



IBA TOOLKIT ON INSOLVENCY AND ARBITRATION
QUESTIONNAIRE
NATIONAL REPORT OF ENGLAND AND WALES

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IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in England and Wales 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 England and Wales 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. Insolvency law in England and Wales¹ is principally to be found in the Insolvency Act 1986, as amended (“IA 1986”).²
2. IA 1986 provides for an automatic stay, or moratorium, of legal proceedings brought against a company or individual that has become subject to certain forms of insolvency proceedings. As discussed in more detail in response to Question 3(b) below, the main bases upon which this moratorium will arise are:
 - Under Section 130(2), IA 1986, immediately upon the court making a winding-up order against the company.
 - Under Schedule B1, paragraph 43, IA 1986, immediately upon the company entering into administration.
 - Under Section 285, IA 1986, immediately upon a bankruptcy order being made against an individual.

¹ This Report was completed before 31 December 2020. The United Kingdom left the European Union on 31 January 2020, but pending the conclusion of the UK-EU transition period on 1 January 2021, the UK continued to be treated as though it were a Member State of the EU for most purposes. This Report therefore includes references to EU law, which was still applicable in the UK at the time of writing. However, the Report also addresses the applicable regime after the transition period, that is, from 1 January 2021, following which the parts of EU law relevant to this Report have ceased to apply in the UK, except for the limited cases provided in the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01). According to Article 67(3)(c) of that Withdrawal Agreement, the Recast Insolvency Regulation (Regulation (EU) 848/2015 of the European Parliament and of the Council) shall apply in the United Kingdom, as well as in the Member States in situations involving the United Kingdom, to insolvency proceedings and actions referred to in Article 6(1) of that Regulation, provided that the main proceedings were opened before the end of the transition period.

² Insolvency Act 1986, c.45, <https://www.legislation.gov.uk/ukpga/1986/45/contents>.

- Under Section A7 of the new Part A1, IA 1986,³ upon filing of the appropriate documents in court or upon the court making an order for the appointment of a monitor over the company.
3. Although not expressly stated in the statute, arbitration proceedings fall within the category of legal proceedings to which such moratorium applies.⁴

2. **Does the insolvency legislation in England and Wales provide for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*)? If so,**
- a. **Which disputes fall under the rules on *vis attractiva concursus*?**
 - b. **Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?**

4. The insolvency legislation in England and Wales does not directly provide for the concentration of disputes concerning an insolvent debtor before the insolvency court.
5. However, as discussed in more detail in Question 3(a) below, IA 1986 imposes a moratorium on legal proceedings, including arbitration proceedings, brought against a debtor that has become subject to certain forms of insolvency process.⁵ Continuing with such legal proceedings requires the permission of the court; or, with respect to a company, the permission of the administrator appointed to the company; or, with respect to a bankrupt individual, the permission of the individual's trustee in bankruptcy.
6. The factors that the court will take into consideration when deciding whether to permit an arbitration to continue against an insolvent respondent are addressed in Question 4 below. The court may add conditions to any order granting permission to continue with such proceedings.
7. If, however, the court refuses permission for arbitration proceedings against the insolvent debtor to continue and the moratorium therefore remains in place, the claimant(s) will not be able to pursue the arbitration proceedings any further. In practice, the claimant will instead need to file a proof of debt in the insolvency process.⁶ If the claimant is unsatisfied with the decision of the relevant insolvency office holder on the amount of the debt, the claimant can either use the insolvency process to challenge such decision or seek to negotiate a settlement of the claims with the office holder.
8. In that sense, English insolvency law does provide for a degree of concentration of claims. Following commencement of the types of insolvency process discussed below, arbitration

³ Part A1 was introduced by the Corporate Insolvency and Governance Act 2020, which came into force on 26 June 2020.

⁴ *Bristol Airport plc and another v Powdrill and others* [1990] 2 All ER 493; [1990] Ch 744.

⁵ See paragraphs 22 to 24 below.

⁶ See paragraph 59 *et seq.* below.

claims can only be continued against the insolvency debtor with permission, and in the absence of such permission, all claims must instead be made through the insolvency process.

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

9. The commencement of insolvency proceedings against a party to an arbitration agreement does not affect the validity of that arbitration agreement under English law.⁷ However, the commencement of insolvency proceedings can still have a significant effect on the commencement or continuation of arbitration under such an agreement.
10. The primary impact of IA 1986 on arbitration is in the form of an automatic moratorium that arises upon the commencement of certain types of insolvency process, as discussed in Question 3(b) below.

Effect where the insolvent party is a respondent

11. The effect of the moratorium is an immediate stay on any legal proceedings, including arbitration proceedings seated in England and Wales, in which the insolvent company is a respondent.⁸
12. Parties and members of the arbitral tribunal are bound to recognise that stay. In addition, no new arbitration proceedings seated in England and Wales may be commenced against the affected company without the permission of the court (or the administrator, where the company is in administration). Any attempt to commence proceedings without permission will be invalid.
13. Failure to recognise a moratorium may compromise the validity and enforceability in England and Wales of any award that is ultimately issued.⁹ To the extent that the stay of proceedings is directed by a court order, those continuing the proceedings may, in principle, be held in contempt of court,¹⁰ although it is rare in practice for this sanction to be applied.
14. For a company in administration, the moratorium acts only to suspend the rights of creditors to pursue proceedings against the company. Once the administration comes to an end, it is possible for a creditor to commence or resume proceedings against the company again

⁷ *Philpott and anor v Lycee Francais Charles De Gaulle School* [2015] EWHC 1065 (Ch); *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

⁸ IA 1986, s 130(2), where the company is the subject of a winding-up order; sch B1, para 43(6), IA 1986, where the company is the subject of an administration; s A21(1)(e), 1986, where the moratorium is imposed upon the appointment of a monitor.

⁹ In particular, awards issued in breach of a moratorium appear to be contrary to public policy, as discussed below, and so liable to be set aside under Section 68 Arbitration Act 1996.

¹⁰ *Re Atlantic Computer Systems plc* [1992] 2 WLR 367.

without seeking permission from the court. However, applicable limitation periods will continue to run throughout the term of the administration.¹¹ This applies equally to contractual limitation periods as it does to statutory limitation periods.¹² Where a creditor has not yet commenced proceedings against a company and is concerned that the limitation period will expire before the administration is completed, it may therefore need to seek the permission of the administrator or the court to commence proceedings in time.

15. By contrast, for a company in liquidation, time stops running for all limitation purposes during the period of the liquidation, whether the liquidation is compulsory¹³ or voluntary.¹⁴ Claims will not be revived on completion of the liquidation, because at that point the company will be dissolved,¹⁵ but whether a claim is barred by limitation may be relevant to a creditor's ability to participate in any distribution to creditors.
16. The factors that the court will consider when determining whether to give permission for arbitration proceedings to be continued, or for fresh proceedings to be commenced, are addressed in Question 4 below.

Effect where the insolvency entity is a claimant

17. The automatic moratorium described above applies only to proceedings brought against the insolvent company. No moratorium applies under English law to arbitration proceedings in which the insolvent company is a claimant.
18. Once appointed, it will be for the liquidator or administrator to determine in the discharge of their duties whether it is appropriate for the company to continue with any arbitration, or other proceedings that it has commenced prior to the insolvency. To the extent that the liquidator or administrator elects to continue with the proceedings, the costs of presenting the claims will be part of the costs of the liquidation or administration, and they will be paid from the company's assets.
19. A liquidator or administrator also has the power to commence new proceedings against the company's debtors. To the extent that any claim by the company is disputed by an alleged debtor, and such dispute is subject to an arbitration agreement that the alleged debtor does not agree to waive, the English court will recognise and uphold that agreement, requiring the claims to be brought through arbitration and, if necessary, issuing an injunction pursuant to Section 9 of the Arbitration Act 1996 to restrain the company from pursuing proceedings in breach of that arbitration agreement. The arbitration agreement will prevail even over the statutory powers of a liquidator to resolve claims and cross-claims through the taking of an

¹¹ *Re Cosslett (Contractors) Ltd* [2004] EWHC 658 (Ch); *In the matter of Leyland Printing Company Ltd and Leyprint Ltd* [2010] EWHC 2105 (Ch).

¹² *Bank of Tokyo-Mitsubishi UFJ Ltd v The owners of MV Sanko Mineral* [2014] EWHC 3927 (Admlty).

¹³ *Re Cases of Taff's Well Ltd* [1992] Ch 179.

¹⁴ *Re Northern Ontario Power Co Ltd* [1954] DLR 627.

¹⁵ IA 1986, s 205.

account and the “insolvency set-off” process found in Rule 14.25 of the Insolvency (England and Wales) Rules 2016 (SI 2016/1024) (the “IR 2016”).¹⁶

20. Where a liquidator or administrator commences such arbitration proceedings, the respondent may wish to raise a counterclaim. However, any counterclaim would be subject to the moratorium, and so permission to pursue that counterclaim as part of the arbitration would need to be sought. The factors that the court will apply in considering whether to grant such permission are considered below in response to Question 4.

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?

21. The moratorium on legal proceedings described above arises under English law only in certain circumstances. Those circumstances include both situations in which the relevant insolvency proceedings are aimed at the liquidation of the insolvent entity, and also situations in which the insolvency proceedings aim to restructure and rehabilitate the insolvent entity.
22. IA 1986 provides for a moratorium on legal proceedings brought against a company that has become subject to the following forms of compulsory insolvency process:
- Under Section 130(2), IA 1986, a moratorium applies immediately upon the court making a winding-up order against the company.
 - Under Schedule B1, paragraph 43, IA 1986, a moratorium applies immediately upon the company entering into administration.
 - Under Section A7 of Part A1, IA 1986,¹⁷ a moratorium applies immediately upon the appointment of a monitor to the company.
23. Also:
- Under Section 126, IA 1986, after a winding-up petition has been filed by a creditor, but before the court has ruled on that application, the company or any creditor or contributory of the company can make an application to court asking it to stay any proceedings against the company.
 - Under Schedule B1, paragraphs 42-43, IA 1986, an interim moratorium on proceedings automatically takes effect from the moment that: (i) an administration application is issued by a party at court; or (ii) the appropriate form is filed at court by a creditor giving notice of an intention to appoint an administrator.

¹⁶ *Philpott and another v Lycee Francais Charles De Gaulle School* [2015] EWHC 1065 (Ch), which relates to Rule 4.90 of the Insolvency Rules 1986, the precursor to Rule 14.25 of the Insolvency Rules 2016. See also *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25; *Bannai v Erez (Trustee in Bankruptcy of Eli Reifman)* [2013] EWHC 3689 (Comm).

¹⁷ Part A1 was introduced by the Corporate Insolvency and Governance Act 2020, which came into force on 26 June 2020.

- If a provisional liquidator is appointed, under Section 130(2), IA 1986, a moratorium will take effect immediately upon that appointment.
24. Similar considerations apply where the insolvent party is an individual. A moratorium will arise with respect to any proceedings against an individual immediately:
- when a bankruptcy order is made against the individual by the court, under Section 285(3), IA 1986; or
 - when an interim order for an individual voluntary arrangement (“IVA”) is made by the court, under Section 252(1).
25. After a bankruptcy petition has been presented, but before the bankruptcy order is made, the court may order that any proceedings against the individual be stayed (Section 285(1), IA 1986) or that the proceedings only be permitted to continue subject to certain conditions (Section 285(2), IA 1986). Similarly, where an application has been made for an interim order in support of an IVA, but before that order is made, the court may order a stay of any legal proceedings against the individual (Section 254(1), IA 1986).
26. Section 349A, IA 1986, makes express provision for circumstances in which a bankrupt individual had entered into a contract containing an arbitration agreement prior to the commencement of the bankruptcy. It provides that, if the trustee in bankruptcy adopts the contract, the arbitration agreement will be enforceable by or against the trustee in relation to any matters arising from or connected with the contract. Even if the trustee does not adopt the contract, to the extent that any matter arises to which the arbitration agreement applies and which needs to be determined for the purposes of the bankruptcy proceedings, the trustee or the other parties to the contract may apply to court for permission for that matter to be referred to arbitration.

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

27. The automatic moratorium imposed by English law does not distinguish between legal proceedings for different types of relief. Any legal proceedings against the insolvent entity are caught.

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

28. No, the moratorium imposed by IA 1986 applies only in the circumstances specified above.

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?

29. The moratorium on legal proceedings against insolvent entities under English law prohibits both the commencement of fresh proceedings and the continuation of ongoing proceedings, unless permission is obtained from the court or relevant insolvency office holder for such commencement or continuation. See the response to Question 4.

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

30. Where the insolvency procedure adopted is voluntary, under either a members' voluntary liquidation (MVL) or a creditors' voluntary liquidation (CVL), no moratorium will arise. However, in such case the liquidator or any contributory or creditor of the company may apply to the court for an order that any particular litigation or arbitration proceedings be stayed, under Section 112(1), IA 1986.
31. No statutory moratorium applies to a company voluntary arrangement ("CVA"). However, the form of a CVA is an agreement between the company and its unsecured creditors (including unsecured creditors who voted against the agreement and were outvoted, or who did not participate in the voting at all), under Section 5(2)(b), IA 1986. The terms of the CVA may impose obligations on those creditors not to commence or continue legal proceedings, including arbitration, against the company.
32. Similarly, no moratorium applies to a Restructuring Plan under Part 26A of the Companies Act 2006, as introduced by Schedule 9 of the Corporate Governance and Insolvency Act 2020. However, at the time that legislation was introduced on 26 June 2020, it was anticipated that such Restructuring Plans may be accompanied by appointment of a monitor and accordingly with the imposition of a moratorium under Section A7 of Part A1, IA 1986.

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

33. Generally, the English statutory prohibitions against creditors bringing legal proceedings against a company that is being wound-up, or which is subject to an administration in England, are not extra-territorial. Therefore, they do not prevent the commencement or continuation of proceedings in foreign courts or, by extension, in foreign-seated arbitrations.¹⁸ Whether the English insolvency proceedings have an effect on arbitrations being conducted in a seat

¹⁸ *Harms Offshore AHT 'Taurus' GmbH and Co KG v Bloom* [2009] EWCA Civ 632; *Re Oriental Inland Steam Co* (1874) LR 9 Ch App 557.

outside England and Wales will generally depend upon the law of the seat and the extent to which the English insolvency proceedings are recognised in that jurisdiction. Local advice should be sought on these issues. Questions 29 and 31 below consider the UNCITRAL Model Law on Cross-Border Insolvency, which will be relevant in a number of those jurisdictions.

34. This is subject to the provisions of the Recast Insolvency Regulation,¹⁹ which continues to apply as though the United Kingdom was a Member State of the European Union until the conclusion of the UK-EU transition period. Pursuant to the terms of that Regulation, if a company has its centre of main interest in England and insolvency proceedings are commenced in the English courts, the other Member States of the EU are bound automatically to recognise those insolvency proceedings and the resultant moratorium which they impose.²⁰ However, the moratorium will only apply automatically to new proceedings commenced in other Member States after the commencement of the English insolvency proceedings. If any proceedings are already pending in other Member States at the commencement of the English insolvency, the effect of the insolvency on those proceedings will be governed by the law of the relevant Member State.²¹
35. If foreign arbitration proceedings result in an award which then must be enforced in England and Wales, those enforcement proceedings will be subject to the moratorium on legal proceedings described above, and the award creditor will need to submit a proof of debt in the company's insolvency process.

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.)?

36. As indicated above in Question 3(b), the time at which the moratorium takes effect, and so the time at which the stay of any ongoing arbitration proceedings and the prohibition on commencement of new arbitration proceedings is imposed, depends upon the type of insolvency process engaged. See further paragraphs 22 to 25 above.

¹⁹ Regulation (EU) 848/2015.

²⁰ *ibid*, art 20. See also *ARM Asset Backed Securities SA* [2014] EWHC 1097 (Ch), in which Section 130(2), IA 1986, was applied and an injunction granted restraining proceedings in Luxembourg.

²¹ Regulation (EU) 848/2015, art. 18.

- 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?**

37. As noted above in Question 2, notwithstanding the imposition of a moratorium, it is possible for a party to continue existing arbitration proceedings or to commence new arbitration proceedings against insolvent companies with the permission of the court or, in the case of an administration, with the consent of the administrator.

Administration

38. Where the company is in administration, the administrator has a duty to act in the best interests of the creditors of the company as a whole.²² This duty may influence an administrator's decision whether to accede to a particular creditor's request to commence or continue arbitration proceedings against the company.
39. If the administrator does not consent, an application must be made to court for permission pursuant to Schedule B1, paragraph 43(6), IA 1986. The court will consider whether permitting the claimant to proceed with its claim against the insolvent company is compatible with the purposes of the administration procedure, which are to allow for the reorganisation, and hopefully, rescue of a company,²³ or the realisation of its assets to achieve a better result for creditors as a whole than would otherwise be the case,²⁴ or the realisation of the company's assets to make a distribution to secured and preferential creditors.²⁵
40. Where the claim that the applicant wishes to pursue against the company is for monetary relief alone, such as to recover a debt or damages, the court is less likely to grant permission.²⁶ By contrast, where the claim involves a proprietary interest in particular property, or seeks non-monetary relief, then the court may be more willing to grant permission.²⁷
41. Guidance on the principles that the court will apply to determine whether permission should be granted to a claimant with proprietary rights, which also serves as guidance for administrators when determining whether to give consent, was provided in *Re TPS Investments (UK) Ltd*.²⁸ This guidance was adapted from the judgment of Nicholls L.J. in *Re*

²² IA 1986, sch B1, para 3(2).

²³ *ibid*, sch B1, para 3(1)(a).

²⁴ *ibid*, sch B1, para 3(1)(b).

²⁵ *ibid*, sch B1, para 3(1)(c).

²⁶ *AES Barry Ltd v TXU Europe Energy Trading* [2004] EWHC 1757 (Ch).

²⁷ *Magical Marking Ltd and another v Phillips and others* [2008] EWHC 1640 (Pat).

²⁸ *Re TPS Investments (UK) Ltd* [2018] EWHC 360 (Ch) at ¶28.

Atlantic Computer Systems plc,²⁹ which was decided under the predecessor legislation to Schedule B1, paragraph 43(6)), IA 1986.

“(1) The person seeking leave has always to make out a case.

(2) If granting leave to an owner of land or goods to exercise his proprietary rights as lessor and repossess his land or goods is unlikely to impede the achievement of the purpose of the administration, leave should normally be given.

(3) In other cases where a lessor seeks possession, the court has to carry out a balancing exercise, weighing the legitimate interests of the lessor against those of the company’s other creditors.

(4) In carrying out the balancing exercise, great importance is normally to be given to the lessor’s proprietary interests: an administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights.

(5) It will normally be a sufficient ground for the grant of leave that significant loss would be caused to the lessor by a refusal. However if substantially greater loss would be caused to others by the grant of leave, that may outweigh the loss to the lessor caused by a refusal.

(6)–(8) These paragraphs [of the judgment of Nicholls L.J. in *Re Atlantic*] list the various factors to which the court will have regard in assessing the respective losses under heading (5). These include: the financial position of the company, its ability to pay the interest, rentals or other charges (both arrears and continuing charges), the administrator’s proposals and the end result sought to be achieved by the administration, the period for which the administration has already been in force and that for which it is expected to continue, the prospects of success of the administration, the likely loss to the applicant if leave is refused, and the conduct of the parties.

(9) The above considerations may be relevant not only to the decision whether or not to grant leave, but also to a decision to impose terms if leave is granted.

(10) The court may, in effect, impose conditions if leave is refused (for instance, by giving directions to the administrator), in which case the above considerations will also be applicable.

(11) A broadly similar approach will apply in many applications for leave to enforce a security.

(12) The court will not, on a leave application, seek to adjudicate upon a dispute over the existence, validity or nature of a security unless the issue raises a short point of law which it is convenient to determine without further ado. The court only needs to be satisfied that the applicant has a seriously arguable case.”

²⁹ *Re Atlantic Computer Systems plc* [1992] Ch. 505 at 542

42. The court will also consider the status of the proceedings that the claimant seeks to pursue. It will be more likely to grant permission to pursue proceedings that have nearly concluded,³⁰ or in which the company is only one of several defendants or respondents against whom the proceedings will continue in any event,³¹ or where there are other reasons to conclude that arbitration is the best means of resolving the underlying disputes.³² The court will be less likely to grant permission where the claim could equally well be dealt with in the administration without the need for separate proceedings.³³
43. If the court grants permission for proceedings to be continued or commenced, it may impose conditions on how the proceedings are to be conducted, under Schedule B1, paragraph 43(7), IA 1986. The court has broad discretion to impose such conditions as it considers appropriate, and the factors that the court will take into account when determining whether to give permission will also influence what conditions will be required.³⁴ Examples of possible conditions include limits on the issues that may be raised in the dispute, requirements for security or undertakings from one or more parties, procedural directions or limitations, or any other condition that the court considers appropriate.

Liquidation

44. Where a company is in liquidation or provisional liquidation, only the court may grant permission for proceedings to be commenced, or to be continued, against the company, pursuant to Section 130(2), IA 1986. The liquidator has no power to consent to such proceedings.
45. When determining whether to grant an application for permission, the court has “a broad and unfettered discretion to do what was right and fair in the circumstances of a particular case”.³⁵ The court will apply similar reasoning to that in *Re TPS Investments* referred to above, with a focus on the purpose of the liquidation to realise the assets of the company and distribute the proceeds to creditors fairly. Permission will not generally be granted if the claims can be dealt with in the course of the liquidation with no more inconvenience, delay, or expense,³⁶ but a court may be more willing to give permission to pursue proceedings in respect of a proprietary or “security” interest.³⁷

³⁰ *South Coast Construction Ltd v Iverson Road Ltd* [2017] EWHC 61 (TCC).

³¹ *Magical Marking Ltd and another v Phillips and others* [2008] EWHC 1640 (Pat).

³² *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch).

³³ *RAB Capital Plc and RAB Capital Market (Master) Fund v Lehman Brothers International (Europe)* [2008] EWHC 2335.

³⁴ *Re TPS Investments (UK) Ltd* [2018] EWHC 360 (Ch) at ¶28, “(9) The above considerations may be relevant not only to the decision whether or not to grant leave, but also to a decision to impose terms if leave is granted”.

³⁵ *New Cap Reinsurance Corp v HIH Casualty & General Insurance* [2002] EWCA Civ 300.

³⁶ *Exchange Securities and Commodities Ltd* [1983] BCLC 186.

³⁷ *Flightline Ltd v Edwards* [2003] EWCA Civ 63.

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?

46. Where a party is subject to insolvency proceedings covered by a moratorium, the court has the power to police that moratorium and may issue orders requiring specific arbitration proceedings seated in England and Wales brought against that party to be stayed.³⁸ Any such order will be binding on the parties to the arbitration and the tribunal, enforceable through contempt proceedings.
47. With respect to arbitrations seated in other jurisdictions, Section 130(2), IA 1986 governing companies being wound up and Schedule B1, paragraphs 43-45, IA 1986 governing companies in administration do not have extra-territorial effect—that is, they do not apply to proceedings taking place outside of the UK.³⁹
48. Nevertheless, the English courts have the power, pursuant to Section 37 of the Senior Courts Act 1981, to grant injunctions restraining a party from continuing with foreign proceedings, including foreign arbitration proceedings, where such foreign proceedings would negatively impact upon an insolvency proceeding in England and Wales, and the English court has jurisdiction over the party to be restrained.⁴⁰
49. Where the foreign arbitration is seated in a Member State of the EU, for the remainder of the UK-EU transition period, the Recast Insolvency Regulation may apply automatically to impose restrictions on the continuation of those arbitration proceedings. That Regulation is discussed in more detail in Questions 29 and 31 below.

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?

50. Where a winding-up order has been made against a company by a court and a liquidator has been appointed, the liquidator has the power under Section 178(3), IA 1986 to “disclaim” any “onerous property”. “Onerous property” can include contracts which are unprofitable, such as contracts that impose continuing obligations on the company which will prejudice the ability of the liquidator to realise the company’s assets and to distribute them to creditors.⁴¹

³⁸ In exercise of the court’s inherent jurisdiction, Senior Courts Act 1981, s 49(3).

³⁹ *Harms Offshore AHT ‘Taurus’ GmbH and Co KG v Bloom and ors* [2009] EWCA Civ 632.

⁴⁰ For examples where the court has restrained foreign legal proceedings, see *Harms Offshore AHT ‘Taurus’ GmbH and Co KG v Bloom and ors* [2009] EWCA Civ 632 with respect to foreign litigation; and *Excalibur Ventures LLC v Texas Keystone Inc* [2011] EWHC 1624 (Comm) with respect to a foreign-seated arbitration.

⁴¹ *Squires v AIG Europe UK Ltd* [2006] EWCA Civ 7.

51. The effect of the disclaimer is to bring the company's liabilities under the contract to an end.⁴² The other party or parties to the contract may no longer bring claims on the contract but may make a claim, or "prove", in the liquidation for any damages that they suffer as a result.⁴³
52. A similar power to disclaim onerous property exists under Section 315, IA 1986, for trustees in bankruptcy of individuals who are subject to a bankruptcy order.

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?

53. As noted in Question 3(a) above, generally speaking under English law, the commencement of insolvency proceedings with respect to an individual or entity has no effect on the validity of any arbitration agreements to which they are a party.
54. The effect of a liquidator's or trustee in bankruptcy's decision to disclaim a contract that contains an arbitration agreement is, however, unclear. English law generally recognises the separability of arbitration agreements.⁴⁴ There is no authority on the question, but it would therefore appear necessary for the liquidator or trustee in bankruptcy to disclaim the arbitration agreement specifically, rather than merely disclaiming the contract in which the arbitration agreement is contained, and the criteria that the liquidator must satisfy in order to exercise its power to disclaim must be satisfied with respect to the arbitration agreement in particular. These criteria are discussed below in Question 8.
55. IA 1986 gives any person or entity which suffers loss or damage as a result of the contract being disclaimed the right to prove in the insolvency process for the amount of that loss or damage.⁴⁵ To the extent that the amount of such loss or damage is disputed, however, the affected party would appear to be able either to appeal the insolvency office holder's decision on the proof of debt or seek the court's permission to commence arbitration proceedings to resolve the dispute.

⁴² IA 1986, s 178(4).

⁴³ *ibid*, 178(6).

⁴⁴ Arbitration Act 1996, s 7; *Premium Nafta Products Ltd and ors v Fili Shipping Co Ltd and ors* [2007] UKHL 40

⁴⁵ IA 1986, s 178(6) with respect to disclaimers by liquidators; s 315(5) with respect to disclaimers by trustees in bankruptcy.

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?

56. As noted in Question 3(a) above, generally speaking under English law, the commencement of insolvency proceedings with respect to an individual or entity has no effect on the validity of any arbitration agreements to which they are a party.
57. Where a trustee in bankruptcy exercises its power to disclaim a contract which contains an arbitration clause, the arbitration agreement may still be applicable. Section 349A, IA 1986,⁴⁶ provides that where, in connection with the bankruptcy proceedings, an issue arises that would have been subject to the arbitration agreement, the trustee in bankruptcy (with the consent of the creditors' committee) or any other party to the arbitration agreement may apply to the court for an order that the issue should be resolved by arbitration.
58. The position is less clear with respect to a liquidator's power to disclaim onerous contracts under Section 178, IA 1986. Generally, a liquidator may only disclaim executory contracts, not those in which the obligations have already been fully executed or under which property rights have already vested. Where a contract is part-executed, only those parts of it that remain executory may be disclaimed.⁴⁷ As noted above in Question 7, although there is no authority on the point, it appears that these criteria need to be applied to the arbitration agreement specifically, not merely to the contract in which the arbitration agreement is contained. However, it is to be noted that any dispute over a disclaimer of an arbitration agreement is likely to be of limited practical effect, as in such scenario a moratorium would be in place and a creditor could not commence arbitration proceedings under the arbitration agreement without the permission of the court in any event.

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 to the jurisdiction of the insolvency court and a waiver of the arbitration agreement?**

59. Following an order for the winding-up of a company, the appointment of an administrator or the making of a bankruptcy order, the procedure by which a creditor submits a formal

⁴⁶ As amended by Section 107 and Schedule 3, Arbitration Act 1996.

⁴⁷ *Capital Prime Properties plc v Worthgate Ltd (In liquidation)* [2000] BCC 525.

statement of what it believes it is owed is known in English law as submitting a “proof of debt”, or “proving” in the insolvency process.

60. Strictly speaking, it is not necessary for a party to prove in an insolvency process for it to be entitled to make an application to court for permission to commence, or to continue, an arbitration against the company; or for it to be entitled to insist that any claims brought against that party by the insolvency office holder are referred to arbitration.
61. However, proving in the insolvency process is a necessary step if the party wishes:
 - to participate in decisions that are to be made by creditors in connection with the liquidation or administration, pursuant to Part 15, IR 2016.
 - to participate in any distributions to creditors made out of the company’s assets, pursuant to Rule 14.3(1), IR 2016.
62. In an insolvent liquidation or in the case of an individual bankruptcy, it is likely that the only recovery available to an unsecured creditor from the company’s or bankrupt’s assets will be by way of participation in a distribution to creditors. Once such a distribution is made, the assets of the company or bankrupt will likely be exhausted, and the company will be dissolved. Therefore, if the party does not submit a proof of debt as part of this process, it may be unlikely to recover anything from the company or bankrupt in respect of its claims.
63. Secured creditors may not need to prove in the liquidation, as they will instead be entitled to rely upon and enforce their security. However, to the extent such creditors have claims in excess of the secured amount, they will still be required to prove the unsecured portion of their claims in the liquidation if they wish to participate in distributions to unsecured creditors.
64. With respect to an administration, distributions to creditors are less common, since the purpose of administration is principally to rescue the company rather than to distribute its assets. However, to participate in any distributions that are made, the party must first have proved in the administration.
65. Once a party has proved a claim in the liquidation or administration, they are no longer entitled to pursue that claim against the company through other means, whether through litigation or arbitration. The liquidator, or administrator, can either admit a proof for the whole amount claimed, or reject it in whole or in part, in accordance with Rule 14.7, IR 2016.⁴⁸ If the creditor disagrees with the decision of the liquidator or administrator, it may appeal to the court against that decision, under Rule 14.8(1), IR 2016. However, the creditor will not be entitled to pursue any other proceedings, including arbitration proceedings, with respect to its claim without first obtaining the permission of the court. That a creditor has filed a proof in the insolvency process may be taken into consideration by the court when determining whether to grant permission for such other proceedings to be brought.⁴⁹

⁴⁸ See also *McCarthy v Tann* [2015] EWHC 2049 (Ch).

⁴⁹ Applying the principles in *Re TPS Investments (UK) Ltd* [2018] EWHC 360 (Ch) at ¶128, discussed above at paragraph 41.

66. Submission of a proof of debt in either a liquidation or administration proceeding is not regarded as a waiver of any right that the party may have to require arbitration of disputes with respect to claims brought against it by the company. A creditor may therefore prove in a liquidation or administration process, yet still rely upon an arbitration agreement to insist that any claims brought against that creditor by the liquidator or administrator are referred to arbitration.⁵⁰

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)?

67. A liquidator or an administrator appointed to a company may apply to court for orders with respect to certain transactions entered into between the insolvent company and a third party prior to the commencement of the insolvency process:
- Under Section 238, IA 1986, to set aside a transaction at an undervalue entered into between the company and a third party at any time within the two years prior to the onset of insolvency (defined in Section 240, IA 1986), if the company was at the time of the transaction insolvent or became insolvent as a result of the transaction.
 - Under Section 239, IA 1986, to set aside a preference given to any third party during that two-year time period if the third party is connected to the company, or within six months prior to the onset of insolvency if the third party is not so connected, and the company either was insolvent at the time of the preference, or became insolvent as a result of it.
 - Under Section 244, IA 1986, to set aside or vary an extortionate credit transaction entered into between the company and a third party at any time in the three years prior to the commencement of the liquidation or administration.
 - Under Section 245, IA 1986, to avoid certain floating charges entered into between the company and a third party within two years prior to the onset of insolvency if the third party is connected to the company, or within one year if the third party is not so connected.
 - Under Section 423, IS 1986, to set aside a transaction intended to defraud creditors.
68. A trustee in bankruptcy may similarly apply to court for an order to set aside a transaction in which an individual, in the five years before the commencement of bankruptcy, disposed of an asset at an undervalue, and either was insolvent at the time or became insolvent as a result of the transaction, under Section 339, IA 1986.

⁵⁰ *Philpott and another v Lycee Francais Charles De Gaulle School* [2015] EWHC 1065 (Ch).

69. There is no clear authority on what procedure must be followed where a liquidator or administrator wishes to challenge a transaction in exercise of these statutory provisions, but the transaction is subject to an arbitration clause that applies to disputes about the validity of the relevant transaction. Arbitration agreements survive the commencement of insolvency proceedings, and the courts have held that in some cases an arbitration clause can “trump” the powers of a liquidator under IA 1986.⁵¹ However, IA 1986 provides for the liquidator or administrator to make an application to court whenever it wishes to invoke one of these powers; the English courts have confirmed that they have worldwide jurisdiction with respect to the statutory powers listed above in respect of a company that is being wound-up in England and Wales, such that applications under these powers may be made against persons irrespective of whether they are in England and Wales or in a foreign jurisdiction.⁵² It has been suggested that only the court has the power to make orders under these statutory provisions, such that the matter could not be referred to arbitration.⁵³ In the context of foreign insolvency proceedings, where a foreign insolvency office holder sought, in exercise of foreign statutory powers, to invalidate a transaction that was subject to an arbitration agreement providing for English-seated arbitration, the English court held that the issue is arbitrable and that the dispute over the validity of the transaction should be referred to arbitration;⁵⁴ but in those cases the court left open the question whether the same is true in the context of English insolvency proceedings, or where the foreign insolvency proceedings are entitled to recognition in England and Wales.⁵⁵

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

70. An administrator appointed to a company has the power to “bring or defend any action or other legal proceedings in the name and on behalf of the company” under Schedule 1, paragraph 5, IA 1986. It also has the power to “refer to arbitration any question affecting the company” under Schedule 1, paragraph 6, IA 1986. This power apparently encompasses the ability to agree on behalf of the company to new arbitration agreements for the resolution of disputed questions, or to agree on behalf of the company to new contracts which include an arbitration clause for the resolution of disputes, if the administrator considers that to be appropriate in the discharge of its duties.
71. Similarly, in the case of winding-up of the company, the liquidator has the power: to bring or defend “legal proceedings” (including arbitration proceedings) in the name of or on behalf of the company under Schedule 4, paragraph 4, IA 1986; to “do all acts and execute, in the name

⁵¹ *Philpott and ano’r v Lycee Francais Charles De Gaulle School* [2015] EWHC 1065 (Ch).

⁵² *In re Paramount Airways Ltd* [1993] Ch 223, cited with approval in *Jetivia SA and an’or v Bilta (UK) Ltd (in liquidation) and ors* [2015] UKSC 23.

⁵³ *The Arbitration Act 1996*, Robert Merkin QC and Louis Flannery QC, 6th Ed. (2019) at §6.1.14.2.

⁵⁴ *Riverrock Securities Limited v JSC International Bank of St Petersburg* [2020] EWHC 2483 (Comm); *Nori Holdings Ltd and ors v PJSC Bank Otkritie Financial Corporation* [2018] EWHC 1343 (Comm).

⁵⁵ See, in particular *Riverrock Securities* at [46]-[47], [78] and [86].

and on behalf of the company, all deeds, receipts and other documents” under Schedule 4, paragraph 6, IA 1986; and “to do all such other things as may be necessary for winding up the company’s affairs and distributing its assets”, under Schedule 4, paragraph 13, IA 1986.

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

72. There are several forms of creditors’ arrangement available under English law, as noted above in Question 3(f).
73. In the case of a creditors’ voluntary liquidation (“CVL”), no automatic moratorium applies to prevent arbitrations being commenced or continued against the insolvent company, but a creditor or the liquidator may apply to court for an order that specific proceedings should be stayed.⁵⁶
74. In the case of a company voluntary arrangement (“CVA”), no automatic moratorium on arbitration proceedings applies, but the terms of the final agreement between the company and its unsecured creditors (including unsecured creditors who voted against the agreement and were outvoted, or who did not participate in the voting at all),⁵⁷ may impose obligations on those creditors not to commence or continue legal proceedings against the company.
75. In the case of an individual voluntary arrangement (“IVA”) between an individual and his or her creditors, a moratorium against legal proceedings will apply from the moment that the court grants the requisite interim order. After the application for such an order is made but before it has been granted, the court may also order a stay of any legal process against the individual.⁵⁸
76. A Restructuring Plan under Part 26A of the Companies Act 2006⁵⁹ does not attract any automatic moratorium on claims against the debtor company, nor is there any power in the legislation to apply to the court for such a moratorium in connection with such Restructuring Plan. However, at the time that legislation was introduced on 26 June 2020, it was anticipated that such Restructuring Plans could be accompanied by appointments of a monitor, and accordingly with the imposition of a moratorium under Section A7 of Part A1, IA 1986. At the time that this text is prepared, it remains to be seen whether this will occur in practice.

⁵⁶ IA 1986, s 112(1).

⁵⁷ *ibid*, s 5(2)(b).

⁵⁸ *ibid*, s 254(1).

⁵⁹ Part 26A of the Companies Act 2006 was introduced by Schedule 9 of the Corporate Governance and Insolvency Act 2020, which came into force on 26 June 2020.

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?

77. The provisions of IA 1986 and of the IR 2016 are mandatory and cannot be excluded by agreement between the insolvent entity and its creditors, unless provided for in the specific provision of the statute.⁶⁰

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

78. Where a moratorium arises, the provisions of IA 1986 that impose such moratorium on arbitration proceedings are drafted to impose restrictions upon the commencement or continuation of proceedings generally, rather than identifying specific persons who are restricted from taking such steps. The restrictions therefore apply equally to arbitrators as they do to parties, with respect to arbitration proceedings seated in England and Wales. As noted in Question 5 above, if a claimant seeks to continue arbitration proceedings against an insolvent party in breach of a moratorium, and the arbitrators permit that, the insolvency office holder may seek an order from the court confirming the stay of proceedings.⁶¹

79. Conversely, however, as explained in Question 3(a) above, it is possible for arbitration proceedings to continue with the permission of the court or the consent of the administrator. Arbitration proceedings that are already pending when the insolvency is commenced do not become a nullity,⁶² but are merely stayed. Further, it is possible for the court's permission to be sought and granted retrospectively, giving retrospective legitimacy to arbitration proceedings that have been commenced or continued in breach of a moratorium.⁶³ The factors a court will take into consideration when deciding whether to grant permission are addressed above in Question 4.

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?

80. The English court has supervisory jurisdiction over any arbitration proceedings that are seated in England and Wales⁶⁴ and has confirmed that it has worldwide jurisdiction with respect to

⁶⁰ *Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd* [2012] 1 AC 383.

⁶¹ In exercise of the court's inherent jurisdiction, Senior Courts Act 1981, s 49(3).

⁶² *Re Arucana Ltd* [2009] EWHC 3838 (Ch); *Carr v British International Helicopters* [1993] BCC 855.

⁶³ *Bank of Ireland (UK) plc v Colliers International UK plc* [2012] EWHC 2942 (Ch); *Gaardsoe v Optimal Wealth Management* [2012] EWHC 3266 (Ch).

⁶⁴ Arbitration Act 1996, s 2(1).

any insolvency proceedings commenced under IA 1986 with respect to an English company.⁶⁵ Accordingly, the jurisdiction of the party that is not in insolvency makes no difference to the rules applicable or the powers of the court in connection with the insolvency.

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?]**

81. An administrator⁶⁶ or a liquidator⁶⁷ appointed to a company takes control of the company and its business, to the exclusion of its former controllers. They also have express powers to cause the company to bring or defend any legal proceedings. The administrator or liquidator will not participate in its own name in court or arbitration proceedings concerning the company's rights and obligations. Such proceedings will continue to be brought or defended by the company in its own name, albeit the company will be under the control of the administrator or liquidator and will act in accordance with the office holder's directions.
82. Where an administrator or liquidator needs to commence proceedings seeking to exercise a specific power given to them in their office as liquidator or administrator pursuant to a provision of IA 1986 or IR 2016, such proceedings will typically be commenced by the liquidator or administrator in their own name. Such proceedings will never be arbitration proceedings, however, as they concern the exercise of statutory powers and permissions that only the court can give.
83. With respect to individuals who are the subject of bankruptcy proceedings, Section 306(1), IA 1986, provides for the estate of the bankrupt to vest in the trustee in bankruptcy immediately upon his appointment taking effect (save for certain rights of the bankrupt to claims for personal injuries, which remain with the bankrupt). The trustee in bankruptcy then acts in its own name in collecting assets and distributing them to creditors of the bankrupt, including where the trustee in bankruptcy adopts proceedings that were existing at the date of the bankruptcy.⁶⁸

⁶⁵ *In re Paramount Airways Ltd* [1993] Ch 223, cited with approval in *Jetivia SA and an'or v Bilta (UK) Ltd (in liquidation) and ors* [2015] UKSC 23.

⁶⁶ IA 1986, sch 1, para 5.

⁶⁷ *Ibid*, sch 4, paras 3 and 4.

⁶⁸ *Trustee of the property of Vickery (a bankrupt) v Modern Security Systems* [1998] 1 BCLC 428; *Heath v Tang and another* [1993] 4 All ER 694; *Bannai v Erez (Trustee in Bankruptcy of Eli Reifman)* [2013] EWHC 4287 (Comm).

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?

84. Generally, the confidentiality of any arbitration proceedings will not be affected by the commencement of insolvency.
85. However, following commencement of liquidation, administration, or bankruptcy, a claimant against the insolvent entity will not be able to continue with its claim and will need to submit a proof of debt in the insolvency process, as discussed above in Question 2. A liquidator, administrator, or trustee in bankruptcy has a duty to allow any creditor who has submitted a valid proof of debt, or any contributory of a company, to inspect all proofs of debt that have been submitted in the insolvency process.⁶⁹
86. To the extent that court hearings are necessary as part of the insolvency process, there is a presumption that such hearings will take place in open court.⁷⁰ However, a party may apply to the court for permission for the hearing to take place in private, for example because the evidence to be put before the court contains confidential or market-sensitive information.
87. There are no provisions of English law allowing creditors of an insolvent entity to join arbitration proceedings to which the insolvent entity is a party. The rights of the creditors of the insolvent entity are only to participate in the insolvency process through submission of their proofs of debt and to monitor the work of the liquidator, administrator, or trustee in bankruptcy.

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

88. There are no provisions of English law requiring a party to change its name as a result of insolvency proceedings being commenced against it.
89. There are, however, obligations that require a company in administration and its administrator to state the name of the administrator and that the company is in administration on all of its websites and in all “business documents”, ie in all invoices issued by the company, all orders placed by the company with third parties for goods or services, all business letters sent by the company, and any standard order forms prepared by the company for use by its customers.⁷¹ This could include letters that are sent to counterparties, a tribunal, or an arbitration institution in the course of arbitration proceedings, to the extent that such

⁶⁹ IR 2016, Rule 14.6.

⁷⁰ *ibid*, Rule 12.2(3).

⁷¹ IA 1986, sch B1, para 45.

letters are sent by the company itself rather than by its appointed legal representatives. However, it does not include submissions or evidence filed by the company in such proceedings.

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?

90. The liquidator,⁷² administrator,⁷³ or trustee in bankruptcy⁷⁴ has the power to settle any claims brought by or against the company or bankrupt without the need for any confirmatory order from the court. Creditors of the company or bankrupt may, however, challenge the office holder's decision to agree to such a settlement by filing an application in court. In some cases, insolvency office holders may prefer to seek court approval for significant settlements before they are signed so as to prevent any subsequent creditor challenges to the terms.

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

91. As explained in Questions 3 and 4 above, the continuation of any arbitration proceedings against a party in liquidation or administration requires the permission of the court, and the court may set conditions on such permission. In the absence of such permission, no further steps may be taken in the arbitration, whether the adoption of interim measures or otherwise.
92. If court permission to continue the arbitration is obtained then, subject to any conditions that the court may impose on the continuation of the proceedings, the parties are entitled to apply for, and the tribunal is entitled to grant, interim measures in the ordinary way. However, the commencement of insolvency proceedings and the assumption of control over the insolvent entity by the administrator, the liquidator, or the trustee in bankruptcy may mean that interim measures are no longer necessary or appropriate.

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

93. Where interim measures are already in place when insolvency proceedings are commenced, the validity of those measures is not affected. Where those interim measures are imposed by way of court order in support of the arbitration, for example, by way of a freezing injunction,

⁷² *ibid*, sch 4, paras 2 and 3.

⁷³ *ibid*, sch 1, para 18.

⁷⁴ *ibid*, sch 5, paras 6 to 8.

the liquidator or administrator may potentially be in contempt of court if it breaches the terms of that order.

94. However, any further steps taken by a creditor of the insolvent entity to enforce such interim measure may be regarded as “legal proceedings” and so subject to the moratorium imposed by the insolvency process. Moreover, the liquidator or administrator may apply to the relevant arbitration tribunal or court to vary or discharge any interim measure that is in place, relying on the insolvency as a material change of circumstance supporting amendment or discharge of any interim measures.
95. If the creditor is unsecured, the commencement of insolvency may also render interim measures that freeze or place restrictions on assets of little practical benefit in any event.

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?

96. Following the commencement of insolvency, the appointed administrator or liquidator has a duty to take control of and secure the property of the company. The administrator or liquidator can remove the previous directors from office and replace them with the administrator’s or liquidator’s own appointees. While the administrator or liquidator may and often will consult with the former directors and managers of the company, any settlement will need to be agreed by the liquidator or administrator.
97. The same is true of a trustee in bankruptcy, in whom the estate of the bankrupt is vested, who becomes the only person entitled to agree on settlements involving the bankrupt’s assets.
98. Where an insolvent entity or individual agreed on a settlement shortly before the commencement of insolvency, that settlement transaction could potentially be disclaimed by the liquidator or administrator, as addressed in Question 6 above.

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?

99. Proceedings to enforce an arbitration award or a court judgment are considered to be “legal proceedings” for the purposes of IA 1986, and so any such enforcement proceedings will be stayed by any moratorium imposed following the commencement of insolvency.
100. Further restrictions apply with respect to steps to execute a judgment or award debt:
- Under Section 128, IA 1986, where a company is being liquidated by a court order, any form of execution put in force against the company after the commencement of the liquidation is void.

- Under Section 183, IA 1986, where a company is being liquidated by a court order and a creditor has commenced any form of execution against the company before the commencement of the liquidation but has not completed that execution process, the creditor may not retain the benefit of the execution but must provide it to the liquidator.
- Under Section 346(1), IA 1986, similarly, where a creditor has commenced execution against a bankrupt but not completed it by the date of the bankruptcy order, the creditor cannot retain the benefit of that execution as against the trustee in bankruptcy.

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?

101. Following commencement of an insolvency process that imposes a moratorium, no further steps may be taken in an arbitration against the insolvent entity without the permission of the court, as addressed in Question 3(a) above.
102. The creditor will instead be required to submit a proof of debt in the bankruptcy process, which will be assessed by the liquidator, administrator, or trustee in bankruptcy to determine the appropriate value of the creditor's claim, as discussed in Question 9 above.
103. To the extent that the liquidator, administrator, or trustee in bankruptcy's assessment of the claim is disputed by the creditor, the dispute can either be resolved by an appeal to the court against the decision, or the creditor may seek the permission of the administrator, where appropriate, or of the court for permission to continue with the arbitration so as to resolve the dispute. Applying the principles addressed in Question 4 above, a court may be more willing to allow an arbitration to continue to resolve a dispute where the proceedings are well advanced, where the claim involves a proprietary right, or where the arbitration is otherwise an effective and efficient method of resolving the dispute or proving the debt. If the court gives permission for an arbitration to continue, the court may give directions as to how the creditor's claim is to be treated in the insolvency process pending resolution of the arbitration,⁷⁵ and otherwise, the claim will remain a contingent claim in the insolvency until it is resolved.
104. If an arbitration proceeding is permitted to continue to a final award in favour of the creditor of the insolvent entity, the creditor cannot commence proceedings to enforce that award in England and Wales without the permission of the court, as such enforcement proceedings would be "legal proceedings" prohibited by the moratorium. To the extent that the award creditor wishes to participate in any distribution made to creditors from the insolvent entity's assets, it will still need to submit a proof of debt in the insolvency process, as discussed in Question 9 above. The existence of an award in favour of the creditor will not improve its

⁷⁵ Pursuant to its powers under IA 1986, Schedule B1, paragraph 43(7).

standing in the insolvency process, and it will still rank as an unsecured creditor for the purposes of determining any entitlements to any distributions from the insolvency.

105. There may, however, be an advantage for the creditor in obtaining an award, both because it may establish clearly the sum owed to the creditor and also because the award may offer non-pecuniary relief, such as declarations as to entitlements or property rights, which may be useful for the creditor outside of the insolvency process.
106. If the final award is in favour of the insolvent entity then the liquidator, administrator, or trustee in bankruptcy has the power to pursue enforcement of that award in the name of the insolvent entity in the ordinary way.

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?

107. A creditor of an insolvent entity should provide evidence of the amount of the debt it is owed as part of submitting its proof of debt. The creditor may claim the amount that it considers that it is owed even if that amount is disputed by the insolvent entity.
108. The liquidator, administrator, or trustee in bankruptcy will assess the proofs of debt that it receives and determine on the evidence presented whether the claimed debt exists and its amount. The office holder may ask for further information and documentation to substantiate any proof submitted.⁷⁶ The office holder then has a wide power to admit a proof for the whole amount claimed, admit it only for part of the amount claimed, or reject it entirely.⁷⁷ Where the proof of debt is rejected entirely or in part, the office holder must provide the creditor with a statement of their reasons for doing so.⁷⁸
109. An arbitral award may be considered to be good evidence, in many cases conclusive evidence, of the amount owed. There are no restrictions in the IA 1986 on the type of evidence that a creditor may provide in support of its proof of debt, and as such, it appears that there is no requirement for a creditor formally to seek recognition of a foreign award in England and Wales before submitting that award as evidence to the insolvency office holder. The insolvency office holder may, however, seek further information to confirm the enforceability of the award against the insolvent entity before accepting the proof of debt.⁷⁹

⁷⁶ IR 2016, rule 14.4(3).

⁷⁷ *ibid*, rule 14.7.

⁷⁸ *ibid*, rule 14.7(2).

⁷⁹ In exercise of its powers under Rules 14.4 and 14.7, IR 2016.

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

110. The scope of what constitutes “public policy” in English law is not well defined.⁸⁰ However, the courts have previously indicated that the insolvency rules generally are to be regarded as founded in rules of public policy.⁸¹

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)?

111. The “anti-deprivation rule” and the rule that “it is contrary to public policy to contract out of pari passu distribution” have been held to be a part of English Law, thereby including the principle of “equal treatment of creditors” as part of English public policy. They are regarded as “sub-rules of the general principle that parties cannot contract out of the insolvency legislation”.⁸²

112. IA 1986 generally provides for the equal treatment of creditors. For winding up proceedings, Section 175 provides for equal treatment of debts of the same category. Similarly, for personal bankruptcy, Section 328 provides for equal treatment of debts of the same nature. In cases of voluntary winding up, Section 107 provides for the company’s property to be applied “in satisfaction of the company’s liabilities pari passu”.

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

113. Arbitration agreements can have an impact on the commencement of insolvency proceedings. To commence the liquidation of a company, one method is for a creditor to file a winding-up petition in court. Some parties have sought to circumvent an arbitration agreement by instead filing a winding-up petition based upon a debt said to arise from the relevant contract and then seeking to have issues as to whether that debt is in fact due resolved through the insolvency process rather than through arbitration.

⁸⁰ *Kuwait Airways Corporation v Iraqi Airways Co & Anor* [2002] UKHL 19, per Lord Nichols at [17]: “the public policy principle eludes more precise definition”.

⁸¹ *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, per Lord Collins at [1].

⁸² *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc* [2011] UKSC 38, per Lord Collins at [1].

114. The English court has confirmed, however, that this is not permissible and amounts to an abuse of process. Where there is a dispute between parties as to whether a debt is due, and that dispute is subject to an arbitration clause, the parties must first pursue arbitration to determine whether the debt is due before any winding-up petition based upon that debt may be brought. Any winding-up petition brought before the dispute is resolved will be stayed in accordance with Section 9 Arbitration Act 1996.⁸³

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 England and Wales concerning the insolvent party.]

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

115. The United Kingdom left the European Union on 31 January 2020, but pending the conclusion of the UK-EU transition period, the UK continues to be treated as though it were a Member State of the EU for most purposes. Throughout the transition period, the UK retains the effects of the Recast Insolvency Regulation⁸⁴ or, with respect to insolvency proceedings commenced prior to 25 June 2017, the Insolvency Regulation 2000.⁸⁵
116. The Recast Insolvency Regulation applies to insolvency proceedings in respect of any corporate bodies or individuals, save for certain exceptions relating to insurance undertakings, credit institutions, investment firms, and collective investment undertakings. It provides that, if insolvency proceedings are commenced in a Member State which is the centre of main interests (“COMI”) for the insolvent company or individual, those proceedings (referred to as “main proceedings”) will automatically be recognised across all other Member States.⁸⁶ There is, therefore, no need for any formal local procedure in England and Wales to be followed before these effects will apply.
117. Outside of the EU framework, England and Wales have adopted the UNCITRAL Model Law on Cross-Border Insolvency, introduced into English law through the Cross-Border Insolvency Regulations 2006 (“CBIR 2006”). Under those Regulations, there is no automatic recognition of foreign insolvency proceedings. It is instead necessary for steps to be taken locally in England and Wales to have those foreign proceedings recognised. Either the foreign court overseeing the foreign insolvency process can apply for assistance directly to the English court,⁸⁷ or a “foreign representative” (usually a foreign liquidator or administrator) of the

⁸³ *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083; *Salford Estates (No.2) Ltd v Altomart Ltd* [2014] EWCA 1575 Civ.

⁸⁴ Regulation (EU) 848/2015.

⁸⁵ Council Regulation (EC) 1346/2000.

⁸⁶ Regulation (EU) 848/2015, art 19.

⁸⁷ CBIR 2006, sch 1, art 25.

insolvent entity may apply to the English court for recognition of the foreign insolvency proceedings.⁸⁸ There is no requirement for reciprocity under the CBIR 2006, and so it does not matter in which jurisdiction the insolvency proceedings have been commenced.

118. If no application has been made to the English court for recognition of the foreign insolvency proceeding, the court is not bound to recognise such foreign proceeding. The court may refuse to stay any litigation or arbitration proceedings brought in England and Wales against the insolvent entity and may even issue an anti-suit injunction to prevent the foreign proceedings being continued in breach of an arbitration clause.⁸⁹ If it is argued in such case that the foreign insolvency proceedings concern claims that are not arbitrable, the English court will apply English curial law and the proper law of the arbitration agreement, and will look at the substance of the claims rather than their form, to determine whether the claims are properly arbitrable and within the scope of the arbitration agreement.⁹⁰

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?

119. The UNCITRAL Model Law is incorporated into English law with certain modifications by the CBIR 2006, Section 2(1) of which states: “The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain)”.

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

120. As discussed above in Question 29, the commencement of foreign insolvency proceedings will have effect in England and Wales if either they have effect under the Recast Insolvency Regulation (until the expiry of the UK-EU transition period) or a request or application is made to the English court for recognition of the foreign proceedings under the CBIR 2006.

Effect under the Recast Insolvency Regulation

121. Where a judgment is made in a court of another EU Member State commencing insolvency proceedings, and those foreign proceedings are “main proceedings” for the purposes of the Recast Insolvency Regulation, the judgment will automatically have the same effect on any new arbitration seated in England and Wales that may be commenced after the date of the “main proceedings” as it would have on arbitrations seated in the jurisdiction of those “main

⁸⁸ *ibid*, sch 1, art 15.

⁸⁹ *Riverrock Securities Limited v JSC International Bank of St Petersburg* [2020] EWHC 2483 (Comm).

⁹⁰ *Ibid*.

proceedings”.⁹¹ This is subject to an exception where secondary insolvency proceedings have been commenced in England and Wales, in which case English law shall govern those proceedings.⁹²

122. However, where legal proceedings, including arbitration proceedings, are already pending in England and Wales when the “main proceedings” are commenced in the other Member State, Article 18 of the Recast Insolvency Regulation provides that English law will apply to determine the effect on those pending proceedings.⁹³
123. Further, the moratorium under IA 1986 for liquidations, administrations, and bankruptcies, as discussed in Question 3 above, only applies where those insolvency proceedings have been commenced in the courts of England and Wales and not where those proceedings (or similar proceedings) have been commenced in another jurisdiction. In consequence, no automatic moratorium will apply to stay any proceedings pending in England and Wales as a result of any “main proceedings” in another EU Member State.⁹⁴ The English court retains an inherent jurisdiction to stay any proceedings pending in England and Wales to prevent injustice, but it has held that the circumstances would need to be “exceptional” before a stay in favour of foreign insolvency proceedings would be granted.⁹⁵

Effect under the Cross-Border Insolvency Regulations 2006

124. The effect of foreign insolvency proceedings under the CBIR 2006 depends on whether the foreign proceedings are regarded as “main proceedings” or “non-main proceedings”.
125. Foreign main proceedings are insolvency proceedings taking place in the jurisdiction in which the insolvent company or person has its centre of main interests or COMI.⁹⁶ There is a rebuttable presumption that a company’s COMI will be the jurisdiction in which it has its registered office and that an individual’s COMI will be their place of habitual residence.⁹⁷
126. Recognition of foreign main proceedings has the effect of a notional compulsory winding-up of the insolvent debtor in England and Wales, meaning that an automatic stay equivalent to that under Section 130(2), IA 1986, applies. This will stay any legal proceedings, including arbitration proceedings, that are pending against the insolvent entity in England and Wales and prevent any new proceedings being commenced, in both cases unless the permission of the court is obtained.⁹⁸ This stay is “subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Great Britain in such a case”,⁹⁹ and accordingly, questions such as whether the moratorium should

⁹¹ Regulation (EU) 848/2015, art 20.

⁹² *ibid.*

⁹³ *ibid.*, art 18.

⁹⁴ *Syska (Elektrim) v Vivendi Universal SA* [2009] EWCA Civ 677.

⁹⁵ *Mazur Media v Mazur Media GmbH* [2004] All ER (D) 110, [2004] EWHC 1566 (Ch); *Syska (Elektrim) v Vivendi Universal SA* [2009] EWCA Civ 677; *Rawlinson & Hunter Trustees SA (in its capacity as the trustee of the Tchenguiz Discretionary Trust) v Kaupthing Bank HF and ors* [2011] All ER (D) 210, [2011] EWHC 566 (Comm).

⁹⁶ CBIR 2006, sch 1, art 2(g).

⁹⁷ *ibid.*, sch 1, art 16(3).

⁹⁸ *ibid.*, sch 1, arts 20(1) and (2).

⁹⁹ *ibid.*, sch 1, art 20(2)(b).

be lifted to permit specific court or arbitration proceedings to commence or continue will be resolved in accordance with the principles set out in Question 4 above.

127. If the foreign proceedings are commenced in a jurisdiction in which the insolvent debtor has an establishment but which is not its COMI, those proceedings are “foreign non-main proceedings”,¹⁰⁰ and recognition of those proceedings does not attract an automatic moratorium.
128. In either case, the foreign office holder is also entitled to apply to the English court for additional assistance, including requests to stay particular court or arbitration proceedings not otherwise caught by a moratorium, gathering information about assets, and challenging certain transactions entered into by the insolvent debtor before the commencement of insolvency.¹⁰¹

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?

129. Arbitrators sitting in England and Wales will be obliged to comply with any moratorium that is imposed in England and Wales as a result of the recognition of any foreign main proceedings under CBIR 2006, as discussed in Question 31 above. Permission to continue with pending arbitration proceedings notwithstanding such a moratorium may, however, be sought from the court, although it is more likely that the claimant party will make this application rather than any arbitrator.
130. Arbitrators in England and Wales will also be required to comply with any order of the court staying the arbitration as a result of foreign insolvency proceedings, although as noted above, the English courts are reluctant to issue such orders other than in exceptional circumstances.¹⁰²

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

131. Where a moratorium is imposed following recognition or foreign main proceedings under CBIR 2006, or where the court orders a stay, those requirements are mandatory in the same way as rules relating to English insolvency proceedings. Unless and until the foreign insolvency

¹⁰⁰ *ibid*, sch 1, art 2(h).

¹⁰¹ *ibid*, sch 1, art 21.

¹⁰² *Mazur Media v Mazur Media GmbH* [2004] All ER (D) 110, [2004] EWHC 1566 (Ch); *Syska (Elektrim) v Vivendi Universal SA* [2009] EWCA Civ 677; *Rawlinson & Hunter Trustees SA (in its capacity as the trustee of the Tchenguiz Discretionary Trust) v Kaupthing Bank HF and ors* [2011] All ER (D) 210, [2011] EWHC 566 (Comm).

proceedings are recognised in England, however, no mandatory measures apply to tribunals seated in England and Wales.

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

132. There does not appear to be any authority on the question, but if a tribunal seated in England and Wales proceeds to issue an award despite a moratorium on the commencement or continuation of that arbitration under CBIR 2006, or despite a restriction imported into English law from another Member State under the terms of the Recast Insolvency Regulation, then it would appear that the award would be vulnerable to challenge under Section 68(2)(g) of the Arbitration Act 1996 on the grounds that it was seriously irregular and contrary to public policy.

133. In practice, however, it is unlikely that any such award would be issued. If the tribunal attempted to proceed with the arbitration, the relevant insolvency office holder may apply to the court for an order that the arbitration be stayed. Breach of that order could be a contempt of court, and any award issued in breach of such order would again likely be set aside on the basis of Section 68(2)(g) of the Arbitration Act 1996.

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

134. No.