IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF ITALY

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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 the Ability to Commence or Continue Arbitration

1. Does the law of Italy 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. In Italy, the rules governing the relationship between arbitration and insolvency proceedings are contained in different statutes and sources of law, namely:
    a. Italian insolvency law,
    b. Italian arbitration law, and
    c. European Union (EU) and international law.
2. Italian insolvency law is mainly contained in Italian legislative decree No. 14 of 12 January 2019 ("New Insolvency Code") that entered into force on 15 July 2022, replacing Italian royal decree No. 267 of 16 March 1942 ("Old Insolvency Code"). The New Insolvency Code's rules concerning the relationship between arbitration and insolvency proceedings are essentially identical to those of the Old Insolvency Code.
3. Italian arbitration law is set out in Articles 806-840 of Italian Code of Civil Procedure ("CPC"). However, provisions of other acts may also have a bearing on the relationship between insolvency and arbitration.
4. As to EU and international law, the relevant instruments for the purposes of this toolkit are Regulation (EU) 2015/848 ("Recast Insolvency Regulation") and the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards ("New York Convention").
5. The provisions governing the effects of insolvency on arbitration are mainly contained in the insolvency law as described above.
6. It is important to underline that Italian insolvency law contemplates several types of proceedings dealing with the insolvency of a debtor. A difference can be drawn between, on the one hand, proceedings entailing that the debtor is divested of its assets ("fallimento" under the Old Insolvency Code and "liquidazione giudiziale" under the New Insolvency Code) and, on the other hand, proceedings that do not entail such divestment. The latter may or may not,

depending on the specific type of proceedings, envisage supervision or various checks by the court.

7. Unless otherwise stated, this toolkit focuses on "fallimento" and "liquidazione giudiziale", which envisage the divestment of the debtor, the appointment of an insolvency administrator and the liquidation and distribution of the debtor's assets (these proceedings are hereinafter referred to as "insolvency proceedings").

2. Does the insolvency legislation in Italy 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. To begin with, under Italian law, only state courts are allowed to handle insolvency proceedings, including those aimed at liquidating an insolvent company, assessing its liabilities and making pro-rata payments to its creditors.[1]

9. (a) Pursuant to Article 32 of the New Insolvency Code, the court that opens the insolvency proceedings has exclusive jurisdiction over all "actions arising therefrom".[2] Moreover, pursuant to Article 151, paragraph 2, of the New Insolvency Code[3], after the opening of insolvency proceedings every credit against the insolvent debtor must be ascertained in accordance with Articles 200 and following of the New Insolvency Code, which contemplate the exclusive jurisdiction of the insolvency court. Accordingly, the *vis attractiva concursus* covers any claim arising from the opening of the insolvency proceedings or otherwise affecting the assets and debts of the insolvency estate, such as:

(i) claims against an insolvent debtor for contractual or tort liability,

(ii) claims predicated on the debtor's insolvency (such as an *actio pauliana*), and

(iii) claims concerning a relationship affected by the insolvency.

10. By contrast, the *vis attractiva concursus* does not capture the (usually less relevant, as far as their number and effects are concerned) claims against the insolvent debtor that do not affect the assets and debts of the insolvency estate, such as claims for declaratory relief (please see below, answers to Questions 3.c and 3.e).[4]

[1] New Insolvency Code, Article 122, corresponding to Old Insolvency Code, Article 23.
[2] Article 24 of the Old Insolvency Code contains an essentially identical provision. Article 52, paragraph 2, of Old Insolvency Code provides that any claim brought against an insolvent defendant must be assessed according to special procedural rules contained in the Old Insolvency Code.
[3] Old Insolvency Code, Article 52.
[4] See Italian Court of Cassation, 22 August 2022, no 25055; see also Italian Court of Cassation, 12 January 2000, no 282.

11. (b) Even if they are covered by an arbitration agreement, the claims falling under the *vis attractiva concursus* cannot be brought to arbitration.

3. What are the effects (if any) of the opening of insolvency proceedings in Italy 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. In principle, Italian law does not expressly distinguish between proceedings where the insolvent party acts as defendant and those where it acts as claimant. However, since most claims against the insolvent debtor are captured by the *vis attractiva concursus* (as explained in answer to Question 3.e below), after the opening of the insolvency the insolvent party can appear as defendant (directly or through the insolvency administrator) only in a limited number of arbitration 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?

13. Yes. Italian law distinguishes between proceedings aimed at the financial restructuring and reorganisation of the company and insolvency proceedings aimed at the liquidation of the company. As a general rule, only insolvency proceedings aimed at the liquidation of the company have effects on arbitration agreements and proceedings.

14. In contrast with liquidation proceedings, a creditors' arrangement (*concordato preventivo*) has no impact on arbitration agreements or proceedings involving the debtor. In particular, pursuant to Article 97 of the New Insolvency Code, the arbitration agreements entered into by the debtor remain enforceable even if the latter obtains a decree from the competent Court terminating the main contracts in which they are included. This is the opposite of what happens in case of insolvency proceedings, where the termination of a contract also entails the termination of any arbitration clause contained therein (see answers to Questions 7 and 8 below). Pursuant to Articles 54 and 56 of the New Insolvency Code, other forms of creditors' arrangements, such as reorganisation plans (*piano di risanamento*) and restructuring agreements (*accordo di ristrutturazione*), have no impact on arbitration agreements and proceedings involving the debtor.

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

15. Yes. As mentioned in answer to Question 3.e, whether or not a claim is captured by the *vis attractiva concursus* principally depends on its subject matter. Thus, a claim predicated on the insolvency (such as *actio pauliana*) or aimed at ascertaining a credit against the insolvent debtor cannot be adjudicated by the arbitral tribunal because it falls within the exclusive jurisdiction of the insolvency court. By contrast, a declaratory relief claim against the insolvent debtor that has no patrimonial impact on the insolvency estate (e.g. it does not seek to establish a debt of the insolvency estate that may be enforced against it)[5] can be brought to arbitration.

16. The subject matter of a claim is also relevant under Article 150 of the New Insolvency Code[6], which prohibits individual enforcement or precautionary actions on the insolvency estate (unless otherwise allowed by the law).

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. The effects discussed herein do not extend to pre-insolvency proceedings or restructuring proceedings.

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. Insofar as the jurisdiction of an arbitral tribunal seated in Italy is concerned, the law does not draw any distinction between arbitral proceedings that are already pending and those that are yet to be initiated at the time of the opening of insolvency proceedings.

19. It is worth noting that Article 172 of the New Insolvency Code[7] provides that, in the context of insolvency proceedings aimed at liquidation, contracts that have not been entirely performed by both parties by the time of the opening of the insolvency are 'suspended' until the insolvency administrator either terminates or confirms them.

20. Pursuant to Article 192 of the New Insolvency Code,[8] if the insolvency administrator terminates such contracts, any arbitration clause contained therein is also terminated. Accordingly, no arbitration proceedings can commence or continue based on that clause[9].

[5] See Italian Court of Cassation, 12 January 2000, no 282.
[6] Old Insolvency Code, Article 51.
[7] Old Insolvency Code, Article 72.
[8] Old Insolvency Code, Article 83-*bis.*
[9] See Italian Court of Cassation, 23 February 2023, n. 5694.

21. Conversely, if the insolvency administrator confirms such contracts, or if the contracts have already been fully performed before the opening of the insolvency (and thus are not subject to termination or confirmation by the insolvency administrator), any arbitration clauses contained therein continue to be valid and enforceable with respect to claims that are not captured by the *vis attractiva concursus* (such as those brought by the insolvency administrator against debtors of the insolvent party). Thus, arbitration proceedings can commence or continue with respect to such claims.[10]

22. That said, there is no clear guidance from the case law on the effects of insolvency on the procedural measures to be taken in pending arbitration proceedings. In other words, it is unclear what procedural measures arbitrators should take if one party is declared insolvent (on procedural effects, see Questions 16 to 22 below).

23. According to some scholars,[11] arbitrators should apply Article 143 of the New Insolvency Code[12] and Article 300 of the Italian CPC. According to these provisions, if a party to court proceedings becomes insolvent, the proceedings must be stayed, and the interested parties are required to reinstate them within a mandatory term. The rationale is to ensure that the insolvency administrator receives official notice of the pending proceedings so that it can take action in the interest of the estate.

24. According to other scholars,[13] arbitrators should not apply those provisions because they only concern court proceedings. Instead, they must apply Article 816-sexies of Italian CPC, which deals with the procedural consequences of a party's death or loss of *locus standi*. According to that provision, arbitrators must take any measure that, in their discretion, appear necessary to ensure that the parties are able to present their case, including suspending the proceedings. In practice, this means that the arbitrators would request the non-insolvent party to:

    (i) inform the insolvency administrator of the pending arbitration proceedings, and

    (ii) invite him or her to appear in those proceedings within a suitable term compatible with the timetable of the insolvency procedure (taking into account that the administrator must be authorised by the insolvency court to appear before the arbitral tribunal).

[10] If the insolvency administrator starts arbitration against a debtor of the insolvent party based on a valid and enforceable arbitration clause, and the counterparty submits a counterclaim captured by the *vis attractiva concursus*, the arbitral tribunal has jurisdiction only over the claim, the counterclaim falling within the exclusive jurisdiction of the insolvency court (see Italian Court of Cassation, 10 January 2003, no 148). There is an exception however for set-off counterclaims, which the counterparty may always raise against the insolvency administrator in the arbitration.

[11] See e.g. Angelo Castagnola, *Arbitrato pendente e subentro del curatore nel contratto contenente la clausola compromissoria*, on Ferruccio Auletta et al. (eds.), *Sull'arbitrato. Studi offerti a Giovanni Verde*, Napoli, 2010, p. 169 ff.

[12] Which is the same as Old Insolvency Code, Article 143.

[13] See e.g. Mauro Bove, *Arbitrato e fallimento*, accessible in Italian on <https://www.judicium.it/arbitrato-e-fallimento/?testocercato=Arbitrato%20e%20fallimento&a=> accessed 5 April 2024.

25. In any event, where there is more than one claimant and/or defendant, the arbitration is discontinued or suspended only with respect to the insolvent claimant/defendant, whereas it continues among the non-insolvent parties[14].

26. On the other hand, the possibility to apply the Italian insolvency rules on the effects of the insolvency on the jurisdiction of an arbitral tribunal seated in another EU Member State is regulated by the Recast Insolvency Regulation,[15] which distinguishes between pending arbitration proceedings and arbitration proceedings that are yet to be initiated (see answer to Question 3.g below).

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

27. Yes. The effects discussed above only concern compulsory insolvency proceedings.

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

28. Yes, Italian rules on the impact of Italian insolvency proceedings on arbitration agreements and arbitration proceedings concerning the insolvent party intend to apply extraterritorially.

29. However, such extraterritorial application is subject to the conflict of law rules contained in the Recast Insolvency Regulation.[16]

30. The general rule under article 7 of the Recast Insolvency Regulation is that the law of the Member State where insolvency proceedings have been opened will govern the effects of that insolvency across EU Member States. As per article 7(2)(f) of the same Recast Insolvency Regulation, this would include the Italian rules that govern the impact of insolvency on arbitration proceedings and arbitration agreements concerning the insolvent party.

31. Article 18 of the Recast Insolvency Regulation contains an exception to this rule, whereby when arbitration proceedings are pending in other EU Member States at the time of the opening of insolvency, the law of the seat will govern the impact of insolvency on their continuation.

32. However, the said Article 18 does not apply to arbitration proceedings seated outside of the EU or, according to a peculiar decision of the Italian Court of Cassation, involving a party not having its place of business within the European Union.[17] The effect of Italian insolvency proceedings on those arbitration proceedings will be subject to Italian law.

[14] See Italian Court of Cassation, 23 April 2020, no 8123.
[15] Provided that the insolvency proceedings were opened by an EU Court: see Italian Court of Cassation, 21 July 2015, no. 15200 (decision rendered on the basis of EU Regulation 1346/2000).
[16] Please however note that the choice of law rules set forth by the Recast Insolvency Regulation do not apply when the insolvency proceedings have not been opened in an EU Member State.
[17] See Italian Court of Cassation, 21 July 2015, no. 15200.

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.)?

33. The effects of insolvency on arbitration become operative from the opening of the insolvency proceedings, i.e. when the declaration by the court is published.[18]

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?

34. (a) No. Interested third parties cannot intervene in insolvency proceeding with a view to compelling arbitration.

35. (b) The insolvency court would assess whether the arbitration clause is enforceable in light of the principles described above.

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?

36. No. Italian law does not envisage anti-arbitration injunctions or similar orders and recognises the *Kompetenz-Kompetenz* doctrine.

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?

37. As mentioned in Question 3.e above, Article 172 of the New Insolvency Code[19] provides that, in the context of insolvency proceedings aimed at liquidation, if a contract has not yet been fully performed by both parties by the time insolvency proceedings are opened, it remains suspended until the insolvency administrator either terminates or confirms it. In doing so, the

[18] New Insolvency Code, Article 172.
[19] Old Insolvency Code, Article 72.

insolvency administrator enjoys wide discretion, which is to be exercised in the patrimonial interest of the insolvency estate.

38. If the contract containing the arbitration clause has already been performed, then the insolvency administrator cannot terminate it.[20] However, arbitration proceedings cannot commence or continue with respect to claims captured by the *vis attractiva concursus* .

39. As to the impact on arbitration agreements of proceedings not aimed at liquidation, see answer to Question 12 below.

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

40. The insolvency administrator's termination of a contract pursuant to Article 172 of the New Insolvency Code[21] automatically entails the termination of any arbitration clause contained therein.[22] Thus, the parties cannot bring or continue arbitration proceedings based on that clause.

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?

41. As held by the Italian Court of Cassation,[23] the insolvency administrator cannot terminate arbitration agreements entered into by the insolvent debtor without also terminating the contract in which they are contained.

[20] See Nicola Sotgiu, 'Rapporti tra arbitrato e procedure concorsuali' in Carmine Punzi (ed), *Disegno Sistematico dell'Arbitrato* (CEDAM 2012) 487.
[21] Old Insolvency Code, Article 72.
[22] See Italian Court of Cassation, 23 February 2023, n. 5694.
[23] See Italian Court of Cassation, 26 May 2015, no 10800; see also Court of Reggio Emilia, 27 October 2021.

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?

42. Pursuant to Article 151 of the New Insolvency Code[24], after the opening of insolvency proceedings, the insolvency court has exclusive jurisdiction over the ascertainment of the insolvent debtor's debts. This is to safeguard the *par conditio creditorum*.[25] Thus, after the insolvency has been opened, the creditors cannot commence or continue arbitration proceedings against the insolvent debtor with respect to the ascertainment of their credits.

43. It follows that: (*a*) if the insolvency court dismisses the claim of a creditor against the insolvent debtor concerning the latter's debts, the creditor cannot bring the same claim before an arbitral tribunal (all it can do is to lodge an appeal before the insolvency court of appeal); and (*b*) the filing of such claim with the insolvency court cannot be construed as a waiver of the arbitration agreement (the creditor having no other possibility than to bring its claim before the insolvency court).

10. In the event of a contract concluded by the insolvent party and a creditor prior to the opening of the insolvency proceedings, is an arbitration agreement contained in that contract enforceable in relation to an action commenced by the insolvency administrator to avoid that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?

44. While Italian scholars maintain that there would be in principle no obstacle to deferring an *actio pauliana* to arbitration, Italian courts have unanimously held that such claim falls within the exclusive jurisdiction of the insolvency court.[26]

[24] Old Insolvency Code, Article 52.
[25] See M. Vanzetti, 'Clausola arbitrale nel fallimento' in Massimo V. Benedettelli, Claudio Consolo and Luca G. Radicati Di Brozolo (eds), *Commentario breve al diritto dell'arbitrato nazionale ed internazionale* (CEDAM 2010) 434.
[26] See Court of Vicenza, 15 April 2021, no 788; Court of Bologna, 13 December 2021, no 3020. Those judgments were based on Art. 24, paragraph 1, of the Old Insolvency Code, which is however identical to Art. 32, paragraph 1, of the New Insolvency Code.

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

45. Pursuant to Article 132 of the New Insolvency Code[27], the insolvency administrator can enter into new arbitration agreements with the authorisation of the board of creditors.[28] However, for the reasons set out in the answer to Question 3.a, the insolvent debtor's counterparties cannot rely on such agreements to start arbitration proceedings concerning claims captured by the *vis attractiva concursus*.

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

46. A creditors' arrangement (*concordato preventivo*) cannot be concluded in Italian insolvency proceedings aimed at liquidation, as these arrangements are only available in restructuring proceedings. A creditors' arrangement has no impact on arbitration agreements or proceedings involving the debtor.[29] In particular, pursuant to Article 97 of the New Insolvency Code,[30] the arbitration agreements entered into by the debtor remain enforceable even if the latter obtains a decree from the competent tribunal terminating the main contracts in which they are included.[31] This is the opposite of what happens in case of insolvency proceedings, where the termination of a contract also entails the termination of any arbitration clause contained therein (see answers to Questions 7 and 8 above).

47. Pursuant to Article 94 of the New Insolvency Code,[32] in case of a creditor's arrangement, the debtor needs the court's authorisation to enter into new arbitration agreements.[33]

[27] Old Insolvency Code, Article 35.
[28] Based on a literal interpretation of Art. 132 of the New Insolvency Code, which refers to "*compromesso*" (i.e. a self-standing arbitration agreement not included in a contract), some scholars hold that there is no need for the insolvency administrator to obtain the board of creditor's authorisation to enter into contracts containing arbitration clauses (unless such contracts fall within the category of "*acts of extraordinary administration*" (i.e. acts falling outside the ordinary course of business or otherwise potentially detrimental for the insolvency estate) for which such authorisation is always required) (see Guido Canale, ('L'arbitrato del curatore' [2019] Giurisprudenza commerciale 17, 26-27).
[29] Pursuant to Articles 54 and 56 of the New Insolvency Code, even other forms of creditors' arrangements, such as reorganisation plans ("*piano di risanamento*") and restructuring agreements ("*accordo di ristrutturazione*"), have no impact on arbitration agreements and proceedings involving the debtor.
[30] Old Insolvency Code, Article 169-*bis*.
[31] See Lucilla Galanti, 'Profili processuali ancora incerti nel sistema dei rapporti tra arbitrato e concordato preventivo' [2018] Rivista Trimestrale di Diritto e Procedura Civile 1139.
[32] Old Insolvency Code, Article 167.
[33] As with the authorisation under Art. 132 of the New Insolvency Code, some scholars contend that the authorisation at issue only applies to self-standing arbitration agreements ("*compromesso*") or in case of arbitration clauses contained in contract that are considered "*acts of extraordinary administration*" (see Guido Canale, 'Arbitrato, concordato preventivo e procedure concorsuali minori' [2020] Rivista di diritto fallimentare e delle società commerciali 183, 191).

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?

48. The rules regulating the effects of insolvency on arbitration are considered mandatory and, therefore, it is not possible for the insolvent debtor and one or more of its creditors to exclude their application.[34]

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

49. There is no provision of Italian law expressly requiring arbitrators seated in the jurisdiction to apply the above-mentioned rules on the effects of insolvency on arbitration. However, arbitrators may be impliedly bound to do so depending on the domestic or international nature of the arbitration.

50. In domestic arbitrations, arbitrators are arguably always required to apply those rules, as disregarding them would almost certainly expose the award to annulment (see answer to Question 34 below).

51. By contrast, in international arbitrations (i.e. arbitrations where, for instance, one or both parties are non-Italian), arbitrators will apply those rules only insofar as they consider Italian insolvency law applicable based on relevant conflict-of-law criteria. That may be the case where the insolvent party is Italian. Conversely, where the insolvent party is foreign, or – more generally - where there is little or no connection between the insolvency and the Italian legal order, the arbitrators may conclude that there is no basis to apply Italian insolvency law (and hence its rules on the effects of insolvency on arbitration).[35]

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?

52. No. Articles 32[36] and 151[37] of the New Insolvency Code provide for the insolvency court's exclusive jurisdiction irrespective of any personal jurisdiction over the parties.

[34] See for instance Italian Court of Cassation, 24 June 2015, no 13089 concluding that Article 52 of the Old Insolvency Code, which is identical to Article 151 of the New Insolvency Code, is a mandatory provision.
[35] One may think of an arbitration seated in Italy where both parties are foreign, one of them has been declared insolvent in a EU Member State, and the arbitration has commenced after the opening of the insolvency proceedings: as will be explained in the answer to Question 31 below, as a matter of European Union law, in such case the effects of the insolvency on the arbitration agreement (and on the ensuing proceedings) would be governed by the law of the opening State (and not by Italian law).
[36] Old Insolvency Code, Article 24.
[37] Old Insolvency Code, Article 52.

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?]

53. In principle, the insolvency administrator takes part in the arbitration on an exclusive basis. Indeed, according to Article 143 of the New Insolvency Code,[38] she is vested with the representation of the insolvent party's patrimonial rights.

54. However, the insolvent debtor may directly appear in the proceedings:

(i) in case of the insolvency's administrator culpable delay or failure to act. These cases are, however, very rare and the insolvent party must be authorised by the insolvency court to replace the insolvency administrator;[39]

(ii) in disputes concerning its personal rights (such as, by way of example, the right to reputation) that are not part of or otherwise impact on the insolvency estate;[40]

(iii) according to Article 143, paragraph 2 of New Insolvency Code,[41] if the decision of a given issue may entail a criminal charge of bankruptcy for the insolvent debtor or if otherwise provided by law.

55. In these cases, the insolvent debtor appears in the proceedings in its own name, seeking redress for the breach of rights different from the patrimonial rights included in the insolvency estate (the protection of which rests with the insolvency administrator).

17. Do the considerations of confidentiality that apply in a non-insolvency scenario vary as a consequence of the opening of insolvency proceedings against one of the parties to the arbitration? For instance, are there any restrictions on the information that the insolvency administrator can share with the insolvency court or with the creditors in the insolvency concerning the conduct, status or content of the arbitration? Or can the creditors appear in the arbitration as parties interested in the outcome of the proceedings?

[38] Old Insolvency Code, Article 43.
[39] See Italian Court of Cassation, 20 March 2012, no 4484; this is what scholars define as "exceptional additional procedural legitimacy of the insolvent party".
[40] See Italian Court of Cassation, 5 February 2014, no 2608.
[41] Old Insolvency Code, Article 43.

56. The considerations of confidentiality that apply in a non-insolvency scenario may vary as a result of the opening of insolvency proceedings. Since the insolvency administrator is considered a public official under Article 127 of the New Insolvency Code,[42] in that capacity she is required to report to the insolvency court and the creditors on any circumstances relevant to the insolvent debtor,[43] including information relating to arbitration proceedings in which she represents the insolvent debtor. This duty has an absolute nature and is subject to no exception.

57. Creditors are prevented from appearing in the arbitration as 'third' parties interested in the outcome of the proceedings because that would infringe the *par conditio creditorum* rule. Moreover, according to Article 150 of the New Insolvency Code,[44] no individual enforcement or interim proceedings can be started or continued after the opening of insolvency proceedings (unless otherwise provided by the law).

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

58. Yes. After the insolvency declaration (not merely after the insolvency petition has been filed), the name of the insolvent party must be followed by the wording "*in fallimento*". Its tax code, however, does not change. The change of the name is implemented *ex officio* by the competent office.[45]

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?

59. Pursuant to Article 132 of the New Insolvency Code,[46] any settlement in the arbitration must be authorised by the board of creditors. The insolvency court must in any case be previously informed by the insolvency administrator unless she is already authorised to reach a settlement pursuant to, and within the limit of, the liquidation program approved by the insolvency court.[47]

[42] Old Insolvency Code, Article 30.
[43] See Italian Court of Cassation, 1 February 1988, no 1348. Notably, insolvency administrator information may be used as evidence in the related bankruptcy criminal proceedings.
[44] Old Insolvency Code, Article 51.
[45] The competent Chamber of Commerce is established on a territorial basis, according to the registered office of the insolvent party. It implements the change of the name once it receives the declaration of insolvency issued by the insolvency court.
[46] Old Insolvency Code, Article 35. See also Articles 63 and 88 of the New Insolvency Code as far as the insolvency agreement procedure is concerned (with regard, respectively, the settlement of tax and welfare issues).
[47] According to Article 213, paragraph 7, of the New Insolvency Code, corresponding to Article 104-*ter*, paragraph 8, of the Old Insolvency Code.

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

60. By way of premise, Legislative Decree No. 149 of 10 October 2022 has modified Article 818 of the Italian CPC, which provided that arbitrators cannot issue interim measures unless otherwise provided by the law. According to the new version of that provision, applicable to proceedings commencing after 28 February 2023, the parties can stipulate in the arbitration agreement (or in any other written agreement preceding the start of the arbitration, and also by reference to arbitration rules) that the arbitrators shall have the power to grant interim relief.

61. That said, Article 150 of New Insolvency Code[48] provides that no individual enforcement or interim proceedings can be started or continued after the opening of insolvency proceedings (unless otherwise provided by the law). Some scholars maintain that this provision only concerns interim measures that have a patrimonial impact on the insolvency estate.[49] Following this approach, it may be argued that, under Article 818 of the Italian CPC as amended, an arbitral tribunal might be vested with the power to issue interim measures concerning an insolvent party that have no impact on the insolvency estate.

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

62. As mentioned in Question 20 above , the prohibition of enforcement or interim relief proceedings against the insolvent party contained in Article 150[50] of the New Insolvency Code is interpreted as applying to measures that may have a patrimonial impact on the insolvency estate.[51] Following this approach, it may be argued that, under Article 818 of the Italian CPC as amended, the opening of insolvency proceedings may only affect the validity of interim measures granted by an arbitral tribunal that have a patrimonial impact on the insolvency estate. However, since the recently enacted Legislative Decree No. 149 recognising the arbitrators' power to grant interim relief is only applicable to arbitration proceedings that started after 28 February 2023, there is no case law or doctrine on this specific point.

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?

[48] Old Insolvency Code, Article 51.
[49] Ferro (ed.), 'La legge fallimentare. Commentario teorico-pratico', Padova, 2011, p. 599.
[50] Old Insolvency Code, Article 51.
[51] It states: 'from the day of the insolvency declaration no individual enforcement or interim lawsuit can be started or continued' (free translation).

63. In principle yes. By providing that the insolvency administrator shall represent the insolvent party in proceedings concerning its patrimonial rights included in the insolvency estate, Article 143, paragraph 1, of the New Insolvency Code[52] precludes the insolvent debtor from autonomously settling the dispute in the arbitration. However, the insolvent debtor retains the capacity to settle the disputes in which it can appear directly (see answer to Question 16; this means, in particular, disputes concerning the insolvent party's personal rights not included in the insolvency proceedings or those where there is a delay or inertia by the insolvency administrator).[53]

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?[54]

64. Yes. Unless otherwise provided by the law, after the opening of an insolvency no individual or collective *in rem* or personal actions (be they interim or enforcement proceedings) can be initiated or continued. This is to fulfil the *par conditio creditorum* principle. However, pursuant to Article 216, paragraph 10 of the New Insolvency Code,[55] in those exceptional cases where the continuation of individual enforcement proceedings is not prohibited, it is for the insolvency administrator to decide whether to continue such proceedings or to interrupt them. This is because those enforcement proceedings may be instrumental in liquidating the insolvency estate more quickly in favour of the creditors.[56]

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?

65. A claim that is being pursued in arbitration but has not yet reached a final award is considered "pending". The impact of insolvency on pending arbitration claims is described in answer to Question 3.e) above.

66. The pending claim's status will change only once the award becomes *res judicata*. According to Article 204, paragraph 2, letter c, of the New Insolvency Code,[57] a judgment rendered before

[52] Old Insolvency Code, Article 43, paragraph 1.
[53] See Italian Court of Cassation, 5 February 2014, no 2608. The insolvent debtor may also appear in proceedings where the decision of a disputed issue may give rise to a criminal charge of bankruptcy against the insolvent debtor.
[54] The expression "individual enforcement actions" refers to actions commenced outside of the insolvency proceedings for the enforcement of a credit.
[55] Old Insolvency Code, Article 107, paragraph 7.
[56] See Italian Court of Cassation, 6 February 2002, no. 17334.
[57] Old Insolvency Code, Article 96, paragraph 3, number 3. This rule however is confined to binding arbitrations (i.e. *arbitrati rituali*) that is not applicable to contractual arbitrations (i.e. *arbitrati irrituali*) because the award rendered in the latter proceedings is not considered a judgement under the mentioned Articles.

the declaration that opens insolvency proceedings can be enforced against the insolvency estate, and the credit ascertained therein can be included as part of the insolvency debts, even though it has not yet become *res judicata* at the time of the opening of the insolvency. Given that Article 824-*bis* Italian CPC equates awards to court judgments, Article 204, paragraph 2, letter c, of the New Insolvency Code should also apply to awards.

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?

67. Yes. The award is valid proof of credit for the purpose of the insolvency proceedings. As mentioned in the answer to Question 24, an award[58] rendered before the declaration that opens insolvency proceedings is, according to Article 204, paragraph 2, letter c, of the New Insolvency Code,[59] valid proof of the credit and, as such, it can be included as part of the insolvency debts, even though it is not yet *res judicata*. This is the case notwithstanding that an award becomes enforceable under Article 474 of the Italian CPC (i.e. "*titolo esecutivo*") only after the *exequatur* procedure has been completed, as set forth by Article 825 of Italian CPC.

68. A foreign award would be valid proof of a credit for the purpose of the insolvency proceedings according to Article 204, paragraph 2, letter c, of the New Insolvency Code,[60] when it is recognised under Article 839 of the Italian CPC, which implements the New York Convention.[61]

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

69. All the rules regulating the effects of insolvency on arbitrations (as those governing insolvency proceedings) are deemed part of public policy and cannot be contracted out by the parties.

[58] See the difference between "binding arbitrations" and "contractual arbitrations" as described in previous footnote.
[59] Old Insolvency Code, Article 96, paragraph 3, number 3.
[60] Old Insolvency Code, Article 96, paragraph 3, number 3.
[61] It is based on the same requirements set out in Article 5 of the New York Convention, with the only further requirement being that of serving an Italian translation of both the arbitration clause/agreement and the award (see Article 939, paragraph 3, of the Italian CPC).

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)? [62]

70. Yes. The principle of *par conditio creditorum* is part of public policy and, as such, cannot be disregarded or contracted out. It is set out as a general rule under Article 2741 of the Italian Civil Code ("CC"), which provides that, except in legitimate cases of pre-emption, creditors are all on an equal footing vis-à-vis the insolvent debtor. Privileges, pledges, and mortgages are legitimate grounds for pre-emption.

71. The public policy principle of *par conditio creditorum* concerns the equal treatment of creditors from both a substantive and a procedural point of view.

72. From a substantive point of view, as envisaged by Article 2741 of the Italian CC, which is reflected in Article 221 of the New Insolvency Code,[63] the equal treatment of creditors applies based on the principle of pre-emption rather than that of the proportion of the credit. This means that the order of payment of the various creditors depends on their type of credit and privilege or pre-emption.

73. From a procedural point of view, Articles 150[64] and 151[65] of the New Insolvency Code provide, respectively, that no individual enforcement or interim relief proceedings can be brought against the insolvent debtor and that all credits against the insolvent debtor must be ascertained by the insolvency court.

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

74. No.

[62] 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.
[63] Old Insolvency Code, Article 111.
[64] Old Insolvency Code, Article 51.
[65] Old Insolvency Code, Article 52.

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 Italy concerning the insolvent party]

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

75. The recognition of foreign insolvency proceedings in Italy is subject to two different regimes depending on whether the insolvency has been opened within or outside the European Union.

76. As to insolvency proceedings opened in a Member State of the European Union, their recognition is governed by the Recast Insolvency Regulation, which provides that "main proceedings" (i.e. insolvency proceedings commenced in a Member State that is the insolvent party's centre of main interest) shall be automatically recognised across all Member States,[66] producing the same effects as those rendered in the jurisdiction where they have been opened.[67] It follows that those proceedings do not need to be recognised through a formal local procedure to produce effects in Italy (their effects will apply automatically).

77. The regime governing the recognition of insolvency proceedings opened outside the European Union is less clear cut, as there is no statutory provision specifically dealing with the recognition of such proceedings.

78. The Italian Court of Cassation has held that the recognition of extra-EU insolvency proceedings is subject to the general provisions on the recognition of foreign judgments under Law 218/1995 ("Private International Law Act").[68] According to Article 64 of the Private International Law Act, foreign judgments are automatically recognised without any formal procedure, provided that a number of conditions are met.[69] Thus, based on that provision, if those conditions are met extra-EU judgments on the opening of insolvency proceedings are automatically recognised in Italy.

[66] Recast Insolvency Regulation 2015, 19.
[67] Recast Insolvency Regulation 2015, 20, paragraph 1.
[68] See Galeazzo Montella, 'Riconoscimento ed Effetti in Italia delle Decisioni Extracomunitarie di Insolvenza – Commento' [2008] *Il Fallimento, Tribunale Napoli Sez. V Ord*., 10 gennaio 2008, 571; for a critical view of the Italian system see also Benedettelli (n **Error! Bookmark not defined.**) 28-29.
[69] Namely, the foreign judgement is automatically recognised in Italy if: a) the court had jurisdiction to issue it according to the Italian law principles governing jurisdiction; b) the party against whom it was rendered received proper notice under the applicable law of the submission introducing the proceedings and its essential defence rights were not thwarted; c) the parties appeared in the proceedings or their default was declared pursuant to the applicable law; d) it has become *res judicata* according to the law of the place where it was rendered; e) it is not contrary to another Italian court judgment that has already become *res judicata*; f) there are no pending proceedings in Italy, among the same parties and concerning the same subject matter, which have started before the foreign proceedings in which the judgment was rendered; g) its effects are not contrary to public order; Massimo Fabiani, 'Riconoscimento di Decisioni Dichiarative di Fallimento e Resistenze Giurisprudenziali Municipali - Il Commento' [2008] Int'l Lis, Nota a sentenza, Cass. Civ. Sez. I Sent, 1° agosto 2007, n. 16991, 72.

79. By contrast, certain lower courts have held that those judgments produce no effect in Italy unless and until an Italian court issues a judgment expressly recognising them.[70] Those lower courts rely on Article 26 of the New Insolvency Code,[71] which provides that an Italian company or individual may be subject to insolvency proceedings in Italy even if its main centre of interests is abroad and notwithstanding insolvency proceedings have already been opened in that jurisdiction. From that provision, they infer that foreign insolvency proceedings are not automatically recognised (and produce no automatic effect) in Italy.

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?

80. No. Italy has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.[72]

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

81. The answer is different for intra-EU and extra-EU insolvency proceedings.

82. For intra-EU insolvency proceedings, one should look at the provisions of the Recast Insolvency Regulation, and particularly Articles 7 and 18, which contain the conflict-of-law rules determining the law governing the effects of insolvency proceedings commenced in the EU:[73]

    (i) Pursuant to Article 7, the effects of insolvency proceedings on arbitration agreements and arbitral proceedings are in principle governed by the law of the opening State. Indeed, Article 7.2 provides that such law determines, *inter alia*, the effects of insolvency proceedings on "*current contracts to which the debtor is party*"[74] and on "*proceedings brought by individual creditors, with the exception of pending lawsuits*".[75] Thus, if the law of the opening State provides for the termination of arbitration agreements or a stay of arbitration proceedings in case of insolvency, those effects will apply also on arbitrations seated in another Member State.

[70] See Court of Milan, 30 October 2014; Giovanni Carmellino, 'Riconoscimento di sentenza straniera di apertura di procedura di insolvenza' [2015] Il Fallimento, Nota a sentenza, Tribunale di Milano, Sez. IV civile, 30 ottobre 2014, 693.
[71] Old Insolvency Code, Article 9.
[72] See Stefania Bariatti, 'Sul Riconoscimento in Italia Dei Restructuring Plans Inglesi' [2022] Rivista di Diritto Internazionale Privato e Processuale 5, 8-10.
[73] See Laura Baccaglini, 'Insolvenza e arbitrato in Europa' [2020] Rivista di diritto fallimentare e delle società commerciali 255, 266.
[74] Recast Insolvency Regulation 2015, Article 7, paragraph 2, letter e.
[75] Recast Insolvency Regulation 2015, Article 7, paragraph 2, letter f.

(ii) However, pursuant to Article 18, the effects of the insolvency on pending arbitration proceedings concerning "*an asset or a right which forms part of a debtor's insolvency estate*" are governed by the law of the Member State where the arbitral tribunal has its seat. Thus, if the seat of the arbitration is in Italy, Italian law will apply.

83. By contrast, there is no provision of Italian law expressly dealing with the effects of extra-EU insolvency proceedings on arbitrations seated in Italy.

84. According to one view, by virtue of the automatic recognition mechanism of Article 64 Private International Law Act, non-EU insolvency proceedings produce in Italy the same effects as those they produce in the opening State.[76] Thus, the effects of those proceedings on arbitration seated in Italy are governed by the law of the opening State.

85. According to a different view, non-EU insolvency proceedings can produce in Italy only those effects contemplated by the law of the opening State that are compatible with Italian law.[77]

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?

86. Italian law does not expressly require arbitral tribunals seated in Italy to consider the provisions of the Recast Insolvency Regulation or Article 64 of the Private International Law Act.

87. Nonetheless, it may be argued that arbitral tribunals seated in Italy must consider those provisions because they are part of the law of the seat, which in principle should govern any procedural issue concerning the arbitration, including the effects of a foreign insolvency on the arbitration proceedings.

88. Moreover, arbitral tribunals may be required to consider those provisions as part of their duty to render an enforceable award. Indeed, a failure to consider those provisions may potentially expose the award to annulment (see answer to Question 34 below) or jeopardise its chances of enforcement abroad (especially in the State where the insolvency proceedings have been opened).

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

89. As mentioned, Italian law does not expressly require arbitral tribunals seated in Italy to apply the above-mentioned rules on the effects of foreign insolvency proceedings on arbitration.

[76] See Montella (n 68) 579.
[77] See Carlo Vellani, *L'approccio giurisprudenziale all'insolvenza transfrontaliera* (Giuffrè 2006) 498; Francesco Salerno, 'Legge di riforma del diritto internazionale privato e giurisdizione fallimentare' [1998] Rivista di Diritto Internazionale Privato e Processuale, 5, 38.

Thus, it cannot be said that those rules are mandatory for arbitral tribunals, even though it may be argued that arbitral tribunals must apply them because they are part of the *lex loci arbitri*.

90. That said, it would be unwise for an arbitral tribunal seated in Italy to disregard those rules, for that may expose the award to annulment (see answer to Question 34 below) or reduce the chances of its enforcement abroad (especially in the State where the insolvency proceedings have been opened)

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

91. Under Italian law, the grounds for annulling an arbitral award are set out in Article 829 of the Italian CPC. Although none of those grounds expressly concerns the award's failure to comply with the regime governing the effects of insolvency on arbitration, at least two of them may be construed as potentially covering such circumstance.

92. The first ground that may apply is the one set out in Article 829, paragraph 1, number 1, of the Italian CPC, which allows the parties to challenge an award when "*the arbitral tribunal lacks the power to rule on the dispute* (so-called *potestas iudicandi*)",[78] including because the dispute is non-arbitrable.[79] It may be argued that, if the rules governing the effects of insolvency in the relevant jurisdiction render the arbitration agreement invalid or unenforceable or make the disputes falling therein non-arbitrable, an award issued on the basis of such agreement, or deciding such non-arbitrable disputes, may be annulled under Article 829, paragraph 1, number 1, of the Italian CPC, for lack of *potestas iudicandi*.

93. The second ground for annulment that may be invoked is the one of Article 829, paragraph 3, of the Italian CPC that concerns public policy. It may be argued that an award that disregards the effects of a foreign insolvency on arbitration is contrary to public policy (in particular, where it flouts the provisions of the Recast Insolvency Regulation, thereby calling into question the principle of effectiveness of EU law).

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?

94. No.

[78] According to Article 829 CPC, this ground can only operate if the interested parties have timely raised the issue of the arbitrators' lack of *potestas iudicandi* in the course of the arbitration as required by Article 817, paragraph three, CPC.
[79] See Benedettelli (n **Error! Bookmark not defined.**) 401.