

# International Business Transactions

Miscellaneous Topics

November 23, 2009

# **CURRENCY CONTROLS**

# Some Categories of Currency Control

- Measures to increase foreign (hard) currency reserves:
  - Borrowing Restrictions
  - Export Restrictions
  - Import Encouragement
- FX Control Mechanisms

# Possible Responses to Inconvertibility and Repatriation Restrictions

- Sell goods abroad for dollars but disclose to Latina only a portion of the sales price, depositing the balance abroad.
- Bring in only as much hard currency as they will need.
- Repatriate as much profits as possible as soon as possible.
- Manipulate transfer pricing to “repatriate.”
- Increase book value of assets based on inflationary situation (“indexing”).

# Possible Responses to Inconvertibility and Repatriation Restrictions

- Find ways to use the inconvertible and/or non-repatriatable currency in Latina:
  - Reinvest profits in Latina.
    - If increasing investment, borrowing from an affiliate company at a high interest rate may circumvent repatriation/currency control rules.
  - Obtain more supplies and talent locally that would otherwise
- DGI could try to purchase inconvertibility and/or repatriation insurance
- Abandon the country all together

**Any such measures must not contravene  
the legal requirements of the host  
country!**

# **EXPROPRIATION/NATIONALIZATION**

# Compensation Standards

- Appropriate
- Just
- Full
- Prompt, adequate and effective
- Fair
- Fair actual value
- Equitable
- Book value
- Adjusted book value
- Market value
- Fair market value
- On going concern value
- Immediate and effective

# **THIRD WORLD DEBT**

# Credit Enhancement Examples

- Rights to collateral and priority
- Equity contribution and over collateralization
- Priority of payments
- Co-borrowers (joint and several liability)
- Guarantees
- Financial and operational covenants
- Insurance (including credit default swaps)
- Default provisions (including interest increases and acceleration)
- [Conversion rights]

# Examples of IMF Conditions

(aka “Structural Adjustments”)

- Reduced barriers to trade
- Reduced currency controls
- Balanced fiscal budgets (“austerity”)
- Central bank independence
- Money supply controls
- Privatization
- Deregulation
- Market pricing
- Reduce public subsidies
- Public sector loan limits
- Corruption fighting measures

# Current Problems with the US Economy

- Historically large budget deficits
- Recent failures of Fed
- Great Recession
- Housing bubble bursts
- Persistent trade deficits
- Weakening dollar and rise of the Euro
- High unemployment
- Nationalization of financial institutions and GM
- Increasing internal wealth disparity
- Stock market indexes plummet

# **ALTERNATIVE DISPUTE RESOLUTION**

# Arbitration compared to Litigation: Advantage or Disadvantage?

- Relatively informal
- Flexible, much less extensive procedural rules
- Confidential
- Speedy resolution of dispute
- Usually no ability to appeal
- Not such cumbersome rules of evidence
- Not extensive pre-trial discovery procedures
- No subpoena powers
- Tribunal administration costs must be paid by parties
- Substantive and/or legal experts can serve on panel
- More likely to entertain claims of equity/fairness
- Less likely to entertain claims of public policy
- Limited ability to address disputes between more than two parties
- Limited or no ability consolidate multiple proceedings
- No precedential value
- Parties can design the rules of the arbitration to suit their needs



# Parsons and Whittemore Overseas' Arguments

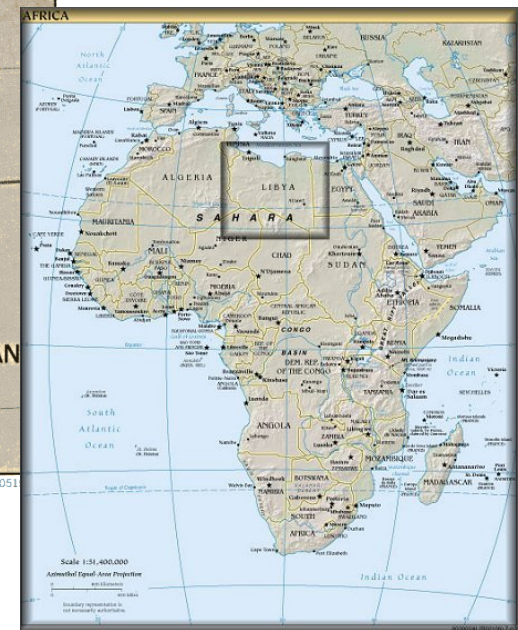
1. Public policy: “With severance of diplomatic relations, Overseas must suspend its work in order to be a good US citizen. We can’t work in defiance of US national policy.”
2. Non-Arbitrability: “US foreign policy issues cannot be placed at the mercy of foreign arbitrators.”
3. Inadequate Opportunity to Present Case: “Arbitration panel refused to delay the proceedings to accommodate the schedule of a witnesses, the US Chargé d'Affairs in Egypt.”

# Parsons and Whittemore Overseas' Arguments

4. Arbitration in Excess of Tribunal's Jurisdiction:  
“The K states that “neither party shall have any liability for the loss of production.” Yet the tribunal awarded nearly \$200,000 to RATKA.”
5. Manifest Disregard for the Law: “The tribunal made errors of law.”



Base 801964 (R0051)



# Sun Oil's Public Policy Arguments

1. “Confirmation would penalize Sun Oil for obeying and supporting the directives and foreign policy objectives of the US government. And if the award enforced, other companies and individuals would be less likely to support the US sanctions program, thereby diminishing the ability of the US government to make and enforce policies with economic costs to US citizens and corporations.”
2. “Enforcement would be inconsistent with the substance of US anti-terrorism policy.”
3. “Enforcement would undermine the anti-terrorism policy b/c
  - Sends a contradictory signal concerning US commitment, and
  - Such an award would be used to finance Libya's terrorist activities.”

# Mickey's Motors Arguments

1. "Enforcement is contrary to US public policy since Pluto was actually motivated to cancel the distribution agreement by its anger at Mickey's shutdown of the lucrative sales to Cuba."
2. "Malaysian law has no antitrust provisions and indeed encourages price fixing and territorial allocations, practices which US anti-trust law prohibits."
3. Mickey's couldn't adequately prepare a defense to the enforcement action since the arbitrators' decision was so conclusional, i.e., it lacked articulated analysis and reasoning."
4. "The award constituted a manifest disregard of the law."

# Public Policy Defense

- US courts have interpreted this defense very narrowly.
- A hurdle often articulated by courts to trigger the public policy defense is that recognition and enforcement of the award “would violate our most basic notions of morality and justice.”
- Only a few awards have been denied enforcement based on the public policy defense.

# Public Policy Defenses

US courts have treated the following issues as *at least potentially* raising legitimate public policy defenses:

- Arbitrator impartiality
- Award constituting punitive damages
- Awards based on illegal agreements
- Antitrust issues
- Awards based on agreements which violate US export regulations or Treasury Department regulations
- Awards in conflict with the US Vessel Owners Limitation of Liability Act