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IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF POLAND

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

IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Poland 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 Poland 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. The effects on arbitration are regulated by the Bankruptcy Act 2003[1] (in Polish: "*Prawo upadłościowe*") and not the Polish arbitration law. The Bankruptcy Act 2003 regulates the debtor's lack of *locus standi* (procedural capacity), the effects on the arbitration agreements, the admissibility of the commencement of new arbitral proceedings, and the impact of the opening of bankruptcy proceedings on pending arbitration.

2. If bankruptcy proceedings are opened against one of the parties, the arbitral tribunal shall suspend the proceedings *ex officio*.[2] Under Article 147 Bankruptcy Act 2003, the provisions of Article 174(1)(4) and (5), and Article 180(1)(5) of the Code of Civil Procedure, as well as Articles 144 and 145 of the Bankruptcy Act 2003 (which regulate the suspension of court proceedings and the bankruptcy receiver's participation in those proceedings), shall apply respectively to proceedings before arbitral tribunals.[3] Article 147 of the Bankruptcy Act 2003 refers to the provisions of the Code of Civil Procedure that regulate the suspension of court proceedings. In general, the opening of restructuring proceedings does not affect pending arbitration proceedings or the commencement of arbitration (see Question 3(d) below).

3. Before the amendment of the Bankruptcy Act 2003 in 2015 (in force as of 1 January 2016), the previous wording of Article 142 of the Bankruptcy Act 2003 (now repealed) that regulated the effects on arbitration before the above-mentioned amendment was as follows: "The arbitration clause concluded by the bankrupt shall expire on the date of the declaration of

[1] Act of 28 February 2003 on Bankruptcy law (Journal of Laws 2003 No. 60 item 535 as amended) (hereinafter referred to as "Bankruptcy Act 2003"). For the full text of this section, please click the link here: https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20030600535/U/D20030535Lj.pdf.
[2] Bankruptcy Act 2003, arts 144 and 147.
[3] Bankruptcy Act 2003, art. 147: "Art 147 Prawa upadłościowego—Do postępowań przed sądami polubownymi przepisy art 174 § 1 pkt 4 i 5 oraz art 180 § 1 pkt 5 Kodeksu postępowania cywilnego, a także art 144 i art 145 stosuje się odpowiednio." Translation by the authors: "Article 147 of the Bankruptcy Act 2003 –The provisions of Article 174 § 1(4) and (5) and Article 180 § 1(5) of the Code of Civil Procedure, as well as Article 144 and Article 145 [of Bankruptcy Act 2003] shall apply accordingly to proceedings before the arbitration tribunals."

bankruptcy and the proceedings already under way shall be discontinued".[4] Under this provision, the moment the bankruptcy proceedings were opened, arbitral proceedings were terminated. This regulation was widely criticized and led to the amendment of the Bankruptcy Act 2003,[5] which uses the term suspension. As explained in Question 3(e) below, this allows arbitral proceedings to be resumed during the insolvency, subject to some requirements.

4. The arbitration proceedings may be resumed in the circumstances described in the answers to Questions 3 and 9 below.

2. Does the insolvency legislation in Poland 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*?

5. Yes. The Polish law provides for the concentration of disputes concerning the bankrupt debtor before the bankruptcy court (*vis attractiva concursus*), including claims subject to arbitration. As a general rule, all disputes that refer to assets comprising the bankruptcy estate fall under the rules on *vis attractiva concursus*. The Bankruptcy Act 2003 does not differentiate between disputes subject to arbitration and those which are not. Therefore, in order to pursue any claim against a debtor in bankruptcy proceedings referring to the debtor's estate, the creditor must register it with the bankruptcy receiver.[6]

[4] "Art 147 Prawa upadłościowego w brzmieniu sprzed nowelizacji—Zapis na sąd polubowny dokonany przez upadłego traci moc z dniem ogłoszenia upadłości, a toczące się już postępowania ulegają umorzeniu." Translation by the authors: "Article 147 of the Bankruptcy Act 2003 before the amendment – The arbitration clause concluded by the debtor shall expire on the date of the declaration of bankruptcy, and the proceedings already pending shall be discontinued."

[5] Justification of the Act of 15 May 2020 on Restructuring law (Journal of Laws 2015 item 978); Parliamentary Document No. 2824. For the full text of this section, please click the link here: http://www.sejm.gov.pl/sejm7.nsf/druk.xsp?nr=2824.

[6] "Art. 236 Prawa upadłościowego – 1. Wierzyciel osobisty upadłego, który chce uczestniczyć w postępowaniu upadłościowym, jeżeli niezbędne jest ustalenie jego wierzytelności, powinien w terminie oznaczonym w postanowieniu o ogłoszeniu upadłości zgłosić syndykowi swoją wierzytelność. 2. Uprawnienie do zgłoszenia wierzytelności przysługuje wierzycielowi ponadto, gdy jego wierzytelność była zabezpieczona hipoteką, zastawem, zastawem rejestrowym, zastawem skarbowym, hipoteką morską lub przez inny wpis w księdze wieczystej lub w rejestrze okrętowym. Jeżeli wierzyciel nie zgłosi tych wierzytelności, będą one umieszczone na liście wierzytelności z urzędu. 3. Przepis ust. 2 stosuje się odpowiednio do wierzytelności zabezpieczonych hipoteką, zastawem lub zastawem rejestrowym, zastawem skarbowym, hipoteką morską na rzeczach wchodzących w skład masy upadłości, jeżeli upadły nie jest dłużnikiem osobistym, a wierzyciel chce w postępowaniu upadłościowym dochodzić swoich roszczeń z przedmiotu zabezpieczenia. 4. Postanowienia niniejszego artykułu dotyczące wierzytelności stosuje się do innych należności podlegających zaspokojeniu z masy upadłości." Translation by the authors: "Bankruptcy Act 2003, art 236 – 1. A personal creditor of the bankrupt party who wants to participate in the bankruptcy proceedings, if this proves necessary to establish their claim, should report their claim to the trustee within the time limit specified in the decision on the

6. By definition, the debtor's estate consists of all assets belonging to the debtor on the day of the declaration of bankruptcy and acquired by the debtor in the course of the bankruptcy proceedings.[7] The proceedings are considered to be in relation with the bankruptcy estate if the award rendered may, in any way, affect it.[8]

7. The Bankruptcy Act 2003 provides for categories of assets that do not comprise the debtor's estate. As a result, one may pursue a claim that relates to such assets before the arbitral tribunal alongside the bankruptcy proceedings.[9] Under Article 63(1) of the Bankruptcy Act 2003, the following items do not comprise the debtor's estate: 1) property which is exempt from enforcement under the provisions of the Code of Civil Procedure; 2) remuneration for the debtor's work in the part not subject to seizure; 3) the amount obtained by exercising a registered pledge or mortgage, if the bankrupt was the administrator of the pledge or mortgage, in the part falling to other creditors in accordance with the agreement appointing the administrator; 4) funds held on a bank account of a qualified entity within the meaning of Tax Ordinance which is subject to blockade.[10] Moreover, exceptions relate to, among others, non-transferable rights (eg personal servitude, usufruct, right of repurchase or pre-emption, and annuity contract), the debtor's personal rights (eg author's moral rights or right to the

declaration of bankruptcy. 2. The creditor is also entitled to submit a claim if their claim was secured by a mortgage, pledge, registered pledge, tax pledge, maritime mortgage or other entry in the land and mortgage register or in the ship register. If the creditor does not report these claims, they will be included in the list of ex officio claims. 3. The provision of sub-clause 2 shall apply accordingly to receivables secured by a mortgage, pledge or registered pledge, fiscal pledge or maritime mortgage on the assets comprising the bankruptcy estate, if the bankrupt party is not a personal debtor and the creditor wants to pursue their claims from the object of the collateral in bankruptcy proceedings. 4. The provisions of this article concerning claims shall apply to other claims to be satisfied from the bankruptcy estate."

[7] "Art 62 Prawa upadłościowego W skład masy upadłości wchodzi majątek należący do upadłego w dniu ogłoszenia upadłości oraz nabyty przez upadłego w toku postępowania upadłościowego, z wyjątkami określonymi w art 63-67a." Translation by the authors: "The bankruptcy estate includes the property belonging to the bankrupt on the day of the declaration of bankruptcy and acquired by the bankrupt in the course of bankruptcy proceedings, with exceptions specified in Articles 63-67a.".

[8] See SC, Judgement, 14 February 2003, case ref. no. IV CKN 1750/00, LEX nr 79117; SC, Judgement, 10 February 2006, case ref. no. III CZP 2/06, LEX nr 167158; SC, Judgement, 16 January 2009, case ref. no. III CSK 44/08; sn.pl.

[9] Stanisław Gurgul, commentary to Art. 62 in: Stanisław Gurgul (ed), *Bankruptcy law. Restructuring law. Commentary* [*Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz*] (C.H. Beck 2020).

[10] "Art 63 (1) Prawa upadłościowego—Nie wchodzi do masy upadłości: 1) mienie, które jest wyłączone od egzekucji według przepisów ustawy z dnia 17 listopada 1964 r.—Kodeks postępowania cywilnego (Dz. U. z 2019 r. poz. 1460, z późn. zm.); 2) wynagrodzenie za pracę upadłego w części niepodlegającej zajęciu; 3) kwota uzyskana z tytułu realizacji zastawu rejestrowego lub hipoteki, jeżeli upadły pełnił funkcję administratora zastawu lub hipoteki, w części przypadającej zgodnie z umową powołującą administratora pozostałym wierzycielom; 4) środki pieniężne znajdujące się na rachunku będącym przedmiotem blokady rachunku podmiotu kwalifikowanego w rozumieniu art 119zg pkt 2 ustawy z dnia 29 sierpnia 1997 r.—Ordynacja podatkowa (Dz. U. z 2019 r. poz. 900, z późn. zm.)." Translation by the authors: "Article 63 (1) of the Bankruptcy Law – The following do not become part of the bankruptcy estate: 1) property that is exempt from enforcement under the provisions of the Act of 17 November 1964. -Code of Civil Procedure; 2) remuneration for the work of the debtor in the part not subject to seizure; 3) the amount obtained from the enforcement of the registered pledge or mortgage, if the debtor performed the function of the administrator of the pledge or mortgage, in part falling to the other creditors in accordance with the agreement appointing the administrator; 4) funds located on the account being the subject of the account blockage of the qualified entity within the meaning of Article 119zg point 2 of the Act of August 29, 1997 - Tax Ordinance."

company name), and the debtor's non-pecuniary rights (eg compensation for wrong suffered or for bodily harm).

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

8. Yes—there are certain distinctions between arbitration proceedings where the insolvent party acts as a defendant and as a claimant.

9. **The debtor as defendant**: Under Polish law, one cannot commence arbitral proceedings against the debtor once the declaration of bankruptcy is issued, as long as the proceedings relate to the bankruptcy estate. If arbitral proceedings were commenced before the declaration of bankruptcy was issued and relate to the debtor's assets, they can be resumed only after the procedure of the registration of claims against the debtor with the bankruptcy receiver is concluded and only if the claimant's claim was not recognized (see Question 9 in detail). The registration of one's claim with the bankruptcy receiver does not influence the effectiveness of the arbitration agreement. Therefore, after the conclusion of the bankruptcy proceedings, if the debtor was not liquidated, commencing arbitration against the debtor is permissible (see Question 9).

10. **The debtor as a claimant**: The scenario is different if it is the bankruptcy receiver bringing the claim forward. Then, the bankruptcy receiver can commence arbitration provided that the creditors' committee (or the judge-commissioner,[11] if the creditors' committee was not established) have given their consent to this.

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?

11. In Poland the sole opening of bankruptcy proceedings does not mean the debtor will be liquidated (although, this is the usual outcome). The Bankruptcy Act 2003 and the effects on

[11] Please note that in Poland there are three *dramatis personae* involved in bankruptcy proceedings. The first is the bankruptcy court, which examines and rules upon the request to declare bankruptcy. The court oversees the bankruptcy proceedings; however, it can perform a given action only if it is explicitly regulated in the Bankruptcy Act 2003. The second is the judge-commissioner, who is appointed by the bankruptcy court. The judge-commissioner is in charge of the bankruptcy (and restructuring) proceedings and conducts them. He is the competent authority to supervise the bankruptcy receiver and is presumed to be competent to perform any given action (unlike the bankruptcy court). Third is the bankruptcy receiver, who is appointed by the court and manages the debtor's assets and is tasked with their liquidation.

arbitration regulated therein apply regardless of whether or not the debtor would be liquidated in the end. In turn, the financial restructuring of the company is regulated by a separate legal act, ie the Restructuring Act 2015,[12] which separately regulates its effects on arbitration (see Question 3(d) below).

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

12. No. Each creditor shall register their claim with the bankruptcy receiver, regardless of the relief sought (an exception to this rule is if the claim relates to assets excluded from the debtor's estate—see Question 2).

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

13. Under Article 2 of the Restructuring Act 2015, the restructuring can be processed via four types of proceedings indicated below.[13] The effects of those proceedings on arbitration vary. Generally speaking, restructuring does not prevent the parties from engaging in arbitration with the reservations made below.

14. **Proceedings for approval of the restructuring arrangement with the creditors** (in Polish: "postępowanie o zatwierdzenie układu")—This procedure is the least formalised out of the four restructuring procedures and is based on the debtor's own activity. In the course of the proceedings, the debtor retains the right to manage their assets and to perform legal actions. The opening of the proceedings has no effect on the arbitral proceedings. The arbitration commenced before the arrangement can be continued and new arbitral proceedings may be initiated, regardless of whether the debtor would be a claimant or defendant. However, an arrangement—once recognized by the court—may, in turn, lead to a change of the legal relationship to which the arbitration agreement refers. Under Article 156(1) of the Restructuring Act 2015, the restructuring of a debtor's liabilities includes in particular: 1) postponement of the due dates; 2) spreading the payment into instalments; 3) reduction of

[12] Act of 15 May 2015 on Restructuring law (Journal of Laws 2015, item 978 as amended) (hereinafter referred to as "Restructuring Act 2015").

[13] "Art 2 Prawa restrukturyzacyjnego—Restrukturyzację przeprowadza się w następujących postępowaniach restrukturyzacyjnych: 1) postępowaniu o zatwierdzenie układu; 2) przyspieszonym postępowaniu układowym; 3) postępowaniu układowym; 4) postępowaniu sanacyjnym." Translation by the authors: "Article 2 of the Restructuring Act – The restructuring is carried out in the following restructuring proceedings: 1) proceedings for the approval of the restructuring arrangement with the creditors; 2) expedited arrangement proceedings; 3) standard arrangement proceedings; 4) reorganization proceedings."

the amount due; 4) conversion of receivables into shares or stocks; and 5) change, exchange, or revocation of the right securing the debt.[14]

15. **Expedited arrangement proceedings** (in Polish: "przyspieszone postępowanie układowe")—The main purpose of the proceedings is to avoid the bankruptcy of the debtor. As it should be more time efficient than the standard arrangement proceedings, the statutory deadlines are shorter, and it should take approximately 3-4 months. The proceedings enable the debtor to conclude an arrangement in a simplified mode. Under Article 257 of the Restructuring Act 2015, the opening of the proceedings does not preclude the creditor from initiating arbitration proceedings in order to pursue claims that will be later included in the schedule of claims.[15] However, if the debtor wishes to waive their claim, conclude a settlement, or assert certain factual circumstances relevant to the case, such an action requires a court supervisor's[16] consent or may risk being deemed null and void.[17]

16. **Standard arrangement proceedings** (in Polish: "postępowanie układowe")—The effects of opening the proceedings are similar to the expedited arrangement proceedings. If standard arrangement proceedings have been opened, arbitral proceedings can be continued and

[14] "Art 156(1) Prawa restrukturyzacyjnego—Restrukturyzacja zobowiązań dłużnika obejmuje w szczególności: 1) odroczenie terminu wykonania; 2) rozłożenie spłaty na raty; 3) zmniejszenie wysokości; 4) konwersję wierzytelności na udziały lub akcje; 5) zmianę, zamianę lub uchylenie prawa zabezpieczającego określoną wierzytelność." Translation by the authors: "Article 156 (1) of the Restructuring Act – The restructuring of the debtor's liabilities includes in particular: 1) postponement of the due date; 2) division of the repayment into instalments; 3) reduction of the amount due; 4) conversion of the debt into shares; 5) change, conversion or revocation of the right which secures the debt."

[15] "Art 257 Prawa restrukturyzacyjnego—Otwarcie przyspieszonego postępowania układowego nie wyłącza możliwości wszczęcia przez wierzyciela postępowań sądowych, administracyjnych, sądowoadministracyjnych i przed sądami polubownymi w celu dochodzenia wierzytelności podlegających umieszczeniu w spisie wierzytelności." Translation by the authors: "Article 257 of the Restructuring Act – The opening of expedited arrangement proceedings does not exclude the possibility for the creditor to initiate court, administrative, court administrative and arbitration proceedings in order to collect the receivables to be included in the list of receivables."

[16] "Art 239(1) Prawa restrukturyzacyjnego—Sąd może z urzędu uchylić zarząd własny dłużnika i ustanowić zarządcę, jeżeli: 1) dłużnik, chociażby nieumyślnie, naruszył prawo w zakresie sprawowania zarządu, czego skutkiem było pokrzywdzenie wierzycieli lub możliwość takiego pokrzywdzenia w przyszłości; 2) oczywiste jest, że sposób sprawowania zarządu nie daje gwarancji wykonania układu lub dla dłużnika ustanowiono kuratora na podstawie art 68 ust. 1; 3) dłużnik nie wykonuje poleceń sędziego-komisarza lub nadzorcy sądowego, w szczególności nie złożył w wyznaczonym przez sędziego-komisarza terminie propozycji układowych zgodnych z prawem." Translation by the authors: "Article 239 (1) of the Restructuring Law 2015 provides that the court may appoint a court supervisor over debtor's assets if: 1) the debtor, even if unintentionally, has violated the law in the scope of management, which resulted in harming the creditors or the possibility of such harm in the future has arisen; 2) it is obvious that the manner of management does not guarantee the execution of the arrangement or a legal guardian has been appointed for the debtor; 3) the debtor does not carry out the instructions of the judge-commissioner or the court supervisor, in particular, he did not submit, within the time limit set by the judge-commissioner, any legal arrangement proposals."

[17] "Art 258 in fine Prawa restrukturyzacyjnego—W sprawach tych uznanie roszczenia, zrzeczenie się roszczenia, zawarcie ugody lub przyznanie okoliczności istotnych dla sprawy przez dłużnika bez zgody nadzorcy sądowego nie wywiera skutków prawnych." Translation by the authors: "Article 258 in fine of the Restructuring Act – In these cases, recognition of the claim, waiver of the claim, conclusion of a settlement or admission of circumstances relevant to the case by the debtor without the consent of the court supervisor shall have no legal effects."

initiated against the debtor freely. However, under Article 276 of the Restructuring Act 2015—unlike the expedited arrangement proceedings—if the claimant could have registered its claim with the court supervisor, the claimant bears all the costs of the proceedings irrespective of the outcome.[18] Additionally, under Articles 277(1) and (3) of the Restructuring Act 2015, the appointed court supervisor shall join the proceedings alongside the debtor and have the rights of the party. In line with the expedited arrangement proceedings, any waiver of claims, conclusion of settlements, or assertion of certain factual circumstances relevant to the case by the debtor requires the court supervisor's consent or may risk being deemed null and void.[19]

17. **Reorganization proceedings** (in Polish: "postępowanie sanacyjne")—The purpose of the proceedings is to avoid the bankruptcy of the debtor by concluding an arrangement with the creditors but also by introducing certain reorganization measures. Among the restructuring proceedings, the reorganization proceedings provide the most complete protection for the debtor against enforcement; however, it is connected with taking away the debtor's right to manage its estate. At the opening of the proceedings, the court appoints an administrator that manages the debtor's estate. The opening of reorganization proceedings does not prevent the commencement and conduct of arbitral proceedings,[20] so long as they are conducted not against or by the debtor but only against or by the administrator.[21] Therefore, if the proceedings were initiated before the reorganization proceedings were opened, the arbitral tribunal shall suspend the proceedings and order the administrator to join them.[22] Moreover, the costs of the arbitral proceedings are borne by the claimant.[23]

[18] "Art 276 Prawa restrukturyzacyjnego—Otwarcie postępowania układowego nie wyłącza możliwości wszczęcia przez wierzyciela postępowań sądowych, administracyjnych, sądowoadministracyjnych i przed sądami polubownymi w celu dochodzenia wierzytelności podlegających umieszczeniu w spisie wierzytelności. Koszty postępowania obciążają wszczynającego postępowanie, jeżeli nie było przeszkód do umieszczenia wierzytelności w całości w spisie wierzytelności." Translation by the authors: "Art. 276 of the Restructuring Act - The opening of standard arrangement proceedings does not preclude the creditor from initiating judicial, administrative, court administrative and arbitration proceedings in order to recover the debts to be included in the debt list. The costs of the proceedings shall be charged to the person initiating the proceedings if there were no obstacles to the inclusion of the receivables in full in the list of receivables."
[19] ibid, art 277(4).
[20] ibid, art 310.
[21] ibid, art 311(1).
[22] Marek Porzycki, Restructuring and bankruptcy of a party to arbitration proceedings [*Restrukturyzacja i upadłość strony postępowania arbitrażowego*] in: Andrzej Szumański (ed), *Commercial Law System*, vol 8: *Commercial Arbitration* (System Prawa Handlowego. Tom. 8. Arbitraż handlowy) (C. H. Beck 205), pp 256-260.
[23] Restructuring Act 2015, art 310: "Art 310 Prawa restrukturyzacyjnego—Otwarcie postępowania sanacyjnego nie wyłącza możliwości wszczęcia przez wierzyciela postępowań sądowych, administracyjnych, sądowoadministracyjnych i przed sądami polubownymi w celu dochodzenia wierzytelności podlegających umieszczeniu w spisie wierzytelności. Koszty postępowania obciążają wszczynającego postępowanie, jeżeli nie było przeszkód do umieszczenia wierzytelności w całości w spisie wierzytelności." Translation by the authors: "Art. 310 of the Restructuring Act – The opening of the reorganization proceedings does not exclude the possibility for the creditor to initiate court, administrative, court administrative and arbitration proceedings in order to recover the claims to be included in the list of debts. The costs of the proceedings shall be charged to the person initiating the proceedings if there were no obstacles to the inclusion of the receivables in full in the list of debts."

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?

18. Yes. As Polish law provides for the concentration of disputes in bankruptcy proceedings (see Question 2) and the obligation to register one's claim with the bankruptcy receiver, it is not permissible to initiate arbitral proceedings against the debtor if the credit is subject to the registration of claims. If the claim was finally refused, the creditor may then commence arbitral proceedings, but only after the conclusion or termination of the bankruptcy proceedings if the debtor was not liquidated.[24] However, the scenario varies if the arbitral proceedings were already pending before the declaration of bankruptcy, in which case they are suspended ex officio.[25] They may be resumed only with the bankruptcy receiver's participation (eg if the debtor was the claimant) and if they relate to the debtor's assets only after a final refusal of claim in bankruptcy proceedings but without the need to wait for the conclusion or termination of bankruptcy proceedings (see answer to Question 9).

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

19. No. Polish bankruptcy law does not differentiate the between effects on arbitration in voluntary and compulsory bankruptcy proceedings.

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

20. If the arbitral tribunal is seated in another EU Member State (excluding Denmark), the effects of insolvency proceedings on pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which the arbitral tribunal has its seat. Under Article 18 of the EU Insolvency Regulation 2015/848, the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat (see Question 32). Pursuant to Article 7 of the EU

[24] "Art 263 Prawa upadłościowego Odmowa uznania wierzytelności według przepisów niniejszego działu nie stanowi przeszkody do jej dochodzenia we właściwym trybie. Z uwzględnieniem art 145 ust. 1 dochodzenie wierzytelności, której odmówiono uznania, jest możliwe dopiero po umorzeniu lub zakończeniu postępowania upadłościowego. Translation by the authors: "Bankruptcy Act 2003, art 263: The refusal to recognize a claim in accordance with the provisions of this section shall not prevent its proper enforcement. With respect to art 145 sec. 1, the recovery of a claim that has been refused recognition shall be possible only after the discontinuance or completion of bankruptcy proceedings."

[25] ibid, art 147.

Insolvency Regulation,[26] Polish law would govern any attempt to commence arbitration proceedings against the debtor in any EU Member State (excluding Denmark) after the opening of the insolvency. Therefore, these arbitrations would be subject to the mandatory concentration of disputes concerning the insolvent debtor before the bankruptcy court.

21. However, if arbitration is seated outside EU (or in Denmark) against a party against which the bankruptcy proceedings were opened in Poland, the rules applied by the arbitration tribunal and the law applicable to the legal relationship subject to the proceedings will also be decisive on the issue of the effects of opening of bankruptcy proceedings on the arbitration proceedings. Polish bankruptcy law does not have extraterritorial reach in this regard. However, if enforcement proceedings are initiated in Poland, such arbitral award will be subject to the state court's evaluation on the basis of the provisions regulating recognition and enforcement of the arbitral award. As Polish law is a Model Law country, in particular, the state court will evaluate whether the award is contrary to the public policy.[27]

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.)?

22. The effects become operative the moment the debtor is declared bankrupt by the bankruptcy court.[28] The effects of the declaration of bankruptcy are binding retroactively on the date of issuance of the first-instance court's declaration of bankruptcy from 0:00 a.m. (or on the date of opening of restructuring proceedings).[29] From this moment, the declaration of bankruptcy is effective and enforceable. Under Article 27(4) of the Bankruptcy Act 2003, court orders issued in the proceedings to declare bankruptcy shall be entered in the Central Register of Bankruptcy and Restructuring (in Polish: "Centralny Rejestr Upadłości I Restrukturyzacji") together with information on the date and manner of submitting an appeal; the orders and other documents included in the Register are available to the participants of the proceedings.[30] As the work on developing the Register is still ongoing, declarations of

[26] EU Insolvency Regulation 2015/848, art 7(1): "Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the 'State of the opening of proceedings')."
[27] See Marek Porzycki, Restructuring and bankruptcy of a party to arbitration proceedings [*Restrukturyzacja i upadłość strony postępowania arbitrażowego*] in: Andrzej Szumański (ed), *Commercial Law System*, vol 8: *Commercial Arbitration* (System Prawa Handlowego. Tom. 8. Arbitraż handlowy) (C. H. Beck 2005), ch 5, p. 272.
[28] Paweł Janda (ed), *Bankruptcy act. Commentary* [Prawo upadłościowe. Komentarz] (Wolter Kluwer 2020).
[29] See SC, Judgement, 18 June 2004, case ref. no. II CK 364/03, LEX nr 108536.
[30] "Art 27(4) Prawa upadłościowego—Postanowienia oraz zarządzenia wydane w postępowaniu w przedmiocie ogłoszenia upadłości zamieszcza się w Centralnym Rejestrze Restrukturyzacji i Upadłości, o którym mowa w art 5 ustawy z dnia 15 maja 2015 r. —Prawo restrukturyzacyjne (Dz. U. z 2020 r. poz. 814), zwanym dalej "Rejestrem", wraz z informacją o terminie i sposobie wniesienia środka zaskarżenia. Postanowienia, zarządzenia i inne dokumenty zamieszczone w Rejestrze są dostępne dla uczestników postępowania." Translation by the authors: "Art. 27 (4) of the Bankruptcy Act – The decisions and orders issued in the proceedings to declare bankruptcy shall be entered in the Central Register of Restructuring and Bankruptcy referred to in Article 5 of

bankruptcy are published in the Court and Commercial Gazette (in Polish: "Monitor Sądowy i Gospodarczy"), which is the Polish general official journal.

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?

23. No. As Polish law provides for the concentration of disputes concerning the insolvent debtor before the bankruptcy court (see Question 2), the Bankruptcy Act 2003 does not permit any relief from the effects indicated in Question 1. Therefore, any pending arbitration shall be suspended ex officio, and new arbitral proceedings, as a general rule, may not be initiated. However, if the claim was registered and finally refused, the creditor may then commence arbitral proceedings but only after the conclusion or termination of the bankruptcy proceedings[31] or—if the arbitral proceedings were pending before the declaration of bankruptcy—may request they be resumed with the bankruptcy receiver's participation (see Question 9).

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?

24. No. Generally speaking, the admissibility of anti-suit injunctions (or anti-arbitration injunctions) is still disputed in Poland, as there is no express provision of law that would allow it.[32] In order to secure the proceedings, the bankruptcy court may, upon request or ex officio, secure the debtor's assets. However, this cannot be done by ordering to stop the arbitration proceedings (and the same applies in restructuring proceedings). The bankruptcy court usually secures the estate by appointing an interim temporary court supervisor[33] or by other means, if there is a concern that the debtor will conceal its assets or otherwise act to the

the Act of 15 May 2015. - Restructuring Law, hereinafter referred to as the "Register", together with information on the date and manner of lodging an appeal. The decisions, orders and other documents included in the Register are available to the participants of the proceedings."

[31] ibid, art 263.

[32] Dominika Szafran, "Anti-suit injunctions in the light of Polish and European Procedural Law" (Anti-suit injunctions w świetle polskiego oraz europejskiego prawa procesowego) [2017] Forum Prawnicze No 5/43/2017.

[33] Bankruptcy Act 2003, art 38.

detriment of the creditors, and if the debtor does not follow the temporary court supervisor's instructions.[34]

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?

25. Yes. As a general rule, the bankruptcy receiver can terminate any agreement, both reciprocal and other than reciprocal, with the consent of the judge-commissioner.[35] Corresponding regulation may be found in Article 298 of the Restructuring Act 2015. The regime when it comes to reciprocal agreements is a bit different; ie, if, on the date of declaration of bankruptcy, the obligations under the reciprocal agreement have not been performed in whole by any party, the bankruptcy receiver may, with the consent of the judge-commissioner, both perform the debtor's obligations and require the other party to perform, or may terminate the agreement.[36] These provisions apply to any agreement, including those that contain an arbitration agreement.

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?

26. As a general rule, the arbitration agreement contained in a terminated agreement is still in force.[37] That is because Polish law provides for the separability doctrine embodied in Article 1180(1) of the Code of Civil Procedure.[38] Therefore, if the bankruptcy receiver terminates the main agreement (see Question 6), the arbitration agreement would still be effective; however, the normal practice would be to terminate the arbitration agreement alongside the main agreement (see Question 8).

[34] ibid, art 40.
[35] ibid, art 98(1)(1c).
[36] ibid, art 98(1).
[37] Franciszek Zoll, Performance and consequences of non-performance or improper performance of obligations [Wykonanie i skutki niewykonania lub nienależytego wykonania zobowiązań] in Adam Olejniczak (ed), *System of Private Law*, vol 6:*Supplement, General provision on obligations* [System Prawa Prywatnego. Tom 6:Suplement. Prawo zobowiązań—część ogólna] (C.H. Beck 2010) ch V p. 120.
[38] Tadeusz Ereciński and Karol Weitz, "Arbitral Tribunal" (Sąd arbitrażowy) (LexisNexis 2008) ch II para 1.3.

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?

27. Yes. The bankruptcy receiver can terminate the arbitration agreement itself. The right to terminate the arbitration agreement is regulated by Article 147a of the Bankruptcy Act 2003. Under this provision, if on the day of the declaration of bankruptcy the arbitration proceedings have not been initiated with the consent of the judge-commissioner, the bankruptcy receiver may, at his own initiative, terminate the arbitration agreement if the pursuit of the claim before the arbitral tribunal would obstruct the process of liquidation of the debtor's assets, in particular if it is impossible to cover the costs of conducting the arbitration proceedings.[39] Alternatively, at the request of the other party, the bankruptcy receiver shall declare in writing within thirty days whether he terminates the arbitration agreement. Failure to submit a statement by the bankruptcy receiver within this period shall be deemed a termination of the arbitration agreement and judge-commissioner's consent is not necessary.[40] In addition, the other party may terminate the arbitration agreement if the bankruptcy receiver, despite the fact that he did not terminate the arbitration agreement, refuses to participate in the costs of proceedings before the arbitration court and judge-commissioner's consent is not necessary.[41] Upon termination, the arbitration agreement shall become invalid.[42]

28. Therefore, under Article 147a(1) Bankruptcy Act 2003, the termination of arbitration agreement is permissible only if the arbitral proceedings have not yet commenced and if the judge-commissioner has consented to it. The consent is given in the form of an order and is

[39] Bankruptcy Act 2003, art 147(a), s 1.
[40] ibid, s 2.
[41] ibid, s 3.
[42] ibid, s 4. "Art 147a Prawa upadłościowego. 1. Jeżeli w dniu ogłoszenia upadłości postępowanie przed sądem polubownym nie zostało wszczęte, za zgodą sędziego-komisarza syndyk może odstąpić od zapisu na sąd polubowny, jeżeli dochodzenie roszczenia przed sądem polubownym utrudnia likwidację masy upadłości, w szczególności gdy stan masy uniemożliwia pokrycie kosztów wszczęcia i prowadzenia postępowania przed sądem polubownym. 2. Na żądanie drugiej strony złożone w formie pisemnej syndyk w terminie trzydziestu dni oświadczy na piśmie, czy odstępuje od zapisu na sąd polubowny. Niezłożenie w tym terminie oświadczenia przez syndyka uważa się za odstąpienie od zapisu na sąd polubowny. 3. Druga strona może odstąpić od zapisu na sąd polubowny, gdy syndyk mimo tego, że nie odstąpił od zapisu na sąd polubowny, odmówi udziału w kosztach postępowania przed sądem polubownym. 4. Na skutek odstąpienia zapis na sąd polubowny traci moc." Translation by the authors: "Article 147a of the Bankruptcy Act – 1. If, on the day of declaration of bankruptcy, the proceedings before the arbitration tribunal have not been initiated, with the consent of the judge-commissioner, the bankruptcy receiver may terminate the arbitration agreement = if the pursuit of the claim before the arbitral tribunal would obstruct the process of liquidation of the debtor's assets, in particular if the state of the debtor's estate makes it impossible to cover the costs of opening and conducting the proceedings before the arbitration court. 2. At the request of the other party, the bank receiver shall declare in writing within thirty days whether he terminates the arbitration agreement. Failure to submit a statement by the bank receiver within this period shall be deemed to constitute the termination of arbitration agreement. 3. The other party may terminate the arbitration agreement if the bank receiver, despite the fact that he did not terminate the arbitration agreement, refuses to participate in the costs of proceedings before the arbitration tribunal. 4. As a result of the termination, the arbitration clause shall become invalid."

non-appealable.[43] The prerequisite of the termination is as follows: "if the pursuit of the claim before the arbitral tribunal would obstruct the process of liquidation of the debtor's assets". The term is rather vague; however, this usually means that the arbitral proceedings would be either less time-effective or more costly than court proceedings.[44]

29. The second option to terminate the arbitration agreement is conditioned upon the other party's activity. At the request of the other party to the agreement, the bankruptcy receiver shall declare in writing within thirty days whether he wishes to terminate the arbitration agreement. The time limit starts to run the moment such request is served to the bankruptcy receiver. According to Article 147a(2) of the Bankruptcy Act 2003 cited above, if the bankruptcy receiver fails to make a declaration in a timely manner, the lapse of the thirty-day time limit shall be deemed as the termination of the arbitration agreement.

30. In the third scenario the other party may terminate the arbitration agreement itself, if the bankruptcy receiver refuses to contribute to the costs of the arbitral proceedings, including the advance of costs or security for costs. The meaning of Article 147a(3) of the Bankruptcy Act 2003 is not clear as to the time when the other party can exercise this right. It seems that it is permissible before the commencement of the arbitral proceedings if the bankruptcy receiver expressly declares that he will not cover the costs of the proceedings, as well as during the proceedings if he does not bear the costs (eg, the advance on costs) imposed on him by the arbitration institution.[45] If the claim has already been awarded by an arbitral tribunal, in order to enforce the award, the claimant is obliged to register its claims with the bankruptcy receiver and cannot exercise this right (see Question 2).

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?

31. As Polish law provides for the concentration of disputes in bankruptcy proceedings and the obligation to register one's claim with the bankruptcy receiver, as a rule it is not permissible to initiate arbitral proceedings against the debtor if the credit is subject to the registration of claims. Registration of claims does not constitute a waiver of the arbitration agreement—it

[43] Dariusz Chrapoński, commentary to Art. 147in: Antoni Witosz (ed) *Bankruptcy act. Commentary* (Prawo upadłościowe. Komentarz) (Wolters Kluwer 2017).
[44] ibid.
[45] ibid.

remains effective and binding; however, for the purposes of the bankruptcy law it may not be enforced against the debtor during the course of the bankruptcy proceeding to commence new arbitral proceedings. If the claim was registered and then refused, the Bankruptcy Act 2003 provides for an appeal procedure—the creditor may object to the refusal within two weeks from the publication of the schedule of claims in the in the Court and Commercial Gazette (in Polish: "Monitor Sądowy i Gospodarczy"), and the objection will be decided by the judge-commissioner, regardless of whether the parties are bound by the arbitration agreement or not.[46]

32. The refusal of the claim in the bankruptcy proceeding does not produce *res judicata* effect,[47] and if the claim was finally refused, there are two possibilities. The creditor may then commence arbitral proceedings, but only after the conclusion or termination of the bankruptcy proceedings, as long as the debtor has not been liquidated[48]; or, if the arbitral proceedings were already pending before the declaration of bankruptcy and relate to the debtor's assets, the creditor may request that the arbitral proceedings be resumed with the bankruptcy receiver's participation.[49] The arbitral tribunal is competent to decide whether the prerequisites for the resumption of arbitral proceedings (eg stemming from the Bankruptcy Act 2003 or the applicable arbitration rules) are met. If the arbitral proceedings are resumed, they may take place simultaneously while the bankruptcy proceedings are ongoing, with the bankruptcy receiver's participation.

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)?

33. No. The procedure of avoiding the transaction concluded by the debtor is regulated by the Bankruptcy Act 2003 in Article 127 et seq. and provides that the competent authority to resolve the dispute is a state court of competent jurisdiction, regardless of whether an arbitration agreement was contained in that contract.[50] The bankruptcy receiver is the only competent entity to bring forward the claim against the debtor's counterparty.[51] Equivalent provisions may be found in the Restructuring Act 2015, although in those cases, it is the administrator bringing forward the claim before a state court.[52]

[46] Bankruptcy Act 2003, art 259.
[47] Rafał Adamus (ed), *Bankruptcy act. Commentary* (C.H. Beck 2019).
[48] Bankruptcy Act 200, art 263. See footnote no. 24.
[49] Paweł Janda (ed), *Bankruptcy act. Commentary* (Prawo upadłościowe. Komentarz) (Wolter Kluwer 2020).
[50] ibid.
[51] Bankruptcy Act 2003, art 132(1).
[52] Restructuring Act 2015, art 306.

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

34. Yes. The bankruptcy receiver can conclude new arbitration agreements provided that the creditors' committee gives its consent first.[53] If the creditors' committee has not been established, the consent is given by the judge-commissioner.[54] After the opening of restructuring proceedings, new arbitration agreements may be concluded without the consent of the creditors' committee.

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

35. No. After the creditors' arrangement in bankruptcy proceedings has been approved by the judge-commissioner, the bankruptcy proceedings are concluded.[55] Then, if the debtor was not liquidated, the new arbitral proceedings may be initiated against the debtor himself.[56] If the arbitral proceedings which were suspended ex officio referred to a claim which was registered and recognized, they may be resumed against the debtor himself with relation to the outstanding part of the claim.[57] If the debtor was ultimately liquidated as a result of the completion of bankruptcy proceedings, which is the case in most of bankruptcy proceedings, the arbitral proceedings shall be discontinued ex officio, as the debtor will have lost its judicial capacity.[58]

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?

36. The provisions of the Bankruptcy Act 2003 are mandatory. Any agreement that excludes the application of the Bankruptcy Act's provisions is null and void under Article 58(1) of the Civil Code as contrary to statutory provisions.

[53] Bankruptcy Act 2003, art 206(1).
[54] Bankruptcy Act 2003, art 213(1).
[55] Bankruptcy Act 2003, art 266d.
[56] ibid, art 367(2).
[57] See Piotr Zimmerman (ed), *Bankruptcy act. Restructuring act. Commentary* (Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz) (C.H. Beck 2020).
[58] See Paweł Janda (ed), *Bankruptcy act. Commentary* (Prawo upadłościowe. Komentarz) (Wolter Kluwer 2020).

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

37. Yes. Both the Bankruptcy Act 2003 and Restructuring Act 2015 are mandatory, and thus, they are binding on the arbitrators seated in Poland. Proceeding with arbitration, despite the fact that bankruptcy proceedings have been opened against one of the parties with its registered seat in Poland, may later lead to either the non-enforcement or setting aside of the arbitral award. If the debtor is declared bankrupt, the debtor formally no longer has the locus standi (procedural capacity) to participate in the arbitral proceedings—the proceedings may only be conducted with the insolvency receiver's participation (see Question 16). Therefore, if the bankruptcy receiver had not joined the proceedings, and they were conducted against the debtor (who does not have the locus standi), the award could be in violation of Article 1206(1)(1) of the Code of Civil Procedure 1964[59] which corresponds with Article V(1)(a) New York Convention.[60]

38. In the famous *Elektrim v. Vivendi* case,[61] however, the Polish Appellate Court in Warsaw did enforce an arbitral award even though the Bankruptcy Act 2003 (in the version before the amendment as cited in Question 1) provided for the termination of arbitral proceedings and invalidity of arbitration agreement by the operation of the law. The Court stated that "incapacity" referred to in Article V(1)(a) New York Convention applies only if it occurs at the time the arbitration agreement was concluded rather than any subsequent loss of capacity to act in pending arbitration proceedings. Additionally, with respect to Article 18 of the EU Insolvency Regulation 2015/848 (previously Article 15), which regulates the applicable law as cited in Question 3, the Court found that the English law (*lex arbitri*) applies (not Polish—*lex concursus*) to the question of the effect of Elektrim's bankruptcy on the proceedings, and as a result, the above-mentioned Bankruptcy Act 2003 provision was not binding. In turn, the Swiss Court while dealing with another arbitration between same two parties concluded that Polish law did apply and the arbitral proceedings were correctly discontinued.

[59] Code of Civil Procedure 1964, art 1206(1)(1): "Art. 1206 § 1 pkt 1 Kodeksu cywilnego: Strona może w drodze skargi żądać uchylenia wyroku sądu polubownego, jeżeli: 1) brak było zapisu na sąd polubowny, zapis na sąd polubowny jest nieważny, bezskuteczny albo utracił moc według prawa dla niego właściwego;". Translation by the authors: "Art. 1206 (1)(1) – A party may, by way of an action, demand that the judgment of the arbitration court be set aside if: 1) there was no arbitration clause, the arbitration clause is null and void, or is no longer valid under the law applicable to it."

[60] Przemysław Feliga, in: Andrzej Szumański (ed), *Commercial Law System*, vol 8: *Commercial Arbitration* (System Prawa Handlowego. Tom. 8. Arbitraż handlowy) (C. H. Beck 2005) ch 24 para 95.

[61] See CA Warsaw, Judgement, 16 Nov 2009, I ACz 1883/09, unpublished.

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?

39. No. If Polish law is applicable (eg on the basis of Article 7(1) of the EU Insolvency Regulation 2015/848), the provisions of the Bankruptcy Act 2003 that regulate the effects on arbitration are applicable.

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?]

40. Under the Bankruptcy Act 2003, the moment the debtor is declared bankrupt, the debtor no longer has the locus standi (procedural capacity) to be a party to the legal proceedings and does not maintain any managerial powers and capacity to dispose of assets. The bankruptcy receiver takes part in the arbitration exclusively.

41. Once the debtor has been declared bankrupt, any court proceedings (including arbitral proceedings) relating to the debtor's estate may take place only by and only against the bankruptcy receiver.[62] These proceedings are conducted by the bankruptcy receiver in their own name for the debtor's account.[63] Thus, only the bankruptcy receiver is formally a party to the proceedings (not as the debtor's representative).[64] However, the lack of locus standi does not amount to the lack of the debtor's legal capacity. The debtor is still recognized as a party with regard to substantive law; ie, it is the debtor who is subject to any legal relationship from which the dispute has arisen. The bankruptcy receiver conducts

[62] "Art 144(1) Prawa upadłościowego Po ogłoszeniu upadłości postępowania sądowe, administracyjne lub sądowoadministracyjne dotyczące masy upadłości mogą być wszczęte i prowadzone wyłącznie przez syndyka albo przeciwko niemu." Translation by the authors: "Bankruptcy Act 2003, art 144(1): After the declaration of bankruptcy, judicial, administrative or court-administrative proceedings concerning the bankruptcy estate may be initiated and conducted only by or against the bankruptcy receiver."

[63] ibid, art 160(1): "Prawa upadłościowego W sprawach dotyczących masy upadłości syndyk dokonuje czynności w imieniu własnym na rachunek upadłego". Translation by the authors: "In cases concerning the bankruptcy estate, the bank receiver shall act in his own name in cases concerning the bankruptcy estate, the bankruptcy receiver shall act in his own name on behalf of the bankrupt."

[64] SC, Judgement, 16 January 2009, case ref. no. III CSK 244/08, LEX nr 523687.

proceedings for the benefit of the debtor; any compensation is awarded directly to or from the debtor.[65]

42. If either expedited or standard arrangement proceedings (or reorganization) proceedings were opened, the court supervision (or an administrator) shall join the proceedings alongside the debtor (see Question 3(d)). After the appointment of a court supervisor, the debtor may perform the activities of ordinary management; however, actions exceeding the scope of ordinary management require either the consent of the court supervisor or of the creditors' committee.[66] With the opening of the reorganization proceedings, the debtor does not lose either its legal capacity or its locus standi; however, making use of them remains severely restricted.[67] The administrator in reorganization proceedings acts in its own name for the debtor's account, and it would be the entity acting in any arbitration which relates to the reorganization estate.[68]

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?

43. Generally, the opening of bankruptcy or restructuring proceedings does not waive the confidentiality obligation that may apply in arbitration. It is, however, customary that most important information about the conduct and outcome of arbitrations is included in periodic reports, which are filed by the bankruptcy receiver, court supervisor, or administrator with the judge-commissioner and are available to creditors and/or are provided by the bankruptcy receiver, court supervisor, or administrator in explanations responding to questions of the creditors' committee.

44. Creditors do not acquire a right to appear in the arbitration as parties interested in its outcome.

[65] CA, Kraków, Judgement, 7 December 2017, case ref. no. I ACz 2098/17, LEX nr 2477369.
[66] Restructuring Act 2015, art 39(1).
[67] Dariusz Kwiatkowski and Robert Kosmal, *Restructuring law. Commentary* (Prawo restrukturyzacyjne. Komentarz)(Wolters Kluwer 2020).
[68] Restructuring Act 2015, art 53(1). See Patryk Filipiak, in Patryk Filipiak and Anna Hrycaj (eds), *Restructuring law. Commentary* (Prawo restrukturyzacyjne. Komentarz) (Wolters Kluwer 2020).

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

45. As a result of the opening of bankruptcy proceedings, the term "w upadłości" ([English: in bankruptcy) is added to the business name.[69] If restructuring proceedings are opened, the term "w restrukturyzacji" (English: in restructuring) is added.[70]

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?

46. In bankruptcy proceedings, the receiver must obtain the creditors' committee's approval of the settlement.[71] If a creditors' committee has not been established, approval is to be granted by the judge-commissioner.[72] Approval is not required only if a settlement must be concluded immediately and concerns an amount not higher than PLN 10,000 (approx. USD 2,700).[73] The conclusion of a settlement without the required approval renders it invalid .[74]

47. In proceedings for approval of the arrangement—see paragraph 12—the debtor is generally free to reach a settlement. Only in the judicial phase of these proceedings, in the period between the decision approving the arrangement and the date when it becomes final and non-appealable, does the conclusion of the settlement which exceeds the scope of ordinary

[69] Bankruptcy Act 2003, art 60^1: "Following the declaration of bankruptcy, the entrepreneur shall use their current legal business name accompanied by: <<in bankruptcy>>." Translation by the authors. Original: "Po ogłoszeniu upadłości przedsiębiorca występuje w obrocie pod dotychczasową firmą z dodaniem oznaczenia <<w upadłości>>."

[70] Restructuring Act 2015, art 66(2): "Following the court's decision on the opening of restructuring proceedings, the entrepreneur shall conduct their activity under the existing business name with the additional designation 'in restructuring'." Translation by the authors. Original: "Po wydaniu przez sąd postanowienia o otwarciu postępowania restrukturyzacyjnego przedsiębiorca występuje w obrocie pod dotychczasową firmą z dodaniem oznaczenia <<w restrukturyzacji>>."

[71] Bankruptcy Act 2003, art 206(1)(6): "The following actions require the consent of the creditors' committee, otherwise being null and void: . . . the recognition, waiver or settlement concerning disputable claims, and referring a dispute to an arbitration court." Translation by the authors. Original: "Zezwolenia rady wierzycieli pod rygorem nieważności wymagają następujące czynności: . . . uznanie, zrzeczenie się i zawarcie ugody co do roszczeń spornych oraz poddanie sporu rozstrzygnięciu sądu polubownego."

[72] ibid, art 213(1): "If no creditors' committee is appointed, the actions reserved to a creditors' committee are taken by the judge-commissioner." Translation by the authors. Original: "Jeżeli rada wierzycieli nie została ustanowiona, czynności zastrzeżone dla rady wierzycieli podejmuje sędzia-komisarz."

[73] ibid, art 206(2): "If an action as referred to in paragraph 1 or 1^1 is urgent and concerns a value not exceeding PLN 10,000, the receiver, court supervisor or administrator may take that action without the committee's consent." Translation by the authors. Original: "Jeżeli czynność, o której mowa w ust. 1 i 1^1, musi być dokonana niezwłocznie i dotyczy wartości nieprzewyższającej dziesięciu tysięcy złotych, syndyk, nadzorca sądowy albo zarządca może ją wykonać bez zezwolenia rady."

[74] ibid, art 206(1): "The following actions require the consent of the creditors' committee, otherwise being null and void: . . . ." Translation by the authors. Original: "Zezwolenia rady wierzycieli pod rygorem nieważności wymagają następujące czynności: . . . ."

business require the consent of the court supervisor—otherwise it is invalid[75]. *A contrario,* settlements concluded within the course of ordinary business do not require the court supervisor's consent.

48. That said, the Act of 19 June 2020 on Supplementary Payment to Bank Credits Extended to Entrepreneurs Affected by Effects of COVID-19 and Simplified Proceeding for Approval of the Composition ("Special Act 2020"),[76] enacted as an element of protective shield regulations counteracting effects of COVID-19 pandemic, temporarily modified rules applicable to the proceeding for approval of compositions. The Special Act 2020 applies to proceedings opened by 31 June 2021 (the date of publication of an announcement about the commencement of proceedings in the official gazette—MSiG—is tantamount to the opening of proceedings).

49. Major modifications occur in the acceleration of protection against creditors—protection starts applying as of the date of the opening of proceedings—at the cost of earlier limitation of the debtor's right to manage its business. Hence, under the Special Act 2020, the requirement to seek and obtain the court supervisor's consent for the conclusion of a settlement exceeding the scope of ordinary business applies from the date of the opening of proceedings, ie, before the judicial phase of the proceedings commences.

50. In expedited arrangement proceedings and arrangement proceedings, a debtor-in-possession must not reach a settlement without the court supervisor's consent.[77] Without consent, the settlement does not produce any legal effects.

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[75] Restructuring Act 2015, art 224(1): "As of the date of issuing the decision on the approval of the arrangement to the date of its validation, the arrangement supervisor shall exercise the powers of a court supervisor." Translation by the authors. Original: "Od dnia wydania postanowienia w przedmiocie zatwierdzenia układu do dnia jego uprawomocnienia nadzorca układu wykonuje uprawnienia nadzorcy sądowego."ibid, art 39(1): "After the appointment of the court supervisor, the debtor may carry out acts of ordinary business. The consent of the court supervisor to perform acts exceeding the scope of ordinary business is required, unless the law provides for the authorisation of the creditors' committee. The consent may also be granted after the performance of the act within thirty days from the day when it was performed. An act exceeding the ordinary business and carried out without the required consent shall be invalid." Translation by the authors. Original: "Po powołaniu nadzorcy sądowego dłużnik może dokonywać czynności zwykłego zarządu. Na dokonanie czynności przekraczających zakres zwykłego zarządu wymagana jest zgoda nadzorcy sądowego, chyba że ustawa przewiduje zezwolenie rady wierzycieli. Zgoda może zostać udzielona również po dokonaniu czynności w terminie trzydziestu dni od dnia jej dokonania. Czynność przekraczająca zakres zwykłego zarządu dokonana bez wymaganej zgody jest nieważna."

[76] Journal of Laws 2020, item 1086 as amended.

[77] Restructuring Act 2015, art 258: "The debtor shall immediately inform the court supervisor about court proceedings, administrative proceedings, court-administrative proceedings and proceedings before arbitration courts concerning the arrangement estate, conducted for and/or against the debtor. In those cases, the admission of claim, waiver of claim, concluding a settlement and/or acknowledgment of circumstances relevant to the case by the debtor without the consent of the court supervisor shall not have legal effects." Translation by the authors. Original: "Dłużnik niezwłocznie informuje nadzorcę sądowego o postępowaniach sądowych, administracyjnych, sądowoadministracyjnych i przed sądami polubownymi, dotyczących masy układowej, prowadzonych na rzecz lub przeciwko dłużnikowi. W sprawach tych uznanie roszczenia, zrzeczenie się roszczenia, zawarcie ugody lub przyznanie okoliczności istotnych dla sprawy przez dłużnika bez zgody nadzorcy sądowego nie wywiera skutków prawnych."; ibid, art 277(4): "In the proceedings referred to in section 1, the acknowledgment of a claim, the waiver of a claim, concluding a settlement and/or acknowledgement of circumstances relevant to the case by the debtor without the consent of the court supervisor shall not have legal

51. However, if self-administration was revoked by the court and the debtor-in-possession replaced by the administrator, it is the administrator who is empowered to reach a settlement.[78] Only if the judge-commissioner ordered that settlements require approval by her/him or the creditors' committee must the administrator seek approval to reach a valid settlement.[79]

52. In reorganisation proceedings, a settlement may be reached only by the administrator (Article 19(1) Restructuring Act 2015). Also in these proceedings the judge-commissioner may order that settlements require approval by her/him or the creditors committee (Article 19(1) Restructuring Act 2015).

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

53. In bankruptcy proceedings, the answer to this question depends on the nature of the claim and the type of interim measures to be adopted.

54. The general rule is that the adoption by a court of new interim measures securing claims to be satisfied from the bankruptcy estate (most notably, pre-bankruptcy claims for payment against a debtor) is inadmissible.[80] Arguably, this rule also applies to arbitration. If, notwithstanding this rule, the arbitral tribunal adopted interim measures, they could not be enforced (see Question 21).

effects." Translation by the authors. Original: "W postępowaniach, o których mowa w ust. 1, uznanie roszczenia, zrzeczenie się roszczenia, zawarcie ugody lub przyznanie okoliczności istotnych dla sprawy przez dłużnika bez zgody nadzorcy sądowego nie wywiera skutków prawnych."

[78] ibid, art 52(1): "The administrator shall immediately take over the administration of the reorganisation estate, manage it, prepare an inventory, including its estimation, and both draw up and perform the restructuring plan." Translation by the authors. Original: "Zarządca niezwłocznie obejmuje zarząd masą sanacyjną, zarządza nią, sporządza spis inwentarza wraz z oszacowaniem oraz sporządza i realizuje plan restrukturyzacyjny."; ibid, art 51(3): "The provisions of this chapter shall apply accordingly to the administrator appointed in expedited arrangement proceedings and/or arrangement proceedings." Translation by the authors. Original: "Do zarządcy powołanego w przyspieszonym postępowaniu układowym lub postępowaniu układowym przepisy niniejszego rozdziału stosuje się odpowiednio."

[79] ibid, art 19(1): "The judge-commissioner shall direct the course of restructuring proceedings, supervise the actions of the court supervisor and administrator, designate actions which the court supervisor or administrator are not permitted to perform without his permission and/or without the permission of the creditors' committee, as well as admonish them for any misconduct they have committed." Translation by the authors. Original: "Sędzia-komisarz kieruje tokiem postępowania restrukturyzacyjnego, sprawuje nadzór nad czynnościami nadzorcy sądowego i zarządcy, oznacza czynności, których wykonywanie przez nadzorcę sądowego albo zarządcę jest niedopuszczalne bez jego zezwolenia lub bez zezwolenia rady wierzycieli, jak również zwraca uwagę na popełnione przez nich uchybienia."

[80] P. Zimmerman, inP. Zimmerman (ed), *Bankruptcy act. Restructuring act. Commentary* (Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz) (C.H. Beck 2020) Commentary to Bankruptcy Act 2003, art 146 para 9; A. Jakubecki, in A. Jakubecki and F. Zedler (eds), *Bankruptcy and reorganisation act. Commentary* (Prawo upadłościowe I naprawcze. Komentarz.) (Wolters Kluwer 2010) Commentary to Bankruptcy Act 2003, art 146 para 16.

55. Arbitral tribunals may however order interim measures to secure claims which are not satisfied from the bankruptcy estate (provided that such measures are not directed against assets of the bankruptcy estate, eg, they do not impose an attachment of assets—see Question 21). For instance, it is admissible to adopt interim measures securing non-monetary claims resulting from an agreement concluded by the receiver (such as an order prohibiting the receiver from taking specified actions).

56. In the case of restructuring proceedings, arbitral tribunals may adopt interim measures against a debtor (or an administrator).[81]

57. That said, in the judicial phase of proceedings for approval of arrangements in the period between the decision approving the arrangement and the date it becomes final and non-appealable (or, under the Special Act 2020, from the date of the opening of proceedings), in expedited arrangement proceedings and arrangement proceedings, interim measures securing claims covered by the composition (for instance, unsecured claims for payment against a debtor) may not be enforced.[82] In reorganisation proceedings, this prohibition extends to all claims (including claims not covered by the composition such as, for instance, secured claims).[83]

[81] A. Hrycaj, in P. Filipiak and A. Hrycaj (eds), *Restructuring act. Commentary* (Prawo restrukturyzacyjne. Komentarz) (Wolters Kluwer 2020) Commentary to Bankruptcy Act 2003, art 146 para 16.

[82]Restructuring Act 2015, art 259(3): "Initiation of the enforcement proceedings and execution of a decision to secure a claim and/or an order to secure a claim arising from the claims covered by the arrangement by virtue of law shall be inadmissible after the opening of expedited arrangement proceedings." Translation by the authors. Original: "Wszczęcie postępowania egzekucyjnego oraz wykonanie postanowienia o zabezpieczeniu roszczenia lub zarządzenia zabezpieczenia roszczenia wynikającego z wierzytelności objętej z mocy prawa układem jest niedopuszczalne po dniu otwarcia przyspieszonego postępowania układowego."; ibid, art 224(2): "As of the date of issuing the decision in relation to the approval of the arrangement to the date of its validation, the provisions of Article 259 and Article 260 shall apply accordingly." Translation by the authors. Original: "Od dnia wydania postanowienia w przedmiocie zatwierdzenia układu do dnia jego uprawomocnienia przepisy art 259 i art 260 stosuje się odpowiednio."; ibid, art 278(3): "The provisions of Article 259 sections 2-4 shall apply accordingly." Translation by the authors. Original: "Przepisy art 259 ust. 2-4 stosuje się odpowiednio."

[83] ibid, art 312(4): "Directing the enforcement against the debtor's property that enters into the reorganisation estate and the performance of the decision to secure claims and/or the order to secure the claim on the property shall be inadmissible after the opening of reorganisation proceedings." Translation by the authors. Original: "Skierowanie egzekucji do majątku dłużnika wchodzącego w skład masy sanacyjnej oraz wykonanie postanowienia o zabezpieczeniu roszczenia lub zarządzenia zabezpieczenia roszczenia na tym majątku jest niedopuszczalne po dniu otwarcia postępowania sanacyjnego."

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

58. In the case of the opening of bankruptcy proceedings, interim measures directed against assets of the bankruptcy estate may not be enforced.[84] If interim measures were already enforced (the debtor's accounts or assets were attached), they are lifted.[85]

59. For enforcement of interim measures in the case of the opening of restructuring proceedings, see Question 20.

60. In the judicial phase of proceedings for approval of the arrangement, expedited arrangement proceedings, and arrangement proceedings, if necessary for the conduct of a debtor's business, attachments of assets or bank accounts ordered as interim measures and securing claims covered by the composition (for instance, unsecured claims for payment against a debtor) may be lifted by the judge-commissioner.[86] In reorganisation proceedings, the judge-commissioner may lift all attachments made before the opening of proceedings (including those securing claims not covered by the composition).[87]

[84] Bankruptcy Act 2003, art 146(3): "After the declaration of bankruptcy, a decision to direct enforcement proceedings against the bankruptcy estate, execute a decision to secure claims or an order to establish a security on the bankrupt's assets may not be executed, except to secure maintenance claims or claims for pension benefits on account of liability for causing a disease, incapacity for work, disability, or death and claims for the replacement of rights granted under a life estate agreement with life annuity." Translation by the authors. Original: "Po dniu ogłoszenia upadłości niedopuszczalne jest skierowanie egzekucji do majątku wchodzącego w skład masy upadłości oraz wykonanie postanowienia o zabezpieczeniu lub zarządzenia zabezpieczenia na majątku upadłego, z wyjątkiem zabezpieczenia roszczeń alimentacyjnych oraz roszczeń o rentę z tytułu odszkodowania za wywołanie choroby, niezdolności do pracy, kalectwa lub śmierci oraz o zamianę uprawnień objętych treścią prawa dożywocia na dożywotnią rentę."

[85] P. Zimmerman, in P. Zimmerman (ed), *Bankruptcy act. Restructuring act. Commentary* (Prawo upadłościowe. Prawo restrukturyzacyjne. Komentarz) (C.H. Beck 2020) Commentary to Bankruptcy Act 2003, art 146 para 8.

[86] Restructuring Act 2015, art 259(2): "The judge-commissioner, upon the request of the debtor and/or the court supervisor, may revoke a seizure made prior to the opening of the expedited arrangement proceedings in the enforcement proceedings and/or proceedings to secure a claim with respect to the claims subject to the arrangement by virtue of law, if it is necessary for running the business." Translation by the authors. Original: "Sędzia-komisarz na wniosek dłużnika lub nadzorcy sądowego może uchylić zajęcie dokonane przed dniem otwarcia przyspieszonego postępowania układowego w postępowaniu egzekucyjnym lub zabezpieczającym dotyczącym wierzytelności objętej z mocy prawa układem, jeżeli jest to konieczne dla dalszego prowadzenia przedsiębiorstwa."

[87] ibid, art 312(2): "The judge-commissioner, upon the request of the debtor and/or the administrator, may revoke a seizure performed before the opening of reorganisation proceedings in enforcement proceedings and/or proceedings to secure claims directed against the debtor's estate that enters into the reorganisation estate, if this is necessary for running the business." Translation by the authors. Original: "Sędzia-komisarz na wniosek dłużnika lub zarządcy może uchylić zajęcie dokonane przed dniem otwarcia postępowania sanacyjnego w postępowaniu egzekucyjnym lub zabezpieczającym skierowanym do majątku dłużnika wchodzącego w skład masy sanacyjnej, jeżeli jest to konieczne dla dalszego prowadzenia przedsiębiorstwa."

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?

61. Technically, the opening of bankruptcy or restructuring does not affect a debtor's capacity to settle disputes in arbitration, which is an emanation of legal capacity and capacity to act (see Question 16).

62. However, this capacity may only be exercised by a receiver in bankruptcy proceedings and by an administrator in restructuring proceedings (if appointed). They act in their own name but on the account of a debtor and are bestowed with the right to initiate new arbitrations and replace the debtor in pending proceedings .[88] (See Question 16.)

63. If an administrator was not appointed in expedited arrangement proceedings or in arrangement proceedings, the debtor-in-possession may initiate new arbitrations and continues to be a party to pending ones. Certain actions (eg, settlements, waivers, or acknowledgments of claims) require the court supervisor's consent (see Questions 3 and 19).

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?

64. In the case of bankruptcy proceedings, enforcement proceedings directed against assets of the bankruptcy estate initiated before the bankruptcy declaration are automatically (by operation of law) stayed. They are automatically (by operation of law) discontinued when the decision declaring bankruptcy becomes final. The initiation of new enforcement proceedings against assets of the bankruptcy estate is inadmissible.[89]

[88] Bankruptcy Act 2003, arts 144(1) and (2): "1. Upon the declaration of bankruptcy, court, administrative, or administrative court proceedings involving the bankruptcy estate may only be initiated and conducted by or against the receiver. 2. The receiver conducts proceedings as referred to in paragraph 1 on behalf of the bankrupt but in his own name." Translation by the authors. Original: "1. Po ogłoszeniu upadłości postępowania sądowe, administracyjne lub sądowoadministracyjne dotyczące masy upadłości mogą być wszczęte i prowadzone wyłącznie przez syndyka albo przeciwko niemu. 2. Postępowania, o których mowa w ust. 1, syndyk prowadzi na rzecz upadłego, lecz w imieniu własnym."; ibid, art 147: "The provisions of Article 174 § 1 (4) and (5) and Article 180 § 1 (5) of the Code of Civil Procedure, and Articles 144 and 145 apply accordingly to proceedings before arbitration courts." Translation by the authors. Original: "Do postępowań przed sądami polubownymi przepisy art 174 § 1 pkt 4 i 5 oraz art 180 § 1 pkt 5 Kodeksu postępowania cywilnego, a także art 144 i art 145 stosuje się odpowiednio."; Restructuring Act 2015, art 311(1): "Court proceedings, administrative proceedings, court administrative proceedings and proceedings before arbitration courts related to the reorganisation estate may be instituted and conducted exclusively by the administrator or against him. These proceedings shall be conducted by the administrator on his own behalf for the benefit of the debtor." Translation by the authors. Original: "Postępowania sądowe, administracyjne, sądowoadministracyjne i przed sądami polubownymi dotyczące masy sanacyjnej mogą być wszczęte i prowadzone wyłącznie przez zarządcę albo przeciwko niemu. Postępowania te zarządca prowadzi w imieniu własnym na rzecz dłużnika."

[89] Bankruptcy Act of 2003, art 146: "1. Enforcement proceedings directed against the bankruptcy estate, initiated before the declaration of bankruptcy, are stayed, by virtue of law, on the day of declaration of bankruptcy. Such

65. In the judicial phase of proceedings for approval of the arrangement (or, under the Special Act 2020, from the date of the opening of the proceeding), expedited arrangement proceedings and arrangement proceedings—which are enforcement proceedings regarding claims covered by the arrangement initiated before the opening of the restructuring proceedings—are automatically (by operation of law) stayed. New enforcement proceedings regarding such claims may not be initiated.[90] Enforcement proceedings regarding claims not covered by the arrangement may be continued but, in the case of secured claims, their scope is confined to encumbered assets (eg, pledged or mortgaged).[91]

66. In reorganisation proceedings, the stay covers all enforcement proceedings directed against the debtor's assets and initiated before the opening of the former proceedings (including enforcement proceedings regarding claims not covered by the arrangement). No new enforcement proceedings may be directed against a debtor's assets.[92]

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proceedings are terminated by virtue of law after the coming into force of a bankruptcy order. Stay of administration proceedings does not preclude the transfer of ownership of immovable property, if a bid is awarded before the declaration of bankruptcy and the purchaser in enforcement proceedings pays the purchase price in due time. . . . 3. After the declaration of bankruptcy, a decision to direct enforcement proceedings against the bankruptcy estate, execute a decision to secure a claim or an order to establish a security on the bankrupt's assets may not be executed, except to secure maintenance claims or claims for pension benefits on account of liability for causing a disease, incapacity for work, disability, or death and claims for the replacement of rights granted under a life estate agreement with life annuity." Translation by the authors. Original: "1. Postępowanie egzekucyjne skierowane do majątku wchodzącego w skład masy upadłości, wszczęte przed dniem ogłoszenia upadłości, ulega zawieszeniu z mocy prawa z dniem ogłoszenia upadłości. Postępowanie to umarza się z mocy prawa po uprawomocnieniu się postanowienia o ogłoszeniu upadłości. Zawieszenie postępowania egzekucyjnego nie stoi na przeszkodzie przysądzeniu własności nieruchomości, jeżeli przybicia prawomocnie udzielono przed ogłoszeniem upadłości, a nabywca egzekucyjny wpłaci w terminie cenę nabycia. . . . 3. Po dniu ogłoszenia upadłości niedopuszczalne jest skierowanie egzekucji do majątku wchodzącego w skład masy upadłości oraz wykonanie postanowienia o zabezpieczeniu lub zarządzenia zabezpieczenia na majątku upadłego, z wyjątkiem zabezpieczenia roszczeń alimentacyjnych oraz roszczeń o rentę z tytułu odszkodowania za wywołanie choroby, niezdolności do pracy, kalectwa lub śmierci oraz o zamianę uprawnień objętych treścią prawa dożywocia na dożywotnią rentę."

[90] Restructuring Act 2015, art 259(1): "Enforcement proceedings concerning claims subject to the arrangement by virtue of law and initiated prior to the opening of the expedited arrangement proceedings shall be suspended by operation of law as of the date of opening the proceedings." Translation by the authors. Original: "Postępowanie egzekucyjne dotyczące wierzytelności objętej z mocy prawa układem, wszczęte przed dniem otwarcia przyspieszonego postępowania układowego, ulega zawieszeniu z mocy prawa z dniem otwarcia postępowania."; ibid, art 259(3); see question 20.

[91] ibid, art 260(1): "A creditor holding a claim secured on the property of the debtor by a mortgage, pledge, registered pledge, tax lien and/or maritime mortgage may, in the course of expedited arrangement proceedings, only conduct enforcement with respect to the collateral." Translation by the authors. Original: "Wierzyciel posiadający wierzytelność zabezpieczoną na mieniu dłużnika hipoteką, zastawem, zastawem rejestrowym, zastawem skarbowym lub hipoteką morską może w toku przyspieszonego postępowania układowego prowadzić egzekucję wyłącznie z przedmiotu zabezpieczenia."

[92] ibid, art 312(1): "Enforcement proceedings directed against the debtor's property entered into the reorganisation estate, initiated before the opening of reorganisation proceedings, shall be suspended by operation of law with effect as of the date of opening the proceedings." Translation by the authors. Original: "Postępowanie egzekucyjne skierowane do majątku dłużnika wchodzącego w skład masy sanacyjnej wszczęte przed dniem otwarcia postępowania sanacyjnego ulega zawieszeniu z mocy prawa z dniem otwarcia postępowania;" ibid, art 312(4); see question 20.

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?

67. A claim pursued in arbitration will have the status of disputed claim.

68. In bankruptcy proceedings, the claim may nevertheless be recognised on the list of claims—which would entitle a creditor to participate in the distribution of the funds of the bankruptcy estate—if the creditor demonstrates its existence and amount. If the claim is not recognised on the list of claims but is subsequently confirmed in a recognised arbitral award (or in an award whose enforceability was declared by a state court), the judge-commissioner shall correct the list of claims accordingly and recognize the claim.[93]

69. In restructuring proceedings, in principle, disputed claims are not included in the schedule of claims and do not entitle the disputed creditor to vote on the arrangement. If the claim was adjudicated in an arbitral award before the vote on the arrangement, a creditor may rely on the award as a document substantiating the claim and the judge-commissioner may admit such creditor to the vote.[94] If the enforceability of the award was declared by a state court, the creditor must be admitted to the vote by the judge-commissioner.[95] The enforceable arbitral award will also serve as a basis for the judge-commissioner to correct the schedule of claims and include pertinent claims.[96]

[93]Bankruptcy Act of 2003, art 262(2): "A list of claims shall be corrected in accordance with final and non-appealable rulings. Changes in the amount of a claim after a list of claims has been established are taken into account in distribution plans or in voting at a meeting of creditors." Translation by the authors. Original: "Lista wierzytelności ulega sprostowaniu stosownie do prawomocnych orzeczeń. Zmiana wysokości wierzytelności zaistniała po ustaleniu listy wierzytelności jest uwzględniana przy sporządzeniu planu podziału albo przy głosowaniu na zgromadzeniu wierzycieli."

[94] Restructuring Act 2015, art 107(3): "The judge-commissioner may, upon the request of the creditor and after hearing the debtor, admit the creditor whose claim is subject to the condition precedent and/or is disputed and has become probable, to participate in the meeting of creditors. The sum at which the vote of the creditor is calculated shall be determined by the judge-commissioner appropriately to the circumstances." Translation by the authors. Original: "Sędzia-komisarz może na wniosek wierzyciela i po wysłuchaniu dłużnika dopuścić do udziału w zgromadzeniu wierzycieli wierzyciela, którego wierzytelność jest uzależniona od warunku zawieszającego lub jest sporna i została uprawdopodobniona. Sumę, według której oblicza się głos tego wierzyciela, sędzia-komisarz oznacza stosownie do okoliczności."

[95] ibid, art 107(1): "Unless a law provides otherwise, the creditors whose claims have been entered in the approved list of claims and creditors who appear at the meeting of creditors and provide the judge-commissioner with the enforcement order which proves their claims shall have the right to vote at the meeting of creditors." Translation by the authors. Original: "Jeżeli ustawa nie stanowi inaczej, na zgromadzeniu wierzycieli prawo głosu mają wierzyciele, których wierzytelności zostały umieszczone w zatwierdzonym spisie wierzytelności, oraz wierzyciele, którzy stawią się na zgromadzeniu wierzycieli i przedłożą sędziemu-komisarzowi tytuł egzekucyjny stwierdzający ich wierzytelność."

[96] ibid, art 101(2): "The judge-commissioner shall change the list of claims pursuant to the final judgements submitted to him." Translation by the authors. Original: "Sędzia-komisarz zmienia spis wierzytelności stosownie do przedstawionych mu prawomocnych orzeczeń."

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?

70. An arbitral award is proof substantiating the existence and amount of a claim and as such may be taken into account in bankruptcy and restructuring proceedings (see Question 24).

71. In order for a domestic and/or foreign award to be given treatment equal to that of a judgment of a state court and to be binding on the judge-commissioner and the court, it must be recognised, or its enforceability must be declared by a state court .[97]

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

72. The provisions regulating the effects of the opening of bankruptcy or restructuring proceedings on arbitration (or an arbitration agreement), while mandatory, in light of case law could be considered as not constituting part of public policy.

73. The question of whether they may form part of public policy became topical after the Bankruptcy Act 2003 entered into force. It provided that arbitration agreements entered into by the debtor lost effect as a result of the opening of bankruptcy proceedings, and pending arbitrations must be discontinued.[98]

74. The nature of the aforementioned provisions was analysed by the Court of Appeal in Warsaw in two rulings in the matter of recognition of foreign arbitral awards.[99] The awards were issued in 2008 and 2009 by the LCIA arbitral tribunal after the opening of bankruptcy proceedings of one of the respondents (Elektrim S.A.). Earlier, the LCIA arbitral tribunal dismissed the motion to discontinue arbitration with respect to Elektrim S.A. filed by its administrator due to Elektrim S.A.'s bankruptcy.[100] The Court of Appeal expressly rejected the application of Article V(2)(b) of the New York Convention to these awards and the allegation that public policy did not allow recognition. The ruling rendered in the former matter (case file No. I ACz 1686/09) stated that "there are no grounds to assume that the very declaration of enforceability or recognition of the arbitral award—even if it were issued in proceedings, that pursuant to the law of the state where proceedings were conducted, could not be

[97] Code of Civil Procedure, art 1212 et seq.; New York Convention, art III.
[98] Bankruptcy Act of 2003 in the version binding until 31 December 2015, art 142 and 147: "The arbitration clause made by the bankrupt shall expire on the day of the declaration of bankruptcy, and the proceedings already in progress shall be discontinued." Translation by the authors. Original: "Zapis na sąd polubowny dokonany przez upadłego traci moc z dniem ogłoszenia upadłości, a toczące się już postępowania ulegają umorzeniu."
[99] See the rulings of the Court of Appeal in Warsaw of 18 November 2009, case ref. no. I ACZ 1686/09 and of 16 November 2009, case ref. no. I ACZ 1883/2009.
[100] See J. Syska acting as administrator of Elektrim S.A. (in bankruptcy) et al. v. Vivendi Universal S.A. (2009), Case No: 2008, Folio No 367.

continued—was inconsistent with the public policy of the Republic of Poland. Neither the said recognition nor the declaration of enforceability determines that the creditor that has obtained an award favourable to it, will be able to enforce it outside the bankruptcy proceedings that applies to all creditors".[101]

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)?

75. The principle *par conditio creditorum* is considered part of public policy from the substantive point of view. The fundamental rule that no creditor should obtain preferential treatment contrary to insolvency law (be it law regulating bankruptcy or restructuring proceedings) is recognised in case law.[102] For instance, it led to the setting aside of an award which acknowledged the validity of a transaction circumventing the prohibition of set-offs in insolvency proceedings applicable to all creditors, as it infringed public policy.[103]

76. The equal treatment of creditors from a procedural point of view prohibiting individual proceedings (eg, arbitration) outside the bankruptcy proceedings should not be viewed as part of public policy. In particular, in the context of a previously binding provision (repealed as of 31 December 2015), the continuation of foreign arbitration and rendering of an award after the opening of bankruptcy proceedings despite the statutory instruction that arbitrations must be discontinued was found as not infringing public policy (see Question 26).

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

77. No.

[101] Translation by the authors. Original: "brak jest podstaw do przyjęcia, aby samo stwierdzenie wykonalności czy uznanie orzeczenia sądu arbitrażowego, nawet wydanego w postępowaniu, które zgodnie z prawem państwa, w którym toczy się postępowanie, nie mogło być kontynuowane, było sprzeczne z porządkiem publicznym Rzeczypospolitej Polskiej. Zarówno takie uznanie czy stwierdzenie wykonalności nie przesądza bowiem, iż wierzyciel, który w takim postępowaniu uzyskał korzystne dla siebie orzeczenie, będzie mógł je zrealizować poza trybem postępowania upadłościowego, obowiązującego wszystkich wierzycieli."
[102] See the Supreme Court's judgment of 12 September 2007, case ref. no. I CSK 192/07.
[103] See the Supreme Court's judgment of 11 June 2008, case ref. no. V CSK 8/08.

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 Poland concerning the insolvent party.]

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

78. Based on Article 19(1) of the EU Insolvency Regulation 2015/848,[104] judgments opening insolvency proceedings in another EU Member State (excluding Denmark) are automatically recognised in Poland from the time the judgment becomes effective in this other Member State.

79. Judgments on the opening of insolvency proceedings issued in other countries must be recognised by a Polish court in order to become effective in Poland. To this end, a foreign administrator or a debtor-in-possession must apply for opening recognition proceedings .[105] The effects of the judgment extend to Poland as of the date of the recognition decision, not retroactively.

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?

80. Poland implemented the UNCITRAL Model Law on Cross-Border Insolvency in 2003.[106] The body of law regulating cross-border insolvency implementing the UNCITRAL Model Law is in the Bankruptcy Act 2003. These provisions apply to foreign bankruptcy proceedings as well as restructuring proceedings (subject to a separate but narrow set of provisions regarding cooperation set forth in the Restructuring Act 2015).[107]

[104] EU Insolvency Regulation 2015/848, art 19(1): "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings."

[105] Bankruptcy Act 2003, art 386(1): "Proceedings concerning the recognition of rulings to initiate foreign bankruptcy proceedings are initiated upon an application submitted by a foreign administrator or a debtor who retained administration over their assets." Translation by the authors. Original: "Postępowanie w przedmiocie uznania orzeczenia o wszczęciu zagranicznego postępowania upadłościowego wszczyna się na wniosek zarządcy zagranicznego albo dłużnika, któremu pozostawiono zarząd własny majątkiem."

[106] UNCITRAL, "Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)," accessed 9 November 2020. For the full text of this section, please click this link: https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status.

[107] P. Filipiak, in P. Filipiak and A. Hrycaj (eds), *Restructuring law. Commentary* (Prawo restrukturyzacyjne. Komentarz) (Wolters Kluwer 2020) Commentary to Restructuring Act 2015, art 338 para 4.

81. Upon recognition of the judgment opening foreign main proceedings, the effects of insolvency proceedings on arbitration are governed by Polish law[108] and will depend on whether the foreign proceedings are bankruptcy or restructuring proceedings. Polish law generally imposes a stay on the commencement or continuation of arbitrations—referred to in Article 20(1)(a) UNCITRAL Model Law—in the case of the opening of bankruptcy proceedings. As to restructuring proceedings, the effects of their opening on arbitration are defined differently. Namely, the commencement of new arbitrations is not stayed, and the impact on pending arbitrations essentially depends on the type of restructuring proceedings opened (see Question 3).

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

82. As a rule, the impact of opening main insolvency proceedings outside of Poland on arbitration concerning an asset or a right which forms part of a debtor's estate pending in Poland at the time of the opening of insolvency proceeding abroad is governed by Polish law.

83. This rule stems from Article 18 in conjunction with Article 7(2)(f) of the EU Insolvency Regulation 2015/848[109] regulating effects of insolvency proceedings opened in EU Member States (excluding Denmark) and Article 397(1) of the Bankruptcy Act 2003,[110] which applies to insolvency proceedings opened in other counties (provided that judgments opening such proceedings were recognised by a Polish court) (see Question 30).

[108] Bankruptcy Act 2003, art 397(1): "Upon the day of the recognition of a ruling to initiate foreign bankruptcy proceedings, the consequences resulting from the initiation of foreign bankruptcy proceedings for court, enforcement, administrative, administrative court, or arbitration court proceedings conducted in the Republic of Poland shall be governed by Polish law taking into account whether foreign bankruptcy proceedings involved liquidation or debt restructuring, the extent to which the debtor has been deprived of the right to administer their assets, and the extent to which claims have been covered by an arrangement. The assessment of the possibility of initiating proceedings after the recognition of a ruling to initiate foreign bankruptcy proceedings shall also be governed by Polish law." Translation by the authors. Original: "Z dniem uznania orzeczenia o wszczęciu zagranicznego postępowania upadłościowego do skutków wszczęcia zagranicznego postępowania upadłościowego dla prowadzonych w Rzeczypospolitej Polskiej postępowań sądowych, egzekucyjnych, administracyjnych, sądowoadministracyjnych lub przed sądami polubownymi stosuje się prawo polskie z uwzględnieniem, likwidacyjnego lub restrukturyzacyjnego charakteru zagranicznego postępowania upadłościowego, zakresu pozbawienia dłużnika prawa zarządu majątkiem oraz zakresu objęcia wierzytelności układem. Prawo polskie stosuje się również do oceny możliwości wszczęcia postępowania po uznaniu orzeczenia o wszczęciu zagranicznego postępowania upadłościowego."

[109] EU Insolvency Regulation 2015/848, art 18: "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat."; ibid, art 7(2)(f): "The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following: . . . (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits".

[110] Bankruptcy Act 2003, art 397(1); see question 30.

84. If the arbitration in Poland was not commenced at the time of the opening of an insolvency proceeding in another EU Member State (excluding Denmark), then the effects of insolvency proceedings on the subsequent arbitration will be governed by the law of this other EU Member State (*lex fori concursus*).[111] For insolvency proceedings opened in non-EU countries, upon recognition of the judgment opening the foreign main proceedings, Polish law will apply[112] (see Question 30).

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?

85. Yes.

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

86. Yes.

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

87. Yes. Assuming that the foreign judgment on the opening of insolvency proceedings was recognised, the domestic arbitral award disregarding effects of insolvency may be set aside by a Polish court on grounds set forth in Article 1206(1) and (2) of the Code of Civil Procedure.

88. For instance, the failure to give effect to foreign insolvency law regulating the satisfaction of creditors may lead to the infringement of public policy.[113] If under foreign insolvency law, an arbitration clause expired as a result of the opening of insolvency proceedings before arbitration commenced, the award may be set aside due to the expiry of the clause.[114]

[111] EU Insolvency Regulation 2015/848, art 7(2)(f), *in principio*.
[112] Bankruptcy Act 2003, art 397(1).
[113] Code of Civil Procedure, art 1206(2)(2): "Moreover, an arbitral award shall be set aside if the court determines that: . . . 2) an arbitral award is contrary to the basic principles of the legal order of the Republic of Poland (the public order clause)." Translation by the authors. Original: "Uchylenie wyroku sądu polubownego następuje także wtedy, gdy sąd stwierdził, że: . . . 2) wyrok sądu polubownego jest sprzeczny z podstawowymi zasadami porządku prawnego Rzeczypospolitej Polskiej (klauzula porządku publicznego)."
[114] Code of Civil Procedure, art 1206(1)(1): "A party may file a motion to set aside an arbitral award if: . . . 1) there was no arbitration clause, or an arbitration clause is void, invalid or has expired according to relevant law." Translation by the authors. Original: "Strona może w drodze skargi żądać uchylenia wyroku sądu polubownego, jeżeli: . . . 1) brak było zapisu na sąd polubowny, zapis na sąd polubowny jest nieważny, bezskuteczny albo utracił moc według prawa dla niego właściwego."

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

89. There are no other provisions of law regulating the effect of foreign insolvency on arbitration seated in Poland. To the best of our knowledge, there is no other relevant case law either.