

International Arbitration & International Insolvency – Major Issues

Hon. Samuel L. Bufford
U.S. Bankruptcy Judge (Retired)



Private Law vs. Public Law

- Private law matters, parties can choose their mode of resolution of disputes
- Public law matters – state interest predominates



Jurisdiction

- Arbitration – relies on consent of the parties
- Insolvency law – state mandated procedures where some creditors will not be paid in full
- Does arbitrator lack jurisdiction where a party is involved in an insolvency case?
 - Can a court order fill this void?



Enforceability of Arbitral Award

- **New York Convention – art. 5**
 - Consent of the insolvency estate to the arbitration?
 - Arbitrable? – jurisdiction issue
 - Public policy

Insolvency Case Opened Before Arbitration Commences

- **Moratorium** – does it prevent the commencement of the arbitration?
 - Is the arbitration outside the scope of the moratorium?
 - Secured vs. unsecured creditor
 - Universal vs. territorial reach of insolvency law
 - May the arbitration panel issue a default award against the debtor for failure to participate because of the moratorium?
 - Is such an award enforceable in a State different from that where the insolvency case is pending?
- **Avoidance of the arbitration agreement** – power of administrator?
- **Funding** – does debtor need court authority to use estate funds for arbitration?

Arbitration Commences Before the Insolvency Case is Opened

- **Moratorium**
- Does it apply to arbitration agreement by the debtor?
 - Scope of national moratorium law may be limited
 - Does this issue depend on –
 - State of the seat of arbitration
 - State of arbitral administrator
 - State where the arbitration takes place
 - States where the arbitrators are from?
- Does it prevent enforcement of the award, if made before the insolvency case is commenced?
- May such an award be enforced in another State?

Arbitration Commences Before the Insolvency Case is Opened

- **Funding** of the arbitration proceeding
 - May the administrator fund a postpetition arbitration proceeding?
 - Does it require a court order?
 - Does the court have jurisdiction to issue such an order?
 - If the funding is paid before the insolvency case is opened, may administration reclaim unused funds?