



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

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## IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in Brazil 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 Brazil 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 answer to the first question is yes.
2. The Brazilian Bankruptcy Act (Law n. 11,101/2005) (the “Brazilian Bankruptcy Act”)<sup>1</sup> was recently amended by Law n. 14,112/2020 to include, among other provisions, one express provision establishing that the opening of an insolvency proceeding (bankruptcy liquidation or judicial reorganization) does not authorize the court-appointed insolvency judicial administrator to deny the effects of an arbitration agreement and also does not prevent or suspend the commencement of an arbitral proceeding.<sup>2</sup> This new amendment came into force on 23 January 2021.<sup>3</sup>
3. As an introductory remark, it is important to highlight that, when it comes to *insolvency*, the Brazilian Bankruptcy Act provides for two main types of proceedings: (i) judicial reorganization and (ii) bankruptcy liquidation.
4. On the one hand, judicial reorganization is an insolvency proceeding voluntarily filed by the debtor (not by its creditors) to pursue the restructuring of its debts and activities by means of a judicial reorganization plan (comparable to proceedings under Chapter 11 of the United States Bankruptcy Code). The main assumption of judicial reorganization is that the debtor remains able to develop economically viable activities and therefore shall be granted access to legal remedies to overcome a temporary crisis. Typically, the debtor and its management remain in place and in charge of the debtor’s activities during the judicial reorganization, subject to certain restrictions related to selling, transferring, or encumbering certain assets.

<sup>1</sup> Brazilian Bankruptcy Act (already consolidating the recent amendments brought by Law n. 14,112/2020) is available at: <[http://www.planalto.gov.br/ccivil\\_03/\\_ato2004-2006/2005/lei/l11101.htm](http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2005/lei/l11101.htm)>.

<sup>2</sup> Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, art 6 para 9.

<sup>3</sup> For an overview of the main changes, see: Andre Luis Monteiro, ‘Insolvency and Arbitration in Brazil: One More Step Ahead’ (2021) <<http://arbitrationblog.kluwerarbitration.com/2021/02/04/insolvency-and-arbitration-in-brazil-one-more-step-ahead/>> accessed 11 February 2021.

A court-appointed insolvency judicial administrator supervises the process but without any management powers.

5. On the other hand, bankruptcy liquidation is an insolvency proceeding that may be commenced upon request from creditors or the insolvent debtor party, the purpose of which is to realize the insolvent party's assets for the benefit of its creditors (comparable to proceedings under Chapter 7 of the United States Bankruptcy Code). The main assumption of bankruptcy liquidation is that the insolvent party is no longer able to develop its business activities, so its assets shall be liquidated and sold to pay for existing claims pursuant to a certain order of priorities. Upon adjudication of bankruptcy liquidation, the management is immediately removed from its activities and a court-appointed insolvency judicial administrator is appointed to formally represent the bankrupt estate.
6. The Brazilian Bankruptcy Act further provides for the extrajudicial reorganization proceeding (*recuperação extrajudicial*) as an alternative process for corporate reorganization. This generally consists of a pre-packaged restructuring plan, in which the debtor seeks confirmation of a reorganization plan that has been agreed upon by more than fifty percent (50%) of a certain class of creditors as of the filing of such confirmation request. Upon confirmation by the Bankruptcy Court, such plan becomes binding on the remaining creditors of the specific class that have not agreed upon/executed the reorganization plan prior to the Bankruptcy Court's confirmation (ie, holdout creditors).
7. Finally, it is important to mention that the Brazilian Bankruptcy Act applies to all judicial reorganization and bankruptcy liquidation proceedings in Brazil.

2. **Does the insolvency legislation in Brazil 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*?**

8. The answer to the first question is yes. The *vis attractiva concursus* is set forth in Article 76 of the Brazilian Bankruptcy Act. It is worth noting, however, that the scope of the *vis attractiva concursus* varies according to the type of proceedings: judicial reorganization or bankruptcy liquidation proceedings.
9. The literal terms of the Brazilian Bankruptcy Act indicate that there is no mandatory *vis attractiva concursus* in connection with the judicial reorganization proceeding. However, there are precedents from the Superior Court of Justice (the highest Brazilian court for non-constitutional matters) that recognize the exclusive jurisdiction of the judicial reorganization court to decide on any measures that directly affect the insolvent's assets.<sup>4</sup> In general, those

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<sup>4</sup> Brazilian Bankruptcy Act, art 66.

measures are freezing orders, search and seizure orders, orders for sale, etc.<sup>5</sup> The new amendment to the Brazilian Bankruptcy Act expressly provides that the judicial reorganization court will have jurisdiction to coordinate and decide on any measure that directly affects the insolvent's assets that are essential to its business<sup>6</sup> during the stay period.

10. By contrast, with respect to bankruptcy liquidation proceedings, the Brazilian Bankruptcy Act expressly provides for *vis attractiva concursus*. As per Article 76 of the Brazilian Bankruptcy Act, the bankruptcy court has the exclusive jurisdiction to hear all lawsuits involving the insolvent's assets, interests, and business. However, the legal provision contains three large exceptions: labour claims, tax claims, and lawsuits not directly related to insolvency issues or not governed by the Brazilian Bankruptcy Act in which the insolvent party acts as plaintiff or co-plaintiff.<sup>7</sup>
11. The interpretation of legal scholars and case law is that arbitration proceedings fall under the third exception discussed above and, therefore, may continue or be initiated after the declaration of bankruptcy liquidation.<sup>8</sup> This conclusion is confirmed by the new Paragraph 9 of Article 6 of the Brazilian Bankruptcy Act, which states that “the commencement of a judicial reorganization or the issuance of a winding-up order neither permit the trustee/liquidator to discharge the arbitration agreement, nor prevent or stay arbitrations from starting or continuing”. Logically speaking, if the arbitration is not stayed as a result of the issuance of a winding-up order, it follows that the *vis attractiva concursus* is not applicable to claims subject to arbitration.

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

12. The answer to Question 3(a) is no. The opening of a judicial reorganization or a bankruptcy liquidation proceeding does not affect the enforceability and effectiveness of an arbitration

<sup>5</sup> As shown in the Superior Court of Justice rulings on Ronaldo Muniz Neto v. Lotáxi, AgRg on CC n. 125.893/DF (2013); Volkswagen Brasil v. Metalzul, REsp n. 1.733,685/SP (2018); Felipe Matz Vieira v. GELRE, EDcl on CC n. 133,470/SP (2015); and Banco Sofisa v. OPP, AgInt on CC n. 164,903/PR (2020).

<sup>6</sup> Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, art 6 paras 7-A and 7-B.

<sup>7</sup> The *vis attractiva concursus* does not extend to disputes over illiquid credits, tax execution procedures, repossession suits, labour proceedings, or actions in which the bankrupt estate or the company under judicial reorganization are the plaintiffs, as per the Superior Court of Justice rulings on Tecnosolo v. Município do Rio de Janeiro, REsp n. 1,766,412/RJ (2019); Consoft v. Instituto de Previdência do Estado de São Paulo, REsp n. 1,236,664/SP (2014).

<sup>8</sup> Renato Stephan Grion, Luiz Fernando Valente de Paiva, and Guilherme Piccardi Andrade Silva, ‘A arbitragem no contexto das recuperações judiciais e extrajudiciais e das falências’ in Leonardo de C Melo and Renato R Beneduzi (eds), *A reforma da arbitragem* (1st edn, Forense 2016) 97; and André Luis Monteiro, José Antonio Fichtner, and Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense 2019) 476-478.

agreement validly signed by fully capable parties at the time of contracting, regardless of whether the insolvent party acts as a defendant or a claimant.<sup>9</sup> Therefore, the opening of such proceedings does not affect the commencement or continuation of an arbitration proceeding.<sup>10</sup> It is important to mention that even before the recent amendment to the Brazilian Bankruptcy Act, this was the position expressed by the majority of legal scholars, case law,<sup>11</sup> and also in the Propositions Nos. (i) 6 of the Federal Justice Council's First Journey of Dispute Prevention and Extrajudicial Solution<sup>12</sup> and (ii) 75 of the Federal Justice Council's Second Journey of Commercial Law.<sup>13</sup> (The propositions are comparable to the Restatements of the Law in the United States.)

13. In judicial reorganization proceedings, the debtor and its management remain in place and in charge of the debtor's activities. Therefore, the debtor remains as claimant or respondent in the arbitration proceedings (if already initiated) and is entitled to file new arbitration proceedings if necessary, represented in accordance with its by-laws.
14. In the case of a bankruptcy liquidation proceeding, with the declaration of liquidation, the insolvent party loses the right to dispose of its assets.<sup>14</sup> The management of the insolvent party's business is transferred to the court-appointed judicial administrator, who steps into the shoes of the insolvent party and represents the interests of the bankrupt estate.<sup>15</sup> Therefore, in the arbitration proceedings already filed, the debtor will eventually be replaced

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<sup>9</sup> As decided by the Superior Court of Justice: *Interclínicas Planos de Saúde S/A – em liquidação extrajudicial v. Saúde ABC Serviços Médico Hospitalares Ltda.*, MC n. 14.295/SP (2008); and *Kwikasair v. AIG*, Resp. n. 1.355,831/SP (2013). In the same sense: André Luis Monteiro, José Antonio Fichtner, and Sergio Nelson Mannheim, *Teoria geral da arbitragem* (1st edn, Forense 2019) 433 (judicial reorganization) and 463 (bankruptcy).

<sup>10</sup> Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, art 6 para 9. In this sense, see: André Luis Monteiro, 'Insolvency and Arbitration in Brazil: One More Step Ahead' (2021) <<http://arbitrationblog.kluwerarbitration.com/2021/02/04/insolvency-and-arbitration-in-brazil-one-more-step-ahead/>> accessed 11 February 2021.

<sup>11</sup> See the following rulings by the São Paulo State Court of Appeals on *Sano SA Indústria e Comércio v. Voith Verfahrenstechnik Gmgh, Voith Paper Máquinas e Equipamentos Ltda. and J. m Voith Aktiengesellschaft*, Ap. 0176616-06.2009.8.26.0100 (2012); and *Kwikasair Cargas Expressas S/A v. AIG Venture Holdings Ltd.*, ED n. 0349971-66.2009.8.26.0000 (2009).

<sup>12</sup> Free translation: "The filing of a judicial reorganization or the declaration of bankruptcy does not authorize the insolvency administrator to refuse the effectiveness of the arbitral agreement, does not prevent the filing of a new arbitral proceeding, and does not stay an ongoing arbitral proceeding." (In Portuguese: "O processamento da recuperação judicial ou a decretação da falência não autoriza o administrador judicial a recusar a eficácia da convenção de arbitragem, não impede a instauração do procedimento arbitral, nem o suspende.").

<sup>13</sup> Free translation: "If there is an arbitration agreement, in the event one of the parties is declared bankrupted, (i) ongoing arbitral proceedings will not be stayed and new arbitral proceedings may be filed, applying to both cases the rule provided for in article 6º, § 1º, of Law n. 11,101/2005; and (ii) the insolvency administrator cannot refuse the effectiveness of the arbitration agreement, given it is autonomous in relation to the contract in which it is inserted." (In Portuguese: "Havendo convenção de arbitragem, caso uma das partes tenha a falência decretada: (i) eventual procedimento arbitral já em curso não se suspende e novo procedimento arbitral pode ser iniciado, aplicando-se, em ambos os casos, a regra do art. 6º, § 1º, da Lei n. 11.101/2005; e (ii) o administrador judicial não pode recusar a eficácia da cláusula compromissória, dada a autonomia desta em relação ao contrato.").

<sup>14</sup> Brazilian Bankruptcy Act, art 99 sub-s VI and art 103.

<sup>15</sup> Paulo Fernando Campos Salles de Toledo, 'Arbitragem e insolvência' (2009) 20 *Revista de Arbitragem e Mediação* <<http://www.revistadoatribunais.com.br>> accessed 1 September 2020.

by the bankrupt estate represented by the court-appointed judicial administrator.<sup>16</sup> The bankrupt estate, represented by the court-appointed judicial administrator, will continue the existing arbitrations and may commence new arbitration proceedings, if, in this latter case, this is in the best interest of the bankrupt estate. The Brazilian Bankruptcy Act does not have an express provision regarding whether authorization of the bankruptcy court to file new arbitration is needed or not. Typically, however, the court-appointed judicial administrator will seek authorisation from the bankruptcy court before commencing formal proceedings.

**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?**

15. The answer is no. As explained in the answer to Question 3(a) above, the opening of any such proceedings does not affect the commencement or continuation of an arbitration proceeding involving the debtor or the bankrupt estate whether the matter is a reorganization or a liquidation. This is what the new Paragraph 9 of Article 6 of Brazilian Bankruptcy Act, as amended by Law 14,112/2020, explicitly provides for.

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

16. The answer is yes. In both judicial reorganization and bankruptcy liquidation, arbitrators do not have jurisdiction to decide on any measures that directly affect the insolvent's assets. In general, those measures are freezing orders, search and seizure orders, orders for sale, etc. In addition, arbitrators cannot issue winding-up orders, accept requests for judicial reorganization, or nominate the administrator. Basically, arbitrators cannot deal with core insolvency issues.

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<sup>16</sup> Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, art 22(III)(c and n) and art 76, sole para. The new amendment to the Brazilian Bankruptcy Act includes an express provision that provides that the court-appointed judicial administrator will take over the representation of the bankrupt estate's arbitration proceedings upon the bankruptcy declaration (art. 22, III, c, as amended by Law 14,112/2020). Long before this amendment to the Brazilian Bankruptcy Act, such replacement has repeatedly occurred over the past years, as per the rulings of the São Paulo State Court of Appeals on: Jackson Empreendimentos Ltda. v. Diagrama Construtora Ltda. (insolvent party) and Bankrupt Estate of Diagrama Construtora Ltda, AI n. 9044554-23.2007.8.26.0000 (2008); Kwikasair Cargas Expressas S/A v. AIG Venture Holdings Ltd., ED n. 0349971-66.2009.8.26.0000 (2009). Also, this understanding is supported by legal scholars, such as: Vera Helena de Mello Franco, 'Do procedimento para a decretação da falência' in Francisco Satiro de Souza Junior and Antônio Sérgio A de M Pitombo (eds), *Comentários à Lei de Recuperação de Empresas e Falência* (Revista dos Tribunais, 2007) 415; Carla de Vasconcellos Crippa, 'Recuperação judicial, falência e arbitragem' (2011) 29 *Revista de Arbitragem e Mediação* <<http://www.revistadostribunais.com.br>> accessed 1 September 2020; and Paulo Fernando Campos Salles de Toledo, 'Arbitragem e insolvência' (2009) 20 *Revista de Arbitragem e Mediação* <<http://www.revistadostribunais.com.br>> accessed 1 September 2020.

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

17. No.

**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?**

18. The answer is no, as the law treats equally both cases. According to the new Paragraph 9 of Article 6 of the Brazilian Bankruptcy Act, “the commencement of a judicial reorganization or the issuance of a winding-up order neither permit the trustee/liquidator to discharge the arbitration agreement, nor prevent or stay arbitrations from starting or continuing”.<sup>17</sup> The new provision encompasses arbitrations pending at the time of the opening of insolvency proceedings and arbitrations which commence after the opening of insolvency proceedings. In both cases, the opening of a judicial (or extrajudicial) reorganization and/or bankruptcy liquidation proceeding does not affect the commencement or continuation of arbitration proceedings.

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

19. The answer is no. Under Brazilian law, judicial reorganization is always voluntary. Bankruptcy liquidation can be voluntary or involuntary; however, for the purpose of arbitrations, the law does not distinguish voluntary and involuntary insolvency proceedings. As explained above, in both cases, arbitrations are not affected by the opening of insolvency proceedings. For further details, please check the answers to Questions 1, 3(a), and 3(b) above.

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

20. The rules above apply equally regardless of whether the arbitration is seated in Brazil or abroad. In both cases, arbitrations are not affected. In relation to the recognition and enforcement of an arbitral award rendered outside of the Brazilian territory, please see Question 25 below.

<sup>17</sup> In this sense, see: Andre Luis Monteiro, ‘Insolvency and Arbitration in Brazil: One More Step Ahead’ (2021) <<http://arbitrationblog.kluwerarbitration.com/2021/02/04/insolvency-and-arbitration-in-brazil-one-more-step-ahead/>> accessed 11 February 2021.

**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.)?**

21. As a general rule, the effects of judicial or extrajudicial reorganization proceedings become operative as from the insolvency court's decision granting the opening of the insolvency proceeding.
22. Also, the effects of bankruptcy liquidation on arbitration become operative as from the insolvency court's decision declaring the debtor's bankruptcy. In such decision, the insolvency court is expected to nominate the judicial administrator, who will then represent the bankrupt estate before the arbitration proceedings immediately if he/she ultimately accepts the nomination.

**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?

23. As explained above, under Brazilian law, the opening of insolvency proceedings does not affect the commencement or continuation of arbitration proceedings. Thus, no specific relief is statutorily required.

**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?**

24. Brazilian law does not expressly provide for anti-arbitration injunctions.
25. However, other measures that can have a similar effect may be available under Brazilian law. For instance, the Brazilian Superior Court of Justice has interpreted that if both (i) a Judicial Court and (ii) an arbitral tribunal declare themselves to have jurisdiction to rule over the same controversy, or if both render conflicting decisions about the same issue, it is possible to file an application ("conflict of jurisdiction application") in the Brazilian Superior Court of Justice to allow the court to decide whether the judicial court or the arbitral tribunal has jurisdiction over the issue.<sup>18</sup> Although this is not an anti-arbitration injunction per se, the effects can be

<sup>18</sup> As per the Superior Court of Justice's rulings on: OI S.A – Em Recuperação Judicial v. 7th Lower Commercial Court of Rio de Janeiro, Rio de Janeiro Court of Appeals, and Arbitral Tribunal of the Market Arbitration Chamber,

similar to an anti-arbitration injunction if it is recognized that the bankruptcy or reorganization court has jurisdiction over the conflict. It is important to mention that the case law largely favours the arbitrators' jurisdiction.

**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?**

26. As per Article 117 of the Brazilian Bankruptcy Act, the contracts involving the debtor insolvent party (containing arbitration agreements or not) are not automatically terminated by the declaration of bankruptcy liquidation. The court-appointed judicial administrator is allowed to choose which contracts should be performed, if the performance is in the best interest of the bankrupt estate. However, considering that (i) the arbitration agreement is autonomous in relation to the contract where it is inserted, in accordance with the principle of severability expressed in Article 8 of the Brazilian Arbitration Act, Law n. 9,307/1996 (the "Brazilian Arbitration Act")<sup>19</sup> and (ii) the arbitration agreement is a complete and effective contract when it is executed by the parties (assuming that, at the time of the execution, the requirements of subjective and objective arbitrability were fulfilled by all the parties), the termination of the contract where it is inserted does not affect the validity and effectiveness of the arbitration agreement.
27. The recent amendment to the Brazilian Bankruptcy Act confirms this conclusion and contains an express provision stating that the filing of a judicial reorganization proceeding or a bankruptcy liquidation does not authorize the judicial administrator to refuse the effectiveness of the arbitration agreement.<sup>20</sup>
28. The court-appointed judicial administrator may also terminate or suspend a contract if the contract contains a clause providing for termination in the event that a party files for

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CC n. 157.099/RJ (2018); Partout Administração de Franquias e Bens Ltda. v. 2nd Lower Civil and Commercial Court of Belém/PA and Arbitral Tribunal of the Arbitral Council of the State of São Paulo, CC n. 146.939/PA (2016); S. E. S/A v. 2nd Lower Commercial Court of Rio de Janeiro and Arbitral Tribunal of the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, CC n. 111.230/DF (2013).

<sup>19</sup> The Brazilian Arbitration Act is available at: <[http://www.planalto.gov.br/ccivil\\_03/leis/l9307.htm](http://www.planalto.gov.br/ccivil_03/leis/l9307.htm)>.

<sup>20</sup> Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, art 6 para 9. Even before the amendment to the Brazilian Bankruptcy Act, this is the position held by Propositions Nos. (i) 6 of the Federal Justice Council's First Journey of Dispute Prevention and Extrajudicial Solution (Free translation: "The filing of a judicial reorganization or the declaration of bankruptcy does not authorize the insolvency administrator to refuse the effectiveness of the arbitral agreement, does not prevent the filing of a new arbitral proceeding, and does not stay an ongoing arbitral proceeding"); and (ii) 75 of the Federal Justice Council's Second Journey of Commercial Law (Free translation: "If there is an arbitration agreement, in the event one of the parties is declared bankrupted, (i) ongoing arbitral proceedings will not be stayed and new arbitral proceedings may be filed, applying to both cases the rule provided for in article 6º, § 1º, of Law n. 11,101/2005; and (ii) the insolvency administrator cannot refuse the effectiveness of the arbitration agreement, given it is autonomous in relation to the contract in which it is inserted.") (The propositions are comparable to the Restatements of the Law in the United States.)

insolvency.<sup>21</sup> Nevertheless, it is necessary to obtain a recognition to this effect by a court, which will not be the bankruptcy or reorganization court because the discussion concerns illiquid credits.<sup>22</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?**

29. The answer is no effect. As explained in Question 6 above, the termination/disclaimer of the main contract does not affect the validity and effectiveness of the arbitration agreement.

**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?**

30. No. The filing of judicial reorganization proceedings or the adjudication of the bankruptcy liquidation does not affect the enforceability and effectiveness of an arbitration agreement validly signed by fully capable parties at the time of contracting.<sup>23</sup> Therefore, the court-appointed judicial administrator or the bankruptcy court cannot terminate or suspend the effectiveness of arbitration agreements if validly contracted.

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<sup>21</sup> As shown in the rulings of the São Paulo Court of Appeals in BRN v. FH, AC n. 4002604-92.2013.8.26.0038 (2016) and Cacilda de Godoy and Others v. Filgate and Others, AC n. 0003654-06.2011.8.26.0100 (2015).

<sup>22</sup> As decided by the Superior Court of Justice in RDC v. Decio Martins, AgInt on AREsp n. 1,278,577/SP (2018); Mauro Menezes v. Tatiana Santos, AgIn on EDcl on EDcl on REsp n. 1,534,185/PE (2017); CST v. Aurelino Gomes, AgInt on AREsp n. 734,869/BA (2017); Marcos Gondim and Others v. COFERGUSA, AgRg on REsp n. 969,596/MG (2010); and by the São Paulo Court of Appeals in SICOOB v. Agroz and Others, AI n. 2046190-26.2019.8.26.0000 (2019) and Rubens Vizeu v. Luxemburgo Empreendimentos, AC n. 0060039-95.2011.8.26.0577 (2018).

<sup>23</sup> As per the São Paulo State Court of Appeals in Jackson Empreendimentos Ltda. v. Diagrama Construtora Ltda. (insolvent party) and Bankrupt Estate of Diagrama Construtora Ltda., AI n. 9044554-23.2007.8.26.0000 (2008).

**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?**

31. The answer to the first question is no. The Brazilian Bankruptcy Act does not impose any obligation on the creditor to commence or continue any arbitration proceeding against the insolvent party. The creditor does not need to ask for court permission to commence or continue any arbitration against the insolvent party. Paragraph 6 of Article 6 of the Brazilian Bankruptcy Act only requires the insolvent party (not the creditor) to inform the insolvency court of any new action filed against it.

32. In the event that the creditor files a proof of claim before the insolvency court seeking the inclusion of such claim in the debtor's list of liabilities, and the respective proof of claim is refused, the existence of an arbitration agreement would mean that an arbitral tribunal would have jurisdiction to decide about the merits of such claim (eg, the existence, validity and/or amount of the claim). If the arbitral tribunal recognizes the creditor's claim and ascertains its amount, the arbitral award would still need to be filed in the insolvency proceedings for inclusion in the insolvent party's list of liabilities. So, the answer to the second question is yes.

33. The answer to the third question is no. The filing of the creditor's credit with the insolvency proceedings for inclusion in the insolvent party's list of liabilities does not represent a waiver of the arbitration agreement. However, if one of the parties to the arbitration agreement files a claim before a bankruptcy or reorganization court to discuss the merits of its claim (eg, the existence or validity of the claim), and, at the same time, the other party does not allege the existence of an arbitration agreement, then it is interpreted that the parties have waived the arbitration agreement in relation to that matter.<sup>24</sup>

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<sup>24</sup> Brazilian Code of Civil Procedure, art 337 ss 5<sup>o</sup> and 6<sup>o</sup>.

**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)?**

34. The answer is no. A lawsuit filed by the court-appointed judicial administrator to revoke fraudulent acts between the insolvent party and a third party with the intent to harm other creditors (*ação revocatória*)<sup>25</sup> is interpreted by some legal scholars to be non-arbitrable.<sup>26</sup> This is considered a core insolvency issue and, therefore, can only be settled by the courts (not the arbitrators). Furthermore, Article 134 of the Brazilian Bankruptcy Act expressly provides that a revocation suit shall proceed before the bankruptcy court. No case law discussing this issue was found in the research carried out for answering this questionnaire.

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

35. In a judicial reorganization proceeding, the court-appointed judicial administrator does not have management powers over the debtor's affairs. Therefore, the debtor insolvent party is allowed to conclude new arbitration agreements, as the conclusion of arbitration agreements is not considered an act of enforcement (eg, seizure, attachment, or foreclosure) against the insolvent party's assets that would demand the reorganization court's approval.

36. In a bankruptcy liquidation proceeding, there is no provision in the Brazilian Bankruptcy Act preventing the conclusion of a new arbitration agreement by the court-appointed judicial administrator representing the estate. As such, we understand that the court-appointed judicial administrator could conclude new arbitration agreements if authorized by the Court and if proven to be in the best interest of the bankrupt estate (though, as a practical matter, this is unlikely to happen as the bankrupt estate shall cease any business activities).

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

37. As explained above, under the Brazilian Bankruptcy Act, the opening of insolvency proceedings does not affect the commencement or continuation of arbitration proceedings. Similarly, as explained above, the filing of a judicial reorganization proceeding or the occurrence of a liquidation does not affect the enforceability and effectiveness of an arbitration agreement validly signed by fully capable parties at the time of contracting.

<sup>25</sup> Brazilian Bankruptcy Act, art 130 and others.

<sup>26</sup> Paulo Fernando Campos Salles de Toledo, 'Arbitragem e insolvência' (2009) 20 Revista de Arbitragem e Mediação <<http://www.revistadoatribunais.com.br>> accessed 1 September 2020.

**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?**

38. As a general principle, the rules established in the Brazilian Bankruptcy Act are mandatory, and therefore, the parties cannot exclude their application. Considering that the provisions of the Brazilian Bankruptcy Act regulating the effects of insolvency on arbitration were recently included by Law n. 14,112/2020, we are not aware of any case law dealing with this issue. It is worth noting that, as the provisions set out in the Brazilian Bankruptcy Act are arbitration-friendly, as explained above, it is unlikely that parties would try to change the legal framework.

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

39. Generally speaking, this question seems to make more sense when the bankruptcy law of the seat of the arbitration prevents the arbitration from continuing due to insolvency proceedings, but the arbitral tribunal decides to proceed with the case. This is not the case of Brazil. As explained above, under the Brazilian Bankruptcy Act, the opening of insolvency proceedings does not affect the commencement or continuation of arbitration proceedings. Anyway, the answer to this question is “yes, they are bound”, as the provisions of the Brazilian Bankruptcy Act are mandatory.

**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?**

40. No.

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

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

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

41. The answer varies according to the type of insolvency proceedings (judicial reorganization or bankruptcy liquidation). In a judicial reorganization, the court-appointed judicial administrator does not take part in the arbitration. The insolvent party continues acting by itself.<sup>27</sup> In bankruptcy liquidation, on the other hand, the insolvent party is replaced by the bankrupt estate.<sup>28, 29</sup> The court-appointed judicial administrator takes part in the arbitration as the legal representative of the bankrupt estate,<sup>30</sup> as per Articles 22(III)(c and n) and Article 76, sole paragraph, of the Brazilian Bankruptcy Act, as well as Article 75(V) of the Brazilian Code of Civil Procedure (Law n. 13,105/2015).<sup>31</sup> The insolvent party (which must not be mistaken for its estate—after the bankruptcy liquidation, they are considered separate entities) may still intervene and present submissions, as per Articles 103, sole paragraph, and 104 of the Brazilian Bankruptcy Act.<sup>32</sup>

**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. There is no express provision under either the Brazilian Bankruptcy Act or the Brazilian Arbitration Act. However, Article 8 of the Brazilian Bankruptcy Act provides that parties may challenge any proof of claim filed in the insolvency proceedings to dispute the existence of the credit or to object to its amount, class or authenticity. A party may have to prove the

<sup>27</sup> Brazilian Bankruptcy Act, arts 64 and 66; Fábio Ulhoa Coelho, *Curso de Direito Comercial* (13th edn, Saraiva 2012) 449; Gladston Mamede, *Direito Empresarial Brasileiro* (4th edn, Atlas 2006) 272; Sergio Campinho, *Falência e Recuperação de Empresa: O Novo Regime da Insolvência Empresarial* (2nd edn, Renovar 2006) 149.

<sup>28</sup> Which is called in Brazil “*massa falida*”.

<sup>29</sup> Fábio Ulhoa Coelho, *Curso de Direito Comercial* (13th edn, Saraiva 2012) 301.

<sup>30</sup> *ibid*, 296.

<sup>31</sup> Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, *Tratado de Direito Empresarial: Recuperação Empresarial e Falência* (2nd edn, RT 2018) 141.

<sup>32</sup> *ibid*, 287.

existence of the credit (as per Article 9(III)), which may include documents from the arbitration. As to ongoing arbitral proceedings, there are rulings by the São Paulo Court of Appeal that grant creditors the right to access the files of the arbitration.<sup>33</sup>

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

43. Yes. In this case, the answer is affirmative for both judicial reorganization and bankruptcy liquidation. However, the party takes a different name in each type of insolvency proceeding. After the judge accepts the application for judicial reorganization proceedings, the company must add after its name “under Judicial Reorganization”<sup>34</sup> in court proceedings and arbitrations, as per Article 69 of the Brazilian Bankruptcy Act.<sup>35</sup> In bankruptcy liquidation proceedings, all assets and debts of a company are gathered under the bankrupt estate (“*massa falida*”),<sup>36</sup> which will be the party represented by the court-appointed judicial administrator in all proceedings.<sup>37</sup> After the winding-up order, the estate will be identified (in court proceedings and arbitrations) as “*massa falida of [name of the company]*”.

**19. Is the insolvency administrator (or the debtor in possession) empowered to reach a settlement in the arbitration, or is the insolvency court required to authorise any settlement for it to be effective?**

44. The answer to this question depends again on the type of insolvency proceedings (judicial reorganization or bankruptcy liquidation). In judicial reorganization, it is not one of the functions of the court-appointed judicial administrator or the Reorganization Court to authorize settlements involving the debtor in possession,<sup>38</sup> as the company remains in control over its rights and assets.<sup>39</sup> The company, however, can reach a settlement with a creditor (during the arbitration or court proceedings), provided—as set forth in Article 66 of Law n. 11,101/2005—that this does not cause any dissipation of its assets. In bankruptcy liquidation, the court-appointed judicial administrator can settle disputes involving the bankrupt estate, provided the terms of the proposed settlement are approved by the Bankruptcy Court, after

<sup>33</sup> See the following cases: São Manoel v. UTC, AI n. 2171492-02.2018.8.26.0000 (2019); UTC v. 2nd Bankruptcy and Judicial Reorganization Court of Sao Paulo, AI n. 2171477-33.2018.8.26.0000 (2019); Pentágono v. Alumini, AI n. 2102800-48.2018.8.26.0000 (2019).

<sup>34</sup> In Portuguese: “*em Recuperação Judicial*”.

<sup>35</sup> Fábio Ulhoa Coelho, *Curso de Direito Comercial* (13th edn, Saraiva 2012) 450.

<sup>36</sup> *ibid*, 307.

<sup>37</sup> Brazilian Code of Civil Procedure, Law n. 13,105/2015, art 75(V).

<sup>38</sup> See the Brazilian Bankruptcy Act, art 22 (I and II).

<sup>39</sup> Brazilian Bankruptcy Act, arts 64 and 66; Fábio Ulhoa Coelho, *Curso de Direito Comercial* (13th edn, Saraiva 2012) 449; Gladston Mamede, *Direito Empresarial Brasileiro* (4th edn, Atlas 2006) 272; Sergio Campinho, *Falência e Recuperação de Empresa: O Novo Regime da Insolvência Empresarial* (2nd edn, Renovar 2006) 149.

consultation with the creditors' committee, as per Article 22(3) of Law n. 11,101/2005, and the debtor insolvent party ("falido").

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

45. The answer depends on the content of the interim measure. As a general rule, any arbitral tribunal has a general power to grant interim measures as per Article 22-B of the Brazilian Arbitration Act (Law n. 9.307/1996).<sup>40</sup> Neither the Brazilian Bankruptcy Act nor the Brazilian Arbitration Act expressly prevents the arbitral tribunal from granting interim measures concerning a party subject to insolvency proceedings (judicial reorganization or bankruptcy liquidation). However, as explained in more detail below, interim measures that directly affect the insolvent's assets (freezing orders, search and seizure orders, orders for sale, etc.) can only be granted by the insolvency court (not by the arbitral tribunal), as established by precedents rendered by the Superior Court of Justice.<sup>41</sup>

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

46. The answer depends on the content of the interim measure. As a general rule, neither the Brazilian Bankruptcy Act nor the Brazilian Arbitration Act provides for this, which means that, as a general rule, interim measures already granted by the arbitral tribunal are not affected by the opening of insolvency proceedings. However, the Superior Court of Justice (the highest Brazilian court for non-constitutional matters) has decided in two precedents that interim measures that order the seizure of the insolvent party's assets can only be granted by the bankruptcy or reorganization court (not by the arbitral tribunal). This exceptional rule applies to judicial reorganization (after the decision granting the reorganization) and to bankruptcy liquidation (after the winding-up order). In the case *Galvão Engenharia v. Clark* (2017), the Superior Court of Justice made clear that "the insolvency court [not the arbitral tribunal] has the duty to oversee the destination of the assets held by the party in judicial reorganization".<sup>42</sup> In the case *Hornbeck v. Astromarítima* (2018), the Court, based on Article 47 of the Brazilian

<sup>40</sup> José Antonio Fichtner, Sergio Nelson Mannheimer, and André Luis Monteiro, 'Tutela provisória na arbitragem e Novo Código de Processo Civil: tutela antecipada e tutela cautelar, tutela de urgência e tutela da evidência, tutela antecedente e tutela incidental' in *20 Anos da Lei de Arbitragem* (1st edn, Atlas 2017) 481; Francisco José Cahali, *Curso de Arbitragem* (7th edn, RT 2018) 315; Leonardo de Faria Beraldo, *Curso de Arbitragem* (1st edn, Atlas 2014) 359; Carlos Alberto Carmona, *Arbitragem e Processo* (3rd edn, Atlas 2009) 322 and 329.

<sup>41</sup> See *Galvão Engenharia v. Clark*, CC 148.932/RJ (2017), *Hornbeck v. Astromarítima*, AgInt no CC 153.498/RJ (2018), and *Oi v Bratel*, REsp. n. 157.099/RJ (2018).

<sup>42</sup> *Galvão Engenharia v. Clark*, CC 148.932/RJ (2017). In Portuguese: "Cabe ao juízo em que se processa a recuperação judicial fiscalizar o destino dos bens da recuperanda".

Bankruptcy Act, decided that “the insolvency court [not the arbitral tribunal] is the one who has powers to order the seizure of the insolvent party’s assets”.<sup>43</sup>

**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?**

47. Again the answer to this question depends on the type of insolvency proceedings (judicial reorganization or bankruptcy liquidation). In judicial reorganization, the company can reach a settlement with a creditor (during the arbitration or court proceedings), provided—as set forth in Article 66 of the Brazilian Bankruptcy Act—that this does not cause any dissipation of its assets.<sup>44</sup> In bankruptcy liquidation, the insolvent party loses its capacity to administer its assets, in accordance with Article 103 of the Brazilian Bankruptcy Act, and it is thus not authorised to reach any settlement (in this case, the court-appointed judicial administrator can settle disputes on behalf of the bankrupt estate, provided the terms of the proposed settlement are approved by the Bankruptcy Court, after consultation with the creditors’ committee<sup>45</sup> and the debtor insolvent party (“falidos”).

**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?**

48. The opening of insolvency proceedings (judicial reorganization or bankruptcy liquidation) has the effect of suspending all individual enforcement actions already filed.<sup>46</sup> Therefore, individual enforcement actions (judgement or arbitral award) will be suspended, and the claimant will enforce his/her credit in the insolvency proceedings (judicial reorganization or bankruptcy liquidation).<sup>47</sup>

<sup>43</sup> Hornbeck v. Astromarítima, AgInt no CC 153.498/RJ (2018). In Portuguese: “É do juízo em que se processa a recuperação judicial a competência para promover os atos de execução do patrimônio da empresa”.

<sup>44</sup> Fábio Ulhoa Coelho, *Curso de Direito Comercial* (13th edn, Saraiva 2012) 449; Gladston Mamede, *Direito Empresarial Brasileiro* (4th edn, Atlas 2006) 272; Sergio Campinho, *Falência e Recuperação de Empresa: O Novo Regime da Insolvência Empresarial* (2nd edn, Renovar 2006) 149.

<sup>45</sup> As per the Brazilian Bankruptcy Act, art 22(3).

<sup>46</sup> Brazilian Bankruptcy Act, art 6; Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, *Tratado de Direito Empresarial: Recuperação Empresarial e Falência* (2nd edn, RT 2018) 101; Ricardo Negrão, *Manual de Direito Comercial e da Empresa* (7th edn, Saraiva 2012) 363; Geraldo Fonseca de Barros Neto, ‘A suspensão das execuções pelo processamento de recuperação judicial’ (2010) <<http://www.revistadotribunais.com.br>> accessed 25 May 2020; José Emilio Nunes Pinto, ‘A arbitragem na recuperação de empresas’ (2005) <<http://www.revistadotribunais.com.br>> accessed 25 May 2020; Carla de Vasconcellos Crippa, ‘Recuperação judicial, falência e arbitragem’ (2011) <<http://www.revistadotribunais.com.br>> accessed 25 May 2020.

<sup>47</sup> Ricardo Negrão, *Manual de Direito Comercial e da Empresa* (7th edn, Saraiva 2012) 171.

**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 answer to the first question is that there is no special status. The answer to the second question is that nothing changes and, therefore, the claim does not receive a different status after the rendering of the arbitral award. After the arbitration award is rendered (recognising the existence of the debt and its amount), the credit becomes enforceable in insolvency proceedings. For the credit to have any status in the insolvency proceedings (judicial reorganization or bankruptcy liquidation), the creditor must file a proof of claim, which is governed by Articles 7 through 20 of the Brazilian Bankruptcy Act.<sup>48</sup> That said, while the arbitration is pending and the proof of claim of the credit has not yet been filed (the arbitral award will work as a proof of claim), the litigious credit has no status in the insolvency process. That is the general rule. There is, however, one important exception. Even when the arbitration is pending, the creditor can file an application to the arbitrators asking for an interim measure to earmark some amounts of money of the estate to be used in the future to pay that credit that is the subject matter of the arbitration.<sup>49</sup> This exceptional possibility is available both in judicial reorganization and bankruptcy liquidation. This possibility does not violate the *par conditio creditorum* principle, as the credit—if recognised by the future arbitral award—will be paid following the order of priorities. This mechanism works as a sort of pre-annotation of the future credit on the list of credits to be paid at the end of the insolvency proceedings.

**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. Yes, under both Article 515(VII) of the Brazilian Code of Civil Procedure<sup>50</sup> and Article 31 of the Brazilian Arbitration Act, an arbitration award rendered in Brazil has the same legal nature and effects as a judgement, and both are valid proofs of credit. If the arbitration award is rendered outside of the Brazilian territory, it must be recognized by the Superior Court of Justice as per Articles 34 and 35 of the Brazilian Arbitration Act, Article V of the New York Convention,<sup>51</sup> Articles 960 through 965 of the Brazilian Code of Civil Procedure,<sup>52</sup> and Articles 216-A through 216-N of the Rules of Procedure of the Superior Court Justice. Once the foreign

<sup>48</sup> Fábio Ulhoa Coelho, *Curso de Direito Comercial* (13th edn, Saraiva 2012) 362.

<sup>49</sup> Brazilian Bankruptcy Act, art 6(3); Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, *Tratado de Direito Empresarial: Recuperação Empresarial e Falência* (2nd edn, RT 2018) 109.

<sup>50</sup> Law n. 13.105/2015.

<sup>51</sup> Incorporated under Brazilian law as Decree n. 4.311 of 2002.

<sup>52</sup> Law n. 13.105/2015.

arbitral award has been recognised, it becomes a valid proof of credit as well. There is no further requirement.

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

51. Yes, the provisions of the Brazilian Bankruptcy Act are part of public policy, as shown by some Superior Court of Justice decisions.<sup>53</sup>

**27. Is the principle of *par conditio creditorum* part of public policy? If so, is public policy linked to the equal treatment of creditors from a 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)?**

52. The principle of *par conditio creditorum* is part of public policy from both a substantive and a procedural standpoint. The creditors are, however, divided into separate classes, and equal treatment is expected within those classes, for there exists an order of preference for the payment of the debts, as provided for in Article 83 of the Brazilian Bankruptcy Act.

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

53. No.

<sup>53</sup> Banco Volkswagen v. Lauck & Cia, AgInt on REsp 1.841.893/MT (2020); Sementes Esperança v. Banco do Brasil, AgInt on AREsp n. 1.433.517/SP (2020); Banco Triângulo v. Verno, REsp 1.704.201/RS (2019); Calçados DLuna v. Calçados DLuna, REsp n. 1.637.877/RS (2017); Dibox-Distribuição v. Banco Votorantim, REsp n. 1.532.943/MT (2016); Ferragens Amadeo v. Estado do Rio Grande do Sul, REsp n. 1.172.387/RS (2011); Casa de Portugal v. Ministério Público do Estado do Rio de Janeiro, REsp n. 1.004.910/RJ (2008).

## 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 Brazil concerning the insolvent party.]

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

54. Yes, they do. Before the new amendments (Law n. 14,112/2020) to the Brazilian Bankruptcy Act, all foreign decisions had to be recognized by the Superior Court of Justice to produce effects in Brazil, as set forth in Article 961 of the Brazilian Code of Civil Procedure. The jurisdiction of the Superior Court of Justice for the recognition of foreign decisions is also a matter of Constitutional Law.<sup>54</sup> The law also applied to insolvency decisions (decisions declaring judicial reorganizations and winding-up decisions), as established by the Superior Court of Justice in *Direct Import v. Calçados Três Coroas*, REsp 15708 (1997).<sup>55</sup> The recent amendments, however, provide for new proceedings to recognize foreign insolvency proceedings in Brazil. According to these new provisions,<sup>56</sup> the insolvency court (which is always a first instance judge, not the Superior Court of Justice) would arguably have jurisdiction to recognize, in Brazil, foreign insolvency proceedings. It is not clear yet—as the new provisions came into force on 23 January 2021—which court will have the power to rule on the recognition of foreign insolvency proceedings, the Superior Court of Justice or the insolvency court.<sup>57</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?**

55. The answer to the first question is yes, at least in part. The Brazilian Bankruptcy Act was recently amended by Law n. 14,112/2020 to partially adopt the UNCITRAL Model Law on Cross-Border Insolvency. Indeed, Brazilian Law did not adopt in full the UNCITRAL Model Law, establishing significant differences, in particular regarding arbitration.

56. According to Subparagraph 1(a) of Article 20 of the Model Law, “effects of recognition of a foreign main proceeding 1. Upon recognition of a foreign proceeding that is a foreign main

<sup>54</sup> Brazilian Constitution, art 105(I)(i).

<sup>55</sup> Carmen Tiburcio, ‘Efeitos Extraterritoriais Da Falência. Revista de Direito Bancário e do Mercado de Capitais’ (2013) <<http://www.revistadoatribunais.com.br>> accessed 25 May 2020; Alexandre Ferreira de Assumpção Alves and Raphael Vieira da Fonseca Rocha, ‘Insolvência Transnacional e Direito Falimentar Brasileiro’ (2016) Revista EMERJ, 9-65.

<sup>56</sup> Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, arts 167-D to 167-O.

<sup>57</sup> See, for example, Nadia de Araujo and Lidia Spitz, supporting the jurisdiction of the Superior Court of Justice: <<https://www.conjur.com.br/2020-dez-13/opiniao-insolvencia-transnacional-lei-falencias>>.

proceeding: (a) Commencement or continuation of individual actions or individual proceedings concerning the debtor’s assets, rights, obligations or liabilities is stayed”.

57. Based on this provision, the UNCITRAL Guide to Enactment and Interpretation of the Model Law states that “by not distinguishing between various kinds of individual action, [Subparagraph 1(a)] also covers actions before an arbitral tribunal” and, therefore, “article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement”. The Guide states that, due to the relative independence of international arbitration from the legal system of the State where the arbitral proceeding takes place, “it might not always be possible, in practical terms, to implement the automatic stay of arbitral proceedings”. In addition, the Guide highlights that “the interests of the parties may be a reason for allowing an arbitral proceeding to continue, a possibility that is envisaged in paragraph 2 and left to the law of the enacting State”.<sup>58</sup>
58. Brazilian Law did not adopt this possibility of automatic suspension of ongoing arbitrations seated in Brazil. Quite the opposite. Accordingly, the second paragraph of Article 167-M of the Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, expressly states that, in spite of the recognition of foreign proceedings as the main insolvency proceeding, “it does not affect the creditors’ right to commence or continue any court proceedings or arbitrations seeking a monetary award against debtor, except when it involves executive measures against the debtor’s assets, which will keep stayed”.
59. According to this provision, the effects of insolvency proceedings taking place abroad do not prevent the creditor from commencing or continuing arbitrations against the insolvent debtor, even after the foreign insolvency proceedings have been recognised as the main insolvency proceeding by Brazilian courts.<sup>59</sup>

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

60. As explained above, the second paragraph of Article 167-M of the Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, expressly states that, in spite of the recognition of foreign proceedings as the main insolvency proceeding, “it does not affect the creditors’ right to commence or continue any court proceedings or arbitrations seeking a monetary award against debtor, except when it involves executive measures against the debtor’s assets, which will keep stayed”. According to this provision, the effects of insolvency proceedings taking

<sup>58</sup> Available at: <<https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>>. Accessed 15 January 2021.

<sup>59</sup> In this sense, see: Andre Luis Monteiro, ‘Insolvency and Arbitration in Brazil: One More Step Ahead’ (2021) <<http://arbitrationblog.kluwerarbitration.com/2021/02/04/insolvency-and-arbitration-in-brazil-one-more-step-ahead/>> accessed 11 February 2021.

place abroad do not prevent the creditor from commencing or continuing arbitrations against the insolvent debtor in Brazil.<sup>60</sup>

**32. Are arbitrators seated in the jurisdiction required to take into account the rules on recognition of foreign insolvencies (if any) to evaluate the effects of such insolvencies in the arbitration, as described in the previous question?**

61. There are no legal provisions to this effect in any of the pertinent rules.

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

62. As we explained above, the second paragraph of Article 167-M of the Brazilian Bankruptcy Act, as amended by Law n. 14,112/2020, expressly states that, in spite of the recognition of foreign proceedings as the main insolvency proceeding, “it does not affect the creditors’ right to commence or continue any court proceedings or arbitrations seeking a monetary award against debtor, except when it involves executive measures against the debtor’s assets, which will keep stayed”. The first part of the legal provision does not seem to be mandatory and, therefore, the arbitral tribunal may stay the arbitration based on particular circumstances. The second part seems to be mandatory, as the arbitral tribunal does not have power to rule over the insolvent’s assets (ie, it cannot grant any measures that directly affect the insolvent’s assets as, for example, freezing orders), and it must necessarily observe any limitations imposed by the judicial reorganization court concerning such assets.

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

63. This issue is still unsettled, as there are no legal provisions, case law, or academic works to this effect. However, it seems correct to say that an arbitral decision that grants any measures that directly affect the insolvent’s assets as, for example, freezing orders, search and seizure orders, and orders for sale, is likely to be set aside.

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<sup>60</sup> In this sense, see: Andre Luis Monteiro, ‘Insolvency and Arbitration in Brazil: One More Step Ahead’ (2021) <<http://arbitrationblog.kluwerarbitration.com/2021/02/04/insolvency-and-arbitration-in-brazil-one-more-step-ahead/>> accessed 11 February 2021.



**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?**

64. No.