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A PRIMER ON INTERNATIONAL ARBITRATION IN THE ELEVENTH CIRCUIT

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I. Introduction

a. Thank you for this kind opportunity to address the Maritime Law Association's Miami meeting on the subject of International Arbitration in the Eleventh Circuit. In particular, I would like to thank Allan Kelley, with the Fowler White Burnett law firm for his support.

b. As the title indicates, this presentation will focus on the law applicable if an aspect of an international arbitration triggers the jurisdiction of a federal district court within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit, whose territorial jurisdiction is composed of the states of Alabama, Florida and Georgia. The Eleventh Circuit sits in Atlanta, Georgia, but hears arguments in different locations within the Circuit.

II. Overview

a. The regulation of international arbitration involves the complex interaction of public international law, local law, foreign law and contract law. I will briefly describe each of those elements below.

i. Public International Law

1. There are two instruments of public international law that are directly relevant to the regulation of international commercial arbitration in the Eleventh Circuit: (1) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), and (2) the Inter-American Convention on International Commercial Arbitration ("Panama Convention"). The United States is a contracting party to both. Although both regulate the international commercial arbitration, there are differences between them. An initial decision in any arbitral process is to make a determination as to which is applicable. 9

U.S.C. § 305 gives the parties the power to decide whether the New York Convention or the Panama Convention would apply to the agreement to arbitrate and any resulting arbitration or award. (I discuss 9 U.S.C. § 305 in greater detail below.)

a. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).
    i. The Drafters of the New York Convention intended to accomplish the following objectives (among others):

        1. Elimination of the requirement of double homologation.

        2. Elimination of formal defenses to the execution of the arbitration agreement by requiring only that the agreement be in writing and signed by the parties or evidenced by an exchange of letters or telegrams.

        3. Making the arbitration clause contained in a contract executable.

        4. Obliging a judge to refer a claim to arbitration if the claims fell within the scope of an arbitration agreement that satisfied the convention's requirements, and that was not otherwise null and void, inoperative or incapable of being performed.

        5. Providing a uniform set of defenses to the recognition and enforcement of an award that satisfied the requirements for application of the convention.

        6. Permitting a contracting state to provide more limited set of defenses to recognition and enforcement of an international commercial arbitration award.

b. Inter-American Convention on International Commercial Arbitration

i. The Inter-American Convention does differ from the New York Convention in some respects. (The list below should not be considered to be exhaustive.)

1. The Inter-American Convention is limited to International Commercial Arbitration.

2. The Inter-American Convention, at Article 3 provides for the application of default arbitration rules, in the event that the parties have not agreed to rules. (The default rules are the Inter-American Commission on International Commercial Arbitration Rules.)

3. The Inter-American Convention does not include a provision that requires a court to refer parties to arbitration.

4. The Inter-American Convention does not contain an article permitting a contracting state to provide more favorable requirements for recognition and enforcement of international commercial arbitration awards in their national legislation.

ii. Local Law

1. There are two sources of potential regulation of the arbitral process in the Eleventh Circuit, federal arbitration and state arbitration law. Here, I will only focus for the purposes of state arbitration law on the law of the state of Florida.

a. 9 U.S.C. § 305.

2. United States Federal Law

a. The federal arbitration law is found at 9 U.S.C. § 1 et seq which is titled "Arbitration." The title is comprised of three chapters. The first chapter is the original "United States Arbitration Act" (as amended), that went into effect on January 1, 1926. Chapter 2 incorporates the New York Convention into the domestic legal order, and Chapter 3 incorporates the Panama Convention into the domestic legal order. In both cases, the incorporation of the Convention is subject to the terms and conditions set forth in the respective incorporating chapter.

   i. While the possibility exists of an international arbitration agreement or award not being covered by either convention, the almost universal acceptance of the New York Convention suggests that such a situation would be exceptional. Consequently, when considering an international arbitration agreement, procedure or award, one should look first to Chapters 2 and 3 of Title 9.

   ii. Chapters 2 and 3 establish when an agreement and award could be subject to one or both of the conventions even though the situs of the arbitration is within the United States. The chapters also establish the test for the existence of federal question jurisdiction, and venue, provide for a relaxed removal rule, permit a court to order arbitration in any place in the world, provide for a three year period within which confirmation must be applied for, establish a test for confirmation, and providing for residual application of Chapter 1, where not in conflict with either Chapter 2 or 3, as indicated therein.

   iii. Chapter 3, which incorporates the Panama Convention, also contains some dispositions special to the Panama Convention.

      1. The rules of the Inter-American Convention on International Commercial Arbitration to be applied in the United States must be

approved by the United States Department of State.

2. Where both the New York and Panama Conventions are applicable, the parties can choose the convention to apply. Failing agreement, the Panama Convention will apply. For the Panama Convention to be applicable, the award must originate in a contracting state that is also a member of the Organization of American States.

3. Although the convention does not so authorize, the legislation provides that the United States will only apply the convention on a reciprocal basis.

4. The legislation authorizes a court to compel arbitration in any place in the world.

b. Florida International Commercial Arbitration Act

i. The Florida International Commercial Arbitration Act is almost a verbatim copy of the 2006 version of the UNCITRAL Model Law on International Commercial Arbitration.

ii. As such, its regulation of the arbitral process is more detailed and complete that what is found in the Federal Arbitration Act. In particular:

1. The Florida law removes all formal defenses to the execution of the arbitration agreement.

2. Establishes and regulates the concepts of competence-competence and the separability of the arbitration clause.

3. Details the interim relief powers of the arbitrator.

4. Provides for default procedural rules in the event that the parties do not provide for arbitral rules.

5. Regulates conflicts and choices regarding conflicts of substantive law.

6. Provides grounds for set aside or vacatur that are virtually identical to six of the seven categories of defenses of recognition and enforcement provided in the New York Convention.

7. Provides a set of defenses limited to those provided in the New York Convention for the recognition and enforcement of international commercial arbitration.

iii. Foreign Law

1. UNCITRAL Model Law on International Commercial Arbitration

    a. See the discussion of the Florida International Commercial Arbitration Act.

    b. In assessing foreign arbitration laws, you can measure the foreign law against the UNICTRAL Model Law to determine whether it meets international standards.

iv. Contract Law

1. Since the obligation to submit a claim to resolution through arbitration is born of the consent of the parties to do so, contract law is an important component in the regulation of international commercial arbitration.

2. Some questions that arise with frequency are:

a. To what extent does the law applicable to the contract apply also to the arbitration clause contained in the contract?

b. To what extent does the law of the place of arbitration apply to the agreement to arbitrate?

III. The Role of the Eleventh Circuit

a. By far the most disputes that involve international commercial arbitration find themselves before a federal judge.

b. Consequently, the federal courts of appeal have developed a rich body of case law interpreting and applying the conventions. This is true in part because of the liberal access to the appellate process provided by federal law with respect to the first level of appeal.

c. As you understand, it is much more difficult to access the United States Supreme Court.

d. Consequently, the law of international commercial arbitration as developed by the courts for a particular circuit is the law that generally will be applied in that circuit, leaving the possibility of conflicts between and among circuits with respect to many important issues.

e. It becomes important therefore to understand the law as developed by the circuit if one is to deal with a matter of international commercial arbitration that triggers the application of the law as developed by the decisions of that circuit.

f. I have selected three opinions issued by panels of the Eleventh Circuit for discussion this morning that I consider to be important in understanding key positions that the Circuit has taken: Bautista v. Star Cruise Line 396 F.3d 1289 (11th Cir. 2005), Outokumpu Stainless USA, LLC v. Converteam SAS, No. 1710944, (11th Cir. August 30, 2018), and Industrial Risk Industrial Risk v. Man Gutehoffnungshütte, (11th Cir. 1998) 141 F. 3d 1434 (11th Cir. 1998) and Internaves de México S.A. de C.V. v. Andromeda Steamship Corp, No. 17-12164 (11th Cir. August 1, 2018). I have attached copies of the opinions to this note. A student in my international commercial arbitration seminar with direct discussion with respect to each. I have attached a copy of each opinion for your reference.

IV. Conclusion.