IBA TOOLKIT ON INSOLVENCY AND ARBITRATION

QUESTIONNAIRE

NATIONAL REPORT OF PORTUGAL

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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 Portugal 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 its Article 87, the Portuguese Insolvency and Corporate Recovery Code (DL 53/2004) ("CIRE")[1] sets out the effects that insolvency proceedings produce in relation to an arbitration agreement or to an already pending arbitration proceedings.

2. Article 87 of the CIRE states that "1 - The effectiveness of arbitration agreements to which the insolvent is a party concerning disputes whose outcome may influence the value of the estate is suspended, without prejudice to the provisions of applicable international treaties. 2 - Proceedings pending on the date of the declaration of insolvency shall nevertheless continue, without prejudice, where applicable, to the provisions of Article 85(3) and Article 128(5)".[2]

3. The effects provided by the insolvency legislation mentioned above are considered to be part of the consequences produced by the opening of insolvency proceedings. In fact, the rule appears in the chapter on the procedural effects of the declaration of insolvency, and the legislature has therefore referred to the date of the declaration of insolvency to determine the effects on arbitration proceedings and arbitration agreements.

2. Does the insolvency legislation in Portugal 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*?

[1] *Código da Insolvência e da Recuperação de Empresas,* DL no. 53/2004, of March 18 (Diário da República, no. 66, of 18 March 2004, https://dre.pt/dre/legislacao-consolidada/decreto-lei/2004-34529075).

[2] Article 87 of CIRE: "*1 - Fica suspensa a eficácia das convenções arbitrais em que o insolvente seja parte, respeitantes a litígios cujo resultado possa influenciar o valor da massa, sem prejuízo do disposto em tratados internacionais aplicáveis. 2 - Os processos pendentes à data da declaração de insolvência prosseguirão porém os seus termos, sem prejuízo, se for o caso, do disposto no n.º 3 do artigo 85.º e no n.º 5 do artigo 128.º*".

b. Are disputes in arbitration or subject to an arbitration agreement covered by the *vis attractiva concursus*?

4. The insolvency legislation in Portugal provides for the concentration of disputes concerning the insolvent debtor before the insolvency court (*vis attractiva concursus*).

5. Pursuant to Article 85(1) of CIRE, pending actions (declaratory, enforcement or interim measures) will be joined to the insolvency proceedings at the request of the insolvency administrator. This includes (i) actions brought against the debtor relating to assets included in the insolvent estate (e.g., an action for recovery of real estate included in the insolvent estate), (ii) actions brought against a third party but whose result may influence the value of the insolvent estate, (iii) actions brought by the debtor exclusively in connection with assets.

6. Regarding arbitration proceedings, pursuant to Article 87(2) of CIRE, due to the nature of arbitration proceedings,[3] pending proceedings are not joined to insolvency proceedings, but instead continue before the arbitral court until their final conclusion, regardless of the procedural position held by the insolvent. This understanding is based on the fact that Article 87(2) does not refer directly to the provision on consolidation of proceedings (Article 85(1) and (2)).[4]

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

7. The answer to this question is no. Article 87 does not make a distinction between situations in which the insolvent party acts either as a defendant or as a claimant in arbitration proceedings.[5]

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?

[3] E.g., Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 205; L. M. T. Menezes Leitão, *Código da Insolvência e da Recuperação de Empresas - Anotado* (7th edn, Almedina, 2013), p. 123; Ana Prata et al., *Código da Insolvência e da Recuperação de Empresas - Anotado* (1st edn, Almedina, 2013), p. 266; Luís Carvalho Fernandes and João Labareda, *Código da Insolvência e da Recuperação de Empresas Anotado* (3rd edn, Quid Juris, 2015), p. 433; Iñaki Carrera and Francisco da Cunha Matos, "A arbitrabilidade e a empresa em crise: Convivência harmoniosa entre a jurisdição arbitral e a jurisdição estatal" (2018) 3 *PLMJ Arbitration Review*, 49, 55.

[4] See Iñaki Carrera and Francisco da Cunha Matos, "A arbitrabilidade e a empresa em crise: Convivência harmoniosa entre a jurisdição arbitral e a jurisdição estatal" (2018) 3 *PLMJ Arbitration Review*, 49, 55.

[5] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 204.

8. The answer to this question is no.

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

9. Article 87 of CIRE distinguishes between the types of relief that can be obtained from an arbitral tribunal, in the sense that, in the case of a dispute which influences the value of the insolvent estate, the respective arbitration agreement is automatically suspended with the opening of the insolvency proceedings. It covers declaratory as well as condemnatory (order for payment) requests for relief.

10. Arbitrations pending at the time of the opening of insolvency proceedings are not suspended, continuing until their conclusion, as mentioned below in response to question 3(e), and so the type of subject matter and relief sought are irrelevant to ascertaining the effects of the opening of insolvency proceedings on arbitral proceedings.

11. As regards interim measures adopted in arbitration proceedings, reference is made below in response to questions 20 and 21.

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

12. There is no legal provision indicating that the effects of Article 87 of CIRE apply to pre-insolvency procedures, namely the Special Process for Revitalisation ("PER"),[6] the Special Process for the Viability of Companies ("PEVE"),[7] the Special Process for Payment Agreements ("PEAP"),[8] and the Out-of-court Business Recovery Procedure ("RERE").[9] Some legal scholars argue that these rules cannot be applied by analogy to the PER or the PEVE.[10]

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?

[6] *Processo Especial de Revitalização,* Articles 17-A to 17-J of CIRE.
[7] *Processo Extraordinário de Viabilização de Empresas,* Law 75/2020, of 27 November (Diário da República no. 232, of 27 November 2020, https://dre.pt/dre/detalhe/lei/75-2020-149861977).
[8] *Processo Especial para Acordo de Pagamento*, Articles 222-A to 222-J of CIRE.
[9] Regime Extrajudicial de Recuperação de Empresas, Law 8/2018, of 2 March (Diário da República no. 44, of 2 March 2018, https://dre.pt/dre/legislacao-consolidada/lei/2018-114801278).
[10] Catarina Serra, "Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)" (2017), *Revista de Direito Comercial,* pp. 614-615. The Portuguese Supreme Court of Justice expressed, in the Judgment of 26.04.2016, case no. 1212/14.5T8LSB.L1.S1, strong reservations as to the applicability of Article 87 of CIRE to PER, given the specific purposes of the latter.

13. Article 87(1) of CIRE states that once the insolvency of a party to an arbitration agreement has been declared, the effectiveness of the arbitration agreement is suspended if it applies to disputes whose outcome may influence the value of the insolvent estate, which is not always the case.

14. Accordingly, it is impossible for the parties (insolvent debtor and opposing party) to begin arbitration proceedings based on an arbitration agreement concerning a dispute whose outcome may influence the value of the insolvent estate. With the suspension of the arbitration agreement, the principle of *vis attractiva consursus* is applicable and then either party has the right to resort to the courts where the insolvency proceedings are taking place. In this circumstance, the other party is barred from invoking the arbitration agreement, which under normal conditions would be permissible as per Articles 96(b) and 577(a) of the Portuguese Civil Procedure Code.

15. Some might argue that Article 87 of CIRE does not apply to mandatory arbitration, i.e., disputes that must be resolved through arbitration as mandated by law. This perspective stems from the fact that Article 87 of CIRE makes references to an "arbitration agreement", which implies a focus on voluntary arbitration. In contrast, the foundation of mandatory arbitration lies in a legal mandate rather than in an agreement between parties.[11]

16. The legal solution has the virtue of allowing the concentration in a single forum of the assessment of the relevant details in financial terms, guaranteeing the equal position of creditors (*par conditio creditorum*).[12]

17. Specialised commentary has argued that (i) in cases where the insolvency administrator considers that the interests of the insolvent estate make it inadvisable to suspend the effectiveness of the arbitration agreements referred to, and (ii) exceptionally, when the needs to protect the interests of the opposing party require the effectiveness of the arbitration agreements, the suspensive effect referred to in Article 87(1) of CIRE is not applicable.[13] New actions must be brought against the insolvency administrator, because he or she is the one who

[11] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), pp.201-202.
[12] Ana Prata et al., *Código da Insolvência e da Recuperação de Empresas - Anotado* (1st edn, Almedina, 2013), p. 266.
[13] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 203. According to the author, this situation is analogous to the recognition of the possibility of the insolvency administrator to confirm the acts of administration or disposal that the debtor performs after the transfer of the powers of disposal and administration to the insolvency administrator (Article 81 (1) of CIRE), but which are beneficial to the interests of the insolvent estate. In line with this, Pedro Metello de Nápoles, "Efeitos da Insolvência na Convenção de Arbitragem. Insuficiência Económica das Partes em Processo Arbitral", in *V Congresso do Centro de Arbitragem Comercial* (Almedina, 2012), p. 146 and p. 150, which admits the cessation of the suspensive effect when the continuation is beneficial to the interests of the insolvent estate, alluding to the rule of Article 144 of the former Code of Special Processes of Company Recovery and Bankruptcy, repealed by the CIRE, which allowed the liquidator to enter into new arbitration agreements and, *a fortiori* (in the author's opinion), to execute those that already existed. In further support of this view, see Francisco da Cunha Matos and Maria Beatriz Brito, "A superveniente insuficiência económica das partes como alegado fundamento de inoponibilidade da convenção de arbitragem" (2017) 2 *PLMJ Arbitration Review*, in *Revista PLMJ Arbitragem*, no. 1, 2017, pp. 33-34.

represents the insolvent for all purposes of a financial nature that are of interest to the insolvency, pursuant to Article 81(4) of CIRE.

18. As the law does not prescribe the duration of the suspension, it should be understood that it continues during the entire duration of the insolvency proceedings.[14]

19. Under the terms of Article 87(2) of CIRE, insolvency proceedings will not have any effect on arbitration proceedings which are pending on the date of the declaration of insolvency. This will continue until their final conclusion, irrespective of the procedural position held by the insolvent party. This brings advantages in terms of procedural economy and, above all, legal certainty, specifically regarding the use of procedural steps or in cases where the arbitral tribunal is about to issue an award, which may, moreover, be a relevant element in the insolvency proceeding (e.g., an arbitral award stating the existence of claims in favour of the insolvent party or in favour of the opposing party).[15]

20. It should be understood that starting insolvency proceedings does not mean, in itself, that the insolvent party does not have the economic means to bear the costs of arbitration proceedings.[16] Therefore, as a matter of principle, it is not legitimate for an insolvent party to seek to avoid submitting the dispute to arbitration when the arbitration agreement is not automatically suspended on the basis of Article 87 of the CIRE).[17]

21. In fact, the increase in the insolvent party's costs (namely the costs of the arbitration proceedings) does not affect the effectiveness of the arbitration agreement, as it does not directly translate into the insolvent party's actual impossibility to perform its obligations[18]. The arbitration agreement, as a legal transaction entered into between the parties, binds them (*pacta sunt servanda*) taking into account that both parties knew, or should have known, at the

[14] In accordance with article 230 of CIRE, the insolvency proceedings end with: (i) the final distribution, (ii) or the res judicata of the decision confirming the insolvency plan, (iii) or at the debtor's request, when the debtor is no longer insolvent or all creditors give their consent, (iv) or when the insolvency administrator establishes the insufficiency of the insolvent estate to satisfy the costs of the proceedings and the remaining debts of the insolvent estate, (v) or after the end of the liquidation, when the final distribution does not take place.

[15] Catarina Serra, "Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)" (2017), Revista de Direito Comercial, p. 703.

[16] The Judgment of the Supreme Court of Justice of Portugal, of 26.04.2016, case no. 1212/14.5T8LSB.L1.S1 ruled to this effect, although it did not offer a direct answer to the question of whether the supervening economic insufficiency is a valid ground for the unenforceability of the arbitration agreement. It merely stated that the proper place to assess this circumstance is the arbitral tribunal, in accordance with the negative effect legally recognised in respect of the arbitration agreement.

[17] The issue is discussed in Portuguese case law and doctrine. See Francisco da Cunha Matos and Maria Beatriz Brito, "A superveniente insuficiência económica das partes como alegado fundamento de inoponibilidade da convenção de arbitragem" (2017) 2 PLMJ Arbitration Review, p. 41.
It remains to be proven that the costs of arbitration tribunals are, by definition, higher than those of judicial courts. Moreover, the right of access to justice is not understood to have an absolute and unsurpassable value in Portuguese law. Above all, in arbitration proceedings, the party not in financial difficulties may always advance the costs payable by the insolvent party and finance the arbitration proceedings pursuant to Article 17(5) of the Arbitration Law, Law 63/2011, of 14 December ("LAV"), in addition to the international trend of third-party funding.

[18] On the other hand, it represents a subjective impossibility, because it is relative to the debtor, probably temporary, and does not exonerate him, in accordance with the principle of irrelevance of the *difficultas praestandi* (contract performance that is extraordinarily onerous or excessively difficult).

time of entering into the arbitration agreement, the rights and obligations that mutually arise from it and, in particular, the costs of arbitration.[19]

22. However, Article 85(3) of CIRE (which is applicable to arbitration because Article 87(2) refers to it) establishes the following: upon the declaration of insolvency in insolvency proceedings, the insolvent party will be replaced by the insolvency administrator (i) in arbitration proceedings that have been brought against the insolvent and which deal with matters relating to assets included in the insolvent estate, (ii) in arbitration proceedings that have been brought against third parties but the outcome may influence the value of the estate, and (iii) in proceedings that have been brought by the insolvent and are exclusively of a financial nature.

23. Furthermore, after the opening of insolvency proceedings, it is impossible for the parties (the insolvent and opposing party) to begin arbitration proceedings based on an arbitration agreement concerning a dispute whose outcome may influence the value of the insolvent estate (Article 87(1) of CIRE). The declaration of insolvency does not affect the possibility of submitting disputes other than these to arbitration.

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

24. No.

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

25. It depends. One should distinguish the scenario where the States involved are subject to Regulation (EU) No 2015/848 of the European Parliament and of the Council of 20 May 2015 (all EU Member States except Denmark) from the remaining cases.

26. Under the Regulation, Portuguese insolvency courts have jurisdiction to open insolvency proceedings when the centre of the debtor's main interests is located within their territory (Article 3(1) of Regulation (EU)). That being the case, under Article 7 of Regulation (EU) No 2015/848, the law governing the general effects of insolvency proceedings, including on arbitration agreements, is the law of the State in which the proceedings are opened (*lex concursus*).[20] However, under Article 18 of Regulation (EU) No 2015/848, the law governing the

[19] The insolvent's economic insufficiency may fulfil the requirements of the *rebus sic standibus* clause (Article 437 of the Portuguese Civil Code - Change of Circumstances) when the insolvent undergoes a very significant economic change that is strange to the normal operation of his activity and the normal (foreseeable) events on the date of the signing of the arbitration agreement (See Francisco da Cunha Matos and Maria Beatriz Brito, "A superveniente insuficiência económica das partes como alegado fundamento de inoponibilidade da convenção de arbitragem" (2017) 2 *PLMJ Arbitration Review*, p. 50).

[20] Nevertheless, as Dário Moura Vicente, "International Insolvency: Applicable Law" (2006) *Revista O Direito* IV 138, p. 793, p. 800 points out, preliminary questions regarding the existence and content of claims which will be

effects of insolvency proceedings on pending arbitration proceedings, including arbitration agreements founding those proceedings, is the law of the Member State in which the proceedings are pending or in which the arbitral tribunal has its seat (*lex fori arbitri*). This is a concession to territorialism and a departure from the universalism of insolvency proceedings.[21]

27. Therefore, as regards the scope of application of Article 18 of the Regulation, the CIRE rules are not intended to be applied extraterritorially with regard to international arbitration.[22]

28. As for the countries not bound by the Regulation, and in the absence of international treaties or conventions (Article 275(2) of CIRE), the provisions of Article 276 CIRE are applicable and, under this article, the effects of the insolvency proceedings are governed by the law of the State in which the proceedings were opened[23].

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.)?

29. Article 87 of CIRE is framed within the part relating to the procedural effects of the declaration of insolvency, so it is safe to say that the insolvency effects become operative in relation to the arbitration agreement at the time the debtor is declared insolvent. Although Portuguese law does not explicitly address this point, the solution can be drawn from Article 2(8) of Regulation (EU) No 2015/848, that states: “'the time of the opening of proceedings' refers to the moment when the judgment initiating insolvency proceedings takes effect, irrespective of whether the judgment is final”.

30. With regard to arbitration agreements that do not lose effectiveness upon the debtor's declaration of insolvency (those that do not settle future disputes whose outcome affects the value of the insolvent estate), and whose effects may be affected by the refusal of performance of the contract by the insolvency administrator or by the termination for the benefit of the estate of a contract containing them, the insolvency effects are produced at the time of termination or refusal of performance.

31. In the case of the continuation of proceedings already pending, for the sake of protecting the principle of effective judicial protection, the continuation of the arbitration proceedings should not be immediate, but should be suspended for a reasonable period to allow the insolvency

affected by the insolvency are not part of the object of the Regulation, so they should rather be resolved in the light of the *lex contractus*.

[21] See Catarina Serra, “Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)” (2017) *Revista de Direito Comercial*, p. 718.

[22] See Catarina Serra, “Insolvência transfronteiriça”, in *Revista de Direito Comercial*, 2018, p. 1291 and p. 1301, fn. 75.

[23] The law applicable to the claims by the insolvency administrator appointed in foreign proceedings and to the exercise of voting rights at the creditors' meeting inherent to such claims in Portugal is the law applicable to these foreign insolvency proceedings (Article 284(2) of CIRE). Therefore, a foreign law may be applied to secondary insolvency proceedings taking place in Portugal.

administrator to prepare him or herself to defend the interests of the insolvent estate in the best possible way by becoming familiar with the proceedings[24].

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?

32. The effects set out in the CIRE are automatic and mandatory. However, the decisions of the insolvency administrator may be subject to review by the interested party in the insolvency proceeding. If the opposing party in the arbitration proceeding is a creditor of the insolvent debtor, it must present claims, under condition, in the insolvency (see Question 9 below).

33. Pursuant to Article 87 of CIRE, the insolvency judge must take into consideration the fulfilment of the requirement of not affecting the insolvent estate through the resolution of the dispute via arbitration.

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?

34. Article 87 of CIRE does not allow insolvency courts to order the suspension of pending arbitration proceedings. The courts may only order the suspension of arbitration agreements concerning disputes whose outcome may influence the value of the insolvent estate, thus preventing the start of new arbitration proceedings that may have such outcomes.

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?

35. Under the CIRE, the insolvency administrator has the power to administer and dispose of the assets of the insolvent estate (Article 81(1)). The court is only responsible for supervising the insolvency administrator (Article 58), and does not have the power to terminate or suspend the

[24] Following Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 205 and "Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)" (2017), Revista de Direito Comercial, pp. 711-712.

effectiveness of any contracts. This applies regardless of whether or not they contain arbitration agreements.

36. Under Article 102(1) of CIRE, the contracts (with or without arbitration agreements) in which, at the date of the declaration of insolvency, there is still no full performance by the insolvent party or by the other party, are automatically suspended, and the insolvency administrator may choose to perform or refuse to perform such contracts.

37. Furthermore, pursuant to Articles 120 and following of CIRE, the insolvency administrator may determine the termination of contracts/acts, whether or not they contain arbitration agreements, provided they are harmful to the insolvent estate. Pursuant to Article 120 of the CIRE, such contracts/acts must have been concluded within the two years prior to the date of start of the insolvency proceeding and the bad faith of the third party must be verified (knowledge of the debtor's insolvency situation or of the start of the insolvency proceedings, or knowledge of the prejudicial nature of the act and that the debtor was in imminent insolvency at that date); pursuant to Article 121, the contracts/acts may be rescinded by the insolvency administrator regardless of the bad faith of the third party, as is the case of acts entered into gratuitously within the two years prior to the date of start of the insolvency proceedings.

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?

38. The termination/disclaim of the contract in accordance with Article 102 does not affect the arbitration agreement. The only effect in the arbitration agreement is the one established in Article 87.

39. In cases where the disputes do not affect the value of the insolvent estate, the arbitration agreement remains effective (Article 87(1) of CIRE), independently of the insolvency administrator's choice regarding the fulfilment of the contract in terms of Article 102.

40. In cases where the disputes affect the value of the insolvent estate, the effects of the arbitration agreement are suspended (Article 87(1) of CIRE). However, there are scholars who consider that the effects of the arbitration agreement should not be suspended when the insolvency administrator considers that: (i) the interests of the insolvent estate benefit from not suspending the effects; and (ii) the interests of creditors require the effectiveness of arbitration agreements, especially when, by law or by the insolvency administrator's decision, the contract must be fulfilled by the insolvent (Article 102 of CIRE).[25]

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

[25] See Catarina Serra, "Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)" (2017) *Revista de Direito Comercial*, pp. 710-711.

of such decision on pending arbitration proceedings derived from the arbitration agreement in question?

41. With the declaration of insolvency, the effectiveness of the arbitration agreement, possibly included in a contract, is automatically suspended when the arbitral proceedings have not yet begun (Article 87(1) of CIRE, and (2) *a contrario*), provided the arbitral award may influence the value of the insolvent estate.

42. In situations where the arbitration agreement is not automatically suspended (i.e., when the arbitral award does not impact the value of the insolvent estate), the insolvency administrator will have the possibility to perform or refuse to perform legal transactions underway entered into by the insolvent party, as provided in Article 102 of CIRE (see Question 6 above). [26]However, as stated in Question 7 above, the insolvency administrator cannot invoke Article 102 of CIRE solely against an arbitration agreement, as the effectiveness of such an agreement is established in Article 87(1).

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?

43. To address the questions comprehensively, it is crucial to examine two distinct scenarios within the context of insolvency and arbitration: first, cases where the claim emerges from a dispute not yet initiated, and second, situations where the claim is related to arbitration proceedings that are pending.

44. In the first scenario, where a creditor needs to initiate proceedings to assert a claim, it is crystal clear that a claim has an impact on the insolvent estate, thus the arbitration agreement becomes ineffective as per Article 87(1) of CIRE. In such instances, any claim against the insolvent party must be filed within the insolvency proceedings, adhering to the principle of *vis*

[26] See Catarina Serra, “Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)” (2017) *Revista de Direito Comercial*, pp. 709-711 and *Lições de Direito da Insolvência*, p. 203. According to the author, the insolvency administrator has the power to perform with or refuse to perform with ongoing contracts concluded by the insolvent (Article 102 CIRE) and, sometimes, the duty to perform them (see for instance, Article 104(1) and (2) and Article 106(1). If, by decision of the administrator or by force of law, the contract must be performed with, the author considers that it will be performed in its entirety, including the arbitration agreement, if any. Otherwise, it would be unreasonable to impose on the other party the fulfilment of a contract different from the one entered into by the latter.

attractiva concursus. A decision by the insolvency court to reject a claim is final and authoritative in terms of its existence and amount. For example, a decision to neither confirm nor rank a claim establishes *res judicata*, effectively barring any other court or any arbitral tribunal from re-evaluating the claim's existence and amount, as specified in Article 577(i) of the Civil Procedure Code (CPC).

45. However, as explained above in the answer to Question 3(e), it may be argued that (i) in cases where the insolvency administrator considers that the interests of the insolvent estate advise against the suspension of the effectiveness of the arbitration agreements and (ii) exceptionally, when the needs to protect the interests of the opposing party require the effectiveness of the arbitration agreements, the suspensive effect referred to in Article 87(1) of CIRE does not apply, namely when the insolvency administrator decides to fulfil the contract (Article 102 of CIRE).[27] In these instances, the approach mirrors that which applies to pending arbitration proceedings, as detailed in the following paragraph.

46. Regarding the second scenario, the dynamics change when arbitration proceedings are already in progress. In this case, Article 128(5) of CIRE,[28] as applicable through Article 87(2) of the same Code, dictates that in line with the principle of equal treatment of creditors (*par conditio creditorum*), the claimant is required to file its claim ("*Reclamação de créditos*") in the insolvency proceedings to be included in the list of creditors. This requirement stands irrespective of any ongoing arbitration, as detailed in Articles 90 and 87(2), which refer to Article 128(5) of CIRE. The arbitral tribunal in the ongoing arbitration retains the jurisdiction to determine the claim's existence and value. However, the acknowledgment of the claim in the insolvency proceedings is subject to a suspensive condition, awaiting the arbitral tribunal's final verdict. [29]

47. The filing of the claim ("*Reclamação de créditos*") in the terms mentioned above does not amount to a waiver of the arbitration agreement as the arbitral tribunal retains the jurisdiction to determine the claim's existence and value.

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

[27] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 203. Along the same lines, Pedro Metello de Nápoles, "Efeitos da Insolvência na Convenção de Arbitragem. Insuficiência Económica das Partes em Processo Arbitral", in *V Congresso do Centro de Arbitragem Comercial* (Almedina, 2012), p. 146 and p. 150.

[28] "*A verificação tem por objecto todos os créditos sobre a insolvência, qualquer que seja a sua natureza e fundamento, e mesmo o credor que tenha o seu crédito reconhecido por decisão definitiva não está dispensado de o reclamar no processo de insolvência, se nele quiser obter pagamento*". Translation: "The verification concerns all claims on the insolvency, regardless of their nature and basis, and even the creditor who has his claim recognized by a final decision is not exempt from claiming it in the insolvency process if he wants to obtain payment in it".

[29] See Iñaki Carrera and Francisco da Cunha Matos, "A arbitrabilidade e a empresa em crise: Convivência harmoniosa entre a jurisdição arbitral e a jurisdição estatal" (2018) 3 *PLMJ Arbitration Review*, 49, p. 55.

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

48. The CIRE establishes the possibility for the insolvency administrator to bring actions with the purpose of termination of contracts for the benefit of the insolvent estate (clawback proceedings), which will be dependent on the insolvency proceeding (Article 120 and following of CIRE).

49. Acts prejudicial to the insolvent company's assets that have taken place in the two years prior to the start of insolvency proceedings (Article 120 (1) of CIRE) are subject to clawback. The law considers acts detrimental to the estate to be those that reduce, hinder, delay or frustrate the satisfaction of the claims of the insolvent company's creditors (Article 120(2) of CIRE).

50. In light of these considerations, it can be argued that: (i) Article 87(1) leads to the suspension of arbitration agreements, since contracts that reduce, hinder, delay, or frustrate the satisfaction of the insolvent company's creditors' claims are deemed detrimental to the estate; and (ii) issues concerning clawback actions cannot be decided by arbitral tribunals, as these actions are integral to the fulfilment of the insolvency proceedings' goals and are thus considered core claims and non-arbitrable. [30]

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

51. The CIRE expressly provides for the suspensive effect of arbitration agreements concerning disputes whose outcome influences the value of the insolvent estate. That said, it has no provision preventing the insolvency administrator from entering into new arbitration agreements once insolvency proceedings have been opened.

52. On the other hand, the possibility for the insolvency administrator to be authorised by the judge to enter into new arbitration agreements was provided for in Article 144 in the former Code of Special Company Recovery and Bankruptcy Proceedings, which was repealed by the CIRE.

53. The CIRE grants the administrator (i) the powers to administer and dispose of the assets of the insolvent estate (Article 81 of CIRE) and (ii) the possibility to opt for the execution/refusal to perform (Article 102) or the maintenance/termination for the benefit of the insolvent estate (Article 120) of certain contracts. In light of the current Law, some authors defend, as explained above, that there are cases in which, although not expressly provided for, it is possible to circumvent the mandatory effect of suspension of the arbitration agreement[31].

[30] Catarina Serra, Catarina Serra, "Arbitragem e insolvência: Os efeitos da declaração de insolvência sobre a arbitragem (Direitos português e internacional)" (2017) *Revista de Direito Comercial*, p. 689. Antonio Sampaio Caramelo notes that the majority of legal systems regard this issues as non-arbitrable, without specifying whether this is also the case in Portugal. See *Critérios de Arbitrabilidade dos Litígios. Revisitando o Tema*, in IV Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa (Centro de Arbitragem Comercial), Almedina, 2011, p. 40.

[31] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 203.

54. In these terms, although not expressly provided for, the insolvency administrator's prerogative to conclude, at his or her own discretion, new arbitration agreements may be defended, based on his or her power and duty to perform all acts likely to favour the interests of the estate (even those not expressly provided for).

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

55. Pursuant to Article 214 of CIRE, the insolvency plan approved by the creditors is ratified by a court. This ratification judgement takes immediate effect, that is, regardless of whether it has become final and unappealable (*res judicata*) (Article 217 (5) of CIRE). After the ratification judgement becomes final and unappealable, the judge will declare the termination of the insolvency proceedings, except if the content of the plan does not allow it (see Article 230(1)(b) of CIRE). Accordingly, once the insolvency proceedings are closed, the insolvency creditors may again exercise all their rights against the debtor (Article 233 (1) (c) of CIRE), without any restrictions other than those set out in the plan. This means that the suspension of the effectiveness of arbitration agreements, ex Article 87 of the CIRE, ceases to be in force, thus extinguishing the effects of the insolvency on 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?

56. The rules that provide for the effects of insolvency proceedings on arbitration proceedings are mandatory, and the parties may not waive their application, even in the arbitration proceedings. This characteristic is drawn from the universal nature of insolvency proceedings (Article 1(1) of CIRE), under which all claims must be brought (Article 128 of the CIRE). This explains why the rule in Article 87 is mandatory: as a way to protect the insolvent estate, to make the participation of all creditors mandatory, and to allow all to be paid through the insolvency process.

57. Moreover, there are reasons of public interest underlying the insolvency procedure, namely the protection of the economy; in short, the interests of economic agents, which justified the creation of this specially regulated process designed to protect the rights of creditors and debtors, and, for this reason, its provisions should be understood to be mandatory[32].

58. From the above, the egalitarian treatment takes the form of the executive effects, effects on the claims, effects on the business in progress or the resolution by the administrator of the contracts/acts in benefit of the insolvent estate[33]. If these provisions are held not to be mandatory, insolvency proceedings would lose their special status and the rationale behind them too.

[32] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), pp. 41-47.
[33] Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), p. 47.

59. Thus, when those rules are applicable in the arbitration proceedings, it is not possible for an agreement between the insolvent party and one or more of its creditors (e.g., the parties to the arbitration) to exclude the application of those rules.

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

60. There is no express rule in CIRE providing for the direct application of its provisions to the effects of insolvency on arbitration proceedings with their seat in Portugal. The Arbitration Law does not have any rule regarding the application of mandatory provisions of the seat of the arbitration. However, it is possible to argue that such provisions are mandatory regardless the applicable law to the merits.

61. Given the automatic standstill effect of article 87 of CIRE, it is not necessary for the insolvency court to determine whether a certain arbitration agreement is suspended or not. The question arises in particular if a creditor of the insolvent party brings an arbitration action based on an arbitration agreement that was suspended with the opening of insolvency proceedings under article of 87 CIRE. In this scenario, the insolvency administrator, who replaces the insolvent in court, as explained in the answer to Question 16 below, must defend itself in the arbitration action by invoking the plea of suspension of the arbitration agreement (by the opening of insolvency proceedings against the debtor, defendant in the arbitration action).

62. If an arbitral tribunal with its seat in Portugal disregards the effects of the insolvency proceedings on the arbitration, there is a risk of annulment of the award or its unenforceability. In line with the answer to Question 34 below, it may be understood that the award may be subject to annulment pursuant to article 46(3)(a)(i) of the LAV (the arbitration agreement ceased to be valid, i.e., ceased to have any effect as a result of the opening of the insolvency proceedings). This is also a ground for opposition to the enforcement of the arbitral award, pursuant to article 815 of the CPC. Moreover, a conservative court could also hold that there has been a breach of international public order (46(3)(b)(ii) of LAV).

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?

63. No.

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

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

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

64. Under Article 81 of CIRE, in addition to the attribution to the insolvency administrator of the powers to administer and dispose of the assets of the insolvent estate, the insolvency administrator becomes the debtor's legal representative for all effects of a patrimonial nature that are of interest in the insolvency (paragraph 4). Thus, under the terms of Articles 85(3) (by reference to Article 87(2)), the insolvent party loses its procedural capacity, which has to be replaced by that of the administrator. The insolvency administrator will act as a party, in the same manner as the insolvent debtor, (i) in arbitration proceedings that have been brought against the insolvent party and which involve matters relating to property included in the insolvent estate, (ii) in arbitration proceedings that have been brought against third parties but the outcome may influence the value of the estate, and (iii) in proceedings that have been brought by the insolvent party and are of an exclusively financial nature.

65. However, if, after the insolvency has been declared, the insolvent debtor continues to perform acts in the arbitration proceedings, as he or she does not have legal standing as a party, these acts are null and void and must be repeated[34].

66. In the remaining arbitration proceedings, the insolvent debtor maintains its legal standing.

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

67. Article 30(5) of the LAV provides that arbitrators and parties to the arbitration have the duty to keep confidential all the information they obtain and documents they become aware of through the arbitration proceedings. However, the parties can make public the procedural acts

[34] Pedro de Sousa Macedo, *Manual de Direito das Falências*, Vol. II (Almedina, 1968), pp. 117-118.

necessary to defend their rights, in particular, to defend creditor's rights in the insolvency proceedings.

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

68. No.

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?

69. As the insolvency administrator is considered the legal representative of the insolvent debtor, he or she has powers to withdraw, make admissions or reach a settlement in court[35], with the agreement of the creditors' committee, pursuant to Article 55(8) of CIRE. If there is no committee, the insolvency administrator enters into any such procedural settlements without the need for any approval[36]. Creditors wishing to intervene in these acts have the autonomy to appoint a creditors' committee under the terms of Article 67(1) of CIRE.[37]

70. Accordingly, the arbitral tribunal must terminate the proceedings and, if the parties so request, render the settlement in the form of an award on terms agreed by the parties (see Article 41 of the LAV).

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

[35] In addition to these duties, the insolvency administrator is also empowered to file and pursue (a) actions for liability as legally applicable, in favour of the debtor itself, against the founders, de jure and de facto directors, members of the debtor's supervisory body and partners, associates or members, irrespective of the agreement of the debtor or its corporate bodies, partners, associates or members; (b) actions for compensation for losses caused to the majority of the insolvency creditors by the reduction of the assets of the insolvent estate, both before and after the declaration of insolvency; (c) actions against those legally liable for the debts of the insolvent (Article 82(3) of the CIRE); (d) actions against the insolvent's legal representatives (Article 82(4) of the CIRE); and (e) actions against the insolvent's legal representatives (Article 82(5) of the CIRE). The insolvency administrator must also require the partners, associates or members of the debtor to make deferred capital contributions and outstanding ancillary payments, irrespective of the due dates stipulated, and for this purpose, he shall commence any actions that may prove necessary (Article 82 (4) of the CIRE).

[36] As clarified by Ana Prata et al., *Código da Insolvência e da Recuperação de Empresas - Anotado* (1st edn, Almedina, 2013), p. 183.

[37] Article 55(8) of CIRE only refers to judicial proceedings, but it should be applied analogously to arbitration proceedings.

71. In cases where the effect of the arbitration agreement is suspended pursuant to Article 87 of CIRE, arbitral tribunals may not order interim measures in relation to the insolvent debtor.

72. As for situations in which the beginning of insolvency proceedings does not affect the effectiveness of an arbitration agreement, i.e., in cases where the agreement does not relate to disputes whose outcome will influence the value of the insolvent estate, Articles 20 et seq. of the LAV provide for the possibility of the arbitral courts to order interim measures, typified in that law, at the request of one of the parties against the other, without making specific provision in relation to the party that has been declared insolvent

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

73. There are no specific provisions within Insolvency Law pertaining to interim measures. Consequently, it could be argued that Article 87(2) is applicable. Therefore, an interim measure ordered by an arbitral tribunal before the declaration of insolvency remains effective.

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?

74. As stated in the answer to Question 19, the insolvent debtor is replaced by the insolvency administrator in ongoing actions, including arbitration proceedings (Articles 85(3) and 87(2) of CIRE). Therefore, the administrator has powers to withdraw, make admissions or settle in court, with the agreement of the creditors' committee, pursuant to Article 55(8) of CIRE (if it is the case).

75. Article 55 (8) of CIRE refers only to judicial proceedings, but should be applied analogously to arbitration proceedings.

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?[38]

76. As regards enforcement actions in particular, the procedural effects can be produced even before the declaration of insolvency: Article 793 of the Portuguese Code of Civil Procedure allows the creditor who has requested the debtor's declaration of insolvency to come to the

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

enforcement proceedings he or she has started to prove that he or she has requested that declaration and, in this way, suspend the enforcement proceedings.

77. With the declaration of insolvency, any enforcement actions or measures requested by the insolvency creditors affecting the assets of the insolvent estate (including any seizures) are automatically suspended, and the start or continuation of any action brought by the insolvency creditors is prevented (Article 88(1)).

78. In addition, under Article 85(2), if any act of seizure or detention of assets comprised in the insolvent estate is carried out in enforcement proceedings, these proceedings must be joined to the insolvency proceedings.

79. The consolidation will occur even where there are other persons subject to enforcement and the consolidated enforcement proceedings will remain suspended with respect to the insolvent debtor. If there are other defendants besides the insolvent debtor and the enforcement proceedings will not be joined under the terms of the preceding paragraph, the enforcement will continue against them and only a copy of the proceedings relating to the insolvent debtor will be extracted and sent for consolidation (Article 88(2)).

80. Suspended enforcement proceedings are extinguished, as regards the insolvent defendant, when the proceedings end with the final apportionment or when the insolvent estate is found to be insufficient to satisfy the debts of the estate and the costs of the proceedings (Article 88(3)).

81. Pursuant to Article 89(1), during the three months following the date of the declaration of insolvency, no enforcement proceedings may be brought based on debts of the insolvent estate. All actions relating to debts of the insolvent estate must be carried out as a separate part of the insolvency proceedings, with the exception of enforcement actions for tax debts (no. 2).

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?

82. The creditor may claim the credit in the insolvency proceeding even if it is subject to ongoing arbitration proceedings. In that case, the alleged credit is subject to the condition that the arbitral award eventually recognises the existence of such credit and its amount.[39] The fact that an alleged credit is subject to insolvency proceedings is not an obstacle for the conditional creditor to request the opening of insolvency proceedings against the debtor under Article 20 of the CIRE.

83. Additionally, the claim in question is regarded as litigious. Despite the lack of a specific legal rule, it is recognized that the creditor in question has the right to file its claim in the insolvency proceedings. This is based on the inclusive language used in the law, which refers to "any

[39] Joana Neves, *Os Efeitos da Insolvência na Arbitragem Internacional: Problemas de Direito Aplicável*, p. 551, in Estudos em Memória do Conselheiro Artur Maurício, Coimbra Editora, 2014.

creditor"[40] and does not exclude creditors with disputed claims, whether those are under judicial or arbitration proceedings.[41]

84. Once the conditional claim is recognised in the judgment on the confirmation and ranking of claims, and in the case of a suspensive condition (i.e., in a situation where the arbitral award has not been rendered), the insolvency administrator will deposit - at the time of the final assessment - the amount corresponding to the value of the conditional claim with a credit institution until the final decision is rendered (Article 181 of CIRE). If it is a claim under a resolutive condition, that is, in a situation in which the arbitral award has been rendered and is producing effects, but annulment proceedings are pending, the insolvency administrator will make payments as if it were an unconditional claim until the condition is met, without prejudice to the creditor's duty to return payments received if the award is eventually set aside (Article 94 of the CIRE).

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?

85. Under Article 705(2) of the CPC, condemnatory arbitral awards constitute enforceable titles and are therefore a valid proof of a certain creditor's claim against the insolvent.

86. Under Article 128 of CIRE, when claiming a credit, creditors must submit the supportive documents available to them, and an arbitral award that recognises the existence of a specific credit may be used by the creditor in the insolvency proceedings precisely for that purpose. If it is a foreign arbitral award, in accordance with Article 55 of the LAV and the New York Convention, it is necessary for it to be recognised first.

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

87. The answer to Question 13 indicated that the rules relating to insolvency are imperative. However, as regards their nature as public policy, neither the case-law nor the doctrine analysed expressly reached a decision on whether the rules governing the effect of insolvency on arbitration are part of public policy.

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[40] Translation by the Authors. Original: "*Artigo 20.º (Outros legitimados) - A declaração de insolvência de um devedor pode ser requerida (…) por qualquer credor, ainda que condicional e qualquer que seja a natureza do seu crédito*, (…)").

[41] Supporting this, e. g., Alexandre Soveral Martins, *Um Curso de Direito da Insolvência*, Vol. I (3rd edn, Almedina 2021), p. 94-100; Catarina Serra, *Lições de Direito da Insolvência* (2nd edn, Almedina, 2021), pp. 115-118. Also, constant Portuguese case law (e. g., Judgment of the Supreme Court of Justice of Portugal, of 17.11.2015, case no. 910/13.5TBVVD-G.G1.S1 and Judgment of Supreme Court of Justice of Portugal, of 29.03.2012, case no. 1024/10.5TYVNG.P1.S1).

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)? [42]

88. Equal treatment of creditors is provided for and raised as a fundamental principle of insolvency proceedings. In view of its importance, this principle should be considered as imperative and cannot be waived.

89. The *par conditio creditorum* principle applies from a procedural point of view, i.e., pursuant to Article 90 of CIRE, while the insolvency proceedings are pending, creditors may only exercise their rights in accordance with the provisions of the CIRE, suspending, as explained above, pending enforcement actions and prohibiting any new actions from being started.

90. However, from a substantive point of view, creditors may, in insolvency proceedings, be satisfied taking into account the amount of their claim, and there is even provision for the ranking of creditors by category (secured and privileged claims, taking into account the real guarantees they enjoy, and subordinated claims, with unfavourable treatment depending on certain aspects contained in art. 48 of the CIRE). This is understood not to offend the *par conditio creditorum* principle.

91. It has not been possible to locate case law or doctrine to the effect that the *par conditio creditorum* principle in insolvency proceedings is an integral part of public policy.[43]

92. Even so, as this is an imperative principle, it is made clear that arbitral decisions that conflict with this principle, namely, those that hinder the satisfaction of creditors' rights under the provisions of the CIRE, could be considered inadmissible.

93. Furthermore, there is a perspective within Portuguese doctrine that considers issues related to the verification and ranking of credits as non-arbitrable.[44] If a decision made by an arbitral tribunal compromises the principle of *par conditio creditorum*, it could be argued that this decision encroaches upon non-arbitrable issues such as the verification and ranking of the

[42] 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.

[43] However, Antonio Sampaio Caramelo notes that the majority of legal systems regard this principle as a component of public policy, without specifying whether this is also the case in Portugal. See *Critérios de Arbitrabilidade dos Litígios. Revisitando o Tema*, in IV Congresso do Centro de Arbitragem da Câmara de Comércio e Indústria Portuguesa (Centro de Arbitragem Comercial), Almedina, 2011, p. 40.

[44] Joana Neves, *Os Efeitos da Insolvência na Arbitragem Internacional: Problemas de Direito Aplicável*, p. 542, in Estudos em Memória do Conselheiro Artur Maurício, Coimbra Editora, 2014.

credit. In such instances, the arbitral award may be deemed voidable in accordance with Article 46(3)(b)(i) of the LAV.

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

94. No.

IMPACT OF FOREIGN INSOLVENCY ON ARBITRATION SEATED IN NATIONAL JURISDICTION

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

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

95. Foreign insolvency proceedings must be recognised in Portugal in order to produce legal effects.

96. The recognition system varies depending on the jurisdiction where the insolvency was declared and the type of party subject to insolvency. As a general rule, recognition of insolvency proceedings opened in an EU Member State is automatic under Article 19(1) of Regulation (EU) No 2015/848. In other words, the decision to open proceedings in an EU Member State produces the same effects in all other Member States as in the State in which the proceedings were opened. When the debtor's centre of main interests is located outside the European Union, under the terms of Article 288 of the CIRE, a judgment declaring insolvency in foreign proceedings produces effects through its recognition in Portugal. This will occur if the requirements of Article 288(1) of CIRE are met: (i) the recognition cannot lead to a result which is manifestly contrary to the fundamental principles of the Portuguese legal system, and (ii) the jurisdiction of the foreign court or authority is not based on one or more of the cases provided for in Article 7 of CIRE (jurisdiction of the court of the place where the debtor's main interests are situated at the time of death (no. 1); jurisdiction of the court of the place where the debtor has the centre of his main interests (no. 2))[45].

97. If the enforcement of decisions taken in foreign insolvency proceedings is sought, these decisions will be confirmed and reviewed, and the date on which they became final and unappealable will not be relevant (Article 293 of CIRE). The rules of Article 978 and following of the CPC apply to this situation.

[45] Article 288 of the CIRE has already been considered in case law to be applicable also to foreign court decisions ratifying restructuring plans carried out abroad and recognized in Portugal (see Judgment of the Lisbon Court of Appeal, of 25.10.2018, case no. 11.045/18).

98. The Portuguese court with jurisdiction to review and confirm decisions taken in foreign insolvency proceedings is the Court of Appeal with jurisdiction over the area where the person against whom the foreign decision is to be enforced is domiciled (Article 979 of CPC).

99. As follows from Article 293 of CIRE, a formal revision and confirmation of the foreign decision is required only to the extent that its enforcement is requested in Portugal. If the decision in question is invoked incidentally in a case pending before a Portuguese court, as a defence, e.g., based on the res judicata effect of the foreign decision, then such review and confirmation is not required by Portuguese law.

100. Recognising the foreign decision in Portugal means giving it full effect, including the res judicata effect, which prevents the parties from pursuing the same matter in the Portuguese courts.

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?

101. Portugal has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

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

102. The legal rules governing the effects of foreign insolvency proceedings on arbitrations based in Portugal vary according to the jurisdiction where such insolvency proceedings were filed.

103. If the insolvency falls within the scope of the EU Insolvency Regulation, Article 7 provides that the law of the State of the opening of proceedings (*lex fori concursus*) will, as a general rule, govern all the effects produced by the opening of the insolvency. However, as answered to Question 3(g) above, pending arbitration proceedings are excluded (Article 18 of the Regulation).

104. As for the countries not bound by the Regulation, and in the absence of international treaties or conventions (Article 275 (2) of CIRE), the provisions of Article 276 of CIRE apply. Under this article, the effects of the insolvency proceedings are governed by the law of the State in which the proceedings were opened.

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?

105. This issue is not expressly provided for. Still, given that recognition of foreign insolvency proceedings under the EU Insolvency Regulation is automatic and does not require any form of formalised judicial declaration, it could be argued that arbitrators seated in the EU should take

into account the opening of foreign insolvency proceedings and determine their effect on the arbitration in accordance with the choice of law rules contained in the Regulation.

106. In cases not covered by the Regulation, recognition of foreign insolvency proceedings under the CIRE requires judicial recognition. Once such recognition is obtained, the arbitrators seated in Portugal must determine its effects on the arbitration in accordance with the choice of law rules contained in the CIRE.

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

107. As there is no express legal provision on this issue, it should be understood that, in view of the automatic recognition effect of foreign insolvency proceedings under Regulation (EU) 2015/848 (article 19(1)), this takes effect in Portugal as if it were a national judgment. It is, therefore, imposed on arbitration proceedings and binds arbitration to the effects arising from article 87 of CIRE.

108. The answer is the same when article 288 of CIRE is applicable.

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

109. Article 46(3) of the LAV sets out the grounds for annulment of the arbitral award. None of the grounds set out therein expressly refers to the violation of the rules governing the effects of insolvency proceedings on arbitrations.

110. It may be understood that the award may be subject to annulment pursuant to Article 46(3)(a)(i) (the arbitration agreement is no longer valid, i.e., no longer having any effect as a consequence of the opening of the insolvency proceedings). This is also a ground for opposition to the enforcement of the arbitral award pursuant to Article 815 of the CPC. Although there is no doctrine or case law defending that insolvency rules are of international public order, we cannot exclude the possibility that a court may take a conservative view and decide to set aside an arbitral award that violates insolvency rules.

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?

111. No.