IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF THE NETHERLANDS

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IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

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

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

1. Does the law of the Netherlands 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 is primarily contained in the Dutch Bankruptcy Act ("DBA").[1] There are three types of insolvency proceedings for companies under the DBA.[2]

   a) A bankruptcy procedure (*faillissement*) is typically aimed at a liquidation of the debtor and distribution of its assets to its creditors (hereinafter referred to as "bankruptcy").

   b) A suspension of payments (*surseance van betaling*) aims to restructure the company and can end with a composition plan accepted by the creditors (see answer to Question 3(b) below) but in practice is often converted into a bankruptcy.

   c) A court confirmed extrajudicial restructuring plan (*akkoordprocedure buiten faillissement*)—also labelled the "Dutch scheme", which entered into force on 1 January 2021. This procedure provides for the preparation and court approval of an out-of-court restructuring plan.

2. There are no specialised separate courts in the Netherlands dealing with insolvency matters. Instead, the civil chambers of the regular courts are entrusted with this task. Arbitration law is mainly contained in Book IV of the Dutch Code of Civil Procedure ("DCCP").[3]

3. There are no provisions dealing specifically with the effect of insolvency on arbitration in Dutch law, either in insolvency law or in arbitration law. In literature and in the limited case

[1] *Wet van 30 september 1893 op het faillissement en de surséance van betaling* (*Stb.* 1893, 140). For the full text, visit <https://wetten.overheid.nl/BWBR0001860> accessed 29 December 2023. For an informal English translation, visit <http://www.dutchcivillaw.com/bankruptcyact.htm> accessed 29 December 2023.

[2] In addition, the DBA provides for debt restructuring for natural persons (*schuldsanering natuurlijke personen*), which is an alternative insolvency procedure for natural persons, whereby a natural person is put under financial supervision for a period of time with a view to a restructuring of that person's debt and ending with a "clean slate". This procedure is not further dealt with in this National Report.

[3] DCCP, arts 1020 *et seq*. In addition, certain matters related to arbitration are regulated in Article 6:236(1)(n) of the Dutch Civil Code ("DCC"), as well as in Articles 166 and 167 of Book 10 DCC.

law available, the interaction between the two areas of law has mainly been based on an analogous application of the provisions of the DBA applicable to regular court proceedings pending or yet to be initiated at the time of the bankruptcy declaration.[4] An analogous application of these provisions is considered to be appropriate, given that court proceedings and arbitration are both legal proceedings resulting in final and binding decisions that are enforceable by the courts of law in a rather comparable manner.[5]

4. In cross-border situations (eg, if a party with its centre of main interests (COMI) in the Netherlands becomes subjected to insolvency proceedings in the Netherlands and is party to an arbitration with seat outside of the Netherlands or vice versa), the effects of the insolvency proceedings on arbitration may also follow from the European Insolvency Regulation ("EIR"),[6] which applies in all European member states except Denmark. Dutch law does not contain specific provisions for cross-border situations in which the EIR does not apply (see answers to Questions 3(g) and 31 below).[7]

5. Arbitration legislation provides no direct answer regarding the subject-matter arbitrability, capacity to arbitrate, capacity to conclude arbitration agreements, or validity and effectiveness of arbitration agreements after the opening of insolvency proceedings. Subject-matter arbitrability is regulated in Article 1020(3) of the DCCP,[8] a provision that employs a rather broad wording and does not provide for a list of non-arbitrable matters. Thus, it offers no concrete answer as to what can be arbitrated after the opening of insolvency proceedings. In that respect, the relevant provisions of insolvency law need to be considered, but they generally do not restrict arbitrability of related matters, as is explained in the answer to Question 2 below.

6. In a similar vein, the provisions of insolvency law are relevant for determining the capacity of the debtor or the bankruptcy trustee (hereinafter referred to as the "trustee") to conclude new arbitration agreements (see the answer to Question 11) and the capacity to be a party to legal proceedings (see the answer to Question 3(a)). Relevant provisions concerning the capacity, as well as an analogous application of the effects of insolvency on lawsuits (see Paragraph 3 above), may result in different answers for a bankruptcy (*faillissement*), suspension of payments (*surseance van betaling*), and the court confirmed extrajudicial

[4] It is a common view that the provisions from the DBA have at least some relevance for arbitration, even though this does not necessarily imply that arbitrators will have to apply each of these provisions in the same manner as the courts. See further discussion, for example, in the answers to Questions 14 and 32 below.

[5] Also, the provisions regarding the suspension of payments do not contain express provisions relating to arbitration, but similar to what was described for bankruptcy, the provisions concerning court proceedings may be analogously applied. See the answer to Question 3(b) below.

[6] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

[7] Parties that have their centre of main interests ("COMI") outside of the Netherlands can also make use of the (undisclosed version of the) "Dutch Scheme" – any comments in this questionnaire relating to the "Dutch Scheme" are of relevance to those parties too.

[8] DCCP, art 1020(3): "De overeenkomst tot arbitrage mag niet leiden tot de vaststelling van rechtsgevolgen welke niet ter vrije bepaling van de partijen staan." Translation: "The arbitration agreement shall not serve to determine legal consequences that may not be freely determined by the parties."

restructuring plan (*akkoordprocedure buiten faillissement*), respectively. Relevant provisions in case of a suspension of payments (*surseance van betaling*) are contained in Articles 214 *et seq.* DBA, and in case of the court confirmed extrajudicial restructuring plan (*akkoordprocedure buiten faillissement*) in Articles 369 *et seq.* DBA. There is no express provision relating to arbitration, but similar to what was described for bankruptcy, the provisions concerning court proceedings may be analogously applied.

7. This report primarily refers to bankruptcy proceedings (*faillissement*), which is the most common type of insolvency proceeding applicable to companies, with an occasional reference to (the less common) suspension of payment (*surseance van betaling*), and to the court confirmed extrajudicial restructuring plan (*akkoordprocedure buiten faillissement*), in order to point out differences in the interaction between insolvency and arbitration. Within the context of the analysis of the effects of insolvency proceedings on arbitration proceedings, it is helpful to briefly introduce some general concepts of Dutch insolvency law:

    a) **Application for bankruptcy**—An application for bankruptcy can be filed with the competent state court. It can be submitted by the debtor or by one or more of its creditors.[9] The application is granted if it is summarily shown that the debtor (i) has ceased to pay its debts as they have fallen due and (ii) has more than one creditor, whereby at least one of them has a due and payable claim.[10]

    b) **Most relevant effects of the opening of bankruptcy**—The bankruptcy is effective as of the day that the court declares the debtor bankrupt (see the answer to Question 3(h) below). As from that moment, the assets belonging to the debtor, as well as assets obtained by the debtor during the bankruptcy, form part of the estate. Existing attachments of any assets belonging to the estate are lifted. Unsecured creditors can no longer directly enforce their claims but will have to submit them in the bankruptcy proceedings instead.[11] As from that same moment, the debtor loses the right to manage and dispose over any assets forming part of the estate.[12] Any

[9] Also, the Dutch Public Prosecution Office can submit a request for bankruptcy for reasons of public interest, but in practice, this rarely occurs.

[10] DBA, art 1: "De schuldenaar, die in de toestand verkeert dat hij heeft opgehouden te betalen, wordt, hetzij op eigen aangifte, hetzij op verzoek van een of meer zijner schuldeisers, bij rechterlijk vonnis in staat van faillissement verklaard." Translation: "The debtor that is in a situation where it has ceased to pay its due and payable debts shall be declared bankrupt by court order, rendered either upon its own request or upon the request of one or more of its creditors."

[11] ibid, art 20: "Het faillissement omvat het gehele vermogen van de schuldenaar ten tijde van de faillietverklaring, alsmede hetgeen hij gedurende het faillissement verwerft." Translation: "The bankruptcy covers the entire property and all rights and interests and liabilities of the debtor at the time of the declaration of bankruptcy as well as anything it will acquire during the bankruptcy."

[12] ibid, art 23: "Door de faillietverklaring verliest de schuldenaar van rechtswege de beschikking en het beheer over zijn tot het faillissement behorend vermogen, te rekenen van de dag waarop de faillietverklaring wordt uitgesproken, die dag daaronder begrepen." Translation: "As a result of the declaration of bankruptcy the bankrupt debtor loses the right to dispose of and to administer its assets as far as these belong to the estate, this with effect from and including the day on which the bankruptcy order is rendered."

commitments assumed by the debtor during the bankruptcy only bind the estate to the extent such commitments are beneficial to it.[13]

c) **Appointment of trustee**—The court appoints a trustee who is entrusted with the management and liquidation of the estate. In performing this task, the trustee has to act in the interest of the joint creditors. Commitments entered into by the trustee acting in his capacity qualify as estate debts ("estate debts"), which have priority over other claims. The trustee operates under the supervision of a supervisory judge (for ease of reference and considering the terminology in the Questionnaire, we will hereinafter refer to the court of which the supervisory judge (*rechter-commissaris*) is a member as the "insolvency court"), whose approval is required for certain actions provided for in the DBA. In some cases, also a creditors' committee is established with the right of (non-binding) advice in respect of certain actions provided for in the DBA, but in practice, this rarely occurs. Governance is different in a suspension of payments: after filing for *surseance van betaling*, the debtor retains the right to dispose over and manage the estate together with one or more administrators appointed by the court. According to Article 228 DBA, during the suspension of payments, no acts of management or disposal may be exercised by the debtor without cooperation of the administrator. The same holds true for pursuing or defending claims binding or affecting the estate, according to Article 231(3) DBA. A debtor who is in the process of restructuring through a court confirmed extrajudicial restructuring plan (*akkoordprocedure buiten faillissement*) can in principle continue to dispose over and manage its assets (although the court may order specific arrangements affecting such authority if necessary to safeguard the interests of the creditors).

d) **Verification of claims**—Creditors of the bankrupt debtor have to submit their claims for payment from the estate ("Claims for Payment") with the trustee, who will draw up a list of provisionally accepted and provisionally disputed Claims for Payment. This list is discussed at a claims verification meeting, during which creditors also have the right to dispute other claims on the list.[14] If a Claim for Payment remains disputed (by the bankruptcy trustee and/or other creditors), the supervisory judge—after having explored the possibility of a settlement—will refer such claims to the competent court for resolution. This is called the "verification procedure". The adjudication of such a dispute concerning a Claim for Payment after referral by the supervisory judge is hereinafter referred to as a "verification dispute". The

[13] ibid, art 24: "Voor verbintenissen van de schuldenaar, na de faillietverklaring ontstaan, is de boedel niet aansprakelijk dan voorzover deze ten gevolge daarvan is gebaat." Translation: "The liquidation estate is only liable for obligations of the debtor that have arisen after the declaration of bankruptcy to the extent that the estate benefits from such obligations."

[14] ibid, art 119(1): ". . . Ieder der op die lijsten voorkomende schuldeisers is bevoegd de curator omtrent elke vordering en haar plaatsing op een der lijsten inlichtingen te vragen, of wel haar juistheid, de beweerde voorrang of het beweerde retentierecht te betwisten, of te verklaren, dat hij zich bij de betwisting van de curator aansluit." Translation: ". . . Each creditor whose name appears on these lists may ask the trustee to provide information about each claim and why it is included on one of the lists, and may dispute the correctness of these list or dispute the alleged priority ranking of a claim or the alleged right of retention attached to it, or may indicate that it agrees with the contest that the trustee has put forward against it."

respective notions of "Claim for Payment", "verification procedure", and "verification dispute" are relevant in the context of numerous questions throughout this questionnaire.

8. Case law directly dealing with the effect of bankruptcy on arbitration is limited. The topic has received some attention in legal writings, whereby generally no controversial views have been expressed.

2. Does the insolvency legislation in the Netherlands 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*?

9. *Vis attractiva concursus* is rather narrow under Dutch law. Thus, the usual rules on jurisdiction are predominantly applicable with respect to matters that are only *related* to insolvency proceedings. As already briefly stated, insolvency matters are dealt with by the civil chambers of the regular courts. The insolvency court, which has jurisdiction in the relevant insolvency proceedings, usually is the court where the debtor has its domicile or statutory seat, but it can also be the court where the debtor conducts most of its business.

10. Generally speaking, the insolvency court does not 'attract' within its jurisdiction disputes concerning matters merely related to insolvency proceedings, such as purely contractual or commercial disputes—not concerning verification disputes—that need to be settled for the purposes of insolvency proceedings. Rather, general rules on jurisdiction remain applicable to such contractual or commercial disputes. The insolvency court 'attracts' jurisdiction only with respect to pure 'insolvency matters', such as the opening of the proceedings, appointment of the trustee and creditors' committee, and appeals against decisions of the supervisory judge. These matters can neither be applied for nor can they be granted in arbitration.[15]

11. In relation to Claims for Payment, the following applies with respect to the jurisdiction of the insolvency court. If proceedings had already been pending when the bankruptcy was opened (Article 122 DBA) and the Claim for Payment at stake is disputed in the verification procedure, the supervisory judge will refer the proceedings back to the same court/institution where they were pending. If no proceedings were pending when the bankruptcy was opened, the supervisory judge (*rechter-commissaris*) will refer disputed Claims for Payment to litigation to be held before the insolvency court (ie, the court of which the supervisory judge is a member; for the avoidance of doubt, the supervisory judge will not be (one of) the judge(s) adjudicating

[15] H.J. Snijders, "Nederlands arbitragerecht" (2018) 2.1.4.8; G.J. Meijer, T&C Rv, commentaar op art. 1020 Rv, para 6(b); A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht.

such a verification dispute).[16] Accordingly, as a matter of principle, general rules on relative and territorial jurisdiction are not preserved when proceedings concerning the relevant Claim for Payment were not yet pending at the time the bankruptcy was opened. The same seems to hold true for international jurisdiction.[17] However, these rules do not exclude the application of choice of court agreements, which follows from a 1999 decision of the Dutch Supreme Court,[18] where a Claim for Payment disputed in the verification procedure was referred to a foreign court that was designated by the parties in a forum-selection-clause (see also the answer to Question 3(a)). The prevailing view in literature is that there is no reason to treat arbitration agreements differently, which approach is also followed by Dutch lower courts.[19] Consequently, even if verification disputes fall under the *vis attractiva concursus*, it does not imply non-arbitrability of such disputes. Although it thus follows that choice of court, and arbitration agreements are respected, the conduct of these proceedings can still be affected by bankruptcy (eg, certain steps should be followed to allow the trustee to take over proceedings), which is further elaborated in the answer to Question 3(a) below.

12. With respect to ordinary civil and commercial matters that are only related to bankruptcy (not being verification disputes), general rules on jurisdiction are preserved. How the conduct of these other claims is affected by bankruptcy is further elaborated in the answer to Question 3(a) below.

13. Hence, briefly put, if the underlying legal relationship contains an arbitration agreement or the matter had already been pending before a different court or arbitral tribunal when the bankruptcy proceedings were opened, it will be referred to arbitration and continued in arbitration if already pending (see answer to Question 3(a) below). Insolvency law provides for different methods of their continuation, depending on the nature of a dispute, as will be detailed in the answer to Question 3(a). With respect to the situation in which no arbitral proceedings were pending at the moment of the opening of bankruptcy proceedings, there are no provisions in insolvency law that would generally invalidate pre-bankruptcy arbitration agreements. In a similar vein, there is no restriction of the jurisdiction of arbitrators with respect to commercial matters that are only *related* to insolvency of a party. Arbitration agreements are generally enforceable and upheld when invoked in such matters. Hence, the prevailing view amongst Dutch commentators is that the exclusive competence of the state

[16] DBA, art 122(1): "In geval van betwisting beproeft de rechter-commissaris een schikking. Indien hij partijen niet kan verenigen, en voorzover het geschil niet reeds aanhangig is, verwijst hij partijen naar een door hem te bepalen zitting van de rechtbank, zonder dat daartoe een dagvaarding wordt vereist." Translation: "If a claim is disputed, the supervisory judge shall examine if it is possible to come to an agreement to settle the dispute. If he is unable to reconcile the involved parties and the dispute is not already the subject of legal proceedings, he shall set a hearing of the District Court and refer the matter thereto, without the necessity to serve any writ of summons."

[17] It is noted that the insolvency court will generally be the court of the insolvent party's domicile, which would have international jurisdiction as a general rule both under EU and national law (cf. Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and Article 2 DCCP). Yet, it seems to exclude, for example, alternative jurisdiction grounds, such as the place of performance of the obligation in question.

[18] HR 16 April 1999, ECLI:NL:HR:1999:ZC2888, *NJ* 2001/1, ground 3.3.3.

[19] Rechtbank Utrecht 4 September 2002, *TvA* 2004/14, ground 2.8.

court within the meaning of Article 122 DBA does not extend to the determination of the existence or amount of a claim which can then be used as a basis for distribution out of the estate.[20] Thus, the *vis attractiva concursus* generally does not affect the jurisdiction of arbitrators either in verification disputes or in other related matters. Yet, insolvency law may have an impact on the conduct of proceedings (initiation or continuation), as will be detailed under Question 3(a).

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

14. The DBA makes a distinction between proceedings on behalf of the estate, ie, where the bankrupt party is claimant, and proceedings against the estate, ie, where the bankrupt party is defendant, discussed further below. As to the latter, it further distinguishes between Claims for Payment and other claims against the estate. As already briefly mentioned in the answer to Question 1, there are no express provisions on arbitration in the DBA but only provisions that relate to court proceedings, which are applied to arbitration analogously. The most important consequence for arbitration will be to conduct it in such a way that the trustee (or another creditor, where applicable) is given the opportunity to become involved in the proceedings as required under insolvency law.

Proceedings where the bankrupt party acts as a claimant

15. If arbitration proceedings in which the bankrupt party acts as claimant were already pending at the time of the declaration of bankruptcy, the defendant can request a suspension of the arbitral proceedings to summon the trustee to take over the proceedings.[21] If the counterparty does not do so and simply continues the arbitration proceedings against the original (now bankrupt) claimant, the decision rendered—including any cost order obtained—has no legal effect and consequently, cannot be enforced against the estate, other than to the extent that the decision is beneficial to the estate (ie, if the (now bankrupt) party fully or partially wins the proceedings) as follows from Article 24 DBA.

[20] G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5(d) (BPP nr. 13); A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht, fn 15; A.I.M. van Mierlo, "Arbitrage, faillissement (in nationaal perspectief) en de vordering tot betaling van een geldsom uit de boedel" (2012) 70 TvA, fn 11.

[21] DBA, art 27(1): "Indien de rechtsvordering tijdens de faillietverklaring aanhangig en door de schuldenaar ingesteld is, wordt het geding ten verzoeke van de verweerder geschorst, ten einde deze gelegenheid te geven, binnen een door de rechter te bepalen termijn, de curator tot overneming van het geding op te roepen." Translation: "If legal proceedings, started by the bankrupt debtor, are pending at the time of the bankruptcy declaration, the legal proceedings will be stayed upon the request of the defendant in order to give it the opportunity to summon the trustee, within a period to be set by court, to take over the proceedings."

16. The trustee has the following options[22] with respect to an already pending claim in arbitration in which the bankrupt party acts as claimant:

    a) The trustee can take over the arbitration proceedings. The arbitration proceedings will then be continued as from the stage they were in at the time of suspension (previous procedural acts of the bankrupt party, in principle, remain valid). If the claim is granted, it will be for the benefit of the estate. Costs of proceedings awarded to the defendant qualify as estate debt and are as such enforceable against the estate.

    b) The trustee can decide not to take over the arbitration proceedings (for example, if the chances of success are limited). In that case, the counterparty can file for dismissal of the proceedings, after which the arbitral tribunal will issue an award to end the proceedings without substantively deciding the dispute. Note that this does not qualify as a conclusive award on the merits and does not prevent that the dispute is re-initiated at a later point in time. If, regardless of the trustee's decision not to pursue the claim initiated by the bankrupt debtor, the defendant insists on a continuation of the proceedings against its (now bankrupt) counterparty with the purpose of a final resolution of the dispute, any amounts awarded to the bankruptcy debtor will be for the benefit of the estate. In contrast, any cost order or other negative decision obtained against the estate incurred after the opening of bankruptcy proceedings will in that scenario have no binding effect on the estate and cannot be enforced against the estate.

    c) The trustee can also take over the proceedings on his/her own initiative, regardless of whether he was summoned to do so by the counterparty.[23] Paragraph 16(a) applies to this situation *mutatis mutandis.*

17. If there is a claim on behalf of the estate with respect to which no arbitration proceedings are pending at the moment of the opening of bankruptcy, only the trustee can initiate such proceedings as a consequence of the debtor's loss of the right to manage and dispose over its assets (cf. Paragraph 7(c) above).[24] The costs incurred in arbitration commenced by the trustee will qualify as estate debts. The consequences of the commencement of arbitration by the debtor and not by the trustee are the same as in the case of the continuation of pending proceedings as described above.

18. The trustee requires the advice of the creditors' committee (Article 78(1)) and the authorisation of the supervisory judge (*rechter-commissaris*) (Article 68(3) DBA) for the commencement or continuation of any proceedings on behalf of or against the estate, other than in relation to

[22] Interested parties may attempt to influence the trustee's decision in this respect. See the answer to Question 4(a) below. The same applies to the decisions of the trustee in relation to disputes where the bankrupt party is the defendant, which decisions are mentioned in Paragraphs 21-22 (regarding Claims for Payment) and 25 (regarding other claims) below.

[23] DBA, art 27(3): "Ook zonder opgeroepen te zijn, is de curator bevoegd het proces te allen tijde over te nemen en de gefailleerde buiten het geding te doen stellen." Translation: "The trustee is at all times entitled, also without being summoned, to take over the legal proceedings and cause the removal of the bankrupt debtor from the legal proceedings."

[24] ibid, art 25(1): "Rechtsvorderingen, welke rechten of verplichtingen tot de failliete boedel behorende ten onderwerp hebben, worden zowel tegen als door de curator ingesteld." Translation: "Legal actions related to rights or obligations belonging to the estate, shall be exercised by as well as against the trustee."

verification disputes against the estate, for which no such advice or authorisation is required. A failure to obtain this authorization when it is needed does not affect the validity of any procedural acts of the trustee in such proceedings but may result in liability of the trustee towards the debtor and its creditors.[25]

Proceedings where the bankrupt party acts as defendant

19. When it comes to proceedings where the bankrupt party acts as defendant, one has to distinguish between (i) Claims for Payment (ie, those to be filed in the verification procedure) and (ii) other claims against the estate.

A. Claims concerning payment from the estate

20. Upon the declaration of bankruptcy, unsecured Claims for Payment from the estate can only be brought through the verification procedure,[26] as detailed in Paragraph 7(d).

21. If proceedings concerning a Claim for Payment were already pending at the time of the declaration of bankruptcy, these proceedings are suspended by operation of law in anticipation of the outcome of the verification procedure.[27] Considering the purpose and aim of these provisions, the suspension applies to pending arbitral proceedings, and the creditor will have to file its claim for verification in bankruptcy. Any procedural act taken by a party to the arbitration during the suspension is null and void[28] and has no binding effect upon the estate. Claims for Payment which are admitted in verification will receive a distribution out of the estate in accordance with their ranking and taking into account the principle of *paritas creditorum*. If the Claim for Payment is disputed by the trustee and/or any other creditor(s), the supervisory judge refers the Claim for Payment back to the court where the claim was pending prior to the bankruptcy with the participation of the bankruptcy trustee and/or the disputing creditor(s).

[25] ibid, art 72(1): "Het ontbreken van de machtiging van de rechter-commissaris, waar die vereist is (. . .) heeft, voor zoveel derden betreft, geen invloed op de geldigheid van de door de curator verrichte handeling. De curator is deswege alleen jegens de gefailleerde en de schuldeisers aansprakelijk." Translation: "The absence of the authorisation of the supervisory judge, where required (. . .) does not affect, as far as it concerns third parties, the validity of acts performed by the trustee. In such event, the trustee is only liable towards the bankrupt debtor and the creditors."

[26] ibid, art 26: "Rechtsvorderingen, die voldoening van een verbintenis uit de boedel ten doel hebben, kunnen gedurende het faillissement ook tegen de gefailleerde op geen andere dan een in artikel 110 bepaalde wijze worden ingesteld". Translation: "Legal actions concerning a claim for payment from the estate, cannot be exercised against the bankrupt debtor during the bankruptcy in any other way than by [submission for verification]".

[27] ibid, art 29: "Voorzover tijdens de faillietverklaring aanhangige rechtsvorderingen voldoening ener verbintenis uit de boedel ten doel hebben, wordt het geding na de faillietverklaring geschorst, om alleen dan voortgezet te worden, indien de verificatie der vordering betwist wordt. In dit geval wordt hij, die de betwisting doet, in de plaats van de gefailleerde, partij in het geding." Translation: "To the extent that legal proceedings, pending at the time of the declaration of bankruptcy, concern claims for payment from the estate, the legal proceedings shall be stayed after the bankruptcy order and will only be continued if verification of the claim is disputed. In such case the person disputing the verification will become a party to the proceedings instead of the bankrupt debtor."

[28] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 392; HR 18 December 2020, ECLI:NL:HR:2020:2100, *NJ* 2021/309, ground 3.4.3.

The same applies in the case of previously pending arbitrations. They will be continued in the state they were in at the time of the suspension, albeit with different defendant(s).[29]

22. If arbitration proceedings concerning payment from the estate were not yet pending at the time of the declaration of bankruptcy and the Claim for Payment is disputed, the supervisory judge (*rechter commissaris*) will refer the Claim for Payment to be resolved in litigation before the insolvency court, with the participation of the disputing party (the trustee and/or other creditor(s)) (ie, a verification dispute). There was discussion in literature about whether this precluded resolution of such verification disputes in arbitration.[30] A 1999 Supreme Court Decision[31] provides that if a contested Claim for Payment that is referred to the insolvency court is covered by a forum-selection-clause for a foreign court, the insolvency court should—if its jurisdiction is challenged—refer the claim to that foreign court for resolution and stay the proceedings before the insolvency court in anticipation of the outcome of these foreign proceedings. In light of this decision relating to a choice of court agreement, it is commonly viewed that the same line of reasoning and approach should apply to arbitration agreements.[32] There is no common understanding how this functions in practice. According to one line of thought presented in literature, the supervisory judge should refer a Claim for Payment that is subject to an arbitration agreement to the state court, after which the claimant creditor or the trustee and/or any other creditor(s) stepping in for the bankrupt party can challenge the jurisdiction of this state court with reference to the arbitration agreement. After this, the state court will refer the dispute to arbitration for resolution and stay the domestic court proceedings in anticipation of the outcome of these arbitration proceedings.[33] Others state that the

[29] Rechtbank Noord-Nederland 27 March 2013, ECLI:NL:RBNNE:2013:BZ6109, ground 4.3; Rechtbank 's-Gravenhage 15 December 2010, ECLI:NL:RBSGR:2010:BO8353, *JOR* 2012/158, ground 2.4; Rechtbank Utrecht 4 September 2002, *TvA* 2004/14, ground 2.6; M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 392-393; G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5 (BPP nr. 13); A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht.

[30] Whilst criticizing this, the view was expressed that this provision was to bar a referral to arbitration of such claims. See, eg, P. Sanders, "Arbitrage en faillissement" (1998) 6 Tijdschrift voor Arbitrage (TvA), 167-170; P. Sanders, "Het nieuwe arbitragerecht" [1996] 32; AS.J. van den Berg, R. van Delden, and H.J. Snijders, "The Netherlands Arbitration Law" [1993] 33. Others expressed the view that such disputes could be arbitrated regardless of the provision of Article 122 DBC. See, eg, H.J. Snijders, T.A.W. Sterk, "Vierde boek—Arbitrage in: B.C. Punt/H.L. Wedeveen (eds.)" (1994) 230 Burgerlijke rechtsvorderingen 48-49; H.J. Snijders, S.L. Buruma, "Bouwarbitrage en civiele rechter" [1995] 50-51.

[31] HR 16 April 1999, ECLI:NL:HR:1999:ZC2888, *NJ* 2001/1, ground 3.3.3.

[32] Rechtbank Noord-Nederland 29 June 2022, ECLI:NL:RBNNE:2022:2580, *TvA* 2022/100, grounds 3.6-3.8; Rechtbank Utrecht 4 September 2002, *TvA* 2004/14, ground 2.8, through an application by analogy of HR 16 April 1999, ECLI:NL:HR:1999:ZC2888, *NJ* 2001/1, ground 3.3.3; A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht; E.F. Groot, "Faillissementsprocesrecht" (2020) 4.4 (R&P nr. InsR16); G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5 (BPP nr. 13); B. Wessels, "Insolventierecht II" (2019) 2429.

[33] G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5 (BPP nr. 13); B. Wessels, "Insolventierecht II" (2019) 2429.

supervisory judge should refer the case directly to arbitration if the underlying legal relationship contains an arbitration clause, which would prevent this intermediate step.[34]

23. The consequences of the commencement and continuation of arbitrations concerning such claims are the same as in case of commencement and continuation of non-arbitral legal proceedings. This implies that if the trustee disputes a Claim for Payment and consequently takes over the proceedings in arbitration, any cost order obtained against the trustee relating to the conduct of proceedings after the trustee has taken over the proceedings qualifies as an estate debt—and, consequently, can be enforced—against the estate.[35] Likewise, if the Claim for Payment is disputed by one or more creditors, a cost order has legal effect against these creditors (but not against the estate). It is suggested in literature that the arbitrators will have to declare the claim inadmissible if a creditor does not follow the verification procedure and instead directly files for the initiation of arbitration proceedings.[36] From the point of view of insolvency law, any arbitral award rendered either in the Netherlands or abroad on such basis will have no legal effect against the bankruptcy estate, since a Claim for Payment which is not filed for verification remains outside of bankruptcy proceedings.

B. Other claims

24. Naturally, proceedings in which the bankrupt party acts as defendant can also concern other types of claims, not aimed at a payment from the estate. Such claims cannot be submitted in the verification procedure and do not result in verification disputes. These can, for example, comprise actions (i) for the recovery of ownership or possession; (ii) for the annulment or dissolution of a contract; (iii) for inspection of documents of the bankrupt party; (iv) concerning the enforcement of security rights, eg, by holders of rights of pledge or mortgage or by the tax authorities; and (v) for certain injunctions.[37] If proceedings are already pending with respect to such claims, there is no suspension by operation of law.

25. Thus, if arbitration proceedings concerning such other claims are pending, the claimant can request a suspension so as to enable the trustee to step in.[38] If the proceedings are not

[34] A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht; E.F. Groot, "Faillissementsprocesrecht" (2020) 4.4 (R&P nr. InsR16).
[35] Wessels "Insolventierecht II" (2019) 2426.
[36] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 393. Whether an arbitral tribunal in foreign arbitration proceedings will indeed declare a claim inadmissible obviously depends on whether the Dutch bankruptcy is recognized in the jurisdiction where the arbitral tribunal has its seat. Still, an arbitral award that is rendered in arbitration proceedings in which the regime prescribed by the DBA was not followed has no legal effect against the estate (cf. DBA, art 25(2)).
[37] B. Wessels, "Insolventierecht II" (2019) 2352; A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht; F.M.J. Verstijlen, T&C Insolventierecht, commentaar op art. 25 Fw; M.P. van Eeden-van Harskamp, "GS Faillissementswet" art 25 Fw, aant. 3.
[38] DBA, art 28(1): "Indien de rechtsvordering tijdens de faillietverklaring aanhangig en tegen de schuldenaar ingesteld is, is de eiser bevoegd schorsing te verzoeken, ten einde, binnen een door de rechter te bepalen termijn, de curator in het geding te roepen." Translation: "If legal proceedings against the bankrupt debtor are pending at the time of the bankruptcy declaration, the plaintiff is entitled to request a stay of legal proceedings in order to give it the opportunity to summon the trustee, within a period to be set by court, to appear in the proceedings."

suspended and the arbitration is continued against the debtor in bankruptcy (and not the trustee), the arbitration, as well as the resulting arbitral award in those circumstances, will have no legal effect against the estate.[39]

26. Upon being summoned to appear, the trustee has the following options:

    a) The trustee can take over the arbitration proceedings and continue the proceedings from the stage they were in at the time of suspension (previous procedural acts of the bankrupt party, in principle, remain valid). If an arbitral award is obtained during the bankruptcy, this has legal effect—and, consequently, can be enforced—against the estate, whereas any cost order qualifies as an estate debt.

    b) The trustee can take over the arbitration proceedings and immediately assent to the claiming party's claim. This prevents any cost orders resulting from the arbitration (which relate to the arbitration proceedings prior to the bankruptcy, after all) to qualify as an estate debt. Claims for payment concerning such cost orders will have to be submitted in the bankruptcy through the regular verification procedure.[40]

    c) The trustee can decide not to take over the proceedings. In that case, the arbitration proceedings can be continued against the bankrupt party. If an arbitral award is obtained during the bankruptcy, this has legal effect—and, consequently, can be enforced—against the estate. The reason that these proceedings can be continued against the bankrupt party if the trustee decides not to step in is that the trustee would otherwise be in the position to simply refuse to step in pending legal proceedings, that way denying the claiming party of any option to have its claim (not concerning a payment) adjudicated. [41]

27. If proceedings concerning such other claim were <u>not yet pending</u> at the time of the declaration of bankruptcy, new proceedings can only be initiated against the trustee.[42] The trustee is bound by arbitration agreements entered into by the bankrupt party prior to the bankruptcy (see Paragraph 54 below), and claims covered by such agreement will therefore have to be brought in arbitration proceedings.

28. In respect of these other claims (not concerning payment from the estate), the trustee requires the authorisation of the supervisory judge for taking over (*cf.* Paragraph 25) or putting up a defence in (*cf.* Paragraph 27) the arbitration proceedings and will have to obtain the advice of

[39] ibid, art 25(2): "Indien zij, door of tegen de gefailleerde ingesteld of voortgezet, een veroordeling van de gefailleerde ten gevolge hebben, heeft die veroordeling tegenover de failliete boedel geen rechtskracht." Translation: "If such legal actions are exercised or continued by or against the bankrupt debtor and they lead to a judgment against that bankrupt debtor, this judgment shall have no legal effect against the estate."

[40] ibid, art 28(3): "Indien de curator verschijnende dadelijk in de eis toestemt, zijn de proceskosten van de tegenpartij geen boedelschuld." Translation: "If the trustee, after appearing in the proceedings, immediately acknowledges the legal claim of the plaintiff, the costs of proceedings of the opposing party shall not constitute an estate debt."

[41] ibid, art 28(4): "Zo de curator niet verschijnt, is op het tegen de gefailleerde te verkrijgen vonnis de bepaling van het tweede lid van artikel 25 niet toepasselijk." Translation: "If the trustee does not appear in the proceedings, the provision of Article 25, paragraph 2, does not apply to a judgment to be obtained against the bankrupt debtor."

[42] ibid, art 25(1).

a creditors' committee if one has been constituted (*cf.* Paragraph 7(c7.c)) above).[43] A failure to obtain this authorization and/or advice does not affect the validity of any procedural acts of the trustee in such proceedings[44] but may result in liability of the trustee towards the debtor and its creditors.[45]

Arbitration proceedings ready for final award

29. The provisions on suspension dealt with in the foregoing (ie, Articles 27, 28, and 29 DBA) do not apply if pending legal proceedings have reached a final stage of rendering a decision, ie, all written submissions have been exchanged and hearing(s) have been concluded. Thus, the arbitral tribunal can proceed with issuing its final award, which will be binding against the estate in the same manner as if it was rendered prior to the bankruptcy.[46] If the arbitral tribunal issues an interim award instead of a final award, the provisions on suspension will become applicable, and the proceedings can be continued with due observance of the requirements set forth in these provisions.[47]

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?

30. As briefly noted in the introduction (see Paragraph 1), Dutch bankruptcy law distinguishes between bankruptcy (*faillissement*) aimed at liquidation of the debtor, on the one hand, and suspension of payments (*surseance van betaling*) and the court confirmed extrajudicial restructuring plan (*akkoordprocedure buiten faillissement*), which are – in principle - aimed at the restructuring of the debtor's debts with a view to that debtor's continued existence, on the other hand.

Suspension of payments

31. Unlike bankruptcy, a suspension of payments can only be applied for by the debtor itself. The suspension of payments is granted preliminarily immediately upon filing the application with

[43] For the question of how this obligation to obtain the supervisory judge's authorization or the creditors' committee's advice relates to the confidentiality obligations, please refer to the answer to Question 17.
[44] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 393.
[45] DBA, art 72(1).
[46] ibid, art 30(1): "Indien vóór de faillietverklaring de stukken van het geding tot het geven van een beslissing aan de rechter zijn overgelegd, zijn het tweede lid van artikel 25 en de artikelen 27-29 niet toepasselijk." Translation: "If the pleadings and other statements in the legal proceedings had been submitted already to the court for judgment before the bankruptcy order was rendered, Article 25, paragraph 2, and Articles 27 up to and including 29 are not applicable."; M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 393; F.M.J. Verstijlen, T&C Insolventierecht, commentaar op art 30 Fw.
[47] DBA, art 30(2): "De artikelen 27-29 worden weer toepasselijk, indien het geding voor de rechter, bij wie het aanhangig is, ten gevolge van zijn beslissing wordt voortgezet." Translation: "Articles 27 up to and including 29 shall become applicable again if the legal proceedings pending before the court are continued as a result of a decision of that court." See also, M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 393.

the court. When granting the preliminary suspension of payments, the court appoints one or more administrators. The party who is granted suspension of payments as from that moment needs the administrator's cooperation for any procedural acts in pending arbitral proceedings.[48] There is no prescribed form for this cooperation,[49] but a counterparty who fails to prove that the administrator cooperated in the relevant proceedings after the suspension of payments was granted cannot enforce a judgment against the estate covered by the suspension of payments.[50] In practice, such counterparty is therefore well advised to summon the administrator to appear in pending proceedings to prevent any uncertainty in this respect at a later point in time.

32. The court will schedule a creditors' meeting, which usually takes place within two to four months after the suspension of payments has been granted preliminarily, during which the creditors can vote on whether or not the suspension of payments should be definitively granted.

33. Upon application for a suspension of payments or at any time during the suspension of payments, the debtor can offer a composition plan to its creditors, after which the court will (i) set a date on which creditors should submit their claims to the administrator and (ii) schedule a court hearing during which creditors can discuss the list of claims and vote about the composition plan. The administrator will draw up a list setting forth which claims are (provisionally) recognized and which claims are (provisionally) disputed. During the subsequent hearing, disputed claims can still be placed on the list of recognized claims (and *vice versa*), after which the composition plan will be put to a vote. A simple majority of the creditors present at the hearing, which together should represent at least half of the amount of recognized claims, is required for the composition plan to be accepted. If accepted and subsequently confirmed by the court, the plan binds all creditors.

Court confirmed extrajudicial restructuring plan

34. This procedure provides for court confirmation of an out-of-court restructuring plan, for the restructuring of the claims of some or all creditors. Differently from the suspension of payments, the restructuring plan can affect also secured and preferred claims. The restructuring plan will be presented to all creditors whose claims are affected. Creditors can be divided into classes. If at least one class of in-the-money creditors votes in favour of the restructuring plan, the plan can be submitted to the court for confirmation. Once confirmed by the court, the plan is binding upon all creditors affected by it.

[48] Article 231(1)(3): "De surseance stuit de loop niet van reeds aanhangige rechtsvorderingen, noch belet het instellen van nieuwe. . . . De schuldenaar kan, voor zoveel betreft rechtsvorderingen, welke rechten of verplichtingen tot de boedel behorende ten onderwerp hebben, noch eisende, noch verwerende in rechte optreden, zonder medewerking der bewindvoerders." Translation: "A suspension of payments does not suspend any pending legal proceedings, nor does it prevent the start of new legal proceedings. . . . The debtor may not act in court, neither as a plaintiff nor as defendant, in legal proceedings relating to rights and obligations of the debtor's estate, without the cooperation of the administrators."
[49] F.M.J. Verstijlen, "GS Faillissementswet" art 231 Fw, aant. 3.
[50] B. Wessels, "Insolventierecht VIII" (2021) 8173; F.M.J. Verstijlen, "GS Faillissementswet" art 231 Fw, aant. 6.

35. If a claim is disputed by the debtor in full or if that claim has been admitted to the vote for a lower amount than claimed by the relevant creditor, then the court will refuse confirmation of the plan if it finds that this creditor should have been admitted to vote, or admitted for a higher amount, unless this would not have altered the outcome of the vote.[51] To prevent a refusal on this ground, the debtor may—prior to the vote taking place—request the court, in proceedings where the creditor would be given an opportunity to present its position, to provide insight as to whether the relevant creditor is at all to be admitted to the vote, or for a higher amount, and whether admittance of that creditor to the vote for that amount would be a reason to refuse confirmation. For the avoidance of doubt, the court will not adjudicate the conflict underlying the relevant creditor's claim, but only assesses whether the creditor is to be allowed to vote, and if so, for what amount.

36. The newly introduced possibility for a debtor to draw up a restructuring plan out-of-court operates as a 'debtor in possession' procedure, ie, the debtor retains the power to manage and dispose over its assets. Consequently, the effects of bankruptcy proceedings on arbitration proceedings (see the answer to Question 3(a) above) do not apply if a debtor undertakes restructuring efforts making use of this new option.

37. In each instance where the creditors get to vote (be it –in the context of suspension of payments– about granting the suspension of payments definitively or about the composition plan, or –in the context of the court confirmed extrajudicial restructuring plan– in respect of a restructuring plan that is offered), the court will decide whether and if so, for what amount, a creditor with a claim that is disputed is admitted to vote.[52] In other words, if the validity or the amount of a creditor's claim is disputed, a creditor is not certain whether it can exercise a right to vote. Hence, it can have a clear interest in obtaining a final award in arbitration proceedings prior to any hearing where creditors have a right to vote.

[51] ibid, art 384(2)(d): "De rechtbank wijst een verzoek tot homologatie van het akkoord af als . . . een schuldeiser . . . voor een ander bedrag tot de stemming over het akkoord had moeten worden toegelaten, tenzij die beslissing niet tot een andere uitkomst van de stemming had kunnen leiden." Translation: "The District Court refuses a request for confirmation of the composition plan if . . . a creditor . . . should have been admitted to the vote on the composition plan for a different amount, unless this could not have altered the outcome of the vote."

[52] DBA, art 218(3): "Over de toelating tot de stemming beslist, bij verschil, de rechtbank." Translation: "The District Court shall decide who is eligible to vote in the event of a dispute on this matter."; and DBA, art 267: "De rechter-commissaris zo die is benoemd of bij gebreke van dien de rechtbank bepaalt of en tot welk bedrag de schuldeisers, wier vorderingen betwist zijn, tot de stemming zullen worden toegelaten." Translation: "The supervisory judge, if one is appointed, or otherwise the District Court, shall decide whether, and if so, for what amount the creditors whose claims are disputed will be allowed to vote at the meeting on the composition plan."; and DBA, art. 378(4): "Wordt de rechter . . . verzocht zich uit te laten over de toelating van een schuldeiser . . . tot de stemming of over de hoogte van het bedrag van de vordering van een stemgerechtigde schuldeiser . . ., dan bepaalt de rechtbank of en tot welk bedrag, deze schuldeiser . . . tot de stemming over het akkoord wordt toegelaten. " Translation: "If the District Court is requested to rule on the admission of a creditor . . . to the vote . . . or on the amount of the claim of a creditor entitled to vote . . ., the court shall determine whether and up to what amount this creditor . . . shall be admitted to the vote on the agreement."

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

38. As explained in the answer to Question 3(a), with respect to proceedings where the bankrupt party acts as defendant, the DBA distinguishes between Claims for Payment and other claims.

39. If the relief sought in arbitration proceedings encompasses both categories, ie, Claims for Payment and other types of claims against the estate, a different regime will apply to these two respective categories to govern their commencement and continuation. The Claim for Payment must be submitted for verification in the bankruptcy proceedings (cf. Article 26 DBA), whereas in respect of the other claims, the bankruptcy trustee can be summoned to take over the arbitration proceedings (cf. Article 28 DBA).[53] In practice, the arbitral tribunal can stay the proceedings in anticipation of whether the Claim(s) for Payment is (are) disputed in the verification procedure. This would lead to the Claim(s) for Payment being remanded to the arbitration proceedings, which can then be continued as a whole, depending on the outcome of the verification procedure.[54]

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

40. See the answer to Question 3(b) above. Like a suspension of payment (*surseance van betaling*), the new rules on extrajudicial restructuring plan do not require a formal declaration of bankruptcy. That being said, both types of proceedings are regulated in the Dutch Bankruptcy Act. Moreover, and like the suspension of payment, the extrajudicial restructuring plan has also been included in Annex A ("Insolvency Proceedings") of the EU Insolvency Regulation 2015/848.

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?

41. The law provides for different regimes for pending court proceedings and new court proceedings, which are applied by analogy to arbitration proceedings, as detailed in the answer to Question 3(a) above.

[53] B. Wessels, "Insolventierecht II" (2019) 2354; M.P. van Eeden-van Harskamp, "GS Faillissementswet" art 26 Fw, aant. 6.
[54] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 393.

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

42. There are no compulsory insolvency proceedings under Dutch law.

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

43. Yes, the regime described in the answer to Question 3(a) above is intended to apply to arbitration proceedings, regardless of whether their seat is in the Netherlands or abroad.[55]

44. Whether this regime actually affects arbitration proceedings with foreign seats depends on whether the Dutch bankruptcy is recognised in the relevant jurisdiction, but if the regime is not followed, any arbitral award rendered in those arbitration proceedings has no legal effect against the estate.

45. In case arbitration proceedings were already pending at the time of the opening of the insolvency proceedings and the seat of arbitration lies in a European Member State (other than Denmark), the EIR provides for a different regime. In that case, Article 18 EIR provides that the effects of the Dutch insolvency proceedings on such pending arbitration proceedings are governed by the laws of the country of the seat of the arbitration.[56] For arbitration proceedings that were not yet pending, pursuant to Article 7 EIR, the regime described in the answer to Question 3(a) with respect to arbitration proceedings that are not yet pending at the time of the opening of the insolvency proceedings applies *mutatis mutandis* even if the seat of the arbitration is located in another EU Member State.

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.)?

46. The effects of the bankruptcy apply retrospectively as from 00:00 of the day that the court decides to open the bankruptcy proceedings.[57] From this moment, all consequences of the

[55] Rechtbank Utrecht 4 September 2002, *TvA* 2004/14, ground 2.8. See also, HR 15 April 1955, ECLI:NL:HR:1955:1, *NJ* 1955/542 (*Kallir/Comfin*), formulating the starting point that a Dutch bankruptcy has universal effect.

[56] EIR, art 18: "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat."

[57] DBA, art 23: "Door de faillietverklaring verliest de schuldenaar van rechtswege de beschikking en het beheer over zijn tot het faillissement behorend vermogen, te rekenen van de dag waarop de faillietverklaring wordt uitgesproken, die dag daaronder begrepen." Translation: "As a result of the declaration of bankruptcy the

opening of bankruptcy proceedings are triggered, including the effects on legal proceedings concerning the estate.

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?

47. As explained previously, Dutch insolvency law does not limit or prevent arbitrations from being commenced or continued. It merely provides for the conditions under which a decision on the commencement or continuation of any legal action must be made after the opening of insolvency proceedings (see the answer to Question 3(a)).

48. With respect to this decision on the commencement or continuation of any legal action, certain interested parties can seek to influence this decision: any creditor, the creditors' committee (if any), and the bankrupt party itself each have the possibility to either object to decisions of the trustee or request the supervisory judge to order the trustee to undertake or omit certain actions.[58] The supervisory judge, after having heard the trustee, issues a decision upon such a request within three days. This can result in the supervisory judge, for example, ordering the trustee to take over arbitration proceedings that were already pending at the time the bankruptcy was declared (or to refrain from doing so) or to initiate arbitration proceedings that were yet to be commenced (or to refrain from doing so).[59] Note that these proceedings have an informal character; it does not necessarily involve lawyers, no exchange of written submissions is prescribed, and the supervisory judge can issue a decision without hearing the applicant(s). The supervisory judge's decision is open to appeal with the District Court and subsequent cassation appeal with the Dutch Supreme Court.

49. As to Question 4(b), the supervisory judge does not have the authority to send matters concerning the estate to arbitration. As described in the answer to Question 3(a), according

bankrupt debtor loses the right to dispose of and to administer its assets as far as these belong to the estate, this with effect from and including the day on which the bankruptcy order is rendered."

[58] ibid, art 69(1): "Ieder der schuldeisers, de commissie uit hun midden benoemd en ook de gefailleerde kunnen door het indienen van een verzoek tegen elke handeling van de curator bij de rechter-commissaris opkomen, of van deze een bevel uitlokken, dat de curator een bepaalde handeling verrichte of een voorgenomen handeling nalate. Niettemin staat geen beroep open tegen de beslissing van de curator om al dan niet melding of aangifte van onregelmatigheden te doen, als bedoeld in artikel 68, tweede lid, onder c." Translation: "Each of the creditors and the creditors' committee appointed from their number, as well as the bankrupt debtor itself may lodge a petition with the supervisory judge in order to object against any act of the trustee or to achieve that the supervisory judge shall order the trustee to perform a certain act or to refrain from performing an intended act."

[59] B. Wessels, "Insolventierecht IV" (2020) 4238.

to one line of thought in literature, an exception to this principle exists. According to this line of thought, if a Claim for Payment is disputed by the trustee in the verification procedure (see Paragraph 7(d)), the supervisory judge will refer the disputed Claim for Payment directly to arbitration at the request of an interested party if there is a valid arbitration agreement.

50. As already explained, general rules on jurisdiction are retained with respect to all claims which do not require a payment from the estate. Thus, pending arbitrations may be continued and new ones initiated if there is a valid arbitration agreement. Certain interested parties may request the supervisory judge to *order the trustee* to take a certain decision in respect of arbitration proceedings on the basis of Article 69 DBA, as noted in Paragraph 48. Such parties can only submit a request to the supervisory judge on the basis of an interest that the trustee is held to represent, ie, their interest as a creditor of the estate. If the applicant also has another personal interest, eg., as a counterparty in the relevant proceedings, or as a customer or supplier, this interest cannot be used to substantiate the application or appeal.

51. The test to be applied by the supervisory judge in considering a request based on Article 69 DBA is whether the course of action chosen by the trustee is indeed most beneficial for the estate and the interests affiliated therewith.[60]

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?

52. In general, the concept of anti-suit and anti-arbitration injunctions is not known in the Netherlands.[61] Thus, the supervisory judge cannot issue any orders to stop domestic or foreign arbitration proceedings. However, also in this case, creditors, the creditors' committee (if any), and the debtor in bankruptcy itself can request the supervisory judge to order the trustee not to take over or initiate arbitration proceedings. See answer to Question 4 above. When taking its decision, the supervisory judge will take into account the considerations mentioned above under Paragraph 51.

53. Also note that the trustee requires the authorisation of the supervisory judge for taking over arbitration proceedings in respect of claims not concerning payment out of the estate, as well as for initiating arbitration proceedings on behalf of the estate. A failure to obtain this authorization does not affect the validity of any procedural acts of the trustee in such proceedings[62] but may result in liability of the trustee towards the debtor and its creditors.[63]

[60] F.M.J. Verstijlen, "GS Faillissementswet" art 69 Fw, aant. 15.
[61] Save for very rare examples, in which a party's actions in court qualified as abuse of rights; see J.J. van der Helm, "Het rechterlijk bevel en verbod" [2019] (Burgerlijk Proces & Praktijk nr. 19) Deventer: Wolters Kluwer para 79.
[62] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 393.
[63] DBA, art 72(1).

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?

54. The trustee is, in principle, bound by contracts that were concluded by the debtor prior to the declaration of the bankruptcy, including any arbitration clause in these contracts.[64] The supervisory judge or the insolvency court do not have the right to terminate or suspend the effect of such contracts.

55. Although pre-bankruptcy agreements of the bankrupt party remain in full force and effect, there is a possibility for the trustee to refrain from performing certain 'executory contracts' under Article 37 DBA, namely those contracts where both the debtor, as well as its counterparty, have not yet fully performed their obligations. Hence, the trustee can choose which obligations he will comply with (ie, if compliance would be beneficial to the estate) and *de facto* suspend the effectiveness of all other executory contracts by not complying. After all, the contractual counterparty under such contract does not have the right to enforce its rights set forth in such contract (cf. Paragraph 7(b) above), although as explained below, it would be able to file a damages claim based on the trustee's non-compliance with the contract for verification. The other party to such a contract can ask the trustee to decide before a reasonable deadline whether he wishes to continue the contract, ie, to remain bound by it. If the trustee rejects the contract or fails to indicate an intention to remain bound by it within the given time-limit, the trustee will lose the right to claim performance of the contract. If the trustee decides to remain bound by the contract, he will be bound by all contractual terms, including the arbitration clause. In such a case, the trustee has to provide sufficient security to the other party.[65] If the contract is repudiated, the other party can file its claim for damages as an ordinary non-secured Claim for Payment for verification in bankruptcy. If such claim is disputed, it will be referred for resolution in arbitration, as explained above in the answer to Question 3(a).

56. The trustee can request termination or annulment of a contract concluded by the debtor prior to bankruptcy on the same legal grounds that would be available to the debtor, such as

[64] Rechtbank Zutphen 17 October 2007, ECLI:NL:RBZUT:2007:BC0953, *RI* 2008/15, ground 4.8; F.M.J. Verstijlen, GS Faillissementswet, art 68 Fw, aant. 7.2; M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 390; G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5(b) (BPP nr. 13).

[65] DBA, art 37(1)(2): "Indien een wederkerige overeenkomst ten tijde van de faillietverklaring zowel door de schuldenaar als door zijn wederpartij in het geheel niet of slechts gedeeltelijk is nagekomen en de curator zich niet binnen een hem daartoe schriftelijk door de wederpartij gestelde redelijke termijn bereid verklaart de overeenkomst gestand te doen, verliest de curator het recht zijnerzijds nakoming van de overeenkomst te vorderen. . . . Indien de curator zich wel tot nakoming van de overeenkomst bereid verklaart, is hij verplicht bij die verklaring voor deze nakoming zekerheid te stellen." Translation: "If an executory contract, at the time of the declaration of bankruptcy, has not been performed at all or only partially by both the debtor and its counterparty, and the trustee does not state, within a reasonable period set for this purpose in writing by the counterparty, that the estate is bound by that agreement, the trustee will lose its right to claim performance of the agreement . . . If the trustee states that the estate is prepared to perform the agreement, he must provide security for such performance when making this statement."

breach, or reasons of substantive and formal invalidity. However, while he may breach a contract through non-performance, the trustee cannot *actively* undertake any acts that would be in breach of the agreement. For example, if an agreement contains an arbitral clause, the trustee cannot choose to bring a dispute before the state court and such claim has to be brought in arbitration proceedings (cf. Paragraphs 13, 17, and 18 above).

57. Dutch bankruptcy law also provides for the possibility that the trustee avoids certain transactions and preferential transfers of the debtor prior to bankruptcy that are detrimental to the creditors, the so-called the bankruptcy *actio pauliana* (Articles 47 *et seq.* DBA).[66]

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?

58. Under Dutch law, the arbitration agreement exists separately from the contract it is embodied in. Hence, if a contract containing an arbitration agreement is terminated, the arbitration agreement itself remains valid, and the parties to the contract remain bound thereto.[67] As already explained above, if the trustee accepts the executory contract, any arbitration clause contained in it will also be accepted. If the contract is repudiated and the claim for the resulting damages is contested in the verification procedure, the disputed claim will be resolved in arbitration.

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?

[66] ibid, art 42(1): "De curator kan ten behoeve van de boedel elke rechtshandeling die de schuldenaar vóór de faillietverklaring onverplicht heeft verricht en waarvan deze bij dit verrichten wist of behoorde te weten dat daarvan benadeling van de schuldeisers het gevolg zou zijn, door een buitengerechtelijke verklaring vernietigen." Translation: "If the bankrupt debtor, prior to the declaration of bankruptcy, has performed a juridical act which it legally was not obliged to perform, while it knew or should have known that the recovery rights of its creditors would be harmed as a result thereof, this juridical act is voidable on the ground of fraudulent conveyance and it may be nullified by the trustee on behalf of the estate by means of an extrajudicial declaration."

[67] DCCP, art 1053: "De overeenkomst tot arbitrage dient als een afzonderlijke overeenkomst te worden beschouwd en beoordeeld. Het scheidsgerecht is bevoegd te oordelen over het bestaan en de rechtsgeldigheid van de hoofdovereenkomst waarvan de overeenkomst tot arbitrage deel uitmaakt of waarop zij betrekking heeft." Translation: "An arbitration agreement shall be considered and decided upon as a separate agreement. The arbitral tribunal shall have the power to decide on the existence and the validity of the main contract of which the arbitration agreement forms part or to which it is related."; M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 391.

59. As stated previously, there is no possibility for the supervisory judge or insolvency court to influence pending court proceedings, thus also not arbitration proceedings. If the trustee wishes to challenge the validity of an arbitration agreement in pending proceedings, he will have to object the lack of jurisdiction due to invalidity of the arbitration agreement in arbitral proceedings, unless the arbitration is in such an advanced stage that the objection can no longer be raised.

60. The same holds true for arbitrations initiated after opening of the bankruptcy. The trustee can invoke any reason of formal or substantive invalidity of the arbitration agreement. As to the latter, in principle, the same reasons of invalidity under general contract law can be used to try to invalidate arbitration agreements (see Paragraph 56 above). If such claim succeeds, the arbitral tribunal has to rule that it has no jurisdiction.[68]

61. If the trustee bases his claim on the bankruptcy *actio pauliana*, this claim is not covered by the arbitration agreement and can be initiated before the state court (see the answer to Question 10 below).

9. Does the insolvency regime require the alleged creditor to take any step in the insolvency process to be able to commence or continue with the arbitration (eg, file the claim within the insolvency proceedings for verification/registration/ proof)?

a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?

b. Does the filing of the claim with the insolvency proceedings amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement?

62. Yes. For a comprehensive description of the steps that have to, or can be taken, see the answer to Question 3(a). Specifically, with respect to Question 9(a), if the creditor's Claim for Payment is disputed in the verification procedure (see Paragraph 7(d) above), this would indeed result in the arbitral tribunal having jurisdiction to decide on the existence and amount of the Claim for Payment. The result of the arbitration proceedings will then determine whether the Claim for Payment will be accepted in the verification procedure and, if so, for what amount. The commencement or continuation of arbitration proceedings by a creditor without having filed a Claim for Payment in the verification procedure will result in the award not being enforceable against the estate (see Paragraph 23).

63. As to Question 9(b), the filing of the claim with the insolvency proceedings does not amount to a submission of the jurisdiction of the insolvency court and a waiver of the arbitration agreement.

[68] G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 5.8.2.2 (BPP nr. 13).

64. Note that if a creditor's Claim for Payment is disputed in the verification procedure (see Paragraph 7(d) above) and the supervisory judge refers the case to regular court proceedings instead of referring the case directly to arbitration proceedings, the relevant creditor will have to actively challenge the jurisdiction of the state court with reference to the arbitration agreement. This will result in the state court referring the case to arbitration (see Paragraph 22 above).[69]

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)?

65. The majority position is that an arbitration agreement is not enforceable in relation to an action of the trustee based on the insolvency *actio pauliana* because this is a right that did not vest in the bankrupt party prior to bankruptcy, as a result of which this right cannot be covered by an arbitration agreement entered into by that bankrupt party.[70]

66. In addition to the insolvency *actio pauliana*, a trustee under Dutch law has the right to claim damages from a third party if (i) the bankrupt party has prejudiced certain of its creditors; (ii) the relevant third party was involved in the actions of the bankrupt party bringing about this prejudice; and (iii) this involvement amounts to a tortuous act of the relevant third party towards the joint creditors. Also, with respect to this claim, which did not vest in the bankrupt party, it has been suggested in literature that this is not covered by an arbitration agreement of the bankrupt party.[71]

67. The foregoing does not do away with the possibility that the trustee itself concludes a new arbitration agreement for the adjudication of a claim on the basis of the two grounds dealt with in this Question 10 (see the answer to Question 11), if that appears favourable for the estate.

[69] Cf. Rechtbank Noord-Nederland 29 June 2022, ECLI:NL:RBNNE:2022:2580, *TvA* 2022/100, grounds 3.6-3.8; Rechtbank Noord-Nederland 27 March 2013, ECLI:NL:RBNNE:2013:BZ6109, ground 4.3; Rechtbank 's-Gravenhage 15 December 2010, ECLI:NL:RBSGR:2010:BO8353, *JOR* 2012/158, ground 2.4; Rechtbank Utrecht 4 September 2002, *TvA* 2004/14, ground 2.6, 2.8.

[70] G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5(b) (BPP nr. 13); A.I.M. van Mierlo, M. van de Hel-Koedoot, "Faillissement en arbitrage" (2010) 6 Ondernemingsrecht; G.J. Meijer, T&C Rv, commentaar op art. 1020 Rv, para 3(c). See also Rechtbank Utrecht, 11 august 1993, unpublished decision, excerpt in: *Tijdschrift voor arbitrage* (TvA) 1 [1995] 37-38, Commentary by P. Sanders. Ostensibly different: M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 395. The same approach is followed in other legal systems. See V. Lazić, "Insolvency Proceedings and Commercial Arbitration" [1998] Kluwer Law International, The Hague-London-Boston, 199-202.

[71] G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5(b) (BPP nr. 13).

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

68. Yes, but there are two different views regarding the scope of the power to do so.[72] One opinion is that this already follows from Article 68 DBA, which grants the trustee the power to manage the estate. This power does not exclude entering into agreements; rather, the trustee will enter into many different agreements necessary for a proper management of the estate. For certain agreements, the trustee requires permission of the supervisory judge (and advice of the creditors committee if one is appointed), but absence of such permission (or advice) does not affect the validity of the trustee's acts.[73] In this opinion, the power of the trustee to enter into agreements includes arbitral agreements. Another view is to analogously apply Article 104 DBA, containing the right of the trustee to enter into settlement agreements and compromises.[74] The trustee must obtain a previous advice of the creditors' committee, if appointed, and the permission of the supervisory judge for any agreement entered into on the basis of Article 104 DBA. Again, a failure to obtain the advice and permission does not render agreements concluded invalid, but the trustee can be held liable for any detrimental effects of such agreements upon the estate.

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

69. Yes. When it comes to the effect on pending arbitration proceedings of a composition plan becoming final and binding upon having been approved by the court, a distinction can be drawn between arbitration proceedings concerning Claims for Payment and other claims (similar to the situation after the bankruptcy is declared as explained in the answer to Question 3(a)).

Payment claims

70. With respect to proceedings concerning Claims for Payment, one has to further distinguish between proceedings in which the Claim for Payment was disputed by the trustee and proceedings in which the Claim for Payment was solely disputed by one or more creditors.

71. If the Claim for Payment was disputed by the trustee, the arbitration proceedings are suspended by operation of law, after which the formerly bankrupt party can take over the

[72] See B. Wessels, "Insolventierecht IV" (2020) 4394; G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5 (BPP nr. 13); M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 391.
[73] Examples of agreements where the trustee needs supervisory judge permission are a settlement agreement (Article 104 DBA) and agreements to sell goods belonging to the estate to the extent that they exceed a certain value (Article 176 DBA).
[74] B. Wessels, "Insolventierecht IV" (2020) 4394; G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5 (BPP nr. 13); M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 391; V. Lazić, "Insolvency Proceedings and Commercial Arbitration" [1998] Kluwer Law International, The Hague-London-Boston, 126.

proceedings again, which proceedings can result in an arbitral award which is binding against the (no longer bankrupt) party. The only exception is if the proceedings are ready for the final award, ie all written submissions have been exchanged and hearing(s) have been conducted. In that case, the proceedings will not be suspended, and an arbitral award can be rendered which is binding against the formerly bankrupt party, as if it was rendered prior to the approval of the creditors' arrangement.[75] If the proceedings are suspended, but the formerly bankrupt party does not take over the proceedings, an arbitral award can be rendered in default, which is also binding against the (no longer bankrupt) party.[76] Note that the composition plan in practice can prescribe a specific regime for pending proceedings which have not yet come to a resolution of a dispute, eg, by providing that if the Claim for Payment is granted in the pending proceedings, the creditor will receive the same proportion of its Claim for Payment as the other creditors shall receive pursuant to the composition plan.

72. If the Claim for Payment was disputed by one or more other creditors, the arbitration proceedings can only be continued to the extent they relate to the order on the payment of costs of the arbitration.[77]

Other claims

73. When it comes to claims not concerning payment from the estate, arbitration proceedings that were taken over by the trustee can be suspended so as to allow the counterparty to summon the (no longer bankrupt) party to take over the proceedings from the trustee.[78] When taking over the proceedings, the formerly bankrupt party is bound by all prior procedural acts carried out by or against the trustee. If the formerly bankrupt party does not take over the proceedings, an arbitral award can be rendered in default, which is also binding against the (no longer bankrupt) party.

[75] DBA, art 122a(1): "Wanneer de betwisting door de curator is gedaan, wordt de loop van het rechtsgeding van rechtswege geschorst door het in kracht van gewijsde gaan van de homologatie van een akkoord in het faillissement, tenzij de stukken van het geding reeds tot het geven van een beslissing aan de rechter zijn overgelegd, in welk geval de vordering, indien zij wordt erkend, geacht wordt in het faillissement erkend te zijn, terwijl ten aanzien van de beslissing omtrent de kosten van het geding de schuldenaar in de plaats treedt van de curator." Translation: "If a claim is disputed by the trustee, the legal proceedings shall be suspended by operation of law when a final arrangement with the creditors becomes final and binding after it has been approved by the court, unless all pleadings in the matter have already been submitted for judgment, in which case the claim, if admitted, shall be deemed as admitted in the bankruptcy, whereas the bankrupt debtor, where it concerns the decision on the costs of proceedings, shall take the place of the trustee." Article 122a DBA does not provide what happens if the court renders an interim judgment instead of a final judgment, but it seems obvious that the proceedings will then be subject to the regular regime of Article 122(a) DBA and thus are suspended in anticipation of whether they are continued.

[76] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 395.

[77] DBA, art 122a(4): "Wanneer de betwisting is gedaan door een mede-schuldeiser, kan het geding, nadat de homologatie van een akkoord in het faillissement in kracht van gewijsde is gegaan, door partijen worden voortgezet uitsluitend ten einde de rechter te doen beslissen over de proceskosten." Translation: "If a claim is disputed by another creditor and the sanctioning approval of the final arrangement with the creditors in the bankruptcy has become final and binding, the legal proceedings may only be continued by parties in order to obtain a decision of the court on the costs of proceedings."

[78] M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 395.

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?

74. As explained, apart from the provision in the EIR, there are no rules in the DBA that expressly regulate the effect of insolvency on arbitration. Even though there is no case law or a view expressed in the literature, from the point of view of insolvency law it seems appropriate to argue that an analogous application of the provisions relating to lawsuits cannot be excluded by an agreement of the parties.

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

75. As a matter of principle, arbitrators are bound by the rules chosen by the parties and mandatory rules of arbitration law (*lex arbitri)*, if any. If the arbitral tribunal does not comply with the rules discussed above, however, a resulting award will not be enforceable with respect to the estate.

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?

76. No. From the perspective of the Dutch bankruptcy, the findings of the insolvency court about the effect of the insolvency on arbitration are binding, and if these are not complied with (for example, because the other party to the arbitration claims that the insolvency court does not have jurisdiction in respect of this other party), the estate will not be bound by the result of the arbitration proceedings.

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?]

77. Yes. The trustee can take over arbitration proceedings that were already pending at the time of the opening of bankruptcy, and if he does so, the trustee steps into the shoes of the bankrupt party (see also the answer to Question 3(a) above).

78. If the trustee decides not to take over arbitration proceedings that were already pending at the time of the opening of bankruptcy, these proceedings can be continued against the bankrupt party, acting in its own name. If the bankruptcy debtor is the claimant in those proceedings, any arbitral award rendered in such proceedings will have no legal effect against the estate (unless they benefit the estate, see the answer to Question 3(a)). However, this is different if the bankrupt party is a defendant in those proceedings (not concerning a Claim for Payment). In that case, any arbitral award rendered in such proceedings will have legal effect against the bankrupt estate.

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?

79. As noted, the trustee is bound by arbitration agreements entered into by the debtor party prior to the bankruptcy. As a result, if the trustee takes over or initiates arbitration proceedings after the declaration of bankruptcy, the trustee will be bound to the conditions of the arbitration agreement, including any confidentiality obligations.

80. If the arbitration proceedings revolve around a Claim for Payment, also other creditors can dispute such Claim for Payment during the verification meeting (cf. Paragraph 7(d) above) after which they will be entitled to take over the position of the bankrupt party in arbitration proceedings concerning this Claim for Payment. Like the trustee, creditors that are stepping in on this basis will be bound by the arbitration agreement entered into by the bankrupt party prior to the bankruptcy.[79]

81. As noted previously, for certain actions the DBA prescribes that the trustee requires the advice of the creditors' committee, if one is installed, and the authorisation of the supervisory judge (*rechter-commissaris*). In this respect, confidential information relating to arbitration

[79] Rechtbank Noord-Nederland 29 June 2022, ECLI:NL:RBNNE:2022:2580, *TvA* 2022/100, grounds 3.7-3.8; G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5(c) (BPP nr. 13); M. Ynzonides, "De invloed van faillietverklaring op arbitrage" (1991) 6008 WPNR 390.

proceedings may need to be submitted to these parties.[80] Note, however, that the process for obtaining the supervisory judge's authorization does not include publication of the documents submitted to it. A creditors' committee, in turn, will usually be bound by confidentiality obligations in view of information it receives in exercising its function.

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

82. No.

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?

83. The trustee is competent to reach a settlement in arbitration with the authorisation of the supervisory judge and after having obtained the (non-binding) advice of the creditors committee (if any).[81] Failure to request or obtain the authorisation of the supervisory judge does not affect the validity of settlement. Instead, it may result in liability of the trustee towards the debtor and its creditors.[82]

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

84. An arbitral tribunal in arbitration proceedings with seat in the Netherlands can order interim measures (other than granting leave for levying prejudgment attachments (*conservatoir beslag*) with a view to securing future enforcement).[83] During bankruptcy, it is possible that arbitration proceedings are taken over, or initiated, by the trustee (and/or any of the

[80] Certain arbitration rules explicitly allow for such disclosure obligations ensuing from the law, see, for example, Article 6 NAI Rules: "Arbitration is confidential and all persons involved either directly or indirectly shall be bound to secrecy, except and insofar as disclosure ensues from the law or the parties' agreement".
[81] DBA, art 104: "De curator is, na ingewonnen advies van de commissie uit de schuldeisers, zo die er is, en onder goedkeuring van de rechter-commissaris, bevoegd vaststellingsovereenkomsten of schikkingen aan te gaan." Translation: "The trustee is entitled, after having heard the advice of the creditors' committee, if any, and with the approval of the supervisory judge, to enter into settlement agreements or agreements to end a dispute."
[82] ibid, art 72(1).
[83] DCCP, art 1043b: "Tijdens een aanhangig arbitraal geding ten gronde kan het scheidsgerecht, op verzoek van een der partijen, een voorlopige voorziening, met uitzondering van bewarende maatregelen als bedoeld in de vierde titel van het Derde Boek, treffen. De voorlopige voorziening moet samenhangen met de vordering of tegenvordering in het aanhangige arbitraal geding." Translation: "During pending arbitral proceedings on the merits, the arbitral tribunal may, at the request of any of the parties, grant provisional relief, except for conservatory measures as referred to in the Fourth Title of the Third Book. The provisional relief must be related to the claim or counterclaim in the pending arbitral proceedings."

creditors, where applicable). Effects of any order issued in arbitration on the estate will have to be determined by insolvency law, ie, such orders may be enforceable within the context of insolvency proceedings only to the extent permitted by insolvency law.

85. In the circumstances described in Paragraphs 16(b) and 25(c), the arbitration proceedings can be continued against the debtor. In those cases, which are unlikely to frequently occur, the arbitral tribunal can adopt interim measures against the debtor.

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

86. There is no express provision in the DBA, case law or literature on this point. Considering that the trustee (and/or any of the bankrupt party's creditors, where applicable) will enter the arbitration proceedings from the stage they were in at the time of suspension, it is arguable that interim measures issued against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings will retain their binding effect.

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?

87. Bankruptcy results in the debtor's loss of the right to manage and dispose over any assets forming part of the estate (cf. Paragraph 7(b) above) and thus the loss of the authority to settle a dispute in the arbitration. As already explained, the debtor will often not even be a party to the arbitration proceedings any longer after opening of bankruptcy proceedings (see the answer to Question 3(a) above). The trustee, who will in such case be a party to the arbitration proceedings, can settle the dispute in the arbitration (for which he requires authorization of the supervisory judge and the advice of the creditors' committee, if installed). See the answer to Question 19 above.

88. In case of suspension of payments, the debtor can only manage and dispose over any assets together with the court appointed administrator (see the answer to Question 3(b) above). Hence, the debtor will require the cooperation of the administrator to settle a dispute in arbitration. In case of a court confirmed extrajudicial restructuring plan (*akkoordprocedure buiten faillissement*), the debtor can in principle continue to dispose over and manage its assets (unless the court has ordered otherwise).

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?

89. The bankruptcy indeed triggers a general prohibition for unsecured creditors to individually enforce their Claims for Payment.

90. This prohibition does not apply to secured creditors, such as those with a right of mortgage or pledge, who are not barred from enforcing their security rights. There are two limitations to this right. Firstly, the court may order a "cooling off" period during which there can be no enforcement against assets in the possession of the trustee without court permission. Secondly, the bankruptcy trustee may set a time limit within which the secured creditor must exercise his rights.

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?

91. If a Claim for Payment is disputed by the trustee in the verification procedure, this claim qualifies as a disputed claim. A disputed claim will not be entitled to any interim distributions in the bankruptcy. Moreover, a creditor whose claim is disputed is not entitled to vote about any composition plan put to the creditors for approval. To avoid that a trustee disputes a Claim for Payment for the sole purpose of 'shutting out' a certain creditor, the supervisory judge has the ability to provisionally admit a Claim for Payment, up to an amount determined by the supervisory judge, for the purpose of voting and reservation of distribution amounts.[84]

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?

92. Yes, an arbitral award will, in principle, be a valid proof of credit for the purposes of the insolvency proceedings. An arbitral award rendered in arbitration proceedings with seat in the Netherlands has this effect without any further action being required. With respect to foreign arbitration proceedings, the claimant will first have to apply for recognition of the arbitral award at the Dutch court before the arbitral award binds the bankrupt estate. If the

[84] DBA, art 125: "Vorderingen, die betwist worden, kunnen door de rechter-commissaris voorwaardelijk worden toegelaten tot een bedrag door hem te bepalen. Wanneer de voorrang betwist wordt, kan deze door de rechter-commissaris voorwaardelijk worden erkend." Translation: "Claims which are disputed may be admitted provisionally by the supervisory judge up to an amount determined by him. If the priority ranking (right of preference) of a claim is disputed, the supervisory judge may admit it provisionally." See K. Heemrood-Van Dijk, "GS Faillissementswet" art 125 Fw, aant. 2.

arbitral award has not yet been rendered at the time of the bankruptcy declaration, the procedure set forth in the answer to Question 3(a) has to be followed first.[85]

93. As to the recognition of an arbitral award that has been obtained abroad, Dutch law distinguishes between the recognition and enforcement of arbitral awards under a treaty and the recognition and enforcement of arbitral awards where no treaty applies. In the former case, the 1958 New York Convention will most frequently be relied upon. A request for recognition or enforcement will be submitted to the competent Court of Appeal (unless the relevant treaty designates a different court). The Court of Appeal will rule on the application only after having heard the parties. A recourse in cassation can be filed with the Dutch Supreme Court against the Court of Appeal's judgment (again, unless the relevant treaty provides otherwise).

94. The 1958 New York Convention in Article VII(1) permits a party to rely on a more favourable national law on the enforcement. Dutch law on the enforcement of foreign arbitral awards is, in certain aspects, more favourable than the Convention. In both cases, the application for recognition or enforcement has to be submitted to the competent Court of Appeal, whose decision is open to recourse in cassation to the Dutch Supreme Court. Dutch law sets forth an exhaustive list of grounds to refuse recognition, which are similar to those under Article V of the Convention. Yet the enforcement regime is considered to be somewhat more favourable than the Convention, as some of the grounds may be relied upon only if they had been raised in the arbitral proceedings.[86] The reasons for refusing recognition include the absence of a valid arbitration agreement, irregularities having occurred in the composition of the arbitral tribunal, the arbitral tribunal having violated its mandate, or a violation of public policy.

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

95. The insolvency rules are generally considered to form part of Dutch public policy and so it is arguable that the same applies to the provisions on the effects of insolvency on legal proceedings, which are applied analogously to arbitration.[87] However, there is limited case law on this subject and thus, a certain amount of uncertainty remains about whether all rules regulating the effect of insolvency on arbitration are considered part of public policy.

[85] If this procedure is followed and results in an arbitral award in which the payment claim is granted, this award qualifies as verification of the claim in the bankruptcy (ie, the payment claim will no longer be a disputed claim). See K. Heemrood-van Dijk, "GS Faillissementswet" art 122 Fw, aant. 15; G.J. Meijer, "Overeenkomst tot arbitrage" (2011) 9.3.3.5(d) (BPP nr. 13). If the supervisory judge had referred the case to a Dutch court first, after which the Dutch court referred the case to arbitration upon one of the parties challenging the court's jurisdiction (cf. Paragraph 22), the Dutch court will, upon taking note of the arbitral award, rule that the payment claim is verified, which judgment will qualify as verification.

[86] H.J. Snijders, "GS Burgerlijke Rechtsvordering" art 1076 Rv, aant. 9.

[87] See, for example, Court of Appeal Leeuwarden 29 October 2003, ECLI:NL:GHLEE:2003:AN1347, confirming that Article 29 DBA is part of public policy; Dutch Supreme Court 18 December 2020, ECLI:NL:HR:2020:2100, ground 3.2.2.

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)?

96. Yes. This principle is part of public policy, to the extent it mandates equal treatment of creditors from a substantive point of view. It does not in itself stand in the way of individual arbitration proceedings being conducted, after the Claim for Payment was filed and contested in the verification procedure (see Paragraph 7(d)). Thus, Claims for Payment may only further be pursued by filing for verification since there is a preclusion of individual actions of ordinary non-secured bankruptcy creditors outside bankruptcy proceedings under Article 26 DBA. If the steps described in the answer to Question 3(a) are not followed, this may result in the arbitration proceedings having no effect against the estate.

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

97. In 2007, the Dutch legislator published a proposal for a revision of the DBA, which, contrary to the DBA as currently in force, at least to a certain extent explicitly dealt with the effect of insolvency on arbitration. The proposal, which was intended to update the DBA with, among other things, best practices, provided that arbitration proceedings concerning Claims for Payment that were already pending at the time of the bankruptcy declaration would automatically be suspended. However, if the Claim for Payment would have been disputed by the trustee and/or other creditor(s), the regime set forth in the proposal provided that the supervisory judge had the authority to refer the case to regular court proceedings, regardless of whether arbitration proceedings were already pending, if the supervisory judge established that this would be desirable for a proper liquidation of the estate (eg, in view of the costs to be incurred for the arbitration proceedings), and the relevant parties' interests would not be disproportionally affected. The proposal was abandoned and never formally entered the legislative process, but this underlines that regular practice has been that an arbitration agreement governing a Claim for Payment is recognized in bankruptcy.

IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

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

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

98. The DBA contains no provisions on the recognition of foreign insolvency proceedings. According to Dutch Supreme Court case law, the principle of territoriality applies on the basis of which, absent a recognition treaty, the effects of a foreign bankruptcy in the Netherlands are limited. Dutch law applies a different regime to bankruptcy proceedings opened in the Netherlands, to which the principle of universality applies, which claims extraterritorial effect (as described in the answer to Question 3(g)). The Dutch Supreme Court has clarified that the territoriality principle entails that (i) the assets of the insolvent party in the Netherlands are not affected by a general bankruptcy stay effectuated by a foreign bankruptcy; and (ii) a foreign insolvency practitioner (foreign trustee) cannot manage and dispose over assets located in the Netherlands for the benefit of the (foreign) estate if this would result in individual creditors no longer being able to take recourse on assets in the Netherlands forming part of the estate. However, within these limits set by the Dutch Supreme Court, a foreign trustee can exercise all powers in the Netherlands with respect to assets falling within the estate of the foreign bankruptcy, assuming that recognition of the foreign bankruptcy does not violate Dutch public policy and provided that the *lex concursus* grants such powers to the foreign trustee.[88]

99. The most important instrument recognizing foreign insolvencies applicable in the Netherlands is the EIR. Pursuant to and in accordance with the EIR, insolvency proceedings opened in another European Member State (other than Denmark) are automatically recognized in the Netherlands.

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?

100. The Netherlands have not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

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

[88] Dutch Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ5668, *NJ* 2014/454, grounds 3.2.1-3.2.2; Dutch Supreme Court 19 December 2008, ECLI:NL:HR:2008:BG3573, *NJ* 2009/456, ground 3.4.3.

101. If foreign insolvency proceedings have been opened in a European Member State other than Denmark, the effect thereof on arbitration proceedings with seat in the Netherlands is governed by the EIR. Article 18 of the EIR provides that the effects on arbitration proceedings that were already pending at the time of the opening of the insolvency proceedings are governed by the laws of the Member State in which the arbitral tribunal has its seat.[89] Consequently, if one of the parties to pending arbitration proceedings with seat in the Netherlands becomes subjected to insolvency proceedings in a European Member State other than Denmark, the regime described in the answer to Question 3(a) applies *mutatis mutandis*.[90] If arbitration proceedings were not pending at that time, the effects of the insolvency proceedings are governed by the law of the EU Member State where they were opened.[91]

102. The effect of foreign insolvency proceedings opened in Denmark or outside the EU on arbitration proceedings is not dealt with in Dutch case law or statute. It is arguable, based on recognition case law (see above in the answer to Question 29 and footnote 88), that the foreign trustee can, in principle, exercise the right to initiate new proceedings in the Netherlands, provided the *lex concursus* grants such rights to the foreign trustee and provided that the decision opening the foreign insolvency proceedings has not been brought about in a manner that violates Dutch public policy. The same applies to already pending proceedings. However, case law suggests that these are, as a matter of principle, not automatically stayed as a result of the (foreign) bankruptcy and that the insolvent party can continue such proceedings.[92] In this respect, it has been argued in the literature that if the foreign insolvency law provides for a procedure similar to Article 29 DBA (ie, proceedings concerning payment from the estate are stayed automatically in anticipation of whether the Claim for Payment will be disputed by the trustee (and/or other creditor(s))), this procedure should be followed. Otherwise, Article 28 DBA (ie, proceedings are not stayed automatically, but a party can

[89] EIR, art 18: "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat."
[90] See also, DBA, art 32: "De artikelen 27 tot en met 31 zijn van overeenkomstige toepassing met betrekking tot rechtsvorderingen betreffende een goed of recht waarover de schuldenaar het beheer en de beschikking heeft verloren door de opening van een in Nederland op grond van artikel 19 van de verordening, genoemd in artikel 5, derde lid, te erkennen insolventieprocedure." Translation: "Articles 27 up to and including 31 apply accordingly to legal proceedings concerning an asset or right with regard to which the debtor has lost the right of administration and the right of disposition as a result of the opening of insolvency proceedings that have to be recognized in the Netherlands on the basis of Article 19 of the European Regulation mentioned in Article 5(3)." See for example Den Haag Court of Appeal 11 May 2021, ECLI:NL:GHDHA:2021:904, *JOR* 2021/224.
[91] See arts 4(2)(c) and 4(2)(f): "In particular, [the law of the State of the opening of proceedings] shall determine the following: . . . the respective powers of the debtor and the insolvency practitioner . . . the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits".
[92] Amsterdam Court of Appeal 14 January 1999, NIPR 2002/19. See also, A.J. Berends, "Insolventie in het internationaal privaatrecht" (2011) II.2.3.12 (R&P nr. InsR2).

request a stay of the proceedings in order for the trustee to step in) should be applied by analogy.[93]

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?

103. There is no law or other authority on this point in the Netherlands, but it is considered appropriate to take these rules into account.

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

104. Here again, there are no express provisions or other authorities specifically concerning the position under Dutch law. As explained in the answer to Question 29, the arbitrators should take into consideration which effects of foreign insolvencies proceedings are given in the Netherlands according to the EIR and/or Dutch national law. It does not, however, imply that all provisions of foreign insolvency law are of mandatory application. One of the authors of this report[94] expressed the view that arbitrators, in general and without reference to any national law, should not blindly follow and apply all rules of insolvency law, even when they are considered mandatory in the jurisdiction where insolvency proceeding are opened. Instead, only provisions that serve to protect the basic principles of insolvency law, such as preclusion of individual actions of ordinary creditors, should be respected. The same holds true for the provisions which are necessary to ensure the proper participation of an insolvent party and due process. The main argument in support of this view is that it is often difficult to assess whether or not all or only some provisions of insolvency law are mandatory and tend to be applied in arbitration, especially in cross-border cases.

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

[93] B. Wessels, "Insolventierecht X" (2015) 10173, referring to R.J. van Galen, J.C. van Apeldoorn, and A.J. Berends, "Grensoverschrijdende insolventieprocedures. Preadvies" [1998] Deventer: Kluwer 107.
[94] V. Lazić, "Cross-Border Insolvency and Arbitration: Which Consequences of Insolvency Proceedings Should be Given Effect in Arbitration?" in S. Kröll, L.A. Mistelis, P. Perales Viscasillas, and V. Rogers (eds.), "International Arbitration and International Commercial Law: Synergy, Convergence and Evolution" [2011] Liber Amicorum Eric Bergsten, Kluwer Law International, 337-363.

105. Article 1065(1)(e) DCCP[95] provides that an arbitral award may be set aside if the award, or the way in which it has come about, is contrary to public policy. In general, Article 1065(1)(e) DCCP must be applied with restraint.[96] Only a fundamental and serious violation of public policy can constitute a setting aside ground, for example, if an arbitral award was rendered in a procedure in which a party's fundamental right to be heard was violated.[97]

106. We are not aware of any published case law in which a court has held that an arbitral award should be set aside because of the arbitral tribunal's failure to observe the effects of insolvency on the arbitration proceedings.[98] We believe that if the arbitral tribunal would not observe these effects, this would not, by definition, lead to the setting aside of the arbitral award rendered in these proceedings. Instead, only if a failure to respect a certain rule would result in a violation of some basic principles of insolvency, it could qualify as a ground for annulment of an arbitral award. The same should hold true in case of violating the rules meant to ensure a proper representation and participation of an insolvent party in arbitration, resulting in violation of due process. The chances of success of a setting aside claim based on this ground will depend heavily on the specific facts and circumstances of a particular case, which, for example, include the nature and severity of the tribunal's actions that do not respect the effects of the foreign bankruptcy on the arbitration proceedings.

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?

107. No.

[95] DCCP, art 1065(1)(e): "Vernietiging kan slechts plaatsvinden op een of meer van de navolgende gronden: . . . het vonnis, of de wijze waarop dit tot stand kwam, is in strijd met de openbare orde." Translation: "An award may only be set aside on one or more of the following grounds: . . . the award, or the manner in which it was made, violates public policy."

[96] See Supreme Court 17 January 2003, ECLI:NL:HR:2003: AE9395, *NJ* 2004/384, (*International Military Services/Modsaf*), para 3.3; Supreme Court 25 May 2007, ECLI:NL:HR:2007:BA2495, *NJ* 2007/294 (*Spaanderman/Anova Food*), para 3.5; Supreme Court 24 April 2009, ECLI:NL:HR:2009:BH3137, *NJ* 2010/171 (*International Military Services/Modsaf II*), para 4.3.1; Supreme Court 12 April 2019, ECLI:NL:HR:2019:565, (*Ecuador/Chevron*), para 4.3.2.

[97] Supreme Court 25 May 2007, ECLI:NL:HR:2007:BA2495, *NJ* 2007/294 (*Spaanderman/Anova Food*), para 3.5; Supreme Court 24 April 2009, CLI:NL:HR:2009:BH3137, *NJ* 2010/171 (*International Military Services/Modsaf II*), para 4.3.1.

[98] For an unsuccessful attempt, see Den Haag Court of Appeal 24 November 2020, ECLI:NL:GHDHA:2020:2833, grounds 4.14-4.19.