



IBA TOOLKIT ON INSOLVENCY AND ARBITRATION
QUESTIONNAIRE
NATIONAL REPORT OF SWITZERLAND

<p>Domitille Baizeau Partner, LALIVE dbaizeau@lalive.law</p>
<p>Rodrigo Rodriguez Professor of Law, University of Lucerne rodrigo.rodriguez@unilu.ch</p>
<p>Marlen Stöckli Attorney at Law, Transliq AG marlen.stoeckli@transliq.ch *</p>

* Co-author: Alexandre Schwab, Associate, LALIVE. Our thanks to Nikolas Hertel for his help in preparing this report. For the avoidance of doubt, this report is not intended to provide legal advice applicable to any particular fact scenario.

IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Switzerland 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 Switzerland 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. In Switzerland, insolvency proceedings are governed by the Debt Enforcement and Bankruptcy Act (“DEB Act”) and a distinction must be made between (a) **bankruptcy proceedings** (which are “opened” by a court decision)¹ which lead to the bankruptcy and liquidation of the insolvent debtor in order to satisfy the creditors in proportion to their claims against the debtor, and (b) **composition proceedings** initiated by the approval of a debt restructuring moratorium (*Nachlassstundung, Sursis concordataire*) aimed at the insolvent debtor reaching a composition agreement with its creditors.
2. It should be noted that many of the questions addressed in this Report are not covered by any Swiss statutory provision (DEB Act or other) or, in some instances, by any court decision, whether at federal or cantonal level. In the Swiss legal system, scholarly views carry significant weight and can therefore be taken into account, in particular, absent any court decision or statutory provision.
3. Neither the DEB Act, which governs insolvency proceedings opened in Switzerland, nor Chapter 12 of the Swiss Federal Private International Law Act (“PIL Act”),² which governs international arbitrations seated in Switzerland, nor Part 3 of the Swiss Federal Code of Civil Procedure (“CCP”), which governs Swiss domestic arbitration, contain any express provision on the effect of the opening of insolvency proceedings on arbitration.
4. The DEB Act provides that, upon the opening of insolvency proceedings, all pending Swiss civil and administrative court proceedings to which the insolvent debtor is a party, and which affect the insolvent debtor’s estate, shall be suspended, except for urgent cases. Article 207 for bankruptcy proceedings provides that “except for urgent cases, civil proceedings to which

¹ DEB Act (first enacted on 11 April 1889), art 175, accessible in French, German, Italian and Romansch at <<https://www.admin.ch/opc/fr/classified-compilation/18890002/index.html>> accessed 29 December 2023.

² Chapter 12 of the PIL Act (first enacted on 18 December 1987) accessible in French, German, Italian and English at <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/fr> accessed 29 December 2023.

the debtor is a party and which affect the existence of the bankruptcy estate are suspended”;³ and Article 297(5) for composition proceedings provides that: “with the exception of urgent cases, civil and administrative proceedings concerning debt restructuring claims are suspended”).⁴

5. The purpose of the stay is to ensure that the insolvency administrator and the creditors have sufficient time to consider whether or not to pursue pending court proceedings.
6. This is a procedural rule which does not directly apply to foreign court proceedings to which a Swiss insolvent debtor is a party.⁵
7. The effect of the opening of insolvency proceedings on pending arbitration proceedings with a seat in Switzerland has been the subject of scholarly writings, with a distinction being made between domestic and international arbitrations. However, there is little case law on the subject.
8. According to the majority of Swiss scholars, the duty to stay court proceedings pursuant to the DEB Act only applies to domestic arbitrations (governed by Part 3 of the CCP), i.e., where both parties are domiciled in Switzerland and, typically, the subject matter of the dispute has no connection to any foreign jurisdiction.
9. It does not strictly apply to international arbitrations seated in Switzerland, i.e., whenever one of the parties had its domicile outside Switzerland at the time the arbitration agreement was entered into,⁶ regardless of the subject matter of the dispute.⁷ However, scholars recommended that a limited stay of the proceedings should be granted by the arbitral tribunal in international arbitration, as it will allow sufficient time for the insolvency administrator to decide on the position to take in the proceedings, and as such, may prevent a possible

³ Translation by the authors. Original: “Sauf dans les cas d’urgence, les procès civils auxquels le failli est partie et qui influent sur l’état de la masse en faillite sont suspendus” / “Mit Ausnahme dringlicher Fälle werden Zivilprozesse, in denen der Schuldner Partei ist und die den Bestand der Konkursmasse berühren, eingestellt”.

⁴ Translation by the authors. Original: “Sauf en cas d’urgence, le sursis concordataire a pour effet de suspendre les procès civils et les procédures administratives portant sur les créances concordataires” / “Mit Ausnahme dringlicher Fälle werden Zivilprozesse und Verwaltungsverfahren über Nachlassforderungen sistiert”.

⁵ Swiss Federal Supreme Court, BGE 130 III 769, BGE 135 III 127 para 3.3.1 and BGE 140 III 320 para 8.3.2; see also Jolanta Kren Kostkiewicz and Rodrigo Rodriguez, *Internationales Insolvenzrecht* (Stämpfli 2013) (“Kostkiewicz & Rodriguez”) paras 327 ff.

⁶ PIL Act, art 176(1).

⁷ See Bernhard Berger and Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, (4th edn, Stämpfli 2021) (“Berger & Kellerhals”) para 1188; Sebastiano Nessi, ‘Insolvency and Arbitration’ in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (2nd edn, Kluwer Law 2018) (“Arroyo”) ch 18, pt X, 2701; Gabrielle Kaufmann-Kohler and Laurent Lévy, ‘Insolvency and International Arbitration’ in Henry Peter, Nicolas Jeandin, and Jason Kilborn (eds), *The Challenges of Insolvency Law Reform in the 21st Century: Facilitating Investment and Recovery to Enhance Economic Growth* (Schulthess 2006) (“Kaufmann-Kohler & Lévy”) 270-271; Thomas Bauer, Olivier Hari, Vincent Jeanneret, and Karl Wüthrich in Daniel Staehelin and Thomas Bauer (eds), *Basler Kommentar, Bundesgesetz über Schuldbetreibung und Konkurs*, vol 2 (3rd edn, Helbing Lichtenhahn 2021) (“Basler Kommentar”) art 297, para 17.

violation of the right to equal treatment and the right to be heard on the part of the insolvent debtor.⁸ This was recently confirmed by the Swiss Federal Supreme Court.⁹

10. With respect to “foreign” arbitration proceedings, i.e., when the seat of the arbitration is outside Switzerland, to which a Swiss insolvent debtor is a party, the High Court of the Canton of Zurich held in 2019 that failure to stay such proceedings pursuant to Article 207 of the DEB Act does not constitute a breach of Swiss public policy.¹⁰ Upon appeal, the Swiss Federal Supreme Court confirmed the decision in 2021.¹¹
11. Independently of the scope of application of Articles 207 and 297(5) of the DEB Act, some Swiss scholars argue that the Swiss insolvency administrator should in any event, if possible, seek to have all foreign proceedings stayed, in the same way as pending Swiss civil and administrative court proceedings pursuant to Article 207 of the DEB Act,¹² including therefore international arbitration proceedings seated in and outside Switzerland. The Swiss Federal Supreme Court has indicated (without settling the issue) that these scholars’ suggestion might be a way to have foreign – state and arbitral – proceedings being recognized and considered within Swiss insolvency proceedings.¹³
12. There is no Swiss statutory provision, be it insolvency law (the DEB Act and related ordinances) or arbitration law (Chapter 12 the PIL Act for international arbitrations and Part 3 of the CCP for domestic arbitrations) that addresses expressly the effects of the opening of insolvency proceedings in Switzerland on the possibility to commence new arbitration proceedings. In particular, Swiss law does not provide for any specific bar to commencing arbitration proceedings involving an insolvent debtor as a party after the opening of insolvency proceedings. Nonetheless, the opening of insolvency proceedings may have an impact practically speaking on the ability to commence and on the conduct of the arbitration, to the extent that the insolvent debtor then may only act through or with the approval or instructions of the insolvency administrator, depending on the type and stage of the insolvency proceedings in question.
13. The questions of the validity of the arbitration agreement, the arbitrability of disputes and the capacity of an insolvent debtor to be a party to court or arbitration proceedings have been addressed by the Swiss courts and are, in part, addressed by the DEB Act and the PIL Act.
14. First, the Swiss courts have confirmed that an **arbitration agreement** remains valid under Swiss law despite the opening of insolvency proceedings abroad,¹⁴ but according to Swiss

⁸ See Berger & Kellerhals para 1188; Nessi in Arroyo 2701; Kaufmann-Kohler & Lévy 270-271; *Basler Kommentar* art 297 para 17.

⁹ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.10.

¹⁰ High Court of the Canton of Zurich, RT190049 dated 31 October 2019, para 11.2.

¹¹ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.12 f. See also *Aperçu des décisions, février 2021–avril 2021 in PCEF 54/2021* p. 565 and Schwander, *Rechtsprechung zum internationalen Schuldrecht und zum internationalen Zwangsvollstreckungsrecht*, in SRIEL 2021 p. 447, p. 467.

¹² Kostkiewicz & Rodriguez para 330.

¹³ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.12 and 3.13.

¹⁴ Swiss Federal Supreme Court, BGE 138 III 714 para 3.6.

scholars, the position is the same when insolvency proceedings are opened in Switzerland.¹⁵ The Swiss courts have also confirmed that the Swiss insolvent debtor's estate and any creditor who would request and obtain the assignment of a claim (pursuant to Article 260 of the DEB Act) remains bound by a pre-existing arbitration agreement entered into by the insolvent debtor.¹⁶

15. If the (international) arbitration is seated in Switzerland, Chapter 12 of the PIL Act will apply to the question of the validity of the arbitration agreement, and specifically its validity *ratione materiae* (subject matter). Pursuant to Article 178(2) of the PIL Act, "an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law". This approach is in line with Article 177 of the PIL Act which deals with **arbitrability** and provides, very broadly, that "any dispute of financial interest may be subject to arbitration".
16. It was debated among Swiss scholars whether the arbitration agreement may validly be invoked to challenge the schedule of claims in Switzerland (*Kollokationsklage / action en contestation de l'état de collocation*, Article 250 of the DEB Act), but the Swiss Federal Supreme Court recently indicated that the challenge of the schedule of claims is not arbitrable.¹⁷ It is also debated among Swiss scholars (and there is no court decision on point) whether the arbitration agreement may validly be invoked with regard to actions to include or exclude assets from the insolvency debtor's estate based on rights *in rem* (*Aussonderungs und Admassierungsklage / Revendications de tiers et de la masse*, Article 242 of the DEB Act),¹⁸ or avoidance actions (*actio pauliana*, Articles 285 ff., DEB Act; addressed in Question 10 below).¹⁹
17. As for the **capacity of the insolvent debtor**, if the issue is governed by Swiss law (as *the lex incorporationis*), the following applies: upon the opening of a bankruptcy proceeding or the confirmation of a composition agreement with assignment of assets by the insolvency court, the insolvent debtor is not deprived of its capacity to be a party to legal proceedings (*Parteifähigkeit, capacité à être partie*) or to act as party in legal proceedings (*Prozessfähigkeit, capacité d'ester en justice*),²⁰ including therefore in arbitration proceedings.²¹ However, legal acts performed by the insolvent debtor in relation to its estate are invalid *vis-à-vis* the creditors (Article 204 of the DEB Act). Accordingly, what is affected by the opening of insolvency proceedings is the procedural right or procedural capacity of the insolvent debtor directly to continue and commence any legal proceedings

¹⁵ Nessi in Arroyo 2692; Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration – Law and Practice in Switzerland* (OUP 2015) para 3.165; Simon Vorburger, *International Arbitration and Cross-Border Insolvency: Comparative Perspectives* (Kluwer Law International 2014) ("Vorburger") s 6.01, paras 318 ff. and 419 ff.

¹⁶ High Court of the Canton of Zurich, ZR 90/1991, 261; Swiss Federal Supreme Court, BGE 136 III 107 para 2.5.

¹⁷ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.8; see also Swiss Federal Supreme Court, 4A_200/2021 dated 21 July 2021 para 4.2.

¹⁸ Vorburger s 6.01, paras 376-377; see also Nessi in Arroyo 2695.

¹⁹ Nessi in Arroyo 2691 and references cited therein for and against arbitrability.

²⁰ Heiner Wohlfahrt and Caroline Meyer, *Basler Kommentar* art 204, para 44.

²¹ Vorburger s 6.02, para 450.

(*Prozessführungsbefugnis, faculté de conduire le procès comme partie*). That right is vested in the insolvent debtor's estate represented by the insolvency administrator.²²

18. During composition proceedings, the insolvent debtor is usually able to continue to conduct its business under supervision of the administrator. In this way, arbitrations may continue, but they will be subject to the approval of the administrator.
19. A composition agreement requires the consent of a qualified majority of the creditors and the confirmation of the insolvency courts.²³ It is then also binding on the non-consenting creditors.
20. There are two types of composition agreements under the DEB Act: **ordinary composition agreements** (*Ordentlicher Nachlassvertrag, Concordat ordinaire*), which allow for the insolvent debtor's restructuring, usually through a partial waiver of the creditors' claims,²⁴ and **composition agreements with an assignment of assets**, which result in an organized liquidation of the insolvent debtor.²⁵ By contrast to bankruptcy proceedings, composition proceedings are more flexible when it comes to the realization of assets and usually result in higher proceeds for the insolvent debtor's creditors.
21. The confirmation of a composition agreement with assignment of assets has similar effects as the opening of bankruptcy proceedings.²⁶ In both cases, the insolvent debtor loses the right to dispose of its assets.²⁷ By contrast, during the debt restructuring moratorium and in case of an ordinary composition agreement, there is no insolvency estate as such, since the debtor remains mostly free to dispose of its assets.²⁸
22. In **bankruptcy proceedings**, it is for the first and the second creditors' meetings to decide on the commencement, continuation, discontinuation and other aspects of pending proceedings, and this principle will apply to arbitration proceedings.²⁹ In case of confirmation of a **composition agreement with assignment of assets**, this decision lies with the insolvency administrator and is subject to the approval of the creditors' committee.³⁰ However, this is akin to an authorisation process of the insolvency administration and does not affect the capacity of the insolvent debtor.³¹
23. In composition proceedings, the insolvent debtor usually keeps possession of its assets and the legal right to dispose of them (a) during the **debt restructuring moratorium**,³² and (b)

²² Heiner Wohlfahrt and Caroline Meyer, *Basler Kommentar* art 204, para 44; Swiss Federal Supreme Court, BGE 132 III 89 para 1.3.

²³ DEB Act, arts 305 and 306.

²⁴ *ibid*, arts 314 ff.

²⁵ *ibid*, arts 317 ff.

²⁶ *ibid*, art 319; High Court of the Canton of Zug, GVP-ZG 2008, para 3.3, 224; Fritz Rothenbühler and Karl Wüthrich in Daniel Hunkeler (ed), *Kurzkommentar Schuldbetreibungs- und Konkursgesetz* (2nd edn, Helbing Lichtenhahn 2014) ("KUKO SchKG") art 319, para 8; *Basler Kommentar* art 319, para 11.

²⁷ DEB Act, arts 204 and 319(1).

²⁸ *ibid*, art 298.

²⁹ *ibid*, arts 238 and 253.

³⁰ See *ibid*, art 320; Fritz Rothenbühler and Karl Wüthrich, *KUKO SchKG* art 320, paras 23 ff.

³¹ *Vorburger* s 6.02, para 466.

³² DEB Act, art 298.

upon the confirmation of an **ordinary composition agreement** (as opposed to a composition agreement with assignment of assets, which has similar effects as the opening of bankruptcy proceedings). However, the insolvent debtor is subject to the supervision of the insolvency administrator, and the insolvency court may order that certain actions listed in its decision first require the approval of the insolvency administrator.³³ In theory, this could include starting or continuing an arbitration, but the authors are not aware of cases where such measures have been ordered.

- 2. Does the insolvency legislation in Switzerland 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*?**

24. In summary, Swiss insolvency law provides for a broad application of the *vis attractiva concursus* principle, but (i) there is no specific provision requiring the discontinuation of pending international arbitration proceedings or prohibiting the commencement of new international arbitration proceedings, which creates uncertainty as to the application of the principle to arbitration, and (ii) in practice, there may be reasons for a creditor or insolvency administrator to commence or continue arbitration proceedings despite the *vis attractiva concursus* principle.
25. Hence, the starting point is that Swiss insolvency law provides for the concentration of all new and pending disputes concerning the insolvent debtor before the insolvency courts (*vis attractiva concursus* principle). This includes all recovery disputes in enforcement proceedings conducted in Switzerland, as well as all legal issues arising in the course of such proceedings (see also, with respect to already pending Swiss court proceedings, the response to Question 1 at Paragraph 4 above).³⁴ This is obviously in addition to all actions specific to the insolvency of the debtor, such as the revocation of the insolvency,³⁵ the establishment of an extraordinary insolvency administration,³⁶ the transformation of a provisional debt-restructuring moratorium into a final one,³⁷ or *actio pauliana* for rescission, which are also covered by the effects of the *vis attractiva concursus*.³⁸

³³ *ibid*; Vorburger s 6.02, para 456; Lucien Gani in Louis Dallèves, Bénédicte Foëx, and Nicolas Jeandin (eds), *Commentaire Romand, Poursuite et faillite, Commentaire de la Loi fédérale sur la poursuite pour dettes et la faillite ainsi que des articles 166 à 175 de la Loi fédérale sur le droit international privé* (Helbing Lichtenhahn 2005) (“Commentaire Romand”) art 298, para 5.

³⁴ Swiss Federal Supreme Court, BGE 135 III 127 para 3.3.2.

³⁵ DEB Act, art 195.

³⁶ *ibid*, art 237(2).

³⁷ *ibid*, art 295.

³⁸ Jolanta Kren Kostkiewicz, Alexander R. Markus, and Rodrigo Rodriguez, *Zuständigkeiten im internationalen Insolvenzrecht* (Stämpfli 2016) paras 604–608.

26. Whether the *vis attractiva concursus* rule applies to a challenge of the schedule of claims to include or exclude assets from the insolvent debtor's estate, based on rights *in rem* or avoidance actions, was disputed until recently (see the response to Question 1 above at Paragraph 16). Indeed, in the case of claims which have not yet given rise to international arbitration proceedings before the opening of bankruptcy proceedings, the Swiss Federal Supreme Court has held that the award would not be binding on the insolvency administration³⁹ (see the response to Question 9 at Paragraphs 55 ff).
27. The Swiss Federal Supreme Court has held that the insolvency administration can decide on the claims filed, regardless of any pending foreign court proceeding⁴⁰, but does not have to if the foreign court takes into account the Swiss insolvency and suspends the proceedings⁴¹ (see also the response to Question 9, and in respect to the effect of the opening of insolvency proceedings on pending arbitration proceedings, the response to Question 1 at Paragraph 7). Whilst there is no decision on point, the *vis attractiva concursus* principle will thus, in principle, apply to most claims filed against the insolvent debtor that are subject to international arbitrations with a seat in or outside Switzerland to which a Swiss insolvent debtor is a party.
28. However, there is no specific rule requiring the discontinuation of pending international arbitration proceedings or prohibiting the commencement of new international arbitration proceedings.⁴² In other words, even with the broad Swiss *vis attractiva concursus*, a claim can be the subject of an international arbitration proceedings and, at the same time, domestic insolvency proceedings. This may result in contradictory decisions and enforcement issues and is the source of some uncertainty under Swiss law.
29. In practice, the insolvency administrator may have an interest in continuing pending arbitration proceedings notwithstanding the legal possibility to ignore them, including to recover assets.
30. As for the creditor of an insolvent Swiss debtor, it may too have an interest in commencing or continuing arbitration proceedings despite a risk of contradictory decisions and enforcement issues. Such interest could include the need to interrupt statutory limitation, to have a claim determined for insurance or recourse purposes, or to enforce an award against assets held outside of Switzerland.

³⁹ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021, par. 3.8.

⁴⁰ Swiss Federal Supreme Court, BGE 133 III 386 para 4.4, BGE 135 III 127 para 3.3.1, and BGE 140 III 320 para 8.3.2, with regard to foreign state proceedings; Kurt Stöckli and Philipp Possa, *KUKO SchKG* art 207 para 11.

⁴¹ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.12.

⁴² Nessi in Arroyo 2701.

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

31. There is no distinction under Swiss law with regard to these issues between arbitration proceedings where the Swiss insolvent debtor is acting as claimant and those where the Swiss insolvent debtor is respondent. This is because the insolvency administrator is acting like any other party, and as such, can choose to participate or not in the proceedings.

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?

32. Yes, the DEB Act draws a distinction in terms of who can decide on the continuation, commencement, and discontinuation of the proceedings (see the response to Question 1 above at Paragraph 22).

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

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

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

34. Yes, the effects apply during the debt restructuring moratorium and upon the confirmation of an ordinary composition agreement (see the response to Question 1 above at Paragraph 23) and for the process to challenge the decision to exclude a claim from the bankruptcy proceedings or composition proceedings (see the response to Question 9 at Paragraphs 55 ff).

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?

35. See the response to Question 2 above.

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

36. No.

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

37. As noted above, most scholars consider that the stay of proceedings provided for by Articles 207 and 297(5) of the DEB Act applies to domestic arbitrations but does not apply to international arbitrations seated in Switzerland or abroad. Indeed, as the Swiss Federal Supreme Court has held that the stay of proceedings does not apply to court proceedings abroad,⁴³ it can be concluded that the stay also does not apply to international arbitrations seated in Switzerland or abroad. See also the response to Question 1 above at Paragraphs 7 ff.

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.)?

38. The effects become operative with the court decision opening the bankruptcy proceedings or by the approval of a debt restructuring moratorium opening the composition proceedings (see also the response to Question 1 above).

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?

39. As noted above, there is no express statutory bar to the continuation or commencement of international arbitration proceedings seated in Switzerland to which an insolvent debtor is a party.

⁴³ BGE 133 III 386 para 4.4; BGE 135 III 127 para 3.3.1, and BGE 140 III 320 para 8.3.2.

40. In bankruptcy proceedings and in case of confirmation of a composition agreement with assignment of assets, the insolvent debtor will, however, be required to act through the insolvency administrator.⁴⁴ During the debt restructuring moratorium, actions of the insolvent debtor may be subject to the approval of the insolvency administrator, if applicable.⁴⁵

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?

41. As noted under Question 1 above at Paragraph 11, there is no express statutory bar to the continuation or commencement of international arbitration proceedings, whether seated in Switzerland or outside Switzerland, upon the opening of insolvency proceedings in Switzerland affecting one of the parties. Accordingly, the Swiss insolvency courts may not order the arbitration to be discontinued.
42. However, in international arbitrations seated in Switzerland, the arbitral tribunal is free to stay the arbitration pending the resolution of certain issues in the insolvency proceedings, as it enjoys a very broad discretion to do so provided that “the arbitral tribunal shall ensure equal treatment of the parties and [their] right to be heard”.⁴⁶ It may also rely on Article 186(1bis) of the PIL Act, which provides that “[the arbitral tribunal] shall decide on its jurisdiction notwithstanding an action on the same matter between the same parties already pending before a state court , unless there are serious reasons to stay the proceedings”.
43. The arbitral tribunal may, for instance, consider that a stay of the proceedings is required to ensure that the Swiss insolvent debtor obtains the necessary approval from the insolvency administrator or insolvency courts to commence/continue the arbitration proceedings, but it has no obligation to do so.
44. In composition proceedings, if the insolvent debtor commences and/or continues arbitration without the required approval (see the response to Question 1 above at Paragraph 23), this action would remain valid under civil law, but—subject to the protection of any party acting in good faith⁴⁷—any award against the insolvent debtor⁴⁸ would be unenforceable against the insolvent debtor.⁴⁸

⁴⁴ DEB Act, arts 240 and 319(4).

⁴⁵ *ibid*, art 298.

⁴⁶ PIL Act, art 182(3).

⁴⁷ DEB Act, art 298(3).

⁴⁸ Gani, *Commentaire Romand* art 298, para 7; Brigitte Umbach-Spahn, Stephan Kesselbach, and Stefan Bossart in Jolanta Kren Kostkiewicz and Dominik Vock (eds), *Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs SchKG* (4th edn, Schulthess 2017) (“SK SchKG”) art 298, para 12.

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?

45. The position under Swiss law differs depending on the type of insolvency proceedings.
46. In **bankruptcy proceedings**, aimed at the liquidation of the insolvent debtor, the law is silent on the right to terminate contracts entered into by the insolvent debtor. Any termination right will thus be governed by the contract itself and the law applicable to it (including other Swiss law provisions on the termination of contractual relationships in case of bankruptcy of one of the parties).⁴⁹
47. With respect to **composition proceedings**, Swiss insolvency law provides that, upon the commencement of the moratorium, the insolvent debtor may terminate a continuing obligation, with the consent of the insolvency administrator and provided that the counterparty is compensated (the compensation becoming a debt restructuring claim), if the purpose of the debt restructuring would otherwise be frustrated.⁵⁰ As explained in the response to Question 7 below, any dispute arising out of the termination or the amount of the compensation will be decided in accordance with the contract itself.⁵¹
48. If the bankruptcy has been declared or the composition agreement with an assignment of assets has been confirmed after the notice of termination without any compensation claim having been filed, its determination will be made in the schedule of claims.⁵²

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?

49. Pursuant to the principle of separability of the arbitration agreement, the decision to terminate a contract to which the insolvent debtor was a party does not affect the validity of the arbitration agreement contained in it. Any dispute arising out of the termination of a contract, including in the context of composition proceedings (see the response to Question 6 above at Paragraph 47), is not subject to the *vis attractiva* principle and can be resolved in accordance with the dispute mechanism provided for in the contract itself and/or pursuant to its governing law.⁵³

⁴⁹ Daniel Staehelin, *Basler Kommentar* art 211a, para 3; Roger Schober and Monika Avdyli-Luginbühl, *SK SchKG* art 211a, para 3.

⁵⁰ DEB Act, art 297(a).

⁵¹ For the jurisdiction of courts, see Bauer, *Basler Kommentar* art 297a, para 25.

⁵² DEB Act, arts 250 and 321(2).

⁵³ For the jurisdiction of courts, see Bauer, *Basler Kommentar* art 297a, para 25.

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?

50. No, the insolvency administrator or the insolvency courts may not terminate or suspend the effectiveness of arbitration agreements themselves (see the response to Question 1 above at Paragraph 14).

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?**

51. This question is addressed under Question 1 with regard to the suspension or not of pending arbitrations. Creditors are not required to take any specific prior steps in the insolvency proceedings in order to commence or continue an international arbitration seated in Switzerland or abroad.

52. Independently of any pending or new proceedings, the creditors must nonetheless take certain steps in order to have their claims considered in the insolvency.

53. First, in **bankruptcy proceedings**, the creditors must submit their claims to the bankruptcy office within one month of the relevant public announcement,⁵⁴ or within ten days if a call to creditors has already been made in composition proceedings prior to the declaration of bankruptcy.⁵⁵ In the event of late submissions, ie, after the deadline but before the end of the bankruptcy proceedings, the creditor has to bear all the costs caused by the delay and may be required to make a corresponding advance payment.⁵⁶

54. Second, in **composition proceedings**, the creditors must submit their claims to the administrator within one month of the administrator's invitation.⁵⁷ In the event of late submissions, ie, after the deadline but before the end of the composition proceedings,⁵⁸ the creditors lose their right to vote in the negotiations on the composition agreement.

⁵⁴ DEB Act, art 232(2)(2).

⁵⁵ *ibid*, art 234.

⁵⁶ *ibid*, arts 251(1) and (2).

⁵⁷ *ibid*, art 300.

⁵⁸ Gani, *Commentaire Romand* art 300, para 3.

55. In principle, in bankruptcy proceedings or in the case of confirmation of a composition agreement with assignment of assets, the insolvency administrator rules on the admission of claims to the schedule of claims.⁵⁹ However, the administrator initially will not rule on disputed claims which are already the subject of pending court proceedings in Switzerland or national arbitration proceedings at the time of the opening of the insolvency; these claims will simply be mentioned for the record in the schedule of claims.⁶⁰ However, disputed claims in pending court proceedings outside Switzerland may (but do not have to) be ruled upon immediately by the administrator,⁶¹ as can claims that are the subject to international arbitration proceedings seated in or outside Switzerland (see the response to Question 1 above at Paragraphs 4 ff).
56. Where a claim is denied by the insolvency administrator, under the DEB Act, the way to challenge this decision is to contest the schedule of claims within 20 days of its publication.⁶² As noted above in Question 1 at Paragraph 15, despite the broad effects of the PIL Act on the validity of the arbitration agreement (Article 178 (2)) and arbitrability (Article 177), the Swiss Federal Supreme Court recently held that an award issued in arbitral proceedings opened after the opening of bankruptcy proceedings would not be binding on the insolvency administration.⁶³
57. It is also possible in some cases to request a suspension of a challenge to the schedule of claims in the insolvency proceedings in Switzerland pending a decision in foreign court proceedings, provided that such suspension is compatible with the constitutional right to obtain a decision within a reasonable period of time.⁶⁴ This principle should apply by analogy to international arbitration proceedings (seated in⁶⁵ or outside Switzerland).
58. Whilst there is no court decision or scholarly writings on point, in our view, the submission of a claim in the insolvency proceedings or the challenge of the schedule of claims does not amount to a waiver of the right to arbitrate; both the arbitration proceedings and the insolvency proceedings coexist. However, once the challenge of the schedule of claims is decided by the court, the decision has *res judicata* effects.⁶⁶ This may result in contradictory decisions and enforcement issues.

⁵⁹ DEB Act, arts 245 and 321(2).

⁶⁰ Ordinance on the Administration of Bankruptcy Offices, art 63(1); *Verordnung über die Geschäftsführung der Konkursämter / Ordonnance sur l'administration des offices de faillite*. Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.10.

⁶¹ Swiss Federal Supreme Court, BGE 130 III 769, BGE 133 III 386, and BGE 140 III 320; Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021 para 3.12.; see also Kostkiewicz & Rodrigue, paras 325 ff.

⁶² DEB Act, arts 250 and 321(2).

⁶³ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021, para 3.8.

⁶⁴ Swiss Federal Supreme Court, BGE 135 III 127. This decision was rendered under the former code of civil procedure of the Canton of Zurich. However, as per Article 126 of the CPC, the court may suspend proceedings if appropriate; the decision therefore appears to remain good law.

⁶⁵ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021, para 3.10.

⁶⁶ Jacques, *Commentaire Romand* art 250, para 70.

59. In composition proceedings aimed at the conclusion of an ordinary composition agreement, creditors are also expected to file their claims,⁶⁷ but there is no schedule of claims established by the administrator. If the insolvent debtor contests a claim, it is for the respective creditor to enforce such claim before the courts or in arbitration proceedings. Even if the creditor succeeds, he/she is only entitled to the portion of the claim agreed upon in the ordinary composition agreement (see also the response to Question 25 below).

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)?

60. It remains highly controversial among Swiss commentators whether under Swiss law an avoidance action (*actio pauliana*, *Anfechtungsklage*, *action révocatoire*) by the insolvency administrator is arbitrable, ie, whether the arbitration agreement included in the contract that is the subject of the avoidance action is valid and enforceable (see the response to Question 1 above at Paragraph 16).⁶⁸ There is no court decision on point.
61. Those scholars in favour of arbitrability note that, pursuant to Article 289 of the DEB Act, avoidance actions do not fall within the jurisdiction of the insolvency courts, but are decided by the courts of the defendant's domicile (or, if the defendant is not domiciled in Switzerland, at the seat of the insolvent debtor, regardless of whether the debtor is the defendant) and that they may be settled amicably. There is therefore no public policy consideration and, accordingly, Article 177 of the PIL Act, which provides that "any dispute of financial interest may be subject to arbitration", should apply.⁶⁹
62. Swiss scholars who opine against the arbitrability of avoidance actions argue that such actions constitute a right vested in the creditors and a right of which only the insolvency administrator can dispose; on that basis it cannot be subject to international arbitration.⁷⁰

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

63. Under Swiss law, the insolvency administrator can enter into any contract, including therefore arbitration agreements, subject, in bankruptcy proceedings, to the approval of the creditors'

⁶⁷ DEB Act, art 300.

⁶⁸ Nesi in Arroyo 2691 and references cited therein for and against arbitrability.

⁶⁹ Kaufmann-Kohler & Lévy 264.

⁷⁰ Staehelin, *Basler Kommenta* art 289, para 15a.; Vorburger s 6.01, para 378.

committee⁷¹ or of the second creditors' meeting,⁷² and in composition proceedings, if so ordered, with the prior approval of the insolvency administrator.⁷³

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

64. If an ordinary composition agreement is reached,⁷⁴ even if the arbitral tribunal in a pending arbitration renders an enforceable award upholding the claim, the creditor is bound by the composition agreement and is only entitled to the portion of its claim agreed upon in that agreement.⁷⁵
65. In case of a composition agreement with assignment of assets,⁷⁶ the situation is the same as in bankruptcy proceedings: the insolvency administrator (the liquidator) decides on the claims filed in the schedule of claims⁷⁷ and does not have to take into account any pending foreign court proceedings⁷⁸ or arbitration proceedings seated in or outside Switzerland. Here also, the creditors may contest the schedule of claims before the insolvency court within 20 days,⁷⁹ and it is not yet settled under Swiss law whether they may or should also do so in any pending arbitration proceedings (see also the response to Question 9 above at Paragraphs 56 ff). This may result in contradictory decisions and enforcement issues.

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?

66. As a rule, Swiss insolvency provisions are mandatory; the provisions described above that may have an impact on pending or new arbitration proceedings involving the insolvent debtor and its estate cannot be excluded by agreement.

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

67. Yes, arbitrators seated in Switzerland will be bound by the rules of insolvency law described above, but only to the extent that such rules impact on the domestic or international

⁷¹ DEB Act, art 237(3).

⁷² *ibid*, art 253; Kaufmann-Kohler & Lévy 271; Nessi in Arroyo 2694.

⁷³ DEB Act, art 298.

⁷⁴ *ibid*, arts 314 ff.

⁷⁵ *ibid*, art 310(1).

⁷⁶ *ibid*, arts 317 ff.

⁷⁷ *ibid*, art 321(1).

⁷⁸ Swiss Federal Supreme Court, BGE 130 III 769 para 3.2 with regard to foreign state court proceedings.

⁷⁹ DEB Act, arts 250 and 321(2).

arbitration proceedings. In the case of international arbitration proceedings, the direct effect of insolvency law (the DEB Act) is limited (see the response to Questions 1 and 9 above).

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?

68. Whether the creditor party to an international arbitration seated in Switzerland is a Swiss party, and as such subject to the personal jurisdiction of the Swiss courts, does not make any difference to the effectiveness of the position of the insolvency courts on the arbitration.

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?]

69. The answer to this question is given on the assumption that the arbitration proceedings are continued despite the opening of insolvency proceedings over one of the parties to the arbitration and it is addressed in part already in Questions 1 and 3 above.

70. As explained in the response to Question 1 above at Paragraphs 14 and 17, with the opening of **bankruptcy proceedings**, the insolvent debtor loses the right to dispose of its assets⁸⁰ and with it, its procedural right or procedural capacity to act in pending civil court proceedings (*Prozessführungsbefugnis, faculté de conduire le procès comme partie*) that impact the bankruptcy estate.⁸¹ That right is vested in the insolvent debtor's estate represented by the insolvency administrator, which supersedes the insolvent debtor.⁸² Accordingly, only the insolvency administrator takes part in pending arbitration proceedings; the insolvent debtor (the bankrupt) no longer has the procedural capacity to do so in its own name.

⁸⁰ *ibid*, art 204.

⁸¹ Swiss Federal Supreme Court, BGE 132 III 89 para 1.3.

⁸² DEB Act, art 240; Wohlfahrt & Meyer, *Basler Kommentar* art 204, para 44; Adrian Staehelin, Daniel Staehelin, and Pascal Grolimund, *Zivilprozessrecht* (3rd edn, Schulthess 2019) s 13, para 78.

71. In composition proceedings, the insolvent debtor continues to run its business during the **debt restructuring moratorium**.⁸³ The opening of such proceedings, therefore, has no impact on the insolvent debtor's procedural right or procedural capacity to act in pending civil proceedings.⁸⁴ The debtor can take part in the arbitration proceedings in its own name but does so under the supervision of the administrator who may issue instructions in this regard.
72. However, upon the confirmation of **composition agreement with assignment of assets** by the insolvency courts, the position is the same as in the case of the opening of a bankruptcy proceeding. The insolvent debtor loses its right to dispose of its assets⁸⁵ and its procedural capacity to act in civil proceedings that impact its estate.⁸⁶ The estate, represented by the insolvency administrator (here the liquidator), supersedes the debtor,⁸⁷ and only the insolvency administrator may participate in arbitration proceedings. The insolvent debtor no longer has the procedural capacity to do so in its own name.
73. As to the **legal status of the insolvency administrator** in pending proceedings, the prevailing scholarly view is that he/she acts as the legal representative of the insolvent debtor.⁸⁸ The Swiss Federal Supreme Court, however, qualifies the insolvency administrator as an official body of the insolvency estate.⁸⁹ Either way, since the insolvency estate does not have legal personality, the insolvent debtor remains the bearer of all substantive rights and liabilities.⁹⁰ It is only the procedural capacity to act that, in the cases described above, belongs exclusively to the insolvency estate, represented by the insolvency administrator.

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?

74. Swiss arbitration law (Chapter 12 of the PIL Act, and Part 3 of the CCP) is silent on the confidentiality of international arbitration proceedings, and Swiss scholars are divided on whether, and the extent to which, arbitration proceedings (and documents filed therein) are

⁸³ DEB Act, art 298(1), subject to restrictions that may be imposed by the insolvency courts as to the involvement of the administrator. If the business management of the insolvent debtor is transferred to the administrator, only the administrator will take part in any pending arbitration proceedings. DEB Act, art 298(1) *in fine*.

⁸⁴ Daniel Hunkeler, *KUKO SchKG* art 297, para 40; Michael Graber in Karl Spühler, Luca Tenchio, and Dominik Infanger (eds), *Basler Kommentar, Schweizerische Zivilprozessordnung* (3rd edn, Helbing Lichtenhahn 2017) art 83, para 49.

⁸⁵ DEB Act, art 319(1).

⁸⁶ Ramon Mabillard, *SK SchKG* art 319, paras 21 ff.

⁸⁷ DEB Act, art 319(4); Mabillard, *SK SchKG* art 319, paras 21 ff.

⁸⁸ Marc Russenberger, *Basler Kommentar* art 240, para 4.

⁸⁹ Swiss Federal Supreme Court, 5P.376/2002 dated 21 November 2002.

⁹⁰ Stöckli & Possa, *KUKO SchKG* art 204, para 1.

confidential, absent any agreement of the parties, including as part of arbitration rules on which they may agree (eg, Article 44 of the Swiss Rules of International Arbitration).⁹¹

75. As for the DEB Act, it provides for a right to access to records of the insolvency (debt enforcement and bankruptcy) offices to any person with a legitimate and current interest to inspect the records and access will be granted to any entity who can credibly demonstrate such an interest.⁹² Creditors of the insolvent debtor are usually presumed to have a legitimate interest in the inspection due to their procedural status in the insolvency, and a creditor will only be refused access if the inspection is unrelated to its status as a creditor or if the disclosure of a certain file would violate an existing confidentiality obligation.⁹³
76. Article 8a of the DEB Act refers to the records and registers of the debt enforcement and bankruptcy offices but in fact covers all files which are at the disposal of the insolvency administrator,⁹⁴ including therefore any files regarding ongoing arbitration proceedings. Ultimately, the question of whether and to what extent a creditor has a right of inspection will always depend on the specific circumstances of each case,⁹⁵ but the presumption is one in favour of disclosure, and the refusal of inspection can be considered as the exception.
77. Under Swiss law, the creditors do not have the right to appear in court or arbitration proceedings in lieu of the insolvent debtor or the insolvency administrator. However, in bankruptcy proceedings and in case of confirmation of a composition agreement with assignment of assets, the insolvency administrator may offer a claim for assignment to the creditors,⁹⁶ and the creditor to whom the claim has been assigned will participate in the arbitration proceedings in its own name (see also the responses to Questions 3 and 17 above).

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

78. In the case of (a) the opening of a bankruptcy proceedings and (b) the confirmation of a composition agreement with assignment of assets, the name of the insolvent debtor changes in the commercial registry to:

- . . . in Liquidation / en liquidation,

⁹¹ See eg Noradèle Radjai, 'Confidentiality of Arbitration in Switzerland' in Arroyo, ch 18, pt II, 2527–2541; Berger & Kellerhals paras 1230 ff.

⁹² DEB Act, art 8a; Swiss Federal Supreme Court, BGE 115 III 81 para 2. The interest does not have to be of financial nature (Swiss Federal Supreme Court, BGE 105 III 38 para 1).

⁹³ Swiss Federal Supreme Court, BGE 93 III 4 para 1 and Swiss Federal Supreme Court, 5A_83/2010 dated 11 March 2010, para 6.3; Swiss Federal Supreme Court, 7B.189/2005 dated 13 December 2005, para 2.2.

⁹⁴ Swiss Federal Supreme Court, BGE 110 III 49 para 4; Urs Möckli, *KUKO SchKG* art 8a, para 5; see also art 241 and art 320, para 3 in conjunction with DEB Act, art 8a and James T. Peter in Daniel Staehelin and Thomas Bauer (eds), *Basler Kommentar, Bundesgesetz über Schuldbetreibung und Konkurs*, vol 1 (3rd ed, Helbing Lichtenhahn 2021) art 8a, para 24.

⁹⁵ Swiss Federal Supreme Court, BGE 93 III 4 para 2c; Möckli, *KUKO SchKG* art 8a, paras 9 and 19.

⁹⁶ DEB Act, art 260.

- . . . in Nachlassliquidation / en liquidation concordataire.⁹⁷

79. The courts also regularly use:

- Konkursmasse der / masse en faillite de (bankruptcy estate of) . . . ,
- Nachlassmasse der / masse concordataire de (composition estate of)

80. During the debt restructuring moratorium, since the insolvent debtor continues to run its business and to participate in its own name in pending court or arbitration proceedings, its name does not change (see the response to Question 16 above at Paragraph 71).

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?

81. Where the insolvent debtor is pursuing a claim (as claimant) in pending arbitration proceedings, in bankruptcy proceedings and in case of confirmation of a composition agreement with assignment of assets, the insolvency administrator is empowered to reach a settlement in the arbitration with the authorisation of the majority of creditors⁹⁸ or the creditors' committee⁹⁹ (see the response to Question 1 above at Paragraph 18) and if no creditor requests the assignment of the claim (pursuant to Article 260 of the DEB Act).¹⁰⁰ The settlement does not require authorization of the insolvency courts.

82. When it is the creditor pursuing a claim in arbitration against the insolvent debtor, the insolvency administrator is also empowered to reach a settlement with the approval of the majority of the creditors¹⁰¹ or the creditors' committee¹⁰² (see the response to Question 1 above at Paragraph 18). The insolvency administrator then includes the creditor's claim in the schedule of claims according to the settlement amount. The settlement is effective in the insolvency proceedings if no other creditor contests the schedule of claims with regard to the settled claim.¹⁰³

83. In case of composition proceedings, the insolvent debtor is empowered to reach a settlement in any pending arbitration during the debt restructuring moratorium, whether the debtor is claimant or respondent, subject to any instructions by the insolvency administrator.

⁹⁷ Ordinance of the Commerce Registry, arts 159 and 161.

⁹⁸ Ariane Amacker and Christoph Küng, *KUKO SchKG* art 256, para 11; Stöckli & Possa, *KUKO SchKG* art 207, para 19. See also Swiss Federal Supreme Court, BGE 103 III 21 para 3. If a creditor's committee is appointed, that committee is competent to authorize settlements (DEB Act, art 237(3)(3); Swiss Federal Supreme Court, BGE 86 III 124 para 3).

⁹⁹ Rothenbühler & Wüthrich, *KUKO SchKG* art 320, para 10.

¹⁰⁰ See Swiss Federal Supreme Court, BGE 78 III 133 para 3.

¹⁰¹ Dieter Hierholzer, *Basler Kommentar* art 250, para 72.

¹⁰² Rothenbühler & Wüthrich, *KUKO SchKG* art 320, para 10.

¹⁰³ DEB Act, art 250(2).

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

84. There is, to our knowledge, no specific arbitration law or insolvency law provision, court decision, or scholarly writing addressing the question of interim measures against a party subject to insolvency proceedings.
85. Where the arbitration proceedings are not suspended (as to which see the response to Question 1 above at Paragraphs 10 ff.), the insolvent debtor retains the capacity to be a party to those proceedings (albeit acting through, or with the instructions of, the insolvency administrator—see the response to Question 3 above at Paragraphs 17 ff.) and as such, could still be the subject of any order of the arbitral tribunal, including an order for interim measures. However, such measures may not be complied with if they concern, for instance, financial matters (such as advance on costs, security for costs, security for claim, injunction not to call on a guarantee or not to dispose of assets) which may impact the insolvent debtor’s estate and contradict provisions of the DEB Act (including as to the effect of the bankruptcy proceedings and the debt restructuring moratorium).
86. The position should be different if the interim measures concern, for instance, the taking of evidence (such as the non-destruction or production of evidence or the appearance of potential witnesses). These do not affect the insolvent debtor’s estate as such and thus are unlikely to contradict relevant insolvency law provision or interfere with the insolvency proceedings.
87. Arbitral tribunals usually have no direct power to enforce interim measures if these are not complied with. However, in arbitrations seated in Switzerland, the arbitral tribunal can seek the assistance of the courts of the seat of the arbitration in the enforcement of interim measures.¹⁰⁴ Again, however, if the insolvency proceedings are opened in Switzerland, it is unlikely that a court would order interim measures if they effectively bypass the mandatory process provided for by the DEB Act in the insolvency proceedings.

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

88. The answer to this question is effectively the same as for Question 20 above.

¹⁰⁴ PIL Act, art 183(2).

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?

89. This question is addressed in the responses to Question 1 (in particular, Paragraphs 17 ff.) and in Question 16.
90. In brief, under Swiss insolvency law, the legal capacity of the insolvent debtor is not affected by the opening of insolvency proceedings.¹⁰⁵ As of the opening of a bankruptcy proceedings or in case of confirmation of a composition agreement with assignment of assets, however, the insolvent debtor loses its procedural capacity, which is transferred to the insolvency estate, represented by the insolvency administrator.¹⁰⁶ This includes the capacity to settle a dispute in the arbitration.
91. On the other hand, during the debt restructuring moratorium, the insolvent party keeps its legal, as well as its procedural capacity, and can thus settle the dispute in the arbitration, subject to any instructions or approval from the insolvency administrator.

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?

92. Yes, upon the opening of bankruptcy or composition proceedings, individual enforcement actions by creditors regarding claims that arose before the opening of the insolvency proceedings cannot be continued or initiated.¹⁰⁷
93. By way of exception, in bankruptcy proceedings, enforcement actions by way of realization of securities ordered by third parties are permitted.¹⁰⁸ In composition proceedings, enforcement actions by way of mortgage-secured claims are permitted, but the realization of the mortgage remains excluded.¹⁰⁹

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?

94. What happens to a litigious claim in the insolvency process varies depending on whether it is the creditor or the insolvent debtor pursuing the claim in arbitration proceedings, and

¹⁰⁵ Tarkan Göksu, *Schiedsgerichtsbarkeit* (Dike 2014) para 659.

¹⁰⁶ DEB Act, arts 240 and 319(4).

¹⁰⁷ DEB Act, arts 206(1) and 297(1); Hunkeler, *KUKO SchKG* art 297, para 14.

¹⁰⁸ DEB Act, art 206(1).

¹⁰⁹ *ibid*, art 297(1).

whether the insolvency proceedings are bankruptcy proceedings or composition proceedings. Part of this question is addressed in the responses to Questions 1, 2, 3 and 9 above.

95. A first scenario is when the **insolvent debtor** is pursuing a litigious claim against a third party, including in arbitration proceedings.
96. In bankruptcy proceedings, it is first for the insolvency administrator to decide either to pursue the claim or offer that it be assigned to the creditors, provided that the majority of the creditors has renounced to pursue the claim in the name of the estate.¹¹⁰ If no creditor requests the assignment of the litigious claim, the claim can be sold either by public auction or, with the consent of the majority of the creditors, by private contract.¹¹¹ If the sale fails, the debtor regains the procedural right or procedural capacity to be the one to pursue the litigious claim in the arbitration.¹¹²
97. In composition proceedings, the insolvent debtor continues to run its business and will decide on the assertion of its claims during the debt restructuring moratorium, but under supervision of, or with instructions from, the insolvency administrator. In the case of a confirmed composition agreement with assignment of assets, the situation is the same as in bankruptcy proceedings: the decision goes to the administrator (in coordination with the creditors' committee).
98. The steps in the insolvency process are obviously different with respect to **creditors of litigious claims**, as are the possible steps in pending arbitration proceedings.
99. Upon the opening of bankruptcy proceedings, the insolvency administrator publishes a notice inviting all creditors of the insolvent debtor to file their claims.¹¹³ This will include creditors pursuing claims in pending arbitration proceedings. The insolvency administrator then decides on the recognition or otherwise of such claims in the schedule of claims.¹¹⁴ The creditors may then contest the schedule of claims before the insolvency courts within 20 days¹¹⁵ (see also the response to Question 9 above at Paragraphs 56 ff.).
100. In this context, the insolvency administrator can decide on claims regardless of whether they are the subject of pending foreign court proceedings (*vis attractiva concursus* effect, see the response to Question 2 above).¹¹⁶ The same is true of international arbitration proceedings whether seated in or outside Switzerland, although there is no decision directly on point.
101. With respect to international arbitration proceedings seated in Switzerland, as noted above (see the responses to Question 1 at Paragraph 15 and Question 9 at Paragraph 56), the Swiss

¹¹⁰ *ibid*, art 260; Stöckli & Possa, *KUKO SchKG* art 207, paras 19 f.

¹¹¹ DEB Act, arts 260(3) and 256.

¹¹² See Swiss Federal Supreme Court, BGE 68 III 162 and Swiss Federal Supreme Court, 4A_87/2013 dated 22 January 2014, para 1.3.2.

¹¹³ DEB Act, art 232.

¹¹⁴ *ibid*, arts 244 ff.

¹¹⁵ *ibid*, art 250.

¹¹⁶ Swiss Federal Supreme Court, BGE 133 III 386 para 4.4, BGE 135 III 127 para 3.3.1, and BGE 140 III 320 para 8.3.2 with regard to foreign state court proceedings; Stöckli & Possa, *KUKO SchKG* art 207, para 11.

Federal Supreme Court recently held that an award issued in arbitral proceedings opened after the bankruptcy declaration would not be binding on the insolvency administration.¹¹⁷

102. In composition proceedings, creditors are also summoned to file their claims against the insolvent debtor,¹¹⁸ with whom the insolvency administrator then consults.¹¹⁹ Any claim may be contested by the insolvent debtor and any claim that is the subject of pending proceedings is also regarded as contested.¹²⁰ The insolvency courts will then decide if the creditors of contested claims are entitled to vote on a composition agreement (depending on the probability of the validity of the claim),¹²¹ without, however deciding on the validity of such claims.¹²²
103. The effect of an ordinary composition agreement¹²³ or composition agreement with assignment of assets¹²⁴ on a pending arbitration has already been addressed in the response to Question 12.

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?

104. If the claim filed by the creditor is based on an arbitral award that was rendered before the opening of the insolvency proceedings and which is enforceable in Switzerland, both the insolvency administrator and the insolvency courts are bound by the award as to the validity and the amount of the claim.¹²⁵
105. It is for the insolvency administrator to decide on the admission of all claims,¹²⁶ including those based on a decision by a foreign court or an award rendered by an international arbitral tribunal seated outside Switzerland. In doing so, the insolvency administrator will apply the New York Convention. If the insolvency administrator decides not to include the award-credit, the creditor can contest the schedule of claims before the insolvency court within 20 days,¹²⁷ invoking, for instance, that the conditions for recognition and enforcement under the New York Convention are fulfilled.

¹¹⁷ Swiss Federal Supreme Court, 5A_910/2019 dated 1 March 2021, par. 3.8.

¹¹⁸ DEB Act, art 300(1).

¹¹⁹ *ibid*, art 300(2).

¹²⁰ Swiss Federal Supreme Court, BGE 135 III 321 para 3.2.

¹²¹ Hunkeler, *KUKO SchKG* art 305, para 22.

¹²² DEB Act, art 305(3)

¹²³ *ibid*, arts 314 ff.

¹²⁴ *ibid*, arts 317 ff.

¹²⁵ Swiss Federal Supreme Court, BGE 141 III 382 para 4 and BGE 140 III 320 para 8.3.1.

¹²⁶ DEB Act, art 245.

¹²⁷ *ibid*, art 250.

106. If, during the insolvency proceedings, an arbitration award is rendered and becomes enforceable, the status of the respective claim remains uncertain.
107. With regard to bankruptcy proceedings, the Swiss Federal Supreme Court seems to open the door in one of its latest decisions for the insolvency administrator to take into account the decision of a foreign state court where such court voluntarily applies the provisions of Swiss insolvency law, ie, suspends the proceedings until a decision is made to continue the same (see the response to Question 1 above at Paragraphs 4 ff.).¹²⁸ It is, however, uncertain whether this decision would apply in the context of international arbitration proceedings seated in or outside Switzerland.
108. The position is the same in composition proceedings where a composition agreement with assignment of assets is reached.¹²⁹ If, in composition proceedings, an ordinary composition agreement is reached,¹³⁰ and the arbitral tribunal in a pending arbitration renders an enforceable award upholding the claim, the creditor remains bound by the composition agreement and is only entitled to the percentage of its claim agreed upon in that agreement.

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

109. This question is addressed in part under Question 13. As a rule, Swiss insolvency law provisions (and the *vis attractiva concursus* effect) are mandatory, and those provisions that may have an impact on pending or new arbitration proceedings involving the insolvent debtor and its estate cannot be excluded by agreement (see also the response to Questions 3, 17 and 24 as well as the recommendations to the arbitral tribunal in Paragraphs. 43 ff.).

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)?

110. There is no court decision or scholarly writing directly addressing the question of whether the principle of *par conditio creditorum* (equality among creditors) is part of public policy even if it is a key principle in Swiss insolvency law, substantively and procedurally.¹³¹
111. Under Swiss law, only a blatant and unjustified (in the sense of not justified by any objective criteria) violation of the principle of *par conditio creditorum* would be considered as a public policy violation, for instance, if creditors were subordinated or excluded from the insolvency

¹²⁸ DEB Act, art 207; Swiss Federal Supreme Court, BGE 141 III 382 para 5.6.1.

¹²⁹ DEB Act, arts 317 ff.

¹³⁰ *ibid*, arts 314 ff.

¹³¹ DEB Act, art 220.

proceedings due to their foreign nationality or gender or race. The creation of classes of creditors, for instance, would not violate public policy, as long as they do not appear to be arbitrary, even when they differ from the privileges and classes under law.

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

112. 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 Switzerland concerning the insolvent party.]

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

113. Foreign insolvency proceedings need to be formally recognized by way of exequatur proceedings before they can produce effects in Switzerland.¹³²

114. The recognition of foreign insolvency proceedings in Switzerland is governed by Chapter 11 of the PIL Act (Articles 166-175).¹³³

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?

115. With the latest amendment—Chapter 11 of the PIL Act, which entered into force on 1 January 2019—Switzerland moved a step closer to the UNCITRAL Model Law on Cross Border Insolvency (the “**Model Law**”) with, however, some differences remaining.

116. Like the Model Law, Chapter 11 of the PIL Act follows the principle of formal recognition, which is required for any activity of the foreign insolvency administrator in Switzerland. Furthermore, since 2019, reciprocity is no longer required, and insolvency proceedings filed at the Centre of Main Interest (COMI) are recognized, ie, the opening of ancillary local insolvency proceedings is no longer mandatory.¹³⁴ However, some elements are not fully in

¹³² Swiss Federal Supreme Court, 5A_415/2011 dated 21 September 2011, para 2; Swiss Federal Supreme Court, BGE 134 III 366 paras 5.1.2 and 9.

¹³³ Chapter 11 of the PIL Act (first enacted on 18 December 1987) accessible in French, German, Italian and English at <https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en> accessed 29 December 2023.

¹³⁴ PIL Act, art 166.

line with the Model Law: for instance, where the insolvent debtor has its registered seat in Switzerland, insolvency proceedings over that debtor opened at the foreign COMI are not recognized in Switzerland, even if, since 2019, the law provides for the recognition of some insolvency-related decisions.¹³⁵

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

117. This question is addressed above under Questions 1 and 3.
118. Arbitration proceedings seated in Switzerland are governed Chapter 12 of the PIL Act. According to doctrinal views, mandatory provisions of the foreign *lex fori concursus* will only apply to international arbitration proceedings seated in Switzerland if they can be considered as forming part of Swiss international public policy. An arbitral tribunal sitting in Switzerland is therefore not bound by foreign insolvency law as such, unless it can also be considered as forming part of Swiss international public policy.¹³⁶
119. Pursuant to Article 178(2) of the PIL Act, “an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject matter of the dispute, in particular the main contract, or to Swiss law”. Since, under Swiss law, the opening of the insolvency has no impact on the validity of the arbitration agreement, that agreement will be valid.¹³⁷
120. This approach is in line with Article 177 of the PIL Act which deals with arbitrability and provides, very broadly, that “any dispute of financial interest may be subject to arbitration”.
121. As for the capacity of the insolvent debtor to commence or continue legal proceedings, under Swiss private international law, it is governed by the *lex incorporationis* or the law of the seat or place of incorporation of the insolvent debtor.¹³⁸ Where the *lex incorporationis* is a foreign law, it may impact international arbitration proceedings (pending or commenced) seated in Switzerland, if, for instance, such law specifically and expressly provides that the insolvent debtor loses legal capacity to proceed to arbitration.¹³⁹ Whether that is the case will be a matter of interpretation of the foreign law which, however, must be clear as to the effect of

¹³⁵ See Rodrigo Rodriguez, ‘Das revidierte internationale Konkursrecht des IPRG’, Jusletter 14 January 2019 and Rodrigo Rodriguez, ‘Is Swiss international insolvency law finally embracing the Model Law?’ in Joly éditions (ed), *Mélanges en l’honneur de Jean-Luc Vallens* (Joly, Lextenso éditions, 2017).

¹³⁶ Nessi in Arroyo 2701, para 72; Vorburger s 6.01, para 432.

¹³⁷ Swiss Federal Supreme Court, BGE 138 III 714 para 3.6; Nessi in Arroyo 2962, para 27, and 2699, para 60. See also, Vorburger s 6.01, paras 318 ff and 419 ff.

¹³⁸ *Vivendi S.A. et al. v. Deutsche Telekom AG et al.*, Swiss Federal Supreme Court, 4A_428/2008 dated 31 March 2009, para 3.

¹³⁹ *ibid*, which concerned Polish law. See also Swiss Federal Supreme Court, BGE 138 III 714, which concerned Portuguese law.

the loss of capacity on foreign proceedings as a mandatory provision (*Eingriffsnorm/norme d'effet immédiat*).¹⁴⁰

122. The legal situation is more complex if the foreign insolvency is recognized (always on the basis of a specific request for recognition with the competent court) in Switzerland in accordance with Chapter 11 of the PIL Act (see the response to Question 32).

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?

123. Arbitrators seated in Switzerland most likely apply Chapter 12 of the PIL Act, together with the law of the place of incorporation of the parties to the arbitration, when considering their capacity to arbitrate upon the opening of foreign insolvency proceedings impacting their estate, without consideration for Swiss law on the recognition of foreign insolvencies¹⁴¹ (see Question 31). As stated above (Paragraph 119), under Swiss law, the opening of the insolvency in Switzerland (including the recognition of a foreign insolvency, which is legally treated like an insolvency proceeding) has no impact on the validity of the arbitration agreement.¹⁴² However, a (parallel) opening of ancillary proceedings on the basis of a recognition of the foreign insolvency proceedings under Chapter 11 initiated by the foreign insolvency administrator or by a creditor might raise difficult issues, as such proceedings would have preferential access to assets located in Switzerland and to enforcement measures regarding those assets.

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

124. Foreign insolvency proceedings have no mandatory effect on arbitration proceedings seated in Switzerland, except in relation to the capacity of the insolvent debtor. This is addressed in the responses to Questions 1 and 31 above.
125. However, an arbitral tribunal seated in Switzerland may take into account the effect of the opening of foreign insolvency proceedings on the insolvent debtor (acting through or with the instructions of the insolvency administrator) or on the creditor and whether procedural measures such as a stay of the arbitration are justified (see also the response to Question 1), in particular if the recognition of the foreign insolvency proceedings is sought in Switzerland (see Paragraph 122). Specifically, in order to allow the enforcement of the award against assets located in Switzerland, the arbitral tribunal should seek to take into account and

¹⁴⁰ *Vivendi S.A. et al. v. Deutsche Telekom AG et al.*, Swiss Federal Supreme Court, 4A_428/2008 dated 31 March 2009.

¹⁴¹ PIL Act, ch 11.

¹⁴² See fn 137.

coordinate the arbitration proceedings with any ancillary insolvency proceeding (see the response to Question 5 above at Paragraphs 38 ff.).

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

126. Swiss arbitration law provides for very limited grounds to set aside an arbitral award rendered in Switzerland.¹⁴³ These include a violation of the principle of equal treatment and parties' right to be heard¹⁴⁴ and a violation of public policy.¹⁴⁵ Both provisions may only be invoked when the violation is serious.
127. In itself, non-compliance with foreign law, and thus foreign insolvency law, will not suffice to constitute a breach of public policy in the sense understood under Swiss arbitration law, namely Swiss international public policy. Equally, a breach of Article 170 of the PIL Act and other provisions concerning the recognition of foreign insolvencies would most likely not appear to violate Swiss international public policy. However, a blatant and unjustified violation of the principle of *par conditio creditorum*, which is common to all insolvency laws, could be considered as a public policy violation even if in case a foreign insolvency law applies (see the response to Questions 1, 3, 28, and 32 above). Furthermore, where non-compliance with foreign insolvency law leads to a violation of a party's right to be heard or of the parties' equal treatment, the award could be set aside on that ground.

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?

128. No.

¹⁴³ PIL Act, art 190.

¹⁴⁴ *ibid*, art 190(2)(d).

¹⁴⁵ *ibid*, art 190(2)(e).