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Charles Robert Norberg

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THE SETTLEMENT OF INTERNATIONAL ECONOMIC DISPUTES

*Charles Robert Norberg, Esq.**

My subject has been defined as "The Settlement of International Economic Disputes." In addition to discussing the settlement of commercial disputes growing out of foreign trade, I thought it might be useful if I mentioned briefly the settlement of disputes resulting from foreign investment. For the U.S. business community, there has been significant new developments in both of these areas.

THE SETTLEMENT OF FOREIGN TRADE DISPUTES

For centuries businessmen of good will in different countries have learned that trading with each other is inevitably accompanied by disputes and controversies — for example, failure to ship or to deliver, late shipments or deliveries, quality of the merchandise, refusal to accept delivery of goods, differing interpretations of foreign trade terms which set forth the risks of seller and buyer while goods are in transit, interpretation of marine insurance that should have been supplied, terms of payment, foreign exchange regulations and many other technical factors that enter into a foreign trade transaction from the time an exporter receives and accepts an order to the time an importer receives and accepts the goods.

* Treasurer and General Counsel, Inter-American Commercial Arbitration Commission; President, Inter-American Bar Foundation.

Going to court to resolve those disputes has been generally a time-consuming and costly process. Thus, many foreign traders turn to arbitration as a means of dispute settlement. They mutually and voluntarily agree to submit the settlement of their disputes to one or more neutral arbitrators knowledgeable in the customs and usages of the trade giving rise to the disputes. The parties agree to be bound by the decision of the arbitrators and the losing party normally pays the award. To make the procedure effective, the businessman must have confidence that his agreement to arbitrate is valid; he also has to be sure that the resulting arbitral award would, if necessary, be recognized and enforced by the courts.

Today, in the United States, these results are generally achieved by statute, following a 1920 New York state statute which recognized the validity and enforceability of an agreement to arbitrate as well as the enforceability of an arbitral award.¹ Prior to 1920, New York, in accordance with the common law, viewed an agreement to arbitrate as revocable. The American Arbitration Association was organized following the enactment of the New York statute, and today, it has offices throughout the United States which process approximately 40,000 cases a year. Of this number, some 100 cases are in the international field.

In the United States, given the uniformity of the English language and the enactment of a model law,² we are moving towards uniformity of arbitration throughout the fifty states. Nevertheless, in international trade we must cope with a multiplicity of languages, judicial systems, socio-political societies, economies and cultures. In fact, the languages of the Caribbean Basin are Dutch, English, French and Spanish.

As for the legal systems, in the United States, of course, we follow a traditional common law system as do the people of the Caribbean whose heritage also stems from England. Other countries of the Basin have legal systems based on the civil law of their respective parent countries. Legal as well as arbitral procedures differ between the two basic legal systems.³

It would seem that these factors should give rise to international trade disputes and indeed they do. How does one reconcile the difficulties

1. N.Y. CIV. PRAC. LAW, art. 75, §§ 7501 *et. seq.*, (McKinney), as subsequently amended.

2. The Uniform Arbitration Act, 4 MARTINDALE-HUBBELL LAW DIRECTORY 4110-11 (1970).

3. (*Ed. Note*) For an excellent comparison of the treatment of the specific area of choice of forum and choice of law clauses in Anglo-American and civil law countries, see Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 INT'L TRADE L.J. 311 (1978).

and provide a legal framework within which uniformity can be achieved for the resolution of international trade disputes? The answers are on two levels — international and regional.

From the international perspective, one should start with the 1958 United Nations Conference on International Commercial Arbitration held in New York City which promulgated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴ The Convention provides in Article II that:

1. Each contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in the contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III states, *inter alia*, "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the Rules of Procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."

According to Article IV, in order to obtain the recognition and enforcement of the arbitral award, the party applying for recognition and enforcement shall supply "the duly authenticated original award or a duly certified copy thereof; and the original agreement referred to in Article II or a duly certified copy thereof."

The Convention has now been ratified by fifty-two countries, including the United States, the Western European countries, Japan and India, as well as the Socialist bloc countries led by the U.S.S.R. Consequently, among the respective ratifying countries, arbitration agreements between businessmen or with quasi-government corporations are to be recognized as valid and the resulting arbitral awards enforced.

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2519, T.I.A.S. No. 6997, 330 U.N.T.S. 4739.

The Caribbean Basin countries which have ratified the 1958 Convention are Mexico, Trinidad and Tobago, Jamaica and Cuba. Additionally, in Latin America, the Convention has been ratified by Ecuador and Chile.

At the regional level, within the Western Hemisphere, arbitration has developed very slowly. This is due largely to the legal procedural difficulties which result from the intricacies of the civil law system throughout Latin America and its differences from the common law system of the United States.⁵

The Latin American countries themselves, as early as 1889 by the Treaty of Montevideo,⁶ had provided for the recognition and enforcement of foreign arbitral awards. Again, in 1928 at Havana, similar provisions were contained in the Bustamante Code of Private International Law.⁷

Since not all countries of the Western Hemisphere were signatories of those treaties, the OAS moved to establish uniformity in arbitral procedures. The Inter-American Council of Jurists first tried a model law proposed in 1956 in Mexico City but no country adopted it.⁸ In 1966 the Inter-American Juridical Committee proposed a draft convention which came into effect on June 16, 1966. On January 30, 1975, the Inter-American Specialized Conference on Private International Law meeting in Panama adopted the Inter-American Convention on International Commercial Arbitration.⁹ It was signed by the representatives of twelve Latin American governments. The Convention has been ratified by Mexico, Costa Rica, Panama, Chile, Uruguay and Paraguay. I am reliably informed that Ecuador, Honduras and Guatemala will also ratify in the near future.

What does this Convention accomplish? It established a uniform framework for the conduct of international commercial arbitration in the Western Hemisphere. As with a treaty in the United States and probably in the other countries, it replaces and supersedes conflicting municipal law.¹⁰ The Convention recognizes the validity of an agreement to arbitrate existing or future disputes whether the agreement is set forth in an instrument signed by the parties or is in the form of an exchange of letters, telegrams or telex communications. It also provides for the appointment of arbitrators by a third party and those arbitrators may be

5. See, Norberg, *General Introduction to Inter-American Arbitration*, 1978 Y. B. COMM. ARB. 6-8.

6. See generally, *Inter-American Treaties and Conventions*, Organization of American States, Treaty Series No. 9.

7. Bustamante Code of Private International Law, Feb. 20, 1928, 86 L.N.T.S. 246.

8. See Inter-American Council of Jurists, Mexico City, Jan. 17 to Feb. 4, 1956 (3d mtg., Final Act).

9. 14 INT'L LEGAL MATS. 336 (1975).

10. See *supra* note 4.

nationals or foreigners. It gives an arbitration award the status of *res judicata*, as well as force of a final judicial judgment enforceable in foreign countries except for certain well-recognized grounds such as incapacity of the parties and absence of due process.

Most importantly, it provides that where the parties have not expressly agreed otherwise, the arbitration shall be conducted in accordance with the Rules of Procedure of the Inter-American Commercial Arbitration Commission.¹¹ The Commission has, as of January 1, 1978, adopted new rules of procedure modeled on the rules recommended by the United Nations Commission on International Trade Law (UNCITRAL). Hence, not only is there now a uniform system of arbitration rules available for use in the Western Hemisphere, but the work of the Inter-American Commercial Arbitration Commission thereby is made compatible with those national and regional arbitration bodies throughout the world which have or will adopt for themselves the rules of UNCITRAL. The Inter-American Convention is fully compatible with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958).

In sum, there now exists within the Western Hemisphere, and available to the countries of the Caribbean Basin, a legal framework and procedure for the uniform conciliation or arbitration of international trade disputes. This system is also consonant with other arbitration systems existing in other regions of the world.

I would now like to touch briefly upon three special aspects of foreign trade dispute settlement: disputes with government corporations; disputes with the Socialist countries, including the U.S.S.R.; and disputes with Cuba in particular.

Throughout the world, of course, governments have become more and more deeply involved with the economic development of their respective countries. Government-owned or controlled corporations have contributed to the expanded involvement of states in international trade. In most countries an expanding role in interstate commerce means that states must more frequently surrender some of the normal attributes of sovereignty. In countries adhering to the restrictive theory of sovereign immunity, the defense of sovereign immunity cannot be raised for claims arising in private or commercial activities. The United States clearly recognized the restrictive theory in the Sovereign Immunities Act of 1976.¹² Hence, contracts and concession agreements with foreign quasi-

11. The Commission was established in 1934 pursuant to Res. XLI of the Conference of American States, meeting in Montevideo, Uruguay in 1933.

12. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2091 *et. seq.*

governmental corporations can include enforceable arbitration clauses. The necessity of bringing suit in the court of the foreign state is thereby eliminated.

Arbitration of disputes with Socialist bloc countries is an accepted reality. The Soviet Union established the Foreign Trade Arbitration Commission in Moscow in 1932 and has been willing to arbitrate commercial disputes with foreigners since that date but, until recently, pursuant only to the rules of the Commission which provide that the arbitrators must come from a panel of Soviet arbitrators selected by the Commission.¹³ Recently, however, the Soviets have agreed to arbitration in third countries such as Sweden, according to the rules of the Stockholm Chamber of Commerce.¹⁴

The Soviet pattern has been followed by the Republic of Cuba which on February 1, 1963, by Article 10 of Law No. 1091, provided for the establishment of an organization attached to The Chamber of Commerce of the Republic of Cuba which would operate as the Court of Arbitration for foreign trade. On September 15, 1965, the President of the Republic of Cuba promulgated legislation establishing the statutes of the Court of Arbitration for Foreign Trade. The Court is composed of fifteen members appointed by the Executive Board of the Chamber of Commerce but I am not aware of any willingness on the part of the Cubans to arbitrate in third countries such as that recently demonstrated by the U.S.S.R.

With specific reference to the settlement of disputes arising from foreign trade within the Caribbean Basin, I would make the following recommendations: a) that the countries of the Caribbean Basin which have not already done so ratify both the United Nations and the OAS Conventions; b) that the Chambers of Commerce in the respective countries establish relations with the Inter-American Commercial Arbitration Commission so that information about the Commission and the arbitration process can be disseminated to the businessmen and lawyers of those countries; and c) that we work towards establishing a single focal point for administering arbitrations arising within the Caribbean Basin.

13. Decree of the Central Executive Committee and Council of People's Commissions of the U.S.S.R. Chamber of Commerce, Collection of Laws of the U.S.S.R., 1932 No. 48, D. 281.

14. See Kottarchuck, *Has the U.S.S.R. Foreign Trade Arbitration Commission Reached the Age of Aquarius with the Newly Revised Arbitration Statute of 1975*, 11 INT'L LAW. 467-82; *Optional Clause for Use in Contracts in U.S.A. — U.S.S.R. Trade* — 1977, 16 INT'L LEGAL MATS. 445 (1977).

THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES

This subject is highly complex and sensitive, involving the national sensitivities and the international policies of the countries of the foreign investors and of the hosts. I would, nevertheless, like to point out just two aspects of this situation which may be of interest.

First, in 1966, the World Bank established the International Centre for the Settlement of Investment Disputes (ICSID), pursuant to the Convention for the Settlement of Investment Disputes Between States and Nationals of Other States.¹⁵ The Convention provides a system of conciliation or arbitration of disputes arising from foreign investment by the Centre. As of March 20, 1978, seventy states had ratified the Convention. These include the United States, Guyana, Jamaica and Trinidad and Tobago in the Caribbean Basin as well as the United Kingdom. None of the Latin American countries have ratified the Convention.

In 1977, the facilities and good offices of the ICSID were utilized in settling three bauxite cases in which the Government of Jamaica was involved, namely, Alcoa Minerals of Jamaica, Inc.; Kaiser Bauxite Company; and Reynolds Metals Company and Reynolds Jamaica Mines, Ltd.¹⁶

ICSID now has under consideration the establishment of an "additional facility" to enable the Centre to act as administering authority for proceedings outside the scope of the Convention, requested by the parties on a purely contractual basis.¹⁷ For example, even though the countries might not have ratified the Bank Convention, they would have access to the Bank's expertise for fact finding.

The last idea I would like briefly to leave with you is that there seems to be a new approach, at least in the Western Hemisphere, whereby governments of both the foreign investor and the host country have negotiated the settlement of disputes resulting from nationalizations of the foreign investors' properties. Two recent cases have been illustrative of this move away from a hard line position taken by the United States Government; one is the *Marcona* case¹⁸ in Peru and the other the

15. Convention on Settlement of Investment Disputes Between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

16. See International Bank for Reconstruction and Development, press release of March 17, 1977; International Centre for Settlement of Investment Disputes, press release of December 9, 1977.

17. ICSID, Doc. AC/77/8/Sched. B.

18. See Furnish, *Trade Between the Andean Group's Caribbean Basin Countries and the United States*, *supra* note 28, at 1.

nationalization of the oil industry in Venezuela. In each case with the participation of the United States Government, agreements were reached by the host countries with the U.S. foreign investors enabling fair and equitable resolutions of the difficulties. For those familiar with Latin America and its traditional insistence on the Calvo clause approach — for example, no intervention by the United States Government on behalf of one of their citizens as a foreign claimant — these new approaches to international dispute settlement are indeed refreshing.¹⁹

19. For an excellent discussion of this subject, see Rogers, *Of Missionaries, Fanatics and Lawyers: Some Thoughts on Investment Disputes in America*, 72 AM. J. INT'L L. 1-16 (1978).