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ICA AND THE WRITING REQUIREMENT: FOLLOWING MODERN TRENDS TOWARDS LIBERALIZATION OR ARE WE STUCK IN 1958?

Article 7 of the Model Law was revised in 2006 to liberalize any requirements of form, consistent with modern commercial practices and modern legal trends reflected in national laws. To the extent adopted by national legislatures, either of the two available options under this revision will effectively eliminate any requirement of a “record of consent,” thus making arbitration agreements more easily enforceable in the adopting jurisdiction. However, any such revision of national laws on arbitration based on the revisions of Article 7 of the Model Law will not necessarily have any effect on enforcement of awards in other jurisdictions under the New York Convention of 1958. Thus, the revision of the Article 7 of the Model Law presents a very real possibility that an arbitral tribunal seated in a jurisdiction adopting these revisions may accept jurisdiction over a dispute and render an award that might not be enforceable in other jurisdictions because it fails to meet the requirements of Article II of the Convention.

In an effort to preempt this issue, in conjunction with its promulgation of the 2006 revisions of the Model Law, UNCITRAL also adopted a resolution making specific recommendations regarding the interpretation of the Convention. While undoubtedly of some persuasive value, these recommendations do not, however, carry the same force as the actual language of the Convention itself. Thus, the international commercial arbitration community faces a dilemma. Should national legislatures adopt revised Article 7? How should national courts interpret the Convention? Should an effort be mounted to draft a parallel convention on enforcement of arbitral awards?

This paper addresses these questions by evaluating the revisions of Article 7, in the context of the well established principles of competence-competence (both negative and positive) and separability, and suggests that, perhaps, the limits of Article II may be quite appropriate as long as arbitration remains a regime based on actual “consent.” However, the paper further suggests that perhaps the normative circumstances most frequently advanced in arguing for liberalization of the writing

requirement actually dictate that arbitration should today be treated as the default regime for resolution of international commercial disputes. The paper concludes with a brief discussion of a regime in which international commercial arbitration functions as the default, in the absence of any agreement by the parties on dispute resolution.

Key words: *International Commercial Arbitration – Writing requirement – Consent – Default – Separability – Enforcement*

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ [hereinafter *Convention*] is, by almost any measure, an overwhelming success. In 144 countries that are party to this Convention, foreign arbitral awards are enforced with relative ease and efficiency, subject only to a narrow set of specific and well defined exceptions.² However, the application of the Convention is limited, under Article II, to “agreements in writing.”³ Article II further defines “agreements in writing” in terms of two requirements: (1) a written arbitration agreement—either contained in a broader contract⁴ or as a standalone arbitration contract; and (2) a signature or exchange of correspondence.⁵ The first can be characterized as a requirement of a “record of content” and the second as a requirement of a “record of consent.”

Despite its record of success, the Convention has been increasingly criticized as outdated and no longer reflective of modern commercial practices or modern national laws governing arbitration of commercial disputes. During the fifty years since the conception of the Convention, arbitration has become far more commonplace—arguably rising in acceptance from the occasional, to the frequent, and even to the dominant method of dispute resolution for parties to international commercial agreements.⁶ As a result, the cautionary and evidentiary functions inherent in Article II appear largely out of place today.⁷

¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 7 I.L.M. 1042 [hereinafter *Convention*].

² See Article V of the Convention.

³ While Article VII arguably allows for the application of portions of the Convention, in combination with portions of more liberal national law, see *Convention* at 3, the full application of the Convention alone is so limited.

⁴ This broader contract is often called the “container” contract.

⁵ Admittedly, some variations of this characterization exist. However, this characterization may fairly be characterized as a strong majority approach to interpreting the intended effect of the original text. Additionally, the original language was limited to an exchange of letters or telegrams, but such terms are almost universally read to include most, if not all, forms of modern correspondence.

⁶ Admittedly, there is little empirical data on this last point, but the assertion is so often made by commentators that it would appear to be accepted as fact today.

⁷ Much has been written on this issue, suggesting that the formal writing requirement is both obsolete and overly burdensome in modern commercial practice. See, e.g.,

Until quite recently, Article 7 of the UNCITRAL Model Law on International Commercial Arbitration [hereinafter *Model Law*]⁸ mirrored Article II of the Convention.⁹ However, Article 7 of the Model Law was revised in 2006¹⁰ to liberalize any requirements of form, consistent with modern commercial practices and resulting legal trends reflected in national laws.¹¹ To the extent adopted by national legislatures, this revision reduces or eliminates existing requirements as to the form of an arbitration agreement, thus making more arbitration agreements enforceable in adopting jurisdictions. However, any such revision of national laws on arbitration based on the revisions of Article 7 of the Model Law¹² will not necessarily effect enforcement of awards in other jurisdictions under the Convention. Thus, the revision of the Article 7 of the Model Law presents the very real possibility that an arbitral tribunal seated in a jurisdiction adopting these revisions may accept jurisdiction over a dispute and render an award that ultimately might not be enforceable in other jurisdictions because it fails to meet the requirements of Article II of the Convention.

In an effort to preempt this issue, and in conjunction with its promulgation of the 2006 revisions of the Model Law, UNCITRAL also adopted a resolution¹³ making two specific recommendations regarding the interpretation of the Convention. First, the definition in Article II should not be read as exhaustive.¹⁴ In effect, the listed means of satisfying the writing requirement should be read as “including, but not limited to” Second, Article VII of the Convention should be given a broad effect such that a party can rely on the enforcement provisions of the Convention in combination with any more liberal requirements as to the form of an arbitration agreement provided in the national law of the enforcing

Janet Walker, “Agreeing to Disagree: Can We Just Have Words? CISG Article 11 and the Model Law Writing Requirement”, *J. L. & COM.* 25/2005, 153, 153–65.

⁸ United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration § 7 (1985), G.A. Res. 40/72, U.N. Doc. A/40/17, annex I (Dec. 11, 1985).

⁹ While Model Law Article 7 arguably provided somewhat greater flexibility in meeting the requirements for a “record of consent” and a “record of content,” it required both, just like Article II of the Convention.

¹⁰ United Nations Commission on International Trade Law: Model Law on International Commercial Arbitration § 7 (1985, as amended 2006), G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18 2006) [hereinafter *Model Law*], at 4–5. Other provisions were also revised, including a revision to Article 35 related to the Article 7 revision. *Ibid.* at 20–21.

¹¹ *Ibid.* at 27–28 (Explanatory Note by the UNCITRAL secretariat).

¹² *Ibid.* at 4–5.

¹³ *Ibid.* at 28–29 (Explanatory Note by the UNCITRAL secretariat), 39–40 (Recommendation regarding the interpretation of Article II).

¹⁴ Model Law, at 39–40 (Recommendation regarding the interpretation of Article II).

country.¹⁵ While undoubtedly of some persuasive value, these recommendations do not of course carry the same force as the actual language of the Convention itself.

This brings us to the current dilemma faced by the international commercial arbitration community. Should national legislatures adopt revised Article 7? How should national courts interpret the Convention? Should an effort be mounted to draft a parallel convention on enforcement of arbitral awards?¹⁶ In thinking about each of these intimately related questions, it is useful to consider first the specific provisions of revised Article 7.

Revised Article 7 actually provides two alternative options, and the UNCITRAL Secretariat's Explanatory Notes¹⁷ take no position as to which might be preferred. Option one essentially eliminates the requirement of a "record of consent." Oral agreements to arbitrate might be fully enforceable as long as the remaining requirement of a "record of content" is met. Consent need only be proven as required under applicable national contract law. Option two goes one step further, eliminating both the requirement of a "record of consent" and the requirement of a "record of content," and relying on applicable national law for any proof of intent, as well as any requirement of definiteness as to content. Interestingly, there may be little meaningful difference between the two options in the case of an agreement to arbitrate under institutional rules, as the rules themselves may meet any requirement under Option one with respect to a "record of content."¹⁸ However, the focus of this paper is on the requirement of a "record of consent," which is abandoned in both Option one and Option two.

Historically, an agreement to arbitrate a dispute and forego the right to resort to national courts was characterized as giving up "one of the basic rights of the citizens of any civilized community—that is to say, the right to go to their own courts of law" and was further described as "a serious step, for which written evidence is needed."¹⁹ However, as arbi-

¹⁵ *Ibid.*

¹⁶ No one has seriously suggested doing anything to threaten the existing Convention, as its value, as currently drafted, is undisputed. However, a parallel convention, with a more liberalized requirement as to form, might be developed with the hopes of eventually rendering the existing Convention obsolete over time.

¹⁷ Model Law, at 27–28.

¹⁸ The notes from the working group suggest potential contrary views on this, as noted in final comments by the Belgian delegation. See U.N. Doc. A/CN.9/609/Add.3, at 2 (May 12, 2006). However, the issue is not formally addressed by the Explanatory Note.

¹⁹ A. Redfern, M. Hunter, *The Law and Practice of International Commercial Arbitration*, 1999³. This characterization has been modified somewhat to reflect modern practices in the fourth edition.

tration has increasingly become the most common means of resolving international commercial disputes, most have suggested that the need for written evidence, or at least some sort of easily accessible record, has diminished, and arbitration agreements should be treated just like any other contract. This view is essentially adopted by the revisions to Article 7 of the Model Law. With respect to the issue of consent, agreements to arbitrate are treated just like any other contract is treated under applicable national law. Of course the logical predicate to such treatment is that, with respect to consent, an agreement to arbitrate is just like any other contract. But is that true?

Very few other contracts or contractual provisions²⁰ are given any degree of effect prior to the determination of their formation or enforceability—and irrespective of whether or not the parties are found to have ever reached an agreement. And yet, arbitration agreements are routinely given such effect under the related doctrines of positive competence-competence and separability. In the case of most purported agreements, the parties may directly resort to a court to determine whether they are bound. Yet in the case of arbitration, the doctrine of negative competence-competence limits the court's initial review of consent to a "prima facie" determination, leaving any more thorough decisions to any potential action to set aside the arbitrators' decision.²¹ Moreover, these three doctrines, which each give unique and extraordinary effect to an agreement to arbitrate, are fundamental to a modern arbitration regime like the Model Law.

Article 16 (1) of the Model Law provides arbitrators with the competence to decide their own jurisdiction—often called positive competence-competence. This principle is very well established in modern arbitration.²² However, it is worth remembering that the doctrine requires one to engage in an act of "bootstrapping"²³ or to take a "leap of faith" in effectively granting the arbitrators the authority to "presume" that the parties agreed to arbitration, while actually deciding whether the parties "in

²⁰ Choice of law and choice forum provisions may be among the very few exceptions.

²¹ Admittedly, only the doctrine of separability is firmly established under the United States Federal Arbitration Act. *See* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). However, U.S. law is largely out of step with modern arbitration law with respect to the doctrine of competence-competence. *See* *First Options, Inc., v. Kaplan*, 514 U.S. 938 (1995) (explaining that the question of whether the parties agreed to arbitrate is one for the court, unless the parties have expressed a "clear and unmistakable" intent to the contrary). This approach under U.S. law stands in direct contrast to Article 16 of the Model Law.

²² The United States Federal Arbitration Act is of course a notable exception. *See supra* note 35.

²³ One cannot of course lift oneself up by one's own bootstraps—no matter how hard one pulls.

fact” agreed to anything at all. Article 16 also provides for the separability of the arbitration agreement, such that the arbitration agreement will survive the invalidity of—and perhaps even the failure to form—the contract in which it is contained. While the doctrine of separability is almost certainly a practical necessity for any modern arbitration regime, its application requires a substantial element of legal fiction. At least one prominent commentator has explained that such extraordinary treatment of an agreement to arbitrate is justified by the strict form requirements of Article II of the Convention.²⁴ In short, the strong requirement of a “record of consent” justifies the act of “bootstrapping” necessary for positive competence-competence and the legal fiction necessary for separability.

Article 8(1) of the Model Law requires a court to decline jurisdiction in the face of a valid arbitration agreement,²⁵ and the doctrine of negative competence-competence provides that this initial court decision should be limited to a “prima facie” determination of whether the parties agreed to arbitrate—leaving a more thorough examination to any potential subsequent action to set aside the initial decision by the arbitrators. Such a “prima facie” determination is generally quite simple if one requires a “record of consent,” but becomes far more difficult in the absence of such a record. In fact, in the absence of a clear record, any determination of consent by the court under Article 8(1) might necessarily entail a full and complete examination of the issue.²⁶

Without a clear and easily accessible record of consent, how does this affect the principles in support of “bootstrapping” or making the analytical “leap of faith” necessary to justify the jurisdiction of the tribunal to decide its own jurisdiction under the doctrine of positive competence-competence? How does this affect the foundation for the legal fiction necessary to invoke the doctrine of separability? How does this affect the basis for limiting a court to a “prima facie” determination of whether the parties agreed to arbitration under the doctrine of negative competence-competence? Arguably, the justifications, foundations, and practical applications of all of these fundamental principles are seriously undermined by the elimination of any form requirement with respect to consent to arbitrate.

So, does this mean we are “stuck in 1958”? Not necessarily. There may be another, simpler, more practical, and more analytically defensible approach to bringing the law into conformity with modern commercial practice. The movement towards liberalization of the form requirements

²⁴ A. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 1987, 156.

²⁵ This same provision is found in Convention Article II(3).

²⁶ Effectively, this might send all jurisdictional challenges to the court, as is the case under the United States Federal Arbitration Act, absent “clear and unmistakable” consent to the contrary. *See supra* note 35.

is supported, in large part, by the growing predominance of arbitration as the preferred means of deciding international commercial disputes. In fact, most of the literature suggests that arbitration is the normative default, as opposed to national court adjudication. If so, why not simply recognize arbitration as the legal default rule?

Upon initial consideration, the idea of private arbitration as a default over national courts might seem extraordinary—or even preposterous.²⁷ In many respects, however, the idea of national adjudicatory mechanisms giving way to a private dispute resolution mechanism developed through international collaboration is no more revolutionary than national substantive laws yielding to a single body of transnational law developed through international collaboration. The latter was of course accomplished 30 years ago with the promulgation of the Convention on Contracts for the International Sale of Goods (the “CISG”).²⁸ Perhaps the time has come to give serious consideration to a convention under which international commercial transactions would be subject to dispute resolution through arbitration—and not national court adjudication—unless the parties have agreed to the contrary, either opting out of the convention or specifically choosing a national court to decide their dispute.

With the encouraging prospects for broad acceptance of the new Convention on Recognition and Enforcement of Choice of Court Agreements, it seems that arbitration and national court adjudication agreements will be recognized and enforced on relatively equal footing. Thus, it appears to be a perfect time to revisit the more basic question of which should be the default if parties fail to make any effective choice between arbitration and national court adjudication. A normative, majoritarian approach would simply provide a default rule most reflective of actual commercial practice. As such, there is much to recommend a default legal rule providing for arbitration of international commercial disputes.

While in some ways this may appear to be a more radical idea than the abandonment of form under Model Law Article 7, it is arguably much easier to support by reference to basic legal principles. The need for each of the extraordinary doctrines discussed earlier arises from the combina-

²⁷ I first heard this idea expressed by Dr. Eugen Salpius four years ago in a talk he gave at my invitation, at Stetson University College of Law. Dr. Salpius was not addressing the form requirements for arbitration agreements, but was simply suggesting that, at some point, the law ought to recognize commercially normative facts, and designate arbitration as the default over court adjudication. While I initially found the idea quite interesting, I thought it far ahead of its time. However, as a few short years have past, I increasingly find the idea less and less extraordinary, and it appears increasingly rational and reasonable. See G. Cuniberti, “Beyond Contract—The Case for Default Arbitration in International Commercial Disputes”, *Fordham International Law Journal* 32/2009, 417, 417–488.

²⁸ United Nations Convention on Contracts for the International Sale of Goods, G.A. Res. 35/51, U.N. Doc. A/RES/35/51 (Jan. 1. 1988).

tion of the facts that (1) arbitration is not the default rule for dispute resolution, but (2) an effective arbitration regime requires the means to avoid spending unnecessary time and resources in court before going to arbitration. If arbitration is the default rule, then the need for competence-competence (negative or positive) or separability is either eliminated or greatly diminished.²⁹ Admittedly, these same sorts of issues might arise with the choice of a party to go to court, however, it is far more reasonable to apply extraordinary rules, along with extraordinary form requirements, to choice of court agreements that amount to exceptions to normative practices—as compared to our current treatment of arbitration as an “alternative” means of dispute resolution. This “exceptional,” rather than “normative,” treatment of arbitration is precisely why the form requirement for arbitration has become such a problem over time. Arbitration is treated as an “alternative,” requiring actual consent, when it is in fact the predominant normative practice for resolution of international commercial disputes.

The abandonment of the requirement of a “record of consent” attempts to bridge this chasm between the exceptional nature of arbitration in 1958 and the normative nature of arbitration today. However, this bridge leads only to a legal regime in which arbitration—still an exceptional contract giving rise to some very extraordinary legal effects—is subject only to very ordinary contractual requirements. It would seem that such a bridge risks falling into the very chasm it seeks to span, especially when it comes to the application of negative competence-competence in a world without any required “record of consent.”

Instead of attempting to “bridge” this chasm, why not simply move to the other side and recognize arbitration as the default rule? Legal recognition of this normative fact would dramatically reduce the amount of wasted time in courts attempting to avoid genuine agreements to arbitrate—thus eliminating the single most pervasive criticism of arbitration today. While the precise details of such a normative arbitration regime are beyond the scope of this paper, many potential elements are in place today.

The challenges of a default regime would not likely be any greater than those faced when parties agree to arbitrate today, but fail to provide any details. This issue can be addressed in a variety of ways through either well developed default legal regimes, such as the Model Law, or through the designation of default rules. For example, the Inter-American Convention on International Commercial Arbitration provides, in Article 3, a default set of rules,³⁰ based largely on the UNCITRAL Rules.³¹ These

²⁹ This might, to some degree, depend on the specific form of a default arbitration regime.

³⁰ Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, OAS/Ser/A/20 (SEPF), 14 I.L.M. 336 (1975).

³¹ UNCITRAL Rules, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec.15 1976).

rules very effectively address the potential absence of any “record of consent” with respect to arbitral procedures in the event that the parties do nothing more than simply agree to arbitrate. This same approach could be taken in a convention making arbitration the default rule. If parties then failed to cooperate in constituting an arbitral panel, the Permanent Court of Arbitration could be employed to designate an appointing authority, as is done now in the case of ad hoc arbitration under the UNCITRAL Rules.³²

It is also worth considering that today relatively few international commercial transactions lack any dispute resolution provision. Thus, the change of the default rule might not actually change the nature of the ultimate dispute resolution mechanism in very many cases. It would, however, likely add significant efficiencies to the arbitral process and would also comport far more with traditional contracts principles than the current approach to Article 7, in combination with Articles 8 and 16 of the Model Law. Lastly, it is important to remember that parties could always opt out—either by simply choosing not to arbitrate, and thereby leaving themselves to the vagaries and enforcement risks of unilateral choices of national courts, or by agreeing in advance on adjudication by a specific court, rather than arbitration.

In conclusion, we can all likely agree that the current requirements mandated by a strict interpretation of Article II of the New York Convention are out of step with modern commercial and arbitral practice. However, it seems worth considering, at this juncture, whether it is better to attempt to build a “bridge”³³ from 1958 to the present by abandoning the requirement of a “record of consent” or whether it might be more effective simply to move to the other side of the chasm and designate arbitration the default mechanism for resolution of international disputes, thereby avoiding any need for such a bridge.

³² *Ibid.*

³³ This characterization as a “bridge” comes from the notes of UNCITRAL Working Group II, which prepared the revisions of Model Law Article 7. *See* U.N. Doc. A/CN.9/WG.II/WP.139, at 5 (January 23–27, 2006).