



**IBA TOOLKIT ON INSOLVENCY AND ARBITRATION**  
**QUESTIONNAIRE**  
**NATIONAL REPORT OF PERU**

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## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Peru 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 Peru 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. The opening of insolvency proceedings does not affect the initiation or continuation of an arbitration. On the contrary, the insolvency proceedings may be suspended if the matter under discussion is the same as that which will be the subject of a ruling by an arbitral tribunal or if, even though it is another matter, the ruling of the arbitral tribunal is necessary for the insolvency proceedings to continue.<sup>1</sup> Articles 18.7 and 39.5 of the Insolvency Act recognize

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<sup>1</sup> *Wells Fargo Bank Northwest, National Association v. LC Busre S.A.C.* [2018] RESOLUCIÓN N° 0592-2018/SCO-INDECOPI [43]-[44]: “En el ámbito concursal, el artículo 65 del Decreto Legislativo No. 807, establece que los órganos funcionales del Indecopi suspenderán la tramitación de los procedimientos que se siguen ante ellos solo en el caso que: . . . (ii) cuando surja una cuestión contenciosa que, a criterio del Tribunal o de la Comisión u Oficina respectiva, precise de un pronunciamiento previo sin el cual no puede ser resuelto el asunto que se tramita ante Indecopi. . . .”. Unofficial translation: “In the area of bankruptcy, Article 65 of Legislative Decree No. 807 states that the functional bodies of Indecopi [the insolvency authority] will suspend the progress of proceedings before them only in the event that . . . (ii) when a contentious issue arises which, in the opinion of the Court or the respective Commission or Office, requires a prior ruling without which the matter before Indecopi cannot be resolved. . . .”. Decree Law No. 807 (INDECOPI Law) [1996], art 65: “Los órganos funcionales de Indecopi suspenderán la tramitación de los procedimientos que ante ellos se siguen sólo en caso de que, con anterioridad al inicio del procedimiento administrativo, se haya iniciado un proceso judicial que verse sobre la misma materia o cuando surja una cuestión contenciosa que, a criterio del Tribunal de Defensa de la Competencia y de la Propiedad Intelectual o de la Comisión u Oficina respectiva, precisa de un pronunciamiento previo sin el cual no puede ser resuelto el asunto que se tramita ante Indecopi”. Unofficial translation: “Indecopi’s functional bodies shall suspend the proceedings before them only if, prior to the commencement of the administrative procedure, judicial proceedings have been initiated on the same matter or if a contentious issue arises, which, in the opinion of the Court for the Defence of Competition and Intellectual Property or the respective Commission or Office, merits a prior ruling without which the case before Indecopi cannot be resolved”.

the power of the arbitral tribunals to rule on any discussion related to the existence, origin, legitimacy, amount, or title of the credit.<sup>2,3</sup>

2. The only restriction on the powers of the arbitrators is established in Article 18 of the Insolvency Act. Therefore, when the beginning of an insolvency proceeding is made public (by an announcement in the Official Gazette or the “Boletín Concursal”, an online publication), arbitration tribunals may not order, through awards or interim measures, actions that affect the debtor’s assets or the operation of its business. In case such orders have already been issued, arbitral tribunals (and courts) are prevented from enforcing them.<sup>4</sup> Likewise, if an arbitral tribunal has issued provisional measures depriving the debtor of possession over its assets, it must lift the order, and the assets shall return to the entity managing the debtor’s assets for the duration of the insolvency proceeding.<sup>5</sup> Also, any proceedings (including arbitral proceedings) aimed at enforcing a judgment against the assets of the debtor will be suspended.<sup>6</sup>

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<sup>2</sup> Law No. 27809 (Insolvency Act) [2002], art 18(7): “En los procedimientos judiciales o administrativos iniciados para la declaración de obligaciones, la prohibición de ejecución de bienes no alcanza a las etapas destinadas a determinar la obligación emplazada al deudor. La autoridad competente continuará conociendo hasta emitir pronunciamiento final sobre dichos temas, bajo responsabilidad”. Unofficial translation: “In the judicial and administrative procedures initiated for the declaration of obligations, the prohibition regarding the enforcement on assets does not include the stages destined to determine the debtor’s alleged obligation. The competent authority shall continue acting until issuing a final decision on said topics, under liability”.

<sup>3</sup> *ibid*, art 39(5): “Los créditos controvertidos judicial, arbitral o administrativamente serán registrados por la Comisión como contingentes, siempre que dicha controversia esté referida a su existencia, origen, legitimidad, cuantía o titularidad, y el asunto controvertido sólo pueda dilucidarse en el fuero judicial, arbitral o administrativo, por ser competencia exclusiva de la autoridad a cargo”. Unofficial translation: “The credits controverted by judicial, arbitral or administrative proceedings shall be registered by the Commission as contingent, provided that said controversy is referred to their existence, origin, legitimacy, amount or title, and the controverted issue can only be determined by a judicial, arbitral or administrative forum, being of the exclusive jurisdiction of the authority in charge”.

<sup>4</sup> See the answers to Questions 20 and 21.

<sup>5</sup> Law No. 27809 (Insolvency Act) [2002], art 18(3): “Si las medidas cautelares, distintas a las señaladas en el numeral precedente, han sido trabadas se ordenará su levantamiento y la devolución de los bienes involucrados en la medida cautelar a quien ejerza la administración del patrimonio del deudor. . . .”. Unofficial translation: “If precautionary measures, different from those indicated in the previous subparagraph, have been ordered, they shall be reversed and the assets subject to such measure shall be released and refunded to who is exercising management over the debtor’s estate. . . .”.

<sup>6</sup> *ibid*, art 18(4): “. . . a partir de la fecha de la publicación indicada en el Artículo 32, toda autoridad judicial o administrativa se encontrará impedida de tramitar, bajo responsabilidad, el inicio de cualquier procedimiento destinado exclusivamente al cobro de los créditos comprendidos en el concurso. En caso que dichos procedimientos se hayan iniciado antes de la mencionada fecha, la autoridad a cargo de los mismos suspenderá su tramitación en la etapa en la que se encuentren, bajo responsabilidad”. Unofficial translation: “. . . from the date of the publication referred in article 32, every judicial or administrative authority shall be prevented from initiating, under liability, any procedure destined exclusively to the collection of credits subject to insolvency proceedings. In case such proceedings have been initiated before the referred date, the responsible authority for such proceedings shall suspend them in whatever stage they are in, subject to liability”.

3. However, during an insolvency proceeding, an arbitral tribunal may order any other measure, through awards or interim measures, that does not imply the dispossession of the debtor's assets or that does not affect the operation of its business.<sup>7</sup>
4. As noted above, the effects of an insolvency proceeding on pending and future arbitrations are set forth in the INDECOPI Law (Article 65) and the Insolvency Act—Law No. 27809 (Articles 18 and 39). The Legislative Decree that regulates arbitration—Legislative Decree No. 1071—does not contemplate any effect of insolvency proceedings on arbitration proceedings.

2. **Does the insolvency legislation in Peru 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. Pursuant to Articles IV<sup>8</sup> and V<sup>9</sup> of the Insolvency Act, the insolvency proceeding concentrates the discussion of all the credits of the debtor and establishes the distribution of its assets among the creditors. Under Peruvian law, insolvency proceedings are not administered by courts, but by an administrative authority (“Comisión de Procedimientos Concursales” of INDECOPI).<sup>10</sup>

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<sup>7</sup> *ibid*, art 18(2): “Dicha abstención no alcanza a las medidas pasibles de registro ni a cualquier otra que no signifique la desposesión de bienes del deudor o las que por su naturaleza no afecten el funcionamiento del negocio, las cuales podrán ser ordenadas y trabadas pero no podrán ser materia de ejecución forzada”. Unofficial translation: “The referred abstention does not include measures suitable of registration nor any other that does not involve the dispossession of the debtor’s assets or those that by their nature do not affect the business’ operations, which will be able to be ordered and attached but not be subject to mandatory enforcement”.

<sup>8</sup> *ibid*, art IV: “Los Procedimientos concursales producen sus efectos sobre la totalidad del patrimonio del deudor, con las excepciones establecidas expresamente por la ley”. Unofficial translation: “Insolvency proceedings have effects on all the debtor’s estate, with the exceptions expressly established by law”.

<sup>9</sup> *ibid*, art V: “Los procedimientos concursales buscan la participación y beneficio de la totalidad de los acreedores involucrados en la crisis del deudor. El interés colectivo de la masa de acreedores se superpone al interés individual de cobro de cada acreedor”. Unofficial translation: “Insolvency proceedings seek the participation and benefit of all creditors involved in the debtor’s crisis. The collective interest of the mass of creditors takes precedence over the individual interest of each creditor in collecting”.

<sup>10</sup> *ibid*, art 3(1): “La Comisión de Procedimientos Concursales y las Comisiones desconcentradas de las Oficinas Regionales del INDECOPI son competentes para conocer los procedimientos concursales regulados en la presente Ley. El Tribunal [del INDECOPI] es competente para conocer en última instancia administrativa”. Unofficial translation: “The ‘Comisión de Procedimientos Concursales’ and the decentralized Commissions of the Regional Offices of INDECOPI are competent to hear the insolvency proceedings regulated in this Law. The [INDECOPI’s] Tribunal is the final administrative authority”.

6. Said administrative authority is competent to resolve disputes regarding the existence, origin, legitimacy, amount, or entitlement of the credit.<sup>11</sup> For this reason, all creditors must request recognition of their credits before this administrative authority.<sup>12</sup> Only creditors whose credits were presented and recognized by INDECOPI within the period established by law may participate and vote in the creditors' committee.<sup>13</sup>
7. If the parties have agreed to decide their controversies before an arbitral tribunal, the arbitration will continue until the award is rendered.<sup>14</sup> The opening of insolvency proceedings does not suspend it or prevent an arbitration from being initiated. While the arbitration is taking place, credits will be recognized as contingent, and their holders, whose right is under discussion, will not be able to vote in the creditor committee. Those credits will only be fully recognized in the insolvency proceeding after the arbitral tribunal rules on the matter under discussion. From that moment, the creditor may participate and vote in the creditor committee.<sup>15</sup>

**3. What are the effects (if any) of the opening of insolvency proceedings in Peru 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. The opening of insolvency proceedings in Peru does not, generally, prevent commencing or continuing with arbitration proceedings. However, arbitral tribunals will be subject to the limitations described in our answer to Question 1.
9. The Peruvian Insolvency Act does not differentiate between arbitration proceedings initiated by the insolvent party as claimant or as defendant. Both types of arbitration may be initiated and may continue during the insolvency proceedings.

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<sup>11</sup> *ibid*, art 38(6).

<sup>12</sup> *ibid*, art 37(1).

<sup>13</sup> *ibid*, art 34(1).

<sup>14</sup> See n. 3.

<sup>15</sup> Law No. 27809 (Insolvency Act) [2002], art 34(4): “. . . Definida la contingencia, el titular del crédito, podrá participar en las Juntas con derecho a voz y voto. . . .”. Unofficial translation: “. . . Once the contingency has been determined, the creditor may participate in the meetings of the Committee with the right to speak and vote. . . .”.

**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?**

10. The Insolvency Act does not differentiate between insolvency proceedings aimed at the liquidation of the company and proceedings aimed at the financial restructuring or rehabilitation of the company for the purposes of the effects they have on arbitrations.

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

11. As noted in our answer to Question 1, the limitations on arbitration proceedings (either new or continuing) set forth in the Insolvency Act depend on the relief sought in the arbitration. Arbitral tribunals cannot issue orders depriving the debtor of possession over its assets or the operation of its business. However, the arbitral tribunal may order any relief that does not affect possession over the debtor's assets or business.

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

12. Under Peruvian law, there are three Insolvency proceedings: (i) the "preventive" proceeding, (ii) the "ordinary" proceeding, and (iii) the recently approved "accelerated" proceeding. The "preventive" proceeding is a pre-insolvency proceeding that does not require a declaration of insolvency. It can only be commenced by the debtor and requires satisfying certain conditions. It differs from the ordinary insolvency procedure, generally applicable to those entities already in a critical situation.<sup>16</sup> The "accelerated" proceeding is a new ad-hoc insolvency proceeding intended to mitigate the effects of COVID-19 in the Peruvian economy.<sup>17</sup> The effects on arbitration set forth in Article 18 of the Insolvency Act apply to all

<sup>16</sup> Indecopi, 'Presentación, Comisión de Procedimientos Concursales, Ordinario' (Indecopi) <<https://www.indecopi.gob.pe/en/web/procedimientos-concursales/presentacion>> accessed 2 June 2020.

<sup>17</sup> Legislative Decree No. 1511, published on May 11, 2020, created the Accelerated Insolvency Refinancing Proceeding ("Accelerated Proceeding"), designed so that companies affected by the crisis generated by COVID-19 can structure a business refinancing plan with their creditors. The main objective of the Accelerated Proceeding is that companies affected by COVID-19 can access a proceeding to restructure the payment of their debts that is faster and more efficient than the preventive proceeding or the ordinary proceeding.

three types of proceedings, as established in the Insolvency Act<sup>18</sup> and Legislative Decree No. 1511.<sup>19</sup>

**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?**

13. The Insolvency Act makes no difference between arbitration proceedings in progress or those to be initiated.

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

14. The Insolvency Act does not differentiate between voluntary (“at the request of the debtor”, under the Insolvency Act) or compulsory (“at the request of the creditor”, under the Insolvency Act) insolvency proceedings for purposes of the effects on arbitration proceedings.

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<sup>18</sup> These effects are applicable to the preventive proceedings when the debtor requests it. Law No. 27809 (Insolvency Act) [2002], art 18: “1. Cuando el deudor lo solicite al iniciarse el procedimiento, la publicación a que se refiere el Artículo 32 suspenderá la exigibilidad de todas las obligaciones que el concursado tuviera pendientes de pago devengadas hasta dicha fecha, sin que este hecho constituya una novación de tales obligaciones. La suspensión antes mencionada durará hasta que se apruebe el Acuerdo Global de Refinanciación en el que se establecerán las condiciones referidas a la exigibilidad de todas las obligaciones comprendidas en el procedimiento y la tasa de interés aplicable, de ser el caso. 2. En caso de que el deudor no solicite la suspensión de la exigibilidad de las obligaciones a que se refiere el párrafo anterior, será la presentación del Acuerdo Global de Refinanciación, debidamente certificado por el representante de la Comisión, la que determine las nuevas condiciones de refinanciación de todas las obligaciones del deudor devengadas hasta la publicación a que se refiere el Artículo 32. . . .”. Unofficial translation: “1. When the debtor has so requested at the initiation of the procedure, the publication referred to in Article 32 shall suspend the enforceability of every obligation that the insolvent party should have accrued to that date and are pending payment, without this constituting a novation of those obligations. The previously mentioned suspension shall continue until the Global Refinancing Agreement is approved, in which the conditions for the enforceability of the obligations subject to the procedure and the applicable interest rate, if applicable, are established. 2. In case the debtor does not request the suspension of the obligations’ enforceability as referred in the previous subparagraph, the presentation of the Global Refinancing Agreement, duly certified by the Commission’s representative, shall determine the new refinancing conditions for all the accrued payment obligations pending at the date of the publication mentioned in Article 32. . . .”.

<sup>19</sup> Legislative Decree No. 1511 [2020], art 7(2): “Una vez firme o consentida la resolución que admite a trámite el acogimiento de la Entidad Calificada al PARC, el aviso de inicio del PARC se publica en el Boletín Concursal, siendo de aplicación a partir de la referida publicación lo dispuesto en los artículos 17 y 18 de la Ley General del Sistema Concursal sobre la suspensión de la exigibilidad de obligaciones y el marco de protección legal del patrimonio hasta la aprobación o desaprobación del PRE. . . .”. Unofficial translation: “Once the resolution that admits the inclusion of the Qualified Entity to the PARC becomes final, the PARC’s initiation notification shall be published in the Insolvency Bulletin, and the provisions included in Articles 17 and 18 of the Insolvency Act regarding the suspension of the enforceability of obligations and the legal protection framework on estate shall be applicable until the approval or rejection of the PRE. . . .”.

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

15. Article 2 of the Insolvency Act<sup>20</sup> provides that its application is mandatory in insolvency proceedings of a debtor that is domiciled in Peru, even if some of its assets are abroad,<sup>21</sup> and an agreement to the contrary will not be effective. Therefore, to the extent that the debtor of the insolvency proceeding is domiciled in Peru, the restrictions established by the Insolvency Act (see the answer to Question 1) will be applicable to all arbitrations, regardless of their seat.

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

16. Pursuant to Article 18 of the Insolvency Act, the restrictions become effective when the beginning of an insolvency proceeding is made public.<sup>22</sup> In the case of preventive and ordinary proceedings, regulated by this Act, the publication will be made through the Official Gazette El Peruano. In the case of the “Procedimiento Acelerado de Refinanciación Concursal”, recently approved, the publication will be made in the “Boletín Concursal”, which will be available online.<sup>23</sup> Thus, arbitrations are not affected during the prior stage when the proceedings have not been made public.<sup>24</sup> That includes INDECOPÍ’s notification to the debtor that the initiation of a insolvency proceeding was requested against him and the declaration

<sup>20</sup> Law No. 27809 (Insolvency Act) [2002], art 2(1): “La Ley se aplica obligatoriamente a los procedimientos concursales de los deudores que se encuentran domiciliados en el país, sin admitir pacto en contrario. No son oponibles para efectos concursales los acuerdos privados relativos a la sustracción de ley y jurisdicción peruana”. Unofficial translation: “The Law is mandatorily applied to the insolvency proceedings of debtors who are domiciled in the country, without admitting an agreement to the contrary. Private agreements regarding the removal of Peruvian law and jurisdiction are not enforceable for insolvency purposes”.

<sup>21</sup> *ibid*, art 6(3): “La Autoridad Concursal peruana será competente para conocer los procedimientos concursales que se promueven contra deudores domiciliados en el país, incluso en aquellos casos en que parte de sus bienes y/o derechos que integran su patrimonio se encuentren fuera del territorio de la República”. Unofficial translation: “The Peruvian Bankruptcy Authority shall be competent to hear bankruptcy proceedings against debtors domiciled in the country, even in those cases in which part of the assets and/or rights that make up their estate is located outside the Republic’s territory”.

<sup>22</sup> *ibid*, art 18(1).

<sup>23</sup> Legislative Decree No. 1511 [2020], art 2(2).

<sup>24</sup> Law No. 27809 (Insolvency Act) [2002], art 17: “17.1 A partir de la fecha de la publicación a que se refiere el Artículo 32, se suspenderá la exigibilidad de todas las obligaciones que el deudor tuviera pendientes de pago a dicha fecha, sin que este hecho constituya una novación de tales obligaciones, aplicándose a éstas, cuando corresponda la tasa de interés que fuese pactada por la Junta de estimarlo pertinente. . . .”. Unofficial translation: “17.1 As of the date of the publication referred to in Article 32, the enforceability of all the pending obligations of the debtor at that date shall be suspended, without this constituting a novation of such obligations, and the interest rate agreed upon by the Committee, if any, shall be applied to them if considered appropriate . . .”.



of insolvency<sup>25</sup> (when (i) the requesting creditor rejects the offer of payment; (ii) the opposition by the debtor is unfounded or inadmissible; (iii) the debtor acquiesces to the request; or (iv) the debtor fails to respond within 10 days of being notified).

- 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?**

17. The Peruvian Insolvency Act does not permit relief from the restrictions set forth in Article 18.

- 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?**

18. Peruvian law does not grant the insolvency authority the power to halt the initiation or continuation of arbitral proceedings. Arbitrations will continue normally until the award is issued. However, the arbitration tribunals will only be able to rule on the existence, origin, legitimacy, amount, or title of the credit. Pursuant the restrictions established in Article 18 (see the answer to Question 1), they cannot order the dispossession of the assets of the debtor. This is the exclusive competence of the insolvency authority.

- 6. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of contracts that contain arbitration agreements concluded by the insolvent party before the opening of insolvency proceedings? If so, on what basis?**

19. Neither the insolvency administrator nor the insolvency authority has the power to terminate or suspend the effectiveness of contracts concluded by the insolvent party before the opening of insolvency proceedings (whether or not containing arbitration agreements).

20. However, regardless of whether or not a contract contains an arbitration agreement, Article 19.1 of the Insolvency Act provides that Peruvian judicial courts may declare ineffective, and therefore unenforceable to third parties (including creditors in the Insolvency proceedings), contracts affecting the debtor's net worth concluded during the year prior to the opening of the insolvency proceedings that do not pertain to the normal development of the insolvent

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<sup>25</sup> *ibid*, art 28(3).

party's activity.<sup>26</sup> The insolvency administrator, the liquidator, or any of the recognized creditors may request such a declaration from the Peruvian courts.<sup>27</sup>

**7. What is the effect (if any) on the arbitration agreement of the decision of the insolvency administrator or insolvency court to terminate/disclaim the contract that contains such arbitration agreement?**

21. As explained in the previous answer, this prerogative is only given to the Peruvian courts and not the insolvency administrator or insolvency authority. The judge's declaration that a contract is ineffective to third parties will have an impact on the insolvency estate, for example, by reversing the possible effluxes of capital or assets.
22. However, to the extent that this provision is aimed at protecting the assets of the debtor and third parties (mainly the creditors in the insolvency proceedings) and due to the principle of separability, even when the contract is declared ineffective, the arbitration clause will maintain its effects between the parties. Thus, it may still be invoked by any of them to resolve the controversies that arise from this contract. That means that a judge can only declare the contract ineffective based on the Article 19.1 of the Insolvency Act. However, even in that scenario, any controversy between the parties regarding the consequences of this declaration or other matters must be resolved by an arbitral tribunal.

**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?**

23. No. Article 19.1 of the Insolvency Act provides that Peruvian judicial courts may declare ineffective, and therefore unenforceable to third parties (including creditors in the insolvency proceedings), contracts affecting the debtor's net worth concluded during the year prior to

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<sup>26</sup> Law No. 27809 (Insolvency Act) [2002], art 19(1): "El juez declarará ineficaces y, en consecuencia, inoponibles frente a los acreedores del concurso, los gravámenes, transferencias, contratos y demás actos jurídicos, sean a título gratuito u oneroso, que no se refieran al desarrollo normal de la actividad del deudor, que perjudiquen su patrimonio y que hayan sido realizados o celebrados por éste dentro del año anterior a la fecha en que presentó su solicitud para acogerse a alguno de los procedimientos concursales, fue notificado de la resolución de emplazamiento o fue notificado del inicio de la disolución y liquidación". Unofficial translation: "The judge will declare ineffective and, consequently, unopposable against the creditors of the insolvency proceeding, any liens, transfers, contracts and other legal acts, whether gratuitous or onerous, which do not relate to the normal course of the debtor's business, which are detrimental to his assets and were made or concluded by him within the year prior to the date on which he submitted his application for any insolvency proceeding, was notified with the decision to summon or was notified with the commencement of the dissolution and liquidation".

<sup>27</sup> *ibid*, art 20(1).

the opening of the insolvency proceedings that do not pertain to the normal development of the insolvent party's activity.<sup>28</sup> This does not include arbitration agreements.

**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?**

24. Peruvian law does not require an alleged creditor to take any specific step in the insolvency process to be able to commence or continue with an arbitration. According to Article 38 of the Insolvency Act, the “Comisión de Procedimientos Concursales” (insolvency authority) is the entity in charge of verifying the existence of the credits through a credit recognition process.<sup>29</sup>

25. Article 39.5 of the Insolvency Law states that “claims that are disputed judicially, arbitrarily, or administratively will be registered by the Commission as contingent, provided that such controversy refers to their existence, origin, legitimacy, amount, or title, and the controversial matter can only be resolved in the judicial, arbitration, or administrative forum, as it is the exclusive competence of the authority in charge”.<sup>30</sup>

26. Thus, if a credit is rejected in the insolvency proceeding, its existence, origin, legitimacy, amount, or title can be discussed in arbitration. If the arbitral tribunal rules in favor of the creditor, he may reapply for credit recognition in the insolvency proceeding.

27. -In accordance with Article 39.2, filing a claim with the insolvency authority (which is not a court, but an administrative authority) does not amount to a waiver of the arbitration agreement.

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<sup>28</sup> See n. 26.

<sup>29</sup> Law No. 27809 (Insolvency Act) [2002], art 38(1)(2): “38.1 La Comisión notificará al deudor para que, en un plazo no mayor de diez (10) días, exprese su posición sobre la solicitud de reconocimiento de créditos. 38.2 Luego de vencido el plazo señalado en el numeral anterior, la Comisión quedará facultada para emitir pronunciamiento respecto de la solicitud de reconocimiento de créditos . . .”. Unofficial translation: “38.1 The Commission shall notify the debtor so that, within a period of no more than ten (10) days, it may express its position in regard to the application for recognition of credits. 38.2 After the expiration of the period indicated in the preceding paragraph, the Commission shall be empowered to issue a decision regarding the application for credit recognition . . .”.

<sup>30</sup> See n. 3.

**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)?**

28. No. The arbitration agreement will not be enforceable in that case. Article 19.1 of the Insolvency Act provides that Peruvian judicial courts are competent to declare ineffective, and therefore unenforceable to third parties (including creditors in the Insolvency proceedings), contracts affecting the debtor's net worth concluded during the year prior to the opening of the insolvency proceedings that do not pertain to the normal development of the insolvent party's activity.<sup>31</sup> The arbitral agreement will remain enforceable only between the parties.

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

29. After the opening of insolvency proceedings, both the insolvency administrator and the creditor committee can conclude new arbitration agreements.

30. Regarding the insolvency administrator, Article 83.2(c) of the Insolvency Act details its powers. This provision states that it may "[c]onclude the acts and contracts necessary for the purpose of preserving, maintaining and insuring the debtor's assets, with prior knowledge of the Board of Creditors, the President of this Board or the Committee, if any."<sup>32</sup> Such contracts may include arbitral agreements.

31. Likewise, Subsection "d" of the same Article provides that an insolvency administrator has the power to "[c]onclude the necessary contracts and settle and carry out, with or without guarantees, the credit transactions strictly necessary to cover the expenses and obligations demanded by the liquidation, with the knowledge of the Board of Creditors, the President of this Board or Committee, if any. These acts may only be carried out with companies of the financial system."<sup>33</sup> Article 61.4 of the Insolvency Act states that if the creditor committee decides to restructure the debtor and appoint a new administration, it may conclude all kinds of acts and contracts.<sup>34</sup> These contracts may also contain arbitration agreements.

<sup>31</sup> See n. 26.

<sup>32</sup> Law No. 27809 (Insolvency Act) [2002], art 83(2)(c).

<sup>33</sup> *ibid*, art 83(2)(d).

<sup>34</sup> *ibid*, art 61(4): "Si la Junta opta por la alternativa prevista en el literal b) del primer párrafo del presente artículo, la administración designada sustituirá de pleno derecho en sus facultades legales y estatutarias a los directores, gerentes, representantes legales y apoderados del deudor, sin reserva ni limitación alguna, pudiendo celebrar toda clase de actos y contratos". Unofficial translation: "If the Committee chooses the alternative provided in subparagraph b) of the first paragraph of this article, the appointed administration will replace with full rights in its legal and statutory powers, the debtor's directors, managers, legal representatives and attorneys-in-fact, without any reservation or limitation, and may execute all kinds of acts and contracts".

32. The creditors' committee could also agree that any controversy related to the Restructuring Plan must be resolved through arbitration.<sup>35</sup> Likewise, the creditors' committee may approve a Liquidation Agreement<sup>36</sup> that establishes arbitration as the mechanism for solution of any controversy related to this agreement.<sup>37</sup>

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

33. The opening of insolvency proceedings does not affect the initiation or continuation of an arbitration. The only restriction on the powers of the arbitrators is established in Article 18 of the Insolvency Act [see answer to Question 1]. These restrictions remain even after the creditors' committee reaches an agreement. The arbitral tribunal may not order the dispossession of the assets of the debtor until the insolvency proceeding ends.

**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?**

34. According to Article 2 of the Insolvency Act, this law is of mandatory application and does not admit agreements to the contrary.<sup>38</sup>

<sup>35</sup> *ibid*, art 73(1): "La Junta deberá establecer en el Plan de Reestructuración el fuero jurisdiccional, sea el judicial o el arbitral, para la solución de cualquier controversia que pudiera surgir sobre su ejecución o interpretación, en defecto de indicación, se entenderá que es fuero judicial". Unofficial translation: "The Committee shall establish in the Restructuring Plan the jurisdiction, whether judicial or arbitral, for the resolution of any possible dispute that may arise regarding its performance or interpretation; though in the absence of any indication, it shall be deemed to be a judicial court".

<sup>36</sup> *ibid*, art 77: "El Convenio de Liquidación propuesto deberá ser aprobado con la mayoría establecida en el Artículo 53.1. Se suscribe en el mismo acto en el que se acuerde la liquidación o dentro de los treinta días siguientes de adoptado dicho acuerdo por el Liquidador y el Presidente de la Junta de Acreedores, en representación de todos los acreedores". Unofficial translation: "The proposed Liquidation Agreement must be approved by the majority provided for in Article 53.1. It shall be executed in the same act in which the liquidation is agreed or within thirty days after such agreement is adopted by the Liquidator and the Chairman of the Committee of Creditors, in representation of all the creditors".

<sup>37</sup> *ibid*, arts 73(1) and 79: "79. Serán aplicables al Convenio de Liquidación las disposiciones contenidas en el Artículo 73, en lo que resultare pertinente". Unofficial translation: "The provisions of Article 73 shall apply to the Settlement Agreement, as appropriate".

<sup>38</sup> See n. 20.

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

35. As mentioned above, under Article 6 of the Insolvency Act, to the extent that the debtor of the insolvency proceeding is domiciled in Peru, even if some of its assets are abroad,<sup>39</sup> the restrictions established by the Insolvency Act will be applicable to all arbitrations seated in Peru in which a debtor domiciled in Peru is a party.
36. The Insolvency Act and other insolvency rules are also applicable with respect to the assets located in Peru of persons domiciled abroad if the judgment declaring their insolvency has been recognized by the Peruvian judicial courts or when the conflict of law rules so provide.<sup>40</sup> Therefore, the aforementioned restrictions also apply to arbitrations related to these assets.

**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?**

37. No, it does not. As we saw in the answer to the previous question, the application of Peruvian insolvency rules will depend on whether the debtor is domiciled in the country and on whether the debtor’s assets are located in Peru. The particularities of the counterparty in an arbitration are not relevant when determining their application.

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<sup>39</sup> See n. 21.

<sup>40</sup> Law No. 27809 (Insolvency Act) [2002], art 6(2): “Las Comisiones son competentes también para conocer de los procedimientos concursales de personas naturales o jurídicas domiciliadas en el extranjero en caso de que se hubiera reconocido, por las autoridades judiciales peruanas correspondientes, la sentencia extranjera que declara el concurso o cuando así lo dispongan las normas de Derecho Internacional Privado. en ambos supuestos, dicha competencia se extenderá exclusivamente a los bienes situados en el territorio nacional”. Unofficial translation: “The Commissions are also competent to hear the bankruptcy proceedings of the individuals and/or legal entities domiciled abroad in the event that the foreign ruling declaring the bankruptcy has been recognized by the appropriate Peruvian judicial authorities, or when the rules of Private International Law so dictate. In both cases, such competence shall extend exclusively to the assets located in the national territory”. Peruvian Civil Code [1992], art 2105: “Los efectos de la quiebra decretada en el extranjero y reconocida en el Perú, se ajustarán a la ley peruana en lo que respecta a los bienes situados en el Perú y a los derechos de los acreedores. . . .”. Unofficial translation: “The effects of an insolvency declared abroad and recognized in Peru shall adjust to comply with Peruvian law with respect to assets located in Peru and the creditors’ rights. . . .”.

**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?]**

38. Depending on the stage of the insolvency proceeding and the decision made on the debtor's liquidation or restructuring, the representative of the debtor in the arbitrations that are initiated or ongoing may be different.

39. The debtor will participate in the arbitrations in its own name from the opening of the insolvency proceeding until the creditors' committee decides on the future of the debtor.

40. If the creditors' committee decides to restructure the debtor, the insolvency administrator will represent the debtor in all arbitrations involving it.<sup>41</sup> In this case, the creditors' committee may choose between maintaining the debtor's administration, appointing an insolvency administrator, or applying a mixed administration system between the two options.

41. Conversely, if the creditors' committee opts for the liquidation of the debtor, the liquidator will replace the insolvent party in everything related to its procedural capacities, including those related to an arbitration procedure.<sup>42</sup>

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<sup>41</sup> Law No. 27809 (Insolvency Act) [2002], art 61(6): "Los representantes designados por la Junta tienen las facultades generales y especiales de representación establecidas en el Código Procesal Civil desde el momento de su designación, salvo acuerdo en contrario". Unofficial translation: "The representatives appointed by the Committee have the general and specific powers of representation established in the Civil Procedural Code as of the moment of their appointment, unless otherwise agreed".

<sup>42</sup> Law No. 26887 (General Corporation Law) [1997], art 416: "Por el sólo hecho del nombramiento de los liquidadores, éstos ejercen la representación procesal de la sociedad, con las facultades generales y especiales previstas por las normas procesales pertinentes; en su caso, se aplican las estipulaciones en contrario o las limitaciones impuestas por el estatuto, el pacto social, los convenios entre accionistas inscritos ante la sociedad y los acuerdos de la junta general". Official translation [2014]: "By virtue of the mere fact of their appointment, these liquidators exercise the company's procedural representation, with the general and special powers established by the pertinent procedural rules; provisions to the contrary or the limitations imposed, if any, by the bylaws articles of incorporation, shareholder agreements registered with the company, and general meeting agreements shall apply".

**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?**

42. Pursuant to Article 51 of the Decree Law No. 1071<sup>43</sup> (Peruvian Arbitration Act), the arbitration will remain confidential unless the parties agree otherwise or one of them is the State. Neither the Insolvency Act, nor any other law on the matter, contains provisions on confidentiality (or lack of confidentiality) applicable to an arbitration conducted against an insolvent party.

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

43. Under Peruvian law the name of the party only changes when the liquidation of a legal person has been decided. From this moment, the entity shall include the phrase “in liquidation” in all its documents and correspondence.<sup>44</sup> In the case of a restructuring, the name of the legal person or the party in general does not change.

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<sup>43</sup> Legislative Decree No. 1071 (Arbitration Act) [2008], art 51: “1. Salvo pacto en contrario, el tribunal arbitral, el secretario, la institución arbitral y, en su caso, los testigos, peritos y cualquier otro que intervenga en las actuaciones arbitrales, están obligados a guardar confidencialidad sobre el curso de las mismas, incluido el laudo, así como sobre cualquier información que conozcan a través de dichas actuaciones, bajo responsabilidad. 2. Este deber de confidencialidad también alcanza a las partes, sus representantes y asesores legales, salvo cuando por exigencia legal sea necesario hacer público las actuaciones o, en su caso, el laudo para proteger o hacer cumplir un derecho o para interponer el recurso de anulación o ejecutar el laudo en sede judicial. . . .”. Unofficial translation: “1. Unless otherwise agreed, the arbitral tribunal, the secretary, the arbitral institution and, if appropriate, the witnesses, experts and any other person involved in the arbitral proceedings are under an obligation of confidentiality in regard to the conduct of the proceedings, including the award, and any information coming to their attention through the proceedings, under liability. 2. This duty of confidentiality also extends to the parties, their representatives and legal advisers, except where it is legally required to make the proceeding public or, as the case may be, the award public in order to protect or enforce a right or to seek annulment or enforcement of the award in a court of law. . . .”.

<sup>44</sup> Law No. 26887 (General Corporation Law) [1997], art 413: “Durante la liquidación, la sociedad debe añadir a su razón social o denominación la expresión “en liquidación” en todos sus documentos y correspondencia”. Official translation [2014]: “During the liquidation, all of the company’s documents and correspondence must include the expression ‘in liquidation’”.



**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 authorize any settlement for it to be effective?**

44. According to Article 416 of the General Corporation Law, the insolvency administrator has general and special powers of procedural representation.<sup>45</sup> This includes the power to reach settlements in arbitral proceedings.<sup>46</sup>
45. Furthermore, Article 416.8 of the General Corporation Law expressly provides that insolvency administrators have the power to “[c]oncert settlements and assume commitments and obligations that are convenient for the liquidation process”.<sup>47</sup> Therefore, we can conclude that insolvency administrators can reach settlement agreements in arbitral proceedings without requiring approval of the insolvency authority. However, in accordance with Article 83,<sup>48</sup> the liquidator must inform the creditors’ committee, its chairman, or the corresponding committee before reaching settlements in arbitral proceedings.
46. According to Article 61<sup>49</sup> of the Insolvency Act and Article 14<sup>50</sup> of the General Corporation Act, the debtor in possession has general and special powers for procedural representation. This includes the power to reach settlements in arbitral proceedings.

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

47. Yes; however, this power is limited as certain types of interim measures may not be adopted. As explained in the answer to Question 1, Article 18 of the Insolvency Act imposes limitations to arbitral tribunals. From the moment of the publication of the beginning of an insolvency proceeding, arbitration tribunals may only issue orders, including interim measures, that do not imply the dispossession of the debtor’s assets and that do not affect the operation of the business. In case measures that affect the debtor’s assets have already been ordered before the insolvency proceeding began, arbitral tribunals are prevented from enforcing them.<sup>51</sup>

<sup>45</sup> See n. 42.

<sup>46</sup> Legislative Decree No. 1071 [2008] (Arbitration Act), art 50.

<sup>47</sup> Law No. 26887 (General Corporation Law) [1997], art 416(8): “8. Concertar transacciones y asumir compromisos y obligaciones que sean convenientes al proceso de liquidación”. Official translation [2014]: “8. “[c]oncert settlements and assume commitments and obligations that are convenient for the liquidation process”.

<sup>48</sup> Law No. 27809 (Insolvency Act) [2002], art 83(2)(c).

<sup>49</sup> *ibid*, art 61(6).

<sup>50</sup> Law No. 26887 (General Corporation Law) [1997], art 14.

<sup>51</sup> Law No. 27809 (Insolvency Act) [2002], art 18(1): “A partir de la fecha de la publicación referida en el Artículo 32, la autoridad que conoce de los procedimientos judiciales, arbitrales, coactivos o de venta extrajudicial seguidos contra el deudor, no ordenará, bajo responsabilidad, cualquier medida cautelar que afecte su patrimonio y si ya están ordenadas se abstendrá de trabarlas”. Unofficial translation: “Since the publication date referred to in Article 32, the respective authority undertaking the judiciary, arbitration, coercive or out-of-

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

48. If a provisional measure ordered by an arbitral tribunal has affected a debtor's possession over its assets or the management of its business, the tribunal must lift the order and return the property to whoever oversees the administration of debtor's assets during the insolvency proceeding.
49. However, the arbitral tribunal may issue any other order, including by interim measures, that does not imply the dispossession of the debtor's assets and that does not affect the operation of the business.

**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?**

50. The capacity of an insolvent party to participate in arbitration, or to settle a dispute, is not affected by the initiation of insolvency proceedings. However, the debtor will lose the power to participate in arbitration or to settle a dispute directly. As indicated in response to Question 19 above, from the moment of its appointment, the liquidator and insolvency administrator will act as the representative of the insolvent party and therefore will be the one with powers to settle a controversy.<sup>52</sup>
51. However, Article 19.1 of the Insolvency Act provides that Peruvian judicial courts may declare ineffective and, therefore unenforceable to third parties (including creditors in the insolvency proceedings), acts and contracts affecting the debtor's net worth concluded during the year

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court purchase procedures against the debtor, will not order, under liability, any precautionary measure that could affect their estate and, if already ordered will refrain from executing them"; Article 18(4): "En ningún caso el patrimonio del deudor sometido a concurso podrá ser objeto de ejecución forzosa, en los términos previstos en la Ley, con la excepción prevista en el primer y segundo párrafos del Artículo 16. En este sentido, a partir de la fecha de la publicación indicada en el Artículo 32, toda autoridad judicial o administrativa se encontrará impedida de tramitar, bajo responsabilidad, el inicio de cualquier procedimiento destinado exclusivamente al cobro de los créditos comprendidos en el concurso. En caso que dichos procedimientos se hayan iniciado antes de la mencionada fecha, la autoridad a cargo de los mismos suspenderá su tramitación en la etapa en la que se encuentren, bajo responsabilidad." Unofficial translation: "In no case shall the debtor's insolvency estate be subjected to mandatory enforcement, under the terms determined by law, except as provided in the first and second paragraphs of Article 16. In that respect, from the date of the publication referred in Article 32, every judicial or administrative authority shall be prevented from initiating, under liability, any procedure destined exclusively to the collection of credits subject to insolvency proceedings. In case such proceedings have been initiated before the referred date, the responsible authority for such proceedings shall suspend them in whatever stage they are in, subject to liability."

<sup>52</sup> *ibid*, art 83: "2. Son atribuciones y facultades del Liquidador: a) Actuar en resguardo de los intereses de la masa o del deudor, en juicio o fuera de él, con plena representación de éste y de los acreedores . . .". Unofficial translation: "2. The Liquidator has the following faculties and attributions: (a) To act in the best interests of the debtor's estate, in or out-of-court, with full representation of the estate and of the creditors . . .".

prior to the opening of the insolvency proceedings that do not pertain to the normal development of the insolvent party's activity.<sup>53</sup> This includes settlement agreements.

### **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?**

52. Yes. Article 18 of the Insolvency Act prohibits enforcement actions against the insolvent estate. If an enforcement action has affected the estate after the insolvency proceedings were made public, Article 19.6 of the Insolvency Act provides that a judge may declare them ineffective, causing restitution to the estate.

**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?**

53. As mentioned in our response to Question 17, credits subject to arbitration are recognized in the Insolvency proceedings under the "contingent" credit status, according to Article 39.5 of the Insolvency Act.<sup>54</sup>

54. Article 39.2 of the Insolvency Act provides that an arbitral award constitutes proof for purposes of obtaining recognition of a credit in a Insolvency proceeding, provided the amount of the credit is determined.<sup>55</sup> Thus, the status of the credit will change once the award is issued. From that moment, the credit will no longer be considered "contingent" and, thus, the creditor may participate and vote in the creditors' committee.<sup>56</sup>

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<sup>53</sup> See n. 26.

<sup>54</sup> See n. 3.

<sup>55</sup> Law No. 27809 (Insolvency Act) [2002], art 39(2): "Asimismo, serán reconocidos por el solo mérito de su presentación, los créditos que se sustenten en sentencias judiciales consentidas o ejecutoriadas o laudos arbitrales, siempre que su cuantía se desprenda del tenor de los mismos o que hayan sido liquidados en ejecución de sentencia . . .". Unofficial translation: "Claims based on final or enforceable court judgments or arbitration awards shall also be recognized on the sole merit of their submission, provided that their amount is derived from the content thereof or that it has been settled in enforcement of the ruling. . . .".

<sup>56</sup> See n. 15.

**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?**

55. In accordance with Article 39.2 of the Insolvency Act, an arbitration award validly supports a credit for the purposes of the insolvency proceedings.<sup>57</sup>

56. In the case of foreign awards, they need to be recognized by Peruvian courts under the proceedings that may be applicable pursuant to the laws and international treaties in place, including those provided in Article 76 of the Peruvian arbitration Law.<sup>58</sup> The requirements for recognition of a foreign award under Peruvian law are substantially those established in the New York Convention. It shall be noted that the Insolvency authority—INDECOPI—has acknowledged that ICSID awards do not need to be recognized by Peruvian courts.<sup>59</sup>

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

57. Although Peruvian laws that regulate the effects of insolvency on arbitration are mandatory and do not admit an agreement to the contrary, there is no law or judgement that considers such rules part of domestic public policy.<sup>60</sup> Nevertheless, some authors consider that those

<sup>57</sup> See n. 56.

<sup>58</sup> *Cooperativa Agraria Industrial Naranjillo Limitada v. Transmar Commodity Group Ltd* [2019] RESOLUCIÓN N° 0336-2019/SCO-INDECOPI [Tercero]: “. . . podrán ser reconocidos en un procedimiento concursal, por el solo mérito de su presentación, los créditos que se sustenten en sentencias judiciales consentidas o ejecutoriadas o laudos arbitrales extranjeros, siempre que su cuantía se desprenda del tenor de dichos instrumentos y que éstos cuenten con la respectiva resolución judicial de reconocimiento en el Perú, salvo que las normas antes mencionadas establezcan un tratamiento destino”. Unofficial translation: “. . . claims based on foreign final or enforceable judgments or arbitral awards may be recognized in an insolvency proceeding, on the sole basis of their presentation, provided that their amount is derived from the terms of such instruments and that they have the respective judicial recognition decision in Peru, unless the aforementioned rules establish a specific treatment.”

<sup>59</sup> *Cooperativa Agraria Industrial Naranjillo Limitada v. Transmar Commodity Group Ltd* [2019] RESOLUCIÓN N° 0336-2019/SCO-INDECOPI [30]-[31]: “30. Cabe precisar que, de conformidad con lo establecido en el Convenio sobre Arreglo de Diferencias Relativas a Inversiones (en adelante, CIADI) . . . solo los laudos arbitrales emitidos bajo dicho convenio son de reconocimiento y ejecución automática, como si fueran una sentencia judicial definitiva dictada por un tribunal existente en cualquier Estado, sin que sea necesario trámite alguno”. Unofficial translation: “30. It should be specified that, in accordance with the terms established in the Convention on the Settlement of Investment Disputes (hereinafter, ICSID) ratified by Peru on August 9, 1993, applicable to investment disputes to which the contracting State is a party, and in conformity with the provisions of Legislative Decree No. 1071, only the arbitration awards issued under said convention are automatically recognized and enforced, such as if they were a definitive judicial judgment issued by an existing court in any State, without any further formality being required.”

<sup>60</sup> The Peruvian Supreme Court established that insolvency laws cannot be considered, *per se*, as part of public policy. Thus, Peruvian courts must determine on a case-by-case basis whether a provision of the Insolvency Act is public policy. See Peruvian Supreme Court [2019] Judgement No. 1735.2017, 7-8: “7. . . . esta Sala Suprema

rules are part of the domestic public policy.<sup>61</sup> In any case, under the Peruvian Arbitration Act, domestic public policy rules are not grounds for the annulment of an award.

**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)?**

58. The principle of *par conditio creditorum* is partially recognized in Peruvian law; however, there is no law or judgement that considers it part of public policy.<sup>62</sup> The Insolvency Act provides the principle of collectiveness in Article V,<sup>63</sup> while on the other hand, it also recognizes the proportionality principle in Article VI, which recognizes a preference among creditors in the face of insufficiency of the insolvent estate to comply with payment of all credits.<sup>64</sup>

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advierte que la sentencia de vista señala en su considerando cuarto que “en el caso concreto, debemos determinar si el contrato de compraventa es contrario o no a las normas que le interesa al orden público, es decir, a aquellas normas que tutelan los principios fundamentales del Estado de derecho o intereses generales de la colectividad”; empero, luego de delimitar la materia de debate, lejos de absolver dicho cuestionamiento, concluye, sin hacer el respectivo análisis, que los artículos 80.4, 84.1 y 84.2 de la LGSC y el Convenio de Liquidación Extrajudicial son “normas de orden público y, por ende, de ineludible cumplimiento” por cuanto estableció requisitos y/o reglas y/o pasos inequívocos que debió observar la empresa Liquidadora al momento de vender la Planta de harina de pescado. 8. En ese sentido, el órgano jurisdiccional no ha cumplido con su deber de emitir pronunciamiento respecto a los argumentos jurídicos que lo llevan a concluir que los artículos 80.4, 84.1 y 84.2 de la LGSC y el Convenio de Liquidación Extrajudicial son normas de orden público, siendo ello trascendental, más aun cuando ello es fundamento de su decisión de revocar la sentencia de primera instancia que declaró infundada la demanda de nulidad en todos sus extremos”. Unofficial translation: “7. . . . in this particular case, we must determine whether or not the purchase contract is contrary to the rules that are in the concern of public order, that is, to those rules that protect the fundamental principles of the rule of law or general interests of the community”; however, after delimiting the debate subject matter, far from absolving such questioning, it concludes, without making the corresponding analysis, that Articles 80. 4, 84.1 and 84.2 of the LGSC [Insolvency Act] and the Extrajudicial Settlement Agreement are “norms of public order and, therefore, of unavoidable compliance” because they established requirements and/or rules and/or unequivocal steps that the company in liquidation had to observe when selling the fish flour plant. 8. In this sense, the court has not fulfilled its duty to issue a statement regarding the legal arguments that lead it to conclude that Articles 80.4, 84.1 and 84.2 of the LGSC [Insolvency Act] and the Extrajudicial Settlement Agreement are public policy norms, which is transcendental, even more so when this is the basis of its decision to revoke the first court decision that declared the nullity action to be unfounded in all its aspects”.

<sup>61</sup> Pinkas Flint, “Eficiencia y racionalidad en el sistema concursal. El caso peruano” [2008] Universitat Ramon Llull, 294: “Ante la alternativa de regular o no del incumplimiento masivo de las obligaciones el Perú ha establecido un sistema regulatorio del régimen de excepción al que denomina sistema concursal. Este es de orden público”. Unofficial translation: “Given the alternative of regulating or not the massive noncompliance of the obligations, Peru has established a regulatory system of the exception regimen which it denominates the bankruptcy system. It is of public order”.

<sup>62</sup> See n. 61.

<sup>63</sup> See n. 9.

<sup>64</sup> Law No. 27809 (Insolvency Act) [2002], art VI: “Proporcionalidad: Los acreedores participan proporcionalmente en el resultado económico de los procedimientos concursales, ante la imposibilidad del

59. Under Peruvian law, the principle of *par conditio creditorum* extends to the equal treatment among creditors from a procedural point of view. As explained in our response to Question 23, according to Article 18.1 of the Insolvency Act, the insolvency estate is protected from enforcement actions through arbitral or judicial proceedings.

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

60. No.

## IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

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

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

61. Yes. The procedure for recognizing a foreign judgment regarding insolvency proceedings is provided in Articles 2104 and 2105 of the Peruvian Civil Code. Please note that international treaties on the recognition of foreign judgments may also be applicable. Such treaties include the following: “Tratado de Derecho Procesal Internacional de Montevideo” of 1889, “Código de Derecho Internacional” (Código de Bustamante) and the “Convención Interamericana sobre Eficacia Territorial de las Sentencias y Laudos Arbitrales Extranjeros” of 1979.<sup>65</sup> If none

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deudor de satisfacer con su patrimonio los créditos existentes, salvo los órdenes de preferencia establecidos expresamente en la presente Ley.” Unofficial translation: “Proportionality: The creditors have a proportional share in the economic result of the insolvency proceedings, in the event that the debtor is unable to satisfy the existing claims with its assets, except for the preference orders expressly established in this Law”.

<sup>65</sup> Huáscar Ezcurra, “La quiebra declarada en el extranjero y sus efectos en territorio peruano” [2005] *ADVOCATUS* 11 2004-2 277, 285: “El Perú ha suscrito tres Tratados Internacionales Multilaterales sobre reconocimiento de sentencias extranjeras en su territorio nacional. Tales instrumentos internacionales son los siguientes: a. El Tratado de Derecho Procesal Internacional de Montevideo suscrito en 1889 . . . . b. El Código de Derecho Internacional (Código de Bustamante) . . . . c. La Convención Interamericana sobre Eficacia Territorial de las Sentencias y Laudos Arbitrales Extranjeros de 1979 . . . . En consecuencia, en aquellos casos que no exista un Tratado Internacional que vincule a Perú y el país respectivo en el que se pudiera haber emitido la declaración de quiebra, en el tema de reconocimiento automático de las sentencias de un país en el otro, resultarían aplicables a este tema las disposiciones que sobre el particular contiene nuestro Código Civil en materia de Derecho Internacional Privado y de reconocimiento y ejecución de sentencias extranjeras. . . .”. Unofficial translation: “Peru has signed three multilateral international treaties on the recognition of foreign judgements in its national territory. These international instruments are as follows: a. The Treaty of International Procedural Law of Montevideo signed in 1889 . . . . b. The International Law Code (Bustamante Code) . . . . c. The Inter-American Convention on the Territorial Effectiveness of Foreign Judgments and Arbitral Awards of 1979 . . . . Consequently, in those cases where there is no international treaty linking Peru and the respective country

of these treaties is applicable, Article 2104 of the Civil Code provides the general procedure for recognition of foreign judgements in Peru.<sup>66</sup>

62. Article 2105 contains specific provisions applicable to a judicial decision issued in foreign insolvency proceedings. According to such provisions: (i) the Peruvian court competent for the recognition of a foreign insolvency judgment may issue the appropriate preventive measures from the moment the application for recognition is filed; (ii) recognition in Peru of a foreign insolvency judgment must comply with the notice and publicity requirements set forth in Peruvian law for national bankruptcies; (iii) the effects of a foreign insolvency judgment recognized in Peru will adjust to the Peruvian law with respect to those assets located in Peru and the rights of creditors; thus, the rights of creditors domiciled in Peru and debts registered in Peru shall be satisfied according to the preference order provided in Peruvian law; (iv) if there are no creditors domiciled in Peru or debts registered in Peru, or if, after these have been satisfied, a positive balance results, this balance will be remitted to the foreign insolvency administrator abroad after recognition of the foreign insolvency judgement.<sup>67</sup>

**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?**

63. Peru has not adopted legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency.

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

64. Pursuant to Articles 2 and 6 of the Insolvency Act and Article 2105 of the Civil Code, once insolvency judgments are recognized in Peru, the aforementioned restrictions (see the answer to Question 1) apply to all arbitrations related to insolvency assets located in Peru.

65. Also, the Insolvency Act and other insolvency rules are applicable to insolvency proceedings of persons domiciled abroad, but only in relation to assets located in Peru, if the decision declaring their insolvency has been recognized by the Peruvian judicial courts or when the

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where the declaration of Insolvency could have been issued, regarding the automatic recognition of the judgments of one country in the other, the provisions contained in our Civil Code on Private International Law and the recognition and enforcement of foreign judgments would be applicable. . . .”.

<sup>66</sup> Peruvian Civil Code [1992], art 2104.

<sup>67</sup> *ibid*, art 2105.

conflict of law rules so provide.<sup>68</sup> Therefore, the aforementioned restrictions also apply to arbitrations related to these assets.

**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?**

66. Pursuant to Article 2105 of the Civil Code<sup>69</sup> and Article 76 of Legislative Decree No. 1071,<sup>70</sup> the Peruvian judicial courts are the competent bodies for the recognition of an insolvency judgment. Therefore, it is not necessary for the arbitral tribunal to take into account the rules on recognition of foreign insolvency to evaluate the effects of such insolvency in the arbitration. Once foreign insolvency has been recognized by Peruvian courts, arbitrators seated in the jurisdiction give effects to such insolvencies, as provided under Peruvian law.

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<sup>68</sup> See n. 40 and n. 69.

<sup>69</sup> See n. 69.

<sup>70</sup> Legislative Decree No. 1071 (Arbitration Act) [2008], art 76: “1. La parte que pida el reconocimiento de un laudo extranjero deberá presentar el original o copia del laudo, debiendo observar lo previsto en el artículo 9. La solicitud se tramita en la vía no contenciosa, sin intervención del Ministerio Público. 2. Admitida la solicitud, la Corte Superior competente dará traslado a la otra parte para que en un plazo de veinte (20) días exprese lo que estime conveniente. 3. Vencido el plazo para absolver el traslado, se señalará fecha para la vista de la causa dentro de los veinte (20) días siguientes. En la vista de la causa, la Corte Superior competente podrá adoptar, de ser el caso, la decisión prevista en el numeral 8 del artículo 75. En caso contrario, resolverá dentro de los veinte (20) días siguientes. . . .”. Unofficial translation: “1. The party requesting recognition of a foreign award shall submit the original or a copy of the award, observing the provisions of Article 9. The request is processed in a non-contentious manner, without the intervention of the Public Prosecutor’s Office. 2. Once the request has been accepted, the appropriate High Court will transfer it to the other party so that it can express its position within twenty (20) days. 3. Upon the expiration of the time limit for absolving the transfer, a date will be set for the hearing of the case within the following twenty (20) days. At the hearing, the competent High Court may, if appropriate, adopt the decision provided for in Paragraph 8 of Article 75. Otherwise, it will be resolved within twenty (20) days. . . .”.



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

67. Yes. According to Articles 2061<sup>71</sup> and 2105<sup>72</sup> of the Civil Code and Article 6(2) of the Insolvency Act,<sup>73</sup> the aforementioned restrictions [see the answer to Question 1] are mandatory for arbitral tribunals seated in Peru with respect to foreign insolvency proceedings of persons domiciled abroad with respect to assets located in Peru if the judgement declaring their insolvency has been recognized by the Peruvian judicial courts or when the conflict of law rules so provide.

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

68. As stated in the previous answer, the opening of insolvency proceedings only affects arbitration by restricting the arbitrators' ability to order the disposition of the debtor's assets. With the initiation of the insolvency proceedings, only the administrative authority has the power to order the disposition of the debtor's assets, so those matters become non-arbitrable. Thus, if an arbitration tribunal does not respect this restriction, pursuant to Paragraphs e) and f) of Article 63.1 of Legislative Decree No. 2071,<sup>74</sup> the award may be annulled only in relation to the decisions that imply the disposition of debtor's assets.

**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?**

69. No.

<sup>71</sup> Peruvian Civil Code [1992], art 2061: "Los tribunales peruanos tienen competencia para conocer de los juicios originados por el ejercicio de acciones relativas a universalidades de bienes, aun contra personas domiciliadas en país extranjero, cuando el derecho peruano sea el aplicable para regir el asunto, de acuerdo a sus normas de Derecho Internacional Privado. Sin embargo, se respeta la competencia peruana para conocer de las acciones relativas al patrimonio del declarado en quiebra, respecto a los bienes situados en el Perú, y sin perjuicio de lo dispuesto en el Título IV de este Libro." Unofficial translation: "Peruvian courts have jurisdiction to hear cases arising from the exercise of actions regarding universalities of property, even against individuals domiciled in a foreign country, when Peruvian law is applicable to rule the matter, in accordance with its norms of Private International Law. However, the Peruvian jurisdiction to hear actions relating to the assets of the declared bankrupt is to be respected, with regard to assets located in Peru, and notwithstanding the provisions of Title IV of this Section".

<sup>72</sup> See n. 69.

<sup>73</sup> See n. 40.

<sup>74</sup> Legislative Decree No. 1071 (Arbitration Act) [2008], art 63.1.