Panel Discussion Part 5: A Serious Accident Occurs in the Mexican Plant: Problems of Corporate and Product Liability

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PART FIVE: A SERIOUS ACCIDENT OCCURS IN THE MEXICAN PLANT: PROBLEMS OF CORPORATE AND PRODUCT LIABILITY

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THE PROBLEM

After several years of successful association between GROWFAST and AGRICOLAS S.A. de C.V., a serious accident occurred at the AGRICOLAS plant in Monterrey. While transferring Sollate concentrate into vats for dilution and packaging, supervised by both AGRICOLAS employees and two technicians "on loan" from GROWFAST, an unexplained explosion occurred. Three supervisory persons and 35 other employees were killed. Serious injury was caused to dozens of other employees. The chemical laden smoke from the explosion drifted over parts of Monterrey and adjacent towns. By the time it had dissipated, it had caused serious burns to several hundred more people, including a number of foreigners. The foreigners included two United States citizens vacationing in Mexico. Lawsuits are being considered by Mexicans, the two United States citizens, and four Europeans.

THE DISCUSSION

Michael Gordon: As an attorney representing some of the potential plaintiffs, what are your thoughts as to where you would want to bring your suit?

Keith Harvey: The plaintiffs of course would be the U.S. citizens, the Mexican workers at the plant and the Europeans. But what about that poor Mexican corporation AGRICOLAS that was destroyed by that defective product produced in the United States? I thought they might be a good plaintiff as well, especially under Texas product liability law which gives an indemnification provision1 for sellers of a defective product.

Gordon: Lic. Gómez-Palacio, would you encourage the Mexican plaintiffs to stay home and sue in Mexico if several of the Mexicans came

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1. TEX. CIV. PRAC. & REM. CODE ANN., Title 4, § 82.002 (Vernon 1993)
to you in Mexico, or would you encourage them to travel to another forum?

Ignacio Gómez-Palacio: First of all, we know that, in a case like this, American courts would award more compensation, and second, the defendant here is an American corporation. I would advise my client to sue in the United States. The way American judges think is important. What law will be applicable is something else. This is a very crucial issue because generally speaking it is believed that Mexican tort law is a bad law for the plaintiffs to use because the damages awarded will be rather small.² My experience indicates that the Mexican law applied by an American judge and a Mexican judge may be entirely different because the backgrounds of each of the judges are entirely different. For example, Mexico's law refers to el daño moral, "moral damages." Mexican law does not allow punitive damages. Formerly, "moral damages" had a limit.³ However, by amendment to the Civil Code of the Federal District, this cap was removed. The judges now feel rather free to impose higher awards. If a person had $1,000 damages in the hospital, and the person may have lost an arm, a Mexican judge would feel very generous if they awarded $5,000. You put this "moral damage" concept in the hands of an American judge and he may throw everything into the moral damages and grant an award of half a million dollars. So, the same law may be applied quite differently in one place than the other.

Gordon: Is there jurisdiction in Texas?

M.E. Occhialino: Yes. GrowFast is incorporated in Delaware, has its principal administrative offices in Kansas, and has a factory in Texas. It would be easier to say there was jurisdiction in Texas if GrowFast's product, Sollate, was actually manufactured in Texas then the cause of action would arise out acts done in Texas. But Texas follows the principle of "general jurisdiction." If a corporation that is not incorporated in Texas does enough activity in Texas, it can be sued in Texas even if the lawsuit does not arise out of the things the corporation did in Texas.⁴ So if GrowFast has a relatively large factory producing lots of goods in Texas, there probably is jurisdiction in the state courts of Texas. What about the federal courts in Texas? Because federal courts in diversity actions apply the personal jurisdiction rules of the state in which they are sitting, there is personal jurisdiction in federal court in Texas if personal jurisdiction exists in state court. It would be a choice for the plaintiff to make between the state court of Texas and the federal court in Texas.

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² The reference to "Mexican tort law" may be misleading. In Mexico, like other civil law countries, the law of liability for wrongs is derived from the law of obligations. Chapter V of Book 4 (De las Obligaciones) of the Civil Code covers "Obligations resulting from wrongful acts" (De las obligaciones que hacen de los actos ilicitos). Translated in THE MEXICAN CIVIL CODE MICHAEL W. GORDON (1995).
Gordon: Would there also be jurisdiction in Kansas or Delaware?

Occhialino: There would be jurisdiction in the state courts of both Kansas and Delaware, and also in Kansas or Delaware federal courts. In this fact pattern, then, there are at least six U.S. forums that are available. The plaintiff’s difficult task is to choose the one of those six places that will lead to the most favorable result. Assuming that all jurisdictional requirements are met, the plaintiff’s attorney would then ask which of these six different forums would apply law most favorable to the plaintiffs.

Gordon: If you were assured of having U.S. law applied, it would certainly seem better as plaintiff’s lawyer to choose Delaware if Delaware had a record of higher punitive damages than Kansas and Texas. If Kansas or Texas were more likely to apply Mexican law, then you wouldn’t want to go there as the plaintiff.

Occhialino: That’s a fair statement. Choosing among the courts of three American states doesn’t necessarily tell us that law will apply or what American law will apply. Many people think of the United States as a single entity; one country with one body of law. In fact, each state has its own often different body of tort law. In addition each state has its own system for choosing whether to apply its own tort law or that of another state or country. The latter are found in the states choice of law principles. Each state can either apply its own law or the law of another state or a foreign country. This choice of law process is subject to only the most minimal constitutional restraints under the federal due process and full faith and credit clauses of the U.S. Constitution.5 Plaintiff’s attorney would have to do a two-step analysis: (1) choose the body of substantive tort law most favorable to plaintiffs; (2) choose the court to sue in (from among those with jurisdiction) that has a choice of law process that will let the court choose to apply the substantive law the plaintiff’s attorney wants. So, plaintiffs would pick which state to sue in and, in part, that would depend upon which law that state would apply. It is not only a question of Mexico versus the United States but the attorney would also have to be concerned about the substantive laws of Delaware, Texas and Kansas, as well as each state’s choice of law rules.

Gordon: Nowhere do the facts suggest that AGRICOLAS, is owned or controlled by GROWFAST. It is a Mexican corporation; it has an entirely separate board of directors; it is chartered in Mexico; it simply has a distributorship contract with the GROWFAST company. So how can we possibly bring suit against GROWFAST? It could be argued that the accident was caused by AGRICOLAS.

Harvey: I think if you brought the suit in Texas, it would be very difficult to bring in AGRICOLAS. Even if you did get jurisdiction, you would have to come up against the policy of forum non conveniens. Before 1993, I think you probably could have gotten jurisdiction over

5. U.S. Const. art. IV, §1.
AGRICOLAS in Texas because the wrongful death statute of Texas basically said that if someone, whether a citizen of the United States or not, has died or undergone a tort anywhere in the world, you could probably bring a claim against them in Texas. In the case of Dow Chemical v. Castro Alfaro, the Supreme Court of Texas in March of 1990 basically said that forum non conveniens did not apply in Texas and the Texas courts were open to all comers. The state legislature then adopted a new law. With the new law, I think it would be difficult to get jurisdiction over the Mexican corporation. However, if I were representing the Mexican corporation, I think I would like to have jurisdiction in Texas, because I would represent AGRICOLAS against GROWFAST, the seller of Sollate, as another plaintiff.

Boris Kozolchyk: My feeling is that the application of Mexican law by the U.S. court may prevent a healthy recovery. This is not a case of strict liability; it is a case of product liability. As far as I know, there is no cause of action under Mexican law for an injured party to sue a remote manufacturer or vendor, unless the plaintiff is in privity of contract with the defendant or can prove the manufacturer's or the vendor's negligence. Product liability is a distinctly United States concept which emerged from the fall of Prosser's famous "citadel" which separated tort and contract law. Despite its continued use, commentators and courts continue to question it from a conceptual and public policy standpoint. Mexican law does have a doctrine of strict liability, but not of product liability. Under Mexico's strict liability, the defendant is normally the user (whether owner, agent or bailee) of an inherently dangerous mechanism, instrument, apparatus or substance who, with his use, injures the plaintiff.

Strict liability has been used in Mexico predominantly by the victims of vehicular, industrial or hotel accidents in actions against drivers, trucking companies or hotel owners. In these strict liability lawsuits, defendants can raise the defenses of the victims' fault or inexcusable negligence, or the occurrence of a fortuitous event or force majeure. The product liability cause of action, then, simply does not fit the Mexican strict liability mold. Nonetheless, assuming arguendo that it does, the cause of action on product liability would still have to get over the hurdle of inadequate compensation by United States standards. The amount recovered under Mexican law are set forth in workmens compensation

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6. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1985)
8. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon 1993).
11. Id. at 196; See also B. Kozolchyk and M. Ziontz, A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States, 7 ARIZ. J. INT'L. & COMP. LAW, 1 at 27-30, hereafter Kozolchyk and Ziontz)
tables for loss of the victim's life or limb. The amounts recovered under these tables are quite low by United States personal injury damage standards. It is true that Mexican law allows for the recovery of "moral damages," but judging from Mexican judicial decisions and doctrinal comments these are also quite modest in nature. Thus, it is my opinion that a product liability cause of action is unavailable under Mexican law and that defendant's motion for summary judgment, based upon such an allegation, would dispose of the complaint before an American court. If the cause of action were for strict liability, the amount recovered under Mexican law, including moral damages, would be insignificant by United States standards.

Gómez-Palacio: It is my understanding of the facts that an explosion happened in this Mexican company while AGRICOLAS was bottling the pesticide. I'm not too sure we are talking about what I understand to be product liability. There are three types of liabilities under Mexico's Civil Code: (1) contractual liability (2) extra-contractual liability and (3) objective liability. Contractual liability arises through breach of obligations under the contract. That clearly is not applicable. But the other two, extra-contractual and objective liability may be applicable. Extra-contractual liability arises due to the performance of an illegal act or an act contra buenos costumbres, "against good customs." This may not be applicable in this case, because AGRICOLAS was not engaged in an illegal act, the company was just bottling this pesticide. Objective liability arises due to the use of mechanisms, instruments, apparatus or substances which are dangerous in themselves or by reason of their velocity, explosive or inflammable nature, strength of the electrical current they conduct or other analogous causes. This terminology may vary from state to state and some are broader than others. In any event there was recognition of objective liability by the legislature as industry began to develop in this century. Objective liability was recognized because modern industrial mechanisms created risks of doing injury without fault.

However, in the case of both extra-contractual and objective liability, the defendant is not liable if the damage occurs as a consequence of the fault or inexcusable negligence of the victim. Under the facts of this case, people who were injured appear to have been outside the factory. So I believe there would be a cause of action under objective liability.

Dr. Kozolchyk, what would you think about that?

Kozolchyk: I think that the interpretation that would lead to liability would have to be based upon the per se dangerousness of the vehicle or the process of manufacture. Translating Article 1913 literally, "When a person makes use of mechanisms, instruments, apparatuses or substances dangerous in themselves or by reason of their velocity or the explosive

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12. Id. at 33-35.
13. Id.
16. Id.
or inflammable nature of the object itself, or by the electric current that they conduct, they are responsible for the damage which is caused. . . ."
The Article seems to be looking to inherently dangerous objects. In that enumeration, trucks and automobiles have been held to be such inherently dangerous objects. This may be a basis for claiming liability under these facts, but my feeling is that if somebody is asked to give testimony under Mexican law as to whether or not there is in the Mexican law a doctrine of product liability, where negligence doesn't count, where there is no assumption of the risk, and where there is no contributory negligence, a cause of action somewhere between contract and tort, the answer would have to be no. That kind of a cause of action, per se, does not exist.

We have different interpretations of one of the crucial provisions here, Article 1913 of the Mexican Civil Code. I read Article 1913 to say that when a person makes use of dangerous mechanisms or instrumentalities, that person becomes the target defendant. It would not be because of a doctrine of product liability. Under Article 1913, it is not the party who manufactured the dangerous mechanism or instrumentality who may be liable, but the person who harms someone by making use of it. That's the way I read it. I believe that Lic. Gómez-Palacio reads Article 1913 more broadly.

Gómez-Palacio: I believe that our difference is limited to the breadth of meaning to be applied to "dangerous mechanisms, instruments and substances." I agree that Article 1913 does not extend to the manufacturer of such "dangerous mechanisms;" it extends only to the person who makes use of them.

Harvey: I find it intriguing that we have a debate right here among our Mexican law experts about what is the Mexican law. An American judge, asked to apply Mexican law, is probably going to be a little bit disquieted by the thought that it may be difficult to determine what Mexican law is. If that judge had the alternative, would he probably go with the good old safe "what the judge knows" law of the forum? I wonder if we could talk about proof of foreign law in American courts.

Gómez-Palacio: I think conflicting expert opinions will always be possible in an American court. Defendant and plaintiff are going to bring their own experts. I've been in cases where there have been twenty expert opinions. Of course it is always difficult to apply foreign law for any court in the world.

The only area that gets a little closer to product liability is the statute on consumer protection.17 But I must say that I have signed a legal opinion saying that in my opinion, a swimming pool is a dangerous thing that would fall within the doctrine of objective liability. This case involved a swimming pool at a hotel in Mexico owned by an international hotel chain. As I mentioned before there are certain state codes that are more ample, broader, and that is the case of the code of Quintana Roo.

which was a code that was issued thinking about the tourists in Quintana Roo.

Gordon: A similar problem occurred in a case on which I worked with one of our large battery companies. A U.S. court was being asked to apply Mexican law, and the court wanted to assure itself that there was a cause of action under Mexican law and a possibility of some damages being awarded under Mexican law. The court did not want to recognize that Mexican law applies, and then learn that there's no cause of action under Mexican law. It's a little bit like the courts not being willing to remove a case under the doctrine of forum non conveniens, unless there is an agreement that jurisdiction will be accepted in the other area. This occurred in the Bhopal case, where one of the conditions of the court was that the company accept the jurisdiction of India. It is not just a matter of determining the applicable law; the court may want to know what lies downstream.

Keith Harvey suggested that AGRICOLAS may have a cause of action against GROWFAST. Would you expand on that?

Harvey: GROWFAST, of course, will be the target defendant of the Americans that were injured, as well as the European and probably the Mexican citizens because I am sure some American lawyers would try to recruit them as clients. In thinking about the possible defendants other than GROWFAST, I considered the independent Mexican company, AGRICOLAS. But what was AGRICOLAS doing? GROWFAST sent the product to Mexico. AGRICOLAS then took the product, put it in vats to dilute it, and then put it in the containers to sell it. Then there was a mysterious explosion. Who caused this? So I thought that AGRICOLAS too may have a cause of action against GROWFAST because they have damages to their plant; they may be sued in Mexico or in the United States. The most logical thing for AGRICOLAS to do is go to the United States where they could sue GROWFAST under the doctrine of strict liability or some other causes of action.

Gordon: If we change the facts a little and make the party in Mexico not AGRICOLAS but a wholly owned subsidiary of GROWFAST, then we have the opportunity to try the Mexican enterprise under the doctrine of strict liability.

Harvey: I think you would have a better case all across the board.

Occhialino: Your fact pattern as written is very subtle. It states that the product blew up during the process of dilution, but it doesn't say that the product blew up because of any defect in the product as opposed to the way it was being handled by AGRICOLAS at the time. If improper handling, rather than a defective product, was the cause, American concepts of strict product liability might not apply. Product liability law requires a defect. Possibly the product was fine, but the way it was handled was not.

The facts presented in the problem you have written suggest as well that there were two GROWFAST employees who were present, but they were on loan to AGRICOLAS. This would suggest that they might have been under the control of AGRICOLAS. Therefore, under American law the manufacturer, GROWFAST, may not be liable for their conduct at the time.19 This scenario suggests that GROWFAST might not be liable at all and that only AGRICOLAS would be liable. This would be disastrous for plaintiffs because: (1) they couldn’t sue AGRICOLAS in the United States anywhere due to the lack of personal jurisdiction; and (2) according to our panelists, Mexican law may not be very favorable to them in Mexico.

Gordon: In purely domestic parent-subsidiary cases in the United States where there is piercing of the corporate veil, there are relatively few cases where the court doesn’t require a finding of some kind of wrongful conduct on the part of the parent corporation. It’s usually where the parent has used the subsidiary illegally, fraudulently or there is some other kind of misuse. The great fear, of course, is that somebody is going to recognize enterprise liability and that suggests that, if you have a parent and a subsidiary, there ought to be unity and there ought to be liability.

I don’t find the courts talking much about enterprise liability in the United States, the area where I do most of my consulting work for large U.S. corporations, and we’ve never had that raised, by opposing counsel. The defendant corporation doesn’t want to raise enterprise liability, of course, and then have to defend against it. Yet we are beginning to hear enterprise liability referred to in the multinational enterprise context. Do you think we are likely to see a development of that in the transnational context?

Harvey: In Texas, the corporate entity is respected and piercing the corporate veil is very difficult. However, in tort cases there has been a little movement in that direction, e.g., in the Hornsby case20 and the Western Horizontal Drilling Corporation case.21 These cases deal with different approaches to finding individuals liable either for their own negligence or by the way their business is structured through the piercing of the corporate veil by way of the alter ego theory. The facts of the case before us lend themselves to another common law theory used by courts in Texas to pierce the corporate veil namely, the single business

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20. Leitch v. Hornsby 855 S.W.2d 243, 252 (Tex.App. 1994) (The appeals court upheld a jury’s finding of an officer and agent’s personal liability for their own negligence. The piercing of the corporate veil was deemed not necessary unless the individual’s negligence is merely derivative of the corporation’s negligence).
21. In Western Horizontal Drilling Corporation v. Jonnet Energy Corp., 11 F.3d 65, 66 (5th Cir. 1994) the Court referred to the Texas Supreme Court decision in Castleberry v. Branscum, 721 S.W. 2d 270, 272 (Tex. 1986) (Which defined the concept of alter ego as when “a corporation is organized and operated as a mere tool or business conduit of another corporation”).
enterprise theory. Under this theory, one business can be made liable for the debts (and I would extend that principle to include tortious or negligent acts) of another.

Gordon: We find the same thing with experts in the U.S. I was asked to respond in a case where there were two plaintiffs' and two defendants' expert affidavits with regard to whether punitive damages are permissible because the law doesn’t say anything about them. Two lawyers had said they were totally inconsistent with civil law and the other two lawyers had said since they are not expressly excluded in the civil code, therefore it would be in the power of the court to grant punitive damages. I agreed with the first and went back into some of the history of the development of punitive damages, and the court agreed with that side. But it certainly isn’t surprising that we get very, very different views on the law.

Allan Van Fleet: If this were a consignment arrangement where the title was held by the party in the United States, GrowFast, and title didn’t pass until the buyer, AGRICOLAS, purchased the explosive substances, wouldn’t there be liability on the part of GROWFAST under the Mexican code, Article 1932(I)? Article 1932(I) says, “the proprietors shall equally be responsible for damage caused: (I) By the explosion of machines or by the combustion of explosive substances; . . . .”

Gordon: It happened in a building.

Kozolchyk: I believe that the provision in Article 1932 refers back to Article 1931, which concerns the responsibilities of owners of a building. They’re not talking about other ownership of the movable property or personalty, the explosive substances.

Gordon: The provision of Article 1929 refers to responsibility of owners of animals, so I’m not so sure that there is a reference in 1932 to 1931.

Kozolchyk: But 1929 refers specifically to the “owner of an animal,” (el dueño de un animal) unlike the reference to “the proprietors” (los propietarios) in Article 1932.

John Stephenson: Let me change the facts a little bit. What if GROWFAST sells these products to AGRICOLAS by selling them, FOB, from

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22. The single business enterprise theory was defined in Paramount Petroleum Corp. v. Taylor Rental Center, 712 S.W.2d 534, 536 (Tex. App. 1986) as “...when corporations are not operated as separate entities but rather integrate their resources to achieve a common business purpose, each constituent corporation may be held liable for debts incurred in pursuit of that business.” In determining whether two or more corporations have not been maintained as separate entities, courts in Texas have typically considered the following factors: (1) common employees; (2) common offices; (3) centralized accounting; (4) payment of wages by one corporation to another corporation’s employees; (5) common business name; (6) services rendered by the employees of one corporation on behalf of another corporation; (7) undocumented transfers of funds between corporations; and (8) unclear allocation of profits and losses between corporations. See also Superior Derick Services, Inc. v. Anderson, 831 S.W.2d 868, 875 (Tex. App. 1992); Allright Texas, Inc. v. Simons, 501 S.W.2d 145, 150 (Tex. App. 1973); Murphy Brothers Chevrolet Company, Inc. v. East Oakland Auto Auction, 437 S.W.2d 272, 275-276 (Tex. App. 1969).


the factory in either Texas or some other U.S. location, so that GROWFAST has no connection to Mexico, other than selling products in the United States to a distributor from Mexico. Suppose the distribution agreement requires title to transfer in the United States. Does that affect the results?

Occhialino: From my perspective, the answer wouldn’t be different so long as there was a defect in the product as it left the manufacturer’s hands in the United States. I think a Texas Court would apply Texas strict products liability, if the product was manufactured in Texas. On the other hand, if the problem is not a defect created by the manufacturer, but by the way the product was handled by the Mexican company in Mexico, there may be no substantive liability under American law. A person is not liable for the negligence of an independent distributor. The corporate setup under which the product was distributed then could make a significant difference.

Gordon: Would your view change if GROWFAST had no idea who the purchaser was or where the goods would be taken?

Occhialino: That would be important for purposes of personal jurisdiction if a Mexican court were trying to assert jurisdiction and GROWFAST opposed Mexico’s jurisdiction by saying, it didn’t know the product would end up there. I don’t think it would affect a Texas court’s choice of law. I do think it would affect a Mexican court’s jurisdiction if Mexico has jurisdiction principles like the U.S. that focus on foreseeability that you might be sued in the forum.

Gordon: Whose choice of law rules will be applied by a court in the U.S.? Whose choice of law rules will be applied by a court in Mexico? Could we look for a moment at the source of this law?

Occhialino: In the United States all fifty states are free, within the bounds of the constitutional provisions of full faith and credit and due process, to choose the choice of law system that they would prefer. There are two basic choice of law systems: traditional, as reflected in the First Restatement, which is very rule-oriented; and the Second Restatement, which requires a more “significant relationship” or “contacts approach.” Every American state is free to use either one of those systems or any of the many variations of these two that also exist. There are professors who become famous by getting their name on a slight variation of one of the two basic choice of law systems. There is no single choice of law system that must be applied in each state in the United States. There could have been, I suppose, but the United States Supreme Court held that, when a federal court is sitting as a diversity jurisdiction court, instead of having a single federal system of choice of law to apply the federal courts are bound to follow the choice of law system of the state in which the federal court sits. So even if you file

a product liability claim in a federal court, you don’t get a single federal choice of law principle applied by all federal courts. A federal court in Delaware applies state of Delaware principles of choice of law, and a Texas federal court applies state of Texas principles. The big challenge for an American lawyer trying to choose a forum is to find a forum that: (1) has jurisdiction, and (2) has a choice of law system that will point to the product liability law most favorable to the plaintiffs.

Gordon: Would a Texas court have recognized a contractual provision that Texas law ought to apply in the sales of these products to AGRICOLAS?

Occhialino: That is a difficult question because in our hypothetical bystanders are suing rather than parties to the contract itself. I’m not sure that a choice of law clause in a contract between GROWFAST and AGRICOLAS would be relevant to a personal injury action by third persons who aren’t parties to that contract.

Gordon: What if AGRICOLAS itself were suing GROWFAST?

Occhialino: The contractual provision probably would be recognized. Choice of law clauses in contracts are an antidote to the vague choice of law systems that operate in the absence of a contractual provision. The principles of choice of law that are applied in the United States are so vague and so ambiguous that, absent a choice of law clause, this very ambiguity means that good lawyering can make a difference. When one says that the law of the place of the most significant relationship applies, one has said almost nothing. Then the lawyering begins. It is the power of lawyers to shape the policies of the different governments that are involved and the fairness arguments for the parties and then, after making excellent technical arguments, to touch the judge’s sense of justice. In this case the question really is; “Does a Texas federal judge want to hurt an American corporation with a large presence in Texas by choosing an applicable law that will give large damages and easy rules of liability when for the most part, non-American and non-Texan plaintiffs are suing?” In my view, it probably would come down to that. But it would take fifty pages of briefing on pure law before we got to the real issue.

Gordon: If the contract had a provision that Mexican law applied, or that Texas law applied if the matter went to a Mexican court either because it was initiated before a Mexican court or after a forum non conveniens argument, would the Mexican court recognize the choice made in the contract? And, assuming no choice had been made in the contract, how would the Mexican court decide? Do they apply a “significant relationship” principle in determining what law is applicable?

Gómez-Palacio: I believe we would say that there is no choice of law situation. If AGRICOLAS bottled the product in the wrong way, there was an illicit act. There are three distinct principles of liability, and one of them is contractual liability. There you have a choice of law. But in objective liability, which is an accident, then you just go to see whether according to the rules of the code that Mexican law applies. And Article
12 of the Mexican Civil Code says that Mexican laws are applicable to all persons who are in the Republic.

David Spencer: I wanted to raise a question about personal jurisdiction. If I were the lawyer for the U.S. company, or a good plaintiff lawyer, I would anticipate that the U.S. company is going to raise a cross-claim against the Mexican company, AGRICOLAS, because the facts say that the explosion is unexplained. Which of these forums will have personal jurisdiction over that Mexican company in order to hear that cross-claim?

Occhialino: If AGRICOLAS has done nothing in the United States, certainly not in Texas or Kansas or Delaware, under American principles of due process for personal jurisdiction, AGRICOLAS would not be subject to in personam jurisdiction in any American court. That means that the plaintiffs would probably pursue their litigation against GROWFAST, get a judgment against GROWFAST, and after the judgment was paid, GROWFAST perhaps would have to go to Mexico to seek contribution or indemnification either under principles of American or Mexican law or pursuant to the contract they signed in the distribution agreement. I don’t see AGRICOLAS as a party in an American court unless it waives the defense of lack of personal jurisdiction, or unless AGRICOLAS itself sues in the United States.

If AGRICOLAS does sue, it would open itself to a compulsory counterclaim. Then there could be personal jurisdiction and the contribution or indemnification lawsuit would be permitted against them in an American court. But if AGRICOLAS stays out of the American litigation entirely, it would not be forced in against its will, due to lack of personal jurisdiction.

Gordon: Could the matter be transferred out of a Texas court to Mexico under current statutory forum non conveniens law in Texas with regard: (1) to the Mexican citizen plaintiffs; (2) with regard to the United States citizen plaintiffs; and (3) with regard to the European plaintiffs. Where would they send it? Or would they not really send it to Mexico, but say this isn’t the appropriate forum at least with regard to the European plaintiffs?

Harvey: Under the Texas forum non conveniens statute, if the only plaintiffs were Mexicans, I think the claim would be sent back to Mexico. The forum non conveniens law in Texas is divided into two parts: one for residents and another for non-residents, and their standards are different. If the two U.S. citizens are also plaintiffs, I think there would be a big battle under the forum non conveniens statute. Under the Texas

30. E.g., FED. R. CIV. P. 12(h)(1). (The absence of personal jurisdiction may be waived by the defendant).

31. E.g., Sweetheart Plastics, Inc. v. Illinois Tool Works, Inc., 286 F. Supp. 62 (N.D. Ill. 1968), (By filing suit, plaintiff waives objections plaintiff might otherwise have had concerning personal jurisdiction over compulsory counterclaims).

32. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(a) (Vernon 1993)(With respect to a claimant who is not a legal resident of the United States). TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 1993)(With respect to a claimant who is a legal resident of the United States).
forum non conveniens law there's a trap, which is that you have to file a motion to stay or dismiss for forum non conveniens within the same period you would file a motion to transfer venue.\textsuperscript{33} That's the first Monday after 20 days from being served. So you've got to move very quickly to get that motion on file, or you waive it and you're there.

The statutory provision governing claimants who are legal residents of the United States establishes a much higher burden on the defendant to have the suit dismissed on the grounds of forum non conveniens so if one of the plaintiffs is a Texan, the case may have to stay in Texas.\textsuperscript{34}

\textit{Gordon}: So, counsel for the plaintiffs should search the countryside and find one Texan who was injured, and 450 Mexicans would be able to get the case before a Texas court?

\textit{Harvey}: The state of Texas has a long history of being an open forum for anyone who wants to bring a lawsuit, because the plaintiff bar has been very powerful there and they have made sure they have plenty of business. The Texas wrongful death statute basically says that if anyone comes under the wrongful death statute and the country where they are domiciled has similar provisions and if, in the country where they are, the statute of limitations has not run to bring a suit, you can bring it in the state of Texas.\textsuperscript{35} There is a tradition in Texas jurisprudence to make the law as wide as possible so you can bring that cause of action in Texas.

\textit{Occhialino}: If I represented any Mexican plaintiff in this case, I would want to tag along with a plaintiff who was a United States citizen, preferably a Texan. If there is a Texas plaintiff, the Texas forum non conveniens provision makes it impossible to dismiss that Texas plaintiff on forum non conveniens grounds.\textsuperscript{36} And then I would hope there would be some principle that they would not dismiss the suit of the non-Texan and only keep that portion filed by the Texas plaintiff. If I were the defendant, however, I would engage in a two-step process to undo the piggy-backing of the non-Texan's claim onto that of a Texan. I would first move to sever the American citizens from the Mexican nationals.\textsuperscript{37} I would argue that different laws might apply to the Mexican nationals under choice of law principles so it doesn't make sense to try them together with the Texas plaintiffs. Having severed the Mexican nationals, I now have one case involving a Texan plaintiff and another involving numerous Mexican nationals. Now I can make an argument based on forum non conveniens as to the Mexican nationals. By a couple of procedural quick steps, the defendant could undo the plaintiffs' choice to bring a Texan along with several Mexican nationals as plaintiffs.

\textit{Gordon}: Please look at the damage provisions for a minute because certainly that seems critical as to where you are going to initiate your

\textsuperscript{33} TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(b) (Vernon 1995).
\textsuperscript{34} TEX. CIV. PRAC. & REM. CODE ANN. § 71.051(b) (Vernon 1993).
\textsuperscript{35} TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1985).
\textsuperscript{36} TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (West 1986).
\textsuperscript{37} TEX. R. CIV. P. 41.
suit. The plaintiffs' counsel are going to look at Delaware, Kansas, Texas, and Mexico and find where they are most likely to get a judgment of the highest possible damages, and then argue that state's law ought to apply. We are all assuming that Mexican damages aren't going to be very high, though Lic. Gómez-Palacio suggested that under moral damages concepts, damages might go as high as a half million dollars for each plaintiff.\textsuperscript{38}

\textbf{Gómez-Palacio: }In Mexico, there are two kinds of damages, physical and moral damages.

Physical damage is an amount based on the Federal Labor Law depending on the damage caused.\textsuperscript{39} And whatever the Federal Labor Law states, the amount is multiplied by 4 and you have your physical damage. For example, Article 480 of the labor law covers total permanent incapacity. Article 479 covers partial permanent incapacity. In the case of total permanent incapacity, the Federal Labor Law recognizes that you have to obtain the "highest minimum daily salary applicable in the area."\textsuperscript{40} For example, minimum salary in a given area in Mexico right now is 4 dollars a day. So you multiply that by 4 and that gives you 16 dollars. And then the Federal Labor Law will recognize for total permanent incapacity 1,095 days, which you multiply by 16 dollars. As a matter of fact, it comes out to $16,420 for total permanent incapacity. That is the physical damages. There used to be a cap on moral damages, which was two thirds of the physical damages. You would take the $16,420, plus two thirds for moral damage. The Federal District Code was amended years ago. The amendment consisted of abolishing a cap for the moral damages.\textsuperscript{41} It is open now; the judge can just consider whatever amount he feels is proper.\textsuperscript{42} What are moral damages? Article 1916 of the Civil Code covers damage to the feelings, affections, beliefs, appearance, honor, reputation, private life, physical aspects or the reactions of others to him or her.\textsuperscript{43} It refers to the profession of the injured person and recognizes the fact that, depending on his or her profession and income, the damages may be larger in the United States. Now the judge has a free hand because a price is put upon "honor." Well, how much is it worth? For example, one testicle, how much will it affect your feelings? Here, the judge has an absolute free hand with no cap situation. However, due to our traditions, the Mexican judge who is used to applying a cap for moral damages is not going to feel that he is as free as an American judge using this very same standard of moral damages. Punitive damages are still not applicable in Mexico. If a twelve-year old girl scout with a

\begin{itemize}
\item 38. C.C.D.F. art. 1916.
\item 39. C.C.D.F. art. 1915.
\item 40. Id.
\item 41. The previous version of the C.C.D.F article 1916 capped the moral damages at one third of the total recovery the limit was removed on December 31, 1982. See C.C.D.F. art. 1916 bis D.O. (Dec. 31, 1982).
\item 42. Id.
\item 43. Id.
\end{itemize}
grade school education suffered total permanent incapacity, what would a judge in the United States grant for moral damages? Ten or twenty thousand dollars? A jury would probably award even higher damages in the United States. The application of the Mexican law in an American court may be far more favorable to plaintiffs than it is in Mexico.

Gordon: Why did you say initially that the labor law would apply? I thought the injured parties bringing the civil action were not employees of GROWFAST or AGRICOLAS?

Gómez-Palacio: The civil code specifically refers the judge to the Federal Labor Code. It says, "When damage is caused to persons and results in death, total or permanent incapacity, partial permanent, total temporary or partial temporary incapacity, the amount of damages shall be determined according to the provisions established by the Federal Labor Law." To calculate the appropriate indemnity one should take as a base times the "highest minimum daily salary."

Gordon: This is from the Civil Code for the Federal District?

Gómez-Palacio: This is Article 1915.

Gordon: Why would you rely on the Federal District Code if the accident took place in Monterrey? Why wouldn't you look to the Civil Code of the State of Nuevo Leon?

Gómez-Palacio: If the accident occurred in Nuevo Leon, one would rely on the Code of that state. But most of the civil codes follow the Code of the Federal District.

Gordon: But since the amendments to the Federal District Code, some states may not have made comparable amendments to the moral damage provision.

Kozolchyk: The Mexican system of tort compensation is predicated basically on a public law approach to the problem, not a private law approach as in the United States. It is as if to say that the business of the person who has been affected, the victim of the tort, is everybody's business. The concept is much closer to criminal law in conception than it is to tort law in conception. And this is why what you have is basically workmen's compensation tables applied to the accident because it's everybody's problem. It's part of way to resolve a situation in a social fashion, and that's number one. If you add up what an engineer in Mexico would have earned over 25-35 years of productive life as an engineer, it could be two or three million dollars. That is not a consideration under the workmen's compensation table. It seeks the status quo ante to bring the victim to where he was at the time the accident occurred, as if the accident had not occurred. That is the rationale behind this way of compensation. When I first reviewed moral damages under Mexican law, I reviewed the legislative history. What seemed to have motivated it at first was basically trying to inject some rationale for libel and slander into the compensation. This is why they talked about honor.

44. C.C.D.F. art. 1915.
Gordon: It seems to me that it is not yet determined how judges are going to interpret this authority to impose unlimited damages in the long run. I feel very uncomfortable in telling people that they absolutely do not have to worry about any large judgment in Mexico, in view of the open-ended moral damage provision. It wouldn't surprise me if we do see larger awards in the future.

Kozolchyk: The last time I looked up “daños morales” (moral damages) in Mexico's *Semanario Judicial de la Federacion* (whose rough equivalent in the United States would be the Supreme Court Reporter of West's *National Reporter System*) at the National Law Center for Inter-American Free Trade database, Mexican courts were awarding, uniformly, very small amounts for moral damages.

Gordon: Assuming you are not going to be able to bring this case in the United States but will have to bring it in Mexico, in what state in Mexico will you bring it. It could be brought in Monterrey, Nuevo Leon, where AGRICOLAS has its plant. But could it be brought in the Federal District and how would you get jurisdiction over GROWFAST there?

Gómez-Palacio: If this accident occurred in Monterrey, I would agree that the Civil Code of the State of Nuevo Leon would apply unless it could be considered of a federal nature, in which case, the Civil Code of the Federal District might apply. For example, accidents occurring on the ocean beaches are governed by federal law because a strip of land twenty meters in from the highest tide is federal land. Thus, a swimming pool which is within twenty meters of the ocean is actually on federal territory. The principle is that *locus regit actum*, the place governs the act.

Gordon: Is that true of international borders? Is a strip of the borders considered federal territory?

Gómez-Palacio: No. There is a restricted zone for foreign acquisitions, but the zone is not federal territory.

Gordon: Could you serve the president of GROWFAST who is on his way to Costa Rica and has landed at the airport in Mexico City or Monterrey? In other words, can you obtain jurisdiction solely by service of process?

Gómez-Palacio: This raises the very important problem of notice. If a Mexican is notified in Mexico of a suit against him in the United States by one of those companies that goes around serving notices in the United States (e.g., Corporation Trust Co.), he would not pay any attention to it if he were sophisticated and knowledgeable in Mexican law. Under the Mexican Constitution one has to be served in a particular way by an official of the court before there is valid service and jurisdiction. That means that when a judgment is to be enforced in Mexico, the court order is submitted through diplomatic channels to the Mexican Ministry of Foreign Relations, but the Ministry will not pass the judgment on to a Mexican court unless service has been properly made in Mexico. If not, there has been a violation of a Mexican's individual right under the Constitution. So the full trial has to be recommenced. If Mexican plaintiffs were to sue in Mexico and notify the American company I would be
sure to comply with all the procedures under U.S. law and use an American lawyer for that purpose, but it doesn’t happen the other way around. Many times the American attorney just serves notice by mail as in the United States and the service is completely void. I think we have to use the lawyers in each country to see that we have full compliance with the law.

Gordon: Assume that there is a judgment in a Mexican court against a subsidiary of GROWFAST in Mexico; the Mexican court rules on a theory of enterprise liability that GROWFAST in the United States would be liable. Would a United States court enforce this judgment?

Harvey: I think the courts in Texas would enforce the judgment because there is an agreement between Mexico and Texas on the enforcement of judgments.

Occhialino: Texas has adopted the Uniform Enforcement of Foreign Judgments Act. Although American states must recognize the judgments of other U.S. states under the full faith and credit clause of the United States Constitution, and the Texas statute incorporates that principle, the full faith and credit clause of the constitution does not apply when a foreign country’s judgment is brought to the United States for enforcement. The American Constitution does not compel a state to enforce a Mexican judgment. American judges would first look for a bilateral treaty or some other kind of agreement between nations to see if the United States had agreed to enforce judgments of another country. If it has, an American state court would be obligated under the Supremacy Clause of the U.S. Constitution to follow the treaty. If there is no such bilateral agreement between Mexico the United States or even between Mexico and Texas, each state is free to do what it wants to do, which always surprises me. It could be an insult to a foreign country for an American state to decline to enforce their country’s judgments if the state gives as a reason that they’re allegedly the product of a barbaric judicial system or something like that. This could be an embarrassment to the federal government. Yet, that is the current law. Every state makes its own foreign policy with regard to foreign judgment enforcement.

Texas is one of about twenty states that have adopted the Uniform Foreign Country Money-Judgments Act that provides for enforcement of foreign country judgments for money. The Act contains a few conditions under which the judgment will not be enforced. Usually the

46. TEX. CIV. PRAC. & REM. CODE ANN. § 35.001 ET SEQ. (West 1986).
47. U.S. CONST. art. IV, § 1.
48. In fact, no such bilateral treaties exist between the United States or any state and Mexico for the enforcement of the judgments of the other country.
49. TEX. CIV. PRAC. & REM. CODE ANN. § 36.001 ET SEQ. (West 1986); See UNIFORM FOREIGN MONEY-JUDGMENTS ACT (table of jurisdictions adopting the act) 13 U.L.A. 261 (1986).
50. UNIFORM FOREIGN MONEY-JUDGMENTS ACT, 13 U.L.A. 261 (1986) § 4. Recognition must be denied if the foreign tribunal lacks a system compatible with the requirements of due process, lacks subject matter jurisdiction. Id. A court has discretion to deny recognition if the foreign judgment was obtained without fair notice, through fraud, was based on a claim repugnant to the public policy of the state or if the foreign court obtained jurisdiction contrary to an agreement between the parties to try the case elsewhere. Id.
U.S. states will enforce such judgements. I can't think of any reason why a Mexican judgment in a case like this, assuming the existence of jurisdiction in Mexico, would not be entitled to recognition in accordance with this comity standard of Texas.

GROWFAST is not likely to oppose enforcement of the Mexican judgment in Texas, in any event, GROWFAST is going to write a check as fast as it can as soon as the Mexican judgment has been entered because it is likely to be much lower than the judgment of a U.S. court had plaintiffs sued in the United States.

Gordon: GROWFAST probably would have offered the estimated damages under Mexican law as a settlement before the suit was actually brought in Mexico or before it was removed to Texas. Often counsel will calculate the damages in Mexico, and make that as an offer to the individuals. The Uniform Foreign Money-Judgments Recognition Act has been adopted now in 30 some states, though with some variations. Some states have incorporated a reciprocity requirement, which was never the intention of the drafters of that Act. The United States is not moving toward adoption of a national law on recognition of foreign judgments. We are instead negotiating in the Hague for an international convention on recognition of foreign judgments. It is tied up over questions of extraordinary jurisdiction. We look upon the French exercise of jurisdiction on the basis of the plaintiff's citizenship as extraordinary and will not accept that. Many other countries, including Mexico, look upon the U.S. practice of catch-as-catch-can service of process to gain jurisdiction as extraordinary jurisdiction. Although these issues have not yet been resolved, I think we will have an international convention ready for signature in the next few years. I assume Mexico would sign on to that kind of convention.

Kozolchyk: At the National Law Center for Inter-American Free Trade, we have worked on the execution of foreign money judgments with the Asociación de Presidentes de los Tribunales Superiores Estatales (Association of Chief Justices of State Supreme Courts in Mexico). The President of this Association, Justice Julio Patino of the Supreme Court of Veracruz volunteered to draft a model statute for the enforcement of foreign money judgments based on his experience with German money judgments enforced in Veracruz.

Other state chief justices pledged their help in enacting similar model laws. The model statute sets forth a procedure that bypasses in many significant respects the Departamento de Exhortos y Cartas Rogatorias (Office of Letters Rogatory and Judicial Requests) of the Mexican Se-

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cretaría de Relaciones Exteriores (Ministry of Foreign Relations). Accordingly, the foreign judgment will be forwarded almost automatically to the appropriate state supreme court. This court would reject execution of the foreign judgment on specified and limited grounds or forward it for execution to the appropriate lower court two or three weeks after its receipt.

The Patino draft has been forwarded to Governor Patricio Chirino's office for formal presentation to the Veracruz legislature. If those of us who live in states neighboring Mexico could help enact similar statutes by our respective states, I believe we could have mutual enforcement of money judgments across national boundaries very soon.

Mark P. Lang: What I hear from you is that we should tell our clients that they should get down on their knees and give thanks if they are sued in Mexico because the award of damages will be so low that the check will fly in the mail after the judgment and there will never need be a collection proceeding filed in this country. However, in the event some enterprising plaintiff's attorney like Mr. Harvey or myself would get those clients and sue in Texas, we would certainly sue on alternative counts and claim negligent failure to warn, and even sue the corporate officers for gross negligence and breach of contract and request a jury trial, and so on and so forth, negligent failure to properly supervise, negligent retention of attorneys, alter ego, joint and several liability. So GROWFAST would be in deep trouble if it were sued in Texas. I know, I've been there.

If an action were filed in the United States on behalf of the estates of employees who died in such an accident as hypothesized, counsel for the estate would first go to the workers compensation carrier and get $100,000 per death. That workers compensation carrier would then file a lien in the personal injury action and would have a right to one hundred percent payback, or it could be negotiated. Is there such a payment from either the government or a workers compensation carrier in Mexico, in addition to whatever their personal injury action might be against private parties, and would the Mexican government have a lien against a judgment in Texas for those amounts awarded to the injured or killed workers?

Gómez-Palacio: Instead of an insurance carrier, the employer in Mexico is registered in the social security system and actually pays dues to the social security on a monthly basis per worker. The idea is that the employee is covered by the social security and the employer, by paying social security is protected from claims by his employees for illness, accidental injury or death. The social security system may have a claim (un derecho de repetición) under Mexican law against the award.

Lang: Then would that social security administration in Mexico, in a mass disaster situation such as this, have the right to bring an action against negligent third parties, such as the corporation in Texas or even another corporation in Mexico, for reimbursement of those monies they had to pay out due to that third party's negligence?

Kozolchyk: I have seen such lawsuits in the United States on various instances involving recoupment subrogation, and in addition to that for
recovery of sums that the social security has paid for hospitalization which need not have been done, where people have been brought to the United States to very expensive hospitals and things of this nature. Yes, I’ve seen them done in the United States.

Trujillo: It is my understanding that U.S. courts and particularly federal courts are fairly deferential to litigation that has commenced in a foreign jurisdiction. Would it be possible for the U.S. corporation, feeling the threat of litigation in the United States, to commence litigation in Mexico, and by that means divert jurisdiction to Mexico?

Occhialino: Although it is unlikely to be successful, there is such a mechanism in the United States. At least theoretically, GROWFAST might choose not to be the defendant but to become the plaintiff by filing a declaratory judgment action seeking a declaration of non-liability before the injured persons sue GROWFAST. Declaratory judgments are available in most states and in the federal courts. The corporation would seek a declaration of non-liability to whomever it is that they have hurt. In that way GROWFAST would be able to pick the time, the place, and if they do it right, also pick the law that will be applicable by picking the right place in which to file the declaratory judgment action. However several American cases have ruled that it is improper to use the declaratory judgment act if the party filing the action is really a potential personal injury defendant who is likely to be sued soon, and who is merely trying to turn itself into a plaintiff. So in theory there is an American device. In practice the cases are not very favorably disposed to the use of the device in these circumstances. I do not know whether such a procedure is recognized in Mexico.

Lang: Could a prospective Mexican defendant sue in Mexico in order to establish jurisdiction in Mexico when he has injured an American corporation by defrauding it? Assume that the Mexican party begins a lawsuit in Mexico under some pretense in order to prevent the U.S. corporation from establishing jurisdiction over this defendant to claim treble damages or some other type of compensation that is available in the U.S. I think many of the federal courts and even the state courts, would be deferential to the suit that has begun in Mexico already. I think it’s possible for a Mexican defendant to do that.

Harvey: In Texas, a plea of abatement is permitted by which an action in the courts of Texas may be delayed or stopped until a pending action in another jurisdiction has been resolved. If a procedure exists in Mexico for somebody who would be a defendant to actually become a plaintiff, such a person might be able to file a plea of abatement in Texas on the ground that there is a pending proceeding in Mexico, and everything else ought to stop. This might prevent people from using the American courts with very favorable choice of law principles.

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Is there any way in Mexico for GROWFAST to start a suit immediately, asking a Mexican court to declare that it is not GROWFAST’s fault?

Gómez-Palacio: I must confess ignorance there. I think it is a matter of procedural law and I’m not familiar. I would establish a big doubt, though.

Alvin Garcia: What about res judicata and collateral estoppel? Would a judgment in Mexico, preclude litigation by the same parties in the United States? Would a judgment from the United States stop litigation in Mexico?

Occhialino: Let me rephrase your question: If there were a Mexican judgment and it made certain findings and there was subsequent American litigation, would the findings of the Mexican court be binding so that re-litigation would not be permitted in the American court? That question would normally be answered affirmatively under constitutional principles requiring one of giving full faith and credit to the judgments of another state, but since Mexico, rather than a state, is the first forum, full faith and credit is not required; at best it would be a question of comity. And under comity principles, an American court could either say the Mexican court has already found “X” to be true so we don’t have to re-litigate it, or it could choose not to. So there is a lot more deference in an American court to not give collateral estoppel or res judicata impact to a foreign country judgment.

I don’t know how a Mexican court would deal with the question of an earlier American judgment.