January 2021

IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF THE UNITED STATES OF AMERICA

Hon. Allan L. Gropper

United States Bankruptcy Judge (Ret.)

allangropper@gmail.com

Thomas W. Walsh

Special Counsel, Freshfields Bruckhaus Deringer US LLP

thomas.walsh@freshfields.com*

* The authors gratefully acknowledge the valuable research assistance of Nathan Greenberg, Maria Slobodchikova, Alistair Blacklock, Yilin Tim Chen, and Matheus Bastos Oliveira, who are associates at Freshfields Bruckhaus Deringer US LLP. 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 the United States 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 the United States 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. Title 11 of the United States Code (the "Bankruptcy Code")[1] provides that the filing of a bankruptcy petition in the United States immediately triggers a stay of most civil actions or proceedings against the debtor and the debtor's property. This mechanism, aptly termed the "automatic stay" and encoded by statute in Section 362(a)(1) of the Bankruptcy Code, applies to the commencement and continuation of arbitral proceedings.[2]

2. An award issued in contravention of a stay may be declared void and vacated or denied enforcement by United States ("U.S.") courts.[3]

3. Arbitration law in the United States does not contain any statutory provisions that specifically govern the effects of a bankruptcy filing on an agreement to arbitrate or an arbitration. The applicable law derives from the Bankruptcy Code, although the purpose and effect of the Code must be reconciled, to the greatest extent possible, with the purposes and effect of the Federal Arbitration Act ("FAA").[4] For more information, see the response to Question 4.

[1] 11 USC, ss 101 *et seq*.
[2] *In re US Lines Inc* 197 F 3d 631, 640 (2d Cir 1999) ("As the legislative history of the automatic stay provision reveals, the scope of section 362(a)(1) is broad, staying all proceedings, including arbitration.") (quoting *FAA v Gull Air Inc* 890 F 2d 1255, 1262 (1st Cir 1989)).
[3] *Acands Inc v Travelers Cas & Sur Co* 435 F 3d 252, 260 (3d Cir 2006) (holding that the automatic stay applied to an ongoing arbitration as soon as the scope of the parties' submissions supported an award that could diminish the debtor's estate and vacating the resulting arbitration award); *see In re Johnson* 548 BR 770, 798 (Bankr SD Ohio 2016) (finding an arbitration had proceeded in violation of the automatic stay, declaring the consequent award void); *Victrix SS Co SA v Salen Dry Cargo AB* 825 F 2d 709, 713 (2d Cir 1987) (denying enforcement of a London arbitral award and a British judgment confirming such an award against assets of a debtor under insolvency regime in Sweden because "their enforcement would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt"); *see also Ellis v Consolidated Diesel Electric Corp* 894 F 2d 371, 372 (10th Cir 1990) ("It is well established that any action taken in violation of the stay is void and without effect.").
[4] 9 USC, ss 1-16 (1925).

2. Does the insolvency legislation in the United States 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*?

4. Yes. The Bankruptcy Code provides that claims against the debtor and its property should be determined in the bankruptcy proceedings with only limited exceptions. This mechanism is intended to provide an orderly and expeditious resolution of the bankruptcy process.

5. The Code affects the concentration of claims before a bankruptcy court pursuant to the automatic stay described in the response to Question 1. The automatic stay applies to parties with claims or potential claims against the debtor, including claimants in existing arbitrations or potential arbitrations, and it ordinarily requires the parties to make a motion in the court overseeing the bankruptcy proceeding in order to receive permission to proceed.[5] The few exceptions to this rule are enumerated in the Bankruptcy Code and include proceedings against a debtor or its property (i) by a governmental authority exercising a police or regulatory function;[6] (ii) to close out certain derivative positions;[7] and (iii) under a collective bargaining agreement.[8] While only the bankruptcy court that has jurisdiction over the bankruptcy estate has the authority to terminate, annul, modify, or condition the automatic stay,[9] U.S. courts have held that both the bankruptcy court and the court in which the action is pending have concurrent jurisdiction to determine the applicability of the automatic stay.[10]

6. The automatic stay typically does not apply to claims brought on behalf of the bankruptcy estate, whether by the administrator of the estate, referred to as the "trustee," or the debtor (if it remains in control of the estate), as described in the response to Question 16.[11] However,

[5] 11 USC, s 362(a)(1); *In re Edwin A Epstein Jr Operating Co* 314 BR 591, 600 (Bankr SD Tex 2004) ("When proceedings are stayed, only an order of the bankruptcy court can annul, modify, or terminate the stay").
[6] 11 USC, s 362(b)(1), (4).
[7] ibid, s 362(b)(17).
[8] ibid, s 1113; *In re Ionosphere Clubs Inc* 922 F 2d 984 (2d Cir 1990) (interpreting 11 USC, s 1113(f) to preclude the application of the automatic stay to an arbitration pursuant to a collective bargaining agreement).
[9] 11 USC, s 362(a); *In re Franklin* 179 BR 913 (Bankr ED Cal 1995).
[10] *See, eg*, *In re Baldwin-United Corp Litig* 765 F 2d 343, 348 (2d Cir 1985) (adding "[w]hether [the non-bankruptcy court] ought to exercise its authority [to determine applicability of the automatic stay] . . . is a different question"); *Dominic's Rest of Dayton Inc v Mantia* 683 F 3d 757, 760 (6th Cir 2012). In *In Re Gruntz,* 202 F 3d 1074 (9th Cir 2000), the Ninth Circuit Court of Appeals held *en banc* that only federal courts have authority to determine the applicability of the automatic stay (in that case, the question was whether an action for a domestic support obligation was excepted from the automatic stay), but other courts have held that state courts have concurrent jurisdiction.
[11] *Assoc of St Croix Condominium Owners v St Croix Hotel Corp* 682 F 2d 446, 448 (3d Cir 1982) (holding that proceedings originally brought against the debtor are subject to the automatic stay); *4Kids Entm't Inc v Upper Deck Co* 797 F Supp 2d 236, 241 (SDNY 2011) (allowing debtor in pending Chapter 11 case to proceed with its claims but finding counterclaims subject to the automatic stay). *See also Marquis Yachts v Allied Marine Grp, Inc (N)* No CIV 09-1770 JRT/FLN, 2010 WL 1380137, at *4 (D Minn Mar 31 2010) (holding that the issuance of

any action to obtain property from the estate or to exercise control over property of the estate is stayed even if brought by the debtor.[12] As a result, a party to an arbitration with a debtor should consider seeking court authorization for the arbitration to continue, even if the debtor has initiated the arbitration and wishes it to proceed, to avoid future disputes over the enforceability of a consequent award against the debtor.

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

7. As described in the response to Question 2, the automatic stay operates to stay the commencement or continuation of arbitration proceedings against the debtor or its property and typically does not apply to claims brought by the debtor.

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?

8. No. The Bankruptcy Code's provision of an automatic stay of claims against a debtor or a debtor's property is triggered by a petition under Chapter 11 of the Bankruptcy Code for a reorganization of the debtor, by a petition under Chapter 7 of the Code for liquidation and dissolution of the debtor, or by an involuntary petition against a debtor.[13]

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

9. As described in the response to Question 2, the automatic stay provided for under the Bankruptcy Code applies automatically to virtually all claims against the debtor or the debtor's estate, regardless of the subject matter of the claims or the relief sought, with only a few

an award post-bankruptcy in an arbitration proceeding completed prior to the bankruptcy filing and that was not "against the debtor" did not violate the automatic stay provision of the Bankruptcy Code, but that the Federal Arbitration Act does not authorize vacatur of an award for violation of public policy).

[12] 11 USC, s 362(a)(3); *In re Lickman* 297 BR 162, 188 (Bankr MD Fla 2003) (finding automatic stay applied to debtor's attempts "to assert or usurp control over [property of the estate]" outside of the bankruptcy process).

[13] *In re Probulk Inc* 407 BR 56, 62 (Bankr SDNY 2009) (discussing application of the automatic stay to Chapter 7 proceedings); *ICC v Holmes Transp Inc* 931 F 2d 984, 987 (1st Cir 1991) (discussing application of the automatic stay to Chapter 11 proceedings).

narrow exceptions. However, as described in the response to Question 4, the subject matter of the claim affects whether the bankruptcy court will lift the stay.

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

10. The automatic stay provided by the Bankruptcy Code applies only when a bankruptcy proceeding has commenced.[14] However, under U.S. law, a debtor need not be insolvent in order to file a bankruptcy petition.

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?

11. The automatic stay applies to arbitrations that are pending when the bankruptcy petition is filed and arbitrations to be commenced during the course of a bankruptcy proceeding. The automatic stay typically does not affect an arbitration agreement that the debtor or the trustee of the debtor's estate enter into after insolvency proceedings have commenced. However, once a bankruptcy petition has been filed, the trustee or the debtor in possession usually needs court authorization to enter into an arbitration agreement.[15]

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

12. The automatic stay is triggered by the commencement of either voluntary or involuntary bankruptcy proceedings.[16]

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

13. The Bankruptcy Code defines property of the estate to include legal or equitable interests of the debtor in property "wherever located".[17] Considering this broad definition, numerous U.S. courts have interpreted the Code to hold that "the automatic stay applies extraterritorially" to actions against the debtor's worldwide property in Chapter 11 and Chapter 7 proceedings.[18]

[14] *See* 11 USC, s 362.
[15] Fed R Bankr P 9019(c) and answer to Question 11 below.
[16] *See* 11 USC, s 362.
[17] 11 USC, s 541.
[18] *In re Ampal-American Israel Corp* 562 BR 601, 612 n12 (Bankr SDNY 2017) (collecting cases).

In one case, for example, a federal judge upheld a bankruptcy court's finding that a judgment lien over estate property located in Rome, Italy—which had been registered pursuant to a decision of an Italian court enforcing a Swiss arbitration award—had been granted in violation of the automatic stay in the debtor's US-based Chapter 11 proceeding and was therefore void.[19] Courts have justified the application of the automatic stay to foreign proceedings involving the debtor's property on the basis that such proceedings "would have an immediate . . . impact" on the U.S. debtor and/or its property, undermining the Bankruptcy Code's broad jurisdiction over the debtor's property "wherever located" and the purpose of the automatic stay.[20]

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.)?

14. The Bankruptcy Code's automatic stay of claims against a debtor or a debtor's property is triggered by a petition under Chapter 11 of the Bankruptcy Code for a reorganization of the debtor, a petition under Chapter 7 of the Code for liquidation of the debtor, or by an involuntary petition against a debtor under section 303 of the Code. The debtor is not required to take any action to give effect to the stay or to provide notice of the stay to claimants or potential claimants against the debtor or its property.[21]

15. Petitions under Chapter 15 of the Bankruptcy Code, which seek recognition of non-US insolvency proceedings, are treated differently. The Chapter 15 stay comes into force only upon a U.S. bankruptcy court's recognition of the foreign proceeding and only with respect to the debtor and the property of the debtor that is within the territorial jurisdiction of the United States. For a foreign "main" proceeding that emanates from the debtor's "center of main interests" (typically the jurisdiction of registration), the stay enters automatically upon recognition of such foreign proceeding in a U.S. bankruptcy court.[22] For a foreign "nonmain" proceeding that emanates from any other jurisdiction where the debtor has an "establishment," the stay can be entered by a bankruptcy court.[23] See the response to Question 29 for a further explanation of the provisions of Chapter 15.

[19] *In re Gucci* 309 BR 679 (SDNY 2004) (remanding on other grounds), *aff'd*, 197 F App'x 58 (2d Cir 2006); *see also In re Nakash* 190 BR 763, 768 (Bankr SDNY 1996) ("wherever located" language of 28 USC s 1334(d) must be broadly construed to include property located in and outside of the US).
[20] *In re Probulk Inc* 407 BR 56, 64 (Bankr SDNY 2009) (noting that the scope of applicable Bankruptcy Code provisions extends to "all the [debtor's] property, wherever located" pursuant to 28 USC, s 1334, part of the Judicial Code).
[21] *Acands Inc v Travelers Cas & Sur Co* 435 F 3d 252, 259 (3d Cir 2006) ("The stay mandated by [section 362 of the Bankruptcy Code] is automatic in that the debtor does not have to make any formal request that it be issued or that it apply to a particular proceeding[;] . . . . [r]ather, the onus is on the party seeking to proceed to petition the Bankruptcy Court for relief from the stay.").
[22] 11 USC, ss 1520, 1517(b).
[23] ibid, s 1521(a).

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?

16. Yes. A party to an arbitration or potential arbitration with the debtor may file a motion with the court for relief from the automatic stay.[24] Bankruptcy courts typically grant motions to lift a stay with respect to arbitration proceedings unless the debtor opposes the motion on the ground that the matter is "core" to the bankruptcy proceeding and/or because allowing the arbitration to proceed would inherently conflict with the purposes of the Bankruptcy Code.

17. The Bankruptcy Code divides insolvency proceedings "into three categories: 'those that arise under [the Bankruptcy Code]'; those that 'arise in a [bankruptcy] case'; and those that are 'related to a case under [the Bankruptcy Code]'".[25] Proceedings in the first two categories, arising under the Bankruptcy Code or arising in a bankruptcy case, are generally considered "core" proceedings, whereas proceedings that simply relate to a case under the Code are generally categorized as "non-core" proceedings.

18. Disputes that implicate a substantive right conferred to the debtor by the Bankruptcy Code, such as a proceeding for the determination of a creditor's secured status or a motion for relief from the automatic stay, are said to "arise under" the Code. Disputes that do not implicate such a substantive right, but nevertheless would not exist absent a bankruptcy proceeding, such as a dispute over whether to allow a purported creditor's breach of contract action as a claim against the debtor's estate, "arise in" the Bankruptcy Code. Other claims involving a debtor or its property that do not arise under the Bankruptcy Code or in a bankruptcy case are generally considered noncore.[26]

19. Although the federal appellate courts take slightly different approaches, and the U.S. Supreme Court has not addressed this directly, U.S. bankruptcy courts are generally required to authorize arbitrations concerning non-core matters to proceed unless the parties consent to a bankruptcy court's adjudication or unless the arbitration would conflict with the purposes of the Bankruptcy Code. Those purposes are limited but may include "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders".[27]

[24] ibid, s 362(d).
[25] *Stern v Marshall* 564 US 462, 473 (2011) (quoting 28 USC, s 157(a)).
[26] *See also* 28 USC, s 157(b) for a list of core matters that is both non-exhaustive and also over-inclusive.
[27] *In re Henry* 944 F 3d 587, 591 (5th Cir 2019); *see also In re Anderson* 884 F 3d 382, 388 (2d Cir 2018), *cert denied*, 139 S Ct 144 (2018) ("bankruptcy courts are more likely to have discretion to refuse to compel

20. Some U.S. courts have taken the position that the bankruptcy courts' limited discretion to maintain a stay of an arbitration is even more limited in the context of international arbitrations, as compared to U.S. domestic arbitrations, because of concerns for international comity, respect for transnational tribunals, and sensitivity to the needs of the international commercial system.[28]

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?

21. As described in the responses to the preceding questions, the Bankruptcy Code provides that the filing of a bankruptcy petition in the United States (i) immediately triggers a stay of nearly all civil actions, including arbitration proceedings seated in the United States and abroad, involving the debtor or the debtor's property and (ii) requires parties to receive permission to proceed with the arbitration. If an arbitration continues in contravention of a stay of proceedings or otherwise threatens the purpose of bankruptcy proceedings, U.S. bankruptcy courts have the discretion to issue orders to stop arbitration proceedings seated in the United States or abroad. This discretion arises from the Bankruptcy Code, which endows bankruptcy courts with a broad equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Code]".[29]

22. Foreign antisuit injunctions in favor of arbitration may result in U.S. sanctions and ultimately be fruitless. In *MF Global Holdings Ltd v Allied World Assurance Ltd (In re MF Global Holdings Ltd)*, the administrator under a confirmed Chapter 11 plan and his assignee brought an adversary proceeding in the bankruptcy proceeding against Bermuda-based insurers to resolve an insurance dispute.[30] The insurers, relying on an arbitration clause in the policies,

arbitration of core bankruptcy matters"); *In re Thorpe Insulation Co* 671 F 3d 1011, 1021 (9th Cir 2012) ("even in a core proceeding, . . . a bankruptcy court has discretion to decline to enforce an otherwise applicable arbitration provision only if arbitration would conflict with the underlying purposes of the Bankruptcy Code."); *In re Mintze* 434 F 3d 222, 231 (3d Cir 2006) (holding that a court does not have discretion to deny arbitration unless allowing the arbitration to proceed would necessarily jeopardize the objectives of the Bankruptcy Code). *See generally* Alan N Resnick, 'The Enforceability of Arbitration Clauses in Bankruptcy' (2007) 15 Am Bankr Inst L Rev 183; Landon G Van Winkle, 'To Exit the Quagmire, Follow the Bright Line: How Stern can Guide the Split Circuits Toward a Uniform and Efficient Approach to Enforcing Arbitration Clauses in Bankruptcy' (2015) 31 Cal Bankr J 371; Jay Lawrence Westbrook, 'The Coming Encounter: International Arbitration and Bankruptcy' (1983) 67 Minn L Rev 595.

[28] *In re Bethlehem Steel Corp* 390 BR 784, 795 (Bankr SDNY 2008) ("With respect to international agreements, the Court has less discretion to deny motions to arbitrate than it does with respect to domestic agreements."); *Societe Nationale Algerienne Pour La Recherche, La Prod, Le Transp, La Transformation et La Commercialisation des Hydrocarbures v Distrigas Corp* 80 BR 606, 613-14 (D Mass 1987) ("weighing the strong public policy favoring international arbitration with any countervailing potential harm to bankruptcy policy" and concluding that if arbitration were not allowed to proceed "the very image of the United States in the international business community stands to be tarnished").

[29] 11 USC, s 105; *In re Springer-Penguin Inc* 74 BR 879 (Bankr SDNY 1987) (ordering that arbitration proceeding commenced abroad by foreign corporation be stayed pursuant to Bankruptcy Code's equitable powers).

[30] *In re MF Global Holdings Ltd* 561 BR 608 (Bankr SDNY 2016).

obtained an *ex parte* antisuit injunction from a court in Bermuda forbidding the administrator and his assignee from prosecuting the adversary proceeding. In its first decision, the U.S. bankruptcy court found that it had jurisdiction over the insurers and entered a temporary restraining order prohibiting the insurers from continuing their proceedings in Bermuda.[31] The insurers then went back to the Bermuda court and obtained a further order requiring the U.S. parties to withdraw the adversary proceeding within 28 days. The U.S. court thereafter issued several decisions without the participation of the U.S. parties who were under the injunction from the Bermuda court. On January 12, 2017, it held the insurers in contempt for violating its temporary restraining order,[32] and on the same day entered a preliminary injunction carrying the temporary restraining order forward.[33] On January 31, 2017, it entered a further decision finding that the actions of the insurers were in violation of the plan and applicable U.S. law.[34] Appeal of the foregoing decision was denied by the district court.[35] In a final decision, the bankruptcy court found that it was nevertheless appropriate for the coverage dispute to be arbitrated, although there is no indication that it vacated its orders of contempt and awarding damages.[36]

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?

23. The Bankruptcy Code provides that a trustee or debtor in possession can reject "executory" contracts.[37] While the Code does not define the term "executory," bankruptcy courts have generally defined them as contracts "requiring further performance from each party".[38] However, the rejection of an executory contract does not terminate or suspend the contract—"[r]ejection merely constitutes a breach of a contract, and the terms of the contract still control the relationship of the parties".[39]

[31] ibid.
[32] *In re MF Global Holdings Ltd* 562 BR 41 (Bankr SDNY 2017).
[33] *In re MF Global Holdings Ltd* 562 BR 55 (Bankr SDNY 2017).
[34] *In re MF Global Holdings Ltd* 562 BR 866 (Bankr SDNY 2017).
[35] *MF Global Holdings Ltd v Allied World Assurance Co* 2017 WL 2819870 (SDNY 2017).
[36] *In re MF Global Holdings Ltd* 571 BR 80 (Bankr SDNY 2017), *appeal denied*, 296 F Supp 2d 662 (SDNY 2017).
[37] 11 USC, s 365(g).
[38] *In re Great Atl & Pac Tea Co* 467 BR 44, 50 (SDNY 2012), *aff'd sub nom Grocery Haulers Inc v Great Atl & Pac Tea Co* 508 F App'x 63 (2d Cir 2013); *see also In re Lehman Bros Holdings Inc* No 14 CIV 7643 ER, 2015 WL 5729645, at *6 (SDNY 2015) ("The rejection of an executory contract is also considered a fundamental issue of bankruptcy law" and therefore disputes over these issues are "core" proceedings), *aff'd sub nom In re Lehman Bros Holdings Inc* 663 F App'x 65 (2d Cir 2016).
[39] *In re Smurfit-Stone Container Corporation* 2010 WL 5489905, at *19 (D Del May 3, 2010).

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?

24. Although the Bankruptcy Code authorizes the bankruptcy trustee or debtor to reject executory contracts, rejection of such a contract does not terminate an agreement to arbitrate contained therein.[40] See also the response to Question 4.

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?

25. As described in the responses to Question 4, the Bankruptcy Code authorizes U.S. bankruptcy courts to temporarily stay all arbitrations against a debtor or its property. An award rendered in an arbitration in contravention of the stay may be treated as void in the bankruptcy proceedings. Whether a bankruptcy court has discretion to refuse to allow the arbitration eventually to proceed depends on whether the court determines the proceedings to address an issue that goes to the "core" of the bankruptcy proceeding, as further discussed in the response to Question 4.

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?

26. Yes. The alleged creditor must take two steps in the insolvency process in order to commence or continue an arbitration against the debtor or its property. First, the Federal Rules of Bankruptcy Procedure require a creditor to register its claim with a bankruptcy court by filing

[40] *In re Fleming Companies Inc* 325 BR 687, 693–94 (Bankr D Del 2005) (holding that Chapter 11 debtor's rejection of executory contract that contained arbitration provision did not prevent it from enforcing this provision so as to compel arbitration of dispute arising under the contract); *In re Paragon Offshore PLC* 588 BR 735, 749 (Bankr D Del 2018) (holding that rejection of contract with arbitration agreement does not "erase the contractual obligations" of the parties to arbitrate disputes within the scope of the arbitration clause).

a proof of claim which sets forth the creditor's claim.[41] Under U.S. practice, the Federal Rules of Bankruptcy Procedure or a bankruptcy court usually sets the date for creditors to file claims. That date is determined by Rule 3002(c) of the Federal Rules of Bankruptcy Procedure in Chapter 7 liquidations and by a "bar order" entered by the bankruptcy court in most Chapter 11 cases, requiring the filing of all proofs of claim by a date certain.[42] By filing a claim, the creditor submits to the jurisdiction of the U.S. bankruptcy court, but submission does not amount to a waiver of an arbitration agreement.[43]

27. If a creditor or debtor wishes to resolve a disputed claim in arbitration, the second step, as described in the response to Question 4, is for the creditor or debtor to file a motion with the bankruptcy court for relief from the automatic stay that issues when bankruptcy proceedings are commenced.[44] If the bankruptcy court grants the motion to lift the stay, then the arbitration may commence or recommence. If a party does not seek relief from the stay or the court denies the motion to lift the stay, then the court will resolve the claim.[45]

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)?

28. The Bankruptcy Code provides a debtor or trustee with the right to assert claims to avoid transfers of property from the debtor's estate made prior to the initiation of bankruptcy proceedings and recover the property if the transfers were preferential; were for less than reasonably equivalent in value; or were fraudulent in nature.[46] Such actions are referred to as avoidance proceedings. U.S. courts consider such claims to be "core" claims in the bankruptcy proceedings, as described in response to Question 4, that are within the jurisdiction of the bankruptcy courts and, as a result, the courts do not compel arbitration of such claims.[47]

[41] Fed R Bankr P 3001.
[42] Fed R Bankr P 3003(c).
[43] *See In re Touchstone Home Health LLC* 572 BR 255, 276-77 (Bankr D Colo 2017) (approving liquidation of claims through arbitration, even though "[t]he filing of a proof of claim subjects a creditor to the bankruptcy court's jurisdiction").
[44] 11 USC, s 362(d).
[45] *See In re Wade* 523 BR 594, 601 (Bankr WD Tenn 2014) (noting that because the automatic stay was in place, all interested entities had to seek relief and distributions from the bankruptcy estate in the centralized bankruptcy forum).
[46] 11 USC, ss 547–548.
[47] 28 USC, s 157(b)(2)(H); *see also In re Startec Global Commc'ns Corp* 292 BR 246, 254 (Bankr D Md 2003), *aff'd*, 300 BR 244 (D Md 2003) ("[A]voidance of transfers is . . . part of the core jurisdiction of the Bankruptcy Court and a matter over which the court holds exclusive jurisdiction."); *In re Appalachian Fuels LLC* 472 BR 731 (ED Ky 2012) (fraudulent transfer claims are considered "core" claims).

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

29. Yes. With the approval of the bankruptcy court, a debtor or trustee may submit disputes to arbitration after the initiation of bankruptcy proceedings.[48]

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

30. The effects of the U.S. Bankruptcy Code on arbitration, such as the automatic stay of arbitration proceedings against the debtor, ordinarily end when a bankruptcy proceeding is closed or dismissed.[49] However, it is common in Chapter 11 cases for the reorganization plan (which is an agreement between a debtor and its creditors and stockholders to reorganize the debtor's business affairs, debts, and assets) to include a provision that provides for the judicial resolution of all pending proceedings against the debtor or its estate. If the reorganization plan includes such a provision and creditors are on notice of the plan and do not object within the requisite time period, then they may waive the right to bring future claims in arbitration, even if the contracts at issue contain arbitration clauses.[50]

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?

31. The effects of the Bankruptcy Code on arbitration are mandatory and cannot be avoided or modified by contract.[51]

[48] Fed R Bankr P 9019(c) ("On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.").
[49] 11 USC, s 362(c).
[50] *See Ernst & Young LLP v Baker O'Neal Holdings Inc* 304 F 3d 753, 756-58 (7th Cir 2002) (holding that creditor waived its right to arbitrate because it participated in the debtor's Chapter 11 reorganization plan which granted the bankruptcy court jurisdiction over any proceedings pending against the debtor); *Sirius Computer Sols Inc v AASI Creditor Liquidating Tr* 2011 WL 3843943, at *3 (SD Fla Aug 29, 2011) (holding that the confirmed Chapter 11 plan was a new binding contract that superseded arbitration provisions in the debtor's pre-confirmation contract); *see also In re MF Global Holdings Ltd* 571 BR 80, 91-97 (Bankr SDNY 2017) (despite a court-confirmed Chapter 11 liquidation plan, compelling arbitration in adversary proceeding brought by plan administrator and another entity that was assigned all of the Chapter 11 debtor's rights against Bermuda insurers because the arbitration clause in the insurance policy was broadly phrased, related to a non-core dispute and did not conflict with any provision of the plan).
[51] *See Acands Inc v Travelers Cas & Sur Co* 435 F 3d 252, 259 (3d Cir 2006) (holding that "[b]ecause the automatic stay serves the interests of both debtors and creditors, it may not be waived and its scope may not be limited by a debtor") (internal citation and quotation marks omitted).

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

32. Yes, and U.S. courts may vacate or deny enforcement of an arbitral award or treat it as void if the award was rendered in violation of an automatic stay of all pending proceedings against the debtor, as described in the response to Question 1.[52] It is possible that a U.S. court might retroactively vacate the automatic stay and not vacate or deny enforcement of an award rendered in violation of a stay if the arbitration related to a matter that was not central to the jurisdiction of the bankruptcy court (ie, a non-core matter as described in the response to Question 4). However, we are not aware of any U.S. court decisions that have addressed this issue, and the case law instructs that an award rendered in violation of a stay is at least at risk of being vacated or denied enforcement by a U.S. court. Moreover, the U.S. Supreme Court has recently limited the power of bankruptcy courts to enter orders that have retroactive effect.[53]

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?

33. As described in the response to Question 3, the automatic stay of proceedings against the debtor or its estate is viewed as applying extraterritorially. However, in practice, the stay can be enforced only if the U.S. court has personal jurisdiction over the creditor.[54] Similarly, the court's personal jurisdiction over a party to the arbitration would affect the court's power to enter sanctions against that party for violating an injunction.[55] The court's jurisdiction over the arbitrator(s) might also be a possible basis for the court's award of sanctions against them for violation of the automatic stay, but we know of no specific authority on the subject.

[52] *See* ibid (vacating an arbitration award and holding that "the automatic stay applied to the arbitration and that the panel should have halted the arbitration once it became apparent that proceeding further could negatively impact the bankruptcy estate").
[53] *See Roman Cath. Archdiocese of San Juan v Acevedo Feliciano* 140 S Ct 696 (2020).
[54] *See Fotochrome Inc v Copal Co* 517 F 2d 512, 516–17 (2d Cir 1975) (in case under prior Bankruptcy Act, holding that bankruptcy court stay did not apply to a creditor over which the court did not have personal jurisdiction while the stay was in effect).
[55] *See In re MF Glob Holdings Ltd* 562 BR 41, 54 (Bankr SDNY 2017) (holding insurance providers in contempt for violating a bankruptcy court's temporary restraining order).

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?]

34. Where a trustee is appointed (as is typically the case in Chapter 7 liquidation proceedings), he or she replaces the debtor and possesses all the debtor's substantive rights in connection with the bankruptcy estate, including the right to assert or defend claims in arbitration.[56] In these circumstances, an insolvent debtor typically would not be allowed to continue to appear in an arbitration in its own name, although the debtor's further participation would ordinarily be a matter to be decided by the arbitrators under applicable arbitration rules and laws.

35. If a trustee is not appointed (as is typically the case in Chapter 11 proceedings), the debtor in possession will participate in the arbitration in its own name.[57]

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?

36. The Bankruptcy Code codifies a strong presumption of public access to bankruptcy proceedings.[58] Therefore, documents concerning the conduct, status, or content of an arbitration, which are only confidential in the U.S. if the parties have an agreement or order

[56] *See* 11 USC, s 323(b) (the trustee in bankruptcy acts as the representative of the estate, and it is the trustee who "has capacity to sue and be sued"); *Hays & Co v Merrill Lynch, Pierce, Fenner & Smith Inc* 885 F 2d 1149, 1153 (3d Cir 1989) (holding that the trustee "stands in the shoes of the debtor for the purposes of the arbitration clause and . . . the [trustee] is bound by the clause to the same extent as would the debtor"); *In re Jackson* 2020 WL 1466119, at *5 (ED Mich Mar 25, 2020) ("It is well settled that the right to pursue causes of action formerly belonging to the debtor—a form of property under the Bankruptcy Code—vests in the trustee for the benefit of the estate.") (internal citation and quotation marks omitted).

[57] *See* 11 USC, s 1107 (for present purposes, generally providing that "a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under [Chapter 11]").

[58] *See* ibid, s 107(a) (generally providing that documents filed in bankruptcy proceedings are public records and open to public examination); *In re Oldco M Corp* 466 BR 234, 236 (Bankr SDNY 2012) ("the public interest in openness of court proceedings is at its zenith" where a party acts in a fiduciary capacity for another, "such as a trustee in a bankruptcy case") (internal citation and quotation marks omitted).

that states so, are subject to the presumption of public access if filed in a bankruptcy proceeding. However, the Bankruptcy Code empowers the bankruptcy court to seal or redact limited categories of sensitive information.[59] Whether creditors of an insolvent debtor may appear in an arbitration to which the debtor or its estate is a party typically is a matter to be decided by the arbitrators. However, we believe that creditors usually would not be granted leave to appear unless they are parties to the arbitration agreement.

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

37. The Bankruptcy Code does not provide for the change of a party's name as a consequence of the opening of bankruptcy proceedings over the party. However, where a trustee is appointed, the trustee would ordinarily substitute for the debtor, and the title of the arbitration would change accordingly.

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?

38. The bankruptcy court must approve a settlement reached by either the trustee or the debtor in possession.[60] However, the terms of a Chapter 11 reorganization plan could dispense with the requirement of court approval of settlements reached after the plan's confirmation.

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

39. If the bankruptcy court has authorized the arbitration to proceed, as described in the response to Question 4, an arbitral tribunal may proceed with the arbitration. The tribunal should have the authority to order interim measures against the debtor, including orders to preserve

[59] 11 USC, s 107(b) (the courts may restrict public access to information to "protect an entity with respect to a trade secret or confidential research, development, or commercial information; or protect a person with respect to scandalous or defamatory matter contained in a paper filed in a case under this title"); *In re Oldco M Corp* 466 BR 234, 237 (Bankr SDNY 2012) (holding that the courts should "carefully and skeptically review the motion [to seal] and the underlying documents to ensure that compelling or extraordinary circumstances exist").

[60] *See Am Prairie Constr Co v Hoich* 594 F 3d 1015, 1024 (8th Cir 2010) ("It is a recognized principle of bankruptcy law that a bankruptcy court is required to approve any compromise or settlement proposed in the course of a Chapter 11 reorganization before such compromise or settlement can be deemed effective.") (citing Fed R Bank P 9019).

assets, unless the court's order authorizing the arbitration limits the tribunal's authority in this regard.[61]

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

40. The opening of insolvency proceedings in the United States should not, *ipso facto*, affect the validity of interim measures ordered by an arbitral tribunal against an insolvent party prior to the initiation of the proceedings. However, the enforcement of such measures may be suspended pursuant to the automatic stay that is triggered by the initiation of bankruptcy proceedings, as described in the response to Question 2.

41. Interim measures against the debtor that do not affect its property, such as measures ordering the debtor not to take certain actions against the creditor, may not be subject to the automatic stay.[62]

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?

42. Yes. First, as described in the response to Question 16, a trustee may be appointed by the bankruptcy court to replace the debtor in the administration of the estate. Where a trustee is appointed, the debtor will be replaced in the arbitration proceeding and will not have capacity to settle the dispute.

43. Second, an agreement to settle an arbitration that is entered into by the debtor in possession or the trustee (where appointed) is generally subject to the approval of the bankruptcy court.[63] Thus, post-filing settlements entered by the debtor in possession or the trustee are subject to court review.[64] On the other hand, the court's review is limited. A U.S. bankruptcy court should approve a settlement if "after apprising itself of all facts necessary for an intelligent and objective opinion of probabilities of ultimate success should the claim be

[61] For a somewhat analogous situation, see *In re Servicos de Petroleo Constellation SA* 613 BR 564, 570 (Bankr SDNY 2020) (ordering that the parties in Chapter 15 proceedings maintain their rights in relation to an arbitration, including interim remedies prohibiting one of the debtors from pledging, transferring or otherwise encumbering certain assets).

[62] *See Dominic's Rest of Dayton Inc v Mantia* 683 F 3d 757 (6th Cir 2012) (holding that the automatic stay protects interests in debtor's property and has no effect on power of district court to hold debtor in contempt for ignoring pre-insolvency interim measures and committing tortious acts).

[63] *See TMT Trailer Ferry Inc v Anderson* 390 US 414, 424 (1968) (holding that "the requirements . . . that plans of reorganization be both 'fair and equitable,' apply to compromises just as to other aspects of reorganizations").

[64] *See In re Telesphere Comm Inc* 179 BR 544 (Bankr ND Ill 1994) (finding that settlements are subject to court approval under the Bankruptcy Code); *In re Republic Airways Holdings Inc* 2016 WL 2621990, at *2 (SDNY June 5, 2016) (same).

litigated, the agreement is concluded to be fair and equitable".[65] In general, a court should not decide the numerous issues of law and fact raised by a settlement but rather should "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness".[66]

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?

44. Yes. As explained in the responses to Questions 1 to 3, the opening of an insolvency proceeding triggers an automatic stay. Once the automatic stay is in effect, a creditor cannot enforce claims against the insolvent estate, including arbitral awards, outside of the bankruptcy proceeding.

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?

45. A claim that has not reached a final award when the insolvency proceeding is opened has the status of a disputed and/or unliquidated claim. A disputed claim is a claim asserted by a potential creditor but not recognized by the debtor.[67] An unliquidated claim is a claim for which liability is not disputed, but the amount of liability is disputed and has not been determined.[68] The term "claim" in the Bankruptcy Code includes unliquidated, disputed, and contingent claims,[69] and all such claims must be timely filed, even if they are subject to liquidation or determination.

46. If a disputed/unliquidated claim is resolved by an arbitration award, the creditor may file a proof of claim or an amended proof of claim based on the award with the bankruptcy court, as described in the response to Question 9. Provided there are no grounds to vacate or deny enforcement of the award, the bankruptcy court will convert the status of the creditor's claim to an "undisputed" and "liquidated" claim.[70] Alternatively, a creditor may request that the stay be lifted so that a court of competent jurisdiction can reduce the award to judgment, and

[65] *Liberty Towers Realty LLC v Richmond Liberty LLC* 2017 WL 2656128, at *3 (EDNY June 20, 2017).
[66] *In re WT Grant Co* 699 F 2d 599, 608 (2d Cir 1983).
[67] *See In re Mazzeo* 131 F 3d 295 (2d Cir 1997) (holding that "the existence of a dispute, and the prerequisite that the claimant establish its claim by a given quantum of proof, mean only that the claim is disputed").
[68] *See United States v Verdunn* 89 F 3d 799, 802 (11th Cir 1996) (holding that "the concept of a liquidated debt relates to the amount of liability, not the existence of liability").
[69] 11 USC, s 101(5).
[70] *See In re WorldCom Inc* 340 BR 719, 726 (Bankr SDNY 2006) (considering objections to proof of claim that was based on an unconfirmed award).

the creditor can then file a proof of claim or an amended proof of claim with the bankruptcy court based on the judgment. Such a claim cannot be reconsidered by the bankruptcy court.[71]

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?

47. A credit contained in an arbitral award is a valid proof of credit, subject to the debtor's rights under the applicable arbitration law to move to set aside or oppose the enforcement of the award. It has been held that such a motion to set aside the award could be brought in the bankruptcy court.[72] After obtaining relief from the automatic stay where necessary, parties may also seek to vacate arbitral awards in the ordinary course in non-bankruptcy court. If a competent court denies a petition to vacate the award, the bankruptcy court's jurisdiction to reconsider such a judgment is limited.[73]

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

48. As described in the response to Questions 1 and 32, U.S. courts may set aside or deny enforcement of an arbitration award rendered in violation of the Bankruptcy Code. The Bankruptcy Code's provision of an automatic stay of proceedings against the debtor or its estate, which among other things allows the bankruptcy court to centralize all disputes concerning property of the debtor's estate in the bankruptcy court so that liquidation or reorganization can proceed efficiently, has been held to be an element of U.S. public policy for purposes of setting aside a domestic arbitration award under Chapter 1 of the U.S. FAA.[74] In the context of the enforcement of foreign arbitral awards under Chapter 2 of the FAA, which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), U.S. courts have not expressly determined whether the Bankruptcy Code forms part of U.S. public policy. However, U.S. courts have set aside awards

[71] *See Kelleran v Andrijevic* 825 F 2d 692, 695 (2d Cir 1987) ("Bankruptcy proceedings may not be used to re-litigate issues already resolved in a court of competent jurisdiction.").
[72] *See In re WorldCom Inc* 340 BR 719, 726 (Bankr SDNY 2006) ("Bankruptcy courts can review arbitral awards under the Federal Arbitration Act."); *In re Goldbronn* 263 BR 347 (Bankr MD Fla 2001) (reviewing an arbitral award under the Federal Arbitration Act and the state arbitration law of Florida). These decisions do not imply that the bankruptcy court's "review" should be different from the "review" of any other court asked to enforce an arbitral award.
[73] *See Kelleran v Andrijevic* 825 F 2d 692, 695 (2d Cir 1987) ("Bankruptcy proceedings may not be used to re-litigate issues already resolved in a court of competent jurisdiction.").
[74] *Acands Inc v Travelers Cas & Sur Co* 435 F 3d 252, 258 (3d Cir 2006) (holding that "the automatic stay provision of the Bankruptcy Code promotes a public policy sufficient to preclude enforcement of an award that violates its terms or interferes with its purposes").

under Chapter 1 of the FAA that were rendered in violation of the automatic stay created by the Bankruptcy Code, which strongly suggests that at least some courts consider the Act to form part of U.S. public policy for the purposes of award enforcement.[75]

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)?

49. Yes. As described in the responses to the preceding questions, the U.S. Bankruptcy Code provides that all creditors shall have the same rights under the automatic stay vis-à-vis the debtor and its estate. On the other hand, although an arbitration award that is rendered in violation of the automatic stay might be denied enforcement or set aside by U.S. courts, the right of a creditor to enforce an agreement to arbitrate may only be lost if arbitration would conflict with a core bankruptcy interest. Moreover, whether or not a claim is liquidated through arbitration, creditors may have different substantive rights to distribution from the estate (eg, priority claims, secured claims). We know of no cases discussing whether as a sanction for violation of the automatic stay the creditor would forfeit any claim against the estate.

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

50. We are not aware of any other provisions of U.S. law concerning the effect of national insolvency on arbitration that have not been addressed to some degree in the prior questions.

[75] *Fotochrome, Inc. v Copal Co*. 517 F.2d 512, 516 (2d Cir. 1975) (holding that "the 'public policy' limitation on the [New York] Convention is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice" but concluding that the case could "be decided without the necessity of determining whether the Bankruptcy Act involves a 'public policy' which is contrary to enforcement of arbitral awards under the Convention"); *see also Victrix SS Co SA v Salen Dry Cargo AB* 825 F 2d 709, 713 (2d Cir 1987) (denying enforcement of a London arbitral award and a British judgment confirming such an award against assets of a debtor under insolvency regime in Sweden, because "their enforcement would conflict with the public policy of ensuring equitable and orderly distribution of local assets of a foreign bankruptcy").

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 the United States concerning the insolvent party.]

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

51. Yes. If the representative of a foreign bankruptcy estate seeks relief in the U.S. courts, the representative must ordinarily first apply to a U.S. bankruptcy court for recognition under the U.S. version of the Model Law on Cross-Border Insolvency, Chapter 15 of the Bankruptcy Code. Under Chapter 15, the foreign representative may seek to have the U.S. bankruptcy court, *inter alia,* (i) stay the commencement or continuation of actions concerning debtor's assets, rights, obligations, or liabilities; (ii) entrust the foreign representative with the administration or realization of debtor's assets in the United States; and (iii) suspend the right to transfer, encumber, or dispose of any assets of the debtor.[76]

52. A stay issued under Chapter 15 applies to all arbitrations against the debtor or its property that are seated in the United States and any foreign arbitration proceedings affecting the debtor's property in the United States.[77] Pursuant to Chapter 15, a stay of proceedings similar to the stay that takes effect when a petition is filed under Chapter 7 or Chapter 11 of the Bankruptcy Code goes into effect automatically if the U.S. bankruptcy court recognizes the foreign proceeding as a "foreign main proceeding".[78] If the U.S. bankruptcy court recognizes the foreign proceeding as a "foreign nonmain proceeding", the court still has the discretion, at the request of the foreign representative, to grant proper relief (ie, order a stay) for the purpose of protecting or preserving the debtor's assets in the United States.[79]

53. Under Chapter 15, there is a presumption that a "main proceeding" is a proceeding pending in a jurisdiction in which the debtor is registered.[80] This presumption may be rebutted by evidence such as "the location of the debtor's headquarters; the location of those who actually manage the debtor . . . ; the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes".[81] A foreign "nonmain proceeding" is a "foreign proceeding, other than a foreign main proceeding,

[76] 11 USC, ss 1520-1521.
[77] *In re JSC BTA Bank* 434 BR 334 (Bankr SDNY 2010) (holding that automatic stays under Chapter 15 may apply to proceedings in foreign jurisdictions that may affect a debtor's property in the United States but not necessarily to all foreign proceedings).
[78] 11 USC, s 1520(a)(1); *see also Giant Screen Sports LLC v Sky High Entm't* 2007 WL 627607 (ND Ill Feb 27, 2007) (recognizing that stay was in place once the debtor's foreign proceeding was recognized under Chapter 15).
[79] 11 USC, s 1521(a)(1).
[80] ibid, s 1516(c).
[81] *In re SPhinX Ltd* 351 BR 103, 117 (Bankr SDNY 2006), *aff'd*, 371 BR 10 (SDNY 2007).

pending in a country where the debtor has an establishment", meaning a place of operations.[82]

54. Without initiating Chapter 15 proceedings, a foreign representative of a bankruptcy estate may also seek to stay or dismiss proceedings in the United States under principles of comity. Prior to the adoption of Chapter 15, U.S. courts frequently applied comity principles to recognize foreign insolvency proceedings and stayed proceedings pending in the United States that involved the bankruptcy estate. For example, in a non-bankruptcy case, *Royal & Sun Alliance Ins Co of Can v Century Int'l Arms Inc,* the U.S. Circuit Court of Appeals for the Second Circuit distinguished bankruptcy proceedings from all others and stated the importance of dismissing bankruptcy actions where there is already a foreign proceeding in place:

> We have recognized one discrete category of foreign litigation that generally requires the dismissal of parallel district court actions—foreign bankruptcy proceedings. A foreign nation's interest in the "equitable and orderly distribution of a debtor's property" is an interest deserving of particular respect and deference, and accordingly we have followed the general practice of American courts and regularly deferred to such actions. [83]

55. However, there are at least two reasons why an application under Chapter 15 is more advantageous for a foreign representative than a defense pursuant to principles of comity. *First*, a stay or dismissal of proceedings based on comity principles does not have an *erga omnes* effect, meaning that it has no effect on other claims in the United States that involve the debtor. The foreign representative must seek relief on a case-by-case basis. By contrast, Chapter 15 provides a more "effective mechanism[] for dealing with cases of cross-border insolvency" because it allows the foreign representative to secure relief that applies to all proceedings in the United States involving the debtor.[84]

56. *Second*, U.S. courts have held that Chapter 15 proceedings are an "exclusive point of entry" for a foreign representative to obtain relief in the United States, and, as a result, a foreign

[82] *In re Ran* 607 F 3d 1017, 1025 (5th Cir 2010) (refusing to recognise the foreign proceeding because it did not fall within the categories of foreign main proceeding or foreign non-main proceeding).
[83] *Royal & Sun Alliance Ins Co of Can v Century Int'l Arms Inc* 466 F 3d 88, 92-93 (2d Cir 2006). *See also JPMorgan Chase Bank v Altos Hornos de Mexico SA de CV* 412 F 3d 418 (2d Cir 2005) (deferring to the decision of a foreign bankruptcy court as to whether certain property belonged to the debtor's estate); *Victrix SS Co SA v Salen Dry Cargo AB* 825 F 2d 709, 713-14 (2d Cir 1987) (deferring to foreign bankruptcy proceeding as to enforcement of foreign arbitral award against property of bankruptcy estate located in the United States).
[84] *Orchard Enter NY Inc v Megabop Records Ltd* 2011 WL 832881 (SDNY Mar 4, 2011).

representative may no longer obtain relief based directly on principles of comity.[85] However, U.S. courts occasionally still grant relief to foreign representatives on the basis of comity.[86]

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?

57. Yes. In 2005, the United States adopted the UNCITRAL Model Law on Cross-Border Insolvency as Chapter 15 of the Bankruptcy Code. The United States has made some amendments to the text of the Model Law but none that bear on the effects of insolvency on arbitrations.

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

58. As described in the response to Question 29, the foreign representative of a bankruptcy estate should apply to a U.S. court under Chapter 15 of the Bankruptcy Code in order for a foreign insolvency proceeding to have effect on arbitrations seated in the United States that involve the debtor or its estate and foreign arbitrations that may affect property of the debtor located in the United States. See also the response to Question 3.h.

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?

59. If a foreign insolvency proceeding is recognized by a U.S. bankruptcy court under Chapter 15, arbitrators seated in the United States are required to defer to court's rulings on the matter, including any order to stay proceedings against the debtor or its estate, or the resulting award

[85] *Halo Creative & Design Ltd v Comptoir* 2018 WL 4742066 (ND Ill Oct 2, 2018); *see also Webb Mason Inc v Video Plus Print Solutions Inc* 2018 WL 7892976 (D Md Dec 7, 2018) (holding that a debtor must commence a Chapter 15 proceeding to obtain a stay order in the United States); *Oak Point Partners Inc v Lessing* 2013 WL 1703382 (ND Cal Apr 19, 2013) (holding that Chapter 15 was designed to concentrate in the U.S. bankruptcy courts the decision on recognition of foreign insolvency proceedings); *Reserve Int'l Liquidity Fund Ltd v Caxton Int'l Ltd* 2010 WL 1779282 (SDNY Apr 29, 2010) (denying recognition of a foreign representative as debtor's representative in the United States and denying relief where a Chapter 15 case had not been brought in the bankruptcy court).

[86] *EMA Garp Fund v Banro Corp* 2019 WL 773988, at *3-8 (SDNY Feb 21, 2019) (applying principles of comity to dismiss litigation against a debtor that was subject to foreign insolvency proceeding in which the relevant court had released all claims against the debtor).

may be declared void and thus be set aside and/or held unenforceable, as described in the responses to Questions 1, 8, and 26.[87]

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

60. Yes. Rulings of a U.S. bankruptcy court where a Chapter 15 proceeding is pending, including orders authorizing a stay of proceedings against the debtor or its estate, apply to arbitrations seated in the United States as described in the response to Question 32.

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

61. As described in the response to Question 32, an award issued in contravention of an order to stay proceedings against a debtor or its estate may be declared "void" and set aside or held unenforceable by U.S. courts.

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?

62. Although the foregoing is not intended to provide legal advice applicable to specific fact situations, we are not aware of any other provisions of U.S. law concerning the effect of a foreign insolvency on arbitrations seated in the United States that have not been addressed to some degree in the prior questions.

[87] *Acands Inc v Travelers Cas & Sur Co* 435 F 3d 252, 258 (3d Cir 2006) (holding that "the automatic stay provision of the Bankruptcy Code promotes a public policy sufficient to preclude enforcement of an award that violates its terms or interferes with its purposes").