IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF BRAZIL

Renato Stephan Grion

Partner at Pinheiro Neto Advogados

rgrion@pn.com.br*

Andre Luis Monteiro

Of Counsel at Quinn Emanuel Urquhart & Sullivan, LLP

andremonteiro@quinnemanuel.com**

* The author wishes to thank Ana Beatriz Araujo Ribeiro do Valle, Rafael Curi Savastano and Bianca Boya Barcellos for their help and research. The author also wishes to thank Giuliano Colombo for his invaluable comments and insights about the topics discussed below.

** The author wishes to thank Geraldo Fonseca de Barros Neto and Paulo Magalhães Nasser for having shared initial thoughts on these issues. Special thanks also go to Ítalo G. Martins for his help and research. They provided helpful aid for the first edition of this report.

IMPACT OF NATIONAL INSOLVENCY ON DOMESTIC OR FOREIGN ARBITRATION

[These questions relate to the effects that insolvency proceedings initiated in a national jurisdiction 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 Brazilian Insolvency Act ("BIA" – Law n. 11,101/2005) provides for two main types of insolvency proceedings: (i) judicial reorganization; and (ii) bankruptcy.[1] The answers to the Questions may vary depending on the type of insolvency.

2. The answer to Question 1 is "yes". The BIA was amended by Law n. 14,112/2020 to include some express provisions regarding the effects of insolvency on arbitration. The amendment came into force in January 2021.

3. New section 6, para. 9, expressly establishes that (i) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, (ii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate, and (iii)

[1] 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 U.S. Bankruptcy Code). The main assumption of judicial reorganization is that the debtor develops 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. A court-appointed administrator supervises the process, but without any management powers.
Bankruptcy is an insolvency proceeding that may be commenced upon request from creditors or the insolvent debtor party, and which purpose is to realize the insolvent party's assets for the benefit of its creditors (comparable to proceedings under Chapter 7 of the U.S. Bankruptcy Code). The main assumption of bankruptcy 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, the management is immediately removed from its activities and a court-appointed administrator is designated to formally represent the estate.
In addition to these two types of insolvency proceedings, the BIA further provides for out-of-court reorganization proceeding (*recuperação extrajudicial*) as an alternative means 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 at least sixty percent (60%) of a certain class of creditors as of the filing of such confirmation request. Upon confirmation by the Insolvency Court, such plan becomes effective upon the remaining creditors of the specific class that have not agreed upon/executed the reorganization plan prior to the Insolvency Court's confirmation (*i.e.*, holdout creditors).

the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not prevent the commencement of new arbitrations related to the insolvent party and/or the estate (with the caveat described in Question 2 below, regarding bankruptcy cases covered by section 76 of the BIA).

4. It is important to mention that this is the understanding taken by the majority of legal scholars and case law, even before the amendment (Law n. 14,112/2020) came into force.[2] This is also the understanding expressed in Propositions ns. 6[3] and 75[4] of the Federal Justice Council, which work similarly to the *US Restatements of the Law*.

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*?

5. As mentioned in Question 1 and footnote 1, when it comes to insolvency, the BIA provides for two main types of insolvency proceedings: (i) judicial reorganization; and (ii) bankruptcy.

6. Regarding judicial reorganization, the literal interpretation of the BIA indicates that there is no mandatory *vis attractiva concursus*.

7. However, there are decisions from the Superior Court of Justice (the highest Brazilian court for non-constitutional matters) that recognize the exclusive jurisdiction of the insolvency courts to handle some matters related to judicial reorganizations.

8. In general, those measures are freezing orders, search and seizure orders, orders for sale etc.[5], matters that require the use of enforcement powers over the assets of the insolvent party (as

[2] See, Sano SA Indústria e Comércio v. Voith Verfahrenstechkik 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).

[3] 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.*").

[4] 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.*").

[5] See, 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); Angra Infra Multiestratégia FIP v. Estre Ambiental and Others, AI n. 2202498-56.2020.8.26.0000 (2021); Moinho de Trigo Corina v. Banco Sofisa, AI n. 2217084-64.2021.8.26.0000 and 2217084-64.2021.8.26.0000/50000 (2022).

per the construction of section 6, para. 1, BIA). In such cases, Brazilian courts understand that arbitral tribunals do not have jurisdiction over these matters.[6] Further, insolvency courts hold exclusive jurisdiction to decide on the order of creditors[7] (i.e., who ranks first and gets paid first), which is considered a core-insolvency matter.

9. In commercial cases, arbitral tribunals can decide on the existence of the debt against the insolvent party and determine its amount.[8] As a result, arbitrations filed against insolvent parties where the claimant seeks damages for breach of contract, for example, can continue normally and are within the jurisdiction of arbitral tribunals. Once the arbitral tribunal has rendered the decision specifying the correct amount due by the insolvent party, the creditor may submit the proof of debt (i.e., the arbitral award) to the insolvency courts to be included in the insolvent party's list of liabilities.

10. With respect to bankruptcy, the BIA imposes the *vis attractiva concursus* in its section 76. According to this provision, the general rule is that insolvency courts have exclusive jurisdiction to hear all lawsuits involving the insolvent party`s assets, rights and business. There are, however, three (broad) exceptions to this general rule: (i) labour lawsuits, (ii) tax lawsuits, and (iii) lawsuits not regulated by the BIA in which the insolvent party acts as claimant.[9]

11. The majority of legal scholars and case law understand that these exceptions allow the commencement and development of arbitrations even after the issuing of the winding-up order. The first exception deals with labour lawsuits, which can be submitted to arbitration (some restriction apply), according to Brazilian Labour law, and will not be affected by bankruptcy. The second exception deals with tax lawsuits, which cannot be submitted to arbitration under Brazilian law and, therefore, are irrelevant for the purposes of this report.

12. The third exception is the one more useful for commercial arbitrations. Commercial arbitrations that fall under the third exception may be commenced or continued after the issuing of a winding-up order.[10] The third exception requires the case to meet two requirements: (i) "lawsuits not regulated" by the BIA and (ii) "the insolvent party acts as claimant".

13. The sentence "lawsuits not regulated" by the BIA means lawsuits where the subject matter is not a core-insolvency matter, as all lawsuits regarding core-insolvency matters are regulated by the BIA (which would, in any event, be excluded from arbitration for inarbitrability or non-arbitrability). As for the second requirement, the literal interpretation of section 76 of BIA indicates that, among the lawsuits not regulated by the BIA (i.e., lawsuits not dealing with core-

[6] See, Hornbeck v. Astromarítima, AgInt no CC 153,498/RJ (2018) and Canabrava Bioenergia v Agrisul Agrícola, AI n. 2155882-86.2021.8.26.0000 (2021).
[7] Marcelo Barbosa Sacramone and Henrique de Oliveira Lima Braga, 'Os limites objetivos da cláusula compromissória e a recuperação judicial' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 125.
[8] See, OSX Construção Naval v. AGF Engenharia, REsp 1,953,212/RJ (2021).
[9] See, 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).
[10] See, Renato Stephan Grion, Luiz Fernando Valente de Paiva, 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, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 476-478.

insolvency matters), only the ones commenced by the insolvent party would escape from the *vis attractiva concursus*, which would allow them to be adjudicated before arbitral tribunals.

14. The majority of legal scholars, however, have suggested that this exception should be extended to any lawsuit not regulated by the BIA (i.e., lawsuits not dealing with core-insolvency matters), regardless of the position taken by the insolvent party in the case (whether claimant or respondent).[11] In addition, it has been said that section 76 of BIA should be interpreted in connection with section 6, para. 1, BIA, which indicates that only matters that require the use of enforcement powers by the courts over the assets of the insolvent party should be excluded from arbitration.[12] As the amendment to the BIA came into force in 2021, this understanding is still unsettled.[13]

15. In conclusion, as for bankruptcy, the BIA imposes the *vis attractiva concursus* (i) on lawsuits regarding core-insolvency matters (section 76 BIA) and (ii) on lawsuits that require the use of enforcement powers by the courts over the assets of the insolvent party (section 6, para. 1, BIA). If the dispute does not fall under one of these two cases, it can be adjudicated in arbitration under Brazilian law, which makes many cases related to insolvency legally suitable for arbitration, according to the majority of legal scholars. In these arbitrations, the estate will be represented by the court-appointed administrator (this rule is limited to bankruptcy, as in judicial reorganizations the insolvent party will continue to be represented by its directors).

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?

16. The answer to Question 3.a is "no" for judicial reorganization and, according to the majority of legal scholars, "no" for bankruptcy. As explained above in Questions 1 and 2, the opening of

[11] See, André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 482-490; Gabriel Seijo Leal de Figueiredo, Marcos Flávio Lago Lopes, and Johnatan D'Alcântara, 'Efeitos da Falência sobre as Arbitragens em Curso' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 236; and Marcelo Lamego Carpenter and Luis Tomás Alves de Andrade, 'Arbitragem e o Juízo Universal da Falência' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 278-282.

[12] Idem.

[13] In a case involving judicial reorganization (and not bankruptcy), the Sao Paulo Court of Appeal admitted that the insolvency party could start an arbitration even after the commencement of the judicial reorganization proceedings. See, Concessionária Auto Raposo Tavares S/A . v. OAS S/A (insolvent party) AI n. 2077991-28.2017.8.26.0000 (2017). The decision was rendered before the amendment of the BIA. More recently, the Superior Court of Justice handed down a decision confirming that the commencement of judicial reorganization proceedings does not stay or halt ongoing arbitrations. See, INEPAR S.A. INDUSTRIA E CONSTRUCOES (insolvent party) v TUPI B.V, *AgInt no REsp n. 1.692.425/SP (2023).*

insolvency proceedings (both judicial reorganization and bankruptcy) does not affect the possibility to commence or continue an arbitration.[14]

17. As mentioned in Question 1, the BIA was amended by Law n. 14,112/2020 to include some express provisions regarding the effects of insolvency in arbitration. New section 6, para. 9, expressly establishes that (i) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, (ii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate, and (iii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not prevent the commencement of new arbitrations related to the insolvent party and/or the estate (with the caveat described in Question 2 above, regarding bankruptcy cases covered by section 76 of the BIA).[15]

18. As also explained above in Question 1, it is important to mention that this is the understanding taken by the majority of legal scholars and case law.[16] This is also the understanding expressed in Propositions ns. 6[17] and 75[18] of the Federal Justice Council, which work similarly to the *US Restatements of the Law*.

19. Regarding the position taken by the insolvent party (as defendant and as claimant), the law does not draw any distinction in the context of judicial reorganization. As for bankruptcy, the literal interpretation of section 76 BIA suggests that any case should be commenced or transferred to the insolvency courts (*vis attractiva concursus*) if the lawsuit is not regulated by the BIA and the insolvent party acts as claimant. However, as explained in Question 2, the majority of legal scholars have suggested that this exception should be extended to any lawsuit not regulated by

[14] See, Interclínicas Planos de Saúde S/A – em liquidação extrajudicial v. Saúde ABC Serviços Médico Hospitalares Ltda., MC n. 14.295/SP (2008); Kwikasair v. AIG, Resp. n. 1,355,831/SP (2013); Concessionária Auto Raposo Tavares S/A . v. OAS S/A (insolvent party) AI n. 2077991-28.2017.8.26.0000 (2017); INEPAR S.A. INDUSTRIA E CONSTRUCOES (insolvent party) v TUPI B.V, AgInt no REsp n. 1.692.425/SP (2023). Also: André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 433 (judicial reorganization) and 463 (bankruptcy).

[15] See, 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). Also: André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 433 (judicial reorganization) and 463 (bankruptcy).

[16] See, Sano SA Indústria e Comércio v. Voith Verfahrenstechkik 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).

[17] 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.*").

[18] 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.*").

the BIA (i.e., lawsuits not dealing with core-insolvency matters), regardless of the position taken by the insolvent party in the case (whether claimant or respondent).[19] As the amendment to the BIA came into force in 2021, this understanding is still unsettled.

20. The only real effect of the commencement of insolvency proceedings on arbitrations is that the estate will be represented by a court-appointed administrator. This rule is limited to bankruptcy, as in judicial reorganizations the insolvent party will continue to be represented by its directors.

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?

21. As explained in Question 1 and footnote 1, when it comes to insolvency, the BIA provides for two main types of insolvency proceedings: (i) judicial reorganization; and (ii) bankruptcy.

22. Specifically considering the effects (if any) of the opening of insolvency proceedings in Brazil, the answer to Question 3.b is "no" (with one caveat, explained below).

23. As mentioned in Question 1, the BIA was amended by Law n. 14,112/2020 to include some express provisions regarding the effects of insolvency on arbitration. New section 6, para. 9, expressly establishes that (i) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, (ii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate, and (iii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not prevent the commencement of new arbitrations related to the insolvent party and/or the estate (with the caveat described in Question 2 above, regarding bankruptcy cases covered by section 76 of the BIA)[20].

24. As also explained above in Question 1, it is important to mention that this is the understanding taken by the majority of legal scholars and case law.[21] This is also the understanding expressed

[19] See, André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 482-490; Gabriel Seijo Leal de Figueiredo, Marcos Flávio Lago Lopes, and Johnatan D'Alcântara, 'Efeitos da Falência sobre as Arbitragens em Curso' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 236; and Marcelo Lamego Carpenter and Luis Tomás Alves de Andrade, 'Arbitragem e o Juízo Universal da Falência' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 278-282.

[20] See, 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). Also: André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 433 (judicial reorganization) and 463 (bankruptcy).

[21] See, Sano SA Indústria e Comércio v. Voith Verfahrenstechkik 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).

in Propositions ns. 6[22] and 75[23] of the Federal Justice Council, which work similarly to the *US Restatements of the Law*.

25. The caveat mentioned above is as follows: the only real effect of the commencement of insolvency proceedings on arbitrations is that the estate will be represented by a court-appointed administrator in the arbitrations. This rule is limited to bankruptcy, as in judicial reorganizations the insolvent party will continue to be represented by its directors. Although it is not a material distinction and does not impact the commencement or continuation of an arbitration, this may be understood as a distinction between bankruptcy and judicial reorganisation after the commencement of insolvency proceedings.

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

26. Specifically considering the effects (if any) of the opening of insolvency proceedings in Brazil, the answer to Question 3.c is "no". The subject matter or the relief sought in the arbitration is not a driving factor for the law to create any particular effect in the arbitration due to the commencement of insolvency proceedings.

27. It should be noted, however, that arbitral tribunals do not have jurisdiction to rule on core-insolvency matters under Brazilian law. For example: any measures that directly affect the insolvent's assets (freezing orders, search and seizure orders, orders for sale etc.), winding-up orders, requests to commence judicial reorganization, appointment of administrators, definition of the order of creditors[24] (i.e., who ranks first and gets paid first) etc. These matters are inarbitrable (or non-arbitrable) and, therefore, cannot be submitted to arbitration.

---

[22] 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.*").

[23] 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.*").

[24] See, 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); Galvão Engenharia v. Clark, CC 148.932/RJ (2017); Hornbeck v. Astromarítima, AgInt no CC 153.498/RJ (2018); Canabrava Bioenergia v Agrisul Agrícola, AI n. 2155882-86.2021.8.26.0000 (2021); Banco Sofisa v. OPP, AgInt on CC n. 164,903/PR (2020); Angra Infra Multiestratégia FIP v. Estre Ambiental and Others, AI n. 2202498-56.2020.8.26.0000 (2021); Moinho de Trigo Corina v. Banco Sofisa, AI n. 2217084-64.2021.8.26.0000 and 2217084-64.2021.8.26.0000/50000 (2022). Also: José Emilio Nunes Pinto, 'A arbitragem na recuperação de empresas' (2005) 7 Revista de Arbitragem e Mediação <http://www.revistadostribunais.com.br> accessed on 28 February 2024; and Marcelo Barbosa Sacramone and Henrique de Oliveira Lima Braga, 'Os limites objetivos da cláusula compromissória e a recuperação judicial' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 125.

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

28. 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?

29. No. New section 6, para. 9, expressly establishes that (i) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, (ii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate, and (iii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not prevent the commencement of new arbitrations related to the insolvent party and/or the estate (with the caveat described in Question 2 above, regarding bankruptcy cases covered by section 76 of the BIA).[25] 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.

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

30. No. Under Brazilian law, judicial reorganization is always voluntary. In turn, bankruptcy can be voluntary or involuntary. However, for the purpose of arbitration, 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.

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

[25] See, 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). Also: André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 433 (judicial reorganization) and 463 (bankruptcy).

31. The answer to this Question depends on rules of conflict of laws. The BIA does not contain any express legal provision stating that the arbitrations seated outside Brazil would be affected by its provisions.

32. On the one hand, if the effects of insolvency in arbitration are regulated by the law of the seat and the seat of the arbitration is outside Brazil, the BIA may become irrelevant in the arbitration.

33. On the other hand, if the effects of insolvency in arbitration are regulated by the law of the place where the insolvency takes place and the insolvency proceedings are pending before the Brazilian courts, the BIA will apply to the arbitration, regardless of the place where the arbitral seat is.

34. Neither the Brazilian Arbitration Act nor the BIA provides for rules of conflict of laws regarding this point, which means that it is still unsettled in Brazil whether the effects of insolvency in arbitration are governed by the law of the place where the insolvency proceedings take place or the law of the seat of the arbitration.[26]

h. When do the effects (if any) of insolvency on arbitration become operative (e.g., 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.)?

35. As explained in Questions 3.a and 3.b above, the opening of insolvency proceedings (both judicial reorganization and bankruptcy) does not affect the possibility to commence or continue an arbitration.[27] There is only one caveat: after the issuing of the winding-up order, the estate will be represented by a court-appointed administrator, including in the arbitrations. It takes effect when the insolvency court renders the winding-up order. As explained before, this rule is limited to bankruptcy, as in judicial reorganizations the insolvent party will continue to be represented by its directors.

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?

[26] On this point, See, *GUIMARÃES, Márcio Souza. A arbitragem na reforma da lei de falências e recuperação judicial: lei 14.112/2020. Academia Brasileira de Direito Civil. Disponível em:* https://www.abdireitocivil.com.br/artigo/a-arbritagem-na-reforma-da-lei-de-falencias-e-recuperacao-judicial-lei-14-112-2020/. *Access on 3 April 2024; and BENETTI, Giovanna. Arbitragem e empresas em crise: o problema da arbitrabilidade objetiva. Centro de Investigação em Direito Privado. Disponível em:* https://www.cidp.pt/revistas/rjlb/2019/1/2019_01_0879_0917.pdf. *Access on 3 April 2024.*

[27] See, 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). Also: André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 433 (judicial reorganization) and 463 (bankruptcy).

b. What considerations will the insolvency court take into account in making the decision of whether to send the matter to arbitration?

36. As explained in Question 3 above, under Brazilian law, the opening of insolvency proceedings does not affect the commencement or continuation of arbitration proceedings (both judicial reorganization and bankruptcy). Thus, no specific relief is needed.

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

37. Brazilian law does not expressly provide for anti-arbitration injunctions. However, other measures available under Brazilian law may have similar effects, including in the course of insolvency proceedings.

38. Despite the fact that there is no express legal provision to support this interpretation, the Superior Court of Justice understands that if a insolvency court and an arbitral tribunal rule that they both have jurisdiction to hear the same case, the interested party may file an application ("conflict of jurisdiction application") before the Superior Court of Justice and the Court will decide who should hear the case. Similarly, if both the insolvency court and the arbitral tribunal understand that none of them has jurisdiction to hear the case, the Superior Court of Justice, upon application, will decide who has jurisdiction.[28] This understanding is based on an extensive interpretation of section 105, para. I, subpara. "d", of the Brazilian Constitution (which literally says that the Superior Court of Justice should decide who has jurisdiction when "tribunals", "judges and tribunals" or "judges" cannot agree on who should hear the case).

39. Although this is not an anti-arbitration injunction per se, the effects can be similar to an anti-arbitration injunction if the Superior Court of Justice rules that the insolvency court is the one who should decide the case. This may halt the arbitration at the outset. It is important to mention that the Superior Court of Justice's case law largely favours arbitration and 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?

40. The answer to this Question is "yes" for bankruptcy (but "no" for judicial reorganization). As per section 117 of the BIA, existing contracts signed by the insolvent party (containing

[28] See, 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, 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 Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, CC n. 111.230/DF (2013).

arbitration agreements or not) are not automatically terminated by the issuing of the winding-up order. However, the court-appointed administrator has the power to choose which contracts should be performed and which ones should be terminated, according to the best interest of the estate.

41. The specific criterion is that the contracts should be performed (i) if they reduce the estate's liabilities, (ii) if they avoid the increase of the estate's liability, or (iii) if they are essential to the maintenance of the assets forming the estate.

42. The court-appointed administrator may also terminate or suspend contracts which contain termination clauses associated with insolvency.[29]

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?

43. As explained in Question 6 above, the termination of the contract containing the arbitration agreement does not affect the existence, validity and enforceability of the arbitration agreement. As mentioned above in Question 1, new section 6, para. 9, expressly establishes that the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration. This provision is in line with the principle of severability, which distinguishes the arbitration agreement from the contract in which it is inserted (as per section 8 of the Brazilian Arbitration Act). So, if a court-appointed administrator decides to terminate a contract signed between the insolvent party and a third-party, any disputes arising from this contract (including its termination by the court-appointed administrator), can still be submitted to arbitration.

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?

44. No. As mentioned above in Question 1, new section 6, para. 9, expressly establishes that the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, and that the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate. This provision is in line with the principle of severability, which distinguishes the arbitration agreement from the contract in which it is

[29] See, 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).

inserted (as per section 8 of the Brazilian Arbitration Act). Neither the court-appointed administrator nor the insolvency court can terminate or suspend the effectiveness of arbitration agreements.[30]

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 (e.g., 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?

45. The answer to the first Question is "no". The BIA does not require the alleged creditor to take any step in the insolvency proceedings to be able to commence or continue with the arbitration. In other words, the alleged creditor does not need to ask for court permission to commence or continue any arbitration against the insolvent party. Section 6, para. 6, of the BIA only requires the insolvent party (not the creditor) to inform the insolvency court of any new action filed against it.

46. If the event that the alleged creditor files a proof of debt before the insolvency court seeking its inclusion in the insolvent party's list of liabilities, but the insolvency court rejects the application, the alleged creditor will be able to submit the claim to an arbitral tribunal based on the arbitration agreement already in place. The insolvency court may reject the application for lack of evidence of the existence of the debt, if the debt is still not enforceable etc.

47. The arbitral tribunal will decide on the existence, validity, enforceability and/or amount of the claim. If the arbitral tribunal recognizes the creditor's claim and ascertains its amount, the alleged creditor will be able to file the arbitral award with the insolvency court and ask the court to include the debt in the insolvent party's list of liabilities. So, the answer to the second Question is "yes", an arbitral tribunal has jurisdiction to decide on the existence and amount of the claim and, therefore, the alleged creditor is able to submit the debt (now incorporated into an arbitral award) to the insolvency proceedings.

48. The filing by the creditor of the proof of debt with the insolvency court for its 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 an insolvency court to discuss the merits of its claim (*e.g.*, existence, validity and/or enforceability) and, at the same time, the other party does not allege the existence of an arbitration agreement, then it is

[30] See, 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).

interpreted that the parties have waived the arbitration agreement in relation to that specific matter (section 337, paras. 5 and 6 of the Brazilian Code of Civil Procedure).

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)?

49. The answer is no. A lawsuit filed by the court-appointed administrator to set aside fraudulent acts (insolvency *actio pauliana* or, in Portuguese, *ação revocatória*, as set forth in section 130 of the BIA) between the insolvent party and a third party with the intent to harm other creditors is a legal action dealing with core-insolvency matters and, therefore, inarbitrable, at least according to the majority of legal scholars.[31] Furthermore, section 134 of the BIA expressly provides that a setting aside lawsuit shall proceed before the insolvency courts.

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

50. There is no express provision in the BIA allowing the court-appointed administrator to enter into new arbitration agreements after the commencement of the judicial reorganization or the bankruptcy. Equally, there is no express provision preventing the court-appointed administrator from doing so. The BIA simply does not regulate this point. Legal scholars, however, have been supporting the idea that it is possible.

51. As for the judicial reorganization proceeding, the court-appointed administrator does not have management powers over the insolvent party's affairs. But if the question is whether the insolvent party (and not the court-appointed administrator) is still able to enter into arbitration agreements after the commencement of the judicial reorganization, the answer is "yes", at least according to the majority of the legal scholars.[32] The insolvent party is legally allowed to enter into new arbitration agreements even after the commencement of the judicial reorganization.

---

[31] See, *TOLEDO*, *Paulo* Fernando Campos *Salles de Toledo*. *Arbitragem* e insolvência. *Revista de Arbitragem* e Mediação, RT, nº 20, jan-mar/ 2009, <http://www.revistadostribunais.com.br> accessed on 28 February 2024.

[32] See, GUIMARÃES, Márcio Souza. Arbitrabilidade Subjetiva, Capacidade da Parte, Recuperação Judicial, Extrajudicial e Falência. In: Arbitragem, Mediação, Falência e Recuperação. MONTEIRO, André; VERÇOSA, Fabiane; FONSECA, Geraldo (coord.). São Paulo: Thomson Reuters Brasil, 2022, p. 115; André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, Teoria geral da arbitragem (1st edn, Forense, 2019) 435; *CRIPPA*, *Carla* de Vasconcellos. *Recuperação Judicial*, *falência* e *arbitragem*. *Revista de Arbitragem* e Mediação, RT nº 29, abr-jun/2011. <http://www.revistadostribunais.com.br> accessed on 28 February 2024. Limiting this possibility to the debts not subject to the judicial reorganization, See, *TOLEDO*, *Paulo* Fernando Campos *Salles de Toledo*. *Arbitragem* e insolvência. *Revista de Arbitragem* e Mediação, RT, nº 20, jan-mar/ 2009, <http://www.revistadostribunais.com.br> accessed on 28 February 2024; Martins, André, C. e Marcelo Sampaio Goés Ricupero. Nova Lei de Recuperação Judicial. Grupo Almedina, 2021, p. 87.

52. As for bankruptcy, the court-appointed administrator does have management powers over the insolvent party's affairs. According to the majority of legal scholars,[33] the court-appointed administrator is legally entitled to enter into new arbitration agreements after the commencement of the bankruptcy if it is authorized by the insolvency court. The court will grant such authorisation if it understands that the arbitration agreement is in the best interest of the estate.

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

53. As explained above in Question 1, new section 6, para. 9, expressly establishes that (i) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, (ii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate, and (iii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not prevent the commencement of new arbitrations related to the insolvent party and/or the estate (with the caveat described in Question 2 above, regarding bankruptcy cases covered by section 76 of the BIA).

54. This rule also applies after the approval of the reorganization plan. In other words, the approval of the reorganization plan by the creditors and by the insolvency court does not affect the existence, validity and enforceability of arbitration agreements inserted in contracts entered into by the insolvent party and a creditor.[34]

55. According to the majority of legal scholars, it is also possible under Brazilian law to include an arbitration agreement in a reorganization plan, in order to solve disputes arising from the performance of the reorganization plan through arbitration.[35] A more difficult question is

[33] See, GUIMARÃES, Márcio Souza. Arbitrabilidade Subjetiva, Capacidade da Parte, Recuperação Judicial, Extrajudicial e Falência. In: Arbitragem, Mediação, Falência e Recuperação. MONTEIRO, André; VERÇOSA, Fabiane; FONSECA, Geraldo (coord.). São Paulo: Thomson Reuters Brasil, 2022, p. 115-117; André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, Teoria geral da arbitragem (1st edn, Forense, 2019) 470; *CRIPPA*, *Carla* de Vasconcellos. *Recuperação Judicial*, *falência* e *arbitragem*. *Revista de Arbitragem* e Mediação, RT nº 29, abr-jun/2011. <http://www.revistadostribunais.com.br> accessed on 28 February 2024; *TOLEDO*, *Paulo* Fernando Campos *Salles de Toledo*. *Arbitragem* e insolvência. *Revista de Arbitragem* e Mediação, RT, nº 20, jan-mar/ 2009, <http://www.revistadostribunais.com.br> accessed on 28 February 2024.

[34] See, LIGHTCOM COMERCIALIZADORA DE ENERGIA S.A v RENOVA ENERGIA (insolvent party) AI 2237465-30.2020.8.26.0000. (2021); Kelly dos Reis Delbone v : L R A Tarsitano Eireli, Antonio Romeu Tarsitano Confecções Ltda (insolvent party. AI 2258241-51.2020.8.26.0000. (2021); OCP S.A. v FERTILIZANTES HERINGER (insolvent party) AI 2204781-52.2020.8.26.0000 (2021).

[35] See, *SALOMÃO*, *Luis Felipe* e *SANTOS*, *Paulo Penalva*. Recuperação Judicial, Extrajudicial e Falência. Rio de Janeiro: Forense, 2012, p. 237-238; GRION, Renato Stephan; DE PAIVA, Luiz Fernando Valente; SILVA, Guilherme Piccardi de Andrade. A arbitragem no contexto das recuperações judiciais e extrajudiciais e das falências In: MELO, Leonardo de Campos; BENEDUZI, Renato Rezende (coord.). A reforma da arbitragem. Rio de Janeiro: Forense, 2016, p. 107; MORAES, Felipe. Arbitragem e Plano de Recuper*ação Judicial* in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 195; André Luis Monteiro, José Antonio Fichtner, Sergio Nelson Mannheimer, *Teoria geral da arbitragem* (1st edn, Forense, 2019) 451;

whether an arbitration agreement inserted in a reorganization plan approved by the majority of creditors and the insolvency court binds the dissident creditors (e.g., those who disagreed with the inclusion of the arbitration agreement in the reorganization plan). This point is still unsettled under Brazilian law.

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 (e.g., the parties to the arbitration) exclude the application of those rules?

56. As a general principle, the rules established in the BIA are mandatory and, therefore, the insolvent party and one or more of its creditors cannot modify the legal provisions. It is worth noting that, as the provisions set out in the BIA are arbitration-friendly, as explained above, it is unlikely that parties would try to exclude or modify them.

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

57. The answer to this Question depends on rules of conflict of laws. Arbitrators may be bound by the insolvency rules of the seat of the arbitration or by the insolvency rules of the main place of business of the insolvent party. General rules of international arbitration may also apply. It depends on the rules of conflict of laws adopted by the relevant jurisdiction. The simple fact that an arbitration is seated in a specific jurisdiction does not necessarily mean that the insolvency rules of that seat will apply to the arbitration.

58. Neither the BIA nor the Brazilian Arbitration Act provides for any rules of conflict of laws regarding the effects of insolvency on arbitrations seated in Brazil.

59. However, as the rules established in the BIA are in principle mandatory, it is likely that arbitrators acting in an arbitration seated in Brazil will apply the Brazilian insolvency rules. Otherwise, it may risk the validity and enforceability of the arbitral award in Brazil (and in some other jurisdictions). Given that, the answer to the Question above is “yes”.

60. A potential discussion about whether an arbitral tribunal should proceed or not with the arbitration due to insolvency may not frequently arise in Brazil. This is because, as explained in Question 1 above, the BIA is extremely arbitration-friendly and expressly states that (i) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not allow a court-appointed administrator to refuse to submit any disputes covered by an existing arbitration agreement to arbitration, (ii) the opening of insolvency proceedings (both bankruptcy and judicial reorganization) does not stay or suspend ongoing arbitrations related to the insolvent party and/or the estate, and (iii) the opening of insolvency proceedings (both

FIGUEIREDO. Gabriel Seijo Leal. Cláusula Compromissória Em Plano De Recuperação Judicial: Credores Alcançados. Civil Procedure Review. See at: https://civilprocedurereview.faculdadebaianadedireito.com.br/revista/article/view/275/231

bankruptcy and judicial reorganization) does not prevent the commencement of new arbitrations related to the insolvent party and/or the estate (with the caveat described in Question 2 above, regarding bankruptcy cases covered by section 76 of the BIA).

61. In any event, Brazilian law empowers the arbitral tribunal to decide – in the first place, with priority over the courts – on their jurisdiction to hear a case (*Kompetenz-Kompetenz* – sections 8, sole paragraph, and 20 of the Brazilian Arbitration Act, as well as section 485(VII) of the Brazilian Code of Civil Procedure).[36] This rule also applies to arbitrations related to insolvency (for example, when one of the party is insolvent) and, therefore, arbitral tribunals have the power to decide whether they are going to proceed with the arbitration or not. Applying the mandatory rules of the BIA, they will likely understand that the arbitration should proceed.

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?

62. 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?]

63. The answer varies according to the type of insolvency proceedings (judicial reorganization or bankruptcy).

64. In a judicial reorganization, the court-appointed administrator does not take part in the arbitration. The court-appointed administrator does not step into the shoes of the insolvency party. The insolvent party continues acting by itself (sections 64 and 66 of the BIA)[37], as if no insolvency proceedings had ever been brought.

[36] See, Kwikasair Cargas Expressas S/A v. AIG Venture Holdings Ltd., REsp n. 1,355,831/SP (2013).
[37] 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.

65. In contrast, in bankruptcy, the insolvent party is replaced by the estate (which is called in Brazil "*massa falida*").[38] The estate is represented in the arbitration by the court-appointed administrator[39], as per sections 22(III)(c)(n) and 76, sole paragraph, of the BIA, as well as section 75(V) of the Brazilian Code of Civil Procedure.[40] The insolvent party (which is not the estate – after the issuing of the winding-up order they are considered two separate entities) may still intervene and file submissions, as per sections 103, sole paragraph, and 104 (iv)(x)(xii) of the BIA.[41] According to these legal provisions, the insolvency part is entitled to closely follow the insolvency proceedings, request specific measures to protect the estate, and may be required by the insolvency court to provide information.

66. These provisions may also apply to arbitration, allowing the insolvency party to intervene in certain circumstances. The pleadings, however, are drafted and filed by the estate, represented by the court-appointed administrator. The court-appointed administrator (not the insolvent party) also acts in the hearings, representing the estate.

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?

67. Neither the BIA nor the Brazilian Arbitration Act provides for confidentiality (or publicity) in arbitrations related to insolvent parties. Confidentiality will generally apply in institutional arbitration between private parties.

68. However, according to section 8 of the BIA, interested parties (the insolvent party, a creditor, the Federal Prosecution Office) may challenge any proof of debt (for example, an arbitral award) filed in the insolvency proceedings. In these cases, the creditor filing the proof of debt may need to prove the existence of the debt (as per section 9(III)), which may include documents from the arbitration. In these circumstances, it is very likely that the creditor will make public the documents of the arbitration files, lifting the confidentiality of the arbitration.

69. As to ongoing arbitrations, there is case law from the São Paulo Court of Appeal granting creditors the right to access the arbitration files.[42] In the absence of express legal provisions, some legal scholars understand that creditors should be provided not only with basic

[38] Fábio Ulhoa Coelho, Curso de Direito Comercial (13th edn, Saraiva 2012) 301.
[39] Fábio Ulhoa Coelho, Curso de Direito Comercial (13th edn, Saraiva 2012) 296.
[40] Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, Tratado de Direito Empresarial: Recuperação Empresarial e Falência (2nd edn, RT 2018) 141.
[41] Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, Tratado de Direito Empresarial: Recuperação Empresarial e Falência (2nd edn, RT 2018) 287.
[42] See, 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).

information regarding the arbitration, but also with its technical and economic details, as well as the claims and amounts in dispute.[43]

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

70. Yes. In both judicial reorganization and bankruptcy, the names change. However, the insolvent party takes a different name in each type of insolvency proceedings.

71. After the judge accepts the application for judicial reorganization, the insolvent party must add after its name the expression "*under Judicial Reorganization*"[44] in court proceedings and arbitrations, as per section 69 of the BIA[45].

72. In bankruptcy, the issuing of the winding-up order creates a separate entity called "estate" (or, in Portuguese, "*massa falida*").[46] The estate replaces the insolvent party in all court proceedings and arbitrations and the name of the party (claimant or respondent) becomes "*massa falida of* [name of the insolvent party]", as per section 99(VIII) of the BIA.

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?

73. The answer to this Question depends again on the type of insolvency proceedings (judicial reorganization or bankruptcy).

74. In judicial reorganization, neither the court-appointed administrator nor the insolvency court is empowered to reach or review settlements involving the insolvent party (see section 22 (I)(II) of the BIA). This is because the insolvent party remains in control over its rights and assets (sections 64 and 66 of the BIA).[47] As a rule, the insolvent party is the one entitled to negotiate and settle disputes with a debtor or a creditor (during the arbitration or court proceedings). However, the settlement cannot involve any disposal of the insolvency party's fixed assets, as per section 66 of the BIA.

75. In bankruptcy, the insolvent party loses its capacity to manage its assets, as per section 103 of the BIA, and, therefore, it has no longer powers to negotiate or settle a dispute. In this case, the court-appointed administrator is the one entitled to settle disputes involving the estate,

[43] Eliane Cristina Carvalho and Renata Martins de Oliveira Amado, 'Efeitos da recuperação judicial em arbitragens em curso' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 172.
[44] In Portuguese: "*em Recuperação Judicial*".
[45] Fábio Ulhoa Coelho, Curso de Direito Comercial (13th edn, Saraiva 2012) 450.
[46] Fábio Ulhoa Coelho, Curso de Direito Comercial (13th edn, Saraiva 2012) 307.
[47] 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.

provided the terms of the proposed settlement are approved by the creditors' committee and the insolvency court, as per section 22(3) of the BIA.

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

76. The answer depends on the content of the interim measure. As a rule, arbitral tribunals are entitled to grant interim measures as per section 22-B of the Brazilian Arbitration Act.[48] Neither the BIA nor the Brazilian Arbitration Act expressly prevent an arbitral tribunal from granting interim measures concerning a party subject to insolvency proceedings (judicial reorganization or bankruptcy).

77. However, as explained in more detail below, interim measures that directly affect the insolvent party's assets (freezing orders, search and seizure orders, orders for sale, etc.) cannot be granted by arbitral tribunals. Only the insolvency court can grant such interim measures, as established in precedents rendered by the Superior Court of Justice (the highest court for non-constitutional matters in Brazil).[49] This limitation on the arbitral tribunal's power is limited to interim measures that directly affect assets subject to the judicial reorganization or the bankruptcy. There is, however, one important exception. Even when the arbitration is pending, the creditor may file an application to the arbitrators asking for an interim measure to earmark some amounts of money of the estate to guarantee the enforcement of the future arbitral award (section 6(3) of the BIA).[50] This exceptional possibility is available both in judicial reorganization and bankruptcy.

78. It is worth mentioning that, even if the interim measure sought by an interested party against the insolvent party is not related to assets subject to judicial reorganization or bankruptcy, the interim measure shall be previously informed to the insolvency court.[51]

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?

[48] See, José Antonio Fichtner, Sergio Nelson Mannheimer e 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.

[49] 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).

[50] See, Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, Tratado de Direito Empresarial: Recuperação Empresarial e Falência (2nd edn, RT 2018) 109.

[51] See, Hornbeck Offshore Services Lcc v Astromarítima Navegação S/A (insolvent party) AgInt no CONFLITO DE COMPETÊNCIA Nº 153.498 – RJ (2017/0181737-7).

79. The answer depends on the content of the interim measure. Neither the BIA nor the Brazilian Arbitration Act contains any express provision in this regard. As a rule, interim measures already granted by an arbitral tribunal are not affected by the opening of insolvency proceedings (both judicial reorganization and bankruptcy).

80. However, the Superior Court of Justice has decided in two precedents that interim measures that order the seizure of the insolvent party's assets can only be granted by the insolvency court (not by the arbitral tribunal). This exceptional rule applies to judicial reorganization (after the decision granting the reorganization) and to bankruptcy (after the issuing of the winding-up order).

81. 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".[52] In the case *Hornbeck v. Astromarítima* (2018), the Court, based on section 47 of the BIA, 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".[53]

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?

82. The answer to this Question depends on the type of insolvency proceedings (judicial reorganization or bankruptcy).

83. As explained above, in judicial reorganization, neither the court-appointed administrator nor the insolvency court is empowered to reach or review settlements involving the insolvent party (see section 22 (I)(II) of the BIA). This is because the insolvent party remains in control over its rights and assets (sections 64 and 66 of the BIA).[54]

84. As a rule, the insolvent party is the one entitled to negotiate and settle disputes with a debtor or a creditor, before or after the granting of the judicial reorganization. However, after the opening of the judicial reorganization, the settlement cannot involve any disposal of the insolvency party's fixed assets, as per section 66 of the BIA.

85. In bankruptcy, the insolvent party loses its capacity to manage its assets, as per section 103 of the BIA, and, therefore, it has no longer powers to negotiate or settle a dispute. In this case, the court-appointed administrator is the one entitled to settle disputes involving the estate,

[52] See, 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".
[53] See, 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".
[54] See, 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.

provided the terms of the proposed settlement are approved by the creditors' committee and the insolvency court, as per section 22(3) of the BIA.[55]

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?[56]

86. The opening of insolvency proceedings (judicial reorganization or bankruptcy) has the effect of suspending enforcement proceedings already filed[57] (section 6 of the BIA).

87. Also, after the opening of insolvency proceedings (both judicial reorganization and bankruptcy), a creditor cannot start the enforcement of arbitral awards or judgments against the insolvent party (judicial reorganization) or the estate (bankruptcy).

88. In these cases, the creditor needs to file the proof of debt with the insolvency court.[58]

89. In judicial reorganization, there is one exception to the rule described above: it does not apply to credits that are not subjected to the judicial reorganization regime.[59]

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?

90. The answer to the first Question is that there no special status.

91. 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. Regardless of the existence of insolvency proceedings, an arbitral award, once rendered, is always a proof of debt and can be enforced against the debtor.

---

[55] See, Marcelo Barbosa Sacramone and Henrique de Oliveira Lima Braga, 'Os limites objetivos da cláusula compromissória e a recuperação judicial' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 130.

[56] The expression "individual enforcement actions" refers to actions commenced outside of the insolvency proceedings for the enforcement of a credit.

[57] 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.revistadostribunais.com.br> accessed on 28 February 2024; José Emilio Nunes Pinto. A arbitragem na recuperação de empresas (2005) <http://www.revistadostribunais.com.br> accessed on 28 February 2024; Carla de Vasconcellos Crippa. Recuperação judicial, falência e arbitragem (2011) <http://www.revistadostribunais.com.br> accessed on 28 February 2024.

[58] Ricardo Negrão, Manual de Direito Comercial e da Empresa (7th edn, Saraiva 2012) 171.

[59] Marcelo Barbosa Sacramone and Henrique de Oliveira Lima Braga, 'Os limites objetivos da cláusula compromissória e a recuperação judicial' in Andre Luis Monteiro, Fabiane Verçosa and Geraldo Fonseca (eds), *Arbitragem, Mediação, Falência e Recuperação: Resolução de Disputas na Empresa em Crise* (1st edn, Thomson Reuters Brasil, 2022) 124.

92. The existence of insolvency proceedings, however, changes the way the arbitral award can be enforced. Once the arbitral award is rendered and the debtor is subject to ongoing insolvency proceedings, the creditor cannot start enforcement proceedings. The creditor needs to file the proof of debt (i.e., the arbitral award) with the insolvency court (see sections 7 to 20 of the BIA).[60] While the arbitration is pending (and, therefore, no arbitral award has been rendered and no proof of debt exist), the credit pursued by the claimant has no status in the insolvency proceeding.

93. There is, however, one important exception. Even when the arbitration is pending, the creditor may file an application to the arbitrators asking for an interim measure to earmark some amounts of money of the estate to guarantee the enforcement of the future arbitral award (section 6(3) of the BIA).[61] This exceptional possibility is available both in judicial reorganization and bankruptcy.

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?

94. The answer to the first Question is yes. As per section 515(VII) of the Brazilian Code of Civil Procedure and section 31 of the Brazilian Arbitration Act, an arbitral award rendered in Brazil has the same legal effects as a judgment rendered by a Brazilian court. Both an arbitral award and a judgment are valid proofs of a credit and can be filed with the insolvency court.

95. The answer to the second Question is also yes. If an arbitral award is rendered outside Brazil, it must be recognized by the Superior Court of Justice to produce effects in Brazil, as per section 105(I)(i) of the Brazilian Constitution, sections 34 and 35 of the Brazilian Arbitration Act, sections 960-965 of the Brazilian Code of Civil Procedure and article V of the New York Convention (incorporated into the Brazilian legal system through Decree 4,311/2002).

96. As recently decided by the Sao Paulo Court of Appeal, once the foreign arbitral award has been recognised, it becomes a valid proof of credit as well and can be filed with the insolvency court in Brazil.[62]

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

[60] Fábio Ulhoa Coelho, Curso de Direito Comercial (13th edn, Saraiva 2012) 362.
[61] See, Paulo Fernando Campos Salles de Toledo and Adriana Valéria Pugliesi, Tratado de Direito Empresarial: Recuperação Empresarial e Falência (2nd edn, RT 2018) 109.
[62] See, Dedini S/A Indústrias de Base v. Ecodiesel Colômbia, AI n. 2176317-18.2020.8.26.0000 (2021).

97. Yes. According to some decisions handed down by the Superior Court of Justice, the provisions of the BIA are part of public policy.[63]

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 (i.e., 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 (e.g., prohibiting individual proceedings [e.g., arbitration] outside the insolvency process)? [64]

98. The principle of *par conditio creditorum* is part of public policy from both a substantive and a procedural standpoint. Creditors are, however, divided into separate classes and equal treatment is expected within those classes.

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?

99. 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 Brazil concerning the insolvent party]

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

100. There is a distinction between recognition of foreign decisions (arbitral awards and judgments) and recognition of foreign insolvency proceedings. The answer to this Question is "yes" to both cases, but the procedure is different.

[63] See, 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).

[64] If the equality of creditors is part of public policy only from a substantive point of view, an award rendered by a foreign arbitral tribunal despite the prohibition of arbitration might still be effective in the insolvency proceedings because the award creditor will still abide by the *pari passu* distribution in insolvency. If, on the contrary, the public policy consideration of equality of creditors also extends to its procedural dimension, i.e. every creditor should have its claim decided under the same procedure, an award rendered in breach/disregard of such procedures might not be effective in the insolvency proceedings.

101. All foreign decisions (arbitral awards and judgments) must be recognized by the Superior Court of Justice to produce effects in Brazil, as per section 105(I)(i) of the Brazilian Constitution, sections 34 and 35 of the Brazilian Arbitration Act (only re arbitral awards), sections 960-965 of the Brazilian Code of Civil Procedure and article V of the New York Convention (only re arbitral awards).

102. As for foreign insolvency proceedings, it is not necessary any recognition by the Superior Court of Justice, as least according to recent case law and legal scholars.[65] The BIA establishes a specific procedure before the insolvency court for the recognition of foreign insolvency proceedings, which is much simpler than the procedure to recognize foreign decision before the Superior Court of Justice. This specific procedure for the recognition of foreign insolvency proceedings is set forth in sections 167-H through 167-O of the BIA, which incorporate into the Brazilian legal system the UNCITRAL Model Law on Cross-Border Insolvency.

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?

103. The answer to the first Question is yes, at least in part.

104. The BIA has been recently amended by Law n. 14,112/2020 to adopt the UNCITRAL Model Law on Cross-Border Insolvency. However, Brazilian law did not adopt in full the UNCITRAL Model Law, establishing some differences regarding arbitration.

105. According to article 20(1)(a) of the Model Law, "upon recognition of a foreign proceeding that is a foreign main proceeding: (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed". Based on this provision, the UNCITRAL Guide to Enactment and Interpretation the Model Law states that "by not distinguishing between various kinds of individual action, also covers actions before an arbitral tribunal" and, therefore, "article 20 establishes a mandatory limitation to the effectiveness of an arbitration agreement".[66]

106. Brazilian Law did not adopt this possibility of automatic suspension of ongoing arbitrations seated in Brazil. It does the opposite. Accordingly, section 167-M(2) of the BIA (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,

[65] See, case Prosafe SE (0129945-03.2021.8.19.0001) and case Jason Hector Blain (5076905-15.2023.8.24.0000). See also: Comissão de Direito e Prática Comercial da ICC Brasil. Relatório Insolvência Transnacional dated 21 June 2021. Accessed on 8 April 2024 at https://www.iccbrasil.org/wp-content/uploads/2022/04/Relatorio-Taskforce-Insolvencia-Transnacional.pdf. ARAUJO, Nadia de; SPITZ, Lidia, A Insolvência Transnacional na
Nova Lei de Falências, Consultor Jurídico, accessed on 8 April 2024 at: https://www.conjur.com.br/2020-dez-18/opiniao-insolvencia-transnacional-lei-falencias. BARROS NETO, Geraldo Fonseca de, Reforma da Lei de Recuperação Judicial e Falência Comentada e Comparada, Rio de Janeiro: Forense, 2021, p. 205.

[66] Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf. Access on 21 March 2024.

except when it involves enforcement measures against the debtor's assets, which will keep stayed".

107. 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.

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?

108. The answer to this Question is "no". As explained above, section 167-M(2) of the BIA (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 enforcement measures against the debtor's assets, which will keep stayed". Therefore, 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.

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?

109. There is no legal provision to this effect in any of the pertinent rules and, as explained above, the recognition of foreign proceedings as the main insolvency proceeding does not affect the creditors' right to commence or continue any court proceedings or arbitrations.

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

110. As explained above, section 167-M(2) of the BIA (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 enforcement measures against the debtor's assets, which will keep stayed". Therefore, 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. As there is no rule imposing any conditions on arbitrations due to the recognition of foreign proceedings as the main insolvency proceeding, the answer to this Question seems to be "no".

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

111. As explained above, section 167-M(2) of the BIA (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 enforcement measures against the debtor's assets, which will keep stayed". Therefore, 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. As there is no rule imposing any conditions on arbitrations due to the recognition of foreign proceedings as the main insolvency proceeding, the answer to this Question seems to be "no".

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?

112. No.