

IBA TOOLKIT ON INSOLVENCY AND ARBITRATION
QUESTIONNAIRE
NATIONAL REPORT OF CHILE

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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 Chile 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 Chile 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. First, Chilean Insolvency Law No. 20,720 (hereinafter “Law 20,720”) regulates two insolvency procedures against a debtor company: (i) Reorganization (seeking the restructuring or rehabilitation of the company), which can be (a) judicial or (b) extrajudicial or simplified, and (ii) Liquidation, which can be (a) voluntary or (b) compulsory.

2. Regarding the question, Law No. 20,720 establishes in Article 142 the general rule of the compulsory joinder (consolidation) of all pending and new civil lawsuits against the debtor before other courts to the liquidation proceeding. Article 142 prescribes the following:

“Article 142.- General rule of accumulation to the Insolvency Procedure of Liquidation. All civil lawsuits pending against the Debtor before other courts shall be cumulated to the Bankruptcy Procedure of Liquidation. Those initiated after the notification of the Resolution of Liquidation will be promoted before the court that is hearing the Insolvency Procedure of Liquidation.

The civil lawsuits accumulated in the Insolvency Proceedings of Liquidation will continue to be processed in accordance with the corresponding procedure according to their nature, until the final judgment is executed”.¹

3. Nevertheless, Article 143² establishes a series of exceptions to such compulsory joinder.

¹ Translation by the authors. Original:

“Artículo 142.- Regla general de acumulación al Procedimiento Concursal de Liquidación. Todos los juicios civiles pendientes contra el Deudor ante otros tribunales se acumularán al Procedimiento Concursal de Liquidación. Los que se inicien con posterioridad a la notificación de la Resolución de Liquidación se promoverán ante el tribunal que esté conociendo del Procedimiento Concursal de Liquidación.

Los juicios civiles acumulados al Procedimiento Concursal de Liquidación seguirán tramitándose con arreglo al procedimiento que corresponda según su naturaleza, hasta que quede ejecutoriada la sentencia definitiva”.

For the full text of the section, please click the link here:

<https://www.bcn.cl/leychile/navegar?idNorma=1058072>.

² Translation by the authors. Original:

4. The provision cited above establishes the following:

“Article 143.- Exceptions. The rule of accumulation indicated in the previous article shall not apply to the following trials, which shall continue to be processed or shall be conducted before the competent court, respectively:

- (1) Those which are currently being heard by arbitrators.
- (2) Those which are matters of compulsory arbitration.
- (3) Those subject by law to special courts.

In the event that the Debtor is condemned in any of the lawsuits accumulated to the Insolvency Procedure of Liquidation, the liquidator will comply with the resolution in accordance with the provisions of this law”.

5. Thus, for example, those claims *already filed* before arbitrators where no final judgment has been issued will continue to be handled and decided by the arbitrator already appointed. Additionally, there are some matters that are subject to compulsory arbitration (eg shareholders disputes³), which will also need to be submitted to arbitration.
6. These provisions do not apply in the case of a reorganization, as discussed further below. In the case of a reorganization, all arbitration proceedings can continue.

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

7. As mentioned in the response to Question 1, Article 142 of Law 20,720 orders the compulsory joinder of all pending and new civil lawsuits against the debtor in liquidation (ie, in which the debtor is the defendant), with the exceptions provided in Article 143 of Law 20,720 and discussed above. There is no such rule with respect to reorganizations.

“Artículo 143.- Excepciones. La regla de acumulación indicada en el artículo anterior no se aplicará a los siguientes juicios, que seguirán tramitándose o deberán sustanciarse ante el tribunal competente, respectivamente:

- 1) Los que a la fecha estuvieren siendo conocidos por árbitros.
- 2) Los que fueren materias de arbitraje forzoso.
- 3) Aquellos sometidos por ley a tribunales especiales.

En caso que el Deudor fuere condenado en alguno de los juicios acumulados al Procedimiento Concursal de Liquidación, el Liquidador dará cumplimiento a lo resuelto de conformidad a las disposiciones de esta ley”.

³ However, according to Chilean law—Law 18,046 of Sociedades Anónimas, Article 4 Nos. 10 and 125—the claimant in a dispute between shareholders has the right to submit the dispute before ordinary civil courts.

This right may not be exercised by several individuals indicated in the provision, including directors, managers, administrators, and senior executives of the company.

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

8. As explained previously in the response to Question 1, Law 20,720 regulates the effects of the opening of liquidation proceedings in Chile concerning the possibility of commencing or pursuing an arbitration.
9. With respect to arbitration proceedings already commenced, Article 143 states that the arbitrator will retain its jurisdiction to continue the proceeding and resolve the dispute. Regarding the possibility to commence arbitrations after the issuance of the Liquidation Resolution, as a general rule the arbitration clause loses its effectiveness, and the Liquidation Court must hear all civil cases against the debtor, except for compulsory arbitration matters or those subject by law to special courts. These are regulations of public policy and therefore not waivable by the parties, the liquidator, or the creditors meeting.
10. The source that establishes such effects is insolvency legislation, in particular, Articles 142 and 143 of Law 20,720 cited above.
11. The compulsory joinder described only applies to civil lawsuits *against* the debtor. Claims started by the debtor are subject to the general procedural rules, which means that arbitration agreements should remain ordinarily effective in those cases.

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?

12. The compulsory joinder only applies to liquidation (bankruptcy) proceedings. Reorganization proceedings regulated by the Chilean Insolvency Law do not contain a similar rule. However, these reorganization proceedings provide for a 30-day insolvency protection period (which can be extended up to 90 days in accordance with Article 58 of Law 20,720), during which the law forbids the commencement or continuation of summary collection proceedings or executions of any kind against the debtor, arguably including arbitration. Once the 30-day period has ended, both new and pending arbitrations can continue, distinguishing between those debts that are reorganized and subject to the Reorganization Agreement and those that are not.

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

13. No.

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

14. No. With regard to reorganization proceedings, please consult the answer to Question 3.b.

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?

15. Yes. See the answers to Questions 1 and 2 above. Therefore, the following distinction must be observed:

- (i) Arbitration proceedings pending at the time of the opening of the liquidation proceeding remain subject to the decision of the arbitrator pursuant to Article 143(1) of Law 20,720; and
- (ii) Once a liquidation procedure has been initiated, arbitration clauses lose their enforceability unless they are caught by the exception concerning compulsory arbitration in Article 143(2) or those matters subject to special courts in Article 143(3) of Law 20,720. The civil court conducting a liquidation procedure will have jurisdiction over the disputes covered by the arbitration clauses which have ceased to be enforceable.

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

16. Law 20,720 establishes the bankruptcy procedure for compulsory and voluntary liquidation. However, with respect to the effects of insolvency on arbitration the law does not provide a difference between such liquidation procedures.

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

17. As a matter of law, Chilean insolvency proceedings have universal effects and will affect all assets of the debtor, including those located abroad. Law 20,720 contains cross-border

insolvency provisions, which enable the local bankruptcy trustee or local courts to seek the recognition of a Chilean insolvency proceedings abroad. Therefore, the rules of Law 20,720 in relation to arbitrations should apply to all arbitration proceedings.

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.)?

18. The effects discussed above become operative as from the issuance of the liquidation resolution that is passed by the court at the beginning of the liquidation procedure, according to Article 129 of Law 20,720.

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?

19. No exemption from the effects listed is possible, due to the public policy nature of the rules contained in Law 20,720.
20. As to sub-question a., Article 3 deals with the competence of national courts in insolvency proceedings, where parties are not entitled to waive or dispose of the rule. The general rule for granting jurisdiction to courts is the domicile of the debtor. An interested party cannot intervene in the insolvency proceeding in order to proceed with arbitration, requesting the court to lift the effects provided by law, as these are public policy rules. Please see the distinction made in the response to Question 3.a. regarding arbitrations pending and commencing after the issuance of the liquidation decision.
21. With regard to sub-question b., the judge shall examine whether any of the exceptions in Article 143 applies, in other words, if the matter is already being heard by arbitrators or if the subject matter of the dispute is a matter of compulsory arbitration. Except for those cases, the jurisdiction to decide the dispute lies with the insolvency judge.

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?

22. Under the general rules of the Chilean civil procedure, if arbitration proceedings are started in violation of the insolvency rules concerning the compulsory joinder, the liquidator may file a motion to dismiss for lack of jurisdiction before the bankruptcy court or the arbitrator. The bankruptcy court may request the arbitration court not to continue with the procedure and to submit the files to the bankruptcy court. If the arbitration court denies such request, this conflict would be resolved by the Court of Appeals.
23. In the case of international arbitrations seated abroad, the affected party would need to rely on the cross-border provisions of the place where the arbitration is taking place to apply for the recognition of the foreign main proceeding (Chilean) in the country where the arbitration is taking place. In this way, the suspension of the arbitration could be requested, depending on the measures that can be adopted in such legislation.

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?

24. In case of liquidation, the liquidation resolution takes effect immediately from the moment it is issued. These effects include the compulsory joinder of pending lawsuits, as explained in the responses to Questions 1 and 2. The law does not provide for the option of the liquidator or the court to suspend or terminate the effectiveness of contracts with arbitration clauses. Law No. 20,720 only regulates the effect of the decision to open liquidation proceedings on the sale option in leasing contracts, suspending the termination clause in favour of the creditors' meeting, who can decide to terminate, maintain, or exercise the sale option.
25. In the case of reorganizations, the Law 20,720, expressly prohibits the suspension of the execution of contracts whether or not they contain arbitration agreements.⁴ However, as stated in the answer to Question 3.b., these reorganization proceedings provide an insolvency protection period during which the law forbids the commencement or continuation of summary collection proceedings or executions arguably including arbitration.

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?

26. Please see the response to Question 6.

⁴ Law 20,720, art 57, No. 1, c.

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?

27. As mentioned in the response to Question 6, regarding a liquidation proceeding, the liquidation resolution takes effect immediately from the moment it is issued. These effects include the compulsory joinder of pending lawsuits against the debtor, as explained previously in Questions 1 and 2.
28. The law does not provide for the possibility of the liquidator or the court to suspend or terminate the effectiveness of arbitration clauses contained in contracts entered into by the debtor prior to the commencement of insolvency proceedings. Rather, such effect occurs *ipso facto* and with *erga omnes* effects from the issuance of the mentioned resolution.

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?**

29. It will depend on the status of the proceedings (please see the response to Questions 1 and 2 above). If the arbitration is ongoing at the time the liquidation proceedings begin, it will continue under the arbitral tribunal. In these cases, the plaintiff may file a conditional proof of claim with the court, requesting a reservation of funds for the event of a favourable award. According to Chilean law, there is no deadline for the filing of a conditional proof, as long as there are funds to be reserved or assets of the debtor to be sold. If the plaintiff intends to file a claim after the liquidation proceedings have already started, it will need to file a civil claim with the bankruptcy court. In this last scenario, if the claim is dismissed by the court, res judicata principles would apply, so the party cannot resort to arbitration, even though the contract from which that claim derived contained an arbitration agreement.

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)?

30. No. Revocatory or claw-back actions must be filed with the civil courts.

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

31. Article 36 No. 10 of Law 20,720 provides for the liquidator to execute the resolutions legally adopted by the creditors' meeting within the scope of their powers. The creditors' meeting may authorize the liquidator to conclude contracts with arbitration clauses as part of these decisions, particularly in case of provisional or definitive continuation of the business activities of the company.

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

32. The effects of insolvency on arbitration will occur from the moment the court issues the liquidation resolution until the end of the liquidation proceeding.

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?

33. All rules of Law 20,720 are of public policy and mandatory. Neither the court nor the parties can exclude the application of these rules or modify them.

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

34. These rules of public policy are binding for arbitrators, and arbitrators cannot disregard their enforceability. Furthermore, if a party attempts to bring an arbitration claim against another that is subject to liquidation proceedings, the arbitrator must declare his lack of jurisdiction *ex officio*.

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?

35. No. In determining the jurisdiction of the arbitrator, the only relevant considerations are (i) whether the defendant is subject to liquidation proceedings, and (ii) if so, whether the arbitration clause agreed between the parties has been enforced prior to the issuance of the liquidation resolution or whether the dispute refers to compulsory arbitration matters. Consequently, the claimant’s position is irrelevant.

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?]

36. According to Article 130 of Law 20,720, since the issuance of the liquidation resolution, the debtor loses the right to be heard as plaintiff or defendant in respect of the assets that are part of the liquidation proceeding. Upon the issuance of the liquidation resolution, the liquidator assumes the representation of the debtor in such proceeding, leaving the debtor the possibility to intervene as a third party (intervenor). Despite this last effect of the liquidation resolution, the debtor may bring all actions that refer exclusively to his person and rights inherent to it or that refer to assets that are not part of the liquidation proceeding. Therefore, the legal nature of the action and the assets are the relevant factors to consider in order to assess if the debtor maintains that power. Creditors cannot appear in the arbitration as interested parties since the law does not allow it. The liquidator represents the general interest of all creditors.

37. As to sub-question a., the liquidator shall participate on behalf of the debtor in asserting his rights and ensuring the general interest of all creditors. The debtor has only the right to intervene as a third party (intervenor) as provided in Article 130 No. 3 of Law 20,720.

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?

38. As a general rule, arbitrations are private and confidential proceedings, but the liquidator—who will step into the debtor’s shoes before the arbitrator—has a series of information duties towards the creditors, including the obligation to submit a written account in creditor meetings and to report the precise status of the debtor’s business.
39. Such information duties include informing about the debtor’s pending proceedings, their status, procedures, and completion. In any case, the liquidator should keep the confidentiality of the proceeding to the extent permitted by law.
40. Additionally, if the debtor files for a voluntary liquidation proceeding, he must attach a full list of his pending proceedings, which would include any arbitration. However, as explained in the response to Question 3.g., there is no difference in the effects on arbitration if the insolvency is voluntary or compulsory.

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

41. Yes, it does. Pursuant to Article 162 of Law 20,720, the name of the debtor subject to a liquidation proceeding shall be complemented with the phrase “*en Procedimiento Concursal de Liquidación*” (subject to a Liquidation Proceeding).

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?

42. The liquidator is not entitled to reach an agreement in an arbitration by himself. It will be the creditors’ meeting that will adopt the decision and entrust the liquidator to act accordingly.

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

43. Pursuant to Article 148 of Law 20,720, seizures and injunctive relief granted in other proceedings against the debtor and affecting his assets shall become ineffective upon the issuance of the liquidation resolution. The liquidator must request the relevant court or

arbitrators (seated in Chile or abroad) to lift the measures and they must lift them by virtue of the liquidation resolution.

44. Thus, an arbitral court cannot order interim measures on a party subject to liquidation proceedings. Otherwise the principle of *par conditio creditorum* would be affected.

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

45. As stated in the response to the previous question, such measures shall become ineffective upon the issuance of the liquidation resolution.

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?

46. The debtor's capacity will be affected, as the liquidator becomes his legal and judicial representative and will step into his shoes in any arbitration if it could affect the assets subject to the liquidation proceeding.

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?

47. Pursuant to Article 135 of Law 20,720, the issuance of the liquidation resolution stays all creditors' rights to file individual enforcement actions against the debtor. This is a consequence of the bankruptcy's universality and *par conditio creditorum* principles. As mentioned in the answer to Question 3.b., in the case of reorganization proceedings, the debtor is covered by the bankruptcy financial protection from the moment the reorganization resolution is duly published in the insolvency gazette.
48. However, Chilean law provides an exception for creditors secured with mortgages or pledges, who have a right of option: they may execute their guarantees individually or through the liquidation proceeding. But in both cases, in order to receive the payment of their credits, they must provide enough security of payment of the first-class claims (labour, social security, tax, and bankruptcy proceeding cost, among others).

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?

49. The following distinction must be made to answer the question:

- (i) if the debtor is the defendant: pending the award, the claimant can conditionally file its claim in the liquidation proceedings since it does not yet possess the status of creditor. For this purpose, we refer to the analysis of Article 249 of Law 20,720 provided in the response to Question 9. Once the arbitration award is final, the credit that arises from such award is subject to payment on a prorated basis amongst other credits and according to the payment orders provided by the law.
- (ii) if the debtor is the claimant: the liquidator shall represent the debtor in the arbitration. In the event of a favourable award, a credit will be obtained, which will be part of the estate of the debtor's assets to be collected by the liquidator (Article 36 No. 4 of Law 20,720) and used to pay the creditors' claims.

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?

- 50. The award is a perfect and valid title which can be filed before the bankruptcy court.
- 51. Law 20,720 provides for equal treatment of rights for both Chilean and foreign creditors, who will be subject to the order of priority of claims contained in the Chilean Civil Code.
- 52. The award issued by a foreign arbitral tribunal is enforceable in Chile through the exequatur granted by the Supreme Court, in accordance with the New York Convention, Law 19,971 of 2004 on International Commercial Arbitration (which is substantially identical to the New York Convention on this matter) and the Convention on Private International Law, ratified in 1934.

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

- 53. As mentioned in the response to Question 13, all rules governing the effect of insolvency on arbitration are public policy rules. Given the interests and principles involved, they cannot be overridden by parties or the court.

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)?

54. The *par conditio creditorum* is one of the basic principles of Chilean bankruptcy law. Such equality among creditors is enshrined in a series of legal norms within Law 20,720 that have the status of public policy. The latter is linked to the equal treatment of creditors from a substantive and procedural point of view. However, the right of each creditor is established in relation to the importance of its claim, which translates into equality among creditors under similar circumstances.
55. Some examples of this parity in treatment are (i) Article 134: the irrevocable fixing of the rights of the creditors once the liquidation resolution is issued; (ii) Article 135: the suspension of the right of creditors to individually execute on the assets of the debtor; and (iii) Articles 287 and 288: the exercise of revocatory or claw-back actions, which seek to restore assets to the bankruptcy estate.

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

56. All relevant aspects of the matter have been addressed.

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 Chile concerning the insolvent party.]

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

57. Yes. Foreign insolvency procedures must be recognized by Chilean courts in order to produce effects in Chile. Law 20,720 regulates cross-border insolvency in its Chapter VIII, reflecting the provisions of the UNCITRAL Model Law. The recognition of foreign insolvency proceedings in Chile is allowed, upon request by a foreign representative before the competent Chilean courts. Article 314 lists the requirements for a written request for recognition.

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?

58. Law 20,720 in its Chapter VIII fully incorporates the UNCITRAL Model Law without any amendments.

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

59. Foreign insolvency proceedings which have not been formally recognised in Chile have no effect on arbitrations conducted under Chilean jurisdiction.

60. To have effect on arbitration, a request for recognition of foreign proceedings is required. Article 318 of Law 20,720 establishes provisional measures that can be adopted based on the filing of the foreign representative, whenever they are necessary and urgent to protect the debtor's assets in Chile or the interests of creditors. These include suspending individual executions against the debtor's assets and suspending the exercise of the right to levy, dispose, or transfer the debtor's assets. Once the foreign process is recognized, Articles 319 and 320 establish a series of effects and measures that seek to suspend proceedings on the debtor's assets, rights, obligations, or liabilities. Such series of effects are indeed equivalent to the ones provided in Article 20 of UNCITRAL Model Law, and they apply to arbitration. Therefore, it would not be possible to commence new arbitrations and/or an automatic stay would apply to pending arbitrations, related to rights, assets, and obligations of the debtor.

61. Finally, Article 323 regulates that the foreign representative could intervene in domestic proceedings where the debtor is a party once the foreign proceeding has been recognized. This right to appear directly before Chilean courts must always be exercised by an attorney authorized to practice law.

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?

62. Yes, as these cross-border insolvency rules are within Law 20,720, by extension they are public policy rules mandatory in our 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?

63. The rules governing the effects on arbitration of foreign insolvency proceedings will be mandatory once a foreign main proceeding has been recognized. In such a case, Article 319 of Law 20,720 outlines the effects that such recognition produces, including the suspension of the commencement or continuation of individual proceedings in respect of the assets, rights, obligations, or liabilities of the debtor. However, this measure shall not apply with respect to proceedings that are necessary to preserve a credit against the debtor. Article 318 lists several provisional measures that can be adopted from the application for recognition of a foreign proceeding until recognition, if they are urgent to protect the debtor's assets, while Article 320 sets out the measures that can be taken following recognition of a foreign proceeding, whether it is a main or non-main proceeding.
64. All of the above rules are mandatory for arbitrators, who must ensure that the interests of creditors and other interested persons are duly protected by the application of these measures.

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

65. Whenever the application of Chapter VIII of Law 20,720 is justified, according to Article 300, Chilean courts must comply with the measures and effects resulting from the recognition of a foreign proceeding. The purpose of the petition for recognition is to produce immediate effects with respect to the debtor's assets and to request measures to that effect, which, if granted by the competent court, must be fulfilled.
66. Therefore, considering that the rules of the Law 20,720 are of a public policy nature, their disapplication on the effects of foreign insolvencies on arbitration would lead to the setting aside of the award.

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. The relevant provisions on the subject have been addressed throughout this questionnaire.