IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF SOUTH AFRICA

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IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

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

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

1. Does the law of South Africa 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 proceedings in South Africa are governed by –

   1.1 the Insolvency Act 24 of 1936 ("Insolvency Act");

   1.2 the Companies Act 61 of 1973 ("1973 Companies Act")[1]; and

   1.3 the Companies Act 71 of 2008 ("2008 Companies Act").

2. These three statutes govern insolvency proceedings of individuals, trusts and companies. The 2008 Companies Act also sets out the law applicable to the restructuring of companies through business rescue.[2]

3. The below must be read in conjunction with the Arbitration Act 42 of 1965 ("Arbitration Act")[3] which provides that unless the arbitration agreement provides otherwise, an arbitration agreement shall not be terminated by the winding-up of a company.[4] It is important to note that as of 20 December 2017 the Arbitration Act only applies to domestic arbitrations. There is no equivalent provision in the International Arbitration Act 17 of 2017 ("International Arbitration Act"), which is the *lex arbitri* for all foreign or international arbitrations seated in South Africa.

Liquidation

4. As will be discussed in more detail in Question 3 below, the issuing of an application for the winding-up of a company does not automatically impact pending legal proceedings such as

[1] Item 9 of schedule 5 of the 2008 Companies Act provides for the continued application of the Companies Act to winding up of companies despite its repeal.
[2] This Report will only deal with the liquidation of companies in terms of the 1973 Companies Act read with the Insolvency Act and the commencement of business rescue of companies in terms of the 2008 Companies Act. The Report does not deal with the sequestration of the estates of individuals and trusts in terms of the Insolvency Act.
[3] The Arbitration Act was designed with domestic arbitration in mind and contains no provisions which expressly deal with international arbitration. International arbitrations are regulated by the International Arbitration Act.
[4] Section 5(1) of the Arbitration Act.

arbitration. The company, any creditor or shareholder may apply to court for a stay of such legal proceedings including arbitration proceedings. The court may stay or restrain such proceedings on such terms as it deems fit.

5. If and when the winding-up application is granted or a special resolution for the winding-up of a company has been registered, all civil proceedings including arbitration proceedings by or against the company concerned are suspended until the appointment of a liquidator in accordance with section 359 of the 1973 Companies Act.

Business Rescue

6. As will be discussed in more detail in Question 3 below, during business rescue proceedings, no legal proceeding may be commenced or proceeded with in any forum save for the exceptions listed in section 133 of the 2008 Companies Act.

7. It has now been authoritatively settled that the phrase legal proceedings must, depending on the context within which it is used, be interpreted more broadly, to include proceedings before other tribunals including arbitral tribunals.[5]

2. Does the insolvency legislation in South Africa 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*?

8. The High Courts of South Africa are the only courts in South Africa which have the exclusive jurisdiction to determine all matters/disputes relating to insolvency in the first instance, ie, status matters. This includes placing a company into liquidation, confirming the validity of a claim against an insolvent company (irrespective of whether there is an arbitration agreement or pending arbitration proceedings) or any issues related to the winding-up/liquidation proceedings administered by the appointed liquidator. However, this does not imply that the High Court is the sole forum for determining a claim against the insolvent company. A Liquidator and/or the Master of the High Court ("Master")[6] have a discretion on whether it recognises a claim against a company if there is sufficient proof thereof. If a claim is rejected (for whatever reason), the High Court is the only competent forum that has jurisdiction to compel a liquidator to recognise the claim that was rejected. Although an arbitration process may be followed where a liquidator refuses to acknowledge a contract, the liquidator still has the discretion to recognise such a claim upon being presented with an award.

[5] *Chetty t/a Nationwide Electrical v Hart NO and Another* 5 (6) SA 424 (SCA).
[6] The Master is responsible for the administration of insolvent estates of both corporates, individuals and trusts, but the role of the Master is not relevant for purposes of this discussion.

9. Section 5 of the Arbitration Act,[7] provides that "unless the agreement otherwise provides, an arbitration agreement ... shall not be terminated by the winding-up of the corporate body". There is no equivalent provision in the International Arbitration Act. Arbitration agreements are still valid and binding during liquidation proceedings and cannot be disregarded by a liquidator in insolvency proceedings where there is a dispute between an insolvent company and the other party to the agreement unless there is good reason to do so. That is, once a company is wound-up or subject to winding-up proceedings, claims against the estate must be proved with the liquidator or provisional liquidator. While a claim is subject to arbitration and there is no award it is not a liquidated claim and can merely be accepted by the liquidator. The liquidator also has the option to proceed with defending any arbitration proceedings against the company in provisional liquidation.

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

10. Please note that reference to winding-up shall mean liquidation/insolvency and reference to legal proceedings shall include arbitration proceedings.

11. The presentation to any High Court in South Africa of an application for the winding-up of a company has no effect on pending legal proceedings. These legal proceedings are not stayed yet. Section 358 of the 1973 Companies Act [8] governs the stay of legal proceedings at any time after the presentation of the application and before a winding-up order is made and states that:

> "*At any time after the presentation of an application for winding-up and before a winding-up order has been made, the company concerned or any creditor or member thereof may—*
>
> *(a) where any action or proceeding by or against the company is pending in any court in the Republic, apply to such court for a stay of the proceedings; and*
>
> *(b) where any other action or proceeding is being or about to be instituted against the company, apply to the Court to which the application for winding-up has been presented, for an order restraining further proceedings in the action or proceeding,*
>
> *and the court may stay or restrain the proceedings accordingly on such terms as it thinks fit*."

12. Accordingly, should winding-up proceedings be instituted against the company, but an order not granted as yet, the company or creditor can apply to the High Court to have the pending legal proceedings (including arbitrations) stayed.

[7] Section 5 the Arbitration Act 42 of 1965.
[8] Section 358 of the1973 Companies Act.

13. However, once a winding-up order has been granted, section 359 of the 1973 Companies Act states that:

    "*When the Court has made an order for the winding-up of a company or a special resolution for the voluntary winding-up of a company has been registered in terms of section 200—*

    (a) all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator; and

    (b) any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void."

14. It is only once the High Court grants the order for winding-up that legal proceedings are automatically stayed/suspended until the appointment of a liquidator. This would naturally put a halt to any pending arbitration proceedings.[9]

15. Once a liquidator is appointed, the party that intends on persisting with proceedings against the insolvent company must give the liquidator at least 3 (three) weeks' notice in writing before resuming proceedings. The notice must be delivered within 4 (four) weeks after the appointment of the liquidator. If such notice is not delivered, the proceedings are to be considered to have been abandoned unless the Court otherwise directs that the proceedings can continue.[10] Often, there would be no logic in proceeding with the pending legal proceedings against the company in liquidation as the claim would in any event need to be dealt with in the insolvent estate according to the law of insolvency and ranking of creditors' claims, unless the claim is for damages or an illiquid claim for which liability needs to be established.

16. If the insolvent company has instituted legal proceedings against another party prior to its winding-up, the liquidator may continue with such proceedings if he believes that persisting with legal proceedings will be for the benefit of the general body of creditors.[11] The creditors must provide the liquidator with authority to continue with such proceedings and failing to do

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[9] PM Meskin "*Meskin's Insolvency Law*" (2022), Chapter 6.8 Legal Proceedings.

[10] Section 359 of the 1973 Companies Act.

[11] This is in line with the concept of *concursus creditorum*, being the cornerstone of the South African insolvency law. At an elementary level, the concept entails that the rights of the creditors as a group are preferred to the rights of individual creditors. For example, a single creditor can no longer by means of execution obtain full payment of his claim at the expense of others. Neither can the creditors attach assets acquired by the debtor after liquidation. That the concept has been in place since time immemorial is borne out by the fact that its application predates the statutory instruments regulating insolvency in South African law, namely the Insolvency Act and the 1973 Companies Act. Its classic formulation from more than 110 years ago is as follows:

> "*The effect of a winding-up order is to establish a concursus creditorum, and nothing can thereafter be allowed to be done by any of the creditors to alter the rights of the other creditors*";
> and
> "*The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order*." *Walker v Syfret NO* 1911 AD 141 160 and 166.

The concept has been described as freezing creditors rights as at date of the commencement of liquidation and continues to be applied in South African law, without exception (in most instances).

so is terminal to the company's continued participation with such legal proceedings. In respect of provisional liquidators, they must apply to court to have their powers extended should they wish to institute or continue with legal proceedings as the main role of a provisional liquidator is to safeguard the assets of the company pending the appointment of a final liquidator.

17. During business rescue proceedings (aimed at the restructuring of the company to either return the company to solvency or secure a better return for creditors than in a winding-up/liquidation), section 133 of the 2008 Companies Act imposes a general moratorium on legal proceedings, including enforcement actions, against a company in business rescue in any forum.[12] One would thus either require *inter alia* the written consent of the business rescue practitioner (subsection 133(1)(a)) or leave of the court (subsection 133(1)(b)) to institute any legal proceedings against the company. On the other hand, there are no restrictions on a business rescue practitioner (acting as claimant on behalf of the company) proceeding with legal proceedings against another party.

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?

18. Yes. Business rescue proceedings are provided for in Chapter 6 of the 2008 Companies Act and are statutory proceedings aimed at assisting companies in financial distress. They are similar to the Chapter 11 Bankruptcy proceedings in the United States.[13] They are to be used by or against financially distressed companies that will likely be unable to pay their debts in the ensuing 6 (six) months or will likely become insolvent in the ensuing 6 (six) months.[14] The objective of this process is to provide the company with some breathing space to restructure its affairs under the supervision of a business rescue practitioner who is skilled at restructuring and who is responsible for developing and implementing a business rescue plan which details the strategy of how the company will be restructured/rescued.

19. Winding-up proceedings are for companies that are already unable to pay their debts and/or companies not capable of being rescued.

20. The different treatment that the law governing these proceedings gives to arbitration has been explained in Questions 1, 2 and 3(a).

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

[12] Section 133(1) of the 2008 Companies Act.
[13] Chapter 11, Title 11 of the United States Code.
[14] Section 128(1)(f) of the 2008 Companies Act.

21. No, South African law does not draw distinctions based on the subject matter or relief sought. Please refer to the explanation in Question 3(a) above.

22. Should the liquidator of the insolvent company wish to proceed with any pending legal proceedings against another company or individual, he may only do so if it would benefit the general body of creditors. For example, in circumstances where funds may be recovered for the benefit of the insolvent estate and its creditors.

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

23. No. The stay of legal proceedings against a company in liquidation and the general moratorium on legal proceedings against a company in business rescue only applies in the circumstances set out above.[15]

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?

24. Please refer to the answer in Question 3(a).

25. Regarding winding-up proceedings, the law draws no distinction between arbitration proceedings which are pending at the time of the opening of winding-up proceedings and arbitration proceedings which commence after the opening of winding-up proceedings. Legal proceedings (including arbitrations) against the insolvent company are stayed upon the granting of the court order or filing of a special resolution for voluntary winding-up. If you wish to proceed with such legal proceedings, you must notify the liquidator as mentioned in Question 3(a) above. It would only make sense to continue with such proceedings if the nature of the proceedings is such that it would determine the liability of the insolvent company in relation to damages or an illiquid claim.

26. However, with respect to business rescue, section 133(1) of the 2008 Companies Act provides for a legal moratorium on all legal proceedings and states that:

    "*during the business rescue proceedings, no legal proceedings, including enforcement action, against the company or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except…*"

27. The purpose of this legal moratorium is to provide the company and the appointed business rescue practitioner with an opportunity to restructure its affairs.[16] Legal proceedings have been

[15] Section 133 of the 2008 Companies Act.
[16] In *Investec Bank Ltd v Bruyns* 2012 (5) SA 430 (WCC), para 12, the court left open the question as to whether the business rescue proceedings commence on the launching of the application or only retrospectively after the making of a court order.

interpreted by our courts to include arbitration proceedings as they also involve a diversion of resources, both time and money, that may hinder the effectiveness of business rescue proceedings and to construe it narrowly to exclude arbitration proceedings would defeat the purpose of the legal moratorium and lead to insensible and impractical consequences within a business rescue process.[17]

28. Therefore, no legal proceedings, including arbitrations,[18] may be commenced during the business rescue process. There are certain limitations to this, and it depends on the facts of each matter. For example, a business rescue practitioner may consent to the continuation or commencement of legal proceedings (including arbitration proceedings) but this rarely occurs. The leave of the court may also be obtained in certain circumstances (which is beyond the scope of this toolkit).

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

29. Although South African law draws a distinction between voluntary and compulsory insolvency proceedings, as explained in Question 3(a), regardless of whether the proceedings are voluntary or compulsory, the effect on legal proceedings/arbitrations is the same.

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

30. Yes, the effects apply extraterritorially.

31. If the insolvency proceeding is in South Africa in respect of a party (South African company) over which the South African courts have oversight (ie, in respect of such party's legal status), any arbitration proceedings (whether seated in South Africa or abroad) affecting such party will be affected by that party's insolvency.

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.)?

32. Please refer to the answer to Question 3(a).

[17] *Chetty t/a Nationwide Electrical v Hart NO and Another* 5 (6) SA 424 (SCA).
[18] *Chetty t/a Nationwide Electrical v Hart NO and Another* 5 (6) SA 424 (SCA).

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?

- **Liquidation**

33. Please refer to the answer to Question 3(a). In respect of liquidations, every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, must within 4 (four) weeks after the appointment of the liquidator give the liquidator not less than 3 (three) weeks' notice in writing before continuing or commencing the proceedings.[19] If notice is not so given, the proceedings shall be considered to be abandoned unless the Court otherwise directs.[20]

- **Business Rescue**

34. In respect of business rescue, no legal proceeding may be commenced or proceeded with in any forum except with, among others, the leave of the court and in accordance with any terms the court considers suitable.[21]

35. It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in consultation with the creditors and other affected parties, to formulate a business rescue plan designed to achieve the purpose of the process.[22] It has therefore been held that when a party seeks leave to institute legal proceedings against business rescue practitioners in their representative capacities [or the company in business rescue], it has a very high hurdle to overcome.[23]

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?

36. Yes, article 17J of the UNCITRAL Model Law, which has been adopted without amendment under the International Arbitration Act, provides that a South African court may at the request

[19] Section 259(2)(a) of the Companies Act, 1973.
[20] Section 259(2)(b) of the Companies Act, 1973.
[21] Section 133(1)(b) of the Companies Act, 2008.
[22] *Timasani (Pty) Ltd (in business rescue) and Another v Afrimat Iron Ore (Pty) Ltd* [2021] 3 All SA 843 (SCA).
[23] *Zwiegers v Du Toit N.O. and Another* (15418/2021) [2022] ZAWCHC 70 (4 May 2022).

of a party, irrespective of whether its juridical seat is in the territory of South Africa, make amongst others an order a) appointing a liquidator or b) granting an interim interdict or other interim order (ie, anti-arbitration injunction).

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?

37. In terms of South African common law, in respect of insolvent companies, uncompleted contracts (executory contracts, ie, are contracts that have not been fulfilled) are neither terminated or modified nor in any way altered by the insolvency of one of the parties to the contract except in one respect - because of the supervening *concursus,* a liquidator cannot be compelled to perform in terms of the contract. There is nothing that prevents the liquidator from performing either. The liquidator must decide whether it would be to the benefit of the creditors (and under the direction of the creditors) to continue to perform the obligations of the company under an uncompleted contract where the obligations are extant. The liquidator may elect not to do so. So irrespective of whether the contract contains an arbitration clause or not, the liquidator does not have the power to suspend contracts but has an election whether to abide by the contract or not dependent on whether his election would be to the benefit of creditors.

38. We must however be mindful of Section 5 of the Arbitration Act,[24] which provides that arbitral agreements are still alive during liquidation. Therefore, it cannot be disregarded by a liquidator in insolvency proceedings unless there is good reason to do so.

39. In relation to business rescue proceedings, section 136(2) of the 2008 Companies Act provides the business rescue practitioner with the power during the business rescue proceedings to –

    "(a) entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that—
    (i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and
    (ii) would otherwise become due during those proceedings; or

    (b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a)."

40. Therefore, irrespective of whether a contract has an arbitration clause or not, the business rescue practitioner may suspend such obligations contained in the contract which would be onerous on the company to fulfil. It is only the suspension of an obligation and not the

[24] Section 5 of the Arbitration Act.

suspension (and even cancellation if application is made to court) of the entire contract which is permitted.[25]

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?

41. Please see the answer to Question 6 above.
42. In general, the arbitration agreement remains valid and enforceable, even if the contract in which it is contained is terminated or disclaimed by the insolvency administrator or the insolvency court.[26] Usually, an arbitration clause(s) remains valid despite the termination of the agreement. Ordinarily, the definition of a dispute that may be referred to arbitration is wide enough to also cover the validity of such an agreement and/or termination of the agreement and/or includes a severability provision to separate the arbitration provision from the remainder of the agreement in the event that the agreement is terminated, or clauses thereof are declared invalid.

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?

43. Please refer to the answer in Question 6 above.
44. Unless the arbitration agreement provides otherwise, an arbitration agreement cannot be terminated by the winding-up of a company.[27]
45. A business rescue practitioner does however have the power to entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings; and would otherwise become due during those proceedings or apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstance.[28] Any party to an agreement that has been suspended or cancelled, or any provision which has been suspended or cancelled may assert a claim against the company only for damages.[29] This would naturally include the arbitration clauses and agreements contained within the contract,[30] which would mean that the

[25] Section 136(2) of the 2008 Companies Act.
[26] Also see Section 5 of the Arbitration Act.
[27] Section 5(1) of the Arbitration Act.
[28] Section 136(2) of the 2008 Companies Act.
[29] Section 136(3) of the 2008 Companies Act.
[30] This is reinforced by the moratorium on legal proceedings in section 133 of the 2008 Companies Act.

only remedy to an aggrieved party would be to approach the High Courts for relief or follow the dispute resolution process as contained is an adopted business rescue plan, if any. However, depending on the wording of the arbitration agreement in the contract and the severability of clauses in the contract, the parties may be able to proceed to arbitration to settle the claim for damages.

46. In general terms, the liquidation of a company does not automatically suspend or put an end to the contracts concluded by the company prior to being placed in liquidation. However, the liquidator steps into the shoes of the company and must, within a reasonable period, decide whether he/she intends to perform in terms of the contract or not. If the liquidator fails to decide within a reasonable time, it will be assumed that he/she has no intention of performing in terms of the contract. The liquidator cannot be compelled by the other contracting party to render specific performance in terms of the contract; however, the other contracting party remains vested with its normal common law contractual rights to cancel the contract after liquidation. Where the liquidator elects not to abide by the contract, the other contracting party will have a concurrent claim for any damages suffered as a result of the breach of contract.

47. An insolvency practitioner has full powers to protect the assets of the insolvent estate and derive the best benefit for the general body of creditors. If this involves the cancellation of an agreement or suspension thereof, then they are entitled to do so. The underlying basis for all of these types of decisions is that it must be done for the benefit of the creditors. Should an underlying agreement to pending arbitration proceedings be cancelled, then such proceedings will collapse, and the opposing party would have to submit a claim against the insolvent estate.

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?**

48. Please refer to the answer Question 3(a) regarding the commencement or continuation of legal proceedings including arbitrations and when this is advisable, ie, in respect of damages or illiquid claims.

49. It is not necessary for the alleged creditor to have submitted and proved a claim before it can commence or continue with arbitration proceedings.

50. If the claim of a creditor is rejected by the Master or presiding officer, the aggrieved creditor may establish its claim by instituting legal proceedings in the High Court. The existence of an arbitration agreement does not therefore mean that an arbitral tribunal would have jurisdiction to decide on the existence and amount of the claim.

51. Submission and proof of a claim against an insolvent estate in the prescribed manner has no bearing on a party's submission to jurisdiction or waiver of an arbitration agreement.

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

52. For a long time, South African courts have held that if a contract is void from the outset then all of its clauses, including exemption and reference to arbitration clauses, fall with it. The principle was enunciated in *Tswaing*[31] where Cameron JA said that an arbitration clause '*embedded in a fraud-tainted agreement*' could not stand.[32]

53. For example, in *North East Finance*[33] the court had occasion to consider the question of fraud in relation to an arbitration clause and reiterated that the effect of fraud that induces a contract is, in general, that the contract is regarded as voidable. This means that the aggrieved party may elect whether to abide by the contract and possibly claim damages, or to resile from it and regard the contract as void from inception. The court held that the arbitration clause could not survive in the face of allegations of fraud by one party, even though it expressly included the phrase '*any question as to the enforceability of this contract*'. Thus, disputes regarding the validity or enforceability of contracts induced by fraudulent misrepresentation and non-disclosures were not generally intended to be arbitrable.

54. The position may only change if the parties specifically made provision in the contract for such a dispute being referred to arbitration; the so-called "*specifically say so*" clause.[34] This means

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[31] *North West Provincial Government & another v Tswaing Consulting & Others* 2007 (4) SA 452 (SCA) para 13.
[32] The court referred in this regard to *Wayland v Everite Group Ltd* (3) SA 946 (W) at 951H-I which in turn relied on *Allied Mineral Development Corporation (Pty) Ltd v Gemsbok Vlei Kwartsiet (Edms) Bpk* 1968 (1) SA 7 (C) at 14B.That decision referred to Heyman & another v Darwins Ltd 1942] 1 All ER 337 (HL) at 343 where Viscount Simon LC said:

> "*An arbitration clause is a written submission, agreed to by the parties to the contract, and, like other written submissions to arbitration, must be construed according to its language and in the light of the circumstances in which it is made. If the dispute is as to whether the contract which contains the clause has ever been entered into at all, that issue cannot go to arbitration under the clause, for the party who denies that he has ever entered into the contract is thereby denying that he has ever joined in the submission. Similarly, if one party to the alleged contract is contending that it is void ab initio (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void*."

[33] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA).
[34] *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) and *Namasthethu Electrical (Pty) Ltd v City of Cape Town and Another* (201/19) [2020] ZASCA 74 (29 June 2020).

the arbitration clause itself must provide that a dispute as to the enforceability of the main agreement had to be determined by arbitration by for example using the phrase in parentheses: 'including any question as to the enforceability of this contract'. So, if an arbitration clause '*specifically says so*' the validity of the whole agreement must also be determined by a reference to arbitration. This will, of course, depend on a construction of the clause in the contract to see if it does '*specifically say so*', and whether there are any inherent defects as to the enforceability of the contract – ie, fraud or misrepresentations that render a contract void or voidable.

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

55. Nothing prevents a liquidator from resolving disputes through arbitration as long as he/she, as a provisional liquidator, has sought an extension of his/her powers from the court or, as a final liquidator, has obtained such authorisation/powers from the creditors. This would then include concluding arbitration agreements with creditors or debtors of the insolvent company in order for the dispute to be resolved as quickly as possible.[35]

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

56. Once a composition or creditors' arrangement (such as a business rescue plan) has been approved, the effects of insolvency on arbitration will remain in effect until such time as a court or any other relevant authority has been notified of the substantial compliance or rehabilitation of the insolvent company.[36] Only then will the effects of insolvency be lifted.

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?

57. An agreement between the insolvent party and one or more of its creditors cannot exclude the application of the relevant rules.

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

[35] Section 386 of the 1973 Companies Act.
[36] Section 132(2) of the 2008 Companies Act or Section 311(6)(a) of the 1973 Companies Act.

58. Yes. The rules regarding the effects of insolvency law on arbitration proceedings are designed to protect the interests of the creditors and ensures that all the company's creditors are protected. Since the rules cannot be waived in an agreement between the parties, and such arbitration agreement grants authority to the arbitrators to adjudicate the matter, the arbitrators are bound by such rules.

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?

59. No. South African courts have jurisdiction over arbitration proceedings that are seated in South Africa as well as insolvency proceedings in respect of companies that are *domiciled* or have their registered address within a court's jurisdiction within South Africa.[37]

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?]

60. A liquidator or a business rescue practitioner would step into the shoes of the insolvent party, in their representative capacity.

61. The company in liquidation or business rescue would not have the right to participate in the arbitration proceeding as a debtor in possession, as a liquidator or a business rescue practitioner takes over the management of the affairs of the company.[38]

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

[37] Section 149 of the Insolvency Act 24.
[38] Section 361 of the 1973 Companies Act; Section 140 of the 2008 Companies Act.

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?

62. Yes. The confidentiality of arbitration proceedings is compromised when one of the parties are in liquidation or business rescue since the insolvency administrator is required to act in the interests of all the creditors. The insolvency administrator would therefore be duty bound to disclose certain information to creditors or other interested parties.
63. The creditors would not be entitled to appear as interested parties in the arbitration since they would not be a party to the arbitration agreement. This is due to the fact that arbitration proceedings are usually held by consent between the parties that are party to the arbitration agreement. However, as stated above, the insolvency administrator will be obligated to disclose the status and outcome of the arbitration proceedings.

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

64. There are no provisions in South African law requiring a party to change its name as a result of liquidation or business rescue being commenced against it. It is however not uncommon to see entities reflecting either "*in liquidation*" or "*in business rescue*" especially in legal proceedings. An example of this would be Green Bank Limited reflecting as "Green Bank Limited (In Liquidation)".

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?

65. Yes, the liquidator (the insolvency administrator) is empowered to reach settlements in general if it would be to the benefit of the general body of creditors[39]. Protracted proceedings would diminish the resources, so the liquidator is aptly empowered to settle legal proceedings.

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

66. Notwithstanding the fact that section 26 of the Arbitration Act provides the arbitral tribunal with powers and discretions to make interim awards unless the arbitration agreement provides otherwise, an arbitral tribunal cannot make any interim determination concerning a party subject to insolvency proceedings as such proceedings would be stayed or have a moratorium placed over them, pending the appointment of the liquidator or business rescue practitioner

[39] Section 386(4)(b) of the 1973 Companies Act.

and their decision to either continue or terminate with the contract. However, once the proceedings resume after the appointment of a liquidator, the arbitral tribunal may make an interim award in terms of section 26 of the Arbitration Act.

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

67. Insolvency proceedings will not impact the validity of interim measures that are already in place and adopted against the insolvent party prior to the opening of the insolvency proceedings, however the commencement of liquidation proceedings could suspend the operation of such measures taken against an insolvent party. These effects are the same under business rescue and liquidation.

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?

68. Yes.

- **Liquidation**

69. The effect of the winding-up is to establish a *concursus creditorum* and nothing can thereafter be allowed to be done by any of the creditors or the company to alter the rights of other creditors. The winding-up of a company is deemed to commence at the time the liquidation application is presented to the court, or the resolution is registered with the Companies and Intellectual Property Commission. So even though the company in liquidation remains a corporate body and retains all its powers, its capacity is greatly diminished and such powers including the power to settle a dispute in the arbitration may only be exercised by and/or with the express approval of the duly appointed liquidator.[40]

- **Business rescue**

70. During business rescue proceedings, a business rescue practitioner has full management control of the company in substitution for its board and pre-existing management.[41] Any settlement to be made during the business rescue proceedings must therefore be made by and/or with the express approval of the duly appointed business rescue practitioner.

[40] See for example section 353 of the 1973 Companies Act.
[41] Section 140(1)(a) of the 2008 Companies Act.

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?[42]

71. Please refer to the answer to Questions 3(a) and (e) above.

72. Once a company is in liquidation, while legal proceedings may be continued with provided notice has been given to the liquidators or commenced for example to establish liability, a creditor may not seek to enforce any awards or court orders against the assets of the company. The claims of creditors would still need to be dealt with in terms of the law of insolvency and ranking of creditors. For example, if a creditor has security, the creditor will need to be paid from such security and an award or court order cannot take precedence over such security.

73. In relation to business rescue, as discussed, there is a general moratorium on all legal proceedings including enforcement action[43] save with *inter alia* the written consent of the business rescue practitioner or leave of the court.

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?

74. A claim that is being pursued *via* arbitration that has yet to be decided in a final arbitration award could still have the possibility of being recognised as a claim against the insolvent estate. Claims are submitted at meetings of creditors where the presiding officer can choose to accept or reject such a claim. Claims must be submitted with the proof of such claims. Whether the claim has been arbitrated or not, does not result in a differential status, rather the claim would simply be automatically allocated given that the status of an arbitration award is akin to a court order.

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?

75. Yes. A domestic arbitration award is akin to a court order and is only capable of being reviewed or appealed and would thus be a proven title on which someone can claim payment.[44] Foreign awards are similarly recognised once they have been confirmed and made an order of court by

[42] The expression "individual enforcement actions" refers to actions commenced outside of the insolvency proceedings for the enforcement of a credit.
[43] Section 133 of the 2008 Companies Act.
[44] Section 28 read with section 31 of the Arbitration Act.

a South African court pursuant to an application in order to be certified as a valid proof of credit.[45] The South African court recently confirmed that the International Arbitration Act, which provides for the enforcement and recognition of foreign arbitral awards, ensures that foreign arbitral awards will be recognised and enforced by countries who are parties to the New York Convention, thus recognising an effective dispute resolution process of international commercial disputes.[46] This procedure will apply to the recognition of a foreign award with the intention to file it in South African insolvency proceedings as valid proof of credit.

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

76. The general rules applicable to insolvency proceedings also apply to arbitration proceedings, which are discussed in Question 27 below.
77. There is an inherent tension between the public policy interests of upholding arbitration agreements and ensuring a fair distribution of assets among creditors. The rule that prohibits the commencement or continuation of arbitration proceedings against an insolvent party may however be considered part of public policy, since it aims to protect the collective interests of creditors and avoid inconsistent or conflicting outcomes.
78. On the other hand, a rule that allows an insolvent party to participate in arbitration proceedings or to enforce an arbitral award in its favour may not be considered part of public policy, as it does not prejudice the rights of creditors or interfere with the insolvency proceedings.

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)? [47]

79. The principle of *par conditio creditorum* does form part of the public policy of South Africa, albeit indirectly under the principle of the *concursus creditorum* and the stay on individual proceedings.[48]

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[45] Section 16 of the International Arbitration Act.
[46] *GFE MIR Alloys and Minerals SA (Pty) Ltd v Momoco International Limited* (55273/2021) [2023] ZAGPJHC 946.
[47] If the equality of creditors is part of public policy only from a substantive point of view, an award rendered by a foreign arbitral tribunal despite the prohibition of arbitration might still be effective in the insolvency proceedings because the award creditor will still abide by the *pari passu* distribution in insolvency. If, on the contrary, the public policy consideration of equality of creditors also extends to its procedural dimension, ie, every creditor should have its claim decided under the same procedure, an award rendered in breach/disregard of such procedures might not be effective in the insolvency proceedings.
[48] Refer to the moratorium discussed in Question 3(a) above.

80. The treatment of creditors to approve a liquidation and distribution account in liquidation or a business rescue plan in business rescue is based on the proportionate claims on the matter.[49] Minority rights are however protected through special voting channels and categories.[50]

81. Equal treatment is only extended on a procedural basis, claims are ranked according to their security, with the most secure claims being settled first, and the remaining claims being settled after or later.

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

82. No.

IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

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

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

83. Yes. In terms of the Cross-Border Insolvency Act, foreign proceedings need to be recognised in accordance with the proceedings set out in section 15 of the Cross-Border Insolvency Act. Where a foreign representative has been appointed to administer insolvency proceedings, they will need to apply to court for the recognition of the proceedings. Such application is to be accompanied by a certified copy of the decision commencing foreign proceedings and appointing the foreign representative, or a certificate from the foreign court containing the same information, or any other evidence that appears acceptable to the court regarding the appointment of the representative. However, the Cross-Border Insolvency Act is yet to come into operation (see response below). As such, currently, the recognition of cross border insolvency proceedings will be determined in terms of common law as well as the principles of private international law regimes.

84. The recognition of foreign proceedings has various effects in South Africa, such as staying the commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities, and suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor.

85. In the absence of legislation, South African is thus left with no alternative but to allow cross border insolvency matters to be regulated by principles of common law and private

[49] Section 152(2) of the 2008 Companies Act.
[50] Section 152(3)(c) of the 2008 Companies Act.

international law as developed by case law since there is no local statutory dispensation in operation yet. South African High Courts are called upon from time-to-time to consider the granting of relief to foreign insolvency estate representatives and to clothe them with specific powers to deal with assets and matters relating to the estates of debtors in South Africa, but subject to foreign insolvency orders. The established principle is for the foreign liquidator to apply for recognition in South Africa.[51]

86. When a court contemplates the possibility of whether to grant an application for recognition, it exercises a discretion on the basis of comity, convenience and equity.[52] Comity and convenience is a factor which plays a part in influencing the local court to exercise its discretion in favour of recognising a foreign trustee. When a court exercises its discretion, it must also ensure that the interests of local creditors are adequately protected. The matter is entirely one for the discretion of the court.

87. Without such recognition, the foreign insolvency estate representatives are not entitled to bring proceedings in a court in South Africa.[53] The court granting recognition will then make an appropriate order including that they furnish security and will distribute the assets[54] in this country in accordance with the law of this country.[55] Such recognition is granted on terms that protect the position of local creditors holding security for their claims under domestic law and the powers to be exercised by the foreign liquidator will be dealt with in the recognition order.[56]

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?

88. Although South Africa has adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency by means of the Cross-Border Insolvency Act, it is for all practical purposes not yet in operation since the operation is dependent upon the designation by the Minster of Justice of states to which the Act will apply. Section 2 provides that "*…this Act applies in respect*

[51] *Cooperativa Muratori Cementisti - CMC Di Ravenna and Others v Companies and Intellectual Property Commission* 2021 (3) SA 393 (SCA) and *Lagoon Beach Hotel v Lehane* 2016 (3) SA 143 (SCA).
[52] *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C) A) and *Ex parte B Z Stegmann* 1902 TS 40.
[53] *Moolman v Builders & Developers (Pty) Ltd (in provisional liquidation)* 1990 (1) SA 954 (A).
[54] A distinction is drawn between movable and immovable property. The basis for the apparent difference between the manner in which movable property of an insolvent and his immovable property is dealt with in South Africa is that, in the former case, such property is governed by the *lex domicilii* and it is a matter of convenience that a single *concursus creditorum* be established; in the case of immovable property, it is the *lex situs* which governs the position. Thus a foreign trustee appointed in the foreign State where the insolvent was *domiciled* as at the date of the sequestration/liquidation of its estate by a Court of that State has the power and authority, strictly speaking, to deal with the insolvent's movable property in South Africa without the need to obtain recognition here, but that trustee must first be granted judicial recognition in South Africa before he can deal with any immovable property of the insolvent situate in this country. See *Ex Parte Palmer NO: In re Hahn* 1993 (3) SA 359 (C).
[55] *Donaldson v British South Africa Asphalt and Manufacturing Co Ltd* 1905 TS 753.
[56] *Re African Farms Ltd* 1906 TS 373.

of any State designated by the Minister by notice in the Gazette". Unfortunately, no such designation has as yet occurred.

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

89. Yes. See response to Question 29.

90. Section 15 of the Cross-Border Insolvency Act makes provision for foreign proceedings to be recognised.

91. Section 19 provides that from the time of the filling of an application for recognition until the application is decided upon, the court at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the assets of the creditor, grant relief of provisional nature including (a) staying the execution against the debtors assets, (b) entrusting the administration or realisation of all or part of the debtor's assets located in the Republic to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation or otherwise in jeopardy.

92. Section 20 of the Cross-Border Insolvency Act provides that upon recognition of foreign proceedings that are foreign main proceedings[57]:

    92.1 commencement or continuation of individual legal actions or individual legal proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

    92.2 execution against the debtor's assets is stayed;

    92.3 the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended; and

    92.4 section 21 of the Insolvency Act applies with regard to assets situated in the Republic to the same extent as it would have if the debtor had been sequestrated by a court.

93. However, as the Cross-Border Insolvency Act is yet to take effect, the recognition of the cross-board insolvency proceedings is determined in terms of common law and the principles private international law as discussed above.

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?

[57] Foreign main proceedings mean foreign proceedings taking place in the State where the debtor has the centre of his or her or its main interests.

94. No. It is only the High Court that has the competence to recognise the cross-board insolvency proceedings.

95. In addition, and in terms of the Cross-Border Insolvency Act, the effects on arbitration are applicable only in the event that the foreign insolvency had been recognised by the courts of the state. This means that without such recognition, the arbitrators are not required to consider the foreign insolvency unless if the arbitrator is given such powers in terms of the arbitral agreement.

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

96. No, see answer to Question 31. It is subject to an application for recognition of foreign insolvency proceedings in terms of the Cross-Border Insolvency Act being granted.

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

97. No, the law and jurisdiction regulating the agreement and arbitration will apply.

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?

98. No.