IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF MEXICO

Dr. Iván J. Romo

Managing Partner at SOELI Consulting

iromo@soeli.com.mx

Mtro. Gustavo Morante Aguirre

Partner at Torres Morante, S.C.

gmorante@torresmorante.mx

Mtro. Ricardo Mier y Teran Ruesga

Partner at Curtis, Mallet-Prevost, Colt & Mosle, S.C.

rmieryteran@curtis.com

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 Mexico 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. There are no provisions under Mexican law specifically regulating the effects of insolvency on arbitration, and neither the Mexican Code of Commerce (*Código de Comercio*) – which regulates arbitration – nor the Insolvency Law (*Ley de Concursos Mercantiles*) expressly regulate the relationship between arbitration and insolvency.

2. Therefore, in light of the absence of specific provisions on the issue, the effects of insolvency proceedings on arbitration are determined by the provisions of the Insolvency Law that regulate the effect of insolvency proceedings on all proceedings in general. Since the source of these provisions is the Insolvency Law, they are focused on regulating the consequences of insolvency proceedings rather than the arbitrability of disputes, the effectiveness of arbitration agreements or any other arbitration-specific category.

3. As will be explained throughout this report, insolvency proceedings have a limited impact on arbitration and generally arbitration proceedings can continue until the rendering of an award. This is clear from Article 84 of the Insolvency Law which, as seen below, allows for the continuation of all proceedings, including arbitration, in parallel with the insolvency proceedings:

> Article 84.- The actions brought and the lawsuits filed by the insolvent party, and the actions and lawsuits brought against it, which are pending at the time of the declaration of insolvency and which have an impact on the insolvent party's assets shall not be consolidated into the insolvency proceeding, but instead will be continued by the insolvent party under the supervision of the insolvency administrator. For these purposes, the insolvent party shall inform the insolvency supervisor of the existence of those actions and lawsuits on the next day on which the insolvent party learned of the appointment of the insolvency administrator.

Notwithstanding the foregoing, the insolvency administrator might replace the insolvent party in the circumstances set forth in Article 81.

After the declaration of insolvency, other proceedings that have an impact on the insolvent party's assets might be commenced and they shall be prosecuted under the supervision of the insolvency administrator, but without being consolidated into the insolvency proceedings.[1]

4. As this report will also explain, insolvency proceedings in Mexico are divided in two phases: reorganization (*conciliación*) and liquidation (*quiebra*). The general rule, as set forth in Article 84 of the Insolvency Law, is that during the reorganization phase the insolvent party becomes debtor in possession.[2] Article 81 of the Insolvency Law, which is referred to in Article 84 cited above, allows the insolvency administrator (*conciliador*) to request the court for the removal of the debtor in possession from the administration of the company. If that were the case, the insolvency administrator would take control of the administration of the company and of all proceedings in which the company is involved, including arbitration proceedings. As explained in Question 3.b below, in accordance with Article 169 of the Insolvency Law, in liquidation proceedings an insolvency administrator (*liquidador*) takes control over the management of the insolvent party and acquires control over the representation of the insolvent party in any arbitration proceedings in which it is involved.

[1] Insolvency Law of Mexico (published on the Official Gazette on 12 May 2000) ("Insolvency Law"), Article 84, Translation by the authors. Original:
"Las acciones promovidas y los juicios seguidos por el Comerciante, y las promovidas y los seguidos contra él, que se encuentren en trámite al dictarse la sentencia de concurso mercantil, que tengan un contenido patrimonial, no se acumularán al concurso mercantil, sino que se seguirán por el Comerciante bajo la vigilancia del conciliador, para lo cual, el Comerciante debe informar al conciliador de la existencia del procedimiento, al día siguiente de que sea de su conocimiento la designación de éste.
No obstante lo previsto en el párrafo anterior, el conciliador podrá sustituir al Comerciante en el caso previsto en el artículo 81 de esta Ley.
Después de dictada la sentencia de concurso mercantil, podrán iniciarse por separado otros procedimientos de contenido patrimonial en contra del Comerciante, los que serán tramitados ante las autoridades competentes bajo la vigilancia del conciliador, sin que esos juicios deban acumularse al concurso mercantil."

[2] Although the application of Article 84 of the Insolvency Law to arbitration has not been developed by Mexican tribunals, there is case law confirming that Article 84 applies to arbitration proceedings based on a systemic interpretation of Articles 84 and 127 of the Insolvency Law, which expressly refers to arbitral awards against an insolvent party as debts protected by the Insolvency Law. See *Concursos Mercantiles. El Artículo 84, Párrafo Primero, De La Ley Relativa, Al Impedir La Acumulación De Otros Juicios Al Concursal, No Vulnera El Derecho Fundamental A La Seguridad Jurídica*, Precedent Number 1a. LXXIV/2014 (10a.), Gaceta del Semanario Judicial de la Federación, Book 3, Volume 1, dated Ferbuary 2014.

2. Does the insolvency legislation in Mexico 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. No. As noted above, under Article 84 of the Insolvency Law, there is no concentration of disputes involving the insolvent debtor in Mexico and any arbitration involving the insolvent debtor can continue in parallel with the insolvency proceedings.

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

6. The effects of opening insolvency proceedings on the possibility to commence or continue arbitration proceedings are governed by the general rule contained in Article 84 of the Insolvency Law cited above. Arbitration proceedings might be commenced and/or continued following the opening of insolvency proceedings, and such arbitration proceedings shall be conducted independently from the insolvency proceedings.

7. When dealing with the continuation of arbitration proceedings that were commenced before the insolvency declaration of one of the parties, the law makes no distinction between arbitration proceedings in which the insolvent party is acting as defendant and those in which it acts as claimant, and Article 84 applies equally to both. With respect to proceedings commenced after an insolvency declaration has been issued, Article 84 only makes express reference to proceedings against the insolvent party as defendant. However, there is reason to believe that the general rule contained in Article 84 allowing for the continuation of proceedings independently from the insolvency proceedings also applies to proceedings commenced by the insolvent party as claimant. As explained in this report, including in Question 16, under Mexican law, the debtor in possession is responsible for administering the insolvent party during the reorganization phase of the proceedings. Therefore, the debtor in possession is free to commence arbitration proceedings in the exercise of those administrative powers, provided that the arbitration is necessary within the ordinary course of business of the insolvent party or to protect its assets. If, however, the arbitration does not fall within the ordinary course of business of the insolvent party or is aimed at obtaining the early termination of a contract, then the debtor in possession is required to obtain approval from the insolvency administrator. In either case, the arbitration proceedings would be conducted independently from the insolvency 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?

8. The general rule contained in Article 84 of the Insolvency Law cited above applies to proceedings commenced either for the reorganization or liquidation of the company, and the arbitrations involving the insolvent party shall continue autonomously from the insolvency proceedings. However, there is one minor distinction on who controls the representation of the insolvent party in the arbitration. For reorganization proceedings, the debtor in possession will retain the management and representation of the insolvent party. This is clear from Article 84. In contrast, in liquidation proceedings, the insolvency administrator shall take full control of the insolvent party, including its representation in any arbitrations. This rule is set forth in Article 169, paragraph I, of the Insolvency Law. The powers of the debtor in possession and the insolvency administrator are further explained in Question 16 below.

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

9. The law does make a distinction, but it has limited consequences in practice. Article 84 of the Insolvency Law only refers to proceedings relating to the estate of the insolvent party and that thus might have a financial impact on the insolvent party. These proceedings with a financial component will be conducted independently from the insolvency proceedings, but subject to the supervision of the insolvency administrator. Other proceedings involving the insolvent party, but which seek declaratory judgments or other forms of relief that would not result in the recognition of a debt or that otherwise would not have a financial impact on the insolvent party will not be subject to Article 84. Nevertheless, these proceedings will also be conducted independently from the insolvency proceedings, with the only distinction that they will not be subject to the supervision of the insolvency administrator.

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

10. No, Article 84 of the Insolvency Law only applies once an insolvency declaration has been issued.

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?

11. The law does make a distinction between proceedings which are pending at the time of the insolvency declaration and those that are initiated thereafter. The rule applicable in each

scenario is the same in reorganization proceedings: continuation of the arbitration proceedings but under the supervision of the insolvency administrator. The only difference is that, as noted above, whereas the general rule in Article 84 applies equally to proceedings commenced by the insolvent party or against it prior to the insolvency declaration, Article 84 only expressly addresses proceedings commenced against the insolvent party after the insolvency declaration has been issued. In liquidation proceedings the rule is the same and the insolvency administrator takes control over the representation of the insolvent party in arbitration.

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

12. No, it does not.

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

13. As explained above, the effects of insolvency proceedings on arbitration under Mexican law are very limited. To the extent that an insolvent party subject to insolvency proceedings in Mexico is party to an arbitration seated abroad, the insolvent party shall be required to inform the insolvency administrator of such an arbitration and the insolvency administrator shall be empowered to supervise the proceedings.

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.)?

14. There are generally four main stages in an insolvency proceeding in Mexico: commencement of the proceedings, issuance by the competent judge of an insolvency declaration, reorganization, and liquidation. In accordance with Article 84 of the Insolvency Law, the effects of insolvency on arbitration become operative from the moment in which the competent insolvency court issues an insolvency declaration. Notwithstanding the foregoing, as explained in more detail in Question 5 below, an insolvency court will have jurisdiction to order provisional measures that might potentially impact an arbitration involving the insolvent party at an earlier stage, since commencement of the insolvency proceedings.

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?

15. As indicated above, under Mexican law there is a general lack of regulation of the relationship between arbitration and insolvency, and there are no specific provisions allowing the parties to an arbitration to participate as such in insolvency proceedings. However, since under Mexican law insolvency proceedings have a very limited effect on arbitration and the general rule is to allow the continuation of all proceedings involving the insolvent party – including arbitration – separately from the insolvency proceedings, it is not necessary for the parties to an arbitration to seek relief from domestic courts to continue with the arbitral proceedings.

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?

16. At the outset, it is important to note that anti-arbitration injunctions are, in general, underregulated in Mexico; it is not clear if, and when, courts may grant that form of relief, and there are very few known instances in which Mexican courts have issued an anti-arbitration injunction.

17. The uncertainty surrounding anti-arbitration injunctions increases in the context of insolvency, given the absence of regulation of the effects that insolvency proceedings have on arbitration. Articles 25 and 37 of the Insolvency Law empower insolvency courts to order provisional measures aimed at protecting the assets of the insolvent party and the rights of its creditors. The provisional measures that might be ordered by an insolvency court include, *inter alia*, a freezing order with respect to all payments due by the insolvent party, the suspension of all enforcement proceedings against the insolvent party, taking control over the insolvent party's cash flows, and any other measure of "similar nature".[3] The discretion Mexican insolvency courts have over the conduct of insolvency proceedings (including the power to order provisional measures) enables them, in principle, to order an anti-arbitration injunction if it is in the best interests of the insolvent party and necessary for the protection of its assets.

[3] Insolvency Law, Article 37.

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?

18. Yes. Although as a general rule contracts entered into by the insolvent party prior to the opening of the insolvency proceedings must be performed pursuant to their terms, Article 92 of the Insolvency Law authorizes the insolvency administrator to oppose the performance of such contracts, if doing so protects the estate of the insolvent party (i.e. if not performing the contract, including paying any compensation resulting therefrom, results in a better financial outcome than performing the contract). The objection from the insolvency administrator results in the termination of the contract. Article 92 establishes that:

> Contracts, whether preparatory or definitive, for which performance is pending shall be complied with by the Insolvent Party, unless the insolvency administrator opposes such a performance on the basis that it is in the best interest of the Insolvent Party's assets to do so.
>
> The other contracting party shall have the right to have the insolvency administrator confirm if she will oppose performance of the contract. If the administrator confirms that she will not oppose, the Insolvent Party shall perform the contract or guarantee its performance. If the administrator informs that she will oppose performance, or fails to respond to the other contracting party within twenty days, the other contracting party shall be entitled to terminate the contract at any time by informing the insolvency administrator.[4]

19. The right of the insolvency administrator to terminate contracts entered into by the insolvent party only becomes effective after the competent court has issued an insolvency declaration. Once such a declaration is issued, the insolvency administrator will have the right to terminate contracts as part of its ordinary powers and without having to take control over the administration of the insolvent party. If, in the exercise of such ordinary powers, the insolvency administrator decides to terminate a contract, such a decision would be purely an insolvency matter and, as such, would be subject to the exclusive jurisdiction of the insolvency courts and not covered by the arbitration agreement in the contract. In this scenario, while the decision to terminate the contract might escape the arbitration clause, disagreements about the compensation payable pursuant to the contract as a result of such termination might arguably continue to be under the arbitration agreement. The situation would be different if the

[4] Insolvency Law, Article 94. Original: "Los contratos, preparatorios o definitivos, pendientes de ejecución deberán ser cumplidos por el Comerciante, salvo que el conciliador se oponga por así convenir a los intereses de la Masa.
El que hubiere contratado con el Comerciante, tendrá derecho a que el conciliador declare si se opondrá al cumplimiento del contrato. Si el conciliador manifiesta que no se opondrá, el Comerciante deberá cumplir o garantizar su cumplimiento. Si el conciliador hace saber que se opondrá, o no da respuesta dentro del término de veinte días, el que hubiere contratado con el Comerciante podrá en cualquier momento dar por resuelto el contrato notificando de ello al conciliador.
Cuando el conciliador esté a cargo de la administración o autorice al Comerciante la ejecución de los contratos pendientes, podrá evitar la separación de los bienes, o en su caso exigir su entrega, pagando su precio."

insolvency administrator takes control over the management of the insolvent party and in such capacity terminates a contract, as such a termination would likely fall within the arbitration agreement of the contract. In such a case, the effects of the termination of the contract, including the other contracting party's right to compensation, would also likely fall within the arbitration agreement. There is no clear answer to these questions under Mexican law.

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?

20. Although Mexican law does not offer a precise answer, it appears that the termination by the insolvency administrator of an agreement entered into by the insolvent party will be by itself insufficient to affect the validity of the arbitration agreement contained in such a contract, and the arbitration agreement shall continue to be binding as a result of the separability of the arbitration agreement doctrine (incorporated in Article 1432 of the Code of Commerce).[5] In that case, the key question becomes which matters are subject to the arbitration agreement and which to the exclusive jurisdiction of the insolvency courts. As noted in Question 6 above, the decision of an insolvency administrator to terminate a contract in the exercise of its ordinary powers under the Insolvency Law is a purely insolvency matter that is subject to the insolvency courts. The effects of that decision, however, might be subject to the arbitration agreement.

8. Can the insolvency administrator or the insolvency court terminate or suspend the effectiveness of arbitration agreements themselves? If so, on what basis? What is the effect of such decision on pending arbitration proceedings derived from the arbitration agreement in question?

21. There are no specific provisions allowing for the termination of arbitration agreements themselves. Article 92 of the Insolvency Law only allows the insolvency administrator to terminate contracts entered into by the insolvent party, and there is no basis not to apply this general rule to arbitration agreements. However, as a consequence of the separability of the arbitration agreement, which is recognized under Mexican law, for the termination of an arbitration agreement to be effective, such termination should be expressly indicated by the insolvency administrator and should not be understood as a mere consequence of the termination of the main contract in which it is contained.

[5] Code of Commerce, Article 1432. Original: "El tribunal arbitral estará facultado para decidir sobre su propia competencia, incluso sobre las excepciones relativas a la existencia o validez del acuerdo de arbitraje. A ese efecto, la cláusula compromisoria que forme parte de un contrato se considerará como un acuerdo independiente de las demás estipulaciones del contrato. La decisión de un tribunal arbitral declarando nulo un contrato, no entrañará por ese solo hecho la nulidad de la cláusula compromisoria."

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?

22. The Insolvency Law does not require the creditor to take any step in the insolvency process to be able to commence or continue with an arbitration and it is the insolvent party that is obligated to inform the insolvency administrator of the arbitral proceedings. Nevertheless, in order to have the potential award registered as a claim against the insolvent party, the creditor must file its claim before the insolvency proceedings. For those purposes, Article 125 of the Insolvency Law requires the creditor to submit before the insolvency administrator a claim indicating: (i) the general information of the creditor; (ii) the amount of the claim; (iii) any guarantees or other particularities of the claim; (iv) the ranking of the claim vis-à-vis other claims against the insolvent party; and (v) any information identifying the arbitration proceedings commenced with respect to the claim for which registration is requested.

23. The request for registration of a claim is made in the understanding that the arbitration will continue pursuant to its own terms in accordance with Article 84 of the Insolvency Law, and does not amount to a waiver of the arbitration agreement. Moreover, the arbitral tribunal will retain jurisdiction to decide on the existence and amount of the claim, and the insolvency court will recognize the claim as contingent upon the outcome of the arbitration. Therefore, in case a reorganization agreement is reached before the arbitration comes to an end, the insolvency administrator will make a reserve to pay *a pro rata* or proportional part of the registered claim in accordance with the terms of the reorganization agreement, provided that the claim is confirmed by the arbitral tribunal.[6]

24. If prior to the opening of the insolvency proceedings or during them a creditor obtains an arbitral award against the insolvent party, in accordance with Article 127 of the Insolvency Law, such a creditor would be entitled to the recognition and registration in full of its credit against the insolvent party.

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

[6] Insolvency Law, Article 153.

that transaction based on grounds provided by insolvency law (insolvency *actio pauliana* or setting aside action)?

25. Article 114 of the Insolvency Law includes a list of transactions which, if entered into 270 days prior to the insolvency declaration, shall be automatically deemed to have been made in fraudulent conveyance. These transactions include free transfers of assets, transactions and transfers of assets that were clearly not made at arm's length or in market conditions, and debt remissions. Additionally, Articles 115 and 117 of the Insolvency Law include a list of transactions that are presumed to have been made in fraudulent conveyance, subject to the insolvent party presenting evidence to the contrary. These transactions include granting or extending guarantees to a particular creditor when there was no original obligation to do so, payments made in kind when the original obligation was to pay in cash, transactions with the management and/or employees of the insolvent party, and transactions with related entities. The insolvency administrator or the creditors of the insolvent party can request the insolvency court to set aside transactions deemed or presumed to have been made in fraudulent conveyance, and the transaction will be voided only after the court has issued a ruling to that effect.

26. Invalidating or setting aside contracts entered into during the relevant 270-day period and which are deemed to have been made in fraudulent conveyance is purely an insolvency matter. Accordingly, the decision to invalidate those contracts would be subject to the exclusive jurisdiction of Mexican insolvency courts. Even if the arbitration agreement contained in a contract that was set aside for fraudulent conveyance were to survive such termination, which is not clear under Mexican law, the invalidation of the contract would be beyond the scope of the arbitration agreement.

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

27. The general rule under Mexican law is that, following a declaration of insolvency, the insolvent party is first placed in a reorganization phase in which an agreement with all creditors is sought. During that reorganization phase, the debtor in possession retains the management of the company,[7] and the insolvency administrator will be entrusted with the administration of the insolvent party only in exceptional circumstances and upon an express ruling from the insolvency court to that effect.[8] The debtor in possession or the insolvency administrator, as the case might be, have the right to operate the company in the ordinary course of business.[9] Therefore, to the extent that it is consistent with the ordinary course of business of the insolvent party and the new agreement protects or increases the estate of the insolvent party, the debtor in possession or the insolvency administrator, as the case might be, can enter into new contracts. These new contracts might include or constitute arbitration agreements.

[7] Insolvency Law, Article 74.
[8] Insolvency Law, Article 81.
[9] Insolvency Law, Article 75.

28. If no reorganization agreement is reached during the time limits set forth in the Insolvency Law or if the insolvent party and its creditors decide to move directly into liquidation,[10] the insolvent party will be placed into a liquidation phase during which the insolvency administrator will take control over the management of the insolvent party. This rule is contained in Article 178 of the Insolvency Law. Although the insolvency administrator takes control over the insolvent party with the purpose of liquidating the company's estates and paying its creditors, there are no express provisions preventing the insolvency administrator from entering into new arbitration agreements.

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

29. No. As noted above, insolvency proceedings have a very limited impact on arbitration, as arbitration proceedings may continue in parallel to the insolvency proceedings, but subject to the supervision of the insolvency administrator. Once the creditors have reached a reorganization agreement and such agreement has been endorsed by the Mexican insolvency court, the insolvency proceedings come to an end. If at that time an arbitration remains pending, such arbitration will continue pursuant to its own terms, but the insolvent party will no longer be under the supervision of the insolvency administrator. If the arbitration concludes with an award against the insolvent party, such an award will be paid in accordance with the terms of the reorganization agreement and pursuant to the reserve made by the insolvency administrator in such reorganization agreement with respect to the arbitration.

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?

30. The rules on insolvency are deemed of public order in Mexico and are thus mandatory.[11] The parties cannot contract out from these provisions.

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

31. There is no express provision on this issue. Arbitrators seated in Mexico in an arbitration involving a party subject to insolvency proceedings in Mexico would likely be bound to follow the rules discussed above, since the rules on insolvency are deemed of public order. In any case,

[10] Insolvency Law, Article 21.
[11] Insolvency Law, Article 1.

the matter might be of limited relevance in practice since Mexican law allows for the continuation of arbitration in parallel to insolvency proceedings.

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?

32. No, it does not.

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?]

33. As explained above, Mexican insolvency proceedings are divided into two phases: a reorganization (*conciliación*) phase and a liquidation (*quiebra*) phase. During the first of these two phases, pursuant to Article 74 and 75 of the Insolvency Law,[12] the debtor in possession retains the right to administrative the insolvent party and to conduct all acts necessary for the ordinary course of business of the insolvent party. The day-to-day administration of the insolvent party is nevertheless subject to the supervision of the insolvency administrator (*conciliador*).[13] Acts that are beyond the ordinary course of business of the insolvent party, including, in particular, the early termination of contracts, incurring in new debts and granting guarantees to the benefit of third parties must be approved by the insolvency administrator.

34. Therefore, as a general rule, during the reorganization phase of the proceedings the debtor in possession retains the procedural capacity to act in an arbitration. If no reorganization agreement is reached during the time limits set forth in the Insolvency Law or if the insolvent party goes directly into liquidation, then the proceedings enter into the liquidation phase. In accordance with Article 178 of the Insolvency Law, once the liquidation phase is opened, the insolvency administrator (*síndico*) takes control over the management of the insolvent party.

[12] Article 74 of the Insolvency Law provides that: "During the conciliation stage, the administration of the company will correspond to the Merchant, except as provided in article 81 of this Law."

[13] As noted above, pursuant to Article 81 of the Insolvency Law, the insolvency administrator might request the insolvency court for control over the insolvent party during the reorganization phase, if she deems it necessary for the protection of the insolvent party's estate. If the insolvency administrator is granted control, she would then participate in all arbitrations involving the insolvent party as its authorized representative.

Accordingly, once the insolvency proceedings move into the liquidation phase, the insolvency administrator takes control over the insolvent party and participates in the arbitration as its authorized representative. Once the insolvency administrator takes part in the arbitration, she does it on behalf of the insolvent party and acting in the insolvent party's name.

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?

35. Considerations of confidentially in arbitration that would ordinarily apply in non-insolvency scenarios might not apply in an insolvency proceeding scenario. In accordance with Article 7 of the Insolvency Law, insolvency proceedings are public and "any person might request access to all information about it, through the access to information mechanisms of the Federal Judicial Power."[14] There are no express limitations or restrictions on the information that the insolvency administrator can share with the court concerning an ongoing arbitration. Moreover, as indicated above, creditors are required to request registration of their claim and, in order to do so, bear the burden of providing sufficient detail of their claim. In order to effectively register its claim, a creditor whose claim is still pending in arbitration might be required – and is thus allowed – to reveal certain information about the arbitration that might have been otherwise subject to confidentiality.

36. Notwithstanding the foregoing, other creditors in the insolvency proceeding do not acquire the capacity to appear in the arbitration as interested parties.

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

37. The name of the insolvent party does not change. However, once insolvency proceedings enter the liquidation phase, the words "*en liquidación*" – or "in liquidation" are added at the end of insolvent party's name. This addition, however, is for tax purposes and general ease of reference, but does not entail – or require – a change in the corporate form of the insolvent party.

[14] Insolvency Law, Article 7. Translation by the authors. Original: "El procedimiento de concurso mercantil es público, por lo que cualquier persona puede solicitar acceso a la información sobre el mismo, a través de los mecanismos de acceso a la información con que cuente el Poder Judicial de la Federación."

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?

38. Article 154 of the Insolvency Law invalidates any and all agreements entered into by the insolvent party (regardless of whether it is represented by the debtor in possession or the insolvency administrator) and a creditor aimed at settling the creditor's claim and the manner in which it will be satisfied by the insolvent party. Article 154 also sanctions creditors that enter into such agreements by depriving them of any rights they might have had in the insolvency proceedings.[15] Accordingly, during the reorganization phase of the proceedings, the insolvent party cannot enter into settlement agreements that definitively put an end to a creditor's claim by determining the manner in which it will be satisfied outside the context of the insolvency proceedings.

39. Although there is no express provision regarding the insolvent party's ability to settle the amount of a claim that is subject to arbitration, the general principles discussed above would apply. Thus, as indicated above, the general rule is that during reorganization proceedings, the insolvent party remains under the control of the debtor in possession. In those instances, the debtor in possession is authorized to administer the insolvent party in the ordinary course of business, including controlling the defence of the insolvent party in any ongoing arbitration.[16] For management decisions that do not fall in the ordinary course of business of the insolvent party, the debtor in possession must obtain the authorization of the insolvency administrator.[17] Although there are no express provisions to this effect, in the exercise of those powers, the debtor in possession is in principle empowered to reach an arm's length settlement agreement that puts an end to the arbitration and conclusively determines the amount of the creditor's claim, but without resulting in actual payment of the credit or any other transfer of assets to the creditor. Instead, payment of the credit would remain subject to the outcome of the insolvency proceedings. Such an agreement would have to be approved by the insolvency administrator and could potentially be challenged by other creditors, in which case the insolvency court would have to validate the agreement.

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

[15] Insolvency Law, Article 154. Original: "Serán nulos los convenios particulares entre el Comerciante y cualesquiera de sus acreedores celebrados a partir de la declaración de concurso mercantil. El acreedor que los celebre perderá sus derechos en el concurso mercantil."
[16] Insolvency Law, Articles 74 and 84.
[17] Insolvency Law, Article 75. In addition to these provisions specific to the execution of agreements beyond the ordinary course of business, Article 59 of the Insolvency Law requires the insolvency administrator to file before the court a report on the management of the insolvent party every two months. These reports will be available to all creditors, who will have the right to challenge the decisions made by the insolvency administrator, who might be held personally liable for any damages suffered by the creditors as a result of her decisions. See Insolvency Law, Articles 59-61.

40. Yes, nothing in the Insolvency Law or the Commercial Code limit the ability of an arbitral tribunal to order provisional measures with respect to a party that is subject to insolvency proceedings. However, since the insolvency proceedings are a matter of public order under Mexican law,[18] an arbitral tribunal cannot order measures that interfere with the insolvency proceedings. Moreover, insolvency courts have the power to invalidate or modify provisional measures ordered by an arbitral tribunal that might affect an asset of the insolvent party or otherwise jeopardize the integrity of the insolvent party's estate.[19]

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

41. The opening of insolvency proceedings in Mexico does not automatically affect the validity of interim measures adopted against the insolvent party by an arbitral tribunal prior to the opening of the insolvency proceedings. However, as noted in Question 20 above, the opening of insolvency proceedings in Mexico authorizes the insolvency court to review, modify and/or invalidate provisional measures ordered by an arbitral tribunal and which in the opinion of the insolvency court interfere with the insolvency proceedings or jeopardize the integrity of the insolvent party's estate. This rule is contained in Articles 25 and 37 of the Insolvency Law.

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?

42. Yes. As indicated in Question 19 above, during the reorganization phase of the proceedings, the debtor in possession cannot reach a settlement agreement that definitively settles the dispute and results in payment to the creditor. The debtor in possession, subject to the insolvency administrator's approval, may only settle the amount of a claim disputed in arbitration, in the understanding that final payment of the credit shall be done in the context of the insolvency proceedings and in accordance with the outcome of those proceedings.

[18] Insolvency Law, Article 1.
[19] Insolvency Law, Article 37.

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?[20]

43. Under Mexican Law, in particular Articles 43(IX) and 65 of the Insolvency Law, there is a mandatory freeze on all collection and enforcement actions and proceedings against the insolvent party. As noted in Question 3.h above, the commencement of insolvency proceedings and the issuance of an insolvency declaration by the competent judge are two distinct procedural stages of insolvency proceedings. The mandatory freeze described herein is not triggered by the mere commencement of the insolvency proceedings, but takes effect when the insolvency declaration is issued by the competent Mexican court. Labour claims are exempted from this general suspension.

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?

44. A claim that is being pursued in arbitration and for which registration is requested before the insolvency court will be registered as a contingent claim, for which the insolvency administrator will make a reserve. If that claim is decided and the arbitral tribunal issues an award before the insolvency proceedings conclude, the claim will be then registered in full and shall be paid in accordance with the parameters of the reorganization agreement or liquidation proceedings.

25. Is a credit contained in an arbitration award a valid proof of credit (i.e., 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?

45. Mexican law on this issue is not clear. Article 127 of the Insolvency Law establishes the following:

> When a final judgment, labour-law award, final administrative ruling or arbitral award has been issued in a different proceeding prior to the clawback period and which had the effect of declaring the existence of a claim against the insolvent party, the relevant creditor shall present to the judge and the insolvency administrator a certified copy of such decision.

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

The judge shall recognize the credit in the terms of the relevant decision, by including such a claim in his decision establishing the recognized claims and their hierarchy.[21]

46. Although Article 127 seems to suggest that an award on its own constitutes valid proof of credit and should be sufficient for obtaining the recognition and registration in full of a credit by the insolvency proceedings, in some proceedings the insolvency administrators have asked for a domestic judgment recognizing the award in accordance with the New York Convention for the claim to be accepted. For example, in case number 181/2009-V of the Federal Judge of the First District of Jalisco, the insolvency administrator proposed, and the Judge agreed, not to recognise a credit until the underlying award was recognized by a domestic court.

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

47. The law applicable to insolvency proceedings is deemed of public interest in general, as set forth in Article 1 of the Insolvency Law. To the extent provisions of the Insolvency Law have an effect on arbitration, those provisions shall be regarded as part of public policy.

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)? [22]

48. Under Mexican insolvency law, creditors are ranked by hierarchy (individually privileged, secured, with special privilege, ordinary and subordinated).[23] Accordingly, in Mexico, the principle of *par conditio creditorum* does not apply to all creditors in general, but only with respect to creditors of the same class or category, all of which must be treated equally and be paid *pari passu* or pro rata amongst themselves. The principle of *par conditio creditorum* also

[21] Insolvency Law, Article 127. Translation by the authors. Original: "Cuando en un procedimiento diverso se haya dictado sentencia ejecutoriada, laudo laboral, resolución administrativa firme o laudo arbitral anterior a la fecha de retroacción, mediante la cual se declare la existencia de un derecho de crédito en contra del Comerciante, el acreedor de que se trate deberá presentar al juez y al conciliador copia certificada de dicha resolución.
El juez deberá reconocer el crédito en los términos de tales resoluciones, mediante su inclusión en la sentencia de reconocimiento, graduación y prelación de créditos."

[22] 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.

[23] Insolvency Law, Article 217.

only applies from a substantive point of view and does not extend to procedural treatment, as arbitration against the insolvent party is allowed to continue autonomously from the insolvency process. The application of the *par conditio creditorum* to creditors of the same class and in order to ensure equal treatment with respect to the proportion of their credit that is satisfied is a matter of public policy in Mexico.

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

49. No, there are not.

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 Mexico concerning the insolvent party]

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

50. Yes, the Insolvency Law has a specific chapter addressing the recognition of foreign insolvency proceedings in Mexico. In particular, Article 292 of the Insolvency Law regulates the manner in which an interested party may ask a Mexican court to recognize a foreign insolvency proceeding. In order to obtain recognition of foreign proceedings in Mexico, the interested party must file (i) a certified copy of the foreign court's decision opening the insolvency proceedings and (ii) a certification from the foreign court confirming the existence of the proceedings and the capacity of the interested party. If these documents are in a language other than Spanish, the interested party shall submit a Spanish translation.

51. Once recognized, the foreign insolvency proceedings shall be subject to the same legal regime as domestic insolvency proceeding; shall have the same relief available to them, including provisional measures; and may produce the same legal effects. This rule is contained in Article 293 of the Insolvency Law.

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?

52. Yes. Mexico was the first country in the world that implemented the Model Law in 2000. No provisions were included in the Mexican Insolvency Law regarding the effect of insolvency on arbitration. Additionally, Mexico made certain modifications when adopting the Model Law,

including (i) removing subsection (a) from Article 20(1) of the Model Law regarding the stay on all commencement or continuation of individual actions concerning the debtor's assets, rights, obligations, or liabilities as a consequence of the recognition of the foreign proceedings;[24] (ii) removing subsection (a) from Article 21(1) of the Model Law regarding the relief that may be granted upon recognition of foreign proceedings in the form of a stay on the commencement or continuation of individual actions concerning the debtor's assets, rights, obligations, or liabilities as a consequence of the recognition of the foreign proceedings;[25] and (iii) demanding reciprocity for recognizing foreign proceedings (Article 280 of the Insolvency Law).

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

53. No, the mere opening of insolvency proceedings outside of Mexico does not produce effects on arbitrations seated in Mexico. Once those foreign insolvency proceedings are recognized by Mexican courts, as indicated above, the insolvency proceedings will have the limited effect on arbitration that is described in Question 1 herein.

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?

54. No. The recognition of foreign insolvency proceedings is subject to the jurisdiction of Mexican courts, who shall make the relevant determination. If and when a Mexican court recognizes foreign insolvency proceedings, arbitrations seated in Mexico will be subject to the very limited effect described in Question 1 above, without the arbitrators being required to take any action or make any ruling to that effect.

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

55. There are no specific provisions addressing the issue. However, given that the Insolvency Law is generally deemed to be of public order in Mexico, once foreign insolvency proceedings have been recognized in Mexico pursuant to the above, the limited effects of insolvency on arbitration explained in Question 1 above will likely be deemed mandatory.

[24] Article 20 of the Model Law was incorporated in Article 298 of the Insolvency Law.
[25] Article 21 of the Model Law was incorporated in Article 299 of the Insolvency Law.

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

56. Yes, since the Insolvency Law is considered a matter of public order, an arbitral award issued by a tribunal seated in Mexico that is in breach of the Insolvency Law or that is otherwise inconsistent with it, will likely be set aside by Mexican courts.

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?

57. No, there are not.