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THE NEED TO UTILIZE INTERNATIONAL ARBITRATION

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I have been asked to discuss how to convince United States businessmen of the need for utilizing international arbitration. Basically, however, there is a realistic need for this well recognized form of alternative dispute settlement. Primarily, international arbitration affords companies the ability to avoid the uncertainties and complexities of foreign litigation. I found it interesting that Professor Vagts used the word "paradox" in referring to the existence of both the lack of effective treaties on the enforcement of foreign judgments and the host of treaties on the enforcement of foreign arbitral awards. Why is it a paradox? International arbitration was used prior to the establishment of courts, judges, over two hundred law schools, and the training of thirty thousand lawyers a year. We are merely returning to our antecedents and using what the business community has used for centuries.

Let me first define the differences between public arbitration, private arbitration, and the Hague Tribunal. Private international commercial arbitration usually means a contract between two private parties from two different countries. If a government is involved on either or both sides of the contract, the name of the game is changed to public arbitration for some of the reasons mentioned by Mr. O'Kane, Mr. Blechman, and others. When a private company from the United States and a private company from the Soviet Union conduct business, sovereign immunity is not a question. The Russians consider their trading corporations private companies, at least insofar as contractual terms and enforcement of agreements and awards are concerned. They make that point every time they can. Disputes between the United States company and the Soviet trading company may be taken to the Moscow Arbitration Tribunal. Unlike the East German court

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system, the Moscow Arbitration Tribunal has not been characterized as uncivilized. This forum hears hundreds of cases annually and resolves all the international commercial disputes in the Eastern Bloc. Within this framework, however, it is difficult to characterize the United States-Iran Hague Tribunal. I am not yet prepared to say that the Hague Tribunal is (1) arbitration, (2) some kind of mixed claims commission concept, or (3) a tribunal issuing pieces of paper as awards covered under the so-called United Nations Convention on the Recognition and Enforcement of Arbitral Awards.

After establishing the definitional framework, there are just two points I would like to make. First, it is a chore to convince United States companies that international commercial arbitration is easier and more effective than litigation. Second, how do you go about convincing companies of this fact? Well, it is easier to provide for arbitration in your agreements than anything else. If you are dealing with a company that is trading abroad for the first time, the client might inquire whether arbitration or litigation in the courts of Angola will be required if something goes wrong. The attorney will say that we can provide for something else, and the thing provided for is neither litigation nor arbitration in that foreign country. A dispute settlement mode in a neutral, third country should be arranged. Currently, there is a significant trend toward neutral or "third-country arbitration." A contract between a United States company and a Soviet trading company may provide for arbitration in Stockholm. You will not have to waste much time in negotiations because the Russians will agree to it, and we will agree to it.

There is an interesting story behind this point. Prior to 1972, Soviet trading companies would proudly refer to their boiler plate dispute settlement clause, which was part of the contracts used between Soviet companies and all other private companies around the world, and which provided for arbitration by the famous Moscow Arbitration Tribunal. If the Russians truly wanted a product, they would permit themselves to negotiate an alternative arbitration clause setting arbitration in the home country of the defendant. This alternative is called the home-on-home dispute settlement clause. These were the only two options available at the time. You can imagine the complexities in figuring out who the defendant was when the parties were jostling for position. Both options were unsatisfactory to United States clients. In 1972, we were successful in obtaining the agreement that we

would forego our court system for Soviet companies if they would forego their system for United States companies. It was agreed to arbitrate in a neutral country, ultimately chosen to be Stockholm, Sweden. Almost all of the United States-Soviet contracts today call for arbitration in Stockholm. A small number of these contracts may provide for Switzerland, but probably only in rare instances.

Why is international commercial arbitration easier? How is this of practical value to the lawyers who draft these contracts for their clients in Tennessee? If a contract is drafted in Nashville providing for arbitration in London or Paris and a dispute does arise, the attorney could personally represent his client in Paris or London, which he could not do in litigation in Paris or London. There is no prohibition against United States counsel representing a client in arbitration abroad because it is not considered "a judicial proceeding abroad." This factor alone should be sufficient to convince you and your clients of the need for having an arbitration clause.

Second, we have read many cases in law school and have had a lot of discussion on service of process. How do you make personal service when you start a lawsuit abroad? You could have personal service; you heard about personal jurisdiction and subject matter jurisdiction in this symposium. Most service problems are avoided in arbitration because the arbitration clause is a consent to jurisdiction. If you provide for an applicable set of rules, those rules usually allow notice of service by either registered or ordinary mail.

Arbitration, instead of becoming the paradox, is becoming the norm. Foreign companies may insist upon an arbitration clause in their contracts because they fear the litigious environment in the United States. They just cannot deal with our lawyers, discovery, depositions, and pretrial examinations. The foreign companies begin with an arbitration clause and proceed to discuss issues concerning the place of the arbitration, the rules governing the arbitration, who the arbitrators will be, and, most importantly, the applicable law provision. Because arbitration is becoming the norm, you must convince your client that you are up-to-date on this norm and that you have in your office all the current rules and procedures, and the latest effective arbitration clauses.

Moreover, arbitration helps to avoid the difficulties of language. English is becoming the standard language in the world for contract drafting. At the Hague Tribunal for example, everything is

in dual languages, English and Farsi. The cost of a dual language tribunal is significant. In addition, the time and difficulty involved in translating is incredible. For example, while trying to draft a reasonable set of procedures that would accommodate both Soviet and United States trading companies, I was informed by a Russian translator that the word "reasonable" does not exist in the Russian language. The concept "reasonable" translates as "adequate," which places United States negotiators at a great disadvantage because we are trained in the so-called "reasonable" standard for various norms of the law.

Some of the differences between civil law and common law are dissipated by using international arbitration. In some way, the arbitrator has to resolve the choice of law dilemma and come out with a decision, be it civil law or common law. It is my experience that this is done hundreds of times a year, and it seems to be working. In fact, documents published by the United Nations Commission on International Trade Law (UNCITRAL) provide rules of procedure for international commercial contracts. One document is a model set of rules on international conciliation; another is a model set of rules on international arbitration, known as the UNCITRAL Arbitration Rules, which are the basis for the Hague Tribunal arbitrations. UNCITRAL is about to come out with the first model law on international arbitration for the world. One of the advantages of these model rules is related to the language issue I mentioned earlier. All of the negotiations by the 100-odd countries in UNCITRAL that developed the conciliation rules, the arbitration rules, and the model law were done in English. In addition, all of the documents published in the six different official languages of the United Nations are translated from the English version. Having the negotiations accomplished in and translated from English is a tremendous advantage. When there is a problem under the UNCITRAL rules, working from an English base makes interpretation much easier.

The emergence of arbitration as a norm is evidenced by the existence of an arbitration statute in every state in the United States. In addition, the United States Arbitration Act and a host of treaties on arbitration, including treaties of Friendship, Commerce and Navigation, the multilateral treaty on arbitration in the New York Convention of 1958, and the Inter-American Arbitration Convention of 1975, are now in force. We are about to see a series of bilateral investment treaties that will affect a private company's dealings with a foreign government. All of these trea-

ties will provide for arbitration not only between a private company and a government, but also between governments. Two investment treaties have already been signed, one with Egypt and one with Panama, and about twelve more are on the horizon, including one with China.

My final point is that there is simply no other choice. Your client's case should not be submitted to a court in Eastern Europe, Latin America, Central America, or the Middle East. Because three-quarters of the places in the world are not appropriate forums, you must provide for arbitration. It is easy and it is more effective. Why is it more effective? I have listened to the brilliant presentation of my friend Larry Newman on enforcement and I still do not know if it is easy to enforce a foreign judgment. I have not found a resounding number of cases demonstrating that it is easy to enforce foreign judgments.

How about enforcing a foreign arbitration award? The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been in force in the United States since 1970. There is no multilateral treaty on enforcement of foreign *judgments*. A multilateral treaty on enforcement of foreign arbitral awards, however, has been ratified by sixty-three countries in the world. For example, you can go to London, arbitrate, and get your award without going to court. You take that award and mail it to the Southern District of New York. The Southern District Court of New York will enforce this arbitration award under the treaty. You do not reduce it to judgment any place except in that enforcement proceeding in New York where you confirm the award and the judgment. This is a tremendous advantage over trying to enforce a foreign judgment. If uniform money judgment treaties are working, the difference between the ease of enforcing foreign arbitral awards and foreign judgments may not be as great. Unfortunately, it does not appear that these uniform treaties are working as easily as the arbitration treaties, nor have I found as many cases on the enforcement of judgments under the uniform treaties as on the enforcement of foreign arbitral awards.

It has been said that the United States is the most hospitable country for the enforcement of foreign judgments. I will go further and say that we are clearly the most hospitable country for the enforcement of foreign awards. We have established new international law in this country based on "public policy." I have always had trouble with "public policy" because it is the kind of phrase I could never understand. As an example of the confusing

way "public policy" may be used, consider what happened to the contracts that existed between a United States company and Egypt just prior to the three-day war between the Arabs and the Israelis. One of the United States contractors building a dam in Egypt was suddenly forced with the issuance of an order revoking all visas of United States personnel. It was not surprising, therefore, that he got his work crew out of the country. Most United States contractors did this when the revocation order was in fact issued. The Egyptians said: "Don't leave—we don't mean you. We mean Americans, but we don't mean you Americans." This distinction in the Egyptian order did not deter the exodus of United States personnel. The Egyptians completed their contracts with other foreign contractors and then commenced arbitration against the United States company for failure to complete the contracts. The defense to nonperformance is *force majeure* and act of war. The United States defendant thought it had a perfect case on these grounds. Unfortunately, the defendant lost the decision because it was determined that the Egyptians had made strenuous efforts to keep the United States company there and had explained quite clearly that their law on revoking visas did not apply to people with existing contracts. The arbitrators found in favor of the Egyptians and the awards were sent to the United States for enforcement. In the local court proceedings, it was argued that enforcement of the awards was against public policy. The United States court refused to consider this defense, finding it was not appropriate to determine the merits of whether the nonperformance was a result of an act of war, an act of God, or *force majeure* because the issue had already been decided by the arbitrators. Under the New York Convention of 1958, a foreign award that is sent to the United States must be enforced without looking at the merits unless it "offends our public policy." The court determined that two kinds of public policy applied to the case. One type was a domestic public policy, and the other was an international public policy. Because the international arbitration treaty is something beyond local domestic law, the court devised the rule of *double* public policy. Although the awards may have violated United States domestic public policy, they did not violate international public policy. The Egyptian awards, therefore, were enforced.

The United States definitely has become the most hospitable place for the enforcement of foreign arbitral awards. That is why I say arbitration is so effective. Arbitration is effective not only in

contracts between private parties, but also in contracts between a private party and a government. Of course, there is the Foreign Sovereign Immunities Act that protects sovereigns. Nevertheless, important exceptions to the Act do exist. In addition to the commercial exception discussed by Mike Blechman this morning, there is a second exception which deals with the possibility that the arbitration clause is a consent to jurisdiction. The *Libya-LIAMCO Case* held that the arbitration clause was a waiver of Libya's sovereign immunity. This case, however, was appealed on other grounds and was settled before a decision was rendered by the circuit court. Although I do not have a clear court decision which indicates that an arbitration clause, in and of itself, is a waiver and consent to jurisdiction, I think there is a pretty good chance that courts will reach this outcome.