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At the outset, I owe an obligation to you and to my fellow panelists to reveal my true colors. Following the remarks of Mr. Aksen and Mr. Rhodes, you would be entitled to expect me to give some examples of how some distressed clients entered this wonderful world of arbitration, how the scales fell from their corporate eyes, and how their problems were solved. I am going to tell a bit of a story this afternoon. The focus of it is arbitration, but I should tell you it is not an arbitration that occurred. The story is of an arbitration process that was considered very seriously by clients in an industry unaccustomed to and distrustful of arbitration. These clients nevertheless gave very serious consideration to arbitration and indeed adopted a format for arbitrating some extremely important disputes. The only reason that the arbitration was not conducted was that the very existence of that arbitration system, and the possible resort to it as a means of solving these disputes, led to the settlements now being achieved.

I also have a personal point of view on this subject that should be revealed. It is a viewpoint colored by almost a quarter century of litigation experience. My view is that time should be devoted to avoiding formalized combat as well as to conducting it. Yet the avoidance of formalized combat, whether in the context of litigation or arbitration, cannot be successful without a thorough understanding of how that combat is likely to be conducted if attempts at negotiation, mediation, or a more satisfactory resolution fail. Efforts to avoid uneconomic, litigious warfare are not likely to be successful unless those involved in the decisions have a thorough understanding of the very processes they are trying to avoid.

The context of my comments this afternoon is the recent Iranian experience, which was one example of the inevitable commercial and financial disputes that have followed virtually every instance of world turmoil in this century. Every war or revolution, certainly those involving nations that have any kind of substantial interdependence with other countries in the world, has been

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followed by decades of litigation to sort out the disrupted relationships. When I left law school in 1960, the Cuban revolution had just taken place. Cuba was turned on its ear and the Cuban cases were just beginning. One of my first assignments as a starry-eyed, new associate at Shearman and Sterling was to work on the Cuban cases. One of those cases is going to be argued a week from Monday in the United States Supreme Court. Yet after twenty-three years, the Cuban assets are still frozen. No prospect for immediate or near term resolution of those problems is apparent. Although I have not worked steadily on Cuban cases for twenty-three years, that history was something that I had very much in mind in the Iranian experience. I do not think the handling of the Cuban cases is a productive way to solve problems. I am not suggesting that opportunities to sort out the Cuban difficulties were missed. The Cuban experience, however, was one of the driving factors in the Iranian negotiations, and, in fact, was one of the arguments presented to the Iranians during the negotiations. They took that example very much to heart because one of the attorneys representing Iran has been representing Cuba through all the twenty-three years. They knew very well that the experience was something they did not want to repeat. My point is that while I feel a little disloyal to my litigating fraternity in suggesting that we should devote tremendous efforts to avoid litigation, it is only by developing a thorough understanding of these processes, either the litigation processes described this morning or the arbitration techniques discussed this afternoon, that the attorney can avoid getting bogged down in such affairs.

In today's world, the economics of legal practice require practitioners to seek methods of resolving or avoiding protracted conflict. No one can afford to become involved in decades of trench warfare litigation at the hourly rates now being charged for battalions of legal talent.

Some of the experiences in the Iranian episode were quickly followed in other situations. As soon as the Falkland Islands crisis began, many of the concerns that arose during the Iranian experience led to activity directed at avoiding litigation. Many of the events in the Falkland Islands crisis replicated events that occurred during the Iranian situation. The British froze Argentine assets, and the Argentines froze British assets. Syndicated loan payments were disrupted. The whole Falkland Island situation had a sense of *déjà vu*. Many of the same people were involved; the same lawyers were present around the table. In fact, we had

two negotiation rooms going at one point. The Iranian bank group met in one room and when we finished those negotiations, we would move to the next room to discuss the Falkland Islands. A little later on, we had a room down the hall for Mexico. The same scenario is occuring now with Brazil. This group of worthy debtor countries is providing a major source of activity.

I stress the word "debtors" because the focus I have on this situation involves money. The particular perspective that I have comes mainly from my experience in representing international banks who have relationships with countries or companies that have fallen into some form of distress. Money is always involved in these situations. Typically, every war or revolution that one can think of in this century has been followed by substantial periods of litigation and negotiations to sort out the disruptions in relationships.

The Iranian revolution was certainly no exception. At the time of the Iranian revolution in 1979, Iran was one of the world's leading exporters of oil. The proceeds from these oil exports were invested temporarily in what are commonly called Eurodollar accounts. The Eurodollar accounts are simply dollar bank accounts in branches of banks overseas, largely in London. The seizure of the United States embassy, and the freeze on Iranian assets imposed by the Carter Administration in response, led to an immediate disruption of the immense financial and commercial relationships between Iran and the rest of the world. My remarks particularly focus on the disruption of the relationships between Iran and banks both in the United States and in the rest of the world, even though many other commercial relationships were affected. The United States and foreign banks had made very substantial loans to Iran. In addition, Iran had deposited very substantial amounts of money in foreign branches of United States banks, principally in London, but also in Paris. Those accounts were purported to be frozen by the Carter Administration. Very shortly after the freeze Iran commenced litigation overseas to recover the billions of dollars on deposit in those countries. I do not propose to dwell on the subject of the Iranian asset litigation in the United States or overseas, but wish to move rather quickly through that period and get to the discussion of some arbitration possibilities.

From the outset, it was clear to everyone working on the hostage crisis that disposition of various claims between United States companies and Iran would be an essential element in the

resolution of the hostage dispute. No one anticipated that Iran was going to release the hostages without a satisfactory settlement of the claims. Most of the Iranian property outside Iran was either frozen by the executive order or tied up in the litigation process. Although the hostage release negotiations are somewhat beyond my topic today, I want to stress that in all of those discussions it was absolutely clear that some form of resolving the claims without endless litigation was a necessary element in the solution of the crisis.

An arbitration solution did come up in the context of what was called the bank line of negotiations. Negotiations were conducted with Iran on behalf of the United States banks for about nine months preceding the release of the hostages. In those discussions, the subject of arbitration came up a couple of times, but never extensively. First, the subject of the interest on frozen Iranian assets was important to the Iranian representatives. Between the late summer and early fall of 1980, we discussed with the Iranian representatives how we might agree on what interest, if any, would be paid on all of the frozen assets if and when they were released. Interest rates were at virtually an all-time high in this period. The billions of dollars tied up were earning money for those holding the assets. The Iranians were very interested in receiving some of this return. We discussed how this interest issue was to be resolved in the event an agreement could not be reached on interest rates or interest periods. We concluded that it probably would make very good sense to think about some procedure for arbitrating this issue in London, thereby drawing on the city's resources or people with knowledge and understanding of the world money markets to serve as arbitrators. We did not develop any particular procedure at that time, but there was evidence of a serious Iranian interest in having arbitration take place in London on certain issues that subsequently became quite important.

The subject of arbitration in the bank negotiations was broached on one other occasion in November of 1980. I received a call from one of the Iranian representatives in Germany urgently asking for a copy of the UNCITRAL rules. I confess that at the time I had not even heard of the UNCITRAL rules. The Iranian representative did not say why he wanted them, and at the time we were not talking seriously about arbitrating anything in the bank claims. We arranged to get him a set of the rules that he then took to Tehran. I reported the inquiry to the United States

Government, as had been my practice on events of that nature throughout the negotiations, but did not dwell on the request further.

The only other area in which any thought or discussion was given to arbitration was also incidental. In the various plans that were discussed and drafted through the course of the bank negotiations, a package plan dealing with as many issues between Iran and the United States as possible was considered. We did not get into specifics on this package plan only because: (1) we regarded the issues in the plan as beyond our competence; (2) the Treasury and the State Department really did not want us to negotiate such a plan; and (3) we did not have any great motivation for the plan. We did consider, however, various possibilities of how the United States claims might be handled outside of continued litigation in the courts. Some consideration was given to a foreign claim settlement commission, a mixed commission, and a variety of other approaches. None of these proposals ever advanced to the point of any formalized drafting that was exchanged.

The issues involved in the bank negotiations were not ones traditionally arbitrated. The kinds of contracts and agreements in the bank claims against Iran were principally loan contracts. Arbitration provisions are not placed in such agreements because banks feel that if someone owes money, he ought to pay it and therefore nothing is left to arbitrate. If payment is not made as required by the contract, the bank goes to court, receives a default judgment, and seizes the borrower's assets. Banks resist arbitration because they are not experienced with the process, they are not used to seeing arbitration provisions, and they don't like to consider anything they do not know or understand.

In the Iranian negotiations, however, some issues that were not traditional areas of dispute had to be resolved. Normally banks do not wonder about the interest rate they are to pay on money deposits. The Iranian situation, however, changed normal circumstances. The United States banks were holding immense amounts of funds, in demand type accounts and Eurodollar accounts bearing interest. The Eurodollar accounts, held in overseas branches, were mostly call accounts immediately available. In the ordinary practice, a rate would be quoted by Telex every couple of days and the interest rates were not a mystery. In this type of arrangement, no provision was made for having a one-day demand deposit frozen for fourteen months during the highest interest rates in history. The subject of interest was an open one on which we

could anticipate difficulty in reaching agreement. What were we going to do if no agreement could be reached? We were already in the courts in London, Paris, Germany, and all over the United States. We did not like this spread out litigation and neither did anyone else. We believed the interest issue would be well-served by reference to people who understood the world money markets. Therefore, we gave some attention to arbitration in London, the center of the Eurodollar market and the place where people with knowledge of the issues would be available.

Arbitration was not given much further consideration during the last frantic days of trying to settle the Iranian bank claims. In the middle of January, 1981, last-ditch efforts were underway to devise a package or formula for solving the hostage crisis. The Algerian mediation efforts had begun in late November. The bank negotiations, which had been going on since the end of April, had been merged with the Algerian negotiations. We exchanged documents, both through the Algerians and directly with the Iranians in Germany and elsewhere. By the middle of January, the Iranian representatives were in New York. Everyone was working frantically trying to piece this settlement together. Then, the package that had been the subject of some two and a half months of intense work was absolutely rejected by the Iranians on January 11th, just when settlement appeared at hand. Efforts were made to sort out the problems again and come up with some new proposals. On January 15, 1981, the Thursday before President Carter's term ended, we were waiting for a response from the Iranians to our latest proposal. I got a call just after lunch that day from Lloyd Cutler and Bob Carswell at the White House who said they had just received—or Warren Christopher had just received—a new proposal from the Iranians. It was wholly different from everything under consideration at that time. In fact, the Iranian proposal was somewhat of a return to an earlier plan that had been under consideration for about six months. As far as the banks were concerned, the proposal was intended to do three things. After having all foreign deposits unfrozen and receiving approximately 8 billion dollars, Iran would pay off approximately $3.5 billion worth of bank claims it recognized as valid; place another $1.5 billion in escrow for the remaining bank claims it questioned; and arbitrate all of the questionable claims.

The one thing that worried me most about the Iranian plan was this word "arbitrate." We knew that for this plan to have a prospect of success, we would have to get a very quick acceptance

from all of the United States banks holding these Iranian assets voluntarily in their foreign branches. The validity of the Carter freeze order immobilizing the accounts was open to question and was being litigated in the courts of the countries in which the foreign branches were located. No one knew for certain who was right on this issue. To make the hostage deal work, however, the banks would have to release the accounts and pay them to Iran, thereby giving up what was, in effect, security for all the loans to Iran that were in default. This plan was asking the banks to give up money to Iran in return for the release of the hostages. I was concerned that requiring "arbitration" of the remaining bank claims might scare off one or more of the banks and threaten the prospects for success.

The story of the next ninety hours is beyond the scope of the discussion this afternoon. The deal did get done; the plans were put together; the Algerian agreements were signed; and the hostages were released. The basic documentation comprising the Algerian Accords had a number of references to the arbitration of bank claims. The two principal Declarations dealt with the basic structure of the deal and included arbitration in the United States-Iran Arbitral Tribunal. Another document called the Undertakings, which was not released publicly at the request of the Iranians, had provisions for resolving the remaining bank issues. It provided, among other things, that the United States banks and the central bank of Iran, Bank Markazi, would meet immediately to agree upon the remaining amounts owing on their claims against each other. If an agreement was not reached within thirty days (nobody really understood from what point the thirty days commenced), the Undertakings provided that either party could refer the dispute to binding arbitration by an international arbitration panel or to the Tribunal. No one knew what international arbitration panel would be used for the banks.

Everyone expected a prompt meeting and agreement because a lot of work had gone into sorting out the remaining claims. In an overabundance of enthusiasm and optimism, people believed that the arbitration provisions were never going to come into play. The banks and Iran did meet promptly, and in a matter of days after the hostage settlement, meetings commenced with the Bank Markazi officials in London. The United States banks laid out their claims and provided the rest of the figures requested by the Iranians. As one might expect, nothing happened, and it became clear that nothing was going to happen very soon. We had no lev-

erage to bring the Iranians to the negotiating table if they did not want to come. The hostage crisis had provided immense pressure for achieving some of the things that needed to be done. But, if the Iranians did not want to negotiate these claims, how were we going to get them to do it? Aside from their own self-interest in resolving the situation, the Iranians would have received a substantial amount of additional money, which was their money otherwise immobilized, and interest on all the money frozen in the United States when a settlement was reached. The only way that we could get Iran to the negotiation table, however, was by resorting to a more formal process.

We sent a message to the Iranians in February stating that we wanted to continue to negotiate, but at the same time we intended to propose a system for arbitrating the banks' claims if the negotiations were unsuccessful. This formal message also did not receive much of a response from Iran. We followed this message with an outline of an arbitration proposal, built simply on one sentence in the Undertakings, which stated that either party could refer a dispute to binding arbitration by an international arbitration panel agreed upon by the parties. Because it was very difficult to agree with the Iranians on anything, we thought that all we could do was continue the process of making proposals and hope that something would click. We sent an outline for an arbitration system in the form of a proposal for arbitration that they could accept. This kind of ad hoc arbitration was done by a bunch of pseudo-amateurs not having a great deal of experience in arbitration, representing clients who did not have any interest in arbitration, and dealing with another party who did not have any interest in doing anything. We proposed, however, that we ought to arbitrate these claims if we could not negotiate successfully. We suggested that the arbitration should take place in London, in English, and under the UNCITRAL rules as modified by an Exclusion Agreement under the Arbitration Act of 1979. All of our English legal advisors recommended that we should include the Exclusion Agreement because without it we would end up in court and not arbitrating.

Our discussions with the Iranian representatives on the arbitration system focused a great deal on the selection of the arbitrators. We proposed that three arbitrators be appointed: one appointed by the United States banks, one by the Iranians, and a third appointed through some mutually determined process. We discussed a variety of systems to use in picking the third member.

We followed this general proposal with a more detailed proposal in the form of a draft arbitration procedure telex. The final version of this draft procedure provided for the selection of a present or retired chancery or commercial court judge of the High Court of England as the third arbitrator. We had developed immense respect for commercial court judges in England during the bank claims cases. A judge handling the litigation involving the frozen bank accounts in London, while not experienced in this area, had a very quick grasp of the issues that were not well understood by many people, including bankers. We agreed that the third arbitrator should be one of these judges and accordingly, we prepared a variety of provisions for appointing such a judge as an arbitrator.

It is probably worth the time to touch on the main points in the arbitration proposal. First, there was no arbitration agreement. Arbitrating in the absence of an agreement to arbitrate would pose problems in enforcing the award other than through the procedures set up in the United States-Iranian Undertakings. We expected trouble in taking the award elsewhere, even though it was rendered in England, and enforcing it under the New York Convention. We proposed to reach an agreement by sending a telex the Iranians would accept. One United States bank would propose the agreement and Iran would accept it. Any other bank that wished to arbitrate could simply adhere to the agreement. That is, such a bank would give a notice of reference to arbitration, and adhere to the existing agreement.

Second, we needed a procedural body of reference. The UNCITRAL rules were proposed for a couple of reasons, not the least of which was political. The Iranians already had accepted the UNCITRAL rules, and although the people with whom we were negotiating had taken no part in that decision, one of the tricks in getting any agreement with the Iranians is to give them an opportunity to blame someone else for something, rather than forcing them to make a decision themselves. The central bank representatives could blame other Iranian government officials for having gone along with the UNCITRAL rules. Everyone believed that the UNCITRAL rules should be used, even in the absence of much experience with them.

The choice of language was the third important issue in the proposal. None of these agreements, other than a few foreign language documents, were in any language other than English. We did not want to get involved in translating a lot of documents into

Persian. Such translations, of course, have been the experience in the Arbitral Tribunal.

In another section of the proposal, we selected London as the situs of the arbitration; in facilities provided by the London Court of Arbitration. Provisions on the method of choosing the arbitrators also were included. We wanted a short form procedure and therefore did not want the arbitration reference to include any lengthy pleading or claim statement. As a result, we picked up provisions from the UNCITRAL rules providing for additional statements of claim and defense.

Compensation of the panel, another point included in the proposal, potentially involved enormous sums of money. Everyone knew that compensating the panel with fees based on percentages of the amounts involved could make our clients uncomfortable very quickly. We attempted to put a cap on the compensation of the panel. In addition, we were nervous about the use of experts. We experienced some unpleasant situations in the European civil litigation of the bank claims, in which it was quite common for the courts to appoint experts. The French courts, in which the Iranians and the banks litigated the claims on the foreign deposits, appointed "three wise men" to ascertain what Eurodollars were. The appointed experts filed an interim report, and although the money was paid over two years ago, the wise men are still thinking about the nature of Eurodollars. Needless to say, we wanted to have some input into the appointment of experts.

Finally, the enforcement provision in the proposal was designed to pick up the existing enforcement procedures embodied in the Algiers Accords. This was the last effort in designing an arbitration system for the bank claims. We worked on this arbitration proposal throughout 1981. As the year was coming to a close, we made one effort after another to get actual substantive negotiations underway on the bank claims. Every one of those efforts was unsuccessful. We met all kinds of obstacles, many of them coming from the United States Government, which saw the bank negotiations as a possible vehicle for getting some things that it wanted.

As the end of the year approached, time was running out for us to do much of anything other than file our claims in the Tribunal, something we did not want to do. There was, however, an absolute statute of limitations on claims before the Tribunal. It took a lot of time and expense to get the claims put together and everything translated into Persian. One of the banks was preparing to file a claim that was thousands of pages long, when, at the time,

some of the Farsi translation services were charging $200 a page. We had to turn our attention to getting ready, albeit reluctantly, for the Tribunal along with the rest of the claimants. In that context, the ad hoc arbitration process for the banks expired before it was ever invoked. One bank actually made a reference, maybe just whimsically, or perhaps aggressively, to arbitration under the ad hoc system. Arbitration never happened, and, in fact, I think that particular bank may have already reached a settlement.

Thus, the first widespread attempt in the banking industry to deal with arbitration was, largely academic. Nonetheless, developing a process for referring our disputes, whether to an ad hoc system or the Tribunal, was the only real piece of leverage to get negotiations underway. If those negotiations are not successful, we have every right to be in the Tribunal presenting claims against Iran, and it will have to defend them.

I am happy to say that negotiations are going on, although slowly; but that is the nature of negotiations with the Iranians. The negotiations are proceeding, with real prospects for success. Iran admitted in the Algiers Accords that it will pay the debts. This admission, provides a piece of leverage for settlement, and I sincerely hope we will avoid protracted litigation or arbitration of the claims.