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BY DAVID J. ST. LOUIS*

Transcript of Remarks

Professor William S. Dodge (Moderator): We'll hear more about proving your case and the oral part of that procedure from David St. Louis. Mr. St. Louis is a distinguished graduate of this law school. He graduated in 1967. He . . . has a litigation practice in Fresno, California, and he was the lead counsel for the claimants in *Azinian v. Mexico*, and just let me say, on a personal note, I worked with Mr. St. Louis on that case, and came to admire greatly his litigation skills. David?

Mr. David St. Louis: Some years ago, I was invited to address the faculty here at Hastings at the beginning of the year, and I had been in practice probably fifteen years at that time. And it was in this very room that I came and brought my fifteen years of wisdom that I had collected on the street to share with those people [who] had taught me.

I was very well-received. Justice Raymond Sullivan came up afterwards and corrected me on a point of law. The then dean came up and corrected me on my grammar. So I thought, some things never change.

And so it is. Last night I had dinner and I was able to meet and speak with some of the students, and I was happy to find and reflect that the students haven't changed either. You're bright, you're eager, you're looking forward to your futures, and I need to tell you that

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being a graduate of this institution allows you to compete with the best and the brightest, which is what we had to do in the *Azinian* case.

Now, how does a lawyer from Fresno wind up in Washington, D.C., trying a case against the government of Mexico? It was like Clyde [C. Pearce] said: a client called. The client had come to me by way of [a] referral from a Los Angeles lawyer.

It was interesting to note that I made the same observations that Clyde did about what my chances of making a recovery for these people were, by way of an initial assessment. And the initial assessment led me to conclude that I didn't have the faintest idea because no one had ever done this before. So it was quite an intellectual challenge.

Now, when that client comes in—and Clyde did not flesh this out, and I'm going to be very fact specific about my case—when that client comes in the front door, if you are in a very small law firm, you must be prepared to make a commitment of probably three to five thousand hours working on that case. Now, according to San Francisco standards for your first-year practitioners, that means probably about a year and a half to two years of work if you're required to work 2,200 to 2,500 billable hours a year.

Second, you must appreciate that when you are suing—on top of the three governments that are involved—by way of an arbitration, that you are dealing with someone with unlimited resources, and that with the resolve that was shown by Mexico in this case, you must be prepared to spend, in terms of time and costs, millions of dollars. That means that you have to in depth figure out what your chances of success are in bringing a claim under the NAFTA.

I didn't think about those things. I just saw an opportunity, when I read the statute, to do some good for a client, and I proceeded most blindly ahead.

Let me first say that Clyde Pearce and I have worked very closely on both cases. Dan Price was involved in my case before, through the negotiation stages with the government of Mexico, and so I wasn't, perhaps, as blind as I've led you to believe because there was a great deal that had gone on in the past. But in terms of resolution of this dispute, we were on new ground.

The facility that I chose was ICSID and if such a case ever walks in your front door, and you make the decision that you're going to proceed with it, I would suggest that you strongly look at the Additional Facilities that are provided by the World Bank. In terms

of cost savings, my guess would be that we saved, probably, well over $100,000 [to] $150,000 because the World Bank provided all of the facilities to us and did not charge us. So that in itself is something for you to consider.

Now, Clyde has described the [pragmatic concerns] of filing. There were some drawbacks in selecting ICSID as the venue. There seemed to be some minor conflicts in terms of the power of the tribunal as set forth in the NAFTA itself versus the rules of the Additional Facilities. That had to do with the power of the arbitrators. Were the arbitrators fact finders? Or were they just simply judges [who] would listen to your evidence and would then make a decision?

I want to focus on the oral hearing, and I have a reason for doing this. In the pre-trial stages, Clyde has described to you what briefing can look like, and in my case we went through two preliminary motions. I filed a memorial. They filed a counter-memorial. I filed a reply. They filed a rejoinder to the reply, and we went through three rounds of pleadings which have probably occupied, maybe, 20,000 pages including exhibits.

You would have thought that an arbitration process was designed to speedily resolve a dispute. In my case, it did. We moved along rather rapidly, and I believe that . . . [the time] from the date of filing to the date of the decision was less than two years. And from that standpoint, it worked out rather well.

Early in the proceeding, I had made a request to take depositions, and the reason why I wanted to conduct pre-trial discovery was very simple. The case outline that Professor Dodge has [distributed to symposium conference participants] needs to be expanded from one standpoint. My people were private parties. They entered into a contract with a city, the City of Naucalpan, which is a suburb of Mexico City. It has about two million people. We entered into this contract with a government that was no longer in power. Because of that, the government of Mexico, under 201, by virtue of a respondeat superior theory contained in the NAFTA itself, all of a sudden [found] itself trying to defend the actions of a municipality of which the records and the parties [were] no longer available.

So, I needed that discovery to depose the former administration to determine what their state of mind was when they entered into this contract with my clients. The panel, when I made that request, determined that they did not have the authority to order discovery

and they did not have any authority to order . . . protective orders for witnesses. So . . . I wound up in the situation [where] the people [with whom] I was dealing . . . , and [who had] enter[ed] into this contract—the subject of the dispute—were unavailable to me. And at the hearing they were unavailable, for all intents and purposes, to the government of Mexico.

So when we got to the issues of attempting to resolve whether or not a fraud had been committed upon the former administration, there was an empty chair there. And, because I am a litigator from the United States, I resorted to traditional rules as to burden of proof. And I felt [that] since I had evidence of a written contract, and I had evidence from a number of people by way of affidavits, I felt that I carried the burden of proof, since there was only an empty chair there and there was no one to deny what the state of mind was as to these contracting parties.

Now, let me put this in a practical context. This was a $20 million question to my clients. And so when it came time for the panel to make a decision, Benjamin Civiletti, who, as you know, was former Attorney General of the United States, was my party arbitrator, and he asked counsel for the Mexican government, since we had raised the "empty chair" issue, "Where are your people? Where is the former city council, the former mayor of that city? Why aren't they here? Why don't you have an affidavit from them? Where is this evidence?" And . . . Chris Thomas, a very, very capable lawyer, looked at the panel. He said, "We interviewed them, and we decided not to call them, because we could not produce any satisfactory evidence from them."

Now, in my mind, after that question, the next question was whether or not there was performance under the agreement. And this is why it is necessary to either have depositions or have a live hearing. [Y]ou have a right to request witnesses from the opposite side, and one of their witnesses was a gentleman whose name was Piacesi. And Mr. Piacesi was in the private sector, and as perhaps my Mexican brethren will tell you, it is not unusual for people from the private sector to go into government service on a limited basis, and then return to private practice. I asked Mr. Piacesi, after about two and a half hours of cross-examination, whether or not, in his opinion, my people had breached the contract. And Mr. Piacesi said no.

So, here we are, then, Professor Dodge and myself, and Professor Cole was there, and my clients, and we're all patting ourselves on the back, and saying, "You know, we've carried the burden of proof here,

and I think we're going to get out of here with an award."

There were some very complex legal decisions that the panel had to make. One of the decisions that they had to face was that when . . . we were removed under the contract by the new city government, we immediately went into the Mexican court system to seek injunctive relief. There was a provision where, under types of contracts like that, . . . they had an Administrative Court. We were denied relief at that time, and our Mexican lawyer determined that we did not have to pursue these matters any further since the NAFTA provision, specifically Section 1121, says you can go to the NAFTA—you can abandon whatever pursuits that you wish to make in your domestic courts and you may seek relief under these arbitration provisions. That was the state of the record . . . when the decision was made.

And I just want to raise a question which we're going to discuss. In the closing memorial of the Mexican government, they stated, "From the perspective of international law, . . . the actions of the Ayunatimiento," which is the city council, "must be analyzed within the context of Mexican law." In other words, they were saying that this panel should look to the law of Mexico to resolve this dispute. They further felt, and argued to the panel, that this panel was not designed to be an appellate court from domestic proceedings. And since we had not exhausted—this is my interpretation—we had not exhausted our remedies through the Supreme Court of Mexico, that we [would] have to be content with the Mexican law.

The president of the tribunal, when he wrote the decision, stated, "As for factual evidence, they," being the claimants, "have vigorously combated the inferences made by the Ayunatimiento and the Mexican courts, but they have not denied that evidence exists [that the] Ayunatimiento was misled as to DESONA's capacity to perform the concession." Now, we put that in context of what the evidence was, with the empty chair and the burden of proof. It would seem to me that the panel did not follow the traditional notions of the burden of proof, and could have only come to the decision that they had made by imposing upon the claimants a presumption, and that the presumption was that the courts in Mexico were correct, and they therefore should not ought act as a international appellate court. And that flies directly in the face of Section 1121.

So my question to those people [who] are more knowledgeable than I on this panel is: What are the rules of evidence that should be followed and should be applied in arbitrations under the NAFTA? And, perhaps, Professor Dodge, we could ask one of our colleagues

from Mexico to . . . explain to us what the rules are for imposing a burden of proof on parties? And I'm going to leave it there, because I would like to know the answer. Thank you.

Professor Dodge: Mr. Pearce and Mr. St. Louis, thank you both for your presentations. The question has been raised about what the rules for burden of proof are under Mexico's civil law system, and, either Mr. [Raymundo E.] Enriquez or Mr. [Carlos] Garcia Fernandez, would either of you like to address that question as a general matter?

Mr. Fernandez: Thanks, and thank you for these previous interventions which have been very stimulating. I was discussing this with Raymundo, and in both our cases, we [would] have to consult our litigation department in order to have [a] clear[er] idea of this response and come back at some point with a proper answer, which means that we have not a very precise idea of the working mechanism, because neither him nor myself are on the litigation side of it. We were invited from a different perspective, so we promise you, especially Mr. St. Louis, a quick response from them in the near future. Thank you.

Mr. Enriquez: I might add . . . [that] there [are] some Mexican lawyers here that they might be more knowledgeable about this . . . .

Professor Dodge: If anyone . . . in the audience want[s] to take the question . . . . Yes, Mr. Roth?

Mr. Roth: [Comment inaudible on recording.]

Professor Dodge: Reactions? This is just a gap that the tribunal has to fill. Mr. Pearce?

Mr. Pearce: Well, in fact, Article 35 of the Additional Facility Rules reads just that way. If any question of procedure arises which is not covered by these rules, or any rules agreed by the parties, the tribunal shall decide the question.

Professor Dodge: Professor [Don] Wallace[, Jr.], did you want to add something?

Professor Wallace: [Comment inaudible on recording.]

Professor Dodge: Professor Wallace, do you ever face this sort of burden of proof issue in any of the cases that you've sat on?

Professor Wallace: [Comment inaudible on recording.]

Professor Dodge: Other questions about some of the practical aspects of bringing one of these cases, questions that might have been raised by Mr. Pearce or Mr. St. Louis' comments? Yes, Professor [Virginia A.] Leary?

Professor Leary: Simple questions. One of them is: How much, or to what extent, is there a problem involved because . . . there is a reference to the Mexican law . . . [pertaining to administrative contracts]?

The second question is a very peripheral one. . . . [U]nder the UNCITRAL rules, you would have the problem of having to set up the arbitration. . . . You didn't mention at all the International Chamber of Commerce, which has a facility, I think, comparable to the World Bank. I understand that a North American case would not want to go to Paris to have it decided, but I just wondered if that's not at all mentioned . . . .

(Unidentified speaker): I think I can respond briefly to the administrative contract issue. As I understand administrative contracts—and I'm not an expert on civil law, certainly—it is that a contract with the state can be modified at, sort of, at the option of the state. There's a greater freedom for the state, in some sense, to modify or break the contract. That entered into the *Azinian* case, really, only very peripherally. Mexico never made a direct argument based on that. My understanding of the international law jurisprudence on it is that there's some question of the extent to which modification or repudiation of an administrative contract in a civil law system, while valid as a matter of domestic law, to what extent . . . a state might still be responsible for that on the international level.

[W]ith respect to the second question, about facilities, [is] ICC arbitration an attractive option, or even a possible option?

Mr. St. Louis: Well, it's attractive to a practitioner to be able to go to Paris, but that's not the most practical thing for either the respondent in this case, which [was] Mexico, or the claimant, with respect to the additional expenses. And I must say, with some chagrin, but also in pure candor, that one of the other reasons of consideration for the selection of ICSID was [that] under their rules, there is a limitation on the amount of money to be paid to the arbitrators, and that's not true under the other rules. And I can tell you that there's a significant difference between what the gentlemen who agreed to be arbitrators received per hour versus what [was] received in the Canadian case under UNCITRAL.

Professor Dodge: Mr. Price?

Mr. Price: Just as a factual matter, ICC was not one of the agreed-upon fora in Chapter Eleven, so it is "investor's choice." Investor[s] [have] three choices, and ICC [is] not one of them. So it doesn't preclude ICC arbitration, but that could only be by separate agreement of the parties.

And just on Paris as the venue, I need to say that not all ICC arbitrations, unfortunately, take place in Paris. I served as an ICC arbitrator in a case in Medville, Pennsylvania.

Mr. St. Louis: Well, that's another reason we don't choose it.

(Unidentified speaker): . . . I was going to just direct a question briefly to Mr. [Joseph] de Pencier. Of course, the claimant gets the choice, but Canada has been sued several times under the UNCITRAL rules. I'm not sure to what extent any of the cases have been under ICSID, but I know you've had occasion to observe some of those proceedings and follow the other cases. The government of Canada doesn't get to choose, but, as between the two, does the government of Canada have a preference?

Mr. de Pencier: I must admit that we haven't ever thought of it because, as you say, we've never had the choice. I've certainly observed the advantages of having the ICSID secretariat there to provide a nice facility, and also to provide support to the tribunal. In our cases, the chairs of the tribunal tend to operate the entire

proceeding on their own laptop computers, and there are times when that means that, on procedural and small matters, you may have to wait longer than you'd like. Or, who knows where the tribunal is? It can be inconvenient having individuals operate without a secretariat where there are tens of thousands of pages, elaborate schedules, lots of witness statements, who knows what else. Other than that, as I say, we haven't done a thorough analysis of the two sets of rules to compare what would be to our advantage, if the choice were ours.

Professor Dodge: Professor [Frederick M.] Abbott?

Professor Abbott: For the sake of allowing the party representatives to re-litigate the case ex post facto, as I understood the arbitrators' decision.... nothing turned on the question of burden of proof, proof with respect to breach of contract, because they decided that the contract was void out of issue because of fraud or misrepresentation based on evidence uncontradicted by the record with respect to the capacity of the party to perform, and therefore didn't address the breach of contract question as a legal matter. Am I correct in that, number one, and if so, how would you respond to this point of the arbitrators' decision?

Mr. St. Louis: Well, first, you're not correct, and let me say that I did not flesh out my position. My positions was, is, that if the parties to the contract, that signed the contract, the former mayor in particular, [were] not called by the Mexican government, an inference could be drawn that if they failed to produce stronger evidence on the point—and we had testimony from a number of sources—that there was no misrepresentation, at that juncture, for any fraud.

Second, had I had the discovery request honored, and I took that man's deposition, that man would have testified that there was no fraud, that he was fully informed as to the capacity of the plaintiffs, and that, in his opinion and the opinions of *his* city council at that time, that they believed that performance could be had.

Third—and Dan and I were just talking about this—the affidavits that I had filed as to ability to perform were from the vice president of BFI, the world's largest waste company, and... that this was a contract that could have, and would have, been performed. So the finding that the arbitrator made—the arbitrators, I should say—was: [First,]... as I had read, that we had not met a burden of proof—and

I point out that I could have met the burden of proof had I had those discovery requests made; and, second, there was an anticipatory breach of this contract on behalf of the new city council. And the economic director of development said that in his opinion he had advised the city council that there was no breach and not to do this. So, for them to come to where they did from a factual standpoint, they had to reject all of my evidence and accept the evidence that had been presented in a very limited proceeding in the Mexican court.

(Unidentified speaker): I think, if I can just add to that, I think, in some sense, what happened in the *Azinian* case is that there was a good deal of evidence put on by claimants as to why there wasn't fraud. There wasn't a lot of evidence put on by the Mexican government, which really rested on the findings of fact that had been made in the previous domestic court proceeding. And I think in some sense what the tribunal did [was that] it used the previous domestic court proceeding to shift the burden of proof, if you will. So in their mind there wasn't an empty chair because the questions that were at issue had already been passed on by the domestic courts, which is an issue that I'll get into in a little more depth in my presentation.

(Unidentified speaker, presumably Professor Abbott): . . . [Y]ou suggested that I . . . mischaracterized their holding. I . . . understand the holding as: We're not addressing the breach of contract claim because the contract was void out of issue, as decided by and agreed upon by the Mexican court because of, probably, inducement, and therefore there's no need to address this [unintelligible]. I mean, is that wrong?

Mr. St. Louis: No, no. I was not—please excuse me—I did not intend to mischaracterize your perception of what the decision was, because that was the decision. What I was suggesting was that, to look behind the record and had this evidence been presented, you would not have had that finding.

(Unidentified speaker, presumably Professor Abbott): Well, it's a very important set of issues, . . . not only from your side, but from the standpoint of the process . . . because it's quite clear what the tribunal decided, and you're suggesting that, in fact, you don't believe that there was this body of uncontradicted evidence on which they

probably would have made that decision.

Professor Dodge: Well, we need to take a break, but . . . for those of you who would like to actually read the decision in the *Azinian* case, I've given you the web site where you can find it, and it will ultimately be published as well.

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