INTERNATIONAL COMMERCIAL ARBITRATION

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Arbitration is the dispute resolution mechanism of choice in the expanding world economy. Increasingly global business disputes are settled not in courts but in private tribunals run by arbitrators chosen by the litigants and dominated by American lawyers. The forces behind this phenomenon, the advantages and disadvantages of arbitration versus litigation, and the development of new Illinois international arbitral institutions and laws are outlined below.

I. CONVERGING TRENDS SPUR INTERNATIONAL ARBITRATION

A. Growth of Global Economy

1. Rapid expansion of international trade, especially after Cold War

2. Free market policies increasingly influenced by private actors

B. Growth of Alternative Dispute Resolution

1. Broad acceptance of arbitration and mediation--replacing skepticism in U.S. and (for example) hostility in Latin America

2. Private regimes versus public judicial systems

C. New Arrangements Formed Outside Nation States

1. Multilateral economic institutions--e.g., WTO, EU, NAFTA, ASEAN, MERCOSUR, IMF, ICSID, OECD, WIPO, FTAA (proposed)

2. Supranational legal standards--e.g., UN Convention on Contracts for the International Sale of Goods (CISG), UNCITRAL, Hague Conventions on Service and Evidence

3. Non-governmental entities, led by capital markets and multinational corporations

II. COMPARISON OF INTERNATIONAL LITIGATION AND ARBITRATION

A. Characteristics of Litigation

1. Fairness and competence of national courts (varies by country)

a) Impartiality, independence, professionalism, openness

b) Adherence to law, procedural and evidentiary rules (ongoing ALI project on Principles and Rules of Transnational Civil Procedure to "harmonize" law)

c) Correct through appeals--Dean v. Sullivan, 118 F.3d 1170, 1173 (7th Cir. 1997) (choice of arbitration entails trade-off)

d) Civil juries in U.S. (7th Amendment)

2. Jurisdiction and choice of law issues

a) Process; Rule 4, F.R.Civ.P. and Hague Service Convention

b) Divergent views on long-arm and extraterritoriality

c) Parallel litigation where jurisdiction in multiple forums; forum non conveniens and comity

d) Sovereign immunity--Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-11

e) Choice of law; conflict of laws

f) Illinois Choice of Law and Forum Act, 735 ILCS 105/5-1

3. Ability to handle multiparty disputes, provide for provisional measures

4. Breadth of pretrial discovery

a) Critical in certain cases (fraud, antitrust, intellectual property)

b) Foreign antipathy (blocking statutes); cost

5. Speed and cost--court calendars, discovery, appeals

6. Enforcement of foreign judgments

a) Comity: Hilton v. Guyot, 159 U.S. 113 (1895) (foreign judgment should be held conclusive, except if affected by fraud or prejudice, or contrary to principles of international law); International Nutrition Co. v. Horphag Research, Ltd., 257 F.3d 1324 (Fed. Cir. 2001) (according comity to French court

decision on patent ownership)

b) Uniform Foreign Money-Judgments Recognition Act, 735 ILCS 5/12-618 et seq. (determines "conclusiveness" and provides for enforcement of judgments entered outside U.S.); La Societe Anonyme Goro v. Conveyor Accessories, Inc., 677 N.E.2d 30 (Ill. App. Ct. 2 Dist. 1997) (seven-year limitations period that applies to enforcement of sister-state judgment applies equally to enforcement of French foreign judgment); Restatement (Third) of Foreign Relations, § 481 (1987)

c) Uniform Foreign-Money Claims Act, 735 ILCS 5/12-630 et seq. (governs claims expressed in or measured by a foreign currency)

d) Brussels (1968) and Lugano (1988) Civil and Commercial Judgments Conventions in Europe

e) Hague Convention on Recognition and Enforcement of Judgments--1971 (never ratified), reconvened in 1997; ALI International Jurisdiction and Judgments Project

f) No foreign judgments convention or U.S. bilateral treaties

B. Characteristics of Arbitration

1. Predictability and neutrality--place, governing law, procedural rules, scope, parties, language, no jury, no appeal (finality)

2. Tailored to needs of contracting parties, including confidentiality and selection of decisionmaker with special qualifications or expertise

3. Speed and cost--shorter time limits, simplified procedures, less discovery, less likely to be precedential, limited appeals (unless parties agree otherwise, Lapine Technology Corp. v. Kyocera Corp., 130 F.3d 884 (9th Cir. 1997)), fee-shifting

4. Somewhat less adversarial because more limited and private; may impact less on business relations

5. Enforcement of foreign arbitral awards

a) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), 9 U.S.C.

§§ 201-8; Restatement (Third) of Foreign Relations, §§ 487-8 (1987); approved in 1958, 115 nations are now signatories

b) Inter-American Convention on International Commercial Arbitration ("Panama Convention"), immediately following 9 U.S.C. § 301; approved in 1975

c) New York Convention exclusive grounds for refusing enforcement of arbitral awards rendered in foreign jurisdictions: incapacity; inadequate notice; award beyond scope; composition of arbitral authority; award not yet binding; subject matter not arbitrable; award against public policy; Yusef Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997)

d) FAA adds two grounds for vacatur of U.S. arbitration awards: manifest disregard of the law or the agreement; Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998)

e) Cases enforcing foreign arbitral awards: First State Insurance co. v. Banco de Seguros del Estado, 254 F.3d 354 (1st Cir. 2001) (confirming two awards under New York Convention); Industrial Risk Insurers v. M.A.N. Gutenhoffnungshutte GmbH, 141 F.3d 1434 (11th Cir. 1998) (applying New York Convention and rejecting procedural and policy arguments for setting aside); Generica Ltd. v. Pharmaceutical Basics, 125 F.3d 1123 (7th Cir. 1997) (confirming award where respondent was able to "present its case" despite curtailment of cross-examination); Lander Co. v. MMP Investments, Inc., 107 F.3d 476 (7th Cir. 1997) (applying New York Convention to arbitration between two domestic parties calling for performance in a foreign country); Bergesen v. Joseph Muller Corp., 710 F.2d 929 (2d Cir. 1983) (enforcing award in arbitration between two foreign entities under New York Convention); Productos Mercantiles E Industriales, S.A. v. Faberge USA, 23 F.3d 41 (2d Cir. 1994) (enforcing award under Panama Convention); CBS Corp. v. WAK Orient Power & Light Ltd., 168 F. Supp.2d 403 (E.D. Pa. 2001) (arbitral award did not go beyond agreement and was not against public policy; attempt to register Pakistani court judgment enjoined); Space Systems/Loral, Inc. v. Yuzhnoye Design Office, 164 F. Supp.2d 397 (S.D.N.Y. 2001) (court considered, but rejected, defendants' argument that arbitrators had manifestly disregarded law)

f) Refusals to enforce foreign arbitral awards: Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16 (2d Cir. 1997) (vacating award where refusal to continue hearing certain evidence amounted to fundamental unfairness and misconduct); Iran Aircraft Industries v. AVCO Corporation, 980 F.2d 141 (2d Cir. 1992) (refusing enforcement where respondent denied opportunity to present claim in meaningful manner); Fiat S.p.A. v. Ministry of Finance and Planning of Republic of Suriname, 1989 WL 122891 (S.D.N.Y.) (vacating award against party which had not signed arbitration agreement)

C. U.S. Case Law on Foreign Legal Systems and Arbitrability

1. "The expansion of American business and industry will hardly be encouraged if . . . we insist on a parochial concept that all disputes must be resolved under our laws and in our courts . . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)

2. U.S. presumption in favor of arbitration: Moses H. Cone Memorial Hospital v. Mercury Construction corp., 460 U.S. 1, 24-5 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (federal securities acts); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (federal antitrust); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (securities laws and RICO); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1990) (securities laws); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (ADEA age discrimination)

3. Some limitations--patentability (Ballard Medical Products v. Wright, 823 F.2d 527, 531 (Fed. Cir. 1987), but see, Columbia University v. Roche Diagnostics GmbH, 150 F. Supp.2d 191 (D. Mass. 2001)), employment discrimination, family relationships, public or political disputes

III. ARBITRATION INSTITUTIONS AND ALTERNATIVES

A. Administered versus Ad Hoc Arbitrations

1. Leading arbitral institutions: International Chamber of Commerce and Court of Arbitration (Paris, www.iccwbo.org), London Court of

International Arbitration (London, www.lcia-arbitration.com), American Arbitration Association (New York, www.adr.org); regional

2. Rules: UNCITRAL Model Arbitration Rules (www.un.or.at/uncitral), Center for Public Resources Institute for Dispute Resolution (www.cpradr.org), draft ALI Transnational Rules for Arbitration (www.ali.org), or other designated rules

3. Ad hoc--including appointing authority and rules

B. Chicago International Dispute Resolution Association (CIDRA)

1. World Trade Center Chicago (1540 Merchandise Mart); rules, forms, arbitrators/mediators/experts on website (www.cidra.org); online facility (www.onlineresolution.com); consent awards for mediations

2. CIDRA Rule 1: Early pre-hearing conferences; early refinement of issues; establishment of expeditious schedules; discouraging wasteful pre-hearing activities; thorough arbitrator preparation; using available technology; encouraging settlement where appropriate

IV. ILLINOIS LEGAL FRAMEWORK

A. Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

B. Illinois (Uniform) Arbitration Act, 710 ILCS 5/1 et seq.; Uniform State Law Commissioners began meeting in 1997 on revision of the 1955 Uniform Act

C. International Commercial Arbitration Act, 710 ILCS 30/1-1 et seq.

1. UNCITRAL Model Law on International Commercial Arbitration (1985) (www.un.or.at/uncitral)

2. Party autonomy, default rules, limited judicial intervention to break deadlocks; facilitates international commercial arbitrations in Illinois

3. Baugher and Austermiller, "A New Way to Resolve International Business Disputes in Illinois," 88 Ill. Bar Journal 582 (Oct. 2000)

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