IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF THE PEOPLE'S REPUBLIC OF CHINA ("PRC")

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IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

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

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

1. Does the law of the PRC 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. Yes. The PRC Enterprise Bankruptcy Law ("EBL") and the judicial interpretations of the EBL issued by the Supreme People's Court ("SPC") contain provisions on the effect that the opening of insolvency proceedings produces on arbitration.[1] As an overview, the law and the SPC's interpretations contain provisions that specify the impact of insolvency proceedings on a number of issues related to arbitration proceedings, including the ability to commence new arbitration proceedings and/or continue existing arbitration proceedings, the ability to apply for and/or continue existing interim measures (such as freezing assets) in arbitration proceedings against a party that is subject to insolvency proceedings, and the ability to enforce any arbitral award against a party that is subject to insolvency proceedings. These will be explained in further detail below.

2. Does the insolvency legislation in the PRC 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*?

2. Yes. The EBL and the SPC's judicial interpretations require that "any and all civil litigation proceedings concerning the insolvent debtor" that are commenced after a court has accepted an application for insolvency proceedings shall be filed with the same court that handles the insolvency proceedings, ie, the specialised insolvency courts or, for cities where no specialised

[1] The PRC Enterprise Bankruptcy Law 2006; Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (II) 2020; Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (III) 2020.

insolvency court is established, the court at the place where the insolvent debtor resides.[2] However, the aforementioned rule does not apply to civil litigation cases that have been filed before the commencement of the insolvency proceedings.

3. According to Chinese law, all civil litigation cases concerning the insolvent debtor which are commenced after the opening of the insolvency proceedings shall fall under the aforementioned rule of *vis attractiva concursus*.[3] The only exceptions would be disputes that fall within the exclusive jurisdiction of other specialist courts, such as maritime dispute, patent dispute, and civil cases concerning misrepresentation in the securities market.

4. However, this does not apply to arbitration proceedings. As long as the arbitration agreement is valid and is entered into before the commencement of the insolvency proceedings, disputes subject to the arbitration agreement are not covered by the *vis attractiva concursus* rule and should be submitted to arbitration even after the commencement of insolvency proceedings pursuant to the relevant insolvency rules.[4] Further, arbitration proceedings that have been commenced before the opening of the insolvency proceedings would not be affected by the *vis attractiva concursus* rule. See the answer to Question 3 below for details.

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

5. The law does not draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant.

6. Ongoing arbitration proceedings should be temporarily stayed if a party enters into an insolvency proceeding and should resume after the insolvency administrator takes control of the insolvent party and participates in the arbitration on its behalf.[5] Once appointed by the court, the administrator has a duty to represent the insolvency party in arbitrations.

[2] The PRC Enterprise Bankruptcy Law 2006, art 21; Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (II) 2020, art 47.
[3] ibid.
[4] Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (III) 2020, art 8. Article 8 provides that "a debtor or creditor who has objections to the claims recorded in the statement of claims shall state its reasons and legal basis. Where the party having objections still holds objections after the relevant administrator has provided explanations or made adjustments, or where the administrator fails to provide explanations or make adjustments, the party having objections shall file a lawsuit for affirmation of the claims to the competent court within 15 days after verification by the creditors' meeting has been completed. Where the parties concerned have entered into an arbitration clause or agreement before the bankruptcy application is accepted by the court, an application shall be submitted to the designated arbitration institution for confirmation of the creditor-debtor relationship." (emphasis added).
[5] The PRC Enterprise Bankruptcy Law 2006, art 20.

7. Creditors who have not commenced any arbitration before the debtor enters an insolvency proceeding should, in principle, lodge their claims with the administrator first. Subsequently, if a creditor disagrees with the administrator's determination of the amount of its claim against the insolvent debtor, it can then commence an arbitration. Having said that, the EBL does not expressly prohibit a creditor from commencing arbitration against the debtor who has entered an insolvency proceeding. As such, in practice, a creditor might attempt to file an arbitration without waiting for the administrator's decision on the debt claim. However, this would usually be challenged by the administrator, and the tribunal would take the administrator's challenge into account when deciding whether to continue with the arbitration.

8. In both scenarios set forth in paragraphs 6 and 7 above, creditors would not be able to enforce the award rendered in the arbitration proceedings and can only receive distribution *pari passu* with other creditors of the same ranking in the insolvency proceeding.

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?

9. The law does not draw any distinction between different types of insolvency proceedings.

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

10. The law does not draw any distinction based on the subject matter or relief sought in the arbitration.

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

11. These effects do not apply to pre-insolvency proceedings or out-of-court restructuring proceedings. However, we have come across some rare cases where the Supreme People's Court renders an order in pre-insolvency proceedings prohibiting litigations and enforcements against a debtor in high-value restructuring cases.[6]

[6] Such orders were given in the reorganization proceedings of Xinguang Group Holdings and ZK Engineering as well as in the liquidation proceedings of China World Best Group. However, these orders were internal documents among the PRC courts and were not disclosed to the public. Once the Supreme People's Court issues such an order, all courts can obtain the notice within the judiciary's internal system and will be bound by such an order automatically.

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?

12. Please refer to the response to Questions 2 and 3 above. The law does not draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings that are commenced after the opening of insolvency proceedings, and permits both type of claims to continue.

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

13. The law regulating the effect of insolvency on arbitration makes no distinction between voluntary and compulsory insolvency proceedings.

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

14. EBL proclaims to apply extraterritorially.[7]

h. When do the effects (if any) of insolvency on arbitration become operative (e.g., 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.)?

15. The effects of insolvency on arbitration as set out in paragraphs 6-8 in this question become operative from the time of the opening of insolvency proceedings, ie, when a court accepts an application for commencing insolvency proceedings (which may take the form of an application for bankruptcy liquidation, restructuring or compromise).

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?

[7] The PRC Enterprise Bankruptcy Law 2006, art 5.

16. No, PRC law does not permit relief from the effects above. As explained in Question 3 above, an ongoing arbitration could resume after the administrator has taken control of the insolvent party. Any creditor who has not commenced arbitration prior to the insolvency proceedings (despite a valid and binding arbitration agreement) should register its claim with the administrator in the insolvency proceeding. If the creditor is not satisfied with the determination by the administrator, it can bring an arbitration to seek a declaration over its registered claim pursuant to a valid arbitration agreement. Where there is no arbitration agreement, a creditor not satisfied with the determination by the administrator can bring a claim to the specialist insolvency court.

17. Two considerations that the insolvency court will take into account are (i) the existence of a binding arbitration agreement executed prior to the opening of insolvency proceedings and (ii) a determination issued by the administrator over the claim after examining the creditor's registration of such a claim. The insolvency court will allow a creditor who disagrees with the administrator's determination of such a claim to resolve the dispute by way of arbitration, provided that there is a valid arbitration agreement.

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

18. Insolvency courts do not have the power to issue an order to stop arbitration proceedings under the PRC law, regardless of whether the arbitration is seated in the PRC or abroad. However, the insolvency court or the administrator may send notices to arbitral tribunals, notifying them of the opening of the insolvency proceedings and requesting a stay of the on-going arbitration proceedings based on Article 20 of the EBL.

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?

19. The EBL empowers the administrator (but not the insolvency court) to elect to terminate or assume executory contracts concluded by the insolvent party before the opening of insolvency proceedings.[8] An executory contract is a contract under which both parties have not fully performed their primary obligations.

20. The administrator will have full discretionary power over the election in order to maximize the insolvency estate. In cases where the administrator elects to assume the executory contracts, the court will issue a ruling to approve such election upon the application of the administrator.

[8] ibid, art 18.

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?

21. The PRC Arbitration Law upholds the principle of severability of the arbitration agreement/clause from the underlying contract. Therefore, even if the administrator terminates a contract under Article 18 of the EBL,[9] the arbitration agreement contained therein will not be affected. As set out in Question 8 below, arbitration agreements/clauses concluded before the commencement of insolvency proceedings will be upheld. This means that the administrator's decision to terminate an executory contract may be challenged by means of an arbitration if the contract contains an arbitration clause.

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?

22. Arbitration agreements/clauses concluded before the commencement of insolvency proceedings will be upheld. Neither the insolvency administrator nor the court has the power to terminate or suspend such arbitration agreements.

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 (e.g., 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?

23. If an alleged creditor files its claim with the administrator during the insolvency proceedings and the claim is rejected, the creditor can submit its claim to an arbitral tribunal for resolution if there is a valid pre-existing arbitration agreement. Please also refer to the answer to Question 4 above.

[9] ibid.

24. The filing of the claim with the insolvency proceedings does not amount to a submission to the jurisdiction of the insolvency court or a waiver of the arbitration agreement.

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

25. The EBL is silent on whether an administrator's right to avoid fraudulent conveyance or selective payments pursuant to the EBL is subject to an arbitration agreement/clause stipulated in the contract of the transaction to be avoided. In judicial practice, the courts have taken the negative view. In two reported cases,[10] the courts held that under such circumstance, the arbitration clause did not bind the administrator, and the administrator's exercise of the avoidance right under the EBL in its own name is beyond the scope of the arbitration clause.

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

26. Yes, but the insolvency administrator normally will not conclude new arbitration agreements after the opening of insolvency proceedings unless such an agreement is appropriate under a customary trade practice. For example, for maritime contracts and contracts for international trade, it is fairly customary for Chinese companies to agree for arbitration instead of court litigation. In such cases, the administrator might conclude new arbitration agreements as it deems appropriate.

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

27. In cases of insolvency restructuring and composition, an insolvency proceeding will be terminated upon the court's approval of the restructuring or composition plan. In principle, the effect of insolvency proceeding will cease to operate after the termination of the insolvency proceedings. Ongoing arbitrations will continue and new arbitrations can be brought against the insolvent party as usual, subject to the principle against double recovery.

[10] 2015 Lin Min Chu Zi No.1117 ((2015)临民初字第1117号) and 2019 Zhe Min Xia Zhong No.10 ((2019)浙民辖终10号).

28. In case of ongoing arbitrations, the creditor can be repaid from the insolvency estate *pari passu* in accordance with the reorganization or composition plan. But new disputes that arise after the termination of insolvency proceedings will not be affected by the reorganization or composition plan.

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 (e.g., the parties to the arbitration) exclude the application of those rules?

29. Rules regulating the effects of insolvency are mandatory and cannot be contracted out by parties. The provision of Article 20 of the EBL uses a mandatory word "shall" rather than an arbitrary word "may" or "can".[11] Any agreement that excludes the application of such rules is a violation of a mandatory provision of law, which will be construed as void under the PRC Civil Code.[12]

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

30. Arbitrators seated in the PRC are bound by the rules discussed above in considering whether to proceed with an arbitration.

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?

31. The court's personal jurisdiction over the party to the arbitration that is not in insolvency makes no difference with respect to the effectiveness of the insolvency court's position on the arbitration.

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

[11] Article 20 of the EBL provides that "After the court accepts an application for bankruptcy, any civil action or arbitration involving the debtor that has been started but has not yet been concluded ***shall*** be suspended; however, the action or arbitration can proceed after an administrator takes over the debtor's property." (emphasis added).

[12] The PRC Civil Code 2020, art 153. Article 153 provides that a contract is invalid if it violates a mandatory provision of any law or administrative regulation.

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?]

32. Except for cases of debtor-in-possession ("DIP") reorganization, the administrator will take part in the arbitration on behalf of the insolvent party. In DIP cases, normally the insolvent party continues to participate in the arbitration in its own name, and the administrator will take a supervisory role.

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?

33. Considerations of confidentiality will not be altered in an insolvency scenario.

34. Pursuant to Article 10 of Judicial Interpretation III of the EBL,[13] a creditor is only entitled to obtain the insolvent party's information to the extent that the information is needed for participation in the proceeding. Such information includes the financial report, resolutions of the creditors' meeting or the creditors' committee, the administrator's work report, etc. However, the administrator will not disclose any confidential information relating to the arbitration to a creditor, unless the creditor has interests in the arbitration proceeding and has a genuine right to obtain such information under the arbitration law.

35. As the court has the power to supervise the administrator's work, practically speaking, the administrator will give the court access to all information concerning the debtor and the insolvency proceedings, including those in respect of the arbitration proceedings.

36. There is no legal basis for a creditor who is not a party to the arbitration proceeding to appear in the arbitration simply because of insolvency of the debtor.

[13] Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (III) 2020, art 10.

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

37. The name of a party will not change as a consequence of the opening of insolvency 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?

38. If either the insolvency administrator or the debtor in possession wishes to reach a settlement in the arbitration, this act is construed as a disposal of assets. If the contemplated settlement materially affects the other creditors' interest, it should be reported to the court or the creditors' committee, which may raise objection.

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

39. PRC law does not specifically address the issue of whether interim measures can be adopted in an arbitration against a party that is subject to insolvency proceedings (regardless of whether the arbitral proceedings are commenced before or after the opening of the insolvency proceedings). However, there are provisions for the impact of insolvency proceedings on interim property preservation measures (i.e., assets freezing) that have been adopted prior to the opening of the insolvency proceedings against a party subject to insolvency proceedings.[14]

40. As set out in Question 21 below, under the EBL, after the commencement of insolvency proceedings, property preservation measures over the assets of a party subject to insolvency proceedings which have been adopted before the opening of the insolvency proceedings must be discontinued. Likewise, it can be inferred that any application for property preservation measures in arbitration proceedings against a party subject to insolvency proceedings after the opening of the insolvency proceedings will also be restricted.

41. Unlike property preservation measures in arbitral proceedings, which will be restricted or discontinued upon the commencement of insolvency proceedings, the ability to adopt and continue with other types of interim measures (ie, evidence preservation and conduct preservation which is an order requiring a party to take a specific action or prohibiting a party from taking a specific action, similar to an "injunction order" under common law) in arbitration proceedings against a party subject to insolvency proceedings will not be affected after the

[14] The PRC Enterprise Bankruptcy Law 2006, art 19; Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (II) 2020, art 7.

commencement of insolvency proceedings. However, it is important to keep in mind that in China, arbitral tribunals sitting in the PRC have no power to grant any interim measures. Any request for interim measures in arbitration, whether for assets preservation, evidence preservation, or action preservation, must be referred to the supervising court via the relevant arbitral commission.[15]

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

42. Pursuant to the EBL, after the opening of the insolvency proceedings, interim measures for property preservation previously adopted over the assets of a party subject to insolvency proceedings must be lifted.[16] Where the insolvency court rules to dismiss a bankruptcy application and the insolvency proceeding is terminated, property preservation measures that were lifted will be resumed according to the original preservation sequence, unless the court that originally granted the interim measures decides not to.[17] The abovementioned rules also cover property preservation measures in support of arbitration proceedings that are granted prior to the opening of insolvency proceedings.

43. There are no similar provisions under the PRC law that expressly cover other interim measures, ie, measures for evidence preservation and conduct preservation. The effect of such interim measures for evidence preservation and action preservation in arbitration proceedings against a party subject to insolvency proceedings shall remain unaffected.

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?

44. The capacity of the insolvent party to settle the dispute subjected to arbitration is restricted as mentioned in the response to Question 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?

[15] The PRC Arbitration Law 1994 (as amended in 2017), art 28.
[16] The PRC Enterprise Bankruptcy Law 2006, art 19; Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (II) 2020, art 7.
[17] Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (II) 2020, art 8.

45. Yes. The position under the PRC law is that the commencement of insolvency proceedings in the PRC would prohibit individual creditors from continuing or initiating separate enforcement proceedings outside the insolvency proceedings. The enforcement of any debt must be achieved through insolvency proceedings.

46. Specifically, pursuant to the EBL, after an application for commencing insolvency proceedings is accepted by the court, any ongoing enforcement proceedings by any creditors with respect to the assets of the insolvent debtor must be suspended.[18] Further, after such application is accepted by the court, payment of debts made by the debtor to any individual creditor is invalid. All the claims against the insolvent debtor's assets (including enforcement of judgments and/or arbitral awards) must be made through the insolvency proceedings.[19] Creditors should register their debts against the insolvent debtor pursuant to any effective civil judgment or arbitral award with the insolvency administrator of the insolvent debtor.[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?

47. A claim that is being pursued in arbitration is regarded as pending; such unresolved claim may be registered with the administrator during the insolvency proceeding. Once the arbitration award is rendered, the administrator will review and confirm the claim as per the award.

48. Article 119 of the EBL[21] provides that if there is unresolved litigation or arbitration at the time of asset distribution, the administrator shall reserve a proportionate amount to be distributed after a final judgment or award on the disputed claim is rendered. If the creditor is not able to receive distribution due to certain reasons (such as disputes remain unsolved or some personal reasons) within two years after the termination of insolvency proceedings, the reserved amount will be distributed to other creditors proportionately.

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?

49. A credit contained in an arbitration award is a valid proof of credit for the purposes of the insolvency proceedings. If it is a foreign award, it needs to be recognised under the New York Convention or other enforcement regimes to be a valid proof of credit. Except for those

[18] The PRC Enterprise Bankruptcy Law 2006, art 19.
[19] ibid, art 16.
[20] Provisions of the SPC on Several Issues concerning the Application of the PRC Enterprise Bankruptcy Law (III) 2020, art 7.
[21] The PRC Enterprise Bankruptcy Law 2006, art 119.

concerning disputes that fall within the exclusive jurisdiction of other specialist courts (see the answer to Question 2 above), recognition proceedings concerning the insolvent debtor that commenced after the opening of the insolvency proceedings will be conducted by the insolvency court pursuant to the rule of *vis attractiva concursus*.[22]

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

50. There is not yet any reported case where rules of insolvency law are pronounced by PRC courts as part of public policy of the PRC. However, arbitral awards have been set aside based on violations of EBL. For instance, in one case decided by a court in Shaanxi province, the tribunal did not stay the arbitration or notify the administrator; as a result, the administrator could not participate in the arbitration on behalf of the insolvent debtor. The court ruled that the inability for the administrator to participate in the arbitration was a material procedural violation and set it aside on this basis.[23] In another case decided by a court in Beijing, the tribunal affirmed claims that had been discharged under a reorganization plan. The court ruled that the tribunal acted *ultra vires* by rendering such an award and set aside the award on that basis.[24]

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 (i.e., 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 (e.g., prohibiting individual proceedings [e.g., arbitration] outside the insolvency process)?[25]

51. The prevailing view among insolvency practitioners and scholars is that the principle of *par conditio creditorum* is considered as part of public policy from a substantive point of view. The EBL does not expressly prohibit creditors from bringing arbitrations against a debtor in insolvency proceedings without first lodging claims with the administrator. However, any award thus rendered will be subject to the effect of the insolvency proceeding, and the award creditor can only receive distribution *pari passu* with other creditors of the same ranking.

[22] ibid, art 21.

[23] 2017 Shaan 01 Min Te No.135 ((2017)陕01民特135号).

[24] 2017 Jing 02 Min Te No.55 ((2017)京02民特55号).

[25] If the equality of creditors is part of public policy only from a substantive point of view, an award rendered by a foreign arbitral tribunal despite the prohibition of arbitration might still be effective in the insolvency proceedings because the award creditor will still abide by the *pari passu* distribution in insolvency. If, on the contrary, the public policy consideration of equality of creditors also extends to its procedural dimension, ie every creditor should have its claim decided under the same procedure, an award rendered in breach/disregard of such procedures might not be effective in the insolvency proceedings.

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

52. No.

IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

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

29. Do foreign insolvency proceedings need to be recognised under any formal [local] procedure to produce effects in the PRC?

53. According to Article 5 of the EBL, judgments or rulings by foreign courts in insolvency proceedings will need to go through a formal procedure of recognition by the PRC courts (described in paragraphs 54 and 55 below) in order to have any impact on the insolvent debtor's assets located within the territory of the PRC.[26] This is the only provision in the PRC law that deals with the impact of foreign insolvency proceedings in the PRC. The PRC law is silent on how foreign insolvency proceedings (apart from the final judgments or rulings in such proceedings) will be recognised in the PRC. Nevertheless, in light of a recent internal guideline issued by the SPC, foreign judgments or rulings that did not go through any formal recognition procedure may be accepted by courts as valid proof of the competence of a foreign insolvency administrator (see paragraph 56 below).

54. Foreign court judgments or rulings in insolvency proceedings, same as foreign court judgments on other civil and commercial matters, may be recognised according to the relevant bilateral treaties for recognition and enforcement of foreign civil judgments that the PRC has concluded with other countries, or in the absence of such treaties, on the basis of the principle of reciprocity. Foreign court judgments or rulings rendered in insolvency proceedings may not be recognised if the judgments or rulings violate the basic principles of the laws of the PRC, jeopardise the state sovereignty and safety of the PRC, conflict with social and public interests of the PRC, or undermine the legitimate rights and interests of the creditors within the PRC.[27]

55. As with the recognition of foreign civil judgments, recognition of foreign court judgments or rulings in insolvency proceedings in the PRC is challenging. To date, there are only a few bilateral treaties that the PRC has concluded with foreign states regarding recognition and enforcement of foreign civil and commercial judgments. They cover a few European Union jurisdictions (including France and Italy) but do not cover many of the key jurisdictions for foreign investors, including the US, the UK, Australia, Germany, or Japan. In the Nanning

[26] The PRC Enterprise Bankruptcy Law 2006, art 5.
[27] ibid.

Statement of the Second China-ASEAN Justice Forum of 2017, the SPC, together with representatives from other ASEAN countries, indicated a willingness to apply a presumption of reciprocity for the enforcement of foreign judgments from countries within ASEAN. However, we are not aware of this approach being widely implemented by the courts.

56. There have been recent developments with regard to recognition of foreign insolvency proceedings in the PRC. In August 2021, the Maritime Court in Xiamen acknowledged the identity and competence of the administrator appointed by the Singapore High Court in Xihe Holdings' Singapore insolvency proceedings. This is a landmark case where a PRC court recognised foreign insolvency proceedings on the basis of the principle of reciprocity. This case is an illustration of the application of de facto reciprocity: it follows the recognition by the Singapore High Court of a PRC insolvency proceeding commenced in Nanjing, Jiangsu Province in 2020. In addition, according to an internal guideline issued to courts by the SPC in 2022[28] (which is not law itself but guides legal practice of PRC courts), without going through the formal procedure of recognition by the PRC courts, an unrecognised foreign judgment or ruling (together with the relevant notarisation certificate and other documentation) can be treated as valid proof for a foreign insolvency administrator or liquidator to participate in PRC litigation proceedings on behalf of the foreign insolvent company[29].

57. Furthermore, China and Hong Kong have reached an arrangement[30] with regard to mutual recognition of and assistance to insolvency proceedings between China and Hong Kong. The arrangement contains specific procedures with regard to the recognition of Hong Kong insolvency proceedings in China. In China, the new arrangement will apply first to the Intermediate People's Courts in certain pilot areas, including cities of Shanghai, Xiamen and Shenzhen. There are plans to progressively expand the scope of the pilot areas.

58. It remains to be seen whether there will be similar future developments with regard to mutual recognition of and assistance to insolvency proceedings between the PRC and other countries.

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[28] The Meeting Minutes of the National Symposium on Foreign-Related Commercial and Maritime Trial Work (the "SPC 2022 Meeting Minutes") issued by the SPC on 24 January 2022.

[29] Article 6 of the SPC 2022 Meeting Minutes provides that "for a company registered and established outside the territory of the People's Republic of China, if the court of the country of registration has designated a judicial administrator, liquidation administrator or bankruptcy administrator due to the corporate deadlock, dissolution, reorganization, bankruptcy or other reasons, such administrator may participate in the litigation on behalf of the company. The administrator shall submit the judgment or ruling made by the court of the country of registration as well as the relevant documents such as the notarization and authentication thereof to prove his/her litigation representative qualification. The people's court shall organize cross-examination of the above evidence. Where the other party denies the qualification of the administrator as a litigation representative on the grounds that the judgment or ruling made by the court of the country of registration is not recognized by the court in our country, the people's court shall not uphold such denial."

[30] On 14 May 2021, the SPC published the Record of Meeting concerning Mutual Recognition of and Assistance to Insolvency Proceedings signed between the Courts of China and of the Hong Kong Special Administrative Region (the "Meeting Record"), which set out a consensus on the mutual recognition of and assistance to insolvency proceedings between China and Hong Kong. Further details of the implementation of this arrangement in China are set out in an Opinion issued by the SPC on Taking Forward a Pilot Measure in relation to the Recognition of and Assistance to Insolvency Proceedings in the Hong Kong Special Administrative Region (Fa Fa [2021] No. 15) (the "SP's Opinion on Hong Kong Insolvency Proceedings 2021").

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?

59. China has not adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency.

60. Article 5 of the EBL[31] provides that once the insolvency proceedings are initiated according to the EBL, they shall come into effect in respect of the insolvent debtor's property outside of the territory of the PRC.

61. Article 5 also addresses whether foreign judgments or rulings in insolvency proceedings will have any effect on the insolvent debtor's assets located within the territory of the PRC. Please see Questions 29 and 31 above and below for details.

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

62. The PRC law is silent on whether the opening of insolvency proceedings outside of the PRC (except for insolvency proceedings commenced in Hong Kong and recognised by PRC courts, which is dealt with in paragraph 65 below) would have any effect on arbitrations seated in the PRC. In particular, the law is silent on who has the authority to participate in the relevant arbitration proceedings on behalf of the party that is subject to foreign insolvency proceedings. Similarly, PRC law does not address whether any foreign insolvency proceedings, if recognised in the PRC, will affect arbitrations seated in the PRC that concern an insolvent debtor's assets located within the PRC. For example, it is unclear whether recognised foreign insolvency proceedings will impact on interim asset preservation measures in PRC arbitration proceedings and on enforcement of arbitral awards in the same way that PRC domestic insolvency proceedings have.

63. With respect to PRC litigation, if a PRC court discovers during the course of litigation proceedings that one party has commenced foreign insolvency proceedings (i.e., liquidation proceedings or declared bankruptcy), the court is required to notify the foreign bankruptcy administrator or liquidator of the PRC litigation and request their participation in the PRC litigation on behalf of that party.[32] Further, as mentioned in paragraph 56 above, the foreign bankruptcy administrator or liquidator appointed by the foreign court would be eligible to participate in PRC litigation proceedings on behalf of the insolvent debtor by submitting the

[31] The PRC Enterprise Bankruptcy Law 2006, art 5.
[32] Minutes of the Second National Work Conference of the SPC for Foreign-related Commercial and Maritime Trials 2005, art 15.

foreign judgment or ruling that can prove its appointment and relevant notarisation documentation.

64. There is no similar provision under PRC law that deals with the effect of foreign insolvency proceedings on PRC-seated arbitrations. If PRC law applies, it is unclear, in light of the principle of party autonomy in arbitration, to what extent the arbitral tribunal could request the foreign bankruptcy administrator or liquidator of the foreign insolvency proceedings to participate in the PRC-seated arbitration. However, under PRC rules of the conflict of laws, participation in civil legal proceedings (both court litigations and arbitrations) is a matter of a party's civil capacity, which should be determined by the law of the party's place of habitual residence in case of a natural person, or in case of a legal entity, the law of the party's place of incorporation or habitual residence, whichever is appropriate.[33] If a tribunal applies PRC rules of the conflict of laws, it will look for the applicable law governing the insolvent party's civil capacity to determine how such party's participation in the arbitration is affected after a foreign insolvency proceeding has been opened.

65. Nevertheless, with respect to insolvency proceedings commenced in Hong Kong, the 2021 arrangement between China and Hong Kong provides that PRC courts may allow the administrator or liquidator appointed in the Hong Kong insolvency proceedings to participate in PRC arbitration proceedings on behalf of the Hong Kong insolvent company.[34] Further, by virtue of the same arrangement, Hong Kong insolvency proceedings, once recognised by PRC courts, will have the same impact on ongoing PRC arbitration proceedings, interim assets preservation measures and enforcement of arbitral awards as PRC domestic insolvency proceedings, including the suspension of ongoing arbitrations, discontinuing of property preservation measures and suspension of enforcement proceedings.[35]

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?

66. The PRC law does not contain a specific provision that requires arbitrators or arbitration commissions to take into account the rules on the recognition of foreign insolvencies to evaluate the effects of the foreign insolvencies in the arbitration.

67. As mentioned in Question 29, the EBL requires that foreign court judgments or rulings in insolvency proceedings must be formally recognised by the PRC courts in order to have any impact on the insolvent debtor's assets located within the territory of the PRC. Particularly, judgments or rulings in foreign insolvency proceedings can be refused recognition in the PRC on public policy grounds such as violation of basic principles of PRC law, jeopardising state sovereignty and safety, conflict with social and public interests of the PRC, or undermining legitimate rights and interests of the creditors within the PRC. As such, arbitral tribunals in

[33] Law of the PRC on the Application of Laws to Foreign-Related Civil Relations 2010, arts 12, 14.
[34] SPC's Opinions on Hong Kong Insolvency Proceedings 2021, art 14.
[35] SPC's Opinions on Hong Kong Insolvency Proceedings 2021, arts 12, 13.

PRC-seated arbitration proceedings are likely to take into account any decisions by PRC courts on the recognition (or not) of the relevant foreign judgments or rulings in insolvency proceedings to evaluate the effects of such insolvencies in the arbitration, to prevent the risk of arbitral awards being set aside, or refused enforcement in PRC by the supervisory court in the PRC for violation of public policy or for violation of basic principles of PRC law.[36]

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

68. The PRC law is silent on this issue. See answer to Question 31 above.

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

69. The PRC court is likely to consider the rules regulating the effects of insolvency on arbitration and the consistency of arbitral award with any court decision on recognition of foreign insolvency proceedings as part of the public policy in the PRC. As such, an arbitral award which does not respect such effects may be considered as violating of public policy of the PRC and thus risks being set aside by the court.[37]

70. Further, as mentioned in Question 26 above, there are reported cases where arbitration awards were set aside on the basis that violation of the rules regulating the effect of insolvency on arbitration constituted a material violation of the procedural rules in the arbitration.

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?

71. No.

[36] The PRC Arbitration Law 1994 (as amended in 2017), arts 58, 70; The PRC Civil Procedural Law 1991 (as amended in 2021), art 244.
[37] ibid.