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# IBA Toolkit on Insolvency and Arbitration

IBA Arbitration Committee

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# IBA Toolkit on Insolvency and Arbitration

**A PROJECT OF THE IBA ARBITRATION COMMITTEE'S  
INSOLVENCY AND ARBITRATION GROUP**

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*With support from Christian Leathley, IBA Arbitration Committee Vice-Chair*

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# About the Arbitration Committee

Established as the Committee in the International Bar Association's Legal Practice Division which focuses on the laws, practice and procedures relating to the arbitration of transnational disputes, the Arbitration Committee currently has over 3,000 members from over 130 countries, and membership is increasing steadily.

The Committee is currently co-Chaired by Philippe Pinsolle and Samaa Haridi. Through its publications and conferences, the Committee seeks to share information about international arbitration, promote its use and improve its effectiveness. The Committee maintains standing subcommittees and, as appropriate, establishes Task Forces to address specific issues.

# About the Authors

## CO-CHAIRS OF THE INSOLVENCY AND ARBITRATION GROUP

**Jennifer Permesly** is a Partner in the International Litigation and Arbitration group of Skadden Arps Slate Meagher & Flom LLP in New York City. Jennifer's practice focuses on helping clients devise global strategies and solutions to addressing their cross-border disputes, including in situations involving insolvencies. She regularly appears as an advocate before international arbitration tribunals and U.S. courts, and also sits as arbitrator. A Spanish speaker, Ms. Permesly focuses much of her practice on disputes arising out of Latin America. Prior to her current role as Co-Chair, Jennifer served as a USA National Representative on the Steering Committee of the IBA Arbitration Committee's Arb-40 Sub-Group.

**Felipe Ossa** is a Partner at Claro & Cia in Chile, and his practice is focused on international litigation and arbitration. He has acted as counsel and arbitrator in proceedings ad-hoc and under the aegis of ICC, ICDR, ICSID, LCIA, PCA and other institutions. Felipe lectures on arbitration and law of obligations at Universidad de Chile. Also, he has authored several publications on international dispute resolution and features regularly as a speaker in seminars and conferences held in Chile and abroad. He is the Chairman of the ICC Arbitration Commission in Chile and the Chilean chapter of the Spanish Arbitration Club. He is also a member of the Chartered Institute of Arbitrators, the Latin American Group of the ICC and LCIA's Latin American Users' Council.

## ACADEMIC CHAIR OF THE INSOLVENCY AND ARBITRATION GROUP

**Dr Manuel Penades** is an independent arbitrator and Associate Professor at King's College London. Qualified in Spain as well as in England & Wales, he is a leading expert in the intersection of arbitration and insolvency. He regularly appears as counsel and legal expert before arbitration tribunals (ICC, LCIA, VIAC, SCAI) and national courts faced with the crossroads between arbitration and insolvency. Dr Penades was invited in 2019 by UNCITRAL Working Group II to share his professional experience on the topic. He is the Vice-President of the UK Chapter of the Spanish Arbitration Club and regularly advises clients on European Union, Spanish and English laws.



**With support from:**

**Christian Leathley** specialises in international commercial and investment arbitration and is Vice-Chair of the IBA Arbitration Committee. He is head of Herbert Smith Freehill's Latin America group, and head of the US international arbitration group. Christian has represented clients across all the major institutional rules, and represents both investors and states in investor-state cases. Fluent in Spanish, Christian conducts hearings in Spanish and English. He is qualified to practise New York and English law, and has experience in business, and human rights and public international law.



## **OVERVIEW**

The IBA Toolkit on Arbitration and Insolvency was conceived with the goal of providing guidance to parties, counsel and arbitrators in situations where a party involved in national or international arbitration is subject to, or becomes subject to, insolvency proceedings.<sup>1</sup> In 2019, the IBA Committee on Arbitration established a sub-group on Arbitration and Insolvency to examine the intersection of insolvency and arbitration and develop meaningful guidance for the arbitration community on the subject. The sub-group was co-chaired by Felipe Ossa of Claro & Cia and Jennifer Permesly of Skadden Arps Slate Meagher & Flom LLP. Dr Manuel Penades, a leading scholar on the intersection of insolvency and arbitration, was selected to act as Academic Chair. The group also received input from the IBA Arbitration Committee Vice-Chair, Christian Leathley. This Toolkit is the result of the sub-group's work over the course of 2019 and 2020.

### ***Background***

Arbitration and insolvency can present a significant conflict of policy interests. Arbitration is a consent-based mechanism for the resolution of claims in a private forum outside of court, resulting frequently in an internationally enforceable award. Insolvency proceedings are a collective, court-based process to resolve the interests of a plurality of parties, and generally prohibit the conduct of individual enforcement actions against the insolvent party in order to protect the collective interest. When arbitration is pursued while insolvency proceedings are pending or imminent, arbitrators face important legal questions about whether they are authorized to continue the arbitration, whether the debtor continues to have legal capacity to arbitrate, and whether an award ultimately issued will be enforceable, among others. The potential for significant differences in approach is illustrated by the well-known example involving the Polish company Elektrim S.A., in which two different arbitration tribunals seated in two different jurisdictions (England and Switzerland) came to opposite conclusions as to whether arbitration could continue following the opening of insolvency proceedings over Elektrim in Poland.

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<sup>1</sup> "Insolvency proceedings" refers here to a range of possible proceedings, including liquidation or wind-up, voluntary or involuntary restructuring, and, in some jurisdictions, pre-insolvency proceedings.





National legal systems often diverge in their approach to regulating the intersection of arbitration and insolvency. Some jurisdictions purport to prohibit individual proceedings, including arbitration, involving the debtor all together; some prohibit arbitration only in some circumstances or authorize the conduct of arbitration subject to various limitations and procedural adaptations; and others posit that insolvency should not impact arbitration at all. An additional group of States simply have no well-defined regime, or even no regime at all, necessitating a case-by-case analysis and response. There is no international law instrument that purports to harmonise the various national approaches to these issues.

From the perspective of an arbitration tribunal, it may be unclear to what extent a national regime purporting to regulate the effects of insolvency on arbitration should impact the arbitration at all, in particular where the seat of the arbitration is located outside of the jurisdiction conducting the insolvency proceedings. In these cases, the co-existence of national approaches frequently raises conflict of laws questions that add a layer of complexity to the legal issues posed by the insolvency of a party to arbitration at the domestic level. Moreover, the divergence of approaches in the arbitral law of various jurisdictions – for example whether that law permits anti-arbitration injunctions, its approach to evaluating the legal capacity of a party to arbitrate, or its attitude toward the State’s power to regulate domestic versus non-domestic arbitrations – may present further issues for arbitrators.

The frequency with which these issues arise at a domestic and international level is bound to grow, in particular in light of the repercussions of the global COVID-19 pandemic during which this Toolkit is published. While no single set of principles could encompass the wide variety of scenarios in which arbitration and insolvency will overlap, the sub-group on Arbitration and Insolvency identified a need for a comprehensive framework to provide guidance to parties, counsel and arbitrators in identifying the legal issues that may arise in this area and evaluating the possible range of responses and/or solutions.

### ***The Toolkit***

The IBA Toolkit on Arbitration and Insolvency comprises a series of National Reports, the Explanatory Memorandum and the Checklist.

#### **a. The National Reports**

The Toolkit begins from the premise that national insolvency laws should be the starting point for any inquiry as to whether and how insolvency may affect an arbitration. Insolvency is a regime heavily regulated by the State and subjects the debtor to proceedings in domestic



courts. In many jurisdictions, insolvency laws are considered mandatory and might be reflective of public policy considerations. The national jurisdiction in which the insolvency is taking place is also one of the likely jurisdictions in which the award may produce effects and its enforcement may be sought. Accordingly, the Toolkit is based in large part upon National Reports authored by leading experts on insolvency and/or arbitration in 19 jurisdictions.<sup>2</sup> The National Reports are based on a 35-question survey that was prepared by the Insolvency and Arbitration Group, which sought to understand how the laws of the surveyed jurisdictions approach questions relating to the intersection of insolvency and arbitration in a variety of circumstances. We wish to thank the Rapporteurs responsible for each National Report for their tireless efforts to compile their reports.<sup>3</sup>

## b. The Explanatory Report

The Explanatory Report is the cornerstone of the Toolkit. It follows the same structure as the National Reports and seeks to provide context behind each survey question. The Explanatory Report also seeks to summarize, where possible, prevailing and secondary approaches seen in the National Reports and to elaborate nuances within the responses provided. Although the Explanatory Report comments on the position taken by certain national jurisdictions, it should not be relied upon as a source of the national law itself, which is more fully and more accurately elaborated in the respective National Report itself.

The Explanatory Report, like the National Reports themselves, distinguishes between two scenarios in which arbitration and insolvency may intersect.

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<sup>2</sup> The surveyed jurisdictions are: Brazil, Chile, China, Colombia, Egypt, England and Wales, France, Germany, Hong Kong, India, the Netherlands, Nigeria, Peru, Poland, Russian Federation, Singapore, Spain, Switzerland, and the United States. The National Reports are available at the following website: [https://www.ibanet.org/LPD/Dispute Resolution Section/Arbitration/toolkit-arbitration-insolvency.aspx](https://www.ibanet.org/LPD/Dispute%20Resolution%20Section/Arbitration/toolkit-arbitration-insolvency.aspx).

<sup>3</sup> We are only able to recognize the work of the Rapporteurs, but we realize that each National Report was prepared with the additional support of their colleagues, for which we are also grateful. The National Rapporteurs include: **Brazil:** Renato Grion, André Luís Monteiro; **Chile:** Luis Eduardo Toro Bossay, Gonzalo Fernández Ruiz, Javier San Martín, Ricardo Reveco Urzúa; **China:** Helen Tang, Lingqi Wang; **Colombia:** Alberto Zuleta-Londoño, Irma Isabel Rivera. **Egypt:** Ingy Badawy; **England and Wales:** Patrick Taylor, Gavin Chesney; **France:** Flore Poloni, Nicolas Partouche; **Germany:** Dr. Philipp K. Wagner, Carl-Christian Kramer; **Hong Kong:** Robert Rhoda, Look-Chan Ho; **India:** Alipak Banerjee; **Netherlands:** Barbara Rumora-Scheltema, Dr Vesna Lazić; **Nigeria:** Oluwatosin Iyayi; **Peru:** Alfredo Bullard, Huascar Ezcurra, Cristina Ferraro; **Poland:** Rafal Kos, Anna Maria Pukszto; **Russian Federation:** Olga Prokaeva, Leonid Kropotov, Sergey Usoskin; **Singapore:** Paul Tan, Chew Xiang; **Spain:** Dr Francisco Garcimartín, Dr Manuel Penades; **Switzerland:** Domitille Baizeau, Dr Rodrigo Rodriguez, Marlen Stöckli; **United States:** Hon. Allan L. Gropper, Thomas W. Walsh.



**Section I** addresses the impact of insolvency proceedings opened within the surveyed jurisdiction on arbitrations seated within or outside that jurisdiction. It proceeds in three parts.

**Part I** focuses on whether existing arbitration may proceed, or new arbitrations may be initiated, where insolvency proceedings have been initiated in the jurisdiction, and in what circumstances. The questions in Part I explore, for example, whether the national law purports to stay or enjoin arbitrations involving the debtor, whether certain subject matters are precluded from being arbitrated, and whether the debtor and/or insolvency administrator has the capacity to conclude new arbitration agreements, among other things. It also discusses whether any relief from these rules may be obtained, and when, if at all, the relevant effects derived from those rules may conclude. These matters will most directly impact the question of arbitral jurisdiction.

**Part II** discusses the various procedural and administrative considerations that must be taken into account in circumstances where the arbitration proceeds simultaneously to insolvency proceedings. The questions in Part II include whether the debtor may arbitrate in its own name, whether certain orders issued by the arbitrators, such as those granting interim relief, are impacted by the opening of insolvency proceedings, and whether the debtor retains its capacity to settle disputes, to name a few.

**Part III** examines the enforceability of the resulting arbitral award, both in terms of the procedural steps that must be taken to seek the enforcement in the insolvency proceedings themselves, and the enforcement hurdles that an award may face if it is issued in violation of the national laws discussed in Parts I and II.

**Section II** looks at whether an insolvency proceeding opened *outside* the surveyed jurisdiction will be given effect in that jurisdiction, and will have concomitant effects on arbitrations seated within it. Section II seeks to understand whether the national jurisdiction has adopted an international regime for the recognition of foreign insolvencies, such as the UNCITRAL Model Law on Cross-Border Insolvency, and also looks at the mandates established for the recognition of foreign insolvencies under European Union law. Outside of these cross-border instruments, Section II examines whether the surveyed jurisdictions have any other developed mechanism for the recognition of foreign insolvencies and the effects on arbitration under those mechanisms. Finally, Section II addresses the mandatory nature of the regime concerning foreign insolvencies and whether these rules would be considered binding upon the arbitrators seated within the jurisdiction.



**c. The Checklist**

The final piece of the Toolkit is a Checklist on the Effects of Insolvency on Arbitration that may be used by arbitrators, parties and counsel to evaluate the potential impacts of a national insolvency on their arbitration. The Checklist is not designed to be exhaustive of all possible nuances that may arise under the specific laws applicable to the arbitration, nor to include every question that may be posited to the arbitrators for resolution. Rather it seeks to provide a general framework for identifying the issues that may arise and considering how to resolve them.

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The Toolkit seeks to offer an aide memoire to arbitration practitioners, but will naturally benefit from ongoing review and input from the arbitration and insolvency communities. Accordingly, to the extent comments and suggestions are desired to be provided, please contact the Co-Chairs. Should you be interested in submitting a National Report, please also contact the Co-Chairs with your CV and an email summarizing your specific credentials, and we will respond in due course.

Sincerely,

Felipe Ossa, Jennifer Permesly, Manuel Penades, and Christian Leathley

## **EXPLANATORY REPORT**

*This Explanatory Report is intended to be used together with the National Reports of various jurisdictions, available [here](#). The Report was authored by IBA Insolvency and Arbitration Group Academic Chair Dr. Manuel Penades and Co-Chairs Felipe Ossa and Jennifer Permesly.*

- 1 The aim of the IBA Toolkit on Insolvency and Arbitration is to provide an overview of the legal issues which may arise when a party involved in international arbitration is subject to insolvency proceedings.
  - the existence of pending arbitration proceedings at the time of the opening of the insolvency proceedings (hereinafter, 'pending arbitrations');
  - the existence of arbitration agreements concluded before the opening of the insolvency proceedings (hereinafter, 'pre-insolvency arbitration agreement') which could give rise to new arbitration proceedings during the insolvency proceedings (hereinafter, 'new arbitrations');
- 2 A party subject to insolvency proceedings (hereinafter, the 'debtor')<sup>4</sup> may already be or may become involved in arbitration in various ways. This includes:
  - the existence of pending arbitration proceedings at the time of the opening of the insolvency proceedings (hereinafter, 'pending arbitrations');
  - the existence of arbitration agreements concluded before the opening of the insolvency proceedings (hereinafter, 'pre-insolvency arbitration agreement') which could give rise to new arbitration proceedings during the insolvency proceedings (hereinafter, 'new arbitrations');
  - the issuance of awards concerning the insolvent estate during the insolvency proceedings (hereinafter, 'new awards'); and
  - the conclusion of arbitration agreements after the opening of the insolvency proceedings (hereinafter, 'new arbitration agreements').
- 3 Each of the described scenarios produces the encounter of potentially divergent policies. In many jurisdictions, the initiation of insolvency proceedings is intended to result in the channeling of all pending and, sometimes, new civil disputes into a single forum, where the rights and obligations of the debtor can be adjudicated in a forum where all of the creditors' interests are being considered

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<sup>4</sup> The Report covers any participation of the debtor in arbitration, irrespective of its procedural position as

claimant, respondent, counter-claimant or counter-respondent.

and accounted for. But also in many jurisdictions, arbitration is viewed as a preferred or protected mechanism of dispute resolution, which interests may conflict with those of insolvency law. While some jurisdictions have developed specific laws and/or jurisprudence to address this dichotomy, others have not directly examined or finally decided the issue.

- 4 The questions posed by the encounter of insolvency and arbitration may be further complicated by the presence of cross-border elements. For example, a country's national insolvency law may aim to bind parties and arbitrators in locally seated arbitration, but not those participating in foreign seated arbitrations. Alternatively, the national law regarding the impact of insolvency on arbitration may differ depending on whether insolvency proceedings are local or foreign, as jurisdictions might give different weight to the policies surrounding the existence of an insolvency process depending on its connection with national interests.
- 5 The starting point for the Insolvency and Arbitration project was a review of the national law regarding the intersection of arbitration and insolvency in 19 selected jurisdictions (the "National Reports"). The National Reports aim to provide an overview of how the national jurisdiction in question addresses, through law, regulation, and jurisprudence, the intersection of insolvency and arbitration.

The National Rapporteurs were directed to prepare their Reports through answers to specific questions posed to them in the form of a Questionnaire.

- 6 This Explanatory Report follows the structure of the Questionnaire used to create the National Reports, and seeks to provide context for each question as well as an overview of the national law approaches seen in the National Reports.
- 7 By way of overview, the Questionnaire and the National Reports are divided into two Sections.
- 8 **Section I** is focused on how the law of the surveyed jurisdiction addresses the impact that insolvency proceedings initiated in that jurisdiction have on arbitrations seated within that jurisdiction, as well as those seated abroad. Section I proceeds in three parts.
- 9 **Section II** examines how the national law of the relevant jurisdiction approaches the impact that foreign insolvency proceedings – that is, those initiated outside of the jurisdiction – have on arbitrations seated within the jurisdiction.
- 10 While it is beyond the scope of this Explanatory Report to offer a detailed comparative analysis of the surveyed jurisdictions, the Report identifies wherever possible the existence of a prevailing approach among the examined legal systems in each of the questions.

Even when such common patterns are established on an issue-by-issue basis, the Report has not identified two identical approaches to the regulation of the effects of insolvency on arbitration across the 19 surveyed jurisdictions. Therefore, it remains necessary to consult the National

Reports to understand the specific rules and nuances of each legal system. The Explanatory Report does not intend to prescribe solutions of universal application nor does it provide legal advice applicable to specific fact situations.

## **SECTION I: IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION**

**11 Section I** concerns the interaction between national insolvency proceedings with arbitrations seated within the jurisdiction as well as arbitrations seated abroad. It comprises Questions 1 to 28. It is divided into three Parts.

**12 Part I** focuses on the effect of local insolvency proceedings on pending or new arbitrations as well as pre-insolvency and new arbitration agreements. The primary objective is to ascertain whether the opening of local insolvency proceedings impacts the existence and effectiveness of the debtor's arbitration agreements and/or the possibility to commence or continue arbitration proceedings alongside the insolvency proceedings. It also explores the possibility to conclude new arbitration agreements during the insolvency. These matters will most directly impact the question of arbitral jurisdiction. This Part contains Questions 1 to 15.

**13 Part II** examines the situation where arbitration may proceed even when one of the parties has entered into insolvency, and addresses considerations with respect to the arbitration itself. These include both procedural and administrative considerations as well as the extent to which the arbitrators' powers may be impacted or cabined by the national insolvency regime. These questions do not address arbitral jurisdiction per se but rather certain practical and procedural impacts of the insolvency on the arbitration (although in some instances these may ultimately impede or affect arbitral jurisdiction). Part II includes Questions 16 to 22.

**14 Part III** deals with the treatment in insolvency of claims pursued in arbitration and the enforceability of arbitration awards within the insolvency proceedings (or, if applicable, in other courts) in the relevant jurisdiction. Part III includes questions that will impact the enforceability of the arbitral award. Part III covers Questions 23-28.

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

**1. Does the law of *[jurisdiction]* 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?**

15 Question 1 aims to provide a basic overview of the applicable laws or legal regimes that may be relevant to the intersection between insolvency and arbitration in each jurisdiction. The Question has three objectives.

16 First, it helps identify whether the relevant jurisdiction contains any rules that expressly address the impact of local insolvency on arbitration. The National Reports show a wide variation in the level of detail and sophistication of the regime regulating the effect of insolvency on arbitration. Whereas some jurisdictions contain express rules on

the topic and abundant case law related to it, other jurisdictions lack a direct legislative response. In these cases, the legal approach to the interaction between insolvency and arbitration is derived from judicial decisions on a case-by-case basis and/or from the application by analogy of rules governing the impact of insolvency on civil (i.e., domestic court) litigation involving the debtor outside of the insolvency process. The responses to Question 1 will assist counsel, parties and arbitrators to identify the relevant sources and basis for the legal regime in each jurisdiction.

17 The second objective of the Question is to discover whether the rules, if any, that govern the impact of insolvency on arbitration are contained in, or arise from, the insolvency regime or the arbitration laws of the surveyed jurisdiction. In the overwhelming majority of the National Reports, the relevant rules arise under the jurisdiction's insolvency regime. That is, they are included in the insolvency legislation as part of the effects derived from the opening of insolvency proceedings. This means that those rules very rarely feature as arbitration law provisions addressing expressly arbitration-specific categories such as the arbitrability of disputes, the capacity of parties to arbitrate, the validity and effectiveness of arbitration agreements,



or any other arbitration-specific category. This may influence an arbitrator's view as to whether it is bound to apply the insolvency and/or arbitration rules of the jurisdiction where the debtor is subject to insolvency proceedings.

18 The third reason for Question 1 is to allow National Reports the possibility to provide an overview of the effects of insolvency on arbitration. While the nuances of each legal system make it inappropriate to attach them to pre-defined regulatory models, the National Reports suggest that generally the surveyed jurisdictions subscribe to one of the following four broad approaches:

- i. The opening of insolvency may result in a stay of all pending and/or future civil proceedings, whether they be brought in arbitration or litigation. In some jurisdictions, this stay applies only to claims that are brought *against* the debtor, and not to claims pursued by the debtor. Equally, some National Reports explain that this stay may be lifted at the request of an interested party (e.g., the arbitration counterparty).
- ii. The opening of insolvency results in the stay of litigation and arbitration proceedings if and only if the debtor will be liquidated. Litigation and arbitration are permitted to continue where the debtor will be restructured.
- iii. The opening of insolvency may result in a stay of litigation proceedings in the

jurisdiction, but that stay does *not* extend to arbitration proceedings in the national jurisdiction, or at least to arbitration abroad. In some cases, the stay may not extend to arbitration except in those particular instances where the arbitration directly overlaps with a core insolvency issue.

- iv. The opening of insolvency proceedings does not result in the stay of any pending or new litigation or arbitration involving the debtor or the insolvent estate. In some jurisdictions, this default solution may be varied by the insolvency court or the insolvency administrator on a case-by-case basis. The insolvency regime of some jurisdictions also provides for various procedural requirements that must be satisfied before arbitration can commence or continue. This might include the need to file the claim with the insolvency verification process or the requirement to offer the insolvency administrator an opportunity to appear in the arbitration.

19 The conclusion that derives from Question 1 is that there is wide diversity among the surveyed jurisdictions with regards to the existence of express rules governing the impact of insolvency on arbitration and the level of sophistication of those rules. However, when the legal system of a jurisdiction does contain some rules on this topic, they are frequently included in the insolvency regime and not in arbitration laws. Finally, there is also ample

heterogeneity in the treatment that each jurisdiction gives to arbitration during the insolvency of a party.

**2. Does the insolvency legislation in [jurisdiction] 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*?**

20 One of the reasons why arbitration may be seen as incompatible with insolvency in some jurisdictions is the fact that the essence of arbitration is the resolution of private claims out of court whereas insolvency frequently takes the form of a collective process to deal with the insufficiency of the ailing debtor's assets under the supervision of courts or other form of public body. If the insolvency regime did not provide for a centralised and collective forum to address the patrimonial

affairs of the debtor, the potential clash with arbitration would diminish substantially. For that reason, Question 2 asks Rapporteurs to comment on whether their insolvency legislation provides for the rule of *vis attractiva concursus*, which, in its widest form, would direct the concentration of all disputes concerning the insolvent debtor to the insolvency court.

21 The Question is not limited to arbitration; its aim is to provide an overview of how the surveyed jurisdictions approach the existence of individual proceedings involving the estate of the insolvent party, both in litigation as well as in arbitration.

22 While the concentration of claims before the insolvency court is the prevailing solution, it is not the unanimous solution. For instance, some jurisdictions provide that, at least in principle, the opening of insolvency proceedings is not an impediment to conducting individual proceedings outside of the collective process.<sup>5</sup> Even in the jurisdictions where the *vis attractiva* of the insolvency jurisdiction is the general rule, it can be subject to exceptions and limitations. This might include the possibility to continue individual proceedings which were pending at the time of the opening of the insolvency,<sup>6</sup> the possibility for the insolvency court to lift the stay of individual actions,<sup>7</sup> the need to

<sup>5</sup> National Reports of France, Germany, Hong Kong, the Netherlands, Peru, the PRC, and Singapore.

<sup>6</sup> National Reports of Colombia, Hong Kong, Russia, and Spain. See also Question 3.e below.

<sup>7</sup> National Reports of Egypt, England, Hong Kong, Singapore, and the USA. See also Question 4 below.

distinguish between individual proceedings conducted locally or abroad,<sup>8</sup> the different treatment between claims that are brought against the debtor or the insolvency estate, as opposed to claims brought by them,<sup>9</sup> and the existence of other courts which preserve their exclusive jurisdiction over certain categories of disputes.<sup>10</sup> The concrete impact of these rules on arbitration is the subject of Questions 3 and 4.

23 Regardless of the model adopted by each jurisdiction, a common thread among the National Reports is that the approach to the rule on *vis attractiva concursus* is generally consistent with the responses given in Question 1 with regard to the possibility to commence and/or continue arbitration proceedings. This consistency has two relevant implications.

24 The first is that generally the ability to conduct arbitration proceedings outside of the insolvency process is not subject to a more favourable or restrictive treatment than the possibility to conduct autonomous litigation proceedings. While there are some jurisdictions which treat arbitration more favourably than litigation, these are the exceptions.<sup>11</sup>

25 The second implication the National Reports show is that where the commencement and/or continuation of arbitration is stayed, the dispute is generally subject to the rule of *vis attractiva concursus*. That is, once the arbitration agreement ceases to produce effects or the arbitration proceedings are stayed, the jurisdiction to decide the dispute is directed to the insolvency court.<sup>12</sup> Similarly, where arbitration agreements remain operative and arbitration proceedings are not stayed, the rule of *vis attractiva concursus* generally does not apply to the dispute in question.<sup>13</sup>

**3. What are the effects (if any) of the opening of insolvency proceedings in [jurisdiction] on the possibility to commence or continue arbitration proceedings?**

26 Question 3 is a crucial question in the Questionnaire. It provides a detailed overview of the precise effects that the opening of insolvency proceedings will have on the ability to commence or continue arbitration proceedings. It is divided into sub-questions (a) through (f).

<sup>8</sup> National Reports of England, Spain, and Switzerland.

<sup>9</sup> National Reports of India, Spain, and the USA. See also Question 3.a below.

<sup>10</sup> National Report of the PRC.

<sup>11</sup> E.g., National Report of Spain.

<sup>12</sup> The extent to which this applies for international claims within the EU is unclear according to the Report of Spain.

<sup>13</sup> E.g., National Report of Brazil.

27 Sub-questions 3.a, 3.c, 3.e and 3.g examine whether the laws regulating arbitration and insolvency differ depending on certain characteristics of the arbitration. Sub-questions 3.b, 3.d, 3.f, and 3.h focus on whether the laws regulating arbitration and insolvency differ depending on certain characteristics of the insolvency. The responses in the National Reports to these questions demonstrate that generally the arbitral tribunal and the insolvency court will need to gain a basic understanding of the insolvency proceedings and the arbitration claims to fully identify the concrete effect of insolvency on arbitration.

**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?**

28 Sub-question 3.a examines whether the impact of insolvency on arbitration varies depending on the procedural position of the insolvent party, claimant or respondent. National Reports show that this is not a relevant distinction in every jurisdiction. Some jurisdictions stay only those

arbitrations in which the debtor is the respondent, as those cases give rise to the potential for a ruling against the debtor which may impact the estate covered by the insolvency and reduce the assets available to be distributed among creditors.<sup>14</sup> This might also cover scenarios where the insolvent debtor is the claimant, but the respondent in the proceedings asserts or intends to assert a counterclaim against the insolvent party. In these cases, it might be possible that the counterclaims are subject to the stay even when the debtor's affirmative claims are not.

29 Other jurisdictions extend their rules to all arbitration proceedings, regardless of the procedural position of the insolvent party. In these cases, the rules are concerned not only with the potential impact of the outcome of the arbitration on the estate but more generally with the existence of individual proceedings affecting the debtor outside of the collective insolvency process. The jurisdictions that adopt this second approach tend to favour one of the two extremes of the rule on *vis attractiva concursus*. If individual proceedings are generally prohibited, it is irrelevant whether the debtor acts as claimant or respondent.<sup>15</sup> Equally, when the default rule under the insolvency regime is the possibility to commence and continue individual proceedings outside of the insolvency

<sup>14</sup> National Reports of Chile, England, France, Hong Kong, India, Poland, Russia, Singapore, and the USA.

<sup>15</sup> National Reports of Egypt, the PRC, and Switzerland.

forum, the procedural position of the debtor in the arbitration is not a material factor.<sup>16</sup>

- 30 None of the surveyed jurisdictions adopts a solution whereby the debtor is allowed to act as respondent in arbitration, but it is not allowed to act as claimant. This confirms that arbitration is more frequently seen as incompatible with insolvency when it can lead to a decision against the patrimonial interests of the estate.

**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?**

- 31 Sub-question 3.b explores whether the surveyed jurisdictions draw any distinction between proceedings aimed at the liquidation of the company and insolvency proceedings aimed at the financial restructuring or rehabilitation of the company.
- 32 Only a handful of jurisdictions treat arbitration differently depending on the type of insolvency. These jurisdictions appear primarily concerned with the impact that arbitration might have on the distribution of

assets.<sup>17</sup> In those cases, the opening or continuation of arbitration proceedings is perceived to conflict with the objectives of liquidating mechanisms, as arbitration could lead to an enforceable award against the debtor or might not offer the advantages of the sometimes more expeditious dispute resolution methods integrated within the insolvency process. In contrast, arbitration is not perceived to be incompatible with insolvency proceedings aimed at the financial restructuring or rehabilitation of the company. This might be due to the idea that this second type of proceedings tends to preserve the ordinary commercial activity of the debtor, which could include the ability to participate in arbitrations derived from such activity.

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

- 33 Sub-question 3.c looks at the distinction based on the subject matter or relief sought in the arbitration. National Reports show that there are two potentially relevant considerations in this context.
- 34 The first one is the distinction between arbitrations that concern an issue that is inherently related to the insolvency or 'core'

<sup>16</sup> National Reports of Brazil, Colombia, Germany, Nigeria, Peru, and Spain.

<sup>17</sup> National Reports of Chile, India, the Netherlands, Nigeria, Singapore, and Switzerland.

to the resolution of the insolvency estate, and arbitrations dealing with general commercial disputes which, while potentially affected by the insolvency of one of the parties, could have existed in a non-insolvency scenario.

- 35 In some of the surveyed jurisdictions, the prohibition or limitation of arbitration only affects the first type of issues, whereas the jurisdiction over general commercial disputes is not affected by the insolvency or is at least subject to more lenient rules.<sup>18</sup> When this distinction is relevant, legislation and caselaw have developed criteria to separate between the two categories of disputes. Sometimes these rules are linked to the attribution of exclusive jurisdiction to the insolvency court over matters which are inherently related to the insolvency or 'core' to the resolution of the insolvency estate. While it is unclear whether the rules and interpretative criteria governing this distinction amount to rules on arbitrability, some National Reports express the view that arbitration awards over matters reserved to the jurisdiction of the insolvency court would not be valid in that jurisdiction and would be rendered without effect.

- 36 The second relevant consideration concerns the relief that is sought in the arbitration. According to some National Reports,

arbitration may be limited or even not be used to resolve claims that will result in an obligation to pay monetary damages or to obtain a mandatory injunction forcing the debtor to take some specific action with consequences for the estate as a whole.<sup>19</sup> Conversely, arbitration proceedings which are limited to declaratory, as opposed to compensatory (e.g., monetary), relief or which seek to force the debtor to take some specific action without consequences for the estate may be allowed. In some jurisdictions, the prohibition to render condemnatory decisions against the debtor or the insolvent estate is considered part of public policy.<sup>20</sup> Consequently, an award in those terms would be null in those jurisdictions and would be rendered without effect. In other cases, condemnatory awards are not contrary to public policy but are treated exclusively as declaratory decisions for the purposes of insolvency law.<sup>21</sup> It should be noted that, even when condemnatory awards are permitted, the insolvency regime might provide that the enforcement on the monetary order may only be paid through the insolvency process (see Question 23 below).

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<sup>18</sup> National Reports of Brazil, France, Germany, the Netherlands, Russia, Spain, and the USA.

<sup>19</sup> National Reports of Colombia, France, Germany, the Netherlands, and Peru.

<sup>20</sup> National Report of France.

<sup>21</sup> National Report of Germany.

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

37 Sub-question 3.d examines whether the rules governing the effects of insolvency on arbitration also apply to ‘pre-insolvency’ proceedings. These are proceedings aimed at the preventive restructuring of a company and typically do not require a declaration of insolvency. While this type of proceeding is known in the majority of the surveyed jurisdictions, the general approach is that they do not impede the commencement or continuation of arbitration. Exceptionally, arbitration will be prohibited by the ‘pre-insolvency’ regime when the law governing these proceedings provides for a general moratorium covering not only enforcement actions, but also non-executory procedures such as arbitration.<sup>22</sup>

**e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings**

<sup>22</sup> National Reports of England, France, Nigeria, Peru, the PRC, Russia, and the USA.

<sup>23</sup> National Reports of Chile, France, Germany, and Poland.

<sup>24</sup> National Report of the USA.

**and arbitration proceedings which commence after the opening of insolvency proceedings?**

38 Sub-question 3.e focuses on the 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. Many National Reports distinguish between these scenarios, permitting pending arbitrations to continue while prohibiting or limiting the commencement of future arbitrations,<sup>23</sup> or vice versa.<sup>24</sup> Other jurisdictions do not contemplate this distinction as a relevant factor to decide the treatment of arbitration by the insolvency regime.<sup>25</sup>

39 Slight variations of this criterion include the distinction between arbitrations based on arbitration agreements concluded before or after the opening of insolvency proceedings, and distinctions depending on whether the dispute concerns issues that arose pre-insolvency and post-insolvency.<sup>26</sup>

40 In jurisdictions which are part of the European Union, the classification between pending and new arbitrations is also relevant for choice of law purposes, as the law

<sup>25</sup> National Reports of Brazil, Colombia, Egypt, England, Hong Kong, India, the Netherlands, Nigeria, Peru, the PRC, Singapore, Spain, and Switzerland.

<sup>26</sup> National Report of Colombia.



governing the effects of insolvency on arbitrations seated in the EU depends on the status of the proceedings at the time insolvency proceedings commence. Whereas pending proceedings remain subject to the law of the country in which the arbitration has its seat, the law of insolvency will govern the effects over arbitrations commenced after the opening of the insolvency proceedings.<sup>27</sup> The rule is provided in the EU Insolvency Regulation.<sup>28</sup>

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

41 Sub-question 3.f asks whether the law regulating the effect of insolvency on arbitration makes any distinction between voluntary and compulsory insolvency proceedings. The rationale behind this question is to consider whether the law of the selected jurisdictions takes into account

<sup>27</sup> National Reports of England, France, Germany, and Poland. England remained bound by the EU Insolvency Regulation at the time of the writing of the National Report.

<sup>28</sup> Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereinafter, 'EU Insolvency Regulation'). The Spanish Report refers to the possibility of an alternative interpretation of this choice of law rule, which distinguishes between the effects of insolvency on the jurisdiction of the arbitrators and on the conduction of the arbitration proceeding. Whereas

the possibility that a party resorts voluntarily to insolvency proceedings, or conversely is submitted to those proceedings against its will, to trigger the effects of insolvency on arbitration.

42 While in some jurisdictions this distinction might impact the capacity and *locus standi* of the insolvent party in general (see Question 16 below), the majority of National Reports reflect that the voluntary or compulsory commencement of the insolvency does not affect the possibility to arbitrate during insolvency.<sup>29</sup>

43 In the exceptional cases where the law of the jurisdiction incorporates this distinction for the purposes of arbitration, the opening of voluntary insolvency proceedings is seen as a lesser impediment to arbitration than compulsory insolvency proceedings.<sup>30</sup>

**g. Do those effects intend to apply extraterritorially, i.e., to every arbitration regardless of the location**

the former would always be subject to the law of the insolvency proceedings, the latter will be subject to that law or to the law of the seat depending on whether the arbitration commences after or before the insolvency proceedings.

<sup>29</sup> National Reports of Brazil, Chile, Colombia, Egypt, France, Germany, Nigeria, Peru, Poland, the PRC, Spain, Switzerland, and the USA.

<sup>30</sup> National Reports of England, Hong Kong, India, and Singapore.



**of the seat in [jurisdiction] or  
abroad?**

44 In Sub-question 3.g, rapporteurs were asked to comment on whether the applicable laws impacting arbitration are intended to apply extraterritorially, that is, to arbitrations seated outside of the jurisdiction. This is a relevant issue because any question about the effect that the insolvency of a party might have on foreign arbitrations is based on the premise that the insolvency rules providing for such effects intend to apply extraterritorially.

45 The response to this question will not necessarily provide a definitive answer to the issue of whether the insolvency law of the place where insolvency proceedings have been opened will bind the arbitrators or parties to an arbitration seated outside the place of insolvency. This will also depend on the rules governing the arbitration and the approach the arbitrators take towards the existence and effects of the foreign insolvency. Equally, it might depend on whether the foreign insolvency proceedings have been recognised in the seat of the arbitration. These issues are explored in Section II of the National Reports. Nevertheless, it is an important starting point to understand whether the jurisdiction

where the insolvency is pending considers or intends for its law to apply abroad.

46 The majority of the National Reports answer this question in the affirmative.<sup>31</sup> The premise in these jurisdictions is that the insolvency proceedings have universal effect and reach the whole estate of the debtor, wherever located.

47 There are, however, notable exceptions to this approach. In various jurisdictions the rules governing the impact of insolvency on arbitration do not apply to foreign arbitration proceedings.<sup>32</sup> This approach might be due to a voluntary decision to curtail the extraterritorial reach of the insolvency proceedings or follow from the jurisdiction's understanding of its limited power to regulate arbitrations located abroad.

48 The extraterritorial reach of the rules on the effect of insolvency on arbitration is also addressed in some legal systems through choice of law rules. The National Reports of the jurisdictions where EU law applies explain that the EU Insolvency Regulation contains a choice of law regime that governs the extraterritorial application of the law of the jurisdiction where insolvency proceedings have been opened.<sup>33</sup> That law will apply extraterritorially to all arbitrations

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<sup>31</sup> National Reports of Brazil, Chile, Colombia, Egypt, France, Germany, India, the Netherlands, Peru, the PRC, Russia, Spain, and the USA.

<sup>32</sup> National Reports of England, Hong Kong, Nigeria, Poland, Singapore, and Switzerland.

<sup>33</sup> National Reports of England, France, Germany, Poland, and Spain.

seated in other EU Member States when they commence after the opening of the insolvency proceedings. That is, new foreign arbitrations seated in other EU Member States shall be subject to the effects provided by the law of the EU Member State where insolvency proceedings have opened. Conversely, that insolvency law will not apply extraterritorially to pending arbitrations, which will remain subject to the law of the EU Member State in which the arbitration has its seat.

of the surveyed jurisdictions provide that the effects on arbitration commence on the date the insolvency court declared the opening of the insolvency process.<sup>34</sup> Other jurisdictions activate those effects from the date in which the request to open the insolvency proceedings was filed by the debtor or a creditor.<sup>35</sup> One National Report mentions that for the decision to be effective it will have to be published in the Official Gazette of the relevant territory.<sup>36</sup>

**h. When do the effects (if any) of insolvency on arbitration become operative (e.g., from the time of the opening of insolvency proceedings, the declaration by the court, its publication or service of process through other means on the affected parties or even the arbitrators, etc.)?**

51 In a reduced number of jurisdictions, the activation of the effects of the insolvency of the debtor on arbitration require, at least for some types of insolvency proceedings, the adoption of additional express measures by the national court or the insolvency administrator.<sup>37</sup> Finally, in one instance, arbitrators must be formally notified of the opening of insolvency proceedings for any effect to become operative.<sup>38</sup>

49 Sub-question 3.h seeks to understand the point in time in which the general effects provided by the insolvency regime enter into force.

50 The National Reports reflect a wide variety of approaches on this topic. A relevant part

**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**

<sup>34</sup> National Reports of Chile, Egypt, England, France, Germany, Hong Kong, India, the Netherlands, the PRC, Spain, and Switzerland.

<sup>35</sup> National Reports of Colombia, England, Russia, Singapore, and the USA.

<sup>36</sup> National Report of Peru.

<sup>37</sup> National Reports of Brazil, England, and Hong Kong.

<sup>38</sup> National Report of Nigeria.

**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?**

52 Question 4 asks whether there are provisions permitting relief from the effects of insolvency on arbitration and, if so, what procedures must be followed to that end. Therefore, Question 4 is applicable only in those instances where the law does purport to have an effect on arbitral jurisdiction.

53 The answers to this Question 4 vary widely among Reports. In some jurisdictions, the rules governing the impact of insolvency on arbitration are mandatory and cannot be derogated from in any manner.<sup>39</sup> That means that parties cannot contract out of them and that the insolvency court and/or administrator lack the power to order the lift of the effects provided by those rules.

54 In other jurisdictions, interested parties in the arbitration (usually the debtor, the counterparty in the arbitration, or the insolvency administrator) may be allowed to request a lifting of the limitations imposed by the insolvency regime on arbitration.<sup>40</sup> This usually takes the form of a lift of the

stay, so that arbitration can either commence or continue despite the insolvency of one of the parties. Ultimately these matters often turn on the discretion of the insolvency court, which might lift the stay with or without conditions. The case law of these jurisdictions has given rise to a list of factors that are taken into account by the courts when deciding on these requests. The stage in which the arbitration is at the time of the request as well as the efficiency that might be gained from allowing or disallowing arbitration may be relevant considerations.

55 Arbitrators may wish to inquire with the party favouring the commencement or continuation of the arbitration whether a request for the lift of any stay imposed by the insolvency regime has been made and the timeline for its resolution.

56 In few instances, parties interested in the insolvency (creditors, creditors' committee and the debtor) might request the insolvency court to overrule the decision adopted by the insolvency administrator regarding the continuation or commencement of arbitration.<sup>41</sup> This might result in a court decision favouring arbitration despite the original position adopted by the administrator, or vice versa.

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<sup>39</sup> National Reports of Chile, France, Peru, Poland, and Russia.

<sup>40</sup> National Reports of Egypt, England, Hong Kong, India, Nigeria, Singapore, and the USA.

<sup>41</sup> National Report of the Netherlands.

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

57 Question 5 inquires whether, in those countries where the insolvency legislation purports to stay or otherwise impact arbitration, there is a concomitant right of the insolvency court to issue an injunction to stop the arbitration proceedings. As with Questions 3.g and 4, this does not necessarily determine the effectiveness of the injunction, but knowing whether such an injunction is available and has or has not been sought or issued may provide important guidance to arbitrators. The availability of this type of order might prove particularly useful in the context of arbitration proceedings seated in a jurisdiction different from the one in which the insolvency is taking place, given that in those cases the effectiveness of the limitations or prohibitions derived from the insolvency regime might be subject to complex conflict of laws analyses and considerations of extraterritoriality. In practice, the issuance of an order that expressly mandates the discontinuation of an arbitration seated abroad or curtails its

scope might lead the addressee of that order to limit its involvement in the arbitration or even discontinue its participation, thus making it unnecessary for the arbitrators to resolve on the legal effect on foreign insolvency.

58 National Reports show that the answer to this Question 5 frequently depends on the general availability of anti-arbitration injunctions under the law of the jurisdiction. Some National Reports explain that these orders are generally not permitted in their legal system,<sup>42</sup> whereas others indicate that it remains an unsettled matter.<sup>43</sup> In the jurisdictions which accept this type of order, the law provides a series of conditions that need to be weighted by the insolvency court before issuing such orders.<sup>44</sup> In the context of insolvency proceedings, these orders may be issued as part and parcel of the automatic stay that attaches to all proceedings, or more specifically from the power of the court to protect the debtor's estate and police the compliance with the moratorium derived from the insolvency regime.

59 A reduced number of National Reports explains that, while the insolvency court is unable to issue a specific order ordering the discontinuation of arbitration, it might be possible to consider the general decision opening the insolvency proceedings or

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<sup>42</sup> National Reports of Brazil, the Netherlands, Spain, and Russia.

<sup>43</sup> National Report of France, Germany, Nigeria, Peru, Poland, and the PRC.

<sup>44</sup> National Reports of England, Hong Kong, Singapore, and the USA.

arbitration-specific decisions made by the insolvency court within those proceedings as orders which *de facto* prohibit the commencement and continuation of arbitration.<sup>45</sup> The effect that such decision has on arbitrations seated abroad might be beyond the control of the insolvency court (see Questions 29 to 34 below).

**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?**

60 Questions 6 to 8 address issues relating to the termination of contracts containing an arbitration clause by the insolvency court or the insolvency administrator.

61 Question 6 asks generally whether the insolvency court or the insolvency administrator can terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings. National Reports demonstrate that most insolvency regimes

<sup>45</sup> National Reports of Chile, Colombia, Egypt, France, and India.

<sup>46</sup> National Reports of the Netherlands, Poland, PRC, Spain, and the USA.

do afford this power with regard to contracts concluded by the insolvent party before the opening of insolvency proceedings.

62 The grounds that can motivate the decision to terminate or suspend a contract, however, vary across the surveyed jurisdictions. These may include the fact that the contract provides for reciprocal primary obligations which are still pending at the time the decision is made (executory contracts),<sup>46</sup> or the finding that the contract is 'onerous' or 'unprofitable' for the debtor's estate.<sup>47</sup> According to the National Reports, the existence of an arbitration agreement in the contract is not itself an impediment for the exercise of the power to terminate or suspend the contract.

**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?**

63 Question 7 builds on Question 6 and examines whether the decision of the insolvency administrator or insolvency court to terminate or suspend a contract

<sup>47</sup> National Reports of Colombia, England, Nigeria, and Spain.

containing an arbitration agreement produces any effect on the arbitration agreement itself. The main concern behind this Question 7 is to ascertain whether the arbitration agreement is also terminated or suspended as a consequence of the decision made over the main contract.

64 Most National Reports explain that the arbitration agreement is not affected by the decision made on the main contract.<sup>48</sup> This approach is frequently justified on the basis of the doctrine of separability or autonomy of the arbitration clause.<sup>49</sup> Some National Reports, however, mention that this doctrine does not necessarily mean that disputes arising out of the termination or suspension of the main contract and originally covered by the arbitration agreement will be resolved in arbitration, and warn about the possibility that two fora (the insolvency forum and arbitration) may claim jurisdiction over the same dispute.<sup>50</sup> Generally, this question regarding possible dual jurisdiction will be addressed by the law of the jurisdiction governing the intersection of arbitration and insolvency, discussed in Questions 1 to 3.

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<sup>48</sup> An exception to this is the National Report of Hong Kong. The National Reports of England, France, Singapore, and Spain state that this remains an undecided matter.

**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?**

65 Question 8 addresses whether the insolvency court or insolvency administrator may terminate or suspend the effectiveness of an arbitration agreement itself. The focus of the Question is on whether the power that the insolvency court or insolvency administrator might have over contracts in general may be exercised autonomously over an arbitration agreement. The approach to this issue may depend on whether the jurisdiction conceptualises arbitration agreements as mere contracts for the purposes of insolvency law or provides an autonomous or distinct treatment for them.

66 The majority of the surveyed jurisdictions report that arbitration agreements are not subject to the ordinary powers the insolvency court and the insolvency administrator might have with regard to the termination and suspension of contracts.

<sup>49</sup> National Reports of Brazil, Colombia, Germany, the Netherlands, Nigeria, Peru, Poland, the PRC, Russia, Spain, and Switzerland.

<sup>50</sup> National Reports of Egypt and Switzerland.

Therefore, the possibility to terminate arbitration agreements or render them ineffective will require specific rules in the insolvency regime.<sup>51</sup> Some National Reports discuss the existence of such specific rules, primarily concerning the possibility to suspend the effects of arbitration agreements during the insolvency proceedings. This power, where it exists, is generally limited to cases where the agreement has not been activated by the parties at the time the request to suspend is filed. Given this limitation, it will be very rare that an insolvency court or insolvency administrator seek to terminate or suspend the effects of the arbitration agreement which has already given rise to ongoing arbitration proceedings.

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

**a. If an alleged creditor files its claim with the insolvency proceedings and the claim is refused, does the existence of an arbitration agreement mean that an arbitral**

**tribunal would have jurisdiction to decide on the existence and amount of the claim, so that it can be eventually submitted to the insolvency proceedings?**

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

67 Question 9 addresses the steps that a creditor may need to take in the insolvency proceedings in order to be able to proceed with the arbitration. Therefore, it assumes for the purpose of the analysis that the insolvency regime allows arbitration to commence or continue alongside the insolvency proceedings, but subjects this possibility to some requirements.

68 The Question refers expressly to the need for the creditor to file a proof of claim or take similar procedural steps in the insolvency proceedings in order to have its claim recognised among the list of creditors and considered within the administration of the estate's assets. Most National Reports explain that this is a precondition to include the claim within the insolvency proceedings (i.e., for eventual payment of the award).<sup>52</sup> This may be of concern to an arbitration tribunal from the standpoint of ensuring that

<sup>51</sup> National Reports of France, Poland, and Spain.

<sup>52</sup> National Reports of Brazil, Colombia, Egypt, England, France, Germany, the Netherlands, Singapore, Spain, and Switzerland.



its award will be enforceable. Some National Reports mention that this is also a necessary step that an alleged creditor must take before the continuation or commencement of arbitration.<sup>53</sup> This may be of concern to the arbitral tribunal from the standpoint of assessing its jurisdiction or ability to proceed with the arbitration.

69 The Question also addresses the scenario where a creditor files a claim with the insolvency proceedings, but that claim is then rejected or contested by the insolvency administrator or the insolvency court. The existence of an arbitration agreement concerning that claim raises the question whether the challenge over the claim should be resolved in arbitration or by the ordinary verification process provided by the insolvency regime. This is a very relevant issue in practice, as creditors who intend to have their claim included in the insolvency proceedings will want to comply with the steps required by the insolvency regime, which includes identifying the competent forum to resolve any dispute connected to the claim. Overlooking these steps might affect the ability of a creditor to see the claim included in the list of creditors and

thus the access to the procedural and patrimonial rights attached to it.

70 National Reports state that insolvency legislations rarely provide for an express solution to this scenario; rather, the approach has been developed in case law or at least addressed in specialised literature.<sup>54</sup> The positions in the surveyed jurisdictions are very diverse. Some legal systems prioritise the agreement to arbitrate.<sup>55</sup> Conversely, other National Reports provide that any dispute in connection with a claim submitted to the insolvency proceedings must be resolved through the mechanisms designed by the insolvency regime to that end.<sup>56</sup> In those jurisdictions where, according to Question 4, the insolvency court is able to lift the stay of arbitration derived from the opening of insolvency proceedings, creditors may submit a request to that effect once they are notified that the filed claim has been refused or contested.<sup>57</sup> In some legal systems, the application of one or other solution will depend on whether the arbitration has already commenced when the creditor files the claim with the insolvency proceedings.<sup>58</sup>

71 Some National Reports within the group of jurisdictions that mandate the use of the

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<sup>53</sup> National Reports of France, the Netherlands, and the USA.

<sup>54</sup> National Reports of France, Hong Kong, Nigeria, Poland, and Spain.

<sup>55</sup> National Reports of Colombia, France, Germany, the Netherlands, Peru, and the PRC.

<sup>56</sup> National Reports of England, Nigeria, Poland, and the USA.

<sup>57</sup> National Reports of Egypt, England, Hong Kong, Singapore, and the USA.

<sup>58</sup> National Reports in Chile and Switzerland.



insolvency verification process also mention that the insolvency decision with regard to the credit might not produce *res judicata* effects outside of the insolvency proceedings.<sup>59</sup> This might impact the ability of a creditor to resort to arbitration at a later stage.

72 In connection with this matter, Question 9.b inquires whether the filing of the claim with the insolvency proceedings amounts to a submission to the jurisdiction of the insolvency court and a waiver of the arbitration agreement. Should the insolvency regime consider the act of filing as a submission to the insolvency jurisdiction, the creditor would have to decide between appearing in the insolvency proceedings to submit its claim, even if that implied the loss of the right to arbitrate in the eyes of the insolvency regime or, alternatively, seeking to enforce its rights outside of the insolvency through arbitration.

73 According to the majority of the National Reports, the filing of a claim with the insolvency proceeding does not amount to a submission to the jurisdiction of the insolvency court.<sup>60</sup> However, in most cases the insolvency court will not refer the parties to arbitration at its own initiative and the creditor who intends to resort to arbitration will have to actively invoke the arbitration

agreement before the court or at least include an express reservation in favour of arbitration when filing the claim.

74 It should be noted, however, that the answer given to this jurisdictional question from the perspective of the insolvency regime might not necessarily coincide with the approach that an arbitral tribunal, particularly seated abroad, will eventually adopt with regard to the same issue (e.g., if the waiver of the arbitration agreement is deemed to be governed by a law other than the insolvency law).

**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)?**

75 Question 10 asks whether an arbitration agreement may be enforced in connection with an action to set aside or avoid a contract on grounds provided by the

<sup>59</sup> National Reports of Chile, Germany, Poland, and Switzerland.

<sup>60</sup> National Reports of Colombia, England, France, Germany, the Netherlands, Peru, the PRC, Russia, Singapore, Spain, Switzerland, and the USA.

insolvency regime. The National Reports demonstrate that insolvency regimes frequently provide for specific mechanisms whereby the insolvency administrator can request the avoidance of transactions entered into by the debtor prior to the opening of the insolvency proceedings. These actions are part of the tools conferred to the insolvency administrator and the insolvency court to protect the insolvency estate and the equality of creditors.

76 Traditionally, the application of arbitration agreements to these actions has been a controversial matter across jurisdictions. A number of National Reports admit that the topic remains unsettled and has not been fully decided in their jurisdiction.<sup>61</sup> None of the surveyed jurisdictions confirms the possibility to arbitrate avoidance actions derived from insolvency law.

77 The survey demonstrates the various legal issues around the possibility to resort to arbitration in these cases. In the majority of the surveyed legal systems, avoidance actions based on insolvency law such as the insolvency *actio pauliana* are considered inarbitrable. Frequently, such prohibition to arbitrate is linked to the attribution of

exclusive jurisdiction over these actions in favour of the insolvency court.<sup>62</sup>

78 In other jurisdictions, the unavailability of arbitration is linked to the scope of the arbitration agreement, either because it was a claim not contemplated by the parties at the time of the conclusion of the agreement or on the grounds that the right to bring this type of action did not vest in the debtor prior to insolvency.<sup>63</sup> Some National Reports explain that the insolvency administrator, who acts as claimant in these actions, is not bound by the arbitration agreement for the purposes of that action,<sup>64</sup> and note that the claim might be brought not only against the counterparty to the transaction but also against the insolvent debtor. Thus, this issue may give rise to more classic arbitration questions about the scope of the arbitration agreement and the ability to arbitrate with a non-signatory, which may be influenced by the arbitral law relevant to the arbitration.

79 There are some avoidance actions which are not based on the insolvency regime and which would be available in non-insolvency scenarios. These must be distinguished from the actions covered by this Question 10. Various National Reports confirm that those

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<sup>61</sup> National Reports of England, Hong Kong, the Netherlands, Singapore, and Switzerland.

<sup>62</sup> National Reports of Brazil, Chile, Colombia, Egypt, France, Nigeria, Peru, Poland, Russia, Spain, and the USA.

<sup>63</sup> National Report of the Netherlands.

<sup>64</sup> National Reports of Germany, the PRC, and Russia.

ordinary avoidance actions can be decided through arbitration.<sup>65</sup>

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

80 Question 11 addresses whether the insolvency administrator is empowered to conclude new arbitration agreements on behalf or in the stead of the insolvency debtor after the commencement of the insolvency proceedings.

81 Unlike other Questions, the National Reports demonstrate a dominant approach to this matter. Most jurisdictions answer this Question 11 in the affirmative.<sup>66</sup> Frequently, this power is not expressly recognised but is deemed to fall implicitly within the wider faculties of the insolvency administrator to manage the insolvent estate; therefore, it is subject to the requirement that the administrator considers such an agreement to be in the interests of the estate.

82 According to some National Reports, the conclusion of a new arbitration agreement might need to be approved by the insolvency court or the committee of creditors.<sup>67</sup>

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

83 Question 12 inquires whether the approval of a creditors' agreement for the composition or restructuring of the insolvent estate serves to terminate the effects of the insolvency on arbitration, or those effects remain ongoing. The approval of this type of creditor's agreements frequently marks the closure of a relevant phase in the insolvency proceedings and, depending on the legal system, may even produce the end of those proceedings. If the insolvent debtor has not been liquidated at the end of the proceedings, issues sometimes arise concerning the possible re-activation of arbitration agreements and proceedings, and the termination of any other effect the insolvency might have produced on arbitration.

84 Some National Reports state that arbitration returns to its ordinary regime after the creditors' agreement has been approved

<sup>65</sup> National Reports of France, Russia, and Spain.

<sup>66</sup> The exception is the National Report of Colombia.

<sup>67</sup> National Reports of Brazil, Chile, Egypt, France, Germany, Hong Kong, the Netherlands, Peru, Poland, Switzerland, and the USA.

and the debtor resumes its activity.<sup>68</sup> This would include the possibility to commence new arbitration proceedings and to continue those which might have been suspended. In some legal systems, this result is subject to the requirement that the insolvency court also orders the lifting of the statutory moratorium provided by the insolvency regime.<sup>69</sup> Equally, some National Reports explain that the creditors' agreement may contain specific provisions concerning the outcome of pending claims<sup>70</sup> or the stay of actions against the debtor during a period of time, in which case creditors would be bound by it and arbitration might not be available.<sup>71</sup>

- 85 A minority of jurisdictions report that the approval of a creditors' agreement alone does not alter the effects of insolvency on arbitration, which will only cease once the insolvency proceedings come to a complete end.<sup>72</sup>

**13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or**

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

- 86 Question 13 focuses on whether the rules regulating the effects of insolvency on arbitration are mandatory, that is whether they can be displaced by agreement. Given that party autonomy is the prevalent rule in the field of arbitration, it becomes necessary to ascertain whether in the eyes of the insolvency regime an agreement between parties can amend or even exclude the application of the insolvency rules on arbitration.

- 87 In nearly all the surveyed jurisdictions, the answer is that those laws are mandatory and cannot be contracted around unless the insolvency regime itself grants powers to conclude such agreement.<sup>73</sup> As a result, an agreement contrary to the effects provided by the insolvency law on arbitration is null and void.

- 88 Despite this position, some of the National Reports from jurisdictions subject to EU law explain that the mandatory nature of their national insolvency law is subject to the choice of law rules contained in the EU

<sup>68</sup> National Reports of Egypt, England, the Netherlands, Poland, the PRC, Russia, Singapore, Spain, and the USA.

<sup>69</sup> National Report of Singapore.

<sup>70</sup> National Report of the Netherlands.

<sup>71</sup> National Reports of England, Spain, and the USA.

<sup>72</sup> National Reports of France, Hong Kong, India, Peru, and Switzerland.

<sup>73</sup> National Reports of Brazil, Chile, Colombia, England, Egypt, France, Germany, Hong Kong, India, the Netherlands, Nigeria, Peru, Poland, the PRC, Russia, Singapore, Spain, Switzerland, and the USA

Insolvency Regulation. Consequently, if EU law provides that the effects of insolvency on arbitration will be governed by the law of the EU Member State in which the arbitration has its seat, the law of the insolvency proceedings will not apply, even if it is mandatory in principle.<sup>74</sup>

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

89 Question 14 explores whether the fact that the arbitration is seated in the jurisdiction in which the insolvency proceedings are taking place results in the arbitrators being bound by the rules of that legal system on the effects of insolvency on arbitration (see Questions 32 and 33 for arbitrations seated abroad).

90 National Reports demonstrate a uniform approach to this Question 14, the general position<sup>75</sup> being that the mandatory nature of the rules discussed in Question 13 makes those rules also binding upon arbitrators seated within the territory of the

jurisdiction.<sup>76</sup> Some of them state expressly that this means that the rules on the effect of insolvency on arbitration are part of the law applicable by the arbitrators in deciding on their own jurisdiction and conducting the arbitration.<sup>77</sup>

91 The duty to comply with the mandate of the insolvency rules might be a relevant consideration in the context of a setting aside action filed against the award before the courts of the seat which, in the context of this Question 14, would coincide with the jurisdiction where insolvency proceedings were opened. It might also affect the enforceability of the award in that jurisdiction or, at least, its effectiveness within the insolvency proceedings.<sup>78</sup> The public policy questions raised in Questions 26 and 27 might also be relevant to these issues.

**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?**

<sup>74</sup> National Reports of Germany and Spain.

<sup>75</sup> The only exception is the National Report of Russia.

<sup>76</sup> National Reports of Brazil, Chile, Colombia, Egypt, England, France, Germany, Hong Kong, India, the Netherlands, Nigeria, Peru, Poland, the PRC, Russia, Singapore, Spain, Switzerland, and the USA.

<sup>77</sup> National Reports of Chile, Colombia, India, Peru, the PRC, and Spain.

<sup>78</sup> National Reports of Egypt, France, Germany, Poland, and the USA.

- 92 Question 15 asks whether the insolvency court’s personal jurisdiction over the arbitration counterparty/creditor plays any role in establishing the effectiveness of the insolvency regime, including rules on the impact of insolvency on arbitration such as the statutory stay or moratorium.
- 93 Most National Reports state that this is an irrelevant factor for the application of the insolvency regime. In those cases, the application of the insolvency law is exclusively dependent on the opening of

insolvency proceedings within the jurisdiction.<sup>79</sup>

- 94 In other jurisdictions, pertaining to the common law tradition, the subjection of a party to the effects on arbitration provided by the insolvency regime may require the existence of personal jurisdiction over that party.<sup>80</sup> Consequently, it may be argued in those jurisdictions that a stay is only binding and enforceable on the creditor if the courts of the place of insolvency have personal jurisdiction over the creditor.

**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 (i.e., 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?]**

- 95 Questions 16 and 18 address whether the insolvent party retains capacity to act in the arbitration or must be replaced by the insolvency administrator, and whether a name change to reflect the debtor’s new status is required. These administrative requirements should be addressed in the arbitration in order to ensure an enforceable

<sup>79</sup> National Reports of Chile, Colombia, Egypt, England, France, Germany, Hong Kong, India, the Netherlands, Nigeria, Peru, Poland, the PRC, Russia, Spain, and Switzerland.

<sup>80</sup> National Reports of Singapore and the USA.

award which names the proper parties. The participation of the administrator in the arbitration might also require additional conflict checks and disclosures by the arbitrators.

96 Question 16 inquires whether the insolvency administrator takes part in the arbitration exclusively or the insolvent party continues to have procedural capacity to participate.

97 Some National Reports distinguish between liquidation and reorganization proceedings. In those jurisdictions, the insolvent party maintains procedural capacity in reorganization proceedings,<sup>81</sup> restricted by the supervision or intervention of the insolvency administrator in some cases.<sup>82</sup>

98 Regarding liquidation proceedings, most National Reports state that the liquidator takes part in the arbitration exclusively,<sup>83</sup> while in a few the participation of the insolvent debtor is permitted.<sup>84</sup> Some of the surveyed jurisdictions make an exception and allow the insolvent party to maintain procedural capacity when the subject matter

of the arbitration is not part of the insolvency proceedings (e.g., unseizable assets and rights).<sup>85</sup>

99 Sub-question 16.a examines whether, in jurisdictions in which the insolvency administrator takes part in the arbitration, the administrator replaces the insolvent party and/or whether the insolvent party can continue to appear in its own name. According to the majority of National Reports, the insolvency administrator replaces the insolvent party in the arbitration so it is the estate rather than the debtor who takes part in the proceedings.<sup>86</sup> In a few jurisdictions, however, the insolvent party can continue in its own name, frequently alongside the administrator.<sup>87</sup> In these cases, the insolvent party's procedural capacity may be limited, for example, by requiring authorizations from the insolvency court or the insolvency administrator to participate in the arbitration proceedings.<sup>88</sup>

100 In some jurisdictions, the procedural capacity of the insolvent debtor and its ability to participate in the arbitration alongside the

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<sup>81</sup> National Reports of Brazil, Colombia, Peru, Poland, the PRC, Switzerland, and the USA.

<sup>82</sup> National Reports of Peru, Poland, the PRC, and Switzerland.

<sup>83</sup> National Reports of the Brazil, Colombia, Egypt, France, Germany, Hong Kong, the Netherlands, Nigeria, Peru, Poland, the PRC, Spain, Switzerland, and the USA.

<sup>84</sup> National Reports of Chile, England, India, Russia, and Singapore.

<sup>85</sup> National Reports of Chile and Germany.

<sup>86</sup> National Reports of Colombia, Egypt, France, Germany, Hong Kong, the Netherlands, Nigeria, Peru, Poland, the PRC, Switzerland, and the USA.

<sup>87</sup> National Reports of Chile, England, India, and Singapore.

<sup>88</sup> National Reports of Colombia, Germany, and the USA.



administrator might depend on whether the insolvency proceedings commenced at the request of the debtor (voluntary proceedings) or at the request of a third party (compulsory proceedings) (see Question 3.f above).

**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?**

101 Question 17 addresses whether potential confidentiality obligations applicable to

<sup>89</sup> National Reports of Brazil, Egypt, France, Germany, Nigeria, Peru, Russia, and Switzerland.

<sup>90</sup> National Reports of England, Hong Kong, India, the Netherlands, Peru, Poland, the PRC, Russia, Singapore, and Spain.

<sup>91</sup> National Reports of Colombia, England, India, and the USA.

arbitrations are affected by the opening of an insolvency proceeding against one of the parties. Furthermore, it explores whether the insolvency administrator may share information with the insolvency court or the creditors and if the creditors themselves may appear on the arbitration as parties.

102 While the relation between insolvency proceedings and confidentiality in arbitration is not a matter generally regulated by law in the surveyed jurisdictions,<sup>89</sup> the majority of National Reports state that considerations of confidentiality continue to apply after the opening of insolvency proceedings against a party in the arbitration.<sup>90</sup> Conversely, a few National Reports recognise that the public nature of insolvency proceedings may limit considerations of confidentiality.<sup>91</sup>

103 Rules that regulate insolvency proceedings may have an effect on confidentiality considerations. In some jurisdictions, the insolvency administrator has the obligation to report to the insolvency court,<sup>92</sup> or to give information to creditors or to the creditors' committee.<sup>93</sup> To limit the impact this may have on the confidentiality of the arbitration, the insolvency court may seal relevant

<sup>92</sup> National Reports of Colombia, Egypt, France, Germany, Hong Kong, the Netherlands, Poland, Russia, Singapore, and Spain.

<sup>93</sup> National Reports of Chile, Germany, Hong Kong, the Netherlands, Poland, Russia, Singapore, and Switzerland.



information.<sup>94</sup> Other Reports also state that, even if creditors have access to information related to the arbitration, they must treat such information confidentially.<sup>95</sup>

104 National Reports that address the possibility of creditors appearing in the arbitration as parties interested in the outcome of the proceedings explain that this option is not contemplated by the insolvency regime.<sup>96</sup>

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

105 Question 18 inquires whether the name of a party to an arbitration changes once it is subject to insolvency proceedings. This change might have an impact on the documents issued in the arbitration after the opening of the insolvency proceedings and might require the amendment of the name of the case in the records of an arbitral institution.

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<sup>94</sup> National Reports of France and the USA.

<sup>95</sup> National Reports of India, the Netherlands, and Singapore.

<sup>96</sup> National Reports of Colombia, Egypt, England, France, Germany, Hong Kong, Nigeria, Poland, the PRC, Singapore, Switzerland, and the USA.

<sup>97</sup> National Reports of Brazil, Chile, Colombia, Egypt, Germany, Nigeria, Peru, Poland, Singapore, and Switzerland.

106 National Reports are divided in this matter. While in some jurisdictions the name of the insolvent party changes,<sup>97</sup> in others it stays the same.<sup>98</sup> A few National Reports refer specifically to restructuring proceedings, in which case the name of the insolvent party does not change.<sup>99</sup>

107 The formulation of the name adopted by the insolvent party varies among the surveyed jurisdictions. While some add to the debtor's original name an expression that recognises that the party is subject to liquidation or restructuring proceedings,<sup>100</sup> in others the name of the debtor is replaced by that of the insolvency administrator.<sup>101</sup>

**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?**

<sup>98</sup> National Reports of England, France, Hong Kong, India, the Netherlands, the PRC, Russia, Spain, and the USA.

<sup>99</sup> National Reports of Peru and Switzerland.

<sup>100</sup> National Reports of Brazil, Chile, Colombia, Peru, Poland, Singapore, and Switzerland.

<sup>101</sup> National Reports of Egypt, France, Germany, and the USA.

108 Question 19 focuses on whether the insolvency administrator, or the debtor in possession in those cases in which it maintains procedural capacity, has the power to reach a settlement in the arbitration, or whether this requires an authorization from the insolvency court.

109 A handful of National Reports distinguish between restructuring and liquidation proceedings.<sup>102</sup> Regarding restructuring proceedings, in most jurisdictions the insolvency administrator or debtor in possession is empowered to reach a settlement in the arbitration, and there is no need for the insolvency court to approve it.<sup>103</sup>

110 In the case of liquidation proceedings, the majority of the surveyed jurisdictions establish requirements for the insolvency administrator or the debtor in possession to reach a settlement in the arbitration.<sup>104</sup>

111 The National Reports that do not distinguish between restructuring and liquidation proceedings, generally subject the capacity of the debtor and/or the administrator to settle the disputes to a requirement of prior

authorisation.<sup>105</sup> In some cases the settlement must be reported to and/or approved by the insolvency court<sup>106</sup> or the creditors.<sup>107</sup>

112 In a few jurisdictions, the insolvent party is empowered to reach a settlement by itself.<sup>108</sup> However, this power is restricted in order to protect the patrimonial interests of the estate (e.g., transactions of a substantial amount may have to be informed to the creditors or submitted to court approval).

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

113 Questions 20 and 21 focus on the status of interim measures issued by an arbitral tribunal either before or after insolvency proceedings began. In many jurisdictions, interim measures that directly impact assets otherwise subject to the insolvency estate may not be enforceable.

<sup>102</sup> National Reports of Brazil, Colombia, Poland, Singapore, Switzerland, and the USA.

<sup>103</sup> National Reports of Brazil, Poland, Singapore, Switzerland, and the USA.

<sup>104</sup> National Reports of Brazil, Poland, Singapore, Switzerland, and the USA.

<sup>105</sup> National Reports of Chile, Colombia, Egypt, France, Hong Kong, India, Poland, the PRC, Singapore, Switzerland, and the USA.

<sup>106</sup> National Reports of Egypt, France, Hong Kong, India, the Netherlands, Poland, the PRC, Singapore, and the USA.

<sup>107</sup> National Reports of Chile, England, Germany, the Netherlands, Peru, Poland, the PRC, Singapore, and Switzerland.

<sup>108</sup> National Reports of England, Germany, Nigeria, Peru, and Russia.

114 Question 20 addresses in general whether the arbitral tribunal may adopt interim measures concerning a party subject to insolvency proceedings. In the majority of the surveyed legal systems this is legally possible.<sup>109</sup> However, in most cases this possibility is subject to restrictions.<sup>110</sup> In some jurisdictions it is limited according to the type of measure,<sup>111</sup> e.g., it would be possible to take measures for evidence preservation, but not measures regarding assets covered by the insolvency proceedings. The rationale behind this distinction is the need to separate between measures that seek to anticipate and secure a potential enforcement action in the future, and hence have a patrimonial impact over the insolvent estate, and those which have neither such objective nor that effect. According to other Reports, the measures adopted by the arbitral tribunal must be reviewed or even accepted by the insolvency court or a state judge.<sup>112</sup>

115 The rest of the National Reports answer this Question 20 in the negative,<sup>113</sup> or state that

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<sup>109</sup> National Reports of Brazil, Colombia, Egypt, England, France, Germany, Hong Kong, the Netherlands, Nigeria, Poland, Peru, the PRC, Spain, Switzerland, and the USA.

<sup>110</sup> National Reports of Brazil, Colombia, France, Nigeria, Peru, Poland, the PRC, Singapore, and Switzerland.

<sup>111</sup> National Reports of Brazil, Colombia, France, Peru, Poland, the PRC, and Switzerland.

this possibility is admitted only in exceptional circumstances.<sup>114</sup>

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

116 Question 21 refers to the consequences that the commencement of insolvency proceedings may have on interim measures already adopted by an arbitral tribunal against the insolvent party.

117 In most of the surveyed jurisdictions, interim measures granted before the opening of the insolvency proceedings retain their binding effect.<sup>115</sup> Nevertheless, in the majority of cases the effectiveness of the measures is affected, since the possibility of enforcing them is suspended because of the moratorium imposed by the insolvency

<sup>112</sup> National Reports of Colombia, Egypt, England, Germany, and Spain.

<sup>113</sup> National Reports of Chile, India, Russia, and Singapore.

<sup>114</sup> National Report of India.

<sup>115</sup> National Reports of England, Hong Kong, the Netherlands, Nigeria, Singapore, and the USA.

proceedings.<sup>116</sup> Also, according to some National Reports the commencement of insolvency proceedings may qualify as a change in the circumstances which allows the tribunal to review the continuity of the measure.<sup>117</sup>

118 Other National Reports make distinctions based on the type of measure.<sup>118</sup> While a measure of evidence preservation may maintain its binding effect, one consisting of the freezing of assets may be lifted.<sup>119</sup> As explained in paragraph 114 above, the different objective and patrimonial impact of these measures is the reason behind the different treatment. A few National Reports establish that the interim measures adopted by the arbitral tribunal may be reviewed by the insolvency court or the insolvency administrator.<sup>120</sup>

**22. Is the capacity of the insolvent party to settle the dispute in the arbitration**

<sup>116</sup> National Reports of England, France, Germany, India, Poland, Singapore, and the USA.

<sup>117</sup> National Reports of England and Germany.

<sup>118</sup> National Reports of Brazil, Colombia, Peru, the PRC, Switzerland, and the USA.

<sup>119</sup> National Reports of Colombia, Nigeria, Peru, Poland, the PRC, and Russia.

<sup>120</sup> National Reports of Egypt and Spain.

**affected by the opening of insolvency proceedings in the jurisdiction?**

119 Question 22 asks whether the legal capacity of the insolvent party to reach a settlement in the arbitration is impaired by the commencement of insolvency proceedings.

120 Most jurisdictions answer the question in the affirmative.<sup>121</sup> There are different restrictions to the capacity of the insolvent party to settle. In some jurisdictions the insolvent party loses its procedural capacity over to the insolvency administrator, as discussed in Question 19 above. In these cases, the insolvency administrator is the only one allowed to settle.<sup>122</sup> According to other National Reports, the settlement must be reported to and/or authorised by the insolvency court,<sup>123</sup> or it must be approved by the creditors' committee.<sup>124</sup>

121 A number of National Reports specify that the insolvent party's capacity is affected only by the opening of liquidation proceedings, and not by the opening of other types of

<sup>121</sup> National Reports of Chile, Colombia, Egypt, England, France, Germany, Hong Kong, India, the Netherlands, the PRC, and the USA.

<sup>122</sup> National Reports of Egypt, England, Germany, India, and the Netherlands.

<sup>123</sup> National Reports of Colombia, France, Hong Kong, Poland, the PRC, and the USA.

<sup>124</sup> National Report of the PRC.

insolvency proceedings.<sup>125</sup> In those jurisdictions the insolvent debtor maintains its ability to settle in the case of restructuring proceedings, albeit with some limitations.<sup>126</sup>

122 According to a few National Reports, the insolvent party maintains its capacity to settle even after the opening of insolvency

proceedings in general.<sup>127</sup> However, according to most of them the appointment of an insolvency administrator limits the insolvent party's procedural capacity to settle the dispute.<sup>128</sup>

### **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?**

123 Question 23 addresses whether individual enforcement actions are barred once an insolvency proceeding has commenced. The expression "individual enforcement actions" refers to actions filed outside of the insolvency proceedings for the enforcement of a claim.

124 The answer to this Question 23 in the overwhelming majority of jurisdictions is affirmative.<sup>129</sup> In other words, even where the arbitration itself is not stayed, the enforcement of any resulting arbitration award typically must be pursued through the single, collective bankruptcy process. Some Reports also mention that ongoing enforcement proceedings must be suspended.<sup>130</sup>

125 A few of the surveyed jurisdictions mention exceptions to the general prohibition. For example, creditors secured by pledges or

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<sup>125</sup> National Reports of Brazil, Colombia, Egypt, and Switzerland.

<sup>126</sup> National Reports of Brazil and Switzerland.

<sup>127</sup> National Reports of Nigeria, Peru, Poland, Russia, and Singapore.

<sup>128</sup> National Reports of Peru, Poland, Russia, and Singapore.

<sup>129</sup> National Reports of Brazil, Chile, Colombia, Egypt, England, France, Germany, Hong Kong, India, the Netherlands, Nigeria, Peru, Poland, the PRC, Russia, Singapore, Spain, Switzerland, and the USA.

<sup>130</sup> National Reports of Brazil, India, the PRC, Spain, and Switzerland.

mortgages may execute their rights, albeit with some limitations.<sup>131</sup>

**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?**

126 Question 24 addresses the status of an arbitral claim in the insolvency proceedings, and the status of the same claim once it has been affirmed by an award.

127 In most jurisdictions, a claim subject to arbitration is considered a disputed or contingent credit.<sup>132</sup> As such, it shall be submitted to the insolvency process in order to be proved and establish its place and status among the various creditors.<sup>133</sup>

128 According to the National Reports, if the claim is ultimately upheld through an arbitral award, its status in the insolvency changes and it becomes an undisputed credit.<sup>134</sup> As such, it will be considered alongside the rest of the proved claims to

determine the rights of the creditor in the insolvency proceedings, including the participation in the distribution of the insolvent estate's assets. In the case of foreign arbitral awards, access to this status might be subject to a process of prior recognition of the award (see Question 25 below).

**25. Is a credit contained in an arbitration award a valid proof of credit (i.e., 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?**

129 Question 25 inquires whether a credit contained in an arbitration award suffices as proof of credit in insolvency proceedings, and further, whether there are special requirements for foreign awards.

130 In most of the surveyed jurisdictions an arbitration award is a valid proof of credit for the purposes of an insolvency

<sup>131</sup> National Reports of Chile, Egypt, and the Netherlands.

<sup>132</sup> National Reports of Chile, Colombia, Egypt, Hong Kong, the Netherlands, Peru, Poland, Singapore, Spain, and the USA.

<sup>133</sup> National Reports of Colombia, England, France, Hong Kong, Nigeria, Peru, Poland, the PRC, Russia, Singapore, Spain, and the USA.

<sup>134</sup> National Reports of Chile, France, Peru, Spain, and the USA.

proceeding.<sup>135</sup> Nevertheless, in some jurisdictions, the credit contained in the award may be challenged in the proceedings by the insolvency administrator or by other creditors, on the grounds available in the insolvency legislation of the legal system.<sup>136</sup>

131 According to a few National Reports, the award is not considered a valid proof of credit by itself.<sup>137</sup> In these cases, for example, the underlying credit recognised in the award must be submitted by the creditor for verification and admitted by the insolvency administrator.

132 Pursuant to most National Reports, a foreign award must comply with the requirements established by the legislation of that legal system to be considered a valid proof of credit.<sup>138</sup> In most cases this means that it must be recognised and become enforceable through an exequatur proceeding in accordance with the New York Convention.<sup>139</sup> The National Reports confirm that the bases available to deny the enforcement of an arbitration award, including those enumerated under the New

York Convention, remain fully available and applicable in the context of insolvency proceedings. This requirement would exclude the effectiveness of the foreign award in the insolvency proceeding prior to the recognition procedure. Few National Reports address whether the jurisdiction to recognise and grant the exequatur in favour of the foreign award lies with the insolvency court<sup>140</sup> or with other national courts.<sup>141</sup>

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

133 Question 26 probes whether the national jurisdiction's laws governing the effect of insolvency on arbitration can be considered part of the country's public policy, such that they may ultimately impact the validity as well as the recognition and enforcement of the award. This might be a very relevant consideration for arbitrators, who might look at whether compliance with the effects that the law of the insolvency proceedings

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<sup>135</sup> National Reports of Brazil, Chile, Colombia, Egypt, France, Germany, the Netherlands, Peru, Poland, the PRC, Spain, Switzerland, and the USA.

<sup>136</sup> National Reports of Egypt and Germany.

<sup>137</sup> National Reports of France, Hong Kong, Nigeria, and Russia.

<sup>138</sup> National Reports of Chile, Colombia, India, the Netherlands, Peru, the PRC, and Spain.

<sup>139</sup> National Reports of Brazil, Chile, Colombia, the Netherlands, Peru, the PRC, Russia, Singapore, Spain, and Switzerland.

<sup>140</sup> National Reports of the PRC, Russia, and Spain.

<sup>141</sup> National Reports of Brazil, Chile, and the Netherlands.



provides for the arbitration could affect the validity and the effectiveness of the award in that jurisdiction, either for the sole purpose of recognition within the insolvency verification process or in the context of a request for enforcement.

134 In most of the surveyed jurisdictions the rules that regulate the effects of insolvency on arbitration are considered part of public policy.<sup>142</sup> Some National Reports specify that a great majority of the rules are, but not all of them (see also Question 27 below).<sup>143</sup>

135 A few National Reports mention that in their jurisdictions there is no settled position as to whether the relation between insolvency and arbitration is part of public policy,<sup>144</sup> and some Reports affirm that there is no regulation at all regarding the relationship between insolvency and arbitration.<sup>145</sup>

**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**

<sup>142</sup> National Reports of Brazil, Chile, Colombia, Egypt, England, Hong Kong, Nigeria, Singapore, and Switzerland.

<sup>143</sup> National Reports of England, France, Germany, the Netherlands, Russia, and the USA.

<sup>144</sup> National Reports of Peru, Spain, and the USA.

**substantive point of view (i.e., proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (e.g., prohibiting individual proceedings [e.g., arbitration] outside the insolvency process)?**

136 Question 27 focuses on the principle of equality of creditors or *par conditio creditorum* and asks whether the surveyed jurisdictions consider it to be part of their public policy. Most National Reports support the view that the principle of *par conditio creditorum* is part of public policy.<sup>146</sup>

137 In those cases where the principle is found to amount to public policy, the Question further asks whether this characterization is linked exclusively to the equal treatment of creditors from a substantive point of view (i.e., proportion of their credit that is satisfied in the insolvency process) or if it also extends to the equal treatment of creditors from a procedural point of view (e.g., prohibiting individual proceedings

<sup>145</sup> National Reports of India and Nigeria.

<sup>146</sup> National Reports of Brazil, Chile, Colombia, England, France, Germany, Hong Kong, the Netherlands, Poland, the PRC, Russia, Singapore, Spain, Switzerland, and the USA.



[e.g., arbitration] outside the insolvency process).

138 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 by the insolvency regime might still be effective in the insolvency proceedings because the award would 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, i.e., every creditor should have its claim decided under the same procedure, an award rendered in breach/disregard of such procedures might not be effective even in the insolvency proceedings. This distinction might impact the arbitrators' decision on jurisdiction, particularly when seated abroad. If the arbitrators are satisfied that the disregard of the limitations or prohibition to arbitrate provided by the insolvency law will not impede the effectiveness of an award in the insolvency process, because such violation might not be caught by either of the grounds of the New York Convention, then the arbitrators

might be less concerned about accepting jurisdiction over the dispute and rendering an award against the insolvent party.

139 Most jurisdictions that consider that the principle of *par conditio creditorum* is part of public policy do so from both a substantive and procedural point of view.<sup>147</sup> A handful of jurisdictions consider that the principle is part of public policy only from a substantive point of view.<sup>148</sup>

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

140 The purpose of Question 28 is to ensure that no relevant provision of national law regarding the effect of national insolvency law on arbitration has been omitted in the preceding questions. The rapporteurs generally answered this Question 28 in the negative.

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<sup>147</sup> National Reports of Brazil, Chile, Colombia, Hong Kong, Nigeria, and Singapore.

<sup>148</sup> National Reports of Germany, the Netherlands, Poland, the PRC, Russia, and Spain.

## SECTION II: IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

141 **Section II** examines how the national law of the relevant jurisdiction approaches the impact that foreign insolvency proceedings have on arbitrations seated within the jurisdiction. It contains Questions 29 to 35.

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

142 Question 29 asks whether there are formal procedures which must be followed before an insolvency proceeding initiated outside the jurisdiction will produce effect in the jurisdiction. The recognition of a foreign insolvency might be a relevant or even necessary step for that insolvency to produce effects in another jurisdiction. Even if the insolvency law of the place of the insolvency proceedings intends to have universal reach and apply extraterritorially, the consideration of such proceedings and the consequences attached to it (including the effects on arbitration) might require the formal recognition of the valid existence of the foreign insolvency proceedings by the

authorities of the territory in which it intends to produce effects.

143 Nearly all the jurisdictions surveyed require some formal recognition of the foreign insolvency, but the approaches to how this could be achieved vary, with most jurisdictions falling into one of the following three categories.

144 Several jurisdictions will recognise the foreign insolvency pursuant to an existing inter-governmental agreement providing for reciprocal recognition of insolvencies or, in some cases, under treaties providing recognition of foreign judgments generally (which would include judgments of an insolvency court).<sup>149</sup> Where the country is party to very few such agreements, the recognition of foreign insolvencies has, in turn, been quite limited.<sup>150</sup>

145 Other jurisdictions permit recognition of a foreign insolvency pursuant to a letter of request from the foreign insolvency court<sup>151</sup> or formal application to the relevant national insolvency court.<sup>152</sup> In countries that have adopted the UNCITRAL Model Law on Cross-Border Insolvency, the requirements for such an application frequently follow those set forth in the

<sup>149</sup> E.g., National Reports of Egypt, Hong Kong, India, Peru, the PRC, and Russia.

<sup>150</sup> E.g., National Report of the PRC.

<sup>151</sup> E.g., National Reports of Hong Kong and India.

<sup>152</sup> E.g., National Reports of Brazil, Chile, Colombia, England, Singapore, and the USA.

Model Law (discussed further in Question 30 below).

146 Several countries will recognise a foreign order opening insolvency proceedings under the same national laws applicable to the recognition of foreign judgments in general, which in some cases require exequatur proceedings.<sup>153</sup>

147 In the surveyed jurisdictions where EU law applies, the EU Insolvency Regulation provides for the automatic recognition of the insolvency proceedings commenced in another EU Member State.<sup>154</sup> The EU jurisdictions surveyed also permit recognition of non-EU member state insolvencies under their national laws, typically following one of the regimes discussed in the preceding paragraphs.

**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?**

148 The UNCITRAL Model Law on Cross-Border Insolvency is designed to facilitate the recognition of insolvencies across jurisdictions, and provides a framework for recognition as well as a series of principles that may apply once recognition has occurred. The Model Law provides that a “qualifying foreign proceeding” should be recognised as either a main proceeding, taking place where the debtor had its centre of main interests at the date of commencement of the foreign proceeding, or a non-main proceeding, taking place where the debtor has an establishment.

149 Pursuant to Article 15 of the Model Law, a foreign representative (i.e., a representative of an insolvency court) may apply to a national court for recognition of the foreign proceeding in which the foreign representative has been appointed. The Model Law further provides that, upon recognition of a foreign main proceeding, commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed – i.e., including arbitrations.<sup>155</sup> Where the

<sup>153</sup> National Reports of Egypt, France; Switzerland; possibly also Nigeria.

<sup>154</sup> National Reports of England, France, Germany, [Netherlands], Poland, and Spain.

<sup>155</sup> UNCITRAL Model Law, Article 20. While this provision does not refer to arbitration expressly, paragraph 180 of the Guide to Enactment and Interpretation (2013) attached to the UNCITRAL Model Law on Cross-Border Insolvency Law provides that “Subparagraph 1 (a) [of article 20], by not distinguishing between various kinds of individual

proceeding that is recognised is a foreign *non-main* proceeding, such a stay may be made upon application of a party and at the direction of the national court.<sup>156</sup>

150 Given the comprehensive nature of this framework, Question 30 asks whether the jurisdiction has adopted the UNCITRAL Model Law and, if it has, whether it has adopted the provisions relating to the effects of insolvency on arbitration.

151 Only 7 of the 19 jurisdictions surveyed at the time of this report have adopted the UNCITRAL Model Law.<sup>157</sup> Of the jurisdictions that have adopted the Model Law, 3 have opted out of the provisions relating to the effects of insolvency on arbitration, that is, the provisions requiring a stay of all conflicting proceedings.<sup>158</sup> Only 4 jurisdictions surveyed adopt the provisions of the Model Law requiring a moratorium on local proceedings following the recognition of a foreign main insolvency.<sup>159</sup>

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

152 Question 31 asks whether foreign insolvency proceedings produce an effect on arbitration seated in the jurisdiction. The answers to this Question 31 varied.

153 The Reports were generally consistent that without a formal recognition by the local courts of the foreign proceeding, the foreign insolvency would have no impact on arbitration. Once the foreign insolvency was recognised, however, in several jurisdictions the effects on the arbitration are similar to those applicable in the event of a domestic insolvency proceeding, and would be answered by reference to Question 3 above.<sup>160</sup>

154 A jurisdiction that follows the UNCITRAL Model Law in full would impose a moratorium on all proceedings that involve

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action, also covers actions before an arbitral tribunal. Thus, article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement”.

<sup>156</sup> UNCITRAL Model Law, Article 21.

<sup>157</sup> National Reports of Brazil, Chile, Colombia, England, Poland, Singapore, and the USA.

<sup>158</sup> National Reports of Brazil, Colombia, and Poland.

<sup>159</sup> National Reports of Chile, England, Singapore, and the USA.

<sup>160</sup> E.g., National Reports of Brazil, Hong Kong, Peru, and Poland.

the debtor subject to the recognised foreign main insolvency, and this moratorium would equally apply to the arbitration.<sup>161</sup> However, where the arbitration-related provisions of the Model Law have not been adopted, the effects of the foreign insolvency proceedings on arbitration may be more limited. Typically, a Model Law jurisdiction will afford assistance to the foreign insolvency proceedings even in the absence of a formal stay; for example, a court may order interim measures to preserve the debtor's assets and contracts and prevent the constitution and enforcement of security interests over those assets, which could impact the arbitration.<sup>162</sup>

155 In EU Member States, the automatic recognition of a foreign insolvency opened in another EU Member State will lead to the application of the choice of law rules contained within the EU Insolvency Regulation in order to determine the impact of that foreign insolvency on arbitration. Those choice of law rules, discussed at sub-question 3.g above, generally provide that the law of the EU Member State of the opening of insolvency proceedings shall govern, unless the arbitration is already pending at the time of

the opening of insolvency, in which case the law of the EU Member State in which the proceeding are pending will regulate the effects of the insolvency on arbitration.<sup>163</sup>

156 Some National Reports note that under their national law, the capacity of a foreign person or juridical entity to be a party to arbitration is assessed based on the law of his/her nationality or principal place of business, which may align with the place of insolvency.<sup>164</sup> This might require the arbitrators to consider the impact of the foreign insolvency on the capacity of the insolvent party to arbitrate. Some of these jurisdictions have ruled that the capacity of the debtor to arbitrate is only affected by the opening of insolvency proceedings when the insolvency regime extinguishes the legal capacity of the party, as opposed to the effects it might produce over its procedural capacity and the capacity to manage its estate. According to this position, an insolvency rule providing for the prohibition to arbitration would not *per se* deprive a party of its capacity to arbitrate.<sup>165</sup>

157 Finally, several National Reports noted that there was no established answer within their national laws as to whether a foreign

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<sup>161</sup> E.g., National Reports of Chile, England, Singapore, and the USA.

<sup>162</sup> National Reports of Brazil and Colombia.

<sup>163</sup> National Reports of England, France, Germany, the Netherlands, Poland, and Spain.

<sup>164</sup> E.g., National Reports of Egypt, Nigeria, the PRC, and Switzerland.

<sup>165</sup> National Report of Switzerland.

insolvency would produce the same effect as a domestic insolvency.<sup>166</sup>

**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?**

158 Question 32 seeks to understand whether arbitrators would be required to consider the effects of the foreign insolvency on the arbitration. In all of the countries that had rules on the recognition of foreign insolvencies, the National Reports indicated that arbitrators would be required to defer to the recognition (or non-recognition) of the foreign insolvency by the courts, along with its resulting effects.

159 As stated above, in most instances, the effects on arbitration are applicable only in the event that the foreign insolvency had been recognised by the courts of the state; without such recognition, the arbitrators are not required to consider the foreign insolvency. There are two notable exceptions to this rule, however. First, National Reports of jurisdictions where EU law applies note that because the

recognition of insolvencies opened in EU Member States is automatic in other EU Member States and does not require a formal declaration, the arbitrators would likely be bound to consider the impact of the foreign insolvency and the EU Insolvency Regulation where both the arbitration and the foreign insolvency are seated in EU Member States.

160 Second, some National Reports note that where the conflict of laws rules applicable to the arbitration require the arbitrator to look to the laws of the state where the insolvency is taking place (e.g., to answer questions such as the capacity of the debtor to arbitrate, as discussed in paragraph 156 above), the arbitrators would be well advised to consider the impact of these laws on the arbitration in order to render an effective award, regardless of the recognition of the foreign insolvency as a formal matter.

161 Outside these two exceptions, National Reports do not address the possibility that arbitrators apply, by themselves and for the purposes of the arbitration, the rules of the seat concerning the recognition of foreign insolvencies. These rules are understood to be applicable primarily by courts, not arbitrators. This seems to indicate that seeking recognition by the courts of the seat is the most effective way for the foreign insolvency proceedings to produce

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<sup>166</sup> National Reports of China, India, and Nigeria.

effects in the arbitration. Still, most National Reports do not exclude the possibility that, when such recognition has not been sought before the courts of the seat, arbitrators might take into account the recognition criteria provided by the law of the seat to examine whether the insolvency is to be given legal recognition in the arbitration. This might be relevant in scenarios where the party intending to invoke the effects of insolvency in the arbitration has voluntarily refrained from requesting such recognition before the courts of the seat based on the prospect that it would not be granted (e.g., when the foreign insolvency is a sham or violated due process rights).

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

162 Question 33 essentially goes one step further than Question 32, asking whether the rules regarding the effects derived from the recognition of a foreign insolvency are considered rules of mandatory application for arbitrators seated in the jurisdiction. As was the case for Question 32, most National

<sup>167</sup> E.g., National Reports of Chile, Colombia, England, France, Germany, Peru, and the USA.

Reports indicate that where the foreign insolvency has been recognised by the courts of the seat, its effects, as prescribed by the law of the seat, are mandatory for the arbitral tribunal.<sup>167</sup> This is generally not codified in any statute or precedent, however, and thus is a matter of interpretation of the authors.

163 Other National Reports state that it is not entirely clear within their jurisdiction whether the rules that regulate the effects on arbitration of foreign insolvency proceedings are of mandatory application for arbitral tribunals seated in the jurisdiction in cases where such recognition has not taken place.<sup>168</sup> Despite this, the answers to Question 32 generally indicate that arbitrators would not need to apply those rules if the foreign insolvency has not been recognised at the seat of the arbitration.

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

164 Question 34 asks whether an arbitral award which does not take into account the effects of the foreign insolvency which has been recognised by the seat may be set

<sup>168</sup> E.g., National Reports of Brazil, the Netherlands, the PRC, and Switzerland.



aside in the jurisdiction. The answer to this Question 34 varies widely among the National Reports. In most jurisdictions the issue has never been expressly addressed in case law.

165 Many National Reports indicate that because the rules regulating foreign insolvencies are mandatory within the jurisdiction and impact the same principles of equal treatment of creditors that underlie the jurisdiction's insolvency rules more generally, an arbitral award that refused to consider the impact of a foreign insolvency despite its recognition under national law could be set aside on the grounds that it is contrary to public policy.<sup>169</sup>

166 Other National Reports note that the award might be set aside on other recognised grounds, for example, lack of capacity of the debtor to arbitrate or perhaps invalidity of the arbitration agreement in light of the foreign insolvency.<sup>170</sup>

167 Several other National Reports, however, indicate that the grounds for the annulment of an arbitration award are narrow and might not apply squarely to a situation in which a foreign insolvency was not given effect by the arbitrators.<sup>171</sup> These Reports suggest that while arguments to set aside

could be made, the grounds for avoiding an award on public policy are generally quite limited and the mere act of rendering an arbitration award in disregard of the effects produced by the foreign insolvency in accordance with the rules of the seat does not rise to the level of violating the equal treatment of creditors. Rather, it is the execution of the award as against the estate that must itself be in line with the principle of equal treatment, and this is a matter which should be addressed by the executing court and which falls outside of arbitral jurisdiction and of the annulment proceedings. This issue might be linked to the wider or narrower position on the principle of *par conditio creditorum* adopted by the jurisdiction, as discussed in Question 27.

**35. Are there any other provisions or case law concerning the effect of foreign insolvency on arbitration seated in the jurisdiction that have not been mentioned in the previous answers?**

168 Question 35 serves to ensure that no provision of national law of relevance to the intersection of arbitration and foreign

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<sup>169</sup> National Reports of Chile, Colombia, England, France, Germany, Poland, the PRC, Russia, Singapore, and the USA.

<sup>170</sup> E.g., National Report of Egypt.

<sup>171</sup> E.g., National Reports of the Netherlands, Spain, and Switzerland.





insolvency proceedings has been overlooked in the previous questions. National Reports generally answered this Question 35 in the negative.



## **ANNEX**

### **CHECKLIST ON THE EFFECTS OF INSOLVENCY ON ARBITRATION**

*This Checklist is intended to serve as a tool to identify and consider the various issues that may arise when a party to an arbitration is the subject of insolvency proceedings. The Checklist may be used together with the other elements of the Toolkit, including the Explanatory Report and the National Reports of the various jurisdictions, available [here](#).*

#### **Category 1: Conflict of Laws Considerations**

*Category 1 suggests an initial step of considering whether and how national insolvency laws applicable in the jurisdiction where the insolvency is taking place should impact the arbitration. The analysis involves choice of law considerations but also attention to the practical, procedural, jurisdictional, and award enforcement hurdles of an arbitration that might not accord with the laws of the jurisdiction in which the insolvency is taking place.*

1. Are the insolvency proceedings taking place in the same jurisdiction in which the arbitration is taking place?
  - (a) If yes, the arbitrators should proceed to consider whether the national law imposes effects on arbitration as a result of the insolvency, and whether these effects are mandatory or binding on the arbitrators and/or the arbitration parties. (See Category 2 below et seq.)
  - (b) If no, and the insolvency proceedings are taking place in a jurisdiction different from the seat of the arbitration, then proceed to Question 2 below.
2. Does the law governing the arbitration (the *lex arbitri*, which for the purposes of this Checklist is presumed to be the law of the seat of arbitration) contain rules that assist arbitrators in identifying the effects that the foreign insolvency may produce on the arbitrations seated within the jurisdiction?
  - (a) If yes, the application of any such rules by the arbitrators may depend on whether the foreign insolvency proceeding has been or is soon to be recognized by the jurisdiction in which the arbitration is taking place. (See Question 3 below.)
  - (b) However, even when:
    - i. the law of the seat does not contain rules that assist arbitrators in identifying the effects that the foreign insolvency may produce on arbitrations seated within the jurisdiction; or



- ii. the insolvency proceedings have not been formally recognised by the courts of the seat; or
  - iii. despite the recognition of the foreign insolvency, the law of the arbitral seat does not require consideration of the foreign insolvency regime,  
  
the arbitrators may nonetheless wish to consider the impact that the foreign insolvency regime purports to have on the arbitration. (See Question 4 below).
3. Does the law of the arbitral seat provide a mechanism for the recognition of a foreign insolvency? If yes:
- (a) Is recognition automatic? (See, e.g., EU Insolvency Regulation).
  - (b) If not automatic, has recognition been applied for and granted?
  - (c) If the answer to Questions 3(a) or (b) is affirmative, what are the effects on arbitration that derive from recognition? Various options may be possible:
    - (i) Some jurisdictions might provide for special rules governing the impact of foreign insolvencies in local arbitrations. For example, national provisions based on the UNCITRAL Model Law on Cross-Border Insolvency may require the country of recognition to stay local civil proceedings (including arbitrations) in deference to the foreign insolvency (regardless of the effects on arbitration provided by the recognizing State with regard to its own domestic insolvencies).
    - (ii) Other jurisdictions might provide for the application of the same principles that govern the effect of local insolvency proceedings on arbitration.
    - (iii) The EU Insolvency Regulation may require the application of the *lex fori concursus* (that is, the law of the place of insolvency) or the law of the seat, depending on the procedural status of the arbitration, to determine the rules governing the effect of the foreign insolvency in arbitration.
    - (iv) Alternatively, some jurisdictions will always defer to the *lex fori concursus*.
  - (d) Are the rules of the seat on the effects that a recognised insolvency might produce on arbitration applicable by arbitrators as part of the *lex arbitri* and/or because they may impact the validity of an award?
4. Does the law of the place of insolvency purport to impose effects on arbitration? If yes:
- (a) Are these effects intended to apply extraterritorially to arbitrations seated outside the jurisdiction where insolvency proceedings are being conducted?



- (b) Is the insolvency regime regulating the impact of the insolvency proceedings on arbitration part of the international public policy of the jurisdiction where insolvency proceedings are being conducted?
  - (c) Has the insolvency court issued an order seeking to impose effects on the arbitration abroad?
  - (d) Does the personal jurisdiction of the insolvency court over the counter-party to the arbitration have any relevance on the effectiveness of the measures provided by the insolvency law or the insolvency court concerning the arbitration?
  - (e) If the answers to Questions 4(a) to (d) lead to the conclusion that the insolvency regime purports to impose effects of the foreign arbitration,
    - (i) Will the laws impact the ability to commence or continue with the arbitration, and/or the ability to ultimately enforce an award? (See Categories 2, 3 and 5 below.)
    - (ii) Will the insolvency regime or the insolvency court's order impact the arbitration on a practical and procedural level? (See Category 4 below).
5. The application of the laws and/or rules found to be relevant by the arbitrators under Questions 3 and 4 might impact the jurisdiction of the arbitrators as well as the arbitral process:
- (a) For the identification of possible effects on jurisdiction, go to Categories 2 and 3.
  - (b) For the identification of possible effects on the arbitration process, go to Category 4.

**Category 2: Commencement or Continuation of the Arbitration Pending  
Insolvency Proceedings**

*Category 2 concerns whether the arbitration may and/or should commence or continue following the opening of insolvency proceedings, and under what circumstances. It also suggests consideration of whether certain subject matters are excluded from arbitral jurisdiction as a result of the pending insolvency proceedings.*

6. Does the relevant national law permit the arbitration to proceed concurrently with the insolvency proceedings, or does it purport to impose a stay on the arbitration?



7. Does the relevant national law purport to resolve all disputes involving an insolvent party in a single forum (*vis attractiva concursus*)? If so, does this rule purport to include arbitration?
8. In considering whether the arbitration can continue in light of the insolvency, are the following considerations relevant under the national law?
  - (a) Was the arbitration already pending at the time of the opening of the insolvency, or did it commence after the opening of the insolvency? Some jurisdictions impose different effects on pending versus newly commenced arbitrations.
  - (b) Is the insolvent party the arbitration claimant or respondent? Some jurisdictions permit arbitrations to continue where the debtor is the claimant but not where the debtor is the respondent.
  - (c) Are the insolvency proceedings liquidation proceedings, in which the debtor will cease to exist, or restructuring proceedings, in which the debtor will emerge following the proceedings? Some jurisdictions treat arbitrations differently depending on the type of insolvency proceedings. In some jurisdictions, pre-insolvency proceedings may exist, and these may also treat arbitration differently than in the case of insolvency proceedings.
  - (d) Were the insolvency proceedings commenced voluntarily or were they compulsory? Some jurisdictions might treat arbitration differently where the insolvency commenced at the request of the insolvent party in order to prevent the possibility that a debtor seeks to declare insolvency with the view of avoiding pending or forthcoming litigation or arbitration.
9. Have the effects of the insolvency on arbitration become operative merely through the opening of the insolvency proceedings, or do further steps need to be taken before such effects become operative?
10. If the national law purports to impose a stay on arbitration, is such a stay automatic?
  - (a) If the stay is not automatic, has the stay been actually sought and/or issued by the relevant insolvency authority?
  - (b) Can the national courts in which the insolvency is pending issue an order to enjoin the arbitration (e.g., an anti-arbitration injunction)? If so, has such an order been issued?
11. If the national law imposes a stay or prohibition on arbitration (either through the automatic application of the law or through a specific court order), does the law permit relief from such measure?



- (a) If such relief is permitted, has it been sought and/or obtained?
12. If a stay has been imposed and no relief has been sought or granted, may the arbitrators nonetheless continue with the arbitration in light of the applicable choice of law determination or the considerations in Category 1?
13. If the arbitration is allowed to continue, does the dispute concern certain subject matters that are nonetheless reserved to the jurisdiction of the insolvency court and may not be resolved in the arbitration?
- (a) The arbitrators may be prohibited from deciding matters relating to certain “core” insolvency matters, which are exclusively reserved for the insolvency court.
  - (b) In some jurisdictions, the insolvency court has the ability to avoid contracts or transactions concluded prior to the opening of insolvency on the basis of fraud or other similar doctrines, and the arbitrators may be prohibited from ruling on those matters.
  - (c) The arbitrators may not be authorized to issue an award directing a debtor to pay monetary compensation or granting other relief that entails compulsory enforcement measures. In these instances, the award might be limited to, or converted into, a declaratory decision.
14. When will the effects, if any, on the arbitration cease to have their effect? In some jurisdictions it may be possible to resume the arbitration after the insolvency proceedings have concluded or a creditors’ agreement has been reached and approved.

**Category 3: Potential Impact of the Insolvency on the Arbitration Agreement**

*Category 3 involves questions concerning whether the arbitration agreement itself may be affected by the opening of the insolvency proceedings.*

15. Does the relevant national law permit the insolvency administrator or court to terminate or suspend contracts?
- (a) If so, has such termination or suspension of the contract containing the arbitration clause occurred or is it likely to occur during the pendency of the arbitration proceedings?
  - (b) If termination or suspension of a contract has occurred, does such termination or suspension affect the validity or effectiveness of the arbitration agreement itself? The doctrine of separability may result in a situation in which the contract is terminated but the arbitration agreements remains effective. In these



circumstances, the arbitrator must decide whether to give effect to the contract termination in deciding the dispute.

16. Does the insolvency administrator or court have the ability to avoid contracts or transactions concluded prior to the opening of the insolvency on the basis of fraud or other similar doctrines?
  - (a) Does any such avoidance or setting aside affect the jurisdiction of the arbitrators and/or the enforceability of any decision issued in the arbitration?
17. Does the relevant national law permit the insolvency administrator or court to terminate or suspend the arbitration agreement itself?
  - (a) If so, has such termination or suspension of the arbitration agreement occurred or is it likely to occur during the pendency of the arbitration proceedings?
18. Was the arbitration agreement entered into after the opening of the insolvency proceedings? If so,
  - (a) Was it entered into by the debtor or the insolvency administrator?
  - (b) Did the party who concluded the arbitration agreement have the power, under the relevant national law, to do so?
  - (c) Do the rules on the effect of insolvency on arbitration also extend to arbitration agreements concluded after the opening of the insolvency proceedings?

#### **Category 4: Practical and Procedural Effects of the Insolvency on the Arbitration**

*Category 4 includes a series of questions relating to the procedural steps that may need to be taken in the arbitration to reflect the insolvency of one of the parties, as well as some of the practical impacts that the opening of the insolvency may have on the conduct of the arbitration.*

19. Who will participate in the arbitration?
  - (a) Does the insolvent party retain the capacity to continue to participate in its own name (as “debtor in possession”), or does it lose this capacity?
  - (b) Will the insolvency administrator take part in the arbitration? If so,
    - (i) Does he/she “step into the shoes” of the debtor, thereby replacing it entirely?



- (ii) Will the insolvency administrator's participation be exclusive, or will the debtor also continue to have a role and, if so, how will these roles be defined?
- 20. Does the insolvency administrator, and/or the debtor, retain the capacity to settle in the arbitration?
  - (a) The parties/arbitrator may also need to consider whether the settlement must be converted into an award or a judgment in order to be enforceable/effective against the insolvency estate.
- 21. How are the confidentiality obligations that otherwise may apply to the arbitration affected by the opening of the insolvency?
  - (a) Do creditors have any right to appear in the arbitration?
  - (b) Do creditors or other parties with an interest in the insolvency have any right to access information about the arbitration?
- 22. Does the name of the insolvent party change as a result of the opening of the insolvency proceedings, and does such change need to be reflected in the name of the arbitration case and the documents pertaining to it?
- 23. May the arbitrators issue interim measures concerning the insolvent party after the opening of the insolvency proceedings?
  - (a) Are certain types of interim measures prohibited, such as those that would purport to freeze or otherwise impact the insolvent estate?
- 24. Is the validity of interim measures issued prior to the arbitration affected by the opening of the insolvency proceedings?
  - (a) If so, does it depend on whether the measures have patrimonial effect on the insolvent estate?
  - (b) Should the arbitrators, and/or are they required to, modify such measures?

**Category 5: Enforcement of the Arbitration Award Against the Insolvent Debtor**

*Category 5 involves questions concerning the enforceability of the arbitration award.*

- 25. 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, or to enforce the





- potential arbitral decision? The alleged creditor might need to file the claim within the insolvency proceedings in order to register that claim. If so,
- (a) Has the alleged creditor taken such steps? If yes:
    - (i) Is there any argument that such a filing amounted to a waiver of the arbitration agreement and/or submission to the jurisdiction of the insolvency court?
    - (ii) If the insolvency court or administrator has challenged or rejected the claim, may the arbitral tribunal still be competent to decide the matter in a final and binding manner?
    - (iii) If the insolvency court or the administrator rule on the claim, is the matter *res judicata* or can the arbitration commence or proceed alongside the arbitration and eventually replace the insolvency court or administrator's decision?
  - (b) If the creditor has not taken such a step, will this impact the ability to enforce the award within the insolvency proceedings?
26. Does the relevant national law prohibit individual enforcement actions outside the collective insolvency process?
27. If a party intends to rely on the resulting award in the insolvency proceedings, what steps need to be taken to ensure the effectiveness of the award within the insolvency? (These may include, for example, the steps discussed in Question 25 above).
- (a) Has the creditor taken such steps? (In some jurisdictions, formal recognition of foreign awards under the New York Convention may also be required).
  - (b) Will the status of the claim in the insolvency proceedings change once the arbitration award has been issued and will that have any impact on the arbitration?
  - (c) What particular details, form or relief need to be included in the arbitration award in order to ensure its enforceability in the insolvency proceedings? Consider that some national laws do not accept decisions directing the payment of a monetary amount and, in these instances, the arbitrators may consider instead issuing a declaratory decision that the amount is owed.
28. Practically speaking, will the arbitration award be issued in sufficient time to be considered in connection with the administration of the insolvency estate? If not, does the arbitration award still provide meaningful redress to the creditor?



29. Are the relevant national rules applicable to the effects of the insolvency on the arbitration considered part of the public policy of the seat and/or of a prospective place of enforcement, including the insolvency jurisdiction? If so,
  - (a) How can the arbitrators address any possible validity or enforcement hurdles that the arbitration award might be confronted at the post-award stage?
  - (b) In considering this question, do the relevant national laws consider the principle of *par conditio creditorum* to be linked to the substantive rights of creditors (i.e., their right to an equal distribution) and/or to the procedural rights of creditors (i.e., their right to an identical process for dispute resolution)?
30. Are there other relevant validity and/or enforcement considerations that should be addressed in issuing the award?



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