26th Annual ITA Workshop: Young Arbitrators Dallas Roundtable

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The Institute for Transnational Arbitration (ITA) held its 26th Annual ITA Workshop in Dallas, Texas on June 18-20, 2014. This year's ITA Workshop, titled "Modern Enforcement of Arbitral Awards: 'Show Me the Money,'" covered a range of recent developments and strategic considerations relating to the enforcement of arbitral awards.

To kick-off this Workshop, the ITA Young Arbitrators Initiative Committee presented the Young Arbitrators Dallas Roundtable on June 18th. The Roundtable was divided into two panels, each consisting of three experienced international arbitration practitioners.

Valeria Galíndez, Counsel at Uría Menéndez in São Paulo and Chair of the ITA Young Arbitrators Initiative, moderated the first panel titled "Enforcement Against Bankrupt/Insolvent Companies." This panel discussed the intersection of bankruptcy/insolvency proceedings and arbitration, focusing particularly on the issues that parties face in arbitral proceedings.

Jennifer Gorskie, a Partner at Chaffetz Lindsey in New York, outlined the approach U.S. courts take in deciding whether to stay an arbitration due to a pending bankruptcy proceeding. She explained that U.S. courts will usually stay arbitral proceedings when there is an insolvency, but may decide to lift the stay after assessing whether or not the issue in the arbitration impinges on a "core bankruptcy right." Ms. Gorskie observed that given the U.S.'s fundamental policy in favor of arbitration, there is only a conflict with core bankruptcy rights in certain circumstances. Moreover, she noted that there is no automatic stay if the debtor or trustee brings the arbitration.

Ms. Gorskie also discussed whether arbitration is a viable means for addressing cross-border insolvency.

John Adam, an Associate at Latham & Watkins in Paris, explained that bankruptcy proceedings can have a very real impact on due process, and thus on the enforceability of an arbitral award under the New York Convention. In his remarks, he focused on two aspects of due process: notification and participation. Mr. Adam emphasized that notification can be difficult given the changes brought about by an insolvency, such as the introduction of a trustee. Regarding participation, he noted that there may be due process concerns if the trustee cannot participate in the arbitral proceedings, and suggested that a tribunal may grant a stay or an extension of time, depending on the circumstances.

Mr. Adam also highlighted certain choice of law issues that tribunals may face when there is an insolvency, and used the Elektrim/Vivendi cases as an example.

Montserrat Manzano, an Associate at Von Wobeser Y Sierra in Mexico City, addressed whether the cost of arbitral proceedings can serve as a basis for an insolvent company to avoid an arbitration agreement. She stated that there is no straightforward solution and discussed the approaches taken in different jurisdictions, including Mexico and France. Ms. Manzano also considered whether an arbitration should proceed if an insolvent party refuses to pay its share of the costs. She concluded that the insolvent party or trustee must be afforded the opportunity to present its case, and that there may be due process concerns if the insolvent party or trustee cannot bring counterclaims.

Ank Santens, a Partner at White & Case in New York, moderated the second panel titled "Provisional Measures to Secure Enforcement." In introducing this topic, Ms. Santens noted the increasing importance of this subject. She stated that 15 years ago, the default assumption was that an award would be paid when it was rendered. But, she noted, one can no longer have that assumption, given recent attempts by losing parties to annul or resist the enforcement of awards.

Natalie Reid, who will become a Partner at Debevoise & Plimpton in New York effective July 1st, addressed what parties and counsel should think about with respect to provisional measures when drafting an arbitration agreement and prior to commencing an arbitration. She contended that a party should contemplate provisional measures in aid of enforcement from the start, and emphasized that strategic thinking is key. Ms. Reid presented several considerations that a party should have in mind when drafting an arbitration agreement, including whether the right entities will be bound, what type of relief it may seek in the future, where it may need to seek provisional measures, and whether there are any legal requirements for obtaining such relief. She stressed that during the drafting phase, it is important for a party to keep its options open as much as possible.

Ms. Reid recommended that prior to commencing an arbitration, a party should first engage asset tracers to locate the assets, and then seek provisional measures either prior to or when filing its request for arbitration.

Viren Mascarenhas, who was a Senior Associate at Freshfields Bruckhaus Deringer and will be joining King & Spalding as Counsel in New York in August, outlined considerations for drafting an arbitration agreement with a state, particularly with respect to sovereign immunity issues. He noted that the U.S. Foreign Sovereign Immunities Act (FSIA) permits the pre-judgment attachment of assets if the state has explicitly waived its immunity to pre-judgment attachment. However, he cautioned that even if a party obtains this explicit waiver, it still needs to satisfy other provisions within the FSIA, such as the commercial assets requirement.

Mr. Mascarenhas also discussed obtaining provisional measures from arbitral tribunals to secure enforcement. He explained that certain institutional rules provide avenues for seeking provisional measures prior to the constitution of the arbitral tribunal, such as the emergency arbitrator provisions in the SCC and SIAC Rules. He stated that nevertheless, a party may still need to go to court depending on the mandatory law and in cases where third parties are involved in securing assets.

Cecilia Flores, Of Counsel at Haynes and Boone in Mexico City, highlighted what courts can do to aid in the enforcement of arbitral awards. She first discussed a case from a Collegiate Court in Mexico, which had upheld an ex parte provisional measure from an arbitral tribunal because it determined that the right to be heard does not apply if it would affect the purpose of the provisional measure. Ms. Flores then described a second case from Mexico, where a court granted interim measures of protection over the subject-matter of an arbitration, after a private party had asked the court to appoint a single arbitrator and prevent a port administrator from terminating the contract between the parties. In concluding, she suggested that courts and tribunals should work together to give parties effective relief.