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Arbitration as a Transnational Business Dispute Resolution

I. Introduction

In our globally expanding and closely integrating cross-borderline business activities legal disputes are one of their indispensable costs. They are inevitably of transnational nature, and should be resolved by an internationally fair and reliable system of dispute resolution. For business men they should be a costly performed and economically reasonable dispute resolution system.

Resolution by litigation before state courts has been, generally speaking, one of the traditional and typical resolution systems especially for domestic business disputes. Of course, litigation is always burdensome and requires sometimes severe expenses. But as to transnational business litigation, there are different kinds of difficulties. Generally, being in its nature, it shows some national bias based on the forum jurisdiction. Civil procedures and justice systems in every respective nation accompany some kinds of burden especially to the foreign party: They have to expect many difficulties due to the unfamiliar foreign proceedings and face foreseeable as well as unexpected expenses, which would not be necessary for their domestic litigation.[1] Sometimes they need lawyers for their own and foreign lawyers admitted in the jurisdiction for the advocates of the foreign litigation.

Obstacles of litigation in foreign courts should be avoided, as far as possible, for reasonable business activities. Risks and other potential difficulties with foreign litigation should be calculated in advance and minimized. By well established contractual relationships future disputes could be minimized. For avoiding such difficulties or future uncertainties, reasonable business men

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[1] For reducing such costs or obstacles of transnational civil procedure there are some trials to realize the harmonization of civil procedures in the respective nation. One ambitious experiment is a joint project of ALI and Unidroit, see *ALI/Unidroit, Principles of Transnational Civil Procedure*, Cambridge 2005.

should establish substantially clear and undoubted agreements. However, disputes cannot be avoided only by such substantial agreements. For taking precautions against such legal risks by litigation, they have to provide some schemes for avoiding litigation before state courts to resolve their future potential disputes. One of the well known methods for avoiding future litigation before national, especially foreign, courts has been to choose a dispute resolution by arbitration. Especially in transnational business transactions, arbitration is regarded as a favorite way for resolving disputes. Today, according to German literature, over 80 percent of transnational contracts include arbitration agreements.[2]

II. Successful March of International Arbitration?

The popularity of arbitration in transnational contractual relationships, especially in the Western business world, has been referred to some internationally common elements. Arbitration, particularly the transnational aspect, has been regarded as one of the well established and successful resolution systems. Following points could be pointed out as reasons for such success of international arbitration: One is the successful worldwide acceptance of the New York Convention of 1958 for recognition and enforcement of foreign arbitration awards. Today over 130 nations have ratified this Convention, and it is said that this Convention was one of the most successful multi-national conventions. But its real functions or effectiveness, especially efficiencies by enforcement of a foreign arbitration award, depend on the national system of enforcement, and are not proved. The second point is the UNCITRAL-Model Law of Arbitration of 1985. Many countries[3] have accepted fundamental ideas of the Model Law, and they have changed, totally or partly, their national law according to it. Approximation of national legislations of arbitration law has been realized by amendment or new legislation of national law of arbitration based on this Model Law. But such legislation was only one of the first steps for realizing a feasible system of international arbitration. National law of arbitration regulates mostly certain fundamental treatment of agreements of arbitration, appointment procedure of arbitrators, its procedure before arbitrators, arbitral awards and some procedure before state courts to agree its enforcement and the way to contest against arbitral awards. Law of arbitration is a frame-

[2] See Schwab, K.-H.–Walter, G.: *Schiedsgerichtsbarkeit*. 7. Aufl. München, 2005, 345.

[3] Hungary legislated according to this Model Law, as to historical background and political decision, see Kengyel, M.: Schiedsgerichtsbarkeit in Ungarn. *Zeitschrift für Zivilprozess International* (3) 1998. 378.

work for the actual performance of arbitration. It can be applied, if arbitration will be really performed in the jurisdiction. Functions of national law depend only on the choice, whether business men choose the forum as a place of arbitration. Substantial functions or achievements of arbitration depend on the real choice of the jurisdiction by parties as an arbitral place for potential disputes. The third element is successful activities of well established organizations or institutions for international arbitration. In the field of international arbitration there are a number of well established and well known institutions of international arbitration. Most of them have a long history of tradition and achievements. Arbitration could be performed as a form of ad hoc style, too. But the institutions play a more important role in the transnational business world. Between such institutions there exists competition. Most of them are proud and advertise their own merits. Even so, it is not easy to understand the real meaning of their activities for most normal business men when choosing one of them for their dispute resolution.

III. Some Considerations on Arbitration as a Private Dispute Resolution

1. Arbitration is a private dispute resolution system based mainly on the arbitration agreement between private parties. They can and will choose arbitration as a part of their business activities in advance, already on the occasion of their establishment of contractual relationships. One of the most typical results of an arbitration agreement is, as agreed in most jurisdictions, to avoid litigation before the state court. Some well considered reasons must be decisive for choosing it. In much literature some merits of arbitration have been pointed out. Here I will point out a few aspects.

Confidentiality must be one of the aspects. Disputes open to public between contractual parties must be strange for them and should be avoided.

Further for their business activities such disputes could not be profitable. Special knowledge of arbitrators should be considered. It is common that arbitrators should be chosen especially based on the aspect of the special nature of disputes. In our modern transaction professional and technical knowledge for understanding the real core issues of disputes and adequate ways for resolving their disputes are required. It is necessary for the parties to have information of the ability of candidates of their arbitrators.

2. As a reasonable business activity, cost performance of the dispute resolution is one of the most important issues in the business world. The decision whether the arbitration should be chosen as a device of a future dispute resolution should be considered from the view point of such business aspects. In case of

litigation before a state court, the court procedure should be decided and decisively depends on the forum legal system. Parties can choose the forum, but not the procedure itself. They cannot choose judges for their case. They can be specialized on the legal problems of the forum state, but mostly they do not have the necessary special knowledge on the specific matters of the case. On the contrary, if arbitration will been chosen, parties can choose a specialized person of the specific field as their arbitrator; their procedure can be tailored to the case or other requirements of them. They can choose the place of arbitration by which they can choose the arbitration law applied on the case, too. Language problems cannot be disregarded. They can be calculated not only from purely judicial aspects, but from business aspects, too.

3. For accelerating a more popular use of international arbitration, it is necessary to be informed widely about the real phases of transnational arbitration. Sometimes there can be seen some anxieties on arbitration because of its decisive nature to avoid other possibilities for resolving their disputes and no possibilities of appeal in case of litigation. Especially because of the confidentiality of arbitration real achievements of most international arbitration are not predictable. A lack of such information provides parties who are frequent or experienced users of the institute with a profitable position.

4. Establishing amiable institutes or organizations of arbitration should be the next step for encouraging arbitration in a country. Compared with some leading states, Japan had not been regarded as an encouraging country for arbitration. Japan accepted the German system of Civil Procedure and there were some provisions which were almost complete translations of the German Code. For over 130 years this had not been changed. In 2003 a new Code of Arbitration was promulgated and the next year it was enforced. It accepted generally the UNCITRAL Model Law and it is composed as a uniform law for domestic and international arbitration. Like in Germany, Japanese lawmakers wanted to establish an internationally attractive legal system of arbitration. For that purpose it was necessary as a first step to establish arbitration law with an internationally admissible and feasible system of arbitration. Arbitration is regarded as an important part of ADR which is encouraged in our recent total reform of the Judicial System.

As to Japanese international commercial arbitration, JCAA, the Japan Commercial Arbitration Association, is one of the main institutes. But the case number annually filed with the institute has been averagely 10, and remains at a low level. For a long time, we discussed the reasons of such inactive and unpopular international arbitration. Many aspects had been pointed out. One was attributed to our archaic law of arbitration at that time. It was changed by the new code of arbitration. But there can be observed no sign of improvement

of this situation. It must be based on a more profound reason: The lack or insufficiency of international lawyers with the ability of international arbitrators.

IV. Successful Function of International Arbitration

1. As already mentioned, litigation abroad brings unexpected risks and difficulties. Such risks should be surely endured by most big world business entities. But for normal business entities it could be hard to accept such difficulties. To create a feasible dispute resolution system for them, establishing adequate systems or institutions of arbitration must be one of the urgent tasks to realize in the globally expanding market society.

Establishing an attractive and cost performed system of international commercial arbitration should be profitable and encourage most business entities in our globally expanding business world. To accelerate attractiveness as place of international arbitration and to establish an attractive organization for international arbitration there is international competition as the next step of a harmonized legislation of arbitration law in many countries.

2. Attractiveness of arbitration should be based on and established by mainly a high ability of arbitrators. Differently qualified arbitrators are one of the most important prerequisite for establishing an arbitration organization. Well trained arbitrators with different nationalities and different special knowledge should be organized. For business men who want to use the organization as an institutional arbitration, it is one of the most important elements to find reliable arbitrators.

Arbitration based on the private agreements between parties. Neutralities from state interferences are one of the indispensable aspects of international arbitration. State courts should keep restricted position to the arbitration proceedings. In this respect there are some difficulties to regulate arbitration proceedings as a uniform system of domestic and international arbitration. Especially for international arbitration the restrictive position of state courts or other organizations must be respected. Autonomy of the business world for encouraging and establishing a feasible arbitration scheme and a sufficient number of qualified international lawyers is urgently required. In Japan we are now trying to change our legal system totally and we established a new education system of lawyers. But there is no way for supplying international lawyers. To realize an adequate dispute resolution system in our globally expanding market society arbitration is one of the reasonable ways, but there remain many problems to be resolved.