Higher Regional Court Cologne), order dated 8 August 2003, case no 2 Ws 433/03.

<sup>68</sup> BT-Drs. (Official record of German Bundestag) doc no 13/5274, 46.

insolvency proceedings, a request to repeal the interim measure pursuant to Section 1041(3) ZPO is likely to be successful.

**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?**

82. Yes. According to Section 80(1) InsO, the insolvent party loses its right to manage and transfer the insolvency estate to the insolvency administrator who fully takes over the position of the debtor. Therefore, like in state proceedings, the insolvent party loses its capacity to settle the dispute (*Prozessführungsbefugnis*).<sup>69</sup>

**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?**

83. Yes. Section 87 InsO, the provision central to ensuring the principle of *pars conditio creditorum*, provides that the “insolvency creditors shall only be permitted to enforce their claims under the provisions governing the insolvency proceedings”. The German Federal Court of Justice has held, however, that an award containing a payment order does not violate public policy, as it can be interpreted to mean that the claim in question was to be filed with the insolvency administrator and entered into the insolvency schedule.<sup>70</sup>

**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?**

84. Regardless of whether an arbitration award has been rendered or not, the pursued claim is an insolvency claim within the meaning of Section 174 InsO. However, once an arbitration award has been rendered, the insolvency administrator or other creditors may only contest the claim under the requirements of Section 179(2) InsO, which puts the creditor in a more convenient position regarding the claim (see answer to Question 25, Paragraph 89 below).
85. The German Federal Court of Justice has confirmed that the arbitration award confirming the claim against the insolvent party will be interpreted as a determination that the claim is to be filed with the insolvency schedule.<sup>71</sup> In this case, the insolvency administrator shall be obliged to accept the claim assessed by the arbitral award in the schedule. For established claims,

<sup>69</sup> Patricia Nacimiento and Biner Bähr, see n 57, 4752.

<sup>70</sup> BGH, see n 2.

<sup>71</sup> *ibid*, para 7(a).

entry into the schedule has the legal effect of a final judgment with respect to the insolvency administrator and all insolvency creditors (see Section 178(3) InsO).

86. The situation is different in the event that a party in arbitration proceedings pursues a claim against the debtor or the insolvency administrator that does not affect the assets involved in the insolvency estate. This is the case if the party has a right to separation of an object from the insolvency estate, eg as the owner of that object (*Aussonderungsrecht*, Section 47 InsO). The entitlement to separation of such object is governed by the legal provisions applying outside the insolvency proceedings, see Section 47 InsO. Since the insolvency estate is therefore not affected by the right to separation and the arbitration proceedings are not automatically stayed (see answer to Question 1, Paragraph 4), the status of the pursued claim in the arbitration proceedings remains the same. Insolvency law does not prohibit the enforcement of the claim, which is also possible against the insolvency administrator.

**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?**

87. A credit contained in an arbitration award is a claim within the meaning of Section 174 InsO and as such has to be filed in the manner described therein. For a creditor to be satisfied from the insolvency estate, his claim has to be determined (Sections 174 et seq., 187 et seq. InsO). If it is not contested by the insolvency administrator or by another creditor, the credit will be considered to have been determined and entered into the insolvency schedule which has the legal effect of a final judgment with respect to the insolvency administrator and all insolvency creditors (Section 178(3) InsO). This applies to both national and international arbitration awards, regardless of whether they have been declared enforceable pursuant to Section 1060 ZPO.
88. In case an arbitration award (national or international) is contested by either the insolvency administrator or another creditor, Section 179 InsO applies. Section 179(2) InsO provides that if a filed claim is “based on an executable deed or a final judgment”, it will reside with the contesting party to initiate proceedings in order to invalidate the contested claim. If the claim is not based on an executable deed or a final judgment, it will be left to the creditor whose claim was contested to have his claim determined in a court of law (Section 179(1) InsO).
89. An arbitration award that has been declared enforceable pursuant to Section 1060 ZPO constitutes an executable deed within the meaning of Section 179(2) InsO.<sup>72</sup> It is therefore up to the contesting party to file a petition to try and reverse the award as provided in Section 1059 ZPO. In this regard, the general rules apply. In particular, the narrow grounds on which a reversal can be based and the legal deadline of three months after the petitioner has

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<sup>72</sup> Alfred Heidbrink and Marie-Christine Gräfin von der Groeben, “Insolvenz und Schiedsverfahren”, ZIP 2006, 265, 270.

received the award (unless otherwise agreed) must be complied with. It must be noted, however, that the exequatur before the court produces a *res judicata* effect. Hence, according to the prevailing view, the remedies against the exequatur are limited to the ones that would have been available to the debtor.<sup>73</sup> Thus, the challenging party may file for reopening proceedings (Sections 578 et seq. ZPO) or action raising an objection to the claim being enforced (Section 767 ZPO).<sup>74</sup>

90. There is some disagreement, however, as to whether an arbitration award that has not yet been declared enforceable falls within the scope of Section 179(2) InsO or whether it is a regular claim subject to Section 179(1) InsO, meaning that the creditor whose claim was contested would need to have it determined. An arbitration award is only executable and thus an executable deed within the meaning of Section 179(2) InsO after having been declared so. Awards lacking such declaration, however, could constitute final judgments within the meaning of Section 179(2) InsO.<sup>75</sup> These final judgments do not necessarily need to be enforceable—a structural consequence of explicitly mentioning them next to “executable deeds”. Section 1055 ZPO determines that, among the parties, an arbitration award has “the effect of a final and binding judgment handed down by a court”. Furthermore, the rationale behind Section 179(2) InsO is to shield a creditor who has already been through the process of obtaining a final judgment in a court of law from having to initiate proceedings again by placing this burden on the party contesting the validity of the judgment in question.<sup>76</sup> Additionally, Section 1055 ZPO puts an arbitration award on equal footing with a state court judgment, establishing arbitration as an alternative way of dispute resolution of equal rank with proceedings in a state court.<sup>77</sup> This value judgment demands Section 179(2) InsO to equally apply to an award obtained in arbitration proceedings. Hence, even though Germany’s higher courts have yet to address the issue, arguments in favour of including arbitration awards in Section 179(2) InsO are convincing.<sup>78</sup>
91. The above applies to both national and foreign awards subject to the New York Convention.
92. The creditor of the contested claim must then obtain an enforceable title so that the claim is deemed to be determined and updated in the insolvency schedule (Section 183 InsO). Until the arbitral tribunal has bindingly determined the claim, the creditor is not included in the distribution and is not satisfied from the assets involved in the insolvency proceedings. In order for him to be considered in the distribution, he must prove the filing of the action for a declaratory judgment within a period of two weeks after the public announcement of the distribution list (Section 189 InsO). In this case, a share allocated to his claim will be retained (Section 189(2) InsO). If he does not provide such evidence in due time, he will be excluded

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<sup>73</sup> Robert Schumacher in Rolf Stürner et al (eds), *Münchener Kommentar zur Insolvenzordnung* (4th edn, C.H. Beck 2019), vol 2, s 179, para 33; Ralf Sinz in Heribert Hirte and Heinz Vallender (eds), *Uhlenbruck, Insolvenzordnung* (15th edn, Vahlen 2019), s 179, para 33; Carsten Jungmann in Karsten Schmidt (ed), *Insolvenzordnung* (19th edn, C.H. Beck 2019), s 179, para 20.

<sup>74</sup> Robert Schumacher, see n 73, vol 2, s 179, para 33.

<sup>75</sup> Patricia Nacimiento, see n 57, 4757.

<sup>76</sup> Alfred Heidbrink and Marie-Christine Gräfin von der Groeben, see n 72.

<sup>77</sup> *ibid*, 270; Joachim Münch, see n 3, vol 3, s 1055, paras 1 et seq.

<sup>78</sup> This is questionable, according to Robert Schumacher, n 73, vol 2, s 179, para 24.

from the respective distribution round.<sup>79</sup> If a further distribution round subsequently takes place, he will be included and will receive an amount in advance, which puts him on equal footing with the other creditors (Section 192 InsO). However, if the pending distribution was a final distribution, it will definitively no longer be taken into account in the distribution.<sup>80</sup>

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

93. Not all, but the great majority of the rules regulating the effects of insolvency on arbitration are considered part of German public policy. All those provisions meant to enforce the principle of *par conditio creditorum* in practice form part of public policy, most notably Section 87 InsO, which bars insolvency creditors from pursuing their claims outside of the InsO-regulated insolvency proceedings.<sup>81</sup>
94. Section 240 ZPO, ordering ongoing proceedings to be stayed in the event of insolvency, is not considered part of public policy and does not apply to arbitration proceedings.<sup>82</sup> The arbitral tribunal has to take into account, however, that the insolvency administrator assumes the authority to dispose of the insolvent estate, in consequence also entering into the role as respondent in an arbitration proceeding. It therefore has to take the necessary measures to ensure that the insolvency administrator has sufficient time and information to adequately prepare the defence. The exact nature and extent of these measures is at the discretion of the tribunal, but failure to do so in the appropriate manner may well be considered a violation of the right to a fair hearing and would as such constitute ground for the reversal of an arbitral award (Section 1059(1) no. 1b ZPO).

**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)?**

95. The principle of *par conditio creditorum*, underlying Section 87 InsO, is part of public policy.<sup>83</sup> This only applies to the enforcement of claims, however, and not to the procedure in which

<sup>79</sup> Sebastian Mock, see n 45, s 189, para 17.

<sup>80</sup> *ibid.*

<sup>81</sup> Cf BGH, see n 2. In the same judgment, however, the court considered that an award ordering a party to pay (*Leistungsklage*) did not violate public policy, as it could be interpreted to mean that the claim in question is to be filed with the insolvency administrator and entered in the insolvency schedule.

<sup>82</sup> Kai Jaspersen in Volkert Vorwerk and Christian Wolf (eds), *BeckOK ZPO* (36th ed, C.H. Beck 2020), s 240, para 2.13; Astrid Stadler, see n 2, s 240, para 6; Patricia Nacimiento and Biner Bähr, “Insolvenz in nationalen und internationalen Schiedsverfahren”, NJOZ 2009, 4752, 4755.

<sup>83</sup> BGH, see n 2; Joachim Münch, see n 3, vol 3, s 1030, para 47; Ulrich Ehricke, “Die Feststellung streitiger Insolvenzforderungen durch ein Schiedsgericht”, ZIP 2006, 1847, 1850.



these claims are determined—or, in the terminology used above, public policy only necessitates the equal treatment of creditors from a substantive, not a procedural point of view. In practice, this means that an arbitral tribunal is not authorised to order the insolvent party to pay—a petition to that effect will have to be modified accordingly—but may well determine the existence of a claim that must then be filed with the insolvency administrator and entered into the insolvency schedule. In its jurisprudence, the German Federal Court of Justice confirms that an award ordering a payment (*Leistungsklage*) can and must be interpreted in such cases as a declaratory award that the claim in question shall be entered into the insolvency schedule.<sup>84</sup> In any case, the principle of *par conditio creditorum* will be respected, be it by either amending the request for relief and type of award or by way of interpretation in line with public policy. If such a claim is then contested, Section 179 InsO applies, as described above in Paragraphs 88 et seq. If a claim is filed with the insolvency administrator which has not yet been resolved by arbitration but is covered by an arbitration agreement once concluded between the creditor and the insolvent party, a party choosing to contest said claim will be bound by the arbitration agreement.<sup>85</sup> If there is no arbitration agreement, the creditor and the contesting party are free to have their dispute resolved by arbitration.

96. Additionally, the principle of *par conditio creditorum* constitutes the basis for contesting debtor’s transactions in insolvency proceedings according to Sections 129 et seq. InsO.

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

97. A special problem is that—in the case of arbitration clauses which were not entered into by the insolvency administrator—insolvency-specific claims are not subject to arbitration (see answer to Question 3(c), Paragraph 20, and answer to Question 7, Paragraphs 43-45). In practice, it may occur that claims resulting from a challengeable transaction are set off by one party against claims of the insolvent party. Even though the set-off of such claims is generally prohibited under German insolvency law (Section 96(1) no. 3 InsO), it is unclear whether the insolvency administrator can object to such a set-off in an arbitration proceeding based on the provision. While there is no jurisprudence explicitly addressing this question, some argue that the insolvency administrator is unable to raise an objection to the set-off in the arbitration proceeding.<sup>86</sup> Insolvency administrators often agree to have the legal question of set-off assessable by arbitration. This need not be a disadvantage for the insolvency administrator, because at the latest in the (state) proceedings on the declaration of

<sup>84</sup> BGH, see n 2.

<sup>85</sup> If arbitration proceedings have already commenced prior to the opening of the insolvency proceedings, the contesting party will then enter into the role of the insolvent party, usually the respondent.

<sup>86</sup> Alfred Heidbrink, see n 33, 262.

enforceability,<sup>87</sup> the insolvency administrator has the right to raise the insolvency voidance defence (*Einrede der Insolvenzanfechtung*) against the declaration of enforceability.<sup>88</sup>

98. If an arbitration is pending when the insolvency proceedings are opened and the insolvency administrator continues the arbitration in lieu of the insolvent party, the question may arise whether he is bound by procedural steps taken by the insolvent party prior to the insolvency. While neither statutory nor case law appears to address this issue, it is understood that the insolvency administrator is, in principle, bound by procedural steps taken by the insolvent party.<sup>89</sup>

## 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 Germany concerning the insolvent party.]

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

99. No, because Germany follows the principle of universality: the effects of the opening of the insolvency proceedings operate nationally, as well as internationally, and foreign insolvency proceedings are automatically recognised (Section 343(1) sentence 1 InsO). Within the EU, this recognition is further strengthened by the EU Insolvency Regulation, the wide scope of which the German Federal Court of Justice reiterated in 2015: exceptions under Article 26 EU Insolvency Regulation are possible only if recognition of a foreign judgment is contrary to a fundamental principle of German law and is in unacceptable conflict with the German legal system.<sup>90</sup>
100. Even outside the scope of intra-EU cases, the German jurisdiction respects and recognises foreign (ie non-EU) insolvency laws, which is demonstrated by the general rule that the insolvency proceedings and its effects are governed by the jurisdiction of the State in which the proceedings were opened (Section 335 InsO). Few exceptions to this general rule of recognition exist, namely if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law, or where recognition leads to a result which is manifestly incompatible with German public policy (Section 343(1) sentence 2 InsO). The public policy exception primarily concerns cases in which the right to be heard has been fundamentally violated in the foreign insolvency proceedings<sup>91</sup> or in which the debtor was unfairly discriminated against.<sup>92</sup>

<sup>87</sup> ZPO, s 1066 et seq.

<sup>88</sup> BGH, order dated 17 January 2008, case no III ZB 11/07.

<sup>89</sup> Jörn Hombeck and Viktoria Schneider, see n 8, 453.

<sup>90</sup> BGH, judgment dated 10 September 2015, case no IX ZR 304/13.

<sup>91</sup> Peter Kindler, see n 6, vol 12, InsO, s 343, para 20.

<sup>92</sup> *ibid*, para 21.

**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?**

101. No.

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

102. Yes, if these insolvency proceedings are recognised in Germany, as is generally the case under Sections 335 et seq. InsO and/or the EU Insolvency Regulation (see answer to Question 29, Paragraph 100 above).

103. If the arbitration is already pending and insolvency proceedings were opened in another EU Member State, Article 18 of the EU Insolvency Regulation applies, providing that the effects of insolvency proceedings on pending arbitration proceedings are governed solely by the law of the Member State in which the arbitral tribunal has its seat. Therefore, German insolvency law will apply and the effect of the insolvency would be the same as outlined above (see Paragraphs 1 et seq.).

104. For non-EU insolvency proceedings, Section 352 InsO applies with the rule that when foreign insolvency proceedings are opened, German actions concerning the insolvency assets are stayed until one of the parties takes them up again. The provision speaks of “actions”, which generally include a wide range of litigation proceedings.<sup>93</sup> Whether this also applies to arbitration proceedings is subject to controversy.<sup>94</sup> However, the general consensus is that the new situation must be taken into account by the arbitral tribunal when structuring the proceedings at its discretion.<sup>95</sup> As explained above under the answer to Question 1, Paragraph 5, this will not only likely include a stay order,<sup>96</sup> but the tribunal must reconsider whether the change of circumstances makes the continuation of the arbitration possible at all.<sup>97</sup> For example, if the foreign non-EU insolvency law prohibits the insolvent party and administrator to keep participating in the arbitration, this would render their continuation factually impossible, and the tribunal would have to react accordingly.

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<sup>93</sup> *ibid*, s 352, para 5.

<sup>94</sup> *ibid*, para 6; Stefan Kröll, see n 2, 1005; Gerhard Wagner, “Insolvenz und Schiedsverfahren”, KTS 2010, 39, 62; Christoph Thole in Rolf Stürner et al (eds), *Münchener Kommentar zur Insolvenzordnung* (4th edn, C.H. Beck 2020) vol. 3, s 352, para 16.

<sup>95</sup> Stefan Kröll, see n 2, 1005; Matthias Weissinger in Alexander Fridgen et al (eds), *Beck’scher Online-Kommentar Insolvenzordnung* (20th edn, C.H. Beck 2018) s 352, para 10.

<sup>96</sup> Peter Kindler see n 6, vol 12; InsO, s 352, para 6.

<sup>97</sup> Stefan Kröll, see n 2, 1005.

**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?**

105. As described in the answer to Question 31, Paragraph 103 above, Article 18 EU Insolvency Regulation provides that the effects of insolvency proceedings on a pending lawsuit or pending arbitration proceedings are to be governed by the *lex fori processus*.<sup>98</sup> Under German law, pursuant to Section 343(1) InsO, the opening of foreign insolvency proceedings shall be recognised (principle of universality, see Paragraph 100 above). While that provision technically only obliges state courts to recognise foreign insolvency proceedings of its own motion, an arbitral tribunal should come to the same conclusion in order not to jeopardise the enforceability of the award.<sup>99</sup>

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

106. Article 18 EU Insolvency Regulation forms part of the *lex loci arbitri* and is as such generally applicable to any arbitration seated in Germany. That does not mean, however, that the rules set out above will necessarily apply within its scope of application:<sup>100</sup> if the parties have chosen a different procedural law to govern the arbitration, the reference in Article 18 to the “law of the member state” is—despite its wording—generally understood to mean the procedural law agreed on.<sup>101</sup> If the parties have not opted for a different law, Sections 335 et seq. InsO will apply.

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

107. Since Germany follows the principle of universality (see Paragraph 99 above), Section 343 InsO mandates that foreign insolvency proceedings be recognised under German law. If a tribunal fails to recognise a foreign insolvency, this will constitute a breach of public policy, risking a reversal of the award under Section 1059 ZPO.

<sup>98</sup> Reinhard Bork, see n 51, EUInsVO art 18, para 2; Stefan Reinhart see n 51, EUInsVO, art. 18, para 2; Knof in *Uhlenbruck, Insolvenzordnung* (15th edn 2019), vol. 2, EUInsVO art. 18, para 1.

<sup>99</sup> Philipp Wagner, *Abstimmungsfragen zwischen Internationalem Insolvenzrecht und Internationaler Schiedsgerichtsbarkeit – Unter besonderer Berücksichtigung der Anerkennung grenzüberschreitender Insolvenzen durch Schiedsgerichte* (Peter Lang 2008), 128; Daniel Schmitz, *Schiedsverfahren und Insolvenz* (Nomos 2016), 212.

<sup>100</sup> That is, to arbitrations pending in Germany at the time of the opening of the insolvency proceedings.

<sup>101</sup> Reinhard Bork, see n 51, EUInsVO art 18, para 16; Stefan Reinhart, see n 51, vol 4, EUInsVO art 18, para 3.



**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?**

108. No.