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D. Michael Mandig

David Epstein

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AN ACTUAL CASE: COLLATERAL SECURITY IN
AUTOMOBILES MANUFACTURED IN THE UNITED
STATES AND MEXICO AND HELD BY A DEALER IN
SONORA

D. MICHAEL MANDIG*
DAVID EPSTEIN**

INTRODUCTORY NOTE BY PANELISTS:

As we all know, the North American Free Trade Agreement¹ contains detailed provisions governing the resolution of country-to-country as well as investor-country trade disputes.² However, except with respect to intellectual property protection,³ the resolution of disputes between private trading partners, such as a Mexican creditor and a Canadian debtor, is not directly governed by the treaty. Instead, Article 2022 of the NAFTA requires the Parties to “encourage and facilitate the use of arbitration and other means of alternative dispute resolution [such as mediation and conciliation] for the settlement of international commercial disputes between private parties” in the NAFTA region.⁴

But what of conventional court litigation? The treaty merely states a preference for alternatives to court litigation. It does not “sunset” the courts. So, unless private parties doing business in the region are thoughtful enough to include arbitration and other alternative dispute resolution (ADR) provisions in their contracts, resort to the courts may be unavoidable. While the courts often appear ill-equipped to handle international business problems, that is not always the case, as illustrated by the following example of how Mexican and U.S. courts can work together to solve common problems:

D. Michael Mandig: This is an actual case that raises issues all too often discussed only in the academic context. The litigation in this case is a textbook for international litigation, particularly with respect to Mexico and the United States.

My client is a company called General Motors Acceptance Corporation de Mexico (GMAC). It is an affiliate of General Motors Corporation. General Motors (GM) has a Mexican manufacturing operation in Mexico,

* Lead counsel for the Plaintiff in the referenced case. Member of the National Law Center for Inter-American Trade (NLCIFT) and chair of the Civil Procedure Subcommittee of the Arizona-Sonora Judicial Relations Task Force, a joint project of the Supreme Courts of Arizona and Sonora.

** Director, Office of Foreign Litigation, U.S. Department of Justice, Washington, D.C.

1. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex. (effective Jan. 1, 1994), 32 I.L.M. 605 (1993) [hereinafter NAFTA].

2. *Id.* chs. 11, 19, & 20.

3. *Id.* arts. 1714-1718.

4. *Id.* art. 2022(1).

General Motors de Mexico. It manufactures automobiles and trucks which it then distributes through a series of dealerships just as in the United States. The dealerships are scattered throughout Mexico—at last count there were more than 130 dealerships.

Financing of automobile dealer inventories in Mexico is a rather tricky proposition. When I became involved with GMAC, they were utilizing a nationwide system of consignment arrangements under which GM would manufacture a car, a dealer would order a car, and GM would ship the car to the dealership. GMAC would buy the car, pay GM for it and retain ownership. Technically, then, this was an inventory consignment to the dealer under the terms of which GMAC would consign inventory to each of the GM dealers which elected to finance inventory through consignments. This process is necessary in Mexico because Mexico has no counterpart to Article 9 of the Uniform Commercial Code (U.C.C.);⁵ nor does Mexico have title and lien laws like those in the United States for secured inventory financing.

What happened in this case? GMAC conducted business with a gentleman who owned five dealerships in the State of Sonora, Mexico. In December 1992, GMAC discovered that this dealer, who had five separate corporations with facilities in five separate Sonoran cities, was severely in excess of his credit line. GMAC dispatched a couple of individuals from its Mexico City headquarters to the dealer's primary location in Hermosillo, Sonora, and sent some auditors to the other four dealership locations. A quick audit revealed that the dealer was what the trade describes as "out of trust" to the extent of some 755 vehicles. There were 755 vehicles missing which, according to inventory reports furnished to GMAC by its field auditors, were supposed to be on the lots. It is unclear to this day whether the automobiles were sold or otherwise disposed of. Nonetheless, the result was a bill of approximately \$12,500,000.

GMAC, through its counsel in Detroit, Michigan, hired a lawyer in Mexico City who was dispatched to Hermosillo. That lawyer then hired local counsel, and they filed three lawsuits in the state of Sonora—one in Hermosillo, one in Guaymas, and the third in Nogales, Sonora, which shares the border with Nogales, Arizona. Someone suspected the dealer owned Arizona real estate. We investigated the matter, and found a townhouse with title held jointly in the name of the majority shareholder in each of the five corporations and his wife. We attached the townhouse in a prejudgment attachment without notice.

Because we suspected the defendants might also have been banking in the United States, we garnished every bank which conducts business in southern Arizona. One garnishment produced results. The dealer had, over a six year span and through a series of four bank accounts at Bank One in Arizona, deposited and withdrawn roughly \$13.7 million dollars—strangely close to the same amount owed GMAC. We were dismayed to learn that by the time we garnished the bank accounts only about \$70,000

5. U.C.C. § 9.

remained. This is typical for these kinds of situations. In any case, two bank accounts were corporate accounts in the names of two of the dealerships—Mexican corporations—and two accounts were personal, in the name of the majority owner and his wife. There was a lot of activity between and among the Arizona bank accounts.

Arizona has a racketeering statute,⁶ which at the time was more extensive in scope than the federal racketeering laws.⁷ We amended our complaint to add a racketeering claim and attempted to determine whether the moneys going into and out of the bank accounts could be traced to the sale of the inventory.

The version of Arizona's racketeering laws which applied to our case provided a private cause of action for treble damages to any person injured as a result of "racketeering,"⁸ a defined term which, in our case included obtaining money through a scheme or artifice to defraud and "money laundering."⁹ Our objective was to show that GMAC's vehicles were disposed of by the dealers through fraudulent practices and breach of trust and the proceeds of their disposition "laundered" in some fashion through Arizona's banking system.¹⁰

At this point we realized that a lawsuit begun with the purpose of seizing property in aid of foreign litigation became a case of the "tail wagging the dog." When we learned of the significant connection to Arizona, we figured that it would take two to three years to obtain final judgments in the "*juicios ordinarios*"¹¹ that had been commenced in Sonora. By that time it would be difficult to apply pressure to this dealer to see if he had any money hidden away. We advised the client to press the U.S. litigation a bit harder, as we believed it would be quicker to obtain judgment in the United States than to await judgment in the

6. ARIZ. REV. STAT. ANN. §§ 13-2301 to 13-2317 (1996) [hereinafter Arizona Racketeer Influenced and Corrupt Organizations Act (RICO)].

7. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961-1968 (West Supp. 1997).

8. Arizona RICO Act, *supra* note 6, § 2314.

9. *Id.* § 2301(D)(4).

10. The defendants moved to dismiss the complaint. They asserted forum non conveniens, personal jurisdiction and contractual forum selection clauses as support for dismissal. The trial court denied the motions, holding that the plaintiff should be given an opportunity to conduct discovery to prove money laundering. The judge believed that if money laundering and Arizona RICO violations could be proven, dismissal would be inappropriate. On the other hand, the Court also ruled that the forum selection issues would be revisited if discovery did not reveal that proceeds of unlawful activity in Mexico were laundered or used to buy property in Arizona.

11. In Mexican civil procedure there are two principal types of civil actions: the *juicio ejecutivo* [executive action] and the *juicio ordinario* [ordinary action]. The principal distinction between the two types of suits is that the executive action, which is based upon particular types of debt instruments called *títulos ejecutivos* [execution papers], is an accelerated case in which special provisional remedies—such as the appointment of third parties akin to receivers—are available. In ordinary actions such provisional arrangements are either seldom granted or not legally available. In addition, the executive action permits only a limited list of matters to be raised as affirmative defenses. In ordinary actions, many more legal and factual defenses can be raised. See J. OVALLE FAVELA, *DERECHO PROCESAL CIVIL* 361-84, 51-105 (6th ed. 1994). The ordinary action is, as logic suggests, slow, cumbersome and inefficient compared with the executive action and is not favorably regarded by creditors and their attorneys.

Mexican litigation. The idea was to get a judgment in the United States and enforce it in Mexico, if possible. The client consented, and we moved ahead.¹²

This case has been both a textbook and a laboratory. It has taught us some peculiar lessons. Our first mistake related to translation of the forms used to make service of process on the defendants in Mexico. Testing and certification for court translators in the U.S. federal court system is extremely rigorous. Less than ten percent of those who take the exam to get the license pass. We sent letters of request and letters rogatory for service with a translation by a court-certified translator in the United States. I am not certain whether there was concern about the translation's validity or some other factor, but the Mexican court which handled the service of process in Hermosillo insisted that the papers be re-translated by an official translator selected by the court in Hermosillo.¹³ That translation cost us \$2,000.

The only way to plan for that situation might be to carefully select your translator, and ask the court which will serve process in Mexico what its requirements will be. There is no system for training and qualifying court translators in Mexico, so the preferred option is to use a certified translator in the United States, work closely with that individual as the translation is being made and not blindly accept the translation given you. We used a top-notch translator in Arizona, and GMAC had extremely competent local counsel in Hermosillo. The two of us are quite conversant with the legal jargon of the other's procedural systems. We combed through the translations in every instance to ensure we were saying what we meant to say in both languages. We wanted to avoid being tripped up by an inaccurate translation. The translation is something that should never be overlooked, especially when it involves complicated arrangements such as ours.

David Epstein: Let me add a few comments on the service of process issue. My office in the U.S. Department of Justice is the Office of Foreign Litigation in the Civil Division. It serves as the central authority in the United States for the Inter-American Convention on Letters Rogatory.¹⁴ The procedures for service are relatively simple. Forms are available at the U.S. Marshal's Office for service in both English and Spanish. You send your papers in after they are filed with the court and we authenticate them. We send them to the Mexican Ministry of Foreign Affairs under the Inter-American Convention.

12. Enforcement of the judgment in Mexico was not regarded, of course, as a foregone conclusion. This is especially so because the provisions of Mexico's procedural codes leave open the possibility of substantial and time-consuming litigation to procure recognition and enforcement of out-of-country judgments. See generally, D. Michael Mandig, *Inter-American Dispute Resolution: The Role for Border State Judicial Cooperation*, published in: 1 TOWARD SEAMLESS BORDERS: MAKING FREE TRADE WORK IN THE AMERICAS 716, 760-78 (1993).

13. That problem did not arise with all courts with which we dealt. The Mexican federal district court accepted our papers when we submitted evidence. However, the service papers in the State of Hermosillo had to be translated again.

14. Inter-American Convention on Letters Rogatory, Jan. 30, 1975, 14 I.L.M. 339 [hereinafter Inter-American Convention or Convention].

That treaty was implemented slowly in the late 1980s. We were pretty discouraged for a couple of years because many service requests never returned. They literally disappeared. Fortunately, we have seen progress in recent years. Documents are returning to us now on a fairly regular basis—not without some difficulty and problems—but there is considerable improvement, and the statistics show it. Six months to a year for service is probably an accurate estimate.

There is also an exclusivity issue under the Convention. The U.S. State Department advises the American public that the Convention is the exclusive means for service of process in Mexico, which of course has implications if you want to subsequently enforce a judgment there. However, other service of process methods have been used, so it is not entirely clear whether the Convention really is exclusive or whether you can properly use those other abbreviated procedures. I advise people who call me to use both a long and a short route if they can find one for personal service. Mr. Mandig served papers in this case under the Convention's Border States Provision.¹⁵ This provision allows for direct transmission from a border state to the court in Mexico. This raises other issues about separate authentication and legalization if you do not utilize the central authority in Washington, D.C.

Mandig: There are lower court decisions in the United States which create some confusion as to whether the Inter-American Convention is the only means of serving process in foreign jurisdictions that are parties to it.¹⁶ I have a difficult time squaring decisions which hold the Inter-American Convention to be non-exclusive with the Supreme Court's decision that the Hague Convention on Service of Process¹⁷ is, in fact, exclusive.¹⁸ I tell my clients and other lawyers to follow the Convention, just to be on the safe side. If you are able to use the court-to-court transfer mechanism, it is probably not going to be that difficult for you. We had no problems serving process in Sonora.

Questions arise as to whether it is appropriate under the Inter-American Convention and the Additional Protocol¹⁹ to use a direct court-to-court transmission of letters rogatory. There is some debate about whether the Additional Protocol was intended to supplant the provisions of the Con-

15. *Id.* art. 7. Article 7 provides:

Courts in border areas of the States Parties may directly execute the letters rogatory contemplated in this Convention and such letters shall not require legalization.

16. *Compare Pizzabocche v. Vinelli*, 772 F.Supp. 1245, 1249 (M.D.Fla. 1991) (service in Uruguay and Argentina was not required to be made under the Inter-American Convention, even though the U.S., Argentina and Uruguay are all parties to the treaty and its Additional Protocol), *with De Torres v. Arocena*, 587 N.Y.S.2d 495, 498 (Sup. 1992) (service in Uruguay required to be made in accord with the Inter-American Convention, which the Court held preempted inconsistent state service rules).

17. Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Hague Service Convention or Service Convention].

18. *Volkswagenwerk, AG v. Schlunk*, 486 U.S. 694 (1988).

19. Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, 18 I.L.M. 1238 [hereinafter Additional Protocol].

vention, which allow for court-to-court transfers,²⁰ or whether the Additional Protocol is merely a declaratory statement of "how to do it if you serve by means of a central authority." We took the position that if we sent papers to Mexico City, we might never see them again. We therefore served process by letters of request addressed by the Superior Court in Arizona directly to the State Courts in Hermosillo, Nogales, and Guaymas. This approach has presented no problems thus far, and the Mexican Courts accept the Letters even though not submitted through the circuitous route of the Central Authority. Furthermore, there are no decided cases which question the availability of court-to-court transfers of Letters Rogatory.²¹

In any case, the Defendants sought dismissal on forum non conveniens and personal jurisdiction grounds. They also asserted forum selection clauses contained in the contracts and specified Mexico City as the forum of choice. The Arizona court found personal jurisdiction over the individual and two of the corporate defendants, and declined to rule on the forum selection and forum non conveniens issues pending completion of discovery to determine whether money laundering occurred. And even though the court found the merits of the underlying contract claims to be basically undisputed, it declined GMAC's initial requests for summary judgment against the four defendants over whom it found personal jurisdiction could be asserted.

We tried to conduct discovery from the adverse parties. They refused to comply with any requests for discovery, and refused to comply with several Arizona discovery orders. Consequently, the court reached what it had described as the undisputed merits of the case and granted us a

20. See D. McClean, *INTERNATIONAL JUDICIAL ASSISTANCE* 71 (1992) (claiming that the Additional Protocol is a "substantial revision" of the Inter-American Convention which supposedly mandates use of the Central Authority to the exclusion of the diplomatic, consular and direct judicial channels described in Article 4 of the Inter-American Convention).

21. In fact, to argue that the Additional Protocol supplants Article 4 of the Inter-American Convention it was intended to supplement does violence to the language of the Inter-American Convention and the Additional Protocol and, in short, makes no sense. Article 4 of the Convention says that Letters Rogatory may be transmitted to the executing court "through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin of the State of destination, as the case may be." Inter-American Convention, *supra* note 14, art. 4. Article 4 also mandates that signatories to the Convention notify the General Secretariat of the Organization of American States of their designation of the "Central Authority." *Id.* The Additional Protocol merely says that the notice of designation must be made when the State deposits its instruments of ratification or accession with the General Secretariat, and requires the Secretariat to distribute a list of Central Authority designations to all States Parties to the Convention. Additional Protocol, *supra* note 19, art. 2. The Additional Protocol does, by its terms, exclude application of the Convention to proceedings for the gathering of evidence. See *id.*, art. 1 (excluding application of Article 2(b) of the Convention). However, the Additional Protocol does not attempt any express limitation or exclusion of any other term or provision of the Inter-American Convention. In fact, the Additional Protocol does only three things: The Protocol implements the terms of the United States' reservation excluding the application of the Convention to evidence-gathering procedures; it provides details for informing States Parties of the identities of all designated Central Authorities; and it provides forms for using the Convention to effect service of process. It does *not* purport to eliminate judicial, consular or diplomatic channels as alternatives to the Central Authority mechanism.

judgment on the contract claims for about 77 million pesos due to the failure to comply with its orders.²²

Despite the fact that the trial court judge granted us judgment on the contract claims, it remained important for us to continue pursuit of the money laundering claims. This was so because opposing counsel asserted the usual defenses of absence of personal jurisdiction, forum non conveniens, and forum selection. The Arizona court denied a motion to dismiss because, if we had proof of money laundering in Arizona, that would provide a sufficient connection to Arizona to justify asserting personal jurisdiction. The reasoning behind denying the forum non conveniens and forum selection clause arguments is not clear, but we think the judge concluded that a Mexican court probably would not apply and enforce a judgment rendered under the Arizona state racketeering laws. Of necessity, it seemed the case should remain in Arizona for the purpose of litigating the racketeering claim.

Because the defense failed to cooperate, we needed to find a way to collect the evidence that might demonstrate that the money entering and leaving Arizona came from the proceeds of the sale of GMAC's inventory. We utilized the Hague Evidence Convention²³ to achieve this goal.

We quickly recognized that since we were not getting any information from the defendants voluntarily or by court order, we were going to have to obtain information from third parties. After further investigation, we discovered there were probably a dozen banks and financial leasing companies in Mexico which had been doing business with the dealerships over a period of years. We wanted to know what the bank records would reveal with respect to disposition of the inventory proceeds. We moved cautiously under the Evidence Convention, and we were able to trace some of the movement of the funds into the United States back to some of these banks.

If you are careful and work hard and closely with competent Mexican counsel, you can accomplish much more than the stereotypical view of the Mexican court system would lead you to believe. In our case we needed a tremendous amount of paper from a large number of Mexican financial institutions. Mexico has a bank secrecy law, but it does not apply to court orders. We therefore asked the trial judge in Arizona to issue letters of request under the Evidence Convention asking the federal district court in Hermosillo to issue *citaciones*—the Mexican equivalent of subpoenas—to these various entities so they would produce documents and later give testimony.

One question which troubled me was whether we would appear like a bunch of U.S. lawyers run amok on a fishing expedition. I was concerned because I had previously spoken informally with Dr. Jose Luis Sequeros,

22. Appendix, Items A & B.

23. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231 [hereinafter Evidence Convention]. The Evidence Convention prescribes certain procedures by which a judicial authority in one contracting State may request evidence located in another contracting State.

the author of Mexico's Article 23 reservation to the Evidence Convention, and asked him his intent when he wrote the Article. He made it clear that while Mexico intended to allow document discovery for use in U.S. litigation, the limitations of Mexico's Article 23 reservation were intended to ensure some judicial control over inquisitive U.S. lawyers.²⁴

We decided to do what we would do with any judge in the United States. We tried to explain to the Mexican judge what was happening in the litigation in the United States so he would understand clearly that there was a case pending; that there was a judge supervising our actions; and that the information we sought was of vital importance to the litigation in the United States. How could we do that? Along with issuing the letters of request filed in Superior Court in Tucson, we asked our Arizona judge to issue findings of fact and conclusions of law, which he did.²⁵ Though they were of a preliminary nature, the findings were proposed based on the preliminary evidence of money laundering occurring with Mexican financial institutions serving as conduits in some fashion. This served as a judge-to-judge request for help in collecting evidence needed to adjudicate the case in Tucson, Arizona and made clear to the Mexican court that our judge was actively involved in managing this aspect of the case.

The letters of request, findings of fact, and conclusions of law were translated into Spanish and presented to the federal district judge in Hermosillo, Sonora, following the court-to-court transmission method permitted by Mexico's Article 27 declaration.²⁶ Even following all these procedures, we got tripped up with the translation. When we translated the papers, we translated inspection as "*inspección.*" That created problems because under Mexican civil and mercantile procedure, there is a

24. Article 23 of the Evidence Convention states:

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Mexico's reservation says that it will permit pre-trial discovery of documents if (a) there is a judicial proceeding pending, (b) the documents sought are reasonably identifiable as to date, subject and other relevant information, and reasonably believed to be in the possession or under the control of the person from whom they are sought and (c) a direct relationship between the requested documents and the pending proceeding is identified. See *Aclaraciones y Reservas del Gobierno de México de la Convención*, §§ 4(a)-(c) (reprinted in L. Pereznieta Castro, *DERECHO INTERNACIONAL PRIVADO* 354 (D. Michael Mandig trans., 6th ed. 1995) [hereinafter *Aclaraciones y Reservas*]).

25. See Appendix, Item C.

26. Article 27 of the Evidence Convention permits adopting jurisdictions to declare that Letters of Request may be transmitted to its judicial authorities through other than the Central Authority. Evidence Convention, *supra* note 23, art. 27(a).

Mexico's Article 27 declaration states that diplomatic, consular and judicial channels may be used in lieu of the Central Authority route. See *Aclaraciones y Reservas*, *supra* note 25, § 5. The United States apparently did not adopt this more agile approach, and Letters of Request under the Evidence Convention may apparently only be sent through the Department of Justice in Washington, D.C. On the other hand, direct actions to obtain information for use in foreign tribunals are authorized by 28 U.S.C. § 1782. Section 1782 is a much simpler, less cumbersome procedure than the Evidence Convention, and foreign litigants should consult U.S. counsel regarding its use. See generally, D. Epstein & J. Snyder, *INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE AND STRATEGY* §§ 10.13 & 10.15 (2d ed. 1994) (general discussion of 28 U.S.C. § 1782).

procedure called *inspección judicial* [judicial inspection] which is a cumbersome, time-consuming procedure by which, after a company makes documents available, a court employee, an *actuario*,²⁷ accompanies you to the witness' place of business and goes through a painstaking process of authenticating all the papers that are presented there. This presents a good example of a procedure which appears to most U.S. lawyers to be cumbersome, time-consuming, and unnecessary even in the Mexican legal system. Especially in the context of disputes involving voluminous documents, the *inspección judicial* may be a process whose reform needs to be addressed in the future.

The lady who was the *actuaría* in our case was a young and inexperienced attorney, but nevertheless bright and diligent. She dutifully wrote everything down by hand during each judicial inspection. It was her task to go through stacks of documents, essentially one document at a time, and to verify the nature and authenticity of the documents presented to us by each of the Mexican companies summoned to present evidence. Occasionally she needed an explanation from a company representative of what the documents were and how each one fit into the daily routine of the bank, leasing company or foreign exchange house we were visiting. It was a painstaking, slow process.

One day I told her I would bring my laptop computer, so I could help her by typing everything instead. We set this document up on the computer, with normal margins. She typed the order, and we printed it on a portable printer. She told me when she saw the printout that the margin had to be bigger. She showed me the way she had been handwriting the information, and there was a margin about three inches wide along the left-hand side of her handwritten minutes of our document review. I asked her why there was such a wide margin, and she said her document would become part of the court record. She showed me one of the official court files, indicating that to make the documents part of the court record she must first copy all the documents produced, authenticate the copies and then physically place them into the official court files. To place the documents received from each witness into the court file, holes are poked into the left hand margin, and the piles of documents are then bound together with string. That is how the Mexican courts maintain *all* paper files, both in the federal and state courts in Sonora. Unfortunately, Mexico does not devote enough resources to the judicial function. Now is a good time for them to start. Once the documents are accumulated in the court file, the *actuaría* then prepares what is, in effect, a return of execution, reciting for the U.S. court the details of the collection of documents, their authentication and so on. This return

27. The term *actuario* does not have a simple, one-word translation. The *actuario* is an employee of the court and a licensed attorney. The job of the *actuario* is essentially an entry-level position on the judicial career track, and the *actuario* handles service of process and other formal notices, judicial inspections and similar judicial procedures not required to be performed by judges or other higher level judicial functionaries. See generally, Eduardo Pallares, *DICCIONARIO DE DERECHO PROCESAL CIVIL* 70 (20th ed. 1996).

must then be authenticated, translated and transmitted *back* to the U.S. requesting court.

Another quirk we encountered in this process dealt with deposition taking. Depositions, as U.S. lawyers understand them, simply do not exist in Mexican procedure. In fact, the word we use along the border to say "deposition" in Spanish, *deposición*, is a potentially embarrassing false cognate: *Deposición* is generally understood in the interior of Mexico to be what you find in a baby's diaper, a fact pointed out to me by a woman litigator from Zacatecas following a 1993 speech I gave about comparative procedure at the first meeting of the Texas-Mexico Bar Association. I had just been talking about it for an hour.

With this experience in mind, and mindful of the use to which I needed to put our Mexican discovery in the U.S. litigation, I was concerned about the type of testimony we would obtain from the financial institutions when explaining what we saw in the documents. In the United States we would make a request like, "Tell me what these bank statements show." We wanted to make a similar request in our Mexican discovery. We asked the Arizona judge to include in his findings explaining the Letters of Request a holding that in his opinion the best way to get a description of what we found in the bank records was for the Mexican judge to nominate me, Michael Mandig, as the proper person to interrogate the witnesses about the contents of their files. Many people told me that would never happen because the Mexican judge would not give permission. However, under Article 9 of the Evidence Convention²⁸ and under the special provisions in the Federal Civil Procedure Code, and Federal Code of Commerce (each of which essentially codifies Article 9), we asked for that permission.²⁹ The Mexican federal district judge granted our request.

Epstein: Let me make a few comments about the evidence procedure Mr. Mandig followed in this case. The procedure seems to follow a trend to which other Evidence Convention countries subscribe. Countries that

28. Article 9 of the Evidence Convention provides:

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of the practical difficulties.

A Letter of Request shall be executed expeditiously (emphasis added).

29. The 1988 Mexican federal statutory provisions codifying Article 9 of the Evidence Convention are: Código Federal de Procedimientos Civiles, art. 555; Código de Comercio, art. 1074(VII). Each statutory provision says that evidence requests are to be executed in accordance with "national laws," but says that procedures different from the national laws may be followed if requested either by interested parties or by the court which issued the Letters of Request. The only proviso is that neither *orden público* nor *garantías individuales* are violated. *Orden público*, of course, is the undefined concept of "public policy." The reference to *garantías individuales*, i.e., individual guarantees, is likely a reference to the *Garantías Individuales* found in Articles 1 - 29 of the Mexican Constitution. See Constitución Política de los Estados Unidos Mexicanos, arts. 1 - 29. Presumably the reference to individual guarantees relates principally to the basic due process rights of notice and an opportunity to be heard. See *id.* arts. 13, 14 cls. 2 & 16. Precisely how these notions of due process would limit the right to conduct discovery is difficult to say; there is simply no well-developed body of Mexican jurisprudence on the subject.

are strict about gathering evidence are beginning to better understand the U.S. pretrial discovery system. Most of the ingredients seem to be in place for using the Evidence Convention in Mexico. The Mexican federal district courts implement the Convention which allows *ex parte* procedures. Article 9 of the Evidence Convention³⁰ provides a valuable tool because it allows special procedures upon request. That is what Mr. Mandig used in this case. Article 23 also provides a valuable method for pretrial document production.³¹ Thus, if you reasonably identify documents and specify that they relate to litigation in the United States, you may have means of obtaining needed information. Finally, as has already been stressed, you need to hire a Mexican lawyer to walk through the requests and to deal with the Mexican judges handling the evidence requests. Let me add a further comment about how Mexico has taken a reservation on the use of a commissioner as Mr. Mandig used in this case.³² Under, for example, the Federal Rules of Civil Procedure³³ and Article 17 of the Evidence Convention, a U.S. court could appoint Mr. Mandig as a commissioner for the purpose of taking testimony in Mexico. However, in this case the U.S. court did not make the appointment itself.

Mandig: Mr. Epstein is correct. And if the U.S. Judge had appointed me directly, this would have caused problems. Mexico's reservation forbids pursuit of evidence in Mexico by Commissioners appointed by foreign courts.³⁴

There is another interesting part to this case. The shape of the playing field has changed considerably by the fact that the dealer is now in jail. At the same time we began the litigation in the United States and the commercial actions in Sonora, we lodged a *querrela*³⁵ with the State of Sonora's Attorney General. The complaint languished for two and a half years with few results. We pressed the issue harder recently to dispose of the complaint and had a surprise: the Attorney General of Sonora finally decided to file formal criminal charges in Sonoran state court. The majority owner of the dealerships (one of the individual defendants

30. See *supra* text accompanying note 29.

31. See *supra* notes and discussion accompanying note 25.

32. Article 17 of the Evidence Convention provides:

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

33. F. R. Civ. P. 28(b)(4). This Rule is similar to Arizona's state procedural rule. See *Ariz. R. Civ. P. 28(b)(2)*.

34. See *Aclaraciones y Reservaciones, supra note 25*, § 3 (making an "express and complete" reservation with respect to the provisions of Article 17 concerning use of commissioners).

35. A *querrela* is essentially a criminal complaint, filed by a private party and investigated by the Attorney General.

in the U.S. and Sonoran civil litigation) was arrested and is currently residing in a Sonoran jail in lieu of a five million dollar bond. He is under indictment for fraud and criminal breach of a fiduciary trust, awaiting the completion of this criminal prosecution.³⁶ We are currently pursuing other debt collection alternatives, not the least important of which is a claim against a policy of insurance providing worldwide coverage for losses due to dishonesty by GM's employees.

This case is instructive about Mexico's commercial financing laws. This problem may well have been prevented by the existence of U.S.-type laws regulating security interests in motor vehicle inventories. In fact, an additional eighty-five cars disappeared after the problem was discovered. Why? Because there was no mechanism available under Mexican law to seize the remaining inventory, the dealer continued to dispose of the cars.

One might ask "Why did GMAC not try to retrieve the 700 missing vehicles or try to attach or *embargo*³⁷ them in Mexico? What prevented GMAC from terminating the consignment agreement and retrieving the remaining vehicles once it determined the dealer was out of trust?" One problem was a practical one: Our Mexican counsel advised us that, under Mexican law, a thief cannot pass good title. Consequently, it would have been legally possible for GMAC to make a car buyer pay twice. However, as a marketing and a public relations matter, that was viewed as an unwise decision for a national enterprise to undertake. With great trepidation, GMAC chose to enforce installment contracts against people who purchased vehicles from the defendant dealerships, but who would not voluntarily make their payments directly to GMAC. However, GMAC did not take cars away from people who had actually paid for them. That was viewed as one of those situations in which you simply have to take the losses.

As far as the consignment agreement was concerned, GMAC's president in Mexico had the dealer sign a document before a Mexican notary public acknowledging GMAC's right to take possession of the remaining inventory. This was done as soon as the problem was discovered. With the dealer's written authorization in hand, GMAC began hauling cars to another dealer in Hermosillo. However, possession is 9/10s of the law—or maybe 10/10s in Mexico. I say this because, once the dealer's lawyers got involved, they obtained arrest warrants to have my client's officers

36. Since the remarks of Mr. Mandig at the September conference, the criminal defendant's bond was substantially reduced, posted and the defendant released. The criminal charges for breach of fiduciary are still pending, and have survived district court and intermediate appellate review in federal *amparo* proceedings. For an excellent discussion of the Mexican concept of *amparo*, see H. Fix Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CALIF. W. INT'L L.J. 306 (1979).

37. An *embargo* is a seizure of property that can be obtained by a creditor if its claim is based upon a *título ejecutivo*, thereby making use of a *juicio ejecutivo* possible. See *supra* note 11 and accompanying text; 2 DICCIONARIO JURÍDICO MEXICANO 1249-52 (8th ed. 1995). Because the consignment arrangement used by GMAC did not include use of *títulos ejecutivos*, a prejudgment attachment, *i.e.*, *embargo*, to preserve the remaining dealership inventory became more problematic.

arrested for robbery. This was possible because under Mexican penal law there was at least an argument that recovering the inventory, even with the consent of the majority owner of the dealership, was robbery. In fact, to obtain the arrest warrants, the dealer purported to revoke his consent. GMAC's personnel rushed back to Mexico City and waited until local counsel got the arrest warrants quashed.

These sorts of problems can likely be prevented with the kinds of judicial or self-help remedies available under Article 9 of the U.S. Uniform Commercial Code. Hopefully, recognizing the dire need for attracting foreign capital to Mexico will cause Mexico to fall in line with the rest of the world and adopt some needed reforms to its commercial financing system.³⁸

My client, GMAC, has revamped the way it conducts business in Mexico. It is now in a partnership with a Mexican bank, which enables GMAC to use some financing tools that would not otherwise be available. GMAC is also modifying all contract documents to avoid these situations in the future.

Epstein: Mr. Mandig's experience illustrates the need to consider using the established procedures under the various conventions. Some lawyers will have an occasional transnational case, including one in Mexico. Many clients will lack the resources to send U.S. attorneys to Mexico. Consequently, the more you can rely on these treaties, which were designed to be inexpensive and efficient, the better. When the day arrives that Mexico starts enforcing foreign judgments, conformance with these procedures will place you in a much better position to have your judgment enforced.

Mandig: I have been litigating and trying cases for about eighteen years and have been involved in a fair amount of international and cross-border transactions. I have tried to come up with an estimate of costs associated with a trans-border case, as opposed to one located within the United States. My estimate is that cross-border litigation costs about three times as much if you dot all "I's" and cross all "T's". This includes complying with treaties, translating papers, traveling and visiting judges to educate them about the case. This counsels strongly for the use of alternative means of dispute resolution. On the other hand, Mexico has what is called the *juicio ejecutivo*³⁹ which is much more effective in getting somebody's attention than arbitration. One of the challenges is combining court procedures with alternative dispute resolution procedures in the future so that people trying to collect debts will have a range of options available to work with.

QUESTIONS AND COMMENTS

Institute Member: Were you unopposed in the court in Arizona?

Mandig: No there has been a defense lawyer there since the beginning.

38. See generally, Boris Kozolchuk, *Qué Hacer Sobre la Anticuada Ley de Garantía Prendaria Mexicana*, 12 ARIZ. J. INT'L & COMP. L. 533 (1995).

39. See *supra* text accompanying note 11.

Institute Member: Did the lawyer oppose all your efforts?

Mandig: Opposing counsel moved to dismiss the case on jurisdictional and forum non conveniens grounds, but when we presented the request for evidence letters, I do not think opposing counsel mounted much of a defense.

Juan Zuñiga, Katten Muchin & Zavis, Los Angeles, California: I have a few comments and a question on what has been discussed here because I process letters rogatory under the Inter-American Convention for the Mexican Consulate in Los Angeles, California. I have the reverse view of Mexican lawyers processing letters rogatory to U.S. courts. I have seen instances of Mexican judges from outlying states, not so much from Mexico City and the federal district, processing the letters rogatory directly to my client, the Mexican Consulate, as opposed to going through diplomatic channels in an attempt to bypass Mexico City. The Mexican Consulate accepts such a form of letter rogatory and then gives it to me to obtain an order from Superior Court to serve a summons and complaint, or something of that nature. The California courts regularly accept these requests. I would like to emphasize for the Mexican lawyers using that process to follow Mr. Mandig's advice—check your translations closely.

My question is to Mr. Epstein. It concerns the Inter-American Convention and its Protocol. I have been reading the Protocol as a reservation of rights on the taking of evidence that applies to both the United States and Mexico. Some judges have pointed out to me that the commissioner proceeding should not be used in the United States to take deposition testimony or get written interrogatories from a United States resident witness implicated in litigation in Mexico.

Epstein: The provisions for letters rogatory in the Inter-American Convention should apply only to service of process.

Benjamin Aguilera, Snell & Wilmer, Phoenix, Arizona: Mr. Epstein says that it is now taking six to twelve months to get letters rogatory. In my experience it took twenty-two months to get it done in one instance, only to find out at the end that the party had fled the jurisdiction where we had requested service of process. He maintained an address in Culiacan, but since he was not physically present there, the authority expired. It would have been necessary to start the process again, which our client decided not to do.

My client decided to forego obtaining letters rogatory through the central authority. We hired an investigator to track down the defendant and serve him directly by means of a *notario público* who accompanied the private investigator. When using this process, you need to inform the client that he is foregoing execution of the judgment in Mexico. When acting on an informal basis such as this, the judgment will not be executed in Mexico. Fortunately, in this case, our client was able to locate Arizona assets and received maybe thirty cents on the dollar. So there is an avenue to serve Mexican parties informally, but you are not going to be able to collect that judgment there.

APPENDIX A

1 D. Michael Mandig, PCC No. 37028
 Klaus T. Axen, PCC No. 64710
 2 MOLLOY, JONES & DONAHUE, P.C.
 3 33 North Stone, Suite 2100
 Post Office Box 2268
 4 Tucson, Arizona 85702
 Telephone: (602) 622-3531
 5 Attorneys for GMAC

6
 7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 IN AND FOR THE COUNTY OF PIMA

9	GENERAL MOTORS ACCEPTANCE)	
	CORPORATION de MEXICO, S.A. de C.V., a)	No. 290582
10	Mexican corporation,)	
)	Partial Summary Judgment in
11	Plaintiff,)	Favor of GMAC de Mexico, S.A.
)	and Against
12	v.)	Nogales Motor, S.A. de C.V.,
)	Sonora Motor, S.A. de C.V.,
13	MARIO RENE TORRES SERRANO, aka)	Mario Rene Torres Serrano and
14	Mario Rene Torres, and MARCELA GIRON)	Marcela Giron Ortega Torres
	ORTEGA TORRES, aka Marcela G. Torres,)	
15	husband and wife et al.,)	(Assigned to Judge Velasco)
)	
16	Defendants.)	
17)	

18
 19 The Court has reviewed the evidence of record in this case, both
 20 documentary and testimonial; the pleadings; the memoranda in support of and in
 21 opposition to the Plaintiff's request for partial summary judgment, and has heard
 22 oral arguments of counsel regarding the matter.

23 The Court hereby finds that the undisputed material facts regarding
 24 Count One of the Complaint show that Plaintiff is entitled to judgment in its favor
 25 and against certain of the Defendants on Count One.

The Court therefore grants partial summary judgment on Count One to Plaintiff and against the following Defendants in the following amounts:

1. Against Sonora Motor, S.A. de C.V., in the sum of TWENTY MILLION FOUR HUNDRED THIRTY-ONE THOUSAND FIFTY-NINE MEXICAN PESOS and TWENTY-FIVE CENTAVOS (NS20,431,059.25), together with prejudgment interest in the sum of EIGHTEEN MILLION THREE HUNDRED ELEVEN THOUSAND NINE HUNDRED FOURTEEN AND 70/100 MEXICAN PESOS (NS18,311,914.70), for a total judgment of THIRTY-EIGHT MILLION, SEVEN HUNDRED FORTY-TWO THOUSAND, NINE HUNDRED SEVENTY-THREE AND 95/100 MEXICAN PESOS (NS38,742,973.95).

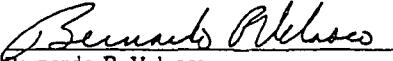
2. Against Nogales Motor, S.A. de C.V., in the sum of FOUR MILLION TWO HUNDRED THIRTY-ONE THOUSAND FOUR HUNDRED NINETY-ONE MEXICAN PESOS and SEVEN CENTAVOS (NS4,231,491.07), together with prejudgment interest thereon in the sum of THREE MILLION EIGHT HUNDRED FORTY-EIGHT THOUSAND ONE HUNDRED FORTY-EIGHT AND 88/100 MEXICAN PESOS (NS3,848,148.88), for a total judgment of EIGHT MILLION SEVENTY-NINE THOUSAND SIX HUNDRED THIRTY-NINE AND 95/100 MEXICAN PESOS (NS8,079,639.95).

3. Against Mario Rene Torres Serrano and Marcela Giron Ortega Torres, jointly and severally, in the sum of FORTY MILLION SIX HUNDRED EIGHTY-TWO THOUSAND TWO HUNDRED FORTY-FOUR MEXICAN PESOS, and THIRTY-FIVE CENTAVOS (NS40,682,244.35), together with prejudgment interest thereon in the sum of THIRTY-SIX MILLION FIVE HUNDRED EIGHTEEN THOUSAND EIGHT HUNDRED TWENTY-EIGHT AND 45/100 MEXICAN PESOS (NS36,518,828.45), for a total judgment of SEVENTY-SEVEN MILLION TWO

1 HUNDRED ONE THOUSAND SEVENTY-TWO AND 80/100 MEXICAN PESOS
2 (NS77,201,072.80).

3 4. Each and all of the foregoing amounts shall bear interest at the
4 rate of one hundred fifteen percent per annum (115%) from May 1, 1995, until paid.

5 DATED this 28th day of June, 1995.

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9 Bernardo P. Velasco
10 Superior Court Judge
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Appendix B

1 D. Michael Mandig, PCC No. 37028
 Klaus T. Axen, PCC No. 64710
 2 MOLLOY, JONES & DONAHUE, P.C.
 3 33 North Stone, Suite 2100
 Post Office Box 2268
 4 Tucson, Arizona 85702
 Telephone: (602) 622-3531
 5 Attorneys for GMAC

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 7 IN AND FOR THE COUNTY OF PIMA

8 GENERAL MOTORS ACCEPTANCE)
 CORPORATION de MEXICO, S.A. de C.V., a)
 9 Mexican corporation,)

Plaintiff,)

v.)

12 MARIO RENE TORRES SERRANO, aka)
 13 Mario Rene Torres, and MARCELA GIRON)
 14 ORTEGA TORRES, aka Marcela G. Torres,)
 husband and wife et al.,)

Defendants.)

No. 290582

) Findings of Fact and Conclusions
 of Law Regarding Plaintiff's
 Motion for Partial Summary
 Judgment

(Assigned to Judge Velasco)

17
 18 On January 26, 1995, this Court issued its minute entry granting
 19 Plaintiff's Motion for Partial Summary Judgment, and directed Plaintiff to file a
 20 proposed form of judgment. In accordance with Rule 56(d) of the Arizona Rules of
 21 Civil Procedure, the Court now makes the following Findings of Fact and
 22 Conclusions of Law.
 23
 24
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1 A. Findings of Fact and Conclusions of Law Regarding Subject
2 Matter Jurisdiction.

3 1. This action was commenced on January 27, 1993. Insofar as
4 pertinent to the Partial Summary Judgment hereby granted, the action alleges, in
5 Count One of the Complaint, that Defendants owe Plaintiff, collectively, the total
6 sum of \$12.7 million. The basis of Count One is alleged breach of five consignment
7 and five guarantee agreements entered into between Plaintiff and the Defendants.

8 2. Article 6, Section 14, of the Constitution of the State of Arizona
9 states that this Court has original subject matter jurisdiction of "cases in which the
10 demand or value of property in controversy amounts to one thousand dollars or
11 more, exclusive of interest and costs." Ariz. Const., Art. 6, Sec. 14(3).

12 3. Because the amount in controversy in this action far exceeds the
13 minimum limits specified in the Arizona Constitution, this Court has subject
14 matter jurisdiction over the action.

15 B. Findings of Fact and Conclusions of Law Regarding Personal and
16 Quasi in Rem Jurisdiction.

17 4. Sonora Motor was served in Hermosillo, Sonora, on May 11,
18 1993, by personal notification in accord with the terms of the Inter-American
19 Convention on Letters Rogatory. An order confirming the completion of service
20 under the Convention was entered by this Court on July 2, 1993.

21 5. Guaymas Motor was served in Guaymas, Sonora, on May 13,
22 1993, by personal notification in accord with the terms of the Inter-American
23 Convention on Letters Rogatory. An order confirming the completion of service
24 under the Convention was enter by this Court on July 2, 1993.

1 6. Nogales Motor was served by service on Mario Torres on
2 June 10, 1993, in Tucson, Arizona, in accord with the terms of the Inter-American
3 Convention on Letters Rogatory.

4 7. Mario and Marcela Torres were served with process in this
5 action on July 16, 1993, by personal notification in Hermosillo, Sonora, in accord
6 with terms of the Inter-American Convention on Letters Rogatory, and an Order of
7 this Court, confirming the completion of service on that date, was entered by the
8 court on May 9, 1994. In addition, Mr. Mario Rene Torres Serrano was notified of
9 this action by personal service of the Summons, the Complaint and various other
10 items, on June 10, 1993, in Tucson, Arizona.

11 8. Defendants moved several times for dismissal based upon this
12 Court's asserted lack of jurisdiction over their persons. However, on June 21, 1993,
13 Judge John F. Kelly, of this Court, found as follows:

14 "With regard to personal jurisdiction over Mr. and Mrs. Torres
15 and Nogales and Sonora Motor, defendant[s have] conceded that
16 personal jurisdiction does exist." June 21, 1993 Minute Entry, at
17 pp. 1-2.

18 The foregoing finding is hereby reaffirmed.

19 9. Plaintiff's Motion for Partial Summary Judgment seeks
20 judgment only against the Defendants referenced in the preceding paragraph, and
21 jurisdictional issues with respect to the remaining Defendants, Guaymas Motor,
22 S.A. de C.V., Caborca Motor, S.A. de C.V., and Cananea Motor, S.A. de C.V., are
23 hereby reserved for later determination.

24 C. Findings Regarding the Legal Representation of the Defendants
25 Against Whom Judgment Is To Be Entered.
26

1 10. All Defendants in this matter were originally represented by
2 Mr. Richard D. Burris, Attorney at Law, admitted to practice as such in the State of
3 Arizona. Mr. Burris' representation of the Defendants before this Court began on
4 April 21, 1993, when Mr. Burris objected to the assertion of personal jurisdiction
5 over the individual and corporate Defendants. He continued as counsel of record
6 until August 29, 1994, when this Court granted a request that Mr. Burris be
7 permitted to withdraw as counsel for the five corporate Defendants. Mr. Burris
8 remains as counsel of record for the Defendants Mario and Marcela Torres.

9 D. Findings of Fact and Conclusions of Law on the Merits.

10 11. Evidentiary Basis for Findings of Fact.

11 The record in this matter is extensive, consisting of numerous
12 affidavits; recorded oral testimony; the admissions contained in the pleadings and
13 other matters. The following findings of fact are based upon the matters contained
14 in the court record heretofore accumulated, including, without limitation, the items
15 listed in the Appendix to these Findings.

16 12. The Findings of the Court.

17 The Court finds the following facts to be undisputed, material facts that
18 entitle Plaintiff to judgment on Count One in its favor and against Defendants
19 Torres, Sonora Motor and Nogales Motor:

20 a. GMAC de México, S.A. ("GMAC") is the Plaintiff in this action.
21 During the pendency of this action, the name of GMAC was changed to, and the
22 Plaintiff GMAC is now officially known as GMAC Holding, S.A., de C.V. GMAC is a
23 Mexican corporation which assists in the process of distribution of vehicles
24 manufactured by General Motors de México, S.A. ("GM"), and sold by GM's
25 authorized dealers in Mexico.

1 b. In Mexico, GMAC assists the motor vehicle distribution process
2 utilizing a consignment plan. Under this plan, a GM dealer places orders for
3 automobiles with GM, for delivery to the dealer's lot. If GMAC participates in the
4 process, it will be billed by GM for the dealer's order, and will become the owner of
5 the inventory placed on the dealer's lot. When an independent GM dealer wishes
6 to acquire inventory under a consignment plan, the dealer will order vehicles from
7 the factory, advise GM that GMAC will underwrite the consignment of the vehicles
8 to the dealer. The General Motors plant at which the vehicle is manufactured then
9 issues a document of title (called a "factura") in the name of GMAC for any vehicle
10 to be consigned to the dealer by GMAC, and GMAC pays GM for the vehicles
11 ordered by the dealer, usually the day of or the day after GMAC is invoiced by GM.
12 (Testimony of John Carrington ("Carrington Testimony") at 32/17-34/10, June 11,
13 1993, hearing transcript.)

14 c. GMAC entered into five, separate consignment agreements with
15 Sonora Motor S.A., de C.V., on December 22, 1984 (the "Sonora Contract"); with
16 Guaymas Motor S.A. de C.V., on May 8, 1990 (the "Guaymas Contract"); with
17 Caborca Motor S.A. de C.V., on May 27, 1984 (the "Caborca Contract"); with Cananea
18 Motor S.A. de C.V., on December 22, 1984 (the "Cananea Contract"); and with
19 Nogales Motor S.A. de C.V., on July 11, 1991 (the "Nogales Contract") (sometimes
20 collectively referred to as the "Consignment Contracts"). (See Affidavit of Bruce
21 Raymond, certified court translator, submitted as Exhibit 6 at June 11, 1993 hearing
22 on Provisional Remedy, and Consignment Contracts attached to Affidavit at tabs B,
23 C, E, G, and I).

24 d. Pursuant to the Consignment Contracts, GMAC agreed to
25 purchase and consign motor vehicles to the Consignee. (Consignment Contracts,
26

1 Page 1, Statement II, attached to Exhibit 6 at June 11, 1993 hearing on Provisional
2 Remedy at tabs B, C, E, G, and I).

3 e. The Consignment Contracts provide for payment to GMAC on
4 the date on which the vehicle is sold or delivered to a customer or 180 days from the
5 shipping date, whichever is earlier. The Consignment Contracts specifically forbid
6 the dealerships from selling or delivering vehicles to customers unless the
7 Consignee has previously paid GMAC for the vehicles. (Consignment Contracts,
8 Paragraphs 5 and 6, attached to Exhibit 6 at June 11, 1993 hearing on Provisional
9 Remedy, at tabs B, C, E, G, and I; June 11 hearing transcript at 53/14-24 (Carrington
10 Testimony).)

11 f. The Consignment Contracts require the Consignees to pay to
12 GMAC the price of the vehicles, and related taxes, charges, expenses, and interest.
13 (Consignment Contracts, Paragraphs 5, 6, 7 & 14, attached to Exhibit 6 at June 11, 1993
14 hearing on Provisional Remedy at tabs B, C, E, G, and I.)

15 g. The Consignment Contracts require the Consignee immediately
16 to notify GMAC of any loss or damage to the vehicles. (Consignment Contracts,
17 Paragraph 11, attached to Exhibit 6 at June 11, 1993 hearing on Provisional Remedy
18 at tabs B, C, E, G, and I.)

19 h. Mario Torres signed five separate guarantee contracts by which
20 he personally guaranteed any and all of the debts of Sonora Motor, Nogales Motor,
21 Cananea Motor, Caborca Motor and Guaymas Motor to GMAC. (Affidavit of D.
22 Michael Mandig dated September 16, 1993, attached as Exhibit 4 to Plaintiff's
23 Statement of Facts in Support of Plaintiff's Motion for Partial Summary Judgment
24 filed September 17, 1993, and Guarantee Agreement of Cananea Motor attached to
25 Affidavit at Tab A.)
26

1 i. Each of the Guarantee Agreements provides in the first
2 paragraph:

3 "GUARANTOR [Mario R. Torres Serrano] guarantees to
4 CREDITOR [GMAC de México, S.A.] the prompt payment of all
5 drafts, vouchers, promissory notes, bills of exchange, letters of
6 credit or other securities or documents of credit, by which
7 CREDITOR would become the creditor of DEBTOR [each of the
8 five dealerships] either at a present or future time, by virtue of
9 DEBTOR being the debtor, maker, acceptor, endorser, guarantor,
10 or simple signer of the stated documents; he also guarantees
11 complete performance of all present and future liabilities Debtor
12 has or may later incur for any reason whatsoever toward
13 CREDITOR."¹

14 (Guarantee Agreement of Cananea Motor, Clause 1, attached to
15 Exhibit 4 to Plaintiff's Statement of Facts in Support of Plaintiff's Motion for Partial
16 Summary Judgment filed September 17, 1993, at tab A.)

17 j. In December 1992, GMAC representatives discovered that 755
18 vehicles were missing from the inventory of the Torres Dealerships, vehicles for
19 which GMAC had not been paid as required by the Consignment Contracts.
20 (Carrington Testimony, page 59/20-60/22, transcript of June 11, 1993, hearing;
21 Affidavit of John Carrington, II, dated January 27, 1993, attached to the Complaint;
22 Affidavit of George Corwin attached to Plaintiff's Response in Opposition to Motion
23 to Dismiss as Exhibit 57.)

24 k. Mr. Carrington, then the credit manager of GMAC, and
25 Mr. George Corwin, President of GMAC and México City Branch Manager, met with
26 Mario Torres in early December 1992. Mr. Torres did not dispute that more than 700
vehicles were missing from the Torres Dealership lots and that payment to GMAC

¹The only difference between the guarantee agreements is that the contract by which Torres guaranteed the indebtedness of Sonora Motor has the quoted language in its Second Clause, not the First. Otherwise, the operative clauses are as translated above, and are identical in each of the five guarantees.

1 for these vehicles was due and owing. Mr. Torres told Mr. Carrington and
2 Mr. Corwin that the missing vehicles had been sold, and claimed that various banks
3 owed the Dealerships approximately half of the debt owing to GMAC, or 20 billion
4 pesos, because customers to whom the vehicles had been delivered had financed the
5 purchase of the vehicles through the banks, but the banks had yet to pay the
6 dealerships. Mr. Torres stated that he had received payment for half of the missing
7 vehicles, but that he had used these sums to restructure bank debt. (Carrington
8 Testimony, pp. 61/11-62/24, 81/23-82/14; Testimony of George Corwin, Jr. ("Corwin
9 Testimony"), pp. 99/2-10, 121/17-122/4, June 11, 1993, hearing transcript).

10 1. Mr. Corwin (President of GMAC and México City Branch
11 Manager, both in December 1992, and at the time of his testimony in June 1993)
12 verified Mr. Torres' admissions concerning having sold cars and not paid GMAC, as
13 Mr. Corwin personally determined, by reference to Sonora Motor records, that
14 Sonora Motor took delivery of and sold at least 80% of the Missing Vehicles
15 attributable to that dealership, and did so without paying GMAC. Mr. Corwin made
16 this verification by comparing the serial numbers of the missing vehicles shown in
17 GMAC's own inventory reports with the serial numbers of vehicles listed as sold
18 units in Sonora Motor's computer records. Mr. Corwin had reviewed 80% of the
19 dealership's records. However, before Corwin could complete the review of Sonora
20 Motor's records, the records disappeared. (Corwin Testimony, pp. 158/14-161/8,
21 June 11, 1993, hearing transcript).

22 13. More than 180 days have expired since any of the 755 vehicles
23 were delivered to any of the Torres dealerships. (Carrington Testimony, pp. 55/13-
24 56/18, June 11, 1993, hearing transcript), and under Clause Six of the Consignment
25
26

1 agreements the Defendant dealers are therefore liable to Plaintiff for the prices of all
2 vehicles delivered and not otherwise paid for.

3 14(a) As of April 30, 1995, the following amounts were owed to GMAC
4 de México, S.A., principal and interest, denominated in pesos:

5	6	7	8
DEALERSHIP	PRINCIPAL AMOUNT	INTEREST TO 4/30/95	
7	SONORA MOTOR	N\$20,431,059.25	N\$18,311,914.70
8	NOGALES MOTOR	4,231,491.07	3,848,148.88
9	CANANEA MOTOR	4,681,793.23	4,200,006.02
10	GUAYMAS MOTOR	7,435,110.93	6,641,912.26
11	CABORCA MOTOR	3,902,789.87	3,516,846.59
12	TOTAL OWED BY ALL DEALERSHIPS	N\$40,682,244.35	N\$36,518,828.45

13
14 16. Under chapter VII, article 340, of the Civil Code of the State of
15 Sonora, and absent a valid, properly recorded agreement between the spouses to the
16 contrary, debts contracted during the marriage by either spouse are obligations of the
17 "sociedad legal" (what Arizona would call the "marital community") and may be
18 satisfied out of the property of the "sociedad legal" or its proceeds. There are
19 exceptions to this rule set out in article 341, but the evidence before the Court does
20 not indicate the exceptions are applicable here, so that entry of judgment against Mr.
21 and Mrs. Torres, jointly and severally, under the guarantees is appropriate. (See
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1 Affidavit of D. Michael Mandig, dated February 22, 1994, attached as Exhibit I to
2 GMAC's Statement of Facts in Support of Plaintiff's Cross-Motion for Partial
3 Summary Judgment.)

4 DATED this 28th day of June, 1995.

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7 _____
8 Bernardo P. Velasco
9 Superior Court Judge
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APPENDIX C

1 D. Michael Mandig, Pima County Computer No. 37028
 2 Michael W. Baldwin, Pima County Computer No. 2464
 3 MOLLOY, JONES & DONAHUE, P.C.
 4 33 North Stone, Suite 2100
 5 Post Office Box 2268
 6 Tucson, Arizona 85702
 7 Telephone: (602) 622-3531
 8 Attorneys for GMAC

9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
 10 IN AND FOR THE COUNTY OF PIMA

11 GENERAL MOTOR ACCEPTANCE)
 12 CORPORATION de MEXICO, S.A. de C.V., a)
 13 Mexican corporation,)

14 Plaintiff)

No. 290582

15 v.)

16 FINDINGS OF FACT AND
 17 CONCLUSIONS OF LAW WITH
 18 RESPECT TO PLAINTIFF'S
 19 MOTION FOR ISSUANCE OF
 20 LETTERS OF REQUEST FOR THE
 21 GATHERING OF EVIDENCE IN
 22 MEXICO

23 MARIO RENE TORRES SERRANO, aka)
 24 Mario Rene Torres, and MARCELA GIRON)
 25 ORTEGA TORRES, aka Marcela G. Torres,)
 husband and wife; SONORA MOTOR S.A.)
 de C.V., a Mexican corporation; CABORCA)
 MOTOR S.A. de C.V., a Mexican corpora-)
 tion; GUAYMAS MOTOR S.A. de C.V., a)
 Mexican corporation; CANANEA MOTOR)
 S.A. de C.V., a Mexican corporation;)
 NOGALES MOTOR S.A. de C.V., a Mexican)
 corporation; JOHN DOES 1-10; JANE DOES)
 1-10; XYZ CORPORATIONS 1-10; and THE)
 UNKNOWN HEIRS OR DEVISEES OF ANY)
 OF THE ABOVE PARTIES, IF DECEASED,)

26 Defendants)

27 With respect to the Plaintiff's request that this court issue Letters of
 28 Request in accordance with the Hague Convention on the Taking of Evidence
 29 Abroad in Civil or Commercial Matters, the Court makes the following preliminary

1 findings. These findings are based on the evidence presented to the court to date,
2 and do not constitute a binding resolution of factual or legal issues in this case.
3 They are made in order to aid the Sonoran courts asked to execute the
4 accompanying Letters of Request in understanding the importance of the requested
5 information to the resolution of issues pending before this Court.

6 Based upon the record before this Court, and good cause having been
7 shown for the making of preliminary findings, the Court finds as follows:

8 A. Findings Required by the Hague Convention on the Taking of
9 Evidence Abroad in Civil or Commercial Matters.

10 1. The Republic of Mexico and the United States of America are
11 parties to the Hague Convention on the Taking of Evidence Abroad in Civil or
12 Commercial Matters (referred to herein as the Evidence Convention). The Evidence
13 Convention became effective on December 24, 1989.

14 2. The Evidence Convention, as acceded to by Mexico, requires the
15 Courts of Mexico to execute Letters of Request for collection of evidence, provided
16 the Letters follow the format prescribed by the Convention. With respect to the
17 production of documents for inspection and copying prior to trial, the Evidence
18 Convention requires competent Mexican tribunals to execute such requests if (a) a
19 civil action is pending in the United States of America, (b) the requested documents
20 are reasonably identified as to date, subject and other relevant information, and (c)
21 the Letters of Request show a direct relationship between the evidence or
22 information sought and the pending proceeding.

23 a. There is an action pending before the Superior Court of Arizona,
24 in and for the County of Pima, entitled as shown in the above caption.

1 b. The information sought through the accompanying Letters of
2 Request is directly relevant to the issues raised in this action.

3 c. The relevance of the requested information is described in the
4 following findings as to relevance and materiality. Reasonable identification of the
5 information and documents sought, as to date, subject and the like, is found in the
6 following findings and in the specific description of the documents sought, attached
7 to the Letters of Request as Appendix "A".

8 B. Findings Regarding Materiality and Relevancy of, and Need for
9 the Requested Information.

10 1. On January 27, 1993, Plaintiff, General Motor Acceptance
11 Corporation de Mexico ("GMAC"), filed a civil action against the above named
12 Defendants for breach of contract, fraud and constructive trust, and conversion.
13 This action is currently pending before this court. Plaintiff's Complaint alleges that
14 GMAC entered into consignment agreements with five Sonoran automobile
15 dealerships: Sonora Motor S.A. de C.V., a Mexican corporation; Caborca Motor S.A.
16 de C.V., a Mexican corporation; Guaymas Motor, S.A. de C.V., a Mexican
17 corporation; Cananea Motor S.A. de C.V., a Mexican corporation; and Nogales
18 Motor S.A. de C.V., a Mexican corporation. Mario Torres, who is the majority
19 owner of the five automobile dealerships, entered into Guaranty Agreements with
20 the plaintiff GMAC by which he guaranteed the corporate indebtedness owed under
21 the Consignment Agreements. This action makes the following allegations:

22 a. The Complaint alleges that, pursuant to the Consignment
23 Agreements, GMAC consigned vehicles owned by GMAC to the possession of each
24 of the dealerships, to be offered for sale by the dealer. It is further alleged that
25 GMAC was to be paid by the dealer for each vehicle prior to any retail sale to a

1 purchaser. It is also alleged that, between April 1, 1992 and January 1993, at least 755
2 automobiles were consigned by GMAC to the dealerships. The Court finds that it is
3 undisputed that these vehicles disappeared from the dealership lots without
4 payment to GMAC.

5 b. GMAC has also made a claim against Torres and the five
6 dealerships for violation of Arizona's Racketeer Influenced and Corrupt
7 Organizations Act ("RICO") for damages and other relief stemming from
8 Defendants' alleged laundering of monies through Torres' business and personal
9 bank accounts in Arizona. Plaintiffs also allege, and have offered some proof
10 tending to show, that funds generated by the sale of GMAC vehicles consigned to
11 the dealerships found their way directly into the personal, Arizona accounts of Mr.
12 and Mrs. Torres.

13 2. Plaintiff has provided this court with bank records and statements
14 from Bank One of Arizona (fka Valley National Bank) with respect to accounts
15 maintained by Defendants Nogales Motor, S.A., Sonora Motor, S.A., and Mario and
16 Marcela Torres. These bank records evince the existence of the following accounts
17 during the following time periods:

18 a. From 1990 to the present date, the Defendant Nogales Motor,
19 S.A., maintained and maintains a business checking account, account number 2108-
20 7926, at the Nogales, Arizona branch of Bank One.

21 b. From March 30, 1989, to the present date, the Defendants
22 Mario and Marcela Torres maintained and maintains a personal checking account,
23 account number 2088-6515, at the Williams Centre Office of Bank One in Tucson,
24 Arizona.

1 c. From February 6, 1981, to the present date, the Defendant
2 Sonora Motor, S.A., maintained and maintains a business checking account, account
3 number 2001-8582, at the Williams Centre Office of Bank One in Tucson, Arizona.

4 d. From December 18, 1983, to the present date, the Defendants
5 Mario and Marcela Torres maintained and maintains a money market account,
6 account number 3550-6407 at the Williams Centre Office of Bank One in Tucson,
7 Arizona.

8 3. The Bank One records and statements show that large sums of
9 money were transferred from four banks in Mexico (Banamex in Nogales, Sonora;
10 Banco del Atlantico in Hermosillo, Sonora; Banca Serfin SNC in Hermosillo,
11 Sonora; and Bancomer in Nogales, Sonora) to the Defendants' various Bank One
12 accounts.

13 4. Between 1990 and the present date, Defendant Nogales Motor, S.A.,
14 caused at least \$798,464.00 to be transferred from four Mexican banks and deposited
15 into its business account, account number 2108-7926, at Bank One in Nogales,
16 Arizona.¹ The monies which have thus far been found to have been transferred
17 from each bank located in Mexico are as follows:

18 a. Bancomer in Nogales, Sonora, transferred \$738,464.00 into the
19 Nogales Motor Bank One account.

20 b. Banamex in Nogales, Sonora, transferred \$32,500.00 into the
21 Nogales Motor Bank One account.

22 _____
23 ¹The court also finds that there are some \$2,087,260.14 in additional
24 wire transfers into the four Arizona bank accounts, but Banc One has not provided
25 any documentary explanation for these deposits. It may be that these additional
wire transfers came from the Mexican banks referenced above, and the Mexican
bank records may well shed light on this issue, which is material to the questions
before the court in the Arizona litigation.

1 c. Banco Serfin in Hermosillo, Sonora, transferred \$21,000.00
2 into the Nogales Motor Bank One account.

3 d. Banco del Atlantico in Hermosillo, Sonora, transferred
4 \$6,500.00 into the Nogales Motor Bank One account.

5 5. Between March 30, 1989, and the present date, Defendants Mario and
6 Marcela Torres caused at least \$150,419.21 to be transferred from two Mexican banks
7 and deposited into their Bank One personal checking account, account number 2088-
8 6515, at the Williams Centre Office of Bank One in Tucson, Arizona. The monies
9 transferred from each bank located in Mexico is as follows:

10 a. Banco Serfin in Hermosillo, Sonora, transferred \$37,919.21
11 into the Torres' Bank One personal checking account.

12 b. Banco del Atlantico in Hermosillo, Sonora, transferred
13 \$112,500.00 into the Torreses' Bank One personal checking account.

14 6. Between February 6, 1981 and the present date, Defendant Sonora
15 Motor, S.A., caused at least \$46,353.87 to be transferred from Mexican banks and
16 deposited into its business account, account number 2001-7926, at the Williams
17 Centre Office of Bank One in Tucson, Arizona. The monies transferred from each
18 bank located in Mexico is as follows:

19 a. Bancomer in Nogales, Sonora, transferred \$25,000.00 into the
20 Sonora Motor Bank One business account.

21 b. Banco del Atlantico in Hermosillo, Sonora, transferred
22 \$21,353.87 into the Sonora Motor Bank One business account.

23 7. Between February 6, 1981 and the present date, Defendants Mario
24 and Marcela Torres caused at least \$8,500.00 to be transferred from Mexican banks
25

1 and deposited into their personal money market account, account number 3550-
2 6407, at the Williams Centre Office of Bank One in Tucson, Arizona.

3 a. Banco del Atlantico in Hermosillo, Sonora, transferred
4 \$8,500.00 into the Torreses' Bank One personal money market account.

5 8. The total sums of money thus far found to have been transferred
6 from each Mexican Bank to the Defendants' various Bank One accounts, broken
7 down by bank, are as follows:

8 a. Bancomer in Nogales, Sonora, transferred at least \$763,464.00
9 to the Defendants' above-mentioned accounts.

10 b. Banco del Atlantico in Hermosillo, Sonora, transferred at least
11 \$148,853.87 to the Defendants' above-mentioned accounts.

12 c. Banca Serfin SNC in Hermosillo, Sonora, transferred at least
13 \$58,919.21 to the Defendants' above-mentioned accounts.

14 d. Banamex in Nogales, Sonora, transferred at least \$32,500 to
15 the Defendants' above-mentioned accounts.

16 9. Because of the fund transfers from Mexico into Arizona, there is a
17 direct relationship between the Defendants' Mexican bank records and the issues in
18 dispute in the Arizona case.

19 10. Analysis of Defendants' Mexican bank records is necessary to prove
20 the extent to which, if at all, the following may have occurred:

21 a. The Defendants commingled corporate and personal funds.

22 b. The Defendants failed to make payments to GMAC upon the
23 sale of the consigned automobiles.

24 c. The Defendants deposited monies received in payment for the
25 sale of GMAC's automobiles into their own accounts.

1 d. The Defendants transferred monies received in payment for
2 the sale of GMAC's automobiles from their Mexican bank accounts to other Mexican
3 bank accounts and to Arizona bank accounts.

4 e. The Defendants Mario and Marcela Torres used monies
5 received in payment for the sale of GMAC's automobiles to purchase goods and
6 services for their personal use, including the real and personal property which they
7 own or attempted to acquire in Arizona.

8 f. The location and amount of monies in the Defendants'
9 possession, i.e., bank accounts, which are due and owing to GMAC.

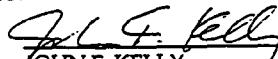
10 11. This Court has a legitimate interest in the dealings between GMAC,
11 Torres and the dealerships for at least two important reasons:

12 a. Mr. and Mrs. Torres hold themselves out as residents of the state
13 of Arizona, with a primary residence owned by them and located in Tucson,
14 Arizona.

15 b. If Plaintiff is able to prove the allegations of its Complaint, as
16 amended, then Mr. and Mrs. Torres, and their dealerships, will be shown to have
17 used the banking system of the State of Arizona for what are, under the laws of the
18 State of Arizona, illegal and improper purposes.

19 12. Examination of an officer or employee of each of the Mexican banks
20 is necessary to understand the bank's records, the relationship between the Mexican
21 banks and the Arizona banks, and the bank's method of conducting business with
22 the Defendants in this action.

23 DATED THIS 1 day of ^{November}~~October~~, 1993.

24 
25 JOHN F. KELLY
 Superior Court Judge /

