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RELIEFS AND REMEDIES OF INTERNATIONAL LITIGATION

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History shows us that never before today have we had more international trade, more travel, be it for business or pleasure, more contact between person and person, more relations between community and community, government and government, State and State. Given the total interrelations in international trade, it would seem that these meetings will not diminish in the future, but rather will increase in many areas.

Enterprising American businessmen have attempted to enlarge their foreign trade and investment opportunities. Every aggressive American lawyer, therefore, who has a business client, large or small, will become directly or indirectly involved, to a greater or lesser degree, in matters dealing with the problems of international business and foreign transactions.

Throughout the world, much money, time, and effort has been spent to encourage more international trade, yet there seems to be still lacking a definite set of rules and regulations to help promote world law and order. Because of differences of laws, opinions, ideology, and beliefs among the people of the world, we are bound to have more international litigation as intercourse in world trade increases.

LEGAL PROTECTION OF INTERNATIONAL BUSINESS TRANSACTIONS

It is a well-accepted principle that caution should be used in negotiating international business transactions and that difficulties such as those created by local tax laws, labor practices, and currency regulations can be minimized through careful research or through negotiations with the host country. It is also true, however, that in many

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Having had the privilege of travelling in ninety-nine countries of this world in the past fourteen years, I have made a study of the economic and trade features of the various States. I have found it true that in most instances, our neighbors in the world are seeking trade more than aid. It has always been my concept that trade can be encouraged and sold by the one, wherever the geographical area, who makes the product the best, the fastest, and the cheapest, and who sells it to world consumers at the most reasonable price. This belief is somewhat contrary to our "Buy-American Act" which I hope will become obsolete in the future. In my research of this subject I found the most comprehensive current treatment to be A Lawyer's Guide to International Business Transactions (Surrey & Shaw ed. 1963). May I also thank David R. Kratze, attorney and friend, for his assistance.

instances international transactions cannot be afforded complete legal protection. In these cases, it is nevertheless the lawyer's task to provide his client with whatever safeguards are available.

In the areas where they are prevalent, non-commercial risks necessarily inject an especially intractable element of uncertainty into the planning of a foreign business transaction. The role of the American lawyer is to identify and evaluate these risks. If the decision is made to proceed, notwithstanding the risks, his task is to plan the transaction so that it will enjoy as protected a legal position as circumstances will permit. Non-commercial risks in international business relations are particularly accentuated when a United States organization or person makes a direct investment abroad.[1] In this situation substantial assets of the investor are exposed to expropriation, nationalization, requisition, or damage in the event of war or insurrection. In addition, the investor faces the risk that currency restrictions will preclude remittance of return of profits in United States dollars or will make it impossible to repatriate in dollars some or all of the dollar capital originally invested.

It is true that the investor can gain some protection by reserving the right to terminate the agreement upon the happening of an event resulting in an impairment of his rights, but this is an inadequate remedy in the case where valuable information and trade secrets once disclosed cannot be effectively recaptured.

Legal Protection Under Local Law

The legal and constitutional system of foreign countries may afford protection against impairment of property or contractual rights by local governmental complications. For example, there may be constitutional or statutory prohibitions against seizure of private property, except for a public purpose and with payment of prompt, adequate compensation.[2] The protections built into the general legal framework of under-developed countries, however, are likely to be inadequate with respect to many of the specialized risks involved in international business transactions.

Assurances may be negotiated on an *ad hoc* basis and embodied either in a special concession agreement or in a guarantee agreement. In recent years, however, it has become increasingly common to find such assurances made available to the foreign investor pursuant

[1] For a comprehensive study of the legal security of foreign investment see Fatouros, Government Guarantees to Foreign Investors (1962), which is brought up to date in Fatouros, The Quest for Legal Security of Foreign Investments—Latest Developments, 17 Rutgers L. Rev. 257 (1963). See, A.B.A. Rep., Comm. on Int'l Trade and Investment, Section of Int'l and Comp. L., The Protection of Private Property Invested Abroad (1963).

[2] See U.N. Doc. No. A/AC 9715, Rev. 1 (1960).

to broad investment incentive programs. These programs may be embodied in statute[3] or, less commonly, in a policy statement[4] describing in detail the assurances and incentives which are available to approved investments, the procedures to be followed in applying for the assurances and the criteria to be applied for by the governmental screening agency in deciding whether to grant the assurances requested.[5]

Basic to every investment incentive program are guarantees with respect to the remittance of profits and the repatriation of capital. In some cases, the remittance of profits from an approved investment is guaranteed without limitation. In others, the guarantee may cover annual remittance of a certain percentage of profits or profits representing a certain percentage return on invested capital. Often a fixed percentage of capital is a maximum which may be repatriated in any year, with the additional limitation that there be no repatriation for an initial time period. In addition, assurances may be provided concerning the right of foreign employees to send to their home State their salaries or other compensation in whole or in part.

CUSTOMARY INTERNATIONAL LAW

In recent years, state responsibility for injuries to aliens has been a focal point of intensive study and debate.[6] Widely divergent views

[3] See Third Report by Secretary-General, Selected List of Laws and Official Texts Concerning Foreign Private Investments in Under-Developed Countries, Annex II; Financing of Economic Development, Promotion of International Flow of Private Capital, U.N. Doc. No. E/365 Rev. 1 (1962).

[4] See, e.g., The statement of the Ceylonese Finance Minister reported in Dep't of Commerce, Foreign Commerce Weekly 3 (Oct. 31, 1960).

[5] Among the most comprehensive guarantees in this respect are those contained in Foreign Investment Encouragement Law, art. 32 (1960) (Korea) (As amended):

> 1. The assets of registered enterprises under this Law shall not be subject to any compulsory expropriation or any form of compulsory transfer of ownership, except appropriation by the Government for a public purpose.
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> 2. In the event of the expropriation of the assets under the preceding paragraph by the Government, just compensation shall be paid for in accordance with law. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken.
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> 3. The investor shall have the right to remit abroad without delay any sums of money received as payment for action taken under this Article free of taxes or fiscal charges.

For the assurances granted under Iranian Law, see Nasr, Investment of Foreign Capital, in Legal Aspects of Foreign Investment 280, 290 (Friedmann & Pugh ed. 1959).

[6] In 1953 the General Assembly of the United Nations requested the International Law Commission to undertake the codification of the international law regarding State responsibility. Since that time the subject has been under active study by the Commission but agreement on a draft convention has not been reached. See the reports on the subject prepared by the Commission's special rapporteur, Dr. F. V. Garcia-Amador, 2 U.N.Y.B. of Int'l Law Comm'n 78 (1961). See also Sohn & Baxter, Draft Convention on the International Responsibility of States for Injuries to Aliens (12th Draft 1961); Sohn & Baxter, Responsibility of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 545 (1961); The Foreign Relations Law of the United States, Pt. IV (Proposed Official Draft, 1962).

are held by representatives of the capital-exporting States of the West, the States of the Communist bloc, and the capital-importing countries of the less developed world. We cannot expect an early international agreement on these divergent views.[7]

There is a substantial body of customary international law relating to State responsibility for injury to aliens which is firmly rooted in State practice, arbitral and judicial decisions. There is considerable measure of agreement as to basic principles. A foundation of this customary law is that a State is not exonerated from responsibility for injury done to an alien if it has accorded to the alien treatment that is in all respects equal to that accorded to its own citizens. Under customary international law, responsibility attaches if the State fails to treat the alien in accordance with an international minimum standard of justice.[8] Under the majority view, the international standard of justice requires that, with certain exceptions, an alien be compensated adequately for his property which is seized by the State. Accordingly, the alien is entitled to such compensation even though nationals of the seizing State are not compensated for their property taken under similar circumstances.[9] These basic principles, long under attack by many Latin American countries,[10] are now rejected by the Communist

[7] After extensive study and debate described in Report on the Protection of Private Property Invested Abroad, supra note 1, at 10-18, the United Nations General Assembly adopted on December 14, 1962, by 87 votes to 2 (France and South Africa) with 12 abstentions (Soviet bloc, Burma and Ghana) a Resolution on Permanent Sovereignty over Natural Resources which provided, in part:

> 4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security, or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case, where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.
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> . . . .
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> 8. Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith . . . .

U.N. Gen. Ass. Off. Rec. 17th Sess., Plenary 1193-94 (A/PV. 1193-94) (1962). It is evident from the equivocal language used in the Resolution and the differing views on such concepts as "appropriate compensation" expressed in the Second Committee and Plenary Debates, that the general principles enunciated are too abstract to provide a very helpful contribution to the development of customary law.

[8] See Root, The Bases of Protection to Citizens Residing Abroad, 4 Proc. Am. Soc'y Int'l Law 16, 20-22 (1910).

[9] Anderson, Basis of the Law Against Confiscating Foreign-Owned Property, 21 Am. J. Int'l L. 525 (1927); Fachiri, International Law and the Property of Aliens, 1929 Brit. Y.B. Int'l L. 32; Re, The Nationalization of Foreign-Owned Property, 36 Minn. L. Rev. 323 (1952). But see Root, supra note 8.

[10] See, e.g., the position taken by the Mexican Government in connection with the

bloc countries and by a substantial and growing number of those less developed States which have recently emerged from colonial status.[11] Indeed, they have rejected the entire concept of State international responsibility to another State for injury to the latter's nationals.[12]

THE DECISION TO LITIGATE

Consideration will now be given to the alternatives available to the lawyer whose client believes his legal rights have been violated. First, we have procedural obstacles immediately confronting the lawyer called upon to enforce these rights, relating to the service of process abroad, the issuance of letters rogatory, and the conduct of foreign arbitration proceedings.

It is usually desirable to retain a foreign lawyer in the geographical area where the dispute will be adjudicated, for his assistance in translations caused by the language barrier and for his ability to survey more realistically the subject at hand.

Consideration should be given to the following items before instituting suit:

1. Availability of witnesses;
2. Availability of documentary evidence;
3. Availability of compulsory process reaching across national borders;
4. Increased costs inherent in this type of litigation (in actions abroad, the losing party must usually sustain the costs of litigation, including attorneys fees, and contingent fees are rarely permitted outside of the United States); and
5. Added delay caused by added distance.

On the other side, a foreign client who is considering asking the American courts for relief, should be advised of the searching nature and cost of our pre-trial state and federal discovery proceedings, which might force him to reveal his business operations, books, and records to an extent that is essentially unknown abroad.

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expropriation of agrarian and oil properties owned by United States citizens. 3 Hackworth, International Law 655-65 (1942).

11 See A.B.A. Rep., supra note 1.

12 [T]he responsibility of a State for injuries to aliens remains in every case in which it may be held to be responsible exactly in the same way as in the case of its own nationals, but it remains its responsibility not to the home state of the injured alien but to the injured alien himself. In other words, it ceases to be an international responsibility and becomes a responsibility only under the municipal law of the State concerned.

Guha Roy, Is the Law of Responsibility of States to Aliens a part of Universal International Law?, 55 Am. J. Int'l Law 863, 888 (1961).

LITIGATION ABROAD—THE CIVIL CODE LAWSUIT

Litigation in most European countries—and other countries modeled on the European system—is governed by civil law procedure. The most distinctive aspect of civil law litigation is that the "trial" is not to a jury, but to the court, which is usually composed of three judges. The court is deemed capable of keeping track of evidence taken over a period of time; there is thus no need to condense proof-taking into a single, continuous session. As a result, a trial in the American sense does not exist under the civil law.[13]

The procedures in the courts of civil law countries vary from jurisdiction to jurisdiction. A proceeding in the Court of Justice at Luxembourg is commenced by filing a petition, analogous to a complaint. Article 38 of the Rules of Procedure provides that the petition shall contain:

(a) The name and domicile of the plaintiff;
(b) The designation of the party against whom the petition is directed;
(c) The subject matter of the dispute and a brief statement of the grounds invoked;
(d) The contentions of the plaintiff; and
(e) Evidence to be added, if any.[14]

Subdivision (e) contemplates a more extensive statement than the short, concise statement of ultimate facts, which is typical in civil law systems. Indeed, in many civil code countries the complaint (and answer) will recite the names of witnesses upon whom the parties will rely. The summons generally contains the date of the first hearing of the cause.

The defendant's answer of defense may not have to be served prior to the first hearing. The answer, like the complaint, will contain contentions of the defendant and the evidence he will set forth in support of his contentions.

Increasingly, civil law proceedings have become written rather than oral. In France, Belgium, Holland, and other countries the proceedings are now written, while in Germany they are theoretically oral. Even in the case of oral proceedings, written memoranda are filed with the court in volume.[15]

In a foreign court, the order of proof-taking is usually determined by the court, which will frequently require the defendant to

[13] A Lawyer's Guide to International Business Transactions (Surrey & Shaw ed. 1963). See the Codice Civile (Italy 1942) which contains no reference to a "trial"; see Sereni, Basic Features of Civil Procedure in Italy, 1 Am. J. Comp. L. 373 (1952).

[14] A Lawyer's Guide to International Business Transactions, supra note 13.

[15] CCH Common Market Rep. ¶ 6471, at 4165 (1962).

prove one or more of his contentions before putting plaintiff to his proof. Issues of liability and damages are often tried separately.

The witnesses called by the court are determined from the lists submitted by the litigants. The witness is not always sworn. In some countries, the testimony is recorded almost verbatim; in others, the judge or his assistant dictates a summary of the testimony into the record. Not all jurisdictions require the witness to sign the transcript of his testimony when it is completed. The examination is conducted primarily by the court, with counsel conducting questioning only after the court has finished. In some jurisdictions, counsel submits questions to the court, and the court then poses the questions to the witness.

Ordinarily, there are no rules of admissibility of evidence. In a lawsuit, under the civil codes, the court will consider all evidence submitted to it, affording it such weight as it determines.

In many jurisdictions the equivalent of a subpoena is available, and the court has power to call witnesses on its own. The civil lawyer rarely contacts witnesses before trial and ordinarily does not seek a written statement from a prospective witness.[16]

In some jurisdictions a single judge takes testimony of the entire record and perhaps makes a recommendation to the collegia which renders judgment.[17]

A proceeding may be commenced in several civil code countries by mailing a summons and the equivalent of a complaint. Such service itself is not jurisdictionally significant, unless there is a basis for jurisdiction other than the mailing.

Service in the United States of the Process of a Foreign Court

American courts have been reluctant to effect service of process on Americans as requested by letters rogatory.[18] American procedure generally does not bar extra-judicial service of process, and there now appears to be no objection to service by a foreign consul. In conse-

[16] The German canons of ethics provide that "questioning of witnesses out of court is advisable only when special circumstances justify it. In such questioning even the appearance of trying to influence the witness is to be avoided." Bundesrechtsanwaltskammer, Richtlinien fuer die Ausuebung des Anwaltsberufs, para. 4(2) (1957).

[17] A more detailed description of the procedures of civil law jurisdictions may be found in: von Mehren, Some Reflections on Japanese Law, 71 Harv. L. Rev. 1486 (1958); Sereni, Rene, & de Vries, The French Legal System; An Introduction to Civil Law Systems (1958).

[18] In re Letters Rogatory out of First Civil Court of City of Mexico, 261 Fed. 652 (S.D.N.Y. 1919); Matter of Romero, 56 Misc. 319, 107 N.Y. Supp. 621 (Sup. Ct. N.Y. County 1907); for a further discussion of Letters Rogatory, see A Lawyer's Guide to International Business Transaction, supra note 13, at 975. Letters Rogatory are requests from an American court to a foreign court, predicated on comity, without regard to the existence of any treaty obligation. Since, if honored, the host court will direct the appearance of the witness, this is the sole device by which an unwilling witness may be compelled to testify.

quence, there is no grave problem of perfecting service in the United States.

Obtaining Evidence in the United States for Use Abroad

Obtaining evidence for use abroad presents few problems. The verbatim question and answer technique of American courts, while differing from civil code procedure, is not likely to present any problems in the civil code court.

A number of states have now adopted the Uniform Foreign Depositions Act[19] with regard to examination of witnesses and parties, and production of official and unofficial documents. In the United States, certified copies of official documents of municipal, state, and federal departments are readily obtainable. The Authentication Offices of the Department of State will authenticate properly sealed state government records, private documents authenticated by a secretary of a state, as well as records of federal departments and agencies.

Obtaining Evidence Abroad for Use in the United States

A brief review of present and contemplated federal practice will indicate the outlines of the problem of admissibility in American courts of testimonial evidence obtained abroad.

Testimonial evidence abroad may be taken by stipulation, notice, commission, or letters rogatory. In each instance, the attorney must ascertain which of these procedures are permitted. A commission is merely the document by which an American court appoints someone, usually a consular official, to hear certain testimony. Examination by commission may be oral or by written interrogatories.

There is no reliable procedure by which documentary evidence may be obtained abroad which can give the American lawyer confidence that it will be admitted in evidence in an American court. Under United States federal procedure, the subpoena is the sole device for obtaining tangible evidence from persons other than litigants. Under Rule 45 of the Federal Rules of Civil Procedure, the subpoena may run only within the district in which the court sits or outside the district to a distance of 100 miles of the place of trial.

Proof of Law—Here and Abroad

Under the civil law systems, American law is generally proved by reference to American texts and treatises as well as by the testimony of experts. The attitude of the common law for many years was that the foreign law was a matter of fact, to be pleaded and proved

[19] Smit & Miller, International Cooperation in Civil Litigation—A Report on Practices and Procedures Prevailing in the United States 17-22 (1962).

as any other fact.[20] The trend over the years has been away from this approach. Twenty-seven states have adopted the Uniform Judicial Notice of Foreign Law Act requiring that judicial notice of the laws of sister states be taken. Under Section 5 of the Act, the court is not obliged to take judicial notice of foreign law; in any case, foreign law is a matter for the judge and not the jury.[21]

Enforcement of Foreign Judgments

There is no federal statute governing the enforcement of foreign judgments in the United States. Local state law controls the effect to be given to foreign awards.[22] Defects in the foreign judgments such as extrinsic fraud, lack of jurisdiction over the person, or lack of due notice and failure to provide an opportunity to be heard will preclude enforcement in American courts. Judgments which are not final will be denied enforcement. Judgments which are not in accord with the public policy of the enforcing state or which are deemed contrary to "natural justice" will similarly be denied enforcement. Most countries either will not recognize foreign judgments at all or will do so only upon the basis of reciprocity.[23]

Conclusion

The author has attempted to give the reader some insight into the extensive field of international law and litigation. It is difficult to cover such a broad subject in an article of this nature. Almost daily changes in the international area require continuous study and research of the many problems that may arise in the practice of international law. It must be admitted that there is much discrepancy, ambiguity, and difference of opinion in the world; but the mere fact of recognizing this lack of uniformity in the law should help encourage its students to attempt to adopt more uniformity of law and order.

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[20] See Smit & Miller, supra note 19, at 74. For examples of pleading, both in haec verba and substance and effect, see McKenzie, The Proof of Alien Law, A.B.A. Proc. Int'l & Comp. Law 55-59 (1959). With regard to federal practice, see Walton v. Arabian Am. Oil Co., 233 F.2d 541 (2d Cir. 1956), cert. denied, 352 U.S. 872 (1956); Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 196-97 (2d Cir. 1955).

[21] See A Lawyer's Guide to International Business Transactions, supra note 13, at 979.

[22] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[23] See Nadelman, Non-Recognition of American Money Judgments Abroad and What To Do About It, 42 Iowa L. Rev. 236 (1957). Enforcement abroad of United States court decisions involving extraterritorial application of United States antitrust laws has created difficulties. See United States v. Imperial Chem. Indus. Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952); British Nylon Spinners Ltd. v. Imperial Chem. Indus. Ltd., [1952] 2 All E.R. 780 (C.A.), aff'd, [1954] 3 All E.R. 88 (Ch.); see Int'l Law Assoc., Report of the Committee on Reciprocal Enforcement of Foreign Judgment, The Foreign Money Judgment Enforcement Act (1958). An excellent bibliography follows this model act.