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IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF SPAIN

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* For the avoidance of doubt, this report is not intended to provide legal advice applicable to specific fact situations.

IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Spain 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 Spain 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. Spanish law contains express provisions that regulate the effect of insolvency on arbitration. They are not found in the Spanish arbitration legislation, but in the insolvency legislation. The Spanish Arbitration Act [Ley 60/2003][1] (hereinafter, "SAA") does not include any provision concerning the effect that the opening of insolvency proceedings produces on arbitration. In contrast, the Spanish Insolvency Act does. As explained in more detail below, the treatment of arbitration during insolvency is generally favourable. Arbitration agreements remain valid and operative, and arbitration proceedings can continue until the rendering of the award.

2. The current Spanish insolvency regime was recast onto the Spanish Insolvency Act by Real Decreto Legislativo 1/2020[2] (hereinafter, "SIAr") and entered into force on 1 September 2020. Article 140 SIAr is the main provision governing the relationship between insolvency and arbitration. It provides the following:

> Mediation clauses, arbitration agreements and proceedings
>
> 1. The declaration of insolvency, by itself, shall not affect the effectiveness of mediation clauses and arbitration agreements subscribed by the insolvent party.
>
> 2. Mediation and arbitral proceedings pending at the time of the declaration of insolvency shall continue until the conclusion of the mediation or the final award. The representation and defense of the insolvent party in these proceedings shall be governed by the rules provided for declaratory proceedings in chapter I of this title.

[1] Ley 60/2003, de 23 de diciembre, de Arbitraje [*Boletín Oficial del Estado*, no. 309, of 26 December 2003, https://www.boe.es/eli/es/l/2003/12/23/60/con].
[2] Real Decreto Legislativo 1/2020, of 5 May 2020 [*Boletín Oficial del Estado*, no. 127, of 7 May 2020, https://www.boe.es/eli/es/rdlg/2020/05/05/1/con], recasts the original Insolvency Act of Spain [Ley 22/2003, Concursal] (hereinafter, "SIA").

3. The insolvency judge, acting at her own motion or at the request of the insolvent party, in cases of intervention, or of the insolvency administrator, in cases of suspension, shall be able to order, before the commencement of the mediation or arbitration proceedings, the suspension of the effects of those clauses and agreements if she deemed that they could be prejudicial for the conduction of the insolvency. This is notwithstanding the provisions in international treaties.

4. In case of fraud, the insolvency administrator shall be allowed to challenge before the insolvency court the mediation clauses and the arbitration agreements and proceedings.[3]

3. In addition, Article 141 SIAr provides as follows:

Judgments and awards

Judgments and awards rendered before or after the declaration of insolvency are binding on the insolvency judge, who will give those decisions that appropriate insolvency treatment.[4]

4. These two provisions are part of the set of rules governing the consequences produced by the opening of insolvency proceedings. They do not address any classic categories pertaining to the law of arbitration (arbitrability, capacity, validity, and effectiveness of the arbitration agreement). However, they may have a direct impact on these categories. For instance, the favourable treatment of arbitration in these rules protects the arbitrability of civil and commercial disputes notwithstanding the insolvency of one of the parties and confirms the validity and effectiveness of the arbitration agreements subscribed by the insolvent party.

[3] Translation by the authors. Original:
"Artículo 140. Pactos de mediación, convenios y procedimientos arbitrales
1. La declaración de concurso, por sí sola, no afectará a la vigencia de los pactos de mediación ni a los convenios arbitrales suscritos por el deudor.
2. Los procedimientos de mediación y los procedimientos arbitrales en tramitación a la fecha de la declaración de concurso continuarán hasta la terminación de la mediación o hasta la firmeza del laudo arbitral. La representación y defensa del concursado en estos procedimientos se regirá por lo establecido para los juicios declarativos en el capítulo I de este título.
3. El juez del concurso, de oficio o a solicitud del concursado, en caso de intervención, o de la administración concursal, en caso de suspensión, podrá acordar, antes de que comience el procedimiento de mediación o de que se inicie el procedimiento arbitral, la suspensión de los efectos de esos pactos o de esos convenios, si entendiera que pudieran suponer un perjuicio para la tramitación del concurso. Queda a salvo lo establecido en los tratados internacionales.
4. En caso de fraude, la administración concursal podrá impugnar ante el juez del concurso los pactos de mediación y los convenios y procedimientos arbitrales."

[4] Translation by the authors. Original:
"Artículo 141. Sentencias y laudos firmes
Las sentencias y los laudos firmes dictados antes o después de la declaración de concurso vinculan al juez de este, el cual dará a las resoluciones pronunciadas el tratamiento concursal que corresponda."

2. Does the insolvency legislation in Spain 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*?

5. The SIAr contains rules on *vis attractiva concursus*. However, they do not apply to disputes which are subject to arbitration, as Article 140 SIAr maintains the validity and effectiveness of the agreement to arbitrate.

6. The rules on *vis attractiva concursus* are still relevant and need to be explained because they apply when the insolvency court decides to suspend the effect of an arbitration agreement pursuant to Article 140.3 SIAr (mentioned above and explained in more detail in Question 8). The reach of the rules on *vis attractiva concursus* depends on whether the dispute is domestic or international.

7. Domestic disputes are those which do not contain an international element requiring the consideration of rules on international jurisdiction. That is, the dispute is internal and does not raise any question about the potential jurisdiction of the courts in another State. In these cases, Article 52 SIAr provides for a wide rule of *vis attractiva concursus*. In accordance with this rule, the insolvency judge shall have exclusive jurisdiction over every civil or commercial claim with patrimonial relevance brought against the insolvent party, with the exception of those filed in civil proceedings relating to capacity, filiation, marriage, and minors (Article 52.1 SIAr). The *vis attractiva concursus* also covers enforcement actions relating to insolvency credits or credits against the estate over assets or rights of the insolvent party that are part or shall be part of the estate (Article 52.2 SIAr).[5]

8. This rule is linked to the regime set forth by Article 136 SIAr, whereby civil and commercial courts shall refuse jurisdiction over disputes which Article 52 SIAr allocates exclusively to the insolvency judge. In the event of litigation pending at the time of the opening of insolvency, Article 137 SIAr provides for their continuation except for those which are suspended or accumulated to the insolvency proceedings pursuant to the SIAr.

9. The reach of the *vis attractiva concursus* is much narrower in the event of international disputes, which are those containing an international element that requires the consideration of rules on international jurisdiction (that is, a dispute which is not purely internal and raises the question that jurisdiction may not lie with the Spanish court). In that context, Article 56 SIAr addresses the international reach of the jurisdiction in the following terms:

[5] Article 52 contains a longer lists of matters that fall within the exclusive jurisdiction of the insolvency court, but they are not relevant for the purposes of this report unless indicated in other answers below.

In the international context, the jurisdiction of the insolvency judge only covers those actions which have their legal basis in the insolvency legislation and which are immediately related to the insolvency.[6]

10. The wording of and philosophy behind Article 56 SIAr takes direct inspiration from the case law of the European Court of Justice on the relationship between the rules on jurisdiction under the European Insolvency Regulation and regime on jurisdiction for civil and commercial matters under the Brussels I Regulation recast (and preceding Brussels Convention 1968 and Brussels Regulation I).[7] It follows from Article 56 SIAr that the exclusive jurisdiction of the insolvency court does not cover ordinary civil and commercial disputes which have an international element. In these cases, the general rules on allocation of jurisdiction will continue to apply. As explained in the answer to Question 8 below, this means that while it is possible for the insolvency court to suspend the effectiveness of an international arbitration agreement pursuant to Article 140 SIAr, not all of the issues covered by such agreement will necessarily be brought before the insolvency court given the narrower reach of the *vis attractiva concursus* in international disputes.

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

11. Article 140 SIAr does not make any express reference to whether the rule only applies in cases where the insolvent party acts as respondent or whether it extends to every scenario covered by the arbitration agreement (ie, regardless of the procedural position of the insolvent party as claimant or defendant).

12. While there has been doctrinal debate about the correct interpretation, the most recent case law confirms that Article 140 SIAr also applies to claims brought by the insolvent party.[8]

[6] Translation by the authors. Original: "Artículo 56. Alcance internacional de la jurisdicción
En el ámbito internacional la jurisdicción del juez del concurso comprende únicamente el conocimiento de aquellas acciones que tengan su fundamento jurídico en la legislación concursal y guarden una relación inmediata con el concurso."

[7] On that caselaw, see F. Garcimartín Alférez, "Cross-Border *Vis Attractiva Concursus*: the EU Approach" (2018) 31 Insolvency Intelligence, Issue 1, 14-21.

[8] Judgment of the Commercial Court in Santander, of 30 September 2019, ES:JMS:2019:1003.

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?

13. Article 140 SIAr applies to every type of insolvency proceeding, regardless of whether its aim is the liquidation of the company or its rescue. Note that the SIAr only envisages one proceeding with two possible outcomes: liquidation or restructuring.

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

14. Article 140 SIAr does not distinguish between the various subject matters or types of relief that can be obtained from an arbitral tribunal. It, therefore, covers declaratory as well as condemnatory requests for relief. In both cases, however, the enforcement of the award (in the event of a condemnatory decision) will be governed by the insolvency legislation and subject to the limitations imposed by it (see answer to Question 23 below).

15. It also follows from Article 54 SIAr that arbitrators can continue to grant interim relief, although such interim measures may be subject to review by the insolvency court. Article 54.2 SIAr provides that when a measure adopted by other tribunals or administrative authorities may be prejudicial for the appropriate conduct of the insolvency proceedings, the insolvency court shall order its suspension, regardless of the body that had ordered it, and it shall be able to request that body to lift the adopted measure.

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

16. Article 140 SIAr does not apply to pre-insolvency proceedings or restructuring proceedings which do not require a declaration of insolvency. Subject to future legislation implementing the European Directive on restructuring,[9] such proceedings are governed by Articles 583 to 720 SIAr. These provisions contain their own rules on the effects produced by pre-insolvency proceedings. While these effects include a general prohibition to continue or commence new enforcement actions (Articles 588-593 SIAr), there is no rule preventing the continuation or commencement of arbitration proceedings, which lack executory nature given the lack of such power by arbitral tribunals.

[9] Directive (EU) 2019/1023 of the European Parliament and of the Council, of 20 June 2019, on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

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?

17. Yes. Article 140 SIAr addresses arbitration agreements and pending arbitration proceedings in two different paragraphs. However, the rule applicable to both of them is, in general terms, equally in favour of arbitration. The only difference of treatment refers to the possibility for the insolvency judge to suspend the effects of the arbitration agreement for reasons related to the insolvency. As explained in Question 8 below, this possibility only applies to arbitration agreements which have not been activated—ie, in scenarios in which no arbitration has yet commenced.

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

18. No.

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

19. In general, the rules in the SIAr are designed to have extraterritorial application. This is provided in Article 47.1 SIAr:

> Effects of the declaration of insolvency
>
> The effects of an insolvency declared in accordance with the rules on jurisdiction laid down in the Article that regulates territorial jurisdiction shall have universal reach.[10]

20. Article 140 SIAr is included in the list of effects produced by the declaration of insolvency. It follows that it intends to apply to every arbitration agreement and proceeding regardless of the location of the seat.

21. In practice, however, the extraterritoriality of the Spanish provisions governing the effects of insolvency on arbitration is subject to the choice of law regime contained in the various insolvency law instruments applicable in Spain. These include the European Insolvency Regulation ("EIR")[11] and the private international law rules in the SIAr. The EIR applies to Spanish insolvency proceedings when the court based its jurisdiction to open the insolvency process on the fact that the debtor's centre of main interests ("COMI") is situated in Spain

[10] Translation by the authors. Original: "Artículo 47. Efectos de la declaración de concurso1. Los efectos del concurso declarado conforme a las reglas de competencia establecidas en el artículo que regula la competencia territorial tendrán alcance universal . . .".

[11] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ L 141, 5.6.2015).

(Article 3.1 EIR). In this case, the Spanish proceedings are known as "main" insolvency proceedings. The EIR is also applicable to proceedings opened in Spain when the debtor's COMI is located in another EU Member State, but the debtor has a permanent establishment in Spain (Article 3.2 EIR). In these cases, the Spanish proceedings are "secondary" and their effects shall be restricted to the assets of the debtor situated in the Spanish territory.

22. According to Article 7.1 EIR, the general choice of law rule is that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which main insolvency proceedings are opened (the "*lex fori concursus*").[12] That means that Spanish insolvency law will apply extraterritorially in every EU Member State when the COMI of the debtor is located in Spain. This includes the rules on the effect of insolvency on arbitration, such as Article 140 SIAr.

23. This choice of law rule is subject to the exceptions provided in Articles 8 to 18 EIR, although only Article 18 EIR is relevant for the purposes of this report. According to Article 18 EIR, when the seat of the arbitration is located in another EU Member State and arbitration proceedings have already commenced at the time the insolvency proceedings are opened, the law of the seat will govern the effects of insolvency on the pending arbitration. In these cases Spanish law will not have extraterritorial effect, regardless of whether it is the COMI of the debtor's insolvency proceedings.[13]

24. There are various possible interpretations on the choice of law rules in Article 18 EIR, and there is no definite judgment by the Court of Justice of the European Union on this matter.[14] One view is that the effects of insolvency on arbitration will be governed solely by the law prescribed by Articles 7 or 18 EIR, depending on the pendency of the arbitration. That would cover every jurisdictional as well as procedural consequence produced by the insolvency on the arbitration. Another reading is that the scope of this choice of law rule would only cover procedural matters, not jurisdictional issues. That is, the law of the seat would determine the procedural adaptations to the pending arbitral proceedings required by the opening of insolvency but not whether the arbitration can continue or must come to an end for lack of jurisdiction (eg, invalidity or ineffectiveness of the arbitration agreement). Procedural adaptations would include matters such as whether the insolvency administrator should step into the shoes of the debtor in the proceedings, whether the arbitration has to be suspended temporarily for the administrator to familiarise herself with the arbitration, or whether the award should be limited to a declaratory (as opposed to condemnatory) decision. This second

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[12] The same rule can be found in Article 10.1 of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions (hereinafter, "Directive on the reorganisation and winding up of credit institutions").

[13] The text of the provision is: "The effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat".

[14] See, F. Garcimartín Alférez, "Cross-Border *Vis Attractiva Concursus*: the EU Approach" (2018) 31 Insolvency Intelligence, Issue 1, 14-21 and M. Penadés Fons, "International Arbitration and *Vis Attractiva Concursus*" in J. Schmidt et al. (eds.), *EU Law after the Financial Crisis* (Intersentia 2016) 237-252 [available via SSRN: https://ssrn.com/abstract=3105572].

interpretation would mean that in Spanish insolvency proceedings covered by the EIR, the Spanish insolvency law (ie, Article 140 SIAr) would always govern the jurisdictional effect of insolvency on arbitration, regardless of the location of the seat in a different Member State. It would be only the procedural adaptations that would be subject to the law of the seat for pending arbitrations pursuant to Article 18 EIR.

25. The choice of law rules of the EIR will not apply to insolvencies opened in Spain when the proceedings are neither "main" nor "secondary" in the eyes of the EIR (see Articles 3.1 and 3.2 EIR referred to above). The EIR will not apply either to govern the effects of Spanish insolvency proceedings over arbitration seated outside the territory of the EU.

26. In these scenarios, the effects of insolvency on arbitration will be subject to the choice of law regime provided in the SIAr. This regime mirrors the EIR rules. In that sense, the choice of law rule in Article 722 SIAr replicates Article 7 EIR and provides for the general application of Spanish law as *lex fori concursus* when the COMI is located in Spain. A similar exception to Article 18 EIR is found in Article 731 SIAr for pending lawsuits and arbitrations that are seated outside of Spain. In these cases, the Spanish choice of law rules will provide that the impact of the insolvency on the pending arbitration should be decided by the law of the seat of the proceedings. This would be subject to the same interpretative question as discussed under Article 18 EIR, elaborated in paragraph 24 above.[15] See also the response to Question 31 for more detail.

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.)?

27. According to Article 32 SIAr, the effects of insolvency on arbitration apply automatically from the date of the decision that declares the insolvency.

[15] While Article 731 SIAr does not mention arbitration proceedings expressly, the wide reference to "juicios declarativos pendientes" (pending declaratory lawsuits) may be interpreted as covering arbitration.

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?

28. The effects provided by the SIAr are mandatory and are not subject to any appropriateness test or judicial discretion. Neither the insolvency judge, the insolvency administrator, nor the parties can apply for those effects to be varied or lifted.

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?

29. Spanish law does not expressly empower courts to issue anti-suit or anti-arbitration injunctions. Some legal scholars, however, have argued in favour of this possibility under the general clause provided for by Article 726 of the Spanish Civil Procedure Act, which empowers courts to grant any provisional or protective measure aimed at ensuring the effectiveness of a future judgment on the merits.[16]

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?

30. The general rule under Spanish law is that the opening of insolvency proceedings does not terminate the contracts subscribed by the insolvent party (Article 156 SIAr). The power to rescind a contract based on the breach by the counterparty will depend on the time when the alleged breach occurred. For breaches committed prior to the declaration of insolvency, rescission will only be possible in relational contracts (*contratos de "tracto sucesivo"*); that is, contracts whose performance extends over a period of time (Article 160 SIAr). In contrast, the power to rescind executory contracts (ie, contracts with reciprocal pending obligations) under general contract law will operate for breaches occurred after the declaration of insolvency (Article 161 SIAr).

31. Article 165 SIAr regulates the possibility for the insolvency court to rescind a contract in the interest of the insolvency process:

[16] See F. Garcimartín Alférez, *El régimen de las medidas cautelares en el comercio internacional,* (McGraw-Hill 1996) 58-59.

Judicial resolution of the contract in the interest of the insolvency process

1. Despite the inexistence of a cause to rescind, the insolvent party, in cases of intervention, and the insolvency administrator, in cases of suspension, shall be able to request the rescission of any contract with reciprocal obligations if they deem it necessary or appropriate for the interest of the insolvency.[17]

32. Spanish courts usually consider that the rescission in the interest of the insolvency is justified when the performance of the contract is excessively costly for the insolvency estate (ie, has a negative net value). The application of this rule implies that (i) the performance of the contract entails a cost, not a benefit, for the estate; and (ii) this cost is higher than the compensation to be paid for damages to the counterparty.

33. The power to rescind provided in Article 165 SIAr does not apply directly to arbitration agreements, which cannot be deemed autonomous contracts for the purposes of this Article. This is because arbitration agreements have their special regime in the already mentioned Article 140 SIAr. Nonetheless, it may apply to contracts that contain arbitration agreements.

34. The power to rescind the contract in the interest of the insolvency process is a pure insolvency matter driven by insolvency considerations and derived from insolvency legislation. It follows that the jurisdiction to rescind on these grounds is allocated exclusively to the insolvency court and cannot be covered by the arbitration agreement. It remains unclear, however, whether issues related, but not core, to the application of Article 165 SIAr should be submitted to arbitration given the favourable regime in Article 140 SIAr. This would include matters such as the evaluation of the prerequisites for the application of Article 165 SIAr (ie, whether a contract contains reciprocal obligations), or the consequences of rescission if parties do not agree on them. Should these issues fall within the jurisdiction of the arbitral tribunal, such a scenario could warrant the suspension of the effects of the arbitration agreement allowed by Article 140 SIAr (see answer to Question 8 below).

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?

35. While there is no definite decision on this matter, it could be argued that the rescission of the contract on the basis of Article 165 SIAr does not automatically extinguish the arbitration agreement. Pursuant to the principle of separability found in Article 22 SAA, the arbitration agreement shall be treated as an autonomous agreement from the rest of the contract and shall be subject to its own regime, which in the insolvency context is found in Article 140 SIAr. In such a case, however, it is unclear which issues should be decided by the arbitration tribunal (see answer to Question 6). In any event, an arbitration award that was incompatible with a

[17] Translation by the authors. Original: "Artículo 165 Resolución judicial del contrato en interés del concurso
1. Aunque no exista causa de resolución, el concursado, en caso de intervención, y, la administración concursal, en caso de suspensión, podrán solicitar la resolución de cualquier contrato con obligaciones recíprocas si lo estimaran necesario o conveniente para el interés del concurso."

judgment of the Spanish insolvency court rescinding the main contract would probably not be recognised or enforced in Spain.

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?

36. Yes. According to Article 140.3 SIAr,

> 3. The insolvency judge, acting at her own motion or at the request of the insolvent party, in cases of intervention, or of the insolvency administrator, in cases of suspension, shall be able to order, before the commencement of the mediation or arbitration proceedings, the suspension of the effects of those clauses and agreements if she deemed that they could be prejudicial for the conduction of the insolvency. This is notwithstanding the provisions in international treaties.[18]

37. Case law related to this provision is scarce. In the leading decision,[19] the insolvency judge emphasised that the power to suspend must be approached in the context of the general rule of Article 52.1 SIA [current Article 140.3 SIAr], which favours the effectiveness of arbitration agreements post-insolvency and hence must be exercised with caution.

38. According to said decision, the harm referred to in Article 52.1 SIA [current Article 140.3 SIAr] should not be equated to the abstract procedural threat produced by the existence of dormant arbitration agreements or to the mere possibility that individual arbitration proceedings may run in parallel to the insolvency. Rather, the relevant harm concerns the substantive collective interest protected by the insolvency process; that is, the need to maximise the value of the insolvent estate to increase the payment rate of outstanding debts to creditors. The judge found support on the similar factors empowering the court to terminate executory contracts "in the interest of the insolvency", as provided by Article 61.2

[18] Translation by the authors. Original:
"Artículo 140. Pactos de mediación, convenios y procedimientos arbitrales
1. La declaración de concurso, por sí sola, no afectará a la vigencia de los pactos de mediación ni a los convenios arbitrales suscritos por el deudor.
2. Los procedimientos de mediación y los procedimientos arbitrales en tramitación a la fecha de la declaración de concurso continuarán hasta la terminación de la mediación o hasta la firmeza del laudo arbitral. La representación y defensa del concursado en estos procedimientos se regirá por lo establecido para los juicios declarativos en el capítulo I de este título.
3. El juez del concurso, de oficio o a solicitud del concursado, en caso de intervención, o de la administración concursal, en caso de suspensión, podrá acordar, antes de que comience el procedimiento de mediación o de que se inicie el procedimiento arbitral, la suspensión de los efectos de esos pactos o de esos convenios, si entendiera que pudieran suponer un perjuicio para la tramitación del concurso. Queda a salvo lo establecido en los tratados internacionales.
4. En caso de fraude, la administración concursal podrá impugnar ante el juez del concurso los pactos de mediación y los convenios y procedimientos arbitrales."

[19] Commercial Court in Santander, of 30 September 2019, ES:JMS:2019:1003.

SIA [current Article 165 SIAr]. In that context, the Court found critical that, in addition to the inevitable costs linked to international arbitration in London (which was the seat in that case), the arbitration agreement was very vaguely drafted, as it failed to choose any arbitral institution or any rules applicable to the arbitration. This would have resulted in additional costs and procedural uncertainty.

39. Finally, the judge clarified that in international disputes, the suspension of arbitration agreements does not necessarily activate the jurisdiction of the insolvency court to hear the merits of the case (the *vis attractiva concursus*). Instead, if the dispute is international, the narrow rules on *vis attractiva concursus* explained in Question 2 mean that the dispute should be resolved by the court that would be ordinarily competent under the general rules on international jurisdiction for civil and commercial matters. In that case, those rules were found in the Brussels I Regulation Recast.[20]

40. Based on these factors, the judge concluded that maintaining the effectiveness of the arbitration agreement would harm the relevant interests in the insolvency and ordered its suspension.[21]

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?

41. The filing of a claim within the insolvency proceedings is not a requirement to be able to commence or continue arbitration proceedings. However, the communication of a credit, even if litigious (Article 262 SIAr), is necessary to be included in the list of creditors. Late communications are allowed as long as they are made before the presentation of the final list of creditors (Article 268.1 SIAr). Should the lately communicated credit be accepted, it will be classified as a subordinated credit unless the creditor can justify that it was unaware of the existence of the credit (Article 268.2 SIAr).

[20] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[21] See further commentary in M. Penades Fons, "English Arbitration, Spanish Insolvency and David Guetta", Kluwer Arbitration Blog, 15 November 2019, <http://arbitrationblog.kluwerarbitration.com/2019/11/15/english-arbitration-spanish-insolvency-and-david-guetta/>.

42. If a creditor files a contentious credit which is subject to arbitration proceedings, this credit will be recognised as litigious (Article 262 SIAr), whereas if the creditor files a claim which has not yet given rise to arbitration proceedings, the insolvency administrator will determine its inclusion or exclusion as it deems appropriate (Article 259 SIAr). When a credit is excluded in whole or in part, the report by the insolvency administrator shall express the reasons for such exclusion (Article 286.2 SIAr) as well as any difference in value between the requested amount and the recognised amount (Article 286.3 SIAr).

43. Creditors can challenge the provisional list of credits within 10 days after receiving notice of such list (Article 297 SIAr). The challenge may refer to the exclusion of the credit, the difference in value, or the insolvency ranking of the claim (Article 298 SIAr). The general jurisdiction to adjudicate those challenges is allocated to the insolvency judge, who will proceed in accordance with the insolvency ancillary process ("*incidente concursal*") (Article 300.1 SIAr). To the knowledge of the authors, there is no court decision finding that the submission of a credit with the insolvency proceedings amounts to a waiver of the arbitration agreement. This means that the rule on jurisdiction under Article 300.1 SIAr should not apply when the insolvent party and the alleged creditor concluded an arbitration agreement applicable to the contentious credit in question. That is, in those cases the arbitration agreement would continue to produce effects and the insolvency court would not be able to decide on this point. This reading would be in line with the rule in favour of arbitration contained in Article 140 SIAr, as otherwise granting jurisdiction to the insolvency court and disregarding the existence of an arbitration agreement in every case a credit was contested by the insolvency administrator within the insolvency process would render arbitration agreements inoperative in a significant number of cases.[22] This would be limited to cases where the dispute is arbitrable and concerns a civil and commercial matter (eg, whether there was a breach of contract, whether the debtor owes a certain amount to the creditor, etc). As explained in the answer to Question 10, claims which can only arise in an insolvency context because they find their legal basis in the insolvency legislation (unlike ordinary civil and commercial disputes) and are immediately related to the insolvency process are reserved for the insolvency court.

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)?

44. Articles 226 to 237 SIAr regulate the possibility for the insolvency practitioner to challenge transactions entered into by the insolvent party within two years prior to the declaration of insolvency. The legitimacy and *locus standi* to bring this challenge lies on the insolvency

[22] In these cases, however, the insolvency court could suspend the effectiveness of the arbitration agreement, as explained in the answer to Question 8.

administrator (Article 232 SIAr). The action is brought against the insolvent party and the other party to the challenged transaction (Article 233 SIAr). According to Article 234 SIAr, the applicable procedure for this action is the insolvency ancillary process ("*incidente concursal*").

45. This type of setting aside action finds its legal basis in the insolvency legislation and is immediately related to the insolvency. It follows that the jurisdiction for its resolution is exclusively allocated to the insolvency judge and arbitration agreements cannot be invoked in this context.

46. Article 238 SIAr preserves the right for the insolvency administrator to commence other non-insolvency challenge proceedings concerning contracts, which would be available under general contract law (ie, general civil and commercial rules). The procedure and jurisdiction for these actions is the same as with the insolvency-specific setting aside actions regulated by Articles 226 to 237 SIAr. However, the actions covered by Article 238 SIAr are neither based on insolvency legislation nor immediately linked to the insolvency, and hence arbitration agreements applicable to the transaction in question should in theory remain effective. This position is, nonetheless, subject to some questions because under Article 238.2 SIAr, the legitimacy to bring the claim is reserved to the insolvency administrator (the "claimant" in this scenario) against the insolvent party and the other party to the challenged transaction (the "respondents"). Given that the insolvency administrator is not itself a party to the arbitration agreement, it is unclear whether the arbitration agreement would be considered effective in this scenario.

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

47. According to Article 111.1 SIAr,

> Continuation of the exercise of the professional or commercial activity
>
> 1. The declaration of insolvency shall not interrupt the continuation of the professional or commercial activity exercised by the debtor.[23]

48. This includes the conclusion of arbitration agreements insofar as such practice constitutes part of the professional or commercial activity exercised by the insolvent party. The capacity to conclude new arbitration agreements after the declaration of insolvency will depend on whether the insolvent party is subject to a regime of intervention or suspension. Pursuant to Article 106 SIAr, the adoption of either one regime or the other will depend on the type of insolvency proceedings. In cases of voluntary insolvency, the debtor shall remain in possession but the exercise of his powers shall be subject to the intervention of the insolvency administrator, who shall be able to authorise or refuse the proposed agreement as

[23] Translation by the authors. Original: "Artículo 111. Continuación del ejercicio de la actividad profesional o empresarial.
La declaración de concurso no interrumpirá la continuación de la actividad profesional o empresarial que viniera ejerciendo el deudor."

appropriate (Article 106.1 SIAr). In contrast, in cases of necessary insolvency, the powers of the insolvent party for the management and disposition of the estate shall be suspended. Instead, the insolvency administrator shall substitute the insolvent party in the exercise of such powers.

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

49. The general effects of insolvency on arbitration, as provided in Article 140 SIAr, cease to apply after the approval of a creditors' arrangement by the insolvency court. This derives from the general rule in 394.1 SIAr, which also provides that such effects shall be substituted by those which, if any, have been provided in the arrangement.

50. The creditors' arrangement becomes effective from the date of the judgment of the insolvency court that approves it (Article 393.1 SIAr).

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?

51. The rules regulating the effects of insolvency on arbitration are mandatory. The insolvent party and its creditors cannot agree to exclude the application of those rules.

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

52. There is no express rule in the SIAr that provides for the direct application of its provisions on arbitrations seated in Spain. It is understood, however, that if those arbitrators have to decide in accordance with Spanish law an issue which is covered and regulated by the SIAr, such legislation will be part of the applicable law, particularly if the arbitrators conclude that disapplying the provisions of the SIAr would affect the validity and effectiveness of the award in Spain. On these issues, see Question 34 below.

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?

53. No.

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?]

54. The SIAr establishes rules for declaratory proceedings that also apply to arbitration proceedings (Article 140 SIAr, which refers to Articles 119 to 121 SIAr). The regime varies depending on whether the insolvent debtor is subject to the intervention or suspension regime (see paragraph 48).

55. According to Article 119 SIAr, where the insolvent debtor is subject to the intervention regime, it shall preserve the capacity to act in lawsuits but shall require the authorisation of the insolvency administrator to file claims, file appeals, withdraw a claim, concede a claim in full or partially, and settle a dispute when the litigious matter may affect the insolvency estate. The same applies *mutatis mutandi* to arbitration proceedings. Additionally, Article 119.2 SIAr clarifies that when the insolvency administrator deems appropriate for the interest of the insolvency to file a claim, but the insolvent party refuses to do so, the insolvency court shall be allowed to authorise the administrator to file it.

56. Where the insolvent debtor is subject to the substitution regime, Article 120 SIAr provides that the insolvency administrator has the capacity to file claims and appeals in the interest of the insolvency. The SIAr also clarifies that the insolvency administrator, acting in the interest of the insolvency but in representation of the insolvent party, shall substitute the insolvent party in the civil, employment and administrative judicial proceedings that are pending at the time of declaration of insolvency, without any exceptions other than the civil proceedings which exercise personal actions. Once the insolvency administrator has appeared in the proceedings, the Officer of the Court shall grant five days for the administrator to familiarise herself with the proceedings. In this case, ie, when the proceeding is pending at the date of opening of insolvency proceedings, the insolvency administrator shall require the authorisation of the insolvency court to withdraw a claim, concede claim in full or partially, and settle a dispute which has commenced prior to the declaration of insolvency.

57. While the general rule derived from Article 140.2 SIAr is that this Article (and Articles 119 to 121 by reference) governs the participation of the insolvency administration in arbitration proceedings in cases of suspension, it is unclear whether an international arbitral tribunal would be subject to the procedural prescriptions provided by these Articles (eg, the five-day familiarisation period for the insolvency administrator).

58. Finally, Article 121 SIAr contains the applicable rules for cases where the insolvent party intends to participate in the proceedings concurrently with the insolvency administrator. In such cases, the insolvent party shall be allowed to act separately, by means of representatives and counsel different from those of the insolvency administrator, as long as a third party has provided sufficient guarantee before the insolvency judge that the expenses of its procedural acts and the effectiveness of the order on costs, if any, shall not affect the insolvency estate, and the insolvent party demonstrates this in the proceedings in which it appears.[24]

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?

59. To the knowledge of the authors, the declaration of insolvency does not vary the standards of confidentiality ordinarily applicable in arbitration. However, if a creditor intends to be included in the list of creditors and the credit is subject to pending arbitration, the inclusion of the credit in the list in accordance with the parameters defined in Articles 292 and 293 SIAr shall disclose to those involved in the insolvency proceedings (and probably to the public at large, as per Article 294.1 SIAr) the existence of the arbitration proceedings, its participants, and the amount in dispute.

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

60. While the name of the insolvent party does not change as a consequence of the declaration of insolvency, the decision ordering such declaration shall be inscribed in the Companies Register and any other public Registers featuring the insolvent party, its assets, or its rights (Articles 36 and 37 SIAr).

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?

[24] The authors are not aware of any case where this rule has been applied in arbitration proceedings. In principle, it should require an adaptation of the arbitration rules to accommodate this policy. If this is not possible, the rule would simply not apply, and the arbitration proceedings will only continue with the insolvency practitioner representing the insolvency debtor.

61. This issue is addressed by Articles 119 to 121 SIAr, which have been explained in the answer to Question 16 above.

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

62. As explained in Question 3(c) above, it follows from Article 54 SIAr that arbitrators can continue to grant interim relief with regard to a party subject to insolvency proceedings. Such interim measures, however, may be subject to review and suspension by the insolvency judge when they are prejudicial for the appropriate conduction of the insolvency proceedings. Additionally, the insolvency judge is able to request the arbitrators to lift the adopted measures (see Article 54.2 SIAr).

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

63. This issue is covered by Article 54.2 SIAr, which has been explained in the answer to Question 20 above.

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?

64. This issue is addressed by Articles 119 to 121 SIAr, which have been explained in Question 16 above.

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?

65. Yes. From the declaration of insolvency, new enforcement actions are prohibited pursuant to Article 142 SIAr. This covers both judicial and extrajudicial executions and enforcement requests by public authorities.

66. As regards enforcement actions which were ongoing at the date of the opening of insolvency proceedings, Article 143 SIAr orders their suspension. In addition, the insolvency judge may order the lift or cancellation of attachments ordered in the suspended enforcement actions when the preservation of such attachment would hinder severely the continuation of the

professional or commercial activity of the insolvent party. It is not possible to order the lift or cancellation of administrative attachments.

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?**

67. As per Article 262.1 SIAr, litigious credits shall receive the same treatment as credits subject to a suspensive condition. That means that they shall be recognised in the insolvency as contingent credits without amount and under the appropriate classification (privileged, general, or subordinate, as per Article 269 SIAr). In addition, their holders shall be admitted as legitimised creditors in the proceedings without any limitations other than the suspension of the rights to adhesion, vote, and payment (Article 261.3 SIAr). Once the contingent credit is confirmed or recognised in a final decision or a decision which is susceptible of provisional enforcement, the creditor shall gain the totality of insolvency rights applicable to his category and classification (Article 261.4 SIAr).

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?**

68. Yes. Awards are binding on the insolvency judge, who will give them the appropriate insolvency treatment (Articles 141 and 260 SIAr).

69. The SIAr does not explicitly make any distinction between domestic and foreign awards. However, given that the inclusion in the list of creditors of those credits contained in awards and other documents is based on the executory nature of those sources, it could be argued that the general rule is that foreign awards must be enforceable in order to benefit from that favourable treatment.

70. Under Spanish law, such enforceability is obtained by way of exequatur (Article 46.2 SAA). This exequatur is governed by the New York Convention and will be processed in accordance with the same procedure set forth by the rules of civil procedure for the exequatur of judgments issued by foreign courts. The domestic (ie, not based on international treaties or EU law) rules on the process of exequatur for foreign judgments are contained in Articles 52 to 55 of the Spanish Act on International Legal Cooperation in Civil Matters ("SAILCCM").[25] Article 52.3 SAILCCM confers jurisdiction over these actions to the insolvency judge.

[25] Ley 29/2015, de 30 de julio, de cooperación jurídica internacional en materia civil.

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

71. To the knowledge of the authors, Spanish courts have not ruled expressly on whether the rules regulating the effect of insolvency on arbitration are part of public policy. In Spain, the public policy exception provided in arbitration instruments, such as the SAA or the New York Convention, is subject to a narrow interpretation.

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)?

72. To the knowledge of the authors, there is no Spanish decision that declares that the principle of *par conditio creditorum* is part of the public policy exception in the context of arbitrations. The equality of creditors from a procedural point of view would not appear to form part of public policy, as the default rule under Article 140 SIAr is that arbitration can exist autonomously from the insolvency process. That is, the general rule for arbitration in the SIAr is the unequal treatment of creditors from a procedural point of view.

73. From a substantive point of view, the SIAr provides for the classification of creditors in different categories or hierarchical levels (privileged, general, and subordinate, as per Article 269 SIAr). Such classification would suggest that the absolute equal treatment of creditors is not a general rule within the SIAr. Therefore, such view of the *par conditio creditorum* would not amount to public policy.

74. What Articles 432.1, 433.2 and 435.2 provide, however, is that the distribution of proceeds among the creditors of each category must be done pro rata, ie "*pari passu*". It could be argued that the use of arbitration to obtain a result that circumvented this equality rule would constitute a violation of public policy. On this point, however, it should be noted that the jurisdiction of arbitrators generally excludes executory or enforcement powers, so the risk of a violation of the "*pari passu*" principle based on the mere conduction of the arbitration or even the rendering of an award would be limited. It would be at the enforcement stage where such violation would take place. At this stage, public policy would require that the enforcement of any arbitral award against a party subject to insolvency proceedings in Spain was conducted through the collective procedure; ie, the award creditor should only receive payment through the insolvency process or the reorganisation plan.

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

75. Yes. It was mentioned in Question 1 that Article 140.4 SIAr provides that "[i]n case of fraud, the insolvency administrator shall be allowed to challenge before the insolvency court the mediation clauses and the arbitration agreements and proceedings".[26]

76. This possibility is further developed in Article 260.2 SIAr, according to which "the insolvency administrator, within the deadline to issue its report, shall be able to challenge in ordinary trial, arbitration agreements and proceedings in cases of fraud".[27]

77. The aim of these provisions is to create a *sui generis* action based on fraud to invalidate arbitral mechanisms which may have been used by the insolvent party and third parties to circumvent the limitations posed by the insolvency regime and the protection of collective interests it pursues. This would include cases of sham arbitrations where parties might intend to obtain a settlement award favouring the creditor. This fraud action is separate from the action to challenge an award under the ordinary grounds for the setting aside of awards. Despite the wording of the mentioned Articles, the very scarce case law on the matter has found that the true object of this action are awards rather than arbitration agreements or proceedings, since it is only at that later stage when fraud can be more easily demonstrated and the risk to the interest of the insolvency proceedings truly crystallises.[28]

78. It is debatable whether this type of challenge action finds its legal basis in the insolvency legislation and is immediately related to the insolvency. Should this be the case, the jurisdiction for its resolution would be exclusively allocated to the insolvency judge and not to the court which would hear arbitration setting aside actions in ordinary circumstances.

[26] Translation by the authors. Original: "Artículo 140. Pactos de mediación, convenios y procedimientos arbitrales
[. . .] 4. En caso de fraude, la administración concursal podrá impugnar ante el juez del concurso los pactos de mediación y los convenios y procedimientos arbitrales."

[27] Translation by the authors. Original: "Artículo 260 Reconocimiento forzoso de los créditos
2. No obstante el reconocimiento, la administración concursal, dentro del plazo para la emisión de su informe, podrá impugnar en juicio ordinario, los convenios o procedimientos arbitrales si concurriera fraude; . . . .".

[28] Judgments of the Provincial Court (Audiencia Provincial) of Islas Baleares (Section 5th), of 16 April 2012 and 11 October 2010, as well as Judgment of the Commercial Court of Madrid (no. 5), of 7 October 2010.

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 Spain concerning the insolvent party.]

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

79. Foreign insolvency proceedings must be recognised in Spain in order to produce legal effects. The system of recognition varies depending on the jurisdiction where the insolvency has been declared and the type of party subject to insolvency. The general rule for main insolvency proceedings opened by the courts of a Member State of the European Union is that recognition shall be automatic. This rule is found in Article 19.1 EIR.

80. In addition, Article 20.1 EIR provides that such recognition shall automatically produce the same effects that the recognised insolvency proceedings have rendered in their jurisdiction of origin. In principle, this is not the case for territorial proceedings, since their effects are restricted to the assets of the insolvent debtor located in the State where those proceedings are opened.

81. Similar rules apply to winding-up proceedings opened in the territory of the European Union over certain credit institutions pursuant to Article 9.1 Directive on the reorganisation and winding up of credit institutions.

82. Articles 742-748 SIAr contain the rules applicable to the recognition of foreign insolvencies that are not covered by either of the abovementioned European instruments. In general, such insolvencies will be recognized if they meet the five conditions set forth in Article 742.1 SIAr:

    1. That the decision refers to a collective procedure based on the insolvency of the debtor, according to which his assets and activities are subject to the control or the supervision of a tribunal or a foreign authority with the aim of its restructuring or liquidation.
    2. That the decision is final under the law of the opening State.
    3. That the jurisdiction of the court or authority that has opened the insolvency proceeding is based on any if the criteria contained in this act or on a reasonable connection of equivalent nature.
    4. That the decision has not been given in default of the debtor or, in other case, that it has been preceded by the service or notification of a summoning notice or equivalent document, in a form and with sufficient time to object.
    5. That the decision is not contrary to Spanish public policy.[29]

[29] Translation by the authors. Original: "1.º Que la resolución se refiera a un procedimiento colectivo fundado en la insolvencia del deudor, en virtud del cual sus bienes y actividades queden sujetos al control o a la supervisión de un tribunal o una autoridad extranjera a los efectos de su reorganización o liquidación.
2.º Que la resolución sea definitiva según la ley del Estado de apertura.

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?**

83. Spain has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. The SIAr follows the private international law model designed by the EIR. While both instruments belong in the wider regulatory family known as "modified universalism", their rules do not always coincide. The main difference for the purposes of arbitration is that, whereas the EIR includes a choice of law regime contained in Articles 7 and 18 EIR, which favours the general application of the *lex fori concursus* with the exception of pending proceedings (see Questions 3.g and 31), Articles 20 and 21 of the UNCITRAL Model Law on Cross-Border Insolvency provide a series of effects (eg, automatic stay) that are determined exclusively by the law of the recognising State.

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

84. The choice of law rules governing the effects of foreign insolvencies on arbitrations seated in Spain vary depending on the jurisdiction where those insolvency proceeding have been opened. If the insolvency falls within the scope of the EIR, Article 7 EIR provides that the insolvency law of the opening State (the *lex fori concursus*) shall, as a general rule, govern all the effects produced by the opening of insolvency. Pursuant to Article 7.2 EIR, this includes matters such as

> [. . .] (c) the respective powers of the debtor and the insolvency practitioner;
>
> (d) the conditions under which set-offs may be invoked;
>
> (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
>
> (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits.

85. As mentioned in the answer to Question 3(g), this would cover the impact of insolvency on arbitration agreements and proceedings, making all such decisions subject to the law of the seat of opening of the insolvency. However, there is an exception with respect to pending

3.º Que la competencia del tribunal o de la autoridad que haya abierto el procedimiento de insolvencia esté basada en alguno de los criterios contenidos en esta ley o en una conexión razonable de naturaleza equivalente.
4.º Que la resolución no haya sido pronunciada en rebeldía del deudor o, en otro caso, que haya sido precedida de entrega o notificación de cédula de emplazamiento o documento equivalente, en forma y con tiempo suficiente para oponerse.
5.º Que la resolución no sea contraria al orden público español."

lawsuits found in Article 18 EIR, which provides that "the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat".

86. The answer to Question 3(g) explained that the scope of this exception is subject to interpretation. One view is that the choice of law rule in Article 18 EIR would govern all the effects of the insolvency on the pending arbitration. Another reading could be that Article 18 EIR only covers procedural matters, not jurisdictional issues. That is, the law of the seat would only determine the procedural adaptations to the pending arbitral proceedings required by the opening of insolvency but not whether the arbitration can continue or must come to an end for lack of jurisdiction (invalidity or ineffectiveness of the arbitration agreement). If this interpretation were accepted, then based on the general choice of law rules in Article 7 EIR, the jurisdictional issue would be governed by the *lex fori concursus* and the EIR itself (see Article 6 EIR).

87. When the EIR does not apply to the foreign insolvency, the effects of such foreign insolvency on arbitrations seated in Spain are governed by the choice of law rules contained in the SIAr.[30] These rules are equivalent to the choice of law regime provided in the EIR. As such, under Article 745.1 SIAr, the law of the state of the opening of insolvency proceedings shall govern, unless the arbitration is already pending at the time of the opening of insolvency. In the case of pending arbitrations, Article 731 SIAr provides that the law of the state in which the proceeding are pending (ie, Spain) will regulate the effects of the insolvency on arbitration.[31] This may be subject to the same open question of interpretation as elaborated in the previous paragraph with respect to the EIR rule.

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?

88. Neither the European instruments nor the SIAr provide expressly that their rules must be applied directly by arbitrators seated in Spain (or in a European Union Member State in the case of the EIR). Given that the recognition under the European instruments is automatic and does not require any form of formalised judicial declaration, it could be argued that arbitrators seated in the EU must take into account the opening of foreign EU insolvency proceedings and determine their effect on the arbitration in accordance with the choice of law rules contained in those instruments.

89. Outside these instruments, the recognition of foreign insolvency proceedings under the regime provided in the SIAr requires judicial recognition. Once such recognition has been obtained, arbitrators seated in Spain should determine the effects on the arbitration in

[30] See, however, the proviso in footnote 14.
[31] As mentioned in footnote 15, while Article 731 SIAr does not refer to arbitration proceedings expressly, the wide reference to "juicios declarativos pendientes" (pending declaratory lawsuits) should also cover arbitration.

accordance with the choice of law rules contained in the SIAr. It is unclear whether arbitrators can resort to those private international law rules when no formal recognition of the foreign insolvency proceedings has been granted by, let alone requested from, the Spanish courts.

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

90. While the rules on the effects of foreign insolvencies on arbitration are mandatory on Spanish courts, it is unclear whether those rules are mandatory on arbitrators. Even if they were, they would be subject to the provisos explained in the answer to Question 32.

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

91. Article 41.1 SAA lists the grounds under which a Spanish court may annul an award. In essence, they replicate the regime provided by Article 34 of the UNCITRAL Model Law on International Commercial Arbitration. None of the grounds set forth in Article 41.1 SAA expressly refers to the violation of the rules governing the effects of foreign insolvencies on Spanish arbitration. Should that violation be relevant for setting aside purposes, it would be necessary to subsume the breach under one of the grounds of Article 41.1 SAA.

92. A potential line of argument would be that the arbitration agreement has ceased to be valid or produce legal effects as a consequence of the insolvency. This loss of validity or effectiveness would derive from the application of the relevant law in accordance with the insolvency choice of law rules mentioned in Question 31 above. There is no case law on the questions posed by the coexistence of two choice of law systems which could be potentially applicable at the same time: one would be the ordinarily applicable regime under the law of arbitration (Article 9 SAA); the other would be the insolvency specific choice of law rules found in the SIAr and the EIR. It is possible that, at least with regard to EIR, the duty of Spanish courts to secure the effectiveness of EU law would force the judge to consider those choice of law rules in the context of a setting aside action under Article 41.1 SAA. To the knowledge of the authors, this argument has not been explored by courts.

93. Another potential line of argument would involve the allegation that the breach of the insolvency rules would be a violation of Spanish public policy. In this context, it would be necessary to distinguish between a violation of the choice of law rules that determine the law applicable to the effects of foreign insolvencies on arbitration (private international law level) and the rules that provide for those effects themselves (substantive or material level).

94. On the private international law level, it would be rare for a court to conclude that the non-application of a choice of law rule amounts to a violation of public policy. The fact that some of those rules are of European origin raises the question whether a breach of the principle of effectiveness of EU law could constitute a breach of public policy.

95. On the substantive or material level, the comments made in the answers to Questions 26 and 27 would probably lead to the result that the lack of observance of most rules on the effects of insolvency on arbitration does not offer grounds to set aside an award on the basis of public policy.

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?

96. No.