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A REPORT ON #YOUNGITATALKS "ARBITRATION & INSOLVENCY: WHEN THEORY MEETS PRACTICE"

by Alicia Yeo

I. INTRODUCTION

In October 2021, the young practitioners' group of the Institute for Transnational Arbitration ("Young ITA") held a virtual webinar to explore the practical issues that arise at the intersection of insolvency and arbitration, from both Brazilian and US law perspectives. This panel was the closing event of São Paulo Arbitration Week. It presented insights on arbitration and insolvency from the perspectives of lawyers involved in shaping its practice and discussed recent developments in the area (such as the newly published International Bar Association ("IBA") Toolkit on Insolvency and Arbitration and the new Brazilian Bankruptcy Act).

Moderated by Young ITA's North America Chair Lídia Rezende (Chaffetz Lindsey, New York), the panel discussion centered on three topics that often arise in the international arbitration and insolvency space: (1) the right to initiate arbitration when insolvency procedures are involved; (2) the viability of arbitration proceedings brought by insolvent parties, particularly with regard to security for costs; and (3) the enforceability of arbitral awards. The panelists were Ruth Teitelbaum (Arbitrator, Mediator and Advisor, New York), Eduardo A. Mattar (Padis Mattar Advogados, São Paulo), Jennifer Permesly (Skadden, New York), and André Luis Monteiro (Quinn Emanuel, London).

They offered a breadth of experience across a range of different jurisdictions and professional backgrounds. Monteiro is Of Counsel at Quinn Emanuel and a former Visiting Scholar at Queen Mary University of London. Teitelbaum currently practices as arbitrator and mediator in international arbitrations but was previously Head of Underwriting at a hedge fund. Mattar, founding partner of Padis Mattar Advogados, focuses on arbitration, insolvency, and special situations, and is a restructuring expert. Permesly, partner in the International Litigation and Arbitration Group of Skadden, is also co-chair of the IBA's Insolvency and Arbitration Group.

II. TOPICS OF DISCUSSION

A. *The Right to Arbitration*

The first question addressed by the panel was whether the initiation of insolvency procedures against a party is capable of precluding the right of that party to initiate arbitration proceedings.

Permesly provided a primer to this layered and complex question, with a focus on the US perspective.

She explained that the insolvency regimes in various jurisdictions do indeed purport to preclude arbitration where the insolvency process has already begun. However, it is unclear whether insolvency rules applying in one jurisdiction must be followed or considered by arbitrators acting in other jurisdictions. The IBA was particularly interested in this question and sought to provide guidance to practitioners in the IBA Toolkit on Insolvency and Arbitration, the development of which Permesly oversaw as co-chair of the IBA's Insolvency and Arbitration Group.

Structurally, the right to arbitration tends to derive from an entirely different statute or set of rules from insolvency regimes across various jurisdictions. In the US, for instance, arbitration operates under a very strong federal preference for arbitration per the Federal Arbitration Act ("FAA"). Yet, the US insolvency regime is under a different statute with a very strong policy rationale that seeks to provide a single forum for the resolution of creditors' claims relating to an insolvent entity. Quoting from the court in *In re Bethlehem Steel Corp.*, she notes that there are sometimes disputes involving both the Bankruptcy Code and the FAA which will present a conflict of "near polar extremes," whereby bankruptcy policy exerts an "inexorable pull towards centralization" while arbitration policy advocates for a "decentralized approach towards dispute resolution."[1] As such, the US and other jurisdictions across the world have struggled to strike the right balance when it comes to reconciling these two seemingly irreconcilable areas of law. Permesly summarized the four general approaches taken by various jurisdictions surveyed by

[1] *In re Bethlehem Steel Corp.*, 390 B.R. 784 (Bankr. S.D.N.Y. 2008)

the IBA's Insolvency and Arbitration Group, noting that the approaches tended to diverge greatly. The IBA ultimately recommended that arbitrators should first consider the default position in the jurisdiction regulating the insolvency, then assess that position's impact on the right to arbitration.

Monteiro then gave an overview of Brazil's recently updated approach to arbitration and insolvency. Brazil's new Bankruptcy Act came into force in January 2021. Notably, the new rules acknowledged the intersection between arbitration and insolvency—an overlap which was not acknowledged in the previous iteration of the Brazilian Bankruptcy Act or the Brazilian Arbitration Act. Monteiro also explained that the new laws took a rather liberal and arbitration-friendly approach, highlighting two particular provisions.

First, Article 6, paragraph 9 provides that a preexisting arbitration agreement is not discharged by the initiation of insolvency proceedings. As such, liquidators or trustees cannot discharge a pre-existing arbitration agreement when the insolvency process begins, nor is it necessary to seek the court's permission to enforce the arbitration agreement against an insolvent party. Neither creditors nor insolvent parties are prevented from commencing or continuing arbitration proceedings after judicial reorganization or winding up orders are issued. Monteiro noted that the position taken by Article 6, paragraph 9 codified the approach already followed by the courts in case law.

Second, Article 22, paragraph III(c) provides that a trustee or liquidator will take over the management of the estate's legal representation in court proceedings and arbitrations. Upon the issuance of winding up orders, the trustee/liquidator will be able to manage legal affairs—it may choose to hire lawyers, replace lawyers, discuss potential settlements, and other such actions. However, Monteiro emphasized that this change does not stay ongoing arbitration proceedings, which will otherwise continue.

B. *Viability of Arbitration Proceedings*

Rezende then steered the discussion towards how parties decide whether to initiate arbitration proceedings at all. What factors parties that are in insolvency proceedings or nearing insolvency usually consider when deciding whether to file for arbitration? Who makes the decision to initiate arbitration proceedings? Does an insolvent party need funding to initiate arbitration proceedings?

Mattar, informed by his experiences as restructuring counsel, provided insight from a Brazilian perspective. He noted that counterparties to the debtor in liquidation or arbitration proceedings are unlikely to be recognized as creditors by bankruptcy courts if there is not already an arbitral or other judicial award acknowledging the debt they are owed. As such, these counterparties are disincentivized from staying arbitration or liquidation proceedings.

On the question of who decides whether to initiate arbitration, Mattar explained that the decision generally falls to (i) the debtor-in-possession, or (ii) the debtor's trustee, receiver, or administrator if it is no longer in possession. Mattar noted that Brazil takes a very liberal approach with regard to what a debtor-in-possession can do, as its decisions do not require approval from the courts. For the second scenario, Mattar explained that liquidation proceedings in Brazil (somewhat equivalent to Chapter VII proceedings in the US) mean that the debtor is separated from its assets and liabilities—consequently, these assets and liabilities are under the management of said trustee, receiver, administrator or equivalent. That entity is charged with deciding how to manage disputes. It may decide to take over arbitration proceedings already in place or to start new arbitration proceedings.

Whether an insolvent party needs funding to initiate arbitration proceedings depends on how the funding is structured, both for reorganization and liquidation proceedings. If the funding is structured in a manner whereby it only considers the financing of the insolvent debtor to bear the costs of the dispute, then the court's approval is not required—debtor-in-possession logic applies. For liquidation proceedings, the court's approval is not a requirement but is generally recommended. If the financing can be considered a transfer of assets (as opposed to granting the funder the right to participate in the claim), then court authorization may be needed for judicial reorganization and certainly needed for liquidation.

Teitelbaum added a further dimension to the picture by explaining the decisionmaking process for potential funders, having previously worked as Head of Underwriting at a third-party funder. She defined "third-party funding" as non-recourse capital from a capital provider which is not a part of the existing capital structure of the company involved in insolvency proceedings or a dispute. "Non-recourse" means that if the claimant does not win or obtain a form of monetary settlement, the funder receives no repayment. In the context of insolvency, liquidators may seek third-party funding where existing shareholders of the company are unable or unwilling to finance legal claims, including international arbitration claims, which would be a source of funds for distribution among creditors.

Teitelbaum observed that there are many ways for a funder to lose, even if the claimant wins. On a basic level, the cost and time required to monetize a claim may mean the funder would have been better off investing in something less risky. Additionally, the funder also loses out if the respondent actually has no attached assets or is otherwise unable to pay. Furthermore, the funder's ability to collect the proceeds of a dispute is affected if there is a flaw in the funding transaction or intravenous circumstances such that the funder is unable to secure its share of the claim proceeds. If there are accusations of fraud relating to the transaction, this can also affect the funder's ability to recover its share. For example, Argentina accused Burford Capital and the claimants of fraud in *Teinver* S.A., *Transportes de Cercanías* S.A. *and Autobuses Urbanos del Sur* S.A. *v. Argentine Republic.*[2]

In the context of insolvency, a key issue is who owns or controls the claim. An important covenant made by the claimant (*i.e.* the recipient of the funds) in a funding agreement is that the claimant actually owns the claim and that no one else has a lien on the claim. If reorganization occurs and the claimant loses ownership of the claim to another entity and that entity is not party to the funding agreement, the funder may have issues recovering its proceeds. As such, funders must weigh the risks of loss of ownership occurring when deciding whether to provide funding.

Additionally, funders consider whether they are willing for the funding agreement

[2] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic, ICSID Case No. ARB/09/1, Decision on Annulment (May 29, 2019).

to become public record. Funding agreements approved by courts will become part of the record—this means there will be a disclosure of the funding agreement itself, rather than a mere disclosure of the existence of funding.

Teitelbaum observed that there are two current trends in this area. First, some funders appear more likely to take on significant risk by purchasing bankrupt companies, which allows control but requires the funders to provide significant capital. She noted that this arguably might not even qualify as third-party funding. Second, other funders are heading in the opposite direction—they avoid any direct relationship with the insolvent party or claim itself, and instead fund law firms through portfolio financing or other routes. This avoids issues of governance and ownership of claims but raises some ethical issues for the lawyers involved.

Rezende then turned the discussion towards security for costs. She asked the panelists what factors are normally considered by tribunals when deciding on applications for security for costs.

Monteiro explained that, generally, if it seems likely that the claimant will not be able to pay adverse costs award, tribunals usually allow the respondent to apply for security for costs. The mere fact that a claimant has obtained funding from a third party does not necessarily mean that there is a material deterioration in the claimant's finances. The significance of the third-party funding depends on why the claimant sought such funding—financially stable claimants may also choose to share risk and liquidity through such arrangements. While the answer might be found in the funding agreement, parties often have concerns about the disclosure of such agreements, as also alluded to by Teitelbaum. Where the party seeking security for costs was already aware that the insolvent party was struggling financially, arbitrators may also consider that the former should not be awarded security for costs, since it knowingly took on the risk of suing an insolvent party. In this case, the question being asked is, "Who took the risk at the beginning of the commercial or business relationship?"

Mattar took this further and clarified that the fact that the debtor is in insolvency proceedings does not mean that security for costs is required—a common misconception. In fact, this might even indicate that the tribunal should not award security for costs. This is because once the debtor is in judicial reorganization or liquidation proceedings, the debtor's pre-existing and ongoing obligations are protected against pre-petition claims to enable the debtor to comply with those ongoing obligations. Financing a pre-existing arbitration dispute falls within this category of protected obligations—priority is given to administrative expenses arising from the need to defend its own interests. However, Mattar cautioned that this is still case-specific. Some insolvent companies may not be able to foot arbitration bills or have empty estates.

To round off this segment of the discussion, Teitelbaum gave an overview of current trends relating to security for costs. On one hand, the number of applications for costs involving insolvency proceedings has increased. However, this has not been met with an equal increase in the number of decisions from tribunals awarding such costs. In Teitelbaum's view, it is likely that there will be increased demand for transparency in funding disclosure and a greater possibility that claimants will have to post security. She noted, however, that the current case law on security for costs is troubling—there is still no coherent view or policy on the role arbitrators should play in deciding the post-award priority of creditors. The lack of a coherent policy creates significant uncertainty and makes international arbitration more costly for all involved. Third party funders are more likely to need to obtain expensive insurance policies, which increases the share of proceeds they will take from the claimants.

Teitelbaum used the tribunal's decision in *Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex v. Turkmenistan* as a case study to demonstrate the issues arising in the context of third-party funding and security for costs applications.[3] In *Unionmatex*, the majority of the tribunal initially ordered the claimant to post US$3 million in security at the request of the respondent, on the basis that the funding agreement stated the third-party funder was not liable for any adverse costs award. Shortly after, the claimant proved incapable of complying with the order to post security. On the basis of denial of justice concerns, the tribunal

[3] Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35 (2018).

then decided to rescind its initial order for security for costs and allow the arbitration to proceed. Teitelbaum noted that the tribunal seemed dismayed or surprised that the funder did not simply put up the US$3 million, which showed that they lacked understanding of how costly the capital is—the true cost to the claimant is much higher than US$3 million, as the claimant likely had to give up a large portion of the potential proceeds in order to obtain such funding (considering its poor bargaining position as a bankrupt entity going up against a foreign sovereign).

To Teitelbaum, this case demonstrated that arbitrators lack a coherent view of their role in relation to security for costs in an insolvency context, as they seem to engage in potentially inappropriate prejudgment of the creditworthiness of the parties in order to make these decisions. She predicts that the coming years will see a rise in arbitrator challenges on the basis of their security for costs decisions, as the reasoning provided often is opaque or not strong enough.

C. *Enforceability of Awards Involving Insolvent Parties*

The panel then turned to what happens once an arbitration award is actually issued.

The first issued raised by Rezende was how tribunals can ensure the enforceability of their awards, in the context of parallel insolvency proceedings conducted in jurisdictions different from the seat of arbitration.

Permesly began with a reminder that the overarching principle of arbitration is to issue an enforceable arbitration award, so arbitrators must consider how the award may be stymied by insolvency proceedings. She noted that there are generally two schools of thought, both of which tend to be extremes—one is too deferential to bankruptcy courts and the other does not pay sufficient heed to the insolvency proceedings.

Drawing on her experience with the IBA Toolkit, Permesly noted that one similarity among all the jurisdictions the IBA Insolvency and Arbitration Group surveyed was that an arbitration award is not automatically enforceable if insolvency proceedings are ongoing—the award will at least need to be brought before a court, whereby the winning party will receive the same consideration as any other creditor in the insolvency proceedings. In other words, an arbitration award does not allow a creditor to circumvent insolvency proceedings via the New York Convention's enforcement mechanisms to receive payment before all other creditors.

A creditor may be able to enforce the arbitration award in other jurisdictions beyond the jurisdiction where the insolvency proceedings are taking place. However, the court assessing the enforcement action will have to carefully consider conflict of laws and public policy issues which arise where insolvency proceedings are ongoing elsewhere.

Permesly then helpfully walked through the IBA Toolkit's checklist for practitioners, which contained a comprehensive list of questions to guide practitioners in ensuring that the arbitration award at hand is enforceable. This checklist can be found in the Annex of the Toolkit.

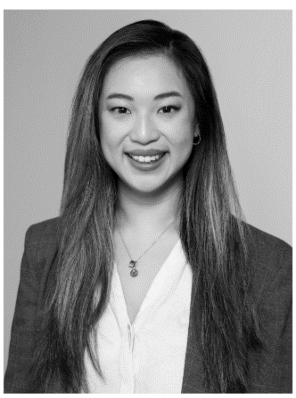
Related to the enforceability of arbitration awards is the question of whether third-party funders can secure payment from arbitration awards where insolvency is involved. On this point, Teitelbaum advised that the clearest solution is for the funder to already have priority in the debt structure. Otherwise, the priority and timing of pay-out from the award proceedings is likely very precarious.

Additionally, Mattar provided insight on how one should handle offsetting in relation to the arbitration award where this might impinge on the priority of creditors in insolvency proceedings. Rezende asked what tribunals ought to do in a situation whereby a claimant's claims and a respondent's counterclaims are both at least partially granted and there would ordinarily be an offset, except one party is subject to insolvency proceedings. Should the tribunal allow an offset? If so, what does this mean for the priority of creditors in the bankruptcy proceedings?

Mattar's answer as to whether a tribunal should allow the offset is that it depends on how the substantive law gives effect to the co-existence of a debt and a credit between two parties. In Brazil, the off-setting is automatic—if the tribunal determines before judicial reorganization or liquidation that there is indeed credit for the claimant against the respondent and vice versa, this will be off-set at that point. However, if the insolvent debtor has credit against the counterparty where there was no debt before the arbitration claim was filed, but the debt was declared in the course of the arbitration proceedings, then the claim is considered pre-petition and the debt is post-petition. In that case, there should not be an offset. Mattar noted that the question of whether the arbitration claim was brought pre-petition or post-petition is one for the bankruptcy court to determine, not the tribunal.

III. CONCLUSION

In the course of the discussion, the panelists explored the various points of tension and overlap between arbitration and bankruptcy, focusing on Brazil's and US' perspectives. They covered issues across the lifecycle of arbitration proceedings—beginning with the right of arbitration, the panel then moved to the viability of arbitration proceedings and ended on the enforceability of arbitration awards. Complete with an overview of recent developments in the arbitration and bankruptcy space, this webinar provided a comprehensive introduction to a complex and interesting area of practice.



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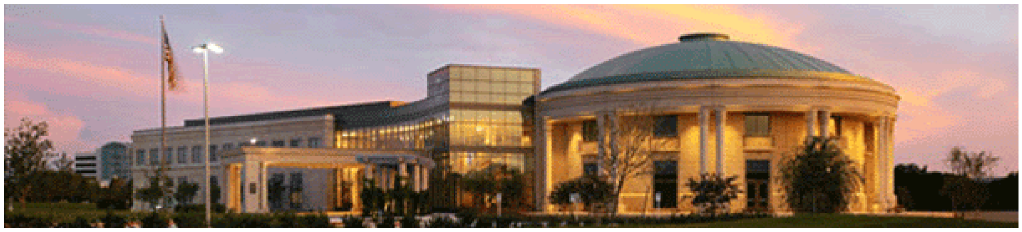

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