

Press Release

Enforceability of arbitration clauses in bankruptcy: Insights from leading practitioners from Russia, Ukraine, England, France, Germany, Singapore and Hong Kong

Moscow, June 2021 – On June 25, 2021, global law firm Dentons, with support from *Legal Academy*, *Legal Insight* magazine and *Interfax Group*, held an online conference on the **enforceability of arbitration clauses in bankruptcy**. Dentons partner and esteemed international arbitrator, **Konstantin Kroll**, moderated the conference, in which leading arbitration and bankruptcy practitioners from seven countries took part.

Dentons partners **Roman Zaitsev** (Russia), **Natalia Selyakova** (Ukraine), **Dominic Pellew** (England), **Anna Crevon-Tarassova** (France), **Lawrence Teh** (Singapore), **Heiko Heppner** (Germany), and **Robert Rhoda** (Hong Kong) shared their insights about what can happen with arbitration in their jurisdiction if bankruptcy is instituted against a claimant or respondent.

RUSSIA:

Roman Zaitsev, *Head of the Litigation and Dispute Resolution practice in Russia, Moscow*

The number of bankruptcy petitions in Russia is growing. Total bankruptcy petitions hit a record 191,604 in 2020, while there were 146,482 in 2019. In Russia, the arbitration clause is generally no longer enforceable in most cases of a respondent's bankruptcy. The arbitration clause usually continues to be effective if the claimant goes bankrupt, but only if the bankrupt company has enough money to fund the arbitration proceedings.

UKRAINE:

Natalia Selyakova, *Head of the Banking and Finance, Restructuring and Insolvency practices in Ukraine, Kyiv*

The number of bankruptcy petitions is growing in Ukraine. Disputes should generally be considered by a commercial arbitration court if the respondent is insolvent. Where the claimant is the insolvent party, the enforceability of the arbitration clause is dubious, as Ukraine's bankruptcy code and the commercial litigation rules contain no specific constraints to proceed with arbitration. However, Ukrainian bankruptcy courts may take the other view in light of the well-established approach in respect of bankruptcy courts' jurisdiction for disputes in bankruptcy proceedings. In this case, there is no uniform practice and everything depends on the specific situation.

ENGLAND:

Dominic Pellew, *International Arbitration Partner, London*

Claims for the setting aside of transactions under Russian insolvency law must, in the eyes of the English courts, be brought by way of arbitration proceeding if the contract contains an arbitration clause. This is despite the fact that under Russian law, such claims can only be brought in the Russian court.

FRANCE:

Anna Crevon-Tarassova, *International Arbitration Partner, Paris*

In France, all litigation and arbitration proceedings against a company are stayed after the opening of insolvency proceedings. However, after the claims pending in the arbitration are registered with the bankruptcy receiver and the receiver is summoned to take part in the arbitration, such proceedings may resume. Under French law, bankruptcy proceedings have no impact on the validity of the arbitration clause and a creditor may initiate new arbitration proceedings even after the opening of the insolvency proceedings, on the condition that such claims are first registered in the insolvency proceedings. However, after the opening of insolvency proceedings, only an insolvency judge can authorize payments under an arbitral award.

SINGAPORE:

Lawrence Teh, *Senior Partner, Singapore*

If the respondent becomes insolvent during arbitration the tribunal would want to know the precise nature of the insolvency to minimize challenges on grounds like incapacity, inability to present case, and breach of arbitral procedure. If bankruptcy proceedings are instituted after arbitration commences, there are immediate legal consequences which affect the continuation of arbitral proceedings and the ability of the tribunal to order security or attach assets. The claimant has a choice whether to prove its claim to the insolvency practitioner. If it decides to prove its claim and is dissatisfied with the treatment of its claim, there is an appeal process. If it wishes to seek court permission to continue with the arbitration it must persuade the court that continuing the arbitration will not cause an undue drain on the assets of the bankrupt respondent.

GERMANY:

Heiko Heppner, *Co-Head of Dispute Resolution in Germany, Frankfurt*

In a bankruptcy case, the insolvency administrator replaces the insolvent party in arbitration or litigation. The arbitration agreement remains in force. If the bankruptcy is instituted after the arbitration, the arbitration is stayed until the administrator reviews the case.

HONG KONG:

Robert Rhoda, *Litigation and Dispute Resolution Partner, Hong Kong*

In the event of a company's bankruptcy in Hong Kong, no actions or litigation may be taken or commenced against it without the court's permission. Existing arbitration is automatically stayed and new arbitration cannot be commenced without the court's permission.

For additional insights, you can watch a recording of the conference at: <https://praktikum.legalacademy.ru/enforceability-of-arbitration-clauses-in-bankruptcy-eng-live>

About Dentons' International Arbitration Group

Dentons' global International Arbitration practice brings together more than 40 partners and 120 lawyers. Our lawyers are involved in more than 100 international arbitrations at any given time with billions of dollars in dispute, across six continents.

In addition to being present in key arbitral hubs including London, New York, Paris, Hong Kong, Singapore, Beijing, Dubai, Frankfurt, our practice extends to all of the other main arbitration forums and arbitral rules around the world. The Firm's lawyers can coordinate the entire process from Russia, regardless of its complexity and geography.

Dentons is recognized as having one of the premier international arbitration practices in Russian and CIS. The Firm's lawyers successfully represent clients in international arbitration and international disputes offering top-notch legal advice and pragmatic solutions through all stages of arbitration – from developing the dispute resolution mechanism best suited for the client through the arbitration hearing and post-arbitration enforcement to recognition of the award.

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