International Arbitration and Insolvency: What Happens to a Pending International Arbitration When An Insolvency Proceeding Is Filed Abroad?

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International Arbitrations and U.S. Law – A Brief History

- From the Perspective of the United States:
  - Strong Congressional policy in favor of enforcing international arbitration agreements (Federal Arbitration Act; New York Convention; UNCITRAL Model Law)
  - Under the FAA, arbitration agreements are enforceable unless certain limited exceptions are present
  - The U.S. Supreme Court has held that refusal to enforce international arbitration agreements "would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974).

International Arbitration v. Insolvency: Inherent Conflict

- Competing Policy Objectives:
  - Arbitration: enforcement of contractual rights vis-à-vis parties to arbitration agreement; emphasis on resolution of disputes between two parties
  - Insolvency: equality of creditors, centralization of claims, coordinated distribution of assets

Insolvency Filing: What Next?

- Does the “automatic stay” prevent arbitration from moving forward?
- Is the insolvency proceeding “recognized” by the seat of the arbitration?
- Does the insolvency filing nullify existing arbitration agreement?
- Does the insolvent party have legal capacity to proceed with arbitration?
- Whose law governs?
- Are the claims “arbitrable”?
- Do considerations of comity require courts to defer to decisions by a bankruptcy court in a foreign country regarding pending arbitration/arbitration awards?
- Who bears the costs of arbitration?
- Will decisions rendered in violation of insolvency laws be enforceable and/or recognizable?

Is the Matter "Arbitrable"?: U.S. Perspective

- What if there is a conflict between the ongoing arbitration and a federal statute (i.e., the Bankruptcy Code)?
- *McMahon Test*: United States Supreme Court articulates 3 part test used to determine whether an agreement to arbitrate a claim is enforceable
  - Does the federal statute expressly provide that arbitration is inapplicable?
  - Does legislative history indicate that permitting arbitration would conflict with the federal statute?
  - Is there an inherent conflict between arbitration and the purposes of the statute?
- *Hays and Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149 (3d Cir. 1989)
  - Court held that Congress did not intend for the Bankruptcy Code to modify the FAA.
  - Thus, the court should determine whether the third prong – conflict in purpose, prevented arbitration of non-core matters.
  - No irreconcilable conflict existed between the purposes of the Bankruptcy Code and arbitration of non-core matters, where bankruptcy courts do not have exclusive jurisdiction over such matters.

U.S. Perspective: The Core v. Non-Core Distinction

- In determining whether a particular dispute is arbitrable, courts will look first to whether the matter is “core” or “non-core”
  - “Core” Proceedings: proceedings involving rights created by federal bankruptcy law
  - “Non-Core” Proceedings: proceedings that do not invoke substantive rights created by federal bankruptcy law and that could exist outside of bankruptcy

U.S. Perspective: The Core v. Non-Core Distinction

- As a general rule:
  - Non-core matters will be subject to arbitration; and
  - Core matters will not be subject to arbitration.
    - US Bankruptcy Courts have exclusive jurisdiction over core matters; indicative of intent to preclude
- Some courts have held that Bankruptcy Courts lack jurisdiction over non-core claims where a valid arbitration agreement covers such claims
  - Such claims would have to be dealt with by the arbitral tribunal
- Other courts have refused to adopt a *per se* ban on arbitral tribunals deciding "core" claims
  - These courts do a case by case analysis to determine whether permitting arbitration of the subject claim would violate a fundamental bankruptcy policy

Outside the U.S.: The Core v. Non-Core Distinction

- Australian Courts:
  - Matters relating to the winding up of a corporation are not arbitrable.
- Swiss Courts:
  - "Core" bankruptcy claims, such as initiation of an insolvency proceeding, appointment of a trustee, determination of creditors' claims and administration of insolvency proceeding may not be arbitrable.
  - Matters "relating" to bankruptcy will generally be arbitrable.
- English Courts:
  - Courts will generally look to whether dispute engages third party rights or involves a matter of public interest
  - Insolvency proceedings that could affect third party rights and interests or involve a matter of public interest will not be arbitrable

What if Arbitral Judgment is Rendered Notwithstanding Stay Issued by US Bankruptcy Court?

- *Fotochrome, Inc. v. Copal Co., Ltd*., 517 F.2d 512 (2d Cir. 1975):
  - Foreign judgment in arbitration entered notwithstanding U.S. Bankruptcy filing and notification by U.S. debtor to tribunal of automatic stay
  - Stay did not have "extraterritorial effect" where court lacked personal jurisdiction over foreign entity
  - United Nations Convention & FAA provide for recognition & enforcement of arbitral award unless enforcement is contrary to public policy of country of enforcement
  - Public policy limitation construed narrowly – only where enforcement would violate from state's most basic notions of morality or justice
  - Ruling affirms that key in determining whether arbitration may continue, or arbitral judgment can be affirmed or enforced, is whether arbitration "would contravene a strong public policy of the forum."

In re Ashapura Minechem Ltd.: A case study on the intersection of an international arbitration award and Chapter 15 of the United States Bankruptcy Code

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Ashapura Minechem Ltd.

- Mumbai, India mining corporation
- Filed voluntary reference petition before the Board for Industrial and Financial Reconstruction.
  - Indian agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions) Act, 1985 (“SICA”).
- Foreign representative filed petition seeking recognition of SICA proceeding as a foreign main proceeding under 11 U.S.C. § 1502(4).

Opposition to Recognition Under Chapter 15

- Armada (Singapore) Pte. Limited and Eitzen Bulk A/S opposed recognition.
  - Each creditor had obtained an arbitration award against Ashapura.
    - Disputes arose under separate Contracts of Affreightment (“COA”s) for the carriage by each creditor of bauxite mined by Ashapura.
    - Disputes surrounded Ashapura’s false declaration to the government of the Indian state of Gujarat regarding where it was selling bauxite; exports eventually blocked.

Opposition to Recognition Under Chapter 15

- Gujarat government action led to Ashapura breach of COAs.
- Eitzen and Armada sought to proceed under arbitration clause of COAs; commenced arbitration proceedings in the UK.
  - Rather than defend arbitrations, Ashapura commenced proceedings in India based upon assertion that COAs were void under doctrine of *force majeure*.
  - Indian courts eventually frustrated Ashapura's efforts to enjoin arbitration.

Arbitration Awards

- Ashapura continued to decline to participate in arbitrations.
  - Eitzen awarded $37 million; Armada awarded $65 million.
    - Each creditor converted arbitration award into U.S. judgment against Armada.

“Resistance and Evasion of Payment”

- After arbitration awards were converted to judgment, Ashapura engaged in a pattern of “resistance and evasion of payment, played over a world-wide canvas.” *Eitzen Bulk A/S v. Ashapura Minechem Ltd.*, No. 08-Civ.-8319 (AKH) (S.D.N.Y. 2010).

Chapter 15 Proceeding

- Eitzen and Armada asserted that the SICA filing comprised part of series of filings in various Indian courts designed to stall payments.
  - No standing to seek SICA protection.
  - Ashapura was not “sick.”
- Bankruptcy court denied motion for preliminary injunction pending recognition hearing, but ultimately granted recognition.

Chapter 15 Proceeding

- 11 U.S.C. § 1517 “does not call for the exercise of much discretion by the bankruptcy court.” *In re Ashapura Minechem Ltd*., No. 11-14668 (JMP).
  - SICA statute not manifestly contrary to the public policy of the United States.
  - Recognition came with admonition that periodic status conference would be held every 60 days.

Dismissal / Current Status

- Chapter 15 case was dismissed after Ashapura failed to comply with conditions in Court order requiring full participation for Eitzen and Armada in SICA proceeding.
- SICA proceeding still is pending; Eitzen and Armada continue to try to collect on judgments.