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?