



IBA TOOLKIT ON INSOLVENCY AND ARBITRATION
QUESTIONNAIRE
NATIONAL REPORT OF COLOMBIA

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IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

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

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

1. Does the law of Colombia contain any provision on the effect that the opening of insolvency proceedings produces on arbitration? If so, what is the source of the provision or provisions providing for the effects? That is, are the effects provided by the insolvency legislation as part of the consequences produced by the opening of insolvency proceedings? Or, are they provided by the arbitration legislation or law as a matter concerning the arbitrability of disputes, the capacity of the parties to arbitrate, the validity and effectiveness of arbitration agreements, or any other arbitration-specific category?

1. Colombian law does not specifically address the effect that the opening of an insolvency proceeding produces on arbitration. Law 1116 of 2006 (“Law 1116”) is the main legislation regarding the insolvency of commercial companies. It regulates reorganization and liquidation proceedings for both individuals and companies dedicated exclusively to commercial activities in Colombia.¹ Neither Law 1116 nor its regulatory decrees² contain specific provisions regarding the effect that the opening of an insolvency proceeding produces on arbitration.
2. The only exception is Article 21 of Law 1116, which expressly permits the commencement of legal proceedings, including arbitration, on the grounds of a breach of obligations that occurs after the commencement of the insolvency proceeding.³ Also, according to case law from the Insolvency Court,⁴ parties may commence independent legal proceedings in any matter

¹ Colombia has several insolvency regimes. Law 1116 of 2006, which came into force on 28 June 2007, establishes the general regime for commercial companies’ insolvency proceedings, which include rules for both reorganization and liquidation proceedings. A reorganization proceeding aims at preserving companies that are still financially viable through an agreement with its creditors. A liquidation proceeding aims for the quick and orderly settlement of the debtor’s assets to ensure the fulfilment of its economic obligations. For the purposes of this analysis, we will only refer to the regime in Law 1116 of 2006 http://www.secretariassenado.gov.co/senado/basedoc/ley_1116_2006.html.

² Decree 1074 of 2015, which regulates some provisions of Law 1116, among others.

³ “Artículo 21. . . . Los incumplimientos de obligaciones contractuales causadas con posterioridad al inicio del proceso de reorganización, o las distintas al incumplimiento de obligaciones objeto de dicho trámite, podrán alegarse para exigir su terminación, independientemente de cuando hayan ocurrido dichas causales . . .”. Translation by the authors: “Article 21. Breaches of contractual obligations caused after the opening of reorganization proceedings or those different from the breach of obligations subject to this proceeding could be alleged to request the contract termination”.

⁴ Colombian Superintendence of Companies, Division for Insolvency Proceedings.

related to a contract, as well as other matters unrelated to the insolvency proceeding's obligations.⁵ This also applies to arbitration.

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

3. The Colombian insolvency regime provides for a partial concentration before the Insolvency Court of disputes concerning the debtor. Colombian *vis attractiva concursus* rules apply only to execution proceedings⁶ against the debtor that are commenced before the initiation of the insolvency proceedings.⁷ *Vis attractiva concursus* rules do not apply to execution proceedings that are brought on the grounds of facts that take place after the initiation of the insolvency proceedings; they exist autonomously and are resolved by the courts, outside of the insolvency proceedings. Also, the Insolvency Court has jurisdiction to rule over the following actions that are brought on the grounds of facts that take place before the initiation of the insolvency proceedings, and this applies regardless of whether the proceedings are initiated before or after the initiation of the insolvency proceedings: (i) claw back actions; (ii) simulation actions; (iii) liability of the parent company when it is responsible for the debtor's insolvency;⁸ (iv) liability of actions against directors and officers when they are responsible for the depletion of the debtor's assets;⁹ and (v) proceedings for the termination of contracts to which the insolvent debtor is a party. These proceedings may be carried out simultaneously with the insolvency proceeding before the Insolvency Court.
4. Proceedings of a purely declaratory nature, including those seeking to establish contractual liability, are not included in the rule, regardless of whether they commence before or after the debtor's admission to insolvency.¹⁰ These proceedings are tried separately before the courts.
5. Arbitration does not fall under the scope of Colombian *vis attractiva concursus* rules because it is not a collection ("execution") proceeding and is therefore not covered by Article 20 of Law 1116.

⁵ *Recaudo Bogotá S.A.S.* [2019] Superintendencia de Sociedades.

⁶ Under Colombian law, execution proceedings correspond to a judicial proceeding commenced by the creditor before the civil courts to obtain payment of its debts. To commence an execution proceeding, the creditor must have a collection document, this is a document evidencing that the credit is clear; express; and has become due and payable (Colombian General Code of Procedure, art 422).

⁷ Law 1116, art 20.

⁸ *ibid*, art 61.

⁹ *ibid*, art 82.

¹⁰ *ibid*, art 20.

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

In answering this question, please address separately each of the following points:

a. Does the law draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant?

6. The opening of insolvency proceedings has no effect on the possibility to commence or continue arbitration proceedings. The Colombian insolvency regime does not provide for an automatic stay of proceedings against the debtor or otherwise impair the ability of third parties to initiate arbitration against the debtor. It also does not affect the debtor's ability to initiate arbitrations against third parties. As mentioned above, arbitrations are not considered collection proceedings and thus may continue. Article 21 of Law 1116 allows the commencement of judicial proceedings on the grounds of the breach of obligations that occurs after the commencement of the insolvency proceeding. Also, according to the Insolvency Court case law, the parties may commence judicial proceedings—including arbitration proceedings—in any matter related to a contract and other matters not related to the insolvency proceeding's obligations.¹¹
7. The law does not draw any distinction between arbitration proceedings where the insolvent party acts as defendant and as claimant. The parties that are admitted to an insolvency proceeding can be part of arbitration proceedings, both as defendants and as claimants.

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?

8. No. Although Law 1116 contains different rules for reorganization and liquidation proceedings, such as the distinction mentioned in the answer to Question 16, provided at Paragraphs 35 to 38 below, regarding the insolvency administrator, there is no distinction as to the effects which opening either of these proceedings may have on the possibility to commence or continue arbitration proceedings.

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

9. There is no distinction as to the effects of the opening of insolvency proceedings based on the subject matter or relief sought in the arbitration. However, in an arbitration proceeding, parties cannot request the payment from the debt subject to restructuring, as such request

¹¹ *Recaudo Bogotá S.A.S.* [2019] Superintendencia de Sociedades.

would involve a violation of the payment order established by law. Therefore, the subject matter or relief sought in the arbitration cannot be related to the payment of obligations that are part of the restructuring debt that is going to be paid in accordance with the reorganization agreement. Hence, like all other credits, the monetary award obtained in an arbitration proceeding will be subject to the reorganization proceeding based on the statutory payment order established by law. As discussed in the answer to Question 2, certain types of actions that may occur after the commencement of an insolvency proceeding, such as clawback actions, will be decided in the insolvency proceeding by the Insolvency Court. We are not aware of any precedent regarding these actions being brought to arbitration.

10. The debtor's ability to comply with the award will be subject to the insolvency rules. Thus, a debtor may not comply with an award that requests the payment of a restructuring debt outside of the insolvency proceedings. Instead, the award must be dealt with through the insolvency proceeding, as discussed in the answer to question 9 below.

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

11. Colombian law does not provide distinctions based on the type of insolvency proceeding.

e. Does the law draw any distinction between arbitration proceedings which are pending at the time of the opening of insolvency proceedings and arbitration proceedings which commence after the opening of insolvency proceedings?

12. The law does not draw a 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. The Colombian insolvency regime does draw a distinction as to the treatment of a receivable originating from an arbitral award, depending on the moment when the alleged wrongdoing occurred (that is, whether it arose before or after the opening of the insolvency proceeding).¹² If the alleged wrongdoing occurred before the commencement of the insolvency proceedings, the obligations corresponding to the future arbitration award are deemed to be litigious obligations and must be included in the Project of Claims and Voting Rights brought before the Insolvency Court.¹³ Once the arbitral award is issued,¹⁴ the payment of the obligation will be made in accordance with the reorganization agreement (not applicable in liquidation proceedings where credits shall be paid with the money obtained from the sale of the debtor's assets). If the alleged

¹² Law 1116, art 25.

¹³ *ibid*. The Project of Claims and Voting Rights is the document by means of which the debtor ranks the pending credits according to the statutory payment order that will be subject to the reorganization proceeding.

¹⁴ This is applicable both to arbitrations commenced before the insolvency and arbitrations commenced after the insolvency, as long as the alleged wrongdoing takes place before the admission to the insolvency proceeding.

wrongdoing occurred after the commencement of the insolvency proceeding, the arbitration may be commenced. Once the arbitral award is issued, it will be paid as an administrative expense. Therefore, its payment will have a priority over the credits that are subject to the reorganization agreement, as is the case with all liabilities that arise after the debtor is admitted to reorganization.

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

13. There is no distinction in the effects mentioned above between voluntary and compulsory insolvency proceedings.

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

14. The above-mentioned statements apply to arbitration proceedings regardless of the location of the seat.

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

15. There are no effects of insolvency on the possibility to commence or continue arbitration proceedings. The effects of insolvency in general become operative at the moment of admission of the debtor into the insolvency proceedings.¹⁵

¹⁵ Law 1116, art 18.

- 4. Does the law of the jurisdiction permit relief from the effects above? If so, what procedures must be followed in order to proceed with an arbitration?**
- a. Can an interested party seek to intervene in the insolvency proceeding in order to proceed with arbitration?**
 - b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?**

16. As mentioned above, there is no impact on arbitration, and the Insolvency Court has no jurisdiction to decide whether a matter should be sent to arbitration. Accordingly, Questions (a) and (b) are not applicable.

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

17. Colombian law does not provide for any rule authorizing the Insolvency Court to stop an arbitration proceeding, whether seated in Colombia or elsewhere. However, the Insolvency Court has wide powers to administer and safeguard the insolvency proceeding.¹⁶ Accordingly, the Insolvency Court could argue that it has the authority to issue orders that may affect an arbitration proceeding. In such case, the Insolvency Court would have to weigh insolvency, arbitration, and civil procedural rules (such as Article 590 of the Colombian General Code of Procedure).
18. Although we are not aware of any precedent regarding orders given by the Insolvency Court to stop arbitration proceedings, the Insolvency Court could potentially apply Article 590 of the Colombian General Code of Procedure, which allows courts to grant “innominate term injunctions”. These are measures to protect a disputed right and prevent its violation or the consequences derived from it, prevent and cease damages, and preserve the purpose of a claim. In the context of insolvency proceedings, the innominate term injunction must be aimed to protect, preserve, and custody debtor’s assets and to safeguard the reorganization of the debtor or the orderly liquidation of its assets in reorganization and liquidation proceedings, respectively. Nevertheless, the innominate term injunctions must comply with certain criteria: (i) there must be a showing of jeopardy of debtor and creditor rights; (ii) there must be a showing of the *prima facie* merits regarding the existence and quantity of the debtor’s obligations; and (iii) the necessity, proportionality, and effectiveness of the ordered measure must be established. Therefore, in practice it is possible that an innominate term injunction ordered by the Insolvency Court may interfere with arbitration proceedings.

¹⁶ *ibid*, art 5.

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?

19. Pursuant to Colombian law, the Insolvency Court (not the administrator) may allow the termination of ongoing agreements that are excessively onerous to the debtor, considering prevailing market conditions. The opposing party in the contract is entitled to compensation for damages, which are to be paid as part of the reorganization agreement. If the parties disagree on the amount of the damages, Law 1116 mandates that the dispute must be settled through a judicial proceeding.¹⁷ There is nothing in the Colombian insolvency regime that suggests that the dispute cannot be brought to arbitration.
20. In the case of liquidation proceedings, upon the commencement of the proceedings, all contracts are terminated, except for those that are: (i) necessary to preserve the debtor's assets or (ii) are directly related to the liquidation of its business and affairs.¹⁸ Any disputes arising out of the performance of the contracts or damages owed under the contract could be brought to arbitration, if covered by an arbitration agreement.¹⁹

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?

21. There is no effect on the arbitration clause if the Insolvency Court authorizes to terminate the contract that contains such clause. Under the autonomy principle set in the Colombian Arbitration Statute (Articles 5 and 79 of Law 1563 of 2012), the arbitration clause is considered to be an independent agreement from that in which it is contained; therefore, it will not be affected by the termination or annulment of the contract containing it. As described in response to Question 6, in Paragraphs 19-20 above, in the event the Insolvency Court allows the termination of an ongoing agreement, and the opposing party in the contract disagrees about the damages it is entitled to receive as a result of such termination, such dispute may be resolved through arbitration.

¹⁷ *ibid*, art 21.

¹⁸ *ibid*, art 50.

¹⁹ Law 1563 of 2012, art 3.

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?

22. No. Colombian law does not enable the insolvency administrator or the Insolvency Court to unilaterally terminate or suspend the effectiveness of arbitration agreements. Neither can the parties to an arbitration agreement unilaterally suspend or terminate its effectiveness.

If the debtor had already executed an arbitration agreement prior to the commencement of the insolvency proceedings, the liquidator and the Insolvency Court may consider that the payment of the arbitrators' fees is an unnecessary expense for the purposes of liquidating the company and choose to refrain from paying them. Under Colombian rules for domestic arbitrations, when a party fails to pay its share of the arbitration expenses at the outset of the proceeding and the other party does not pay them, the arbitration agreement loses its effect under the law.²⁰

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

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

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

23. The arbitration may commence or continue without interference from the insolvency proceeding. Nevertheless, the creditor should file a claim before the Insolvency Court for the litigious claims to be included in the proceeding and, eventually, paid in accordance with the reorganization agreement or out of the liquidation proceeds.

24. (a) Claims that are covered by an arbitration agreement cannot be resolved by the Insolvency Court. The alleged creditor must file a litigious claim before the Insolvency Court, which will be paid within the rules of the insolvency proceedings once the tribunal rules in the creditor's favor.

25. (b) Such filing does not constitute a submission of the jurisdiction of the Insolvency Court or a waiver of the arbitration agreement. Claims that require a declaratory judgment or the finding of liability cannot be decided by the Insolvency Court in Colombia. A claim of this nature would be subject to two proceedings in parallel. On the one hand, it must be filed before the Insolvency Court as a contingent liability, within the legal timeframe for submission of credits

²⁰ *ibid*, art 27.

within the insolvency proceeding.²¹ A financial provision will be made in the insolvency proceeding, to account for a possible successful claim. In parallel, the claimant must initiate arbitration. Once the award is rendered and claimant is successful, the credit is paid within the rules of the reorganization.

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)?

26. No. The Insolvency Court has exclusive jurisdiction to rule on the insolvency *actio pauliana* commenced by the insolvency administrator or any creditor to clawback the transaction. The decision is conclusive and binding upon all parties.²²

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

27. No. The insolvency administrator does not have the power to legally represent the debtor; therefore, it cannot conclude new arbitration agreements. Its function is limited to the filing of the Project of Claims and Voting Rights and the reorganization agreement.

28. In reorganization proceedings, the debtor can continue to conduct its ordinary course of business, which includes entering into arbitration agreements.²³

29. In liquidation proceedings, the liquidator cannot enter into any agreement unless it has the purpose of preserving the liquidation estate and it is subject to prior authorization by the Insolvency Court.²⁴ In a relevant case, the Insolvency Court ordered the liquidator to exclude an arbitration clause from an agreement he intended to execute, as such clause would create additional expenses for the company under liquidation in the event that conflicts would arise.²⁵

²¹ *ibid*, art 3.

²² *ibid*, arts 74 and 75.

²³ *ibid*, art 17.

²⁴ *ibid*, art 50.

²⁵ *Constructora Global S.A. en liquidación judicial* [2013] Superintendencia de Sociedades.

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

30. As discussed throughout, there are no effects of insolvency on arbitration in Colombia. In liquidation proceedings, where the outcome is the winding up of the company instead of a reorganization plan, the liquidator must constitute a reserve that will allow him to pay for the award once it becomes enforceable.

13. Are any or all the rules regulating the effects of insolvency on arbitration mandatory? That is, can an agreement between the insolvent party and one or more of its creditors (eg, the parties to the arbitration) exclude the application of those rules?

31. In general, insolvency rules in Colombia are mandatory and cannot be modified by private agreements.²⁶

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

32. In the case of domestic arbitration, arbitrators are compelled to follow mandatory rules of the Colombian legal system. Given the mandatory nature of the insolvency regulations, arbitrators must consider such rules when conducting domestic arbitration proceedings. However, as there are no effects of insolvency on the possibility of whether to proceed with an arbitration in Colombia, arbitrators may proceed with the arbitration without interference from the insolvency proceedings.

33. In the case of international arbitration seated in Colombia, as mentioned in the answer to Question 26, provided at Paragraphs 53 to 55, the previous rule might be interpreted differently, as arbitrators are not necessarily bound by national mandatory rules, unless they are considered part of Colombia's international public order.²⁷ We are unaware of precedents where Colombian courts have studied whether insolvency rules are part of the international public order of Colombia. To the extent of our knowledge, there is no ruling in Colombia where international arbitrators have been considered to be bound by such regulations. Consequently, it is the duty of the arbitrators to determine on a case-by-case basis whether a specific insolvency rule meets the criteria to be considered as part of Colombian International public order.

²⁶ Law 1116, art 126; Coordinadora Internacional de Cargas Coordicargas S.A. [2015]. Superintendencia de Sociedades; Vida Centro Profesional [2014]. Superintendencia de Sociedades.

²⁷ Case SC17655-2017. [2017] Supreme Court of Justice of Colombia, Civil Cassation Chamber; Case SC-8453-2016 [2016] Supreme Court of Justice of Colombia, Civil Cassation Chamber; Case T-354 [2019] Constitutional Court of Colombia; Case 30.161 [2015] Council of State of Colombia, Third Section; and Case 60714 [2020] Council of State of Colombia, Third Section.

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?

34. No. One of the Colombian insolvency regime principles is *universality*. According to this principle, *all* creditors of the insolvent debtor are bound by the insolvency proceedings, without any regard to other grounds for establishing jurisdiction. The insolvency regime rules over all the aspects that concern the insolvency proceeding, including, but not limited to, the creditors and the relation of the creditors with the debtor.²⁸

Part II: Considerations with Respect to the Arbitration Proceeding Where a Party Is Subject to Insolvency Proceedings

16. Will the insolvency administrator take part in the arbitration exclusively or will the insolvent party in some instances continue to have procedural capacity to participate in the arbitration in its own name (debtor in possession)?

a. If the insolvency administrator takes part in the arbitration, does she step into the shoes of (ie, replace) the insolvent party or can the insolvent party continue to appear in its own name? [in the latter option, what are the roles of the insolvency administrator and the insolvent debtor?]

35. The insolvency administrator in a reorganization proceeding (“*promotor*”) will not take part in the arbitration, and the insolvent party will keep procedural capacity to participate in arbitration on its own behalf through its legal representative (the person who represents and acts on behalf of the debtor). The *promotor* has limited functions related to the negotiation, analysis, and drafting of the reorganization agreement and to the delivery of relevant financial, administrative, accounting, and legal information of the debtor in reorganization.

36. The insolvency administrator in a liquidation proceeding (“*liquidador*”) will have the status of officer of the company and will act as the legal representative of the debtor, representing it before third parties for any and all purposes.

37. The debtor will continue to take part in the arbitration during both reorganization and judicial liquidation proceedings. It will participate in reorganization proceedings through its legal representative, whereas it would participate in judicial liquidation proceedings through its *liquidador*.

38. Article 17 of Law 1116 establishes limitations to the insolvent debtor that may be related to arbitration or any other judicial proceeding. Accordingly, the insolvent party would need the Insolvency Court’s authorization to (i) withdraw a claim, (ii) accept the plaintiff’s claims, (iii) terminate a proceeding unilaterally or by mutual agreement, and (iv) settle.

²⁸ Law 1116, art 4.

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?

39. Considerations of confidentiality that apply in a non-insolvency scenario may not be fully applicable in an insolvency proceeding scenario. As a matter of fact, all insolvency proceedings are considered to be of public nature; therefore, information about them must be made available to all interested parties.²⁹
40. The creditor has the burden of proof regarding (i) the existence of the obligation; (ii) its recognition; and (iii) the amount of such obligation. Regarding an arbitration related to the insolvency proceeding, the interested party shall prove or provide (i) the amount due; (ii) the identity of the creditor; (iii) the documents that support the claim; and (iv) the estimation of compensation.³⁰ The insolvency regime does not provide specific rules about how the existence of the obligation shall be proven; thus, such flexibility suggests that creditors have some discretion to determine the scope and nature of the information about the arbitration that they reveal to the Insolvency Court. On the other hand, the Insolvency Court may, on a case-by-case basis, request the disclosure of information that could be considered confidential. For this purpose, the Insolvency Court may consider factors such as the capacity of the parties to disclose confidential information and the mechanisms to maintain the confidentiality of information received by the Insolvency Court. Therefore, creditors must ensure that the information produced to the Insolvency Court complies with confidentiality considerations that may apply under the arbitration scenario.
41. The Insolvency Court has powers to adopt measures deemed necessary to protect sensitive matters subject to confidentiality.³¹ Accordingly, the Insolvency Court will decide on a case-by-case basis how confidential information must be treated.
42. In any case, creditors do not acquire the ability to appear in the arbitration as parties interested in the outcome of the proceedings.

²⁹ *ibid.*

³⁰ The estimation of compensation refers to the additional amount of money (besides the amount due) that must be paid by the debtor to fulfill its obligation.

³¹ Law 1116, art 5.

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

43. Yes. Debtors subject to reorganization proceedings must add the expression “*en reorganización*” at the end of their name, while debtors in liquidation proceedings must add “*en liquidación judicial*” at the end of their name.

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?

44. In the context of reorganization proceedings, Law 1116 establishes certain limitations on procedural conducts of the insolvent debtor in an arbitration or any other judicial proceeding. The Insolvency Court is required to authorize a settlement reached in the arbitration for it to be effective if it entails the payment of pre-insolvency claims, results in the disposal of debtors’ assets, or affects unreasonably the recovery of debtor’s assets.³²
45. In liquidation proceedings, the liquidator does not need authorization from the Insolvency Court to settle disputes in arbitral proceedings. However, any settlement must consider creditors’ interest and the maximization of the liquidation estate to evaluate whether it is most convenient to settle or to continue with the arbitration.³³

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

46. Yes. However, if the measures conflict with mandatory insolvency rules, the latter will take precedence.³⁴ In other words, due to the universality principle, an arbitral tribunal cannot adopt decisions that affect debtor’s assets that are bound by the insolvency proceeding. As to the other assets of the debtor, the Insolvency Court shall analyse them on a case-by-case basis to determine whether interim measures may be adopted.

³² *ibid*, art 17.

³³ *ibid*, art 48.

³⁴ *ibid*, art 126; Coordinadora Internacional de Cargas Coordicargas S.A. [2015]. Superintendencia de Sociedades; Vida Centro Profesional [2014]. Superintendencia de Sociedades.

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

47. The opening of insolvency proceedings in Colombia may affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings, only if the nature of the interim measure conflicts with mandatory insolvency rules.³⁵ This could occur if there is an order for the freezing of assets or any other that would impair the ability of the insolvency court to properly conduct the insolvency proceedings. If this is the case, the company could find itself legally unable to comply with the order issued by the arbitral tribunal.

22. Is the capacity of the insolvent party to settle the dispute in the arbitration affected by the opening of insolvency proceedings in the jurisdiction?

48. As explained in response to Question 19, the settlement would need to be authorized by the Insolvency Court.

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?

49. Yes. Upon the initiation of insolvency proceedings, creditors cannot commence collection proceedings against the insolvent party (these are subject to an automatic stay). Nevertheless, declarative proceedings can be commenced by creditors.³⁶

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?

50. A claim that is being pursued in arbitration but has not yet reached a final award must be filed before the Insolvency Court as a contingent liability (or litigious credit) within the legal timeframe for submission of credits within the insolvency proceeding.³⁷ A financial provision will be made in the insolvency proceeding to account for a possible successful claim. Once the award is rendered and claimant is successful, the credit is paid within the rules of the reorganization or liquidation proceedings.

³⁵ Law 1563 of 2012, art 89(b)(ii).

³⁶ Law 1116, art 20.

³⁷ *ibid*, art 25.

25. Is a credit contained in an arbitration award a valid proof of credit (ie, valid title) for the purposes of the insolvency proceedings? If it is a foreign award, will it need to be recognised under the New York Convention for it to be accepted or is there any other requirement that needs to be satisfied?

51. Yes. If the arbitral award was issued in Colombia—including international arbitral proceedings seated in Colombia—the award will be considered as a judgment issued by a local court and thus will be valid proof of the credit.³⁸
52. Regarding foreign arbitral awards, there is no precedent of the Insolvency Court that indicates whether such awards shall comply with the recognition procedure established in the New York Convention and in the Colombian Arbitration Statute for them to be accepted as a valid proof of credit. However, insolvency rules provide that whenever a litigious credit is intended to be recognized in an insolvency proceeding, the judgment that contains such credit must be enforceable.³⁹ To become enforceable, a foreign award must be recognized under Colombian law 1563 of 2012, which follows the New York Convention.

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

53. Yes. All insolvency rules in Colombia are considered to be public policy.⁴⁰
54. However, Colombia's Supreme Court of Justice has established that not all provisions that are mandatory under national law are considered to be part of Colombia's international public policy, which would be the rules binding for international arbitrations seated in Colombia.⁴¹ To determine whether a specific insolvency rule is considered part of Colombia's international public policy, arbitrators shall interpret it on a case-by case basis.
55. The Supreme Court and the Constitutional Court of Colombia have established that the international public order of Colombia is composed by the most basic notions of morality and justice, such as, but not limited to, the respect for fundamental rights, the principle of good faith, and the basic guarantees of due process. Further, the Supreme Court stated that the violation of norms that enshrine the fundamental principles of the institutions and the basic structure of the State violate the international public order of Colombia.⁴²

³⁸ Law 1563 of 2012, art 111.

³⁹ Law 1116, art 25.

⁴⁰ *ibid*, art 126; Coordinadora Internacional de Cargas Coordinadoras S.A. [2015]. Superintendencia de Sociedades; Vida Centro Profesional [2014]. Superintendencia de Sociedades.

⁴¹ Case SC17655-2017. [2017] Supreme Court of Justice of Colombia, Civil Cassation Chamber; and Case SC-8453-2016 [2016] Supreme Court of Justice of Colombia, Civil Cassation Chamber.

⁴² Case T-354 [2019] Constitutional Court of Colombia; Case 30.161 [2015] Council of State of Colombia, Third Section; and Case 60714 [2020] Council of State of Colombia, Third Section.

27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a substantive point of view (ie, proportion of their credit that is satisfied in the insolvency process) or does it extend to the equal treatment of creditors from a procedural point of view (eg, prohibiting individual proceedings [eg, arbitration] outside the insolvency process)?

56. Yes, *par conditio creditorum* is a principle of the Colombian insolvency regime from both substantive and procedural points of view.⁴³ According to this principle, all the creditors are equally affected by the debtor's insolvency; therefore, the payment of their pre-insolvency claims must be done within the insolvency proceeding. Colombian law establishes a statutory payment order, and creditors of the same class shall be paid in the same conditions, unless an exception is applicable. It also extends to the equal treatment of creditors from a procedural point of view. Indeed, creditors cannot commence parallel proceedings using different procedural means (eg, litigation or arbitration); cannot seek the preferential payment of an obligation that is part of the insolvency proceeding; and cannot seek to have their credits determined and quantified.

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

57. No.

IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

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

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

58. Yes, Law 1116 provides cross-border insolvency rules for the recognition of foreign insolvency proceedings in Colombia.⁴⁴ The procedure is based on the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, for the recognition of a foreign insolvency proceeding in Colombia, the foreign court or the foreign representative must file an application with the Colombian Insolvency Court accompanied by the following mandatory documents translated into Spanish:

- a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or a certificate from the foreign court affirming the

⁴³ Law 1116, arts 4(1) and 4(2).

⁴⁴ *ibid*, arts 85-93.

existence of the foreign proceeding and of the appointment of the foreign representative; or, in the absence of such evidence, any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative; and

- b) a statement identifying all foreign proceedings (including those conducted in a third state other than Colombia and the forum concursus) in respect of the debtor that are known to the foreign representative.

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?

59. Yes, Law 1116 implements the UNCITRAL Model Law on Cross-Border Insolvency.⁴⁵ The relevant articles of Law 1116 on cross-border insolvency are identical to the UNCITRAL Model Law on Cross-Border Insolvency articles. Law 1116 does not amend any provision of the Model Law related to the effect of insolvency on arbitration.
60. However, in article 105, regarding the effects of recognition of a foreign main proceeding, Law 1116 refrained from incorporating Article 20, Paragraph 1, Subparagraph *a*, of the Model Law, which would have implied that the recognition of a foreign proceeding would have had the effect of staying the “commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities”⁴⁶, including arbitration.
61. Also, in Article 106, regarding discretionary measures, Law 1116 refrained from incorporating Article 21, Paragraph 1, Subparagraphs *a*, *b*, and *c* of the Model Law, which would have allowed Colombian Insolvency Courts to order a stay on the “commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities”⁴⁷, including arbitration.
62. Given that these rules from the Model Law were not incorporated, the only proceedings that are suspended (and are also incorporated into the insolvency proceedings) are execution proceedings against the debtor’s assets, which may not be submitted to arbitration.

⁴⁵ *ibid*, Title III.

⁴⁶ UNCITRAL Model Law on Cross-Border Insolvency, art 20.

⁴⁷ *ibid*, art 21.

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

63. No. However, according to the provisions on cross-border insolvency in Law 1116 mentioned in the answer to Question 30, upon recognition of a foreign proceeding, the Colombian Insolvency Court may order interim measures over the debtor's assets and contracts and prevent the constitution and enforcement of security interests over those assets.⁴⁸

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?

64. Although Colombian law does not set any provision regarding the evaluation of the effects of cross-border insolvency proceedings over arbitration proceedings seated in Colombia, the Colombian Insolvency Court may order interim measures over the debtor's assets and contracts that may affect an arbitration proceeding seated in Colombia, such as the: (i) prohibition of terminating contracts with the insolvent debtor for the reason of its insolvency or (ii) attachments or seizures. Any effect given by Colombian law to an insolvency proceeding that has been recognized in Colombia must be respected by arbitrators seated in the jurisdiction.

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

65. Yes. Although insolvency rules do not establish that the effects on arbitration of foreign insolvency proceedings are of mandatory application—and neither the precedent nor caselaw of the Colombian high courts have set such rule—cross border insolvency provisions are mandatory (as explained under Question 29).

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

66. Certain Colombian insolvency rules may be held to be part of Colombian international public policy and, therefore, their violation by an arbitration tribunal may lead to the setting aside of an award. We are unaware of any case law that may provide guidance on this matter; thus, the evaluation of whether the effects of insolvency established in Law 1116 are considered

⁴⁸ Law 1116, art 85.



part of Colombia's international public order, thus allowing for awards to be set aside if they are not respected by the arbitrators is yet to be determined by Colombian courts.

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

67. No.