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Product Liability Claims on Both Sides of the Border: A Panel Discussion

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MICHAEL GORDON: We are looking at the area of cross-border product liability litigation involving Mexico and the United States. Our hypothetical consists of commercial and tort litigation in the United States, or contractual and extra-contractual objective liability in Mexico. There is an increasing number of contract and tort cases evolving from commercial relations, due to the fact that there is more trade and much more foreign investment in Mexico, and thus there are more accidents in foreign-owned plants, like the explosion in our hypothetical. Like many civil law and common law nations, there are significant differences in the tort law in Mexico and the United States. These differences are also reflected in the quantum of law, both in terms of case law and writings, dealing with tort law in the United States and Mexico.

We also have, it seems, in the case of Mexico and the United States, a different cultural perspective of the responsibility of persons. In Mexico, all states except Quintana Roo have the basic civil code provision that states that a person is responsible for the damage they cause, and then states the exception that the victim is liable himself for his own negligence. Quintana Roo has removed the exception clause in order to encourage tourism. In the United States, there is apparently a different sense of a person’s personal responsibility.

In contrast, contract law in the two jurisdictions is more convergent. Both the United States and Mexico are members of the Convention on Contracts for the
International Sale of Goods (CISG). Consequently, although application of U.S. versus Mexican law outside of the scope of the CISG differs, when we take the CISG into consideration, we find that there is a certain harmonization between the two jurisdictions, at least in what the law says, if not necessarily in how courts will interpret that law.

As for the hypothetical, it is similar to the Benlate case with DuPont. Growfast Chemicals, Inc. (Growfast), is chartered in Delaware with principal administrative offices in Dallas, and manufactures a pesticide and fungicide, Sollate. In addition to manufacturing facilities in Texas, it has a wholly-owned subsidiary called Growmex, S.A. (Growmex), in Veracruz, Mexico. The commercial claims of the problem deal with contracts for the sale of the Sollate, which has caused damage to Mexican commercial growers' crops. However, the sales have been invoiced from the U.S. Growfast Company, if that makes any difference.

The tort side of the problem comes out of an explosion that took place in the plant in Veracruz. It caused the death of thirty-five Mexican employees and a U.S. technician who was on loan to the plant from Growfast in Texas. It also caused some deaths and injuries to a number of people outside the plant—French and German citizens, a U.S. couple who were tourists in the area, and area residents. To include a question of defamation, the fact pattern includes an inappropriate comment made in Mexico City by the president of Growfast shortly after the accident, in which he blamed the explosion on corrupt Mexican government officials that had accepted payoffs during the plant construction. The resulting inadequate safety walls in the dilution room did not contain the explosion in that room. That statement was spread throughout Mexico and the United States. The president has apologized but has cancelled his plans for a forthcoming vacation in Mexico.

In today's exercise, we will look at the various actions that have been filed and discuss why they have been filed where they were. There are contract actions that have been initiated in the United States, in Brazoria, Texas, by commercial growers. There are also a number of contract actions brought in Mexico, in both state court in Veracruz and federal court in Mexico City, because the suits have named both Growmex and Growfast. The Growmex plant is in Veracruz and the company has offices in Mexico City.

Several tort actions have been initiated in the United States. The two U.S. tourists, the estate of the U.S. technician, as well as some of the injured Mexicans employees and area residents have brought suit in the United States in a Texas state court. One Mexican government official who was accused of taking bribes by the president of Growfast has brought suit for defamation against Growfast and the company's president in state court in Dallas, Texas. The German tourist who was


5. In Mexico, the Código de Commercio (Commercial Code) is federal. In the United States, the U.S. Constitution grants Congress the power to "regulate Commerce with foreign nations." Const., art. I, sec. 8, cl. 3.

injured has done the same. Of course, all of these lawsuits ask for extensive discovery under U.S. rules, jury trials and punitive damages.

Suits have also been initiated in Mexico including the suits by the remainder of the injured Mexicans and the two other governmental officials the President of Growfast accused. There is also a tort action initiated in France brought by the injured French traveler under the jurisdictional basis of the domicile of the plaintiff, that is nationality.

There is also a potential lawsuit against the companies in England and Japan that provided some of the ingredients. Although they argue that the explosion was the fault of Mexican employees who disobeyed instructions of the U.S. supervisors, Growfast is of the belief that the English and Japanese companies are partly responsible for the explosion. Both have denied any responsibility, but Growfast is prepared to bring a claim against both of them in Texas if they see things going badly.

II. CHOICE OF JURISDICTION

The question with which we begin is whether there should be an attempt to remove the actions that have been brought in the United States to somewhere else, not necessarily Mexico, under the theory of forum non conveniens?

ADOLFO JIMENEZ: As counsel for Growfast, I would try to remove the claims of the commercial growers from Brazoria, Texas, because it has no connection to the facts of this case, to Washington, D.C., or Dallas. If you are going to sue Growfast, you may have a higher likelihood of getting a fairer hearing in Dallas, Texas. The second factor I would look at is what are the damages going to be in the United States versus Mexico. Damages in Mexico tend to be very small, so there would appear to be a clear advantage in having the case moved to Mexico.

My concern in this type of case, though, is the nature of the event. You are talking about a huge catastrophe that is likely to be very politicized no matter where it occurs in the world and it may not get the kind of treatment that you would ordinarily expect. You may be exposing yourself to a great deal of liability and damages in Mexico that maybe you didn't contemplate in the beginning. I would not just go ahead and assume that removing them and getting the case moved to Mexico is the best case when you're dealing with this kind of disaster.

JOSÉ SANTOS: In my view, the first reaction as counsel to Growfast would be to remove it to a foreign country, particularly where compensatory damages are low. However, once one starts thinking about it, one would realize it is a politicized situation. Nonetheless, whether to remove it is a tremendous dilemma because, given the significant Mexican-American population in Texas, a jury that would absolve Growmex or Growfast from liability may be difficult to obtain. Furthermore, given the magnitude of this tragedy, it may inflame any U.S. jury. I think you have a significant dilemma here in terms of removal for forum non conveniens.

JIMENEZ: It is also critical to consider what law applies, because if you believe that you can succeed in arguing to a U.S. court that Mexican law applies, you have a huge advantage in litigating that case in the United States, in your hometown, providing a higher degree of certainty. But if you are not very confident that you are going to get Mexican law to apply to this particular case, the call is harder.
DAVID EPSTEIN: There is a split in how the courts would decide based on whether it is a contract remedy or a tort remedy. Under a contract claim, in this case, the contract specifies that Texas law should apply but removal to Mexico might lose you jurisdiction over Growfast. On the other hand, regarding the tort claim, the majority of the facts happened in Mexico. It seems logical that a court would view Mexico as the center of gravity and move it there. However, from a fairness point of view, Growfast seems to be an indispensable party to the tort action, so it could be that a U.S. court might condition the removal to Mexico by requiring a stipulation of consent to jurisdiction by Growfast to the tort action in Mexico.

GORDON: Maybe we should move it from Texas to elsewhere in the United States where there is more capacity to handle a decision of this dimension, as suggested by Republic of Bolivia v. Philip Morris Companies, Inc. The focus often is to get it out of the United States, no matter where it is brought. However, it may be that there are good reasons to keep it in the United States, but not where it is initiated. It raises the issue that we may lose control if we remove it, and there may be consequences to that.

CARLOS LOPERENA: Regarding jurisdiction in Mexico, this case could be considered commercial because the defendants, Growmex and Growfast, are merchants. The Commerce Code establishes the jurisdiction in favor of the domicile of the defendant or the debtor. Domicile of the company is usually where it is incorporated. Growfast is incorporated in the United States, Growmex in Mexico. In this case, the debtor and the defendant are the same, so jurisdiction should either be Mexico City, where it has its offices, or Veracruz, where it has its facility. Most likely, the company would be incorporated in Mexico City. Mexico does not have the notion of forum non conveniens regarding jurisdiction. It has just the domicile of the defendant or the jurisdiction to which the parties have submitted themselves in a contract.

For torts, if there is a branch of the company in the place of the tort, the jurisdiction of the branch is one proper venue for bringing a lawsuit. Another proper venue would be Mexico City as the main domicile, or the social domicile, of the company.

Regarding the lawsuit brought by the employees against Growmex in Texas, it is not valid jurisdiction because all the liabilities of the employer are covered by the Mexican Labor Law and these kinds of labor accidents have to be paid through the Social Security Institute. If the employer has its employees recorded in the Social Security Institute, the employer is released from any liability and the one who assumes the labor liability is the Social Security Institute.

There is a U.S. case in which I was hired as an expert witness in Mexican law that illustrates this situation. The crime occurred in the north of Mexico, pertaining to a maquiladora company based in Ciudad Juarez. It had a parent company in El Paso, Texas, and a subsidiary maquiladora plant in Palomas, Chihuahua. Two employees departed Juarez to take the payroll money in cash in a rental car to Palomas, but they never arrived. The employees were discovered burned to death.

8. A foreign-owned, export-oriented assembly plant.
in the trunk of the car. The money was gone and the criminals were unknown. The parents of one employee went to the company asking for the payment of the labor liability and were sent to the Social Security Institute, who paid them. The company also had some private insurance that paid the insured amount to the parents. In addition, they filed a lawsuit against the El Paso parent company. They wanted American law to be applied to the case, because Mexican law would apply a low cap on the indemnification. They argued that the decision of taking the money by car from Juarez to Palomas was made in the United States, by American citizens. Of course, there was no problem in applying American law against an American defendant in the United States. You are not trying to apply American law to a Mexican corporation or a Mexican individual. Under American law, losses, damages, and punitive damages would be very high.

AUDIENCEMEMBER/BROOKS: Tequila Brooks, Dallas, Texas. I understand that, under the Mexican workers compensation law, if the company is found to be have engaged in intentional actions which resulted in the injury, the person gets a little more benefit. How does the Social Security Agency make that decision when it is determining workers compensation benefits? Also, if Social Security made that determination, would the plaintiff’s attorney be able to use that decision as res judicata in a U.S. court case? In other words, can the decision of intentionality by Social Security be used as a fact in the plaintiff’s U.S. lawsuit?

LOPERENA: If I didn’t misunderstand you, I think that your question is what is the difference between intentional damages and accidental damages, mainly when the damage is bodily injury. In Mexico, there is no difference under the social security law. But if you have an intentional injury, there is an additional proceeding, that of the criminal offense against the individuals who caused the injuries, rather than against the company. If the individuals are adjudged to be guilty, the indemnification would be a consequence of the criminal judgment and owed by the authors and perpetrators of the crime. I don’t know if such an indemnification could be covered by Social Security. The employer-company complies with its liabilities by registering its employees with Social Security.

EPSTEIN: Regarding the application of American law, if I understood the question correctly, if the case stayed in the United States on the tort claim under state law and if, under a choice of law clause, the court determined that Mexican law should apply, then I think they would apply the workman’s compensation provisions.

GORDON: There would have had to have been a case in Mexico which had been decided in order to have res judicata. A series of cases were brought in Costa Rica resulting in a whole series of decisions. Now, in the United States, a court has been looking at whether or not, in applying Costa Rican law, it will look at res judicata. We have looked to see whether or not Costa Rican law recognizes res judicata on these issues. Having found that it does, the U.S. court is accepting the res judicata. In our example, I think there has to be a decision in Mexico.

10. See Ley del Seguro Social, art. 46.
11. See Código Penal para el Distrito Federal [C.P.D.F.], art.10.
One of the questions that comes up is whether a court is more likely to remove a matter when no U.S. citizens are plaintiffs.

JIMENEZ: The answer depends on whether the plaintiffs have a reason for bringing that action there. What is difficult about moving the claim from Texas is the presence of Growfast in Texas. That will be a factor in the analysis. The court will go through a balancing test starting with a public interest test and then a private interest test, looking at all of the facts in this particular case and the connection of the case to this particular forum. It also will consider how much impact on the court's resources and docket the case will have in contrast to the connection of the case to that particular forum. It is difficult for a company that is located where they are being sued to get a case moved. But in this case, there is a major catastrophe that occurred somewhere outside of Texas.

GORDON: Does the court treat the question differently if we are asking to remove it to a foreign country as opposed to asking to remove it to Washington or another U.S. location?

JIMENEZ: That is going to be a major factor in the analysis. The court will look to make sure that there is an adequate forum to provide a remedy to the plaintiff. If the court finds that there is no adequate alternative forum, then it won't be removed. Another factor which a court will look at is whether the defendant is accepting jurisdiction where it is asking a case to be moved. To remove the case to Mexico, the defendant would have to be willing to accept jurisdiction there.

EPSTEIN: One of the things that is very confusing about this area is that ruling on forum non conveniens is entirely within the court's discretion. So, it depends on how this test is presented to the court. Whether the foreign country is an adequate alternative and has an adequate remedy is a subjective analysis. Both sides would argue about whether Mexico constitutes an adequate forum, raising the question whether there is an effective tort remedy under Mexican law.

However, I still think that, based on what I have seen in the U.S. cases, the center of gravity shifts to Mexico here because so much in our hypothetical happened in Mexico. The court would analyze where the witnesses are, where the accident occurred, where the proof is, how the witnesses are going to be examined, how easy is it to get evidence from the Mexican witnesses if the case stays in the United States versus how difficult it would be to obtain the evidence in Mexico.

JIMENEZ: One factor that I think is relevant here is whether the plaintiffs' attorneys are going to punish you for objecting to the forum, dragging you through a very onerous discovery process. Plaintiffs' attorneys know full well that they get the advantage that it may be a year before a court decides on the forum issue, and, in the meantime, they will be able to get all of the discovery they are ever going to need in the case.

GORDON: We have a dilemma. If counsel for Growfast wants to remove it, the court is likely to require Growfast to submit to personal jurisdiction in Mexico. However, in the suits brought in Mexico against Growmex and Growfast, what is the Mexican understanding about piercing the corporate veil, although you don’t

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12. Piercing the corporate veil—In the United States, this is a judicial doctrine that allows a plaintiff to hold a parent company liable for actions of a separately incorporated subsidiary company controlled by the parent either because the separate corporate identity had not been respected or because of other exceptional circumstances.
talk about it in those terms? Do you think a Mexican court, in the Mexican initiated cases, would assert jurisdiction over Growfast?

LOPERENA: A Mexican court would assume jurisdiction over Growfast if it is a co-defendant with Growmex. There is a rule that when there is more than one competent court, the jurisdiction will be assumed by the court chosen by the plaintiff. It is common for a plaintiff to sue a foreign company along with its Mexican subsidiary just to obtain jurisdiction, even if the facts that give rise to the lawsuit occurred before the Mexican subsidiary was incorporated. In that case, the Mexican subsidiary has nothing to do with the case, but that is the way the Mexican court assumes jurisdiction.

The veil piercing doctrine is mostly unknown in Mexico; in most cases, the liability of shareholders is only limited to the payment of the shares. We could say in cases of a tort that, as per the Federal Civil Code, those who cause the damage in common, acting jointly, are jointly liable. But it can be difficult to determine who caused the explosion. In cases where it is the product or the misuse of the product or the product stored in a defective warehouse, I think the parent company would not be liable, but the Mexican court would assume jurisdiction against the parent company.

FRANCISCO VELÁZQUEZ: In Mexico, we do not recognize the notion of the corporate veil, but we do have the notion of the economic unit. It is only applicable to labor cases in which a corporation is involved. For instance, at the first level is a corporation that is a holding company. At the second level is a service company and also at the same level, but as a separate entity, is an operating company. You do that in order to manage the profit sharing which flows from the operating company which has no contact with customers. You staff all the three companies. An employee who has been dismissed can sue both the service company, which is his only employer, plus the operating company under the concept of the economic unit. The Mexican law for corporations clearly states that, once you form a corporation, the corporation is an independent company from the shareholder. Also, if the shareholder is another company, it also remains as an independent entity from the shareholder.

AUDIENCE MEMBER/SOCORRO: Marie Socorro Carellas from Mexicali. Piercing of the corporate veil does exist in Mexico under the Código Fiscal de la Federación under the tax code. Any contributions due by the company as a consequence of its operation that are not paid by the company may be collected from the shareholders. The only limitation is that the shareholders individually are responsible in proportion to their percentage participation in the capital stock. It is contemplated as a joint obligation.

GORDON: Let me just raise this. It is something that is happening that worries me. An Ecuadorian shrimp litigation case is an example. After being successful on a motion for forum non conveniens in Florida state court, the twenty-eight

Liability also may be imposed on directors and officers of a corporation, but only on even more extraordinary circumstances.

13. See Código de Comercio [COD.COM.], arts. 1106 and 1120.
15. See Ley General de Sociedades Mercantiles [L.G.S.M.], art. 87.
plaintiffs went back to Ecuador and got a law passed. The law states that when Ecuadorian plaintiffs have a choice of initiating a suit in Ecuador or abroad and they have chosen to initiate that suit abroad, it may not be initiated in Ecuador after a successful motion for *forum non conveniens*. All twenty-eight of them then filed as plaintiffs in Ecuador and all twenty-eight plaintiffs filed a motion to dismiss. Twenty-seven courts granted it. When the twenty-eighth judge did not, he was removed from office and replaced by a judge who would grant it. They are now back in the United States in federal court. It is something that was passed very clearly to benefit these shrimp farmers in Ecuador to give them an opportunity to get higher damages by bringing suit in the United States. This is not unique to Ecuador; it has spread.

EPSTEIN: At least five or six Central American countries have adopted such laws, but I don’t think a U.S. court has ruled on whether the existence of those laws means that there is no adequate alternative forum and thus would uphold keeping the case in the United States. My guess is that a U.S. court would not recognize the validity of those laws and would rule that it violates U.S. public policy to allow coercion to keep any case in the United States on the basis of such foreign laws.

SANTOS: That would also create a real dilemma for the lawyers who are defending this because they are going into court not knowing what is going on in the home country. They get removed to the home country and now they are stuck. Conceptually, they need to come back into the United States if they were kicked out in the first instance.

GORDON: I tend to agree that the American court is not going to permit the foreign court to dictate whether or not the U.S. court believes that there is an adequate and available forum, because there is an ability to waive the prohibition. I think the U.S. court would say go back and waive it because we are now closed to you.

III. CHOICE OF LAW

GORDON: Let’s move on if we can to some other areas. Let’s look at the question of whether we want to have Mexican law applied in the U.S. court, if a removal is not requested. We have touched on it. In our hypothetical, we have some U.S. citizens involved in the action and the U.S. judge is certainly going to realize that, if Mexican law applies, the U.S. citizens may receive considerably smaller damages than they would if American law had applied. The judge may not feel as reluctant to give Mexicans considerably lower damages than American law would give because Mexicans would receive the damages that are customary to them. Do we have a consensus that we would move to apply Mexican law?

JIMENEZ: In the tort action, I would have no hesitation in arguing that Mexican law should apply. The benefits for Growfast and Growmex are just too great. First, contributory negligence is a total bar to recovery and there are very few tort actions in the United States where you don’t find that the plaintiff had some degree of responsibility. Second, as far as damages are concerned, they are going to be far

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17. See *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999).
less because in Mexico damages for pain and suffering are not awarded and that, typically, is the major portion of any U.S. damage award. Third, you are less likely to be hit with punitive damages if Mexican law were to apply.

On the contract action, to the extent that the economic loss doctrine is going to help Growfast and limit the amount of recovery strictly to the contractual damages, or what was agreed to, and to the extent that that is not a benefit in Mexico, it may be better that U.S. law is applied.

LOPERENA: In the contract case, even if it is tried in the United States or in Mexico the applicable law would be Texas law, without any doubt. From a practical point of view, judges are reluctant to apply a foreign law because it is unknown law to them. Most of the motions to apply Mexican law, in my experience, have been rejected by the courts because the judge feels more comfortable applying his own law than looking to expert witnesses for foreign law. One expert says it is white and the other says it is black, trapping the American judge in two different and opposite versions of what Mexican law is.

GORDON: Mexican law accepts a choice of law. U.S. law accepts a choice of law. Our hypothetical contract states the law of Texas applies. What is the law of Texas—the Uniform Commercial Code (UCC) or the Convention on the International Sale of Goods (CISG)?

SANTOS: It's the CISG, quite simply.

GORDON: Do you think the judges are going to agree with that?

SANTOS: Actually, no. Lawyers need to do a very good job at briefing the judges. However, even so, the judges sometimes ignore the briefing and go down a path you never thought they would.

GORDON: It may well be that the parties in drafting this contract had never heard of the CISG. Until fairly recently we have not been very good at teaching it, so many practitioners don't know to use it. Are some practitioners gaining an advantage by being aware of the CISG?

SANTOS: Yes, it is a tremendous advantage. Sometimes you retroactively look at the whole scenario and find out you have just gotten a bonanza. The CISG provides an even broader, more common sense approach to business practices and commercial relationships that even the UCC does. The UCC has tried to emulate a lot of what had become customary in the marketplace. The CISG takes that a few steps further, particularly recognizing international business transactions.

GORDON: One hundred civil judges in Florida were surveyed as to whether a law of Florida provision would lead in their court to application of the CISG or the UCC. About 30% responded, “What is the CISG?” Almost all of the rest responded that the UCC would apply. None of them said they would apply the CISG. A big educational process is needed to instruct people that the CISG is indeed law. Every contract that crosses borders between parties of the convention is to be governed by the CISG. It is extraordinarily important. However, there is an opt out provision which raises the question whether a provision for the application of the law of Texas constitutes an opt out. The implication of that would be that the drafters really meant the UCC of Texas. It's ambiguous.

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20. See CISG, art. 95.
SANTOS: Yes, it needs to be drafted clearly and unequivocally. The CISG is very clear; you must opt out expressly.

JIMENEZ: In at least one arbitration, the arbitrator determined that the use of the language “the law of the State of New Mexico shall apply,” actually incorporated the CISG, so therefore, the CISG was applicable.

AUDIENCE MEMBER/STEPHENSON: John Stephenson. I believe that unless you expressly exclude it, if you use the Texas UCC as governing law, then you automatically have included the CISG. By simply stating a choice of law of a particular country or state, you don’t exclude the CISG.

LOPERENA: If you are discussing whether American or Mexican law would apply, it is a false conflict. In both cases the CISG would apply, because it is considered part of both legal systems. In our hypothetical, it was a sale of goods contract entered by nationals of two state parties to the convention. If it is not expressly excluded, the convention applies. However, the CISG is not applicable to death or bodily injuries caused by the goods that were the subject matter of the sale. It applies only to the material damages.

GORDON: Since we have, in a sense, a false conflict, would a Mexican court be likely to interpret the CISG in the same way as a U.S. court? Would they turn to the same sources of law? If we say it’s a false conflict, then we are essentially saying it doesn’t matter what court it is in, or what law will apply, because it is the CISG. How would a Mexican court approach an interpretation of the CISG?

LOPERENA: Of course, the Mexican court would apply the CISG with the Mexican criteria and Mexican way of interpretation. The loop-holes of the CISG would be governed by Mexican precedents and Mexican judicial criteria. I think it would be the same in any civil law country. The manner every national court interprets the Convention would be fair. It would be an international convention that would be applied in Mexico with Mexican criteria.

GORDON: Would a Mexican judge look at American case law?

LOPERENA: They don’t even look to Mexican case law.

GORDON: Would an American judge look to Mexican case law as well as American case law?

SANTOS: In fact, I think an American judge would have to look to German case law and German interpretations, because there is so little American case law. Germany has been interpreting the CISG or it’s predecessor for 30 years or more. Often lawyers come in and brief the judges on the UCC, which perhaps can be helpful, but if the facts of the case are different it could be a real trap for everybody.

GORDON: Pace University has a web site to which it is very useful to direct judges. They are trying to give abstracts of foreign cases as well as to collect foreign cases in their totality. It may be true that a Mexican court would not go back to past decisions dealing with interpretation. In that case, I could see a situation where there is a Mexican decision that favors the U.S. party and the U.S. judge would use that Mexican decision more than a Mexican judge would.

LOPERENA: In Mexico we have no precedent regarding the interpretation of the CISG. We also need to educate the Mexican courts and bar. In some cases where the contract has a choice of law clause providing for the application of Mexican law, the lawyers would invoke the Mexican statute and not the Convention, because they don’t know that the Convention is applicable. It is too recent a development. Of course, it they are familiar with the CISG, they can argue that the contract is
governed by it, but if the Mexican law is more favorable to the case, the Mexican lawyer could intentionally invoke the Mexican codes, instead of the CISG. If the judge and defendant are not familiar with the Convention, everything could be governed by Mexican law without taking into consideration the CISG. Furthermore, the CISG must have been in force in both countries when the contract is signed in order to be applicable.

GORDON: As for the tort, the applicable law in the United States would be state law. The law applicable to the contract in the absence of the CISG would be state law. Could you outline the Mexican system?

LOPERENA: Commercial law is federal and is applicable throughout the country. Therefore, a case with a cause of action under the Código de Comercio (the commercial code) will be subject to federal law.

GORDON: For the commercial matter then, it really doesn’t make much difference whether we were talking about Veracruz or Mexico City. But what about tort law? Will it make any difference whether the action is in Veracruz or in Mexico City?

LOPERENA: Torts are governed by local law. However, the rules of tort law in the civil court for the State of Veracruz would be pretty much the same as those in Mexico City, since the states basically copy the local laws of the Mexico City federal district.21 There are situations that give rise to liability where for one party it is a civil relation, but a commercial relation for another. Therefore, we must look at whether to apply the civil code, which is different for each state, although most of them track the Código Civil para el Distrito Federal, the Civil Code for Mexico City, or to apply the Commercial Code which is federal and uniform throughout the country. The Commercial Code may be applied because one of the parties is a merchant, such as in our hypothetical where defendant is a merchant. Article 1050 of the Commercial Code states that, in accordance with the commercial provisions, for one of the parties in a transaction it has a commercial nature and for the other it has a civil nature. The controversy arising from that transaction will be governed in accordance with commercial provisions. The Commercial Code would apply and the loopholes in it will be filled in with the Civil Code for the Federal District.

GORDON: We have as many different civil codes as we have states in Mexico, plus we have the Civil Code for the Federal District in ordinary matters and for the entire republic’s federal matters. Which law would apply to this? Since the explosion took place in Veracruz and the company has headquarters in Mexico City, would it be the Federal District Civil Code or the Veracruz Civil Code?

LOPERENA: If you are suing in Veracruz, of course it would be the Veracruz Civil Code. However, if you are suing in Mexico City, the judge will probably apply the Civil Code for the Federal District. Technically speaking, it should be Veracruz. But from a practical point of view, the law of the locus of the court.

21. Currently, the Código Civil para el Distrito Federal and the Mexico City federal district civil code are identical. However, in the near future, the Mexico City civil code will be replaced by a local version being reviewed by the Mexico City congress, at which time the two codes will no longer be identical.

22. See CÓD.COM., art. 1050: “Cuando conforme a las disposiciones mercantiles, para una de las partes que intervienen en un acto, éste tenga naturaleza comercial y para la otra tenga naturaleza civil la controversia que del mismo se derive se regirá conforme a las leyes mercantiles.”
GORDON: But if a judge in the Federal District applied federal district law, have you just federalized our tort applying the Federal District code to it even though it took place in Veracruz?

LOPERENA: I don’t think so. It would be federalized if you linked it to a commercial activity, but perhaps it is another false conflict, because most of the local statutes mirror the Mexico City Civil Code for the Federal District.

IV. DISCOVERY

AUDIENCE MEMBER/BROOKS: Regarding a Texas court retaining jurisdiction, how are you going to get your Mexican witnesses into the United States?

GORDON: How do we get witnesses? Is there any way of forcing an American court to get a witness to appear in the United States if the case is held in the United States?

LOPERENA: No, I think the witness declaration should be taken through letters rogatory by a Mexican court, because Mexico is a member of the Hague Convention on the Taking of Evidence Abroad and the Inter-American Convention on the Taking of Evidence Abroad.

EPSTEIN: On the American pre-trial discovery side, the parties would be trying to take the evidence of the Mexican witnesses under the Hague Evidence Convention. The problem is that since Mexico does not recognize pretrial discovery the way we do it here, we would have to see whether the discovery complied with Article 23, which is a kind of opt out provision for disclosure of documents. If the foreign country does not recognize the so-called American system with full disclosure of documents, it can impose conditions on the disclosure of documents. Mexico has a reservation which allows for limited production of documents. So you would have to narrow your requests and ask for specified documents. If you ask for too much, you could get nothing at all. I advise people to hire a Mexican lawyer, who would help you style the request to make sure that you conform with the Mexican system.

On the examination of witnesses through the convention, if it is compulsory testimony, it would have to be done through the court. The court would ask the questions; it would be a procedure totally different from an American one. I understand that at least some Mexican judges would allow the attorney for the other side to be present and maybe ask supplemental questions, but that’s probably within the discretion of the Mexican judge. If it is voluntary taking of evidence, you can take an American-style deposition before the American consulate.

JIMENEZ: We have found a way to avoid surprise from witnesses that just turn up at the time of trial and may circumvent the very onerous process that you

25. See Hague Convention, art. 23: “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.”
sometimes have to go through to get discovery abroad. That is to ask the court to restrict any witness from appearing at trial unless they appear for deposition well beforehand. Generally, judges are willing to do that, though some are not. There is a fairness issue involved, because here you have a plaintiff who is seeking recovery based on all these foreign witnesses.

AUDIENCE MEMBER/ROGERS: John Rogers. If there are documents in the possession of the Mexican company, Growmex, which are not in the possession of the U.S. company, Growfast, can you tell the U.S. parent company to obtain the documents from the Mexican company for disclosure in the United States?

EPSTEIN: I think that depends on the inter-relationship between the two companies. If you can show that the parent controls the subsidiary, then you could compel the production of the documents through the parent. But then, if you were able to do that, your argument would be that the U.S. Federal Rules of Civil Procedure apply, and not the Mexican rules, and you can do whatever is permitted under the Federal Rules of Civil Procedure. Of course, if the subsidiary is a party to the U.S. case and there is no jurisdictional problem, again the Federal Rules of Civil Procedure would apply. The Supreme Court said in the *Aerospatiale* case\(^\text{26}\) that, if the U.S. court has jurisdiction over the party, even if it is a foreign party, federal rules apply and the Hague Evidence Convention is not exclusive, just a supplemental or optional way of getting evidence.

GORDON: We are almost on the fringe of blocking laws. It would seem that, if we were to add a clause in the complaint and made it say a RICO action or anything that provided for treble damages, then we may find Mexico reacting. I don’t know whether there is a blocking law in Mexico. I know there is a law that counters the Helms Burton Act and the extensive extraterritorial application of that law, but many other nations have passed blocking laws because of the extensive anti-trust litigation that included companies abroad and requested treble damages. They have essentially said to the American subsidiary abroad, you may not send any documents back. France carried it a step further and made it a crime to ask for those documents. Some nations have passed what we call claw-back provisions. If there is a treble damage judgment awarded in the United States that is against a foreign company, that foreign company may take back the treble damages from any assets which the plaintiff might have present in the other country. Has Mexico gone to any blocking laws that would prohibit the transfer of documentation and evidence to a U.S. court?

LOPERENA: I don’t think there is a prohibition, but there is an obligation in principle to follow the orders of a foreign court regarding discovery, if the case is not transferred to a Mexican court, according to either evidence convention. However, in my experience, a client will volunteer all the documentation to a U.S. court if he is the one who has asked for discovery, even though they are not used to sending documents to the court. According to the Mexican Commercial Code, documents should be inspected in the office of the merchant.

In addition, another way to take depositions in Mexico is, if the witnesses are employees of the plaintiff or the defendant, even though they are abroad, there is no

need for the letters rogatory to take the witnesses' depositions. Often, if the
witnesses are volunteering, they appear before the court reporter who comes to
Mexico and takes oaths, and American courts are accepting the depositions. I have
attended depositions in cases in the United States and depositions taken in law firms
in Mexico, but it could be safer to take them in American consulates, because the
extraterritoriality of the foreign consulates and embassies could apply. When you
apply American law, you take an oath that may lead you to perjury under American
law, because you did it in the American territory of an embassy or of a consulate.

Mexico took several interpretative declarations and reservations when it signed
the Inter-American Convention and, I believe, there are also reservations in the
Hague Convention. Mexico does not want the intervention of foreign agents to take
evidence and they are not allowed to take any compulsory measures on Mexican
residents or nationals. However, we accept the taking of evidence abroad through
courts or even through diplomatic or consulate agents, as long as they do not use
any compulsory measures.

V. DAMAGES

GORDON: Thinking about damages, I suppose that if Mexican law provides
extremely low damages, Growfast doesn't really much care if it is found liable as
a corporation. Growfast or Growmex will simply write a check. It appears that there
are limitations on damages so I think we ought to look at them. We have heard that
the Veracruz statute is probably very much like the Federal District statute. Article
1910 in the Civil Code for the Federal District says: "Whoever in acting illegally
or against good customs causes injury to another, is obliged to repair it," and then
the next clause, which Quintana Roo has eliminated, continues "unless he proves
that the injury occurred as the consequence of the fault or inexcusable negligence
of the victim."27 I think we find that kind of liability provision, not only in Mexico,
but throughout much of the civil law world.

The next question is whether or not we will find the same damage provision in
the Federal District and Veracruz. There are two damage provisions. Article 1915
is the restoration for injury or compensatory damages, and Article 1916 is the
mysterious world of moral damages, mysterious to American lawyers at least. Many
have tried to equate it with punitive damages. But in 1982, the Federal District made
modifications to Article 1916 and I don't find any maximum on moral damages in
the current Civil Code.

LOPERENA: There is no limit on moral damages and it is not necessary that
material damage is caused. The material damage could be very low and the moral
damage could be one-half million pesos (or more), which is around $50,000, if the
defendant is wealthy.

GORDON: Could the language of Article 1916 result in a award of
$25,000,000?

LOPERENA: In a case, yes. I have advised my children, if you are going to be
injured by a car, please choose a Rolls Royce because they will pay you more.

27. C.C.D.F., supra.
GORDON: What about Veracruz? We don't have the Veracruz statute, but how do you suppose the Veracruz moral damage provision reads?

LOPERENA: If it is as it was in the Mexico City civil code before 1982, first it will state that moral damages will not be awarded without material damage, and second, the amount will be capped at 25 Mexican pesos, which is about $2.50. Also, it must be proportionate to the material damage. The Civil Code in the federal district was amended to remove any ceiling on moral damages. Thus, they could be $25,000,000, if you have enough evidence of the victim's circumstances, the fault and wealth of the defendant, and the details of the case. Moral damages has to do with feelings, affections, beliefs, decorum, honor, reputation, private life, character and physical aspects or how one is perceived in the opinions of others. The courts have said that it is not necessary to prove the real damage, such as how your beliefs were harmed, just the illicit behavior of the one who caused the damage, because the moral damage is something internal to the individual.

GORDON: Then it seems that we should keep the case out of Mexico City. If this is the only jurisdiction in Mexico that has the potential for extraordinarily high damages, Growfast will want the matter in Veracruz or anywhere else where there is a cap. To my knowledge, there isn't any other state that has yet followed the Federal District.

LOPERENA: The Quintana Roo code mentions indemnification for moral damage which will be fixed prudently by the judge taking into consideration the harm elements of the moral assets, such as affection, honor, prestige, personal integrity. In our hypothetical, the judge will fix the amount of the moral damage taking into consideration how visible the injury is, the part of the body that was injured, the sex, age, and activity of the victim, and some other special conditions. There is no maximum amount and this applies to torts, contractual breach and strict liability arising from the use of dangerous substances. There is also a civil law cause of action of defamation for moral damages that arises from Article 1916.

GORDON: One more thing about the defamation case. If, because of the limitation on damages in Mexico, the public official accused of bribery sues the President of Growfast for defamation in the United States, this will raise the issue of the First Amendment right of free speech. If the U.S. court agrees to apply Mexican law of defamation, is that in essence a ruling that the party has essentially waived his rights or that the party has been denied his free speech rights under U.S. law? What happens in that case?

JIMENEZ: I think this particular case highlights the difficulty that a U.S. court is going to have in applying foreign law, in this case Mexican law. All of a sudden you need to explain to a judge what the law in Mexico is regarding defamation. At one point, we searched and found not a single case where somebody actually recovered monies on a civil cause of action based on defamation.

There was a famous Mexican case, I guess it was brought by the fighter Julio Cesar Chavez where he claimed $25,000,000 (US) based on a report that came out in the newspaper, Financiero. Basically the court found in his favor but gave him

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28. The provision in the Civil Code for the Federal District before 1982 stated 25,000 pesos, but with the revaluation of the peso, it would now be 25 pesos.
no damages. Instead, it applied the Law of Printing which provides for a retraction and a publication of Cesar Chavez' account of the truth. I think we are going to start seeing more cases like this in the United States because information is no longer limited by borders. Now information flows both ways. Also, it is difficult to even claim there is a civil cause of action for defamation. Article 1916 of the Civil Code is perhaps where you can anchor such a civil cause, because it doesn't expressly exempt journalists. On a practical level, you may find that a U.S. judge is going to read Article 1916 and say it doesn't apply to journalists. In a battle of the experts, it is would be very difficult.

The other issue is public policy. In Mexico, defamation is a crime covered by Articles 350 and 351 of the Penal Code for the Federal District and, as I understand it, it is also treated as a crime under the Law of Printing. Under the Penal Code, you could be subject to up to two years of incarceration if you are guilty of defamation. In applying the moral damages statutes, you have to prove two things: first, an illicit act and, second, that you sustained damages. While the illicit act is defamation, the only place that defamation is defined or explained to any extent is in the Penal Code. The plaintiff asks a judge to apply this Penal Code, which says that defamation occurs whenever you dishonor anyone, whether what you say is true or not true, determined or undetermined.

VI. CONSTITUTIONAL CONSIDERATIONS

That is a real problem for a U.S. court because you are now going against the First Amendment. There was a decision in 1997 in Maryland, Telnikoff v. Matusevitch, in which a Maryland court would not enforce a judgment that was obtained in England because it found that the law of defamation in England violated U.S. public policy, simply because the law of England presumed that the statement that was made was true and it's the plaintiff's responsibility to state otherwise. That's a real problem. If the plaintiff is not required to prove falsity, you have a real problem.

Also, in the United States, you have to prove fault. There has to be some standards, some burden that you have to prove. This is a safeguard that is provided by the First Amendment of the U.S. Constitution. So a U.S. judge again is going to have a difficult time reconciling U.S. law and U.S. Constitutional principles with Mexico's law for defamation. The problem is that the plaintiff in this particular case is asking the judge to set precedent because there is no precedent for finding a civil

29. See generally Ley de Imprenta.
30. See C.P.D.P., arts. 350 and 351. Art. 350 provides:
'... La difamación consiste: en comunicar dolosamente a una o más personas la imputación que hace a otra persona física, o persona moral en los casos previstos por la ley, de un hecho cierto o falso, determinado o indeterminado, que pueda causarle deshonra, descrédito, perjuicio, o exponerlo al deprecio de alguien....'
31. Under C.P.D.P., art. 351, the person accused of defaming may not defend himself by proving the truth of the statement except in two cases: 1) when the person defamed was engaged in public work and the statement related to the performance of his functions; and 2) when the fact ascribed is found certain by an irrevocable decision and the person accused acted for reasons of public interest, or for a private but legitimate interest, without any intention of doing harm.
remedy that awards damages based on the Mexican moral damages statute. It smacks of being inappropriate in that particular case.

If the law is not defined as to what constitutes defamation, if it is just anything that causes dishonor but with no standards to apply, a U.S. judge is at a loss. What the plaintiff in a case I dealt with did was urge the court to graft on the First Amendment protections. They were asking the judge to forget Mexican law and just apply U.S. law, even though the conflict of law analysis clearly maintained that the proper law in this particular dispute was Mexican law. I think we are going to start finding that kind of difficulty in the area of tort in general. U.S. judges will maintain a set way of applying law; it’s very alien to them to try to apply it any other way. It is very difficult to educate a judge in a different judicial system.

GORDON: It really was, I think, very difficult for this judge and in many ways Growfast didn’t try to make it any easier for him. I think one major point that Mr. Jimenez makes is that if you can in any way relate a tort to a crime and then get Mexican law to apply, bringing in the principle that U.S. courts don’t enforce foreign criminal law would put a defendant in a pretty good position. Defamation is criminal throughout the world. The government would step in when a person was dishonored and Mexico still takes that pretty seriously as a criminal matter in Article 350 of the Penal Code. By bringing that in, the court begins to worry that they may be applying Mexican criminal law. So Growfast puts the plaintiffs in a difficult position where Growfast is going to get all the benefits of U.S. Constitutional protection but still gets Mexican law to apply and Mexican damage law to apply, which it hopes is going to be rather nominal.

However, there is still a problem of whether you have waived your First Amendment rights. For example, let’s say that we published a Spanish edition of Time magazine and it ends up in Mexico. The magazine has a very critical story about somebody in Mexico, who brings a suit. I don’t think the fact that it found its way into a Spanish speaking country constitutes a waiver of all constitutional rights, no matter where a defamation case might have been brought. But I think if we had published a Mexican edition in Spanish and had targeted that country, we would be much more likely to find that the court holds we have waived our constitutional protection. Do you agree?

JIMENEZ: I agree. The U.S. courts would have to deal with imposing a law that it might consider to be violating U.S. public policy, even though there is a waiver.

LOPERENA: Why is it said that this exception is to protect the media and the journalists? It is because it says that there shall be an obligation to repair moral damage by a person who has exercised his rights of opinion, criticism, expression or informing according to the terms and limitations of Articles 6 and 7 of the General Constitution of the Mexican Republic. That means it is part of the Bill of Rights. Article 6 mentions freedom of speech and Article 7 establishes freedom of the press. If I am exercising a right granted to me by the Bill of Rights, I cannot be considered as acting illicitly. So, if you are protected by the Bill of Rights, you are not acting against the law. Whatever the secondary law provides, the Constitution prevails, of course, over all laws in Mexico.
VI. ENFORCEMENT OF A FOREIGN JUDGMENT

GORDON: Let's move on to some of the matters that deal with enforcing a judgment, one of which is whether or not you would, in the actions brought in Mexico, recommend that Growfast ignore the suits, leaving the defense and liability to Growmex. We already have concluded that Mexico probably does not have a law piercing the corporate veil. I think we have probably addressed that enough because it seems to me that if we believe that Mexico has no jurisdiction over Growfast and Growfast does not enter an appearance, we may not have to worry very much about the judgment. Would you recommend to Growfast and Growmex that they ignore the suit in Paris, France, on the basis of their jurisdiction, which seems a little strange to us. The Parisian tourist in Mexico is injured, goes back to Paris, and initiates a suit in the Court of First Instance in Paris against Growfast. Would you appear in that one?

EPSTEIN: I would appear on behalf of Growfast and contest jurisdiction. If you are talking about potential enforcement in the United States of a French judgment, even where there is a lack of personal jurisdiction, the American courts are very liberal about the enforcement of default judgments. If you don't appear, you run the risk that it could be enforced in the United States. However, if you show that you have appeared and strongly contested jurisdiction, I would say that there is little likelihood under the facts presented that a U.S. court would enforce a judgment from France. Then, I am not an expert on the Brussels Convention, but perhaps that's the one that is in effect in the European Union countries. It is possible that if a judgment were obtained against Growfast and Growmex in France, they could try to enforce it in another country in Europe where Growfast might have assets under the Brussels or the Lugano Conventions.33

GORDON: I think that's critical. The Brussels Convention has a whole series of extraordinary jurisdiction listings in Article 3 which provides that no member of the Convention is required to enforce a judgment which is based on personal jurisdiction in one of the ways listed. For France, it lists this form of personal jurisdiction based on domicile.34 For Germany, although they have now changed it, it listed the jurisdiction based on assets. Remember the famous case of Jean Claude Killy who left a pair of underpants in a hotel and that was considered to be enough of an asset located in Germany for an unlimited judgment. Now the problem is that if Growfast has no assets in France but a lot of assets in England, the Convention allows England to enforce a judgment of France if it is against a third nation, a non-Convention nation. They could not enforce it if it were an English company. But they would enforce it if it's a company of a country which is not a party to the Convention. The Convention also allows any one of the members of the

34. See id., art. 3:
Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title. In particular, the following provisions shall not be applicable as against them ....—in France: Articles 14 and 15 of the civil code (Code Civil).
Convention to enter into an agreement with a non-Convention member party to deny enforcement on the basis of those extraordinary jurisdictions. We have had discussions with England on such an agreement and they have failed, because a lot of other things were brought into the negotiations. I guess we all feel that telling anybody not to enter any kind of an appearance at all is a pretty dangerous thing to do.

JIMENEZ: I would agree. This is another example in which we should be careful not to just instinctively fight, because we may be better off in litigating this case in France than anywhere else because of French law, damage caps and so forth.

LOPERENA: It is what I call over-litigation. When you over-litigate a case and object to everything, sometimes you object to something that is favorable to you.

EPSTEIN: Also, in terms of France, I don't think you would have to stick around there to litigate the entire case. I think if you just contest jurisdiction, and show that you are appearing for that reason and then leave, that would be sufficient to prevent the judgment from being enforced in the United States.

GORDON: What if there is an appearance, you lose on the jurisdiction issue and go home, and then there is a judgment issued on the merits. Then that judgment is brought to the United States to be enforced. Won't an American court enforce that judgment? There is a Pennsylvania case involving a breach of contract claim in England where the English court said, maybe you didn't get very good advice in coming over here to contest the jurisdiction. Under English law, if you contest the jurisdiction and lose on that, it is considered that you have entered a general appearance. If you lose on the jurisdiction issue, are you suggesting that you stay and contest the merits in France?

EPSTEIN: Well, you have kind of a devil's choice there because if you leave and do nothing, then as I said before, I think there is a risk that it's a default judgment. It can just be enforced on that pure basis. However, if you stick around just for the jurisdiction, I think you are on safer ground. Although as you say, the whole issue is going to be re-litigated in the American court.

AUDIENCE MEMBER/ROGERS: John Rogers. If, on our facts, a default judgment is obtained, let's say no appearance is made on behalf of Growfast in Mexico, and default judgment is obtained nevertheless, because a Mexican judge finds some basis for jurisdiction. Could a Mexican court find a basis for jurisdiction? If a Mexican judgment is awarded nevertheless and is sought to be enforced in the United States, what result?

GORDON: If Growfast decides not to appear, the Mexican courts have jurisdiction over Growmex.

LOPERENA: If Growfast is served in the United States after a petition for a Mexican action and Growfast does not appear in Mexico, the consequences of the non-appearance is: first, it is considered to accept all of the facts of the complaint; second, it will not be allowed to present evidence afterwards; third, if there are assets belonging to Growfast in Mexico, the judge may decree an attachment of assets; fourth, most likely it will receive an adverse judgment. I don't know if this judgment would be enforceable abroad. If I were attorney for Growfast I would say,

if you were duly served in the United States and if you have assets in Mexico, don’t fail to answer the complaint in Mexico. If you are absolutely sure that the judgment won’t be enforceable in the United States, don’t appear before the judge. But, to appear just to challenge jurisdiction is a mistake. If you challenge jurisdiction and you lose, you must continue the litigation. If Growfast has assets in Mexico, I would never leave the case without answering the complaint, because the case will be judged by default of Growfast and only if there is one defense posed by Growmex and it is considered precedent maybe both companies will be acquitted. But it could be the case that the Mexican company is acquitted and the American company not. So I believe you will have judgment against your company that could be enforceable in the United States.

AUDIENCE MEMBER/ROGERS: Assuming no assets and no presence on the part of Growfast in Mexico.

LOPERENA: I would leave the answer to that to the American lawyers regarding the likelihood of enforcement of that Mexican judgment in the United States. If there are no assets in Mexico, I wouldn’t care about the judgment in Mexico, because Mexico cannot enforce it if you have no assets there.


LOPERENA: Just subject to the opinion of the American lawyers regarding the enforcement in the United States.

SANTOS: I think it is becoming eminently clear that you need to always be fully apprised of the law where you are going to tangle.

GORDON: Correct me if I am wrong. If plaintiffs have sued Growmex and Growfast in Mexico and Growfast decides not to appear, there will be an immediate default judgment against Growfast?

LOPERENA: Not immediately. The judgment would be the same. One of the defendants is considered in default. But if the other answered the complaint, the proceeding will go forward. The judgment will be the same, but in one case a judge could consider that Growfast is liable and Growmex is not because Growfast did not appear to defend itself.

GORDON: But does it matter? Assume the case goes on and Growmex wins on the liability issue of Growmex. Growmex has now won and is not liable, but Growfast refused to enter an appearance and there is a default judgment rendered against Growfast. If someone executes on Growfast’s assets in Mexico, it is Growmex.

LOPERENA: No, the assets of Growfast are the shares of Growmex and if the shares are in the United States, it is a problem to attach them. There is a provision in Article 20 of the General Law of Negotiable Instruments and Credit Operations\(^\text{36}\) that applies to stock certificates that requires you to have, physically, the attachment of the stock certificates in order to consider that the shares are attached. I recently had a case where the clerk of the court attached stock certificates without having physical possession of them. The defendants challenged the attachment before the

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\(^{36}\) See Ley General de Títulos y Operaciones de Credito [L.T.O.C.], Art 20: "El secuestro de cualquier otro vínculo sobre el derecho consignado en el título, o sobre las mercancías por él representadas, no surtirá efectos si no comprenden el título mismo."
judge, who said that the attachment was valid. The defendant then went to the court of appeals, who affirmed that the attachment was valid. The defendant went to the district court in *amparo*, which denied the *amparo* to the defendant. Finally, the defendant challenged the decision of the district court by appeal to the circuit court, which has the last word that establishes *res judicata*. The Circuit Court annulled the attachment on the shares because the share certificates were not physically attached. So, if the plaintiffs don't obtain physical possession of the stock certificates, they will never attach the Growfast assets, namely Growmex. There is another thing. In the hypothetical case, Growfast and Growmex would be jointly liable. According to the Civil Code of Mexico, if one of the jointly liable parties is acquitted, the other jointly liable party is acquitted as well because they have the same relation. If one pays the debt, it's extinguished for all of them. If one is acquitted, the debt is acquitted for everybody. So, if Growmex wins, Growfast most likely will also win.

EPSTEIN: On the U.S. side, I have to repeat myself. It sounds somewhat far-fetched. But to be on the safe side, if I were Growfast, I would hire a Mexican lawyer, see what kind of a special appearance I can make, if that is possible, to contest jurisdiction. I think that is safer than not appearing and then running the risk that a default judgment is going to be entered and enforced.

AUDIENCE MEMBER/ROGERS: But then we go back to the question, is it possible to enter that kind of limited appearance? Can Growfast challenge jurisdiction in Mexico without submission if it loses.

LOPERENA: In Mexico, it is considered that you have submitted to jurisdiction, implicitly or expressly, in several circumstances. If you appear to answer the complaint or to file a counterclaim, you have submitted implicitly. You have submitted expressly if you sign a document where you submit to the Mexican court. But you have the opportunity, you have the right to challenge jurisdiction and you are not considered to have submitted to the jurisdiction of the court. So, if you challenge jurisdiction and you lose, what is the best advice? To go on with the defense of the case. In practical terms, you have to challenge jurisdiction at the time of answering the complaint on the merits, so we don't have two steps like you have in the United States. If you challenge jurisdiction in the United States, you have to wait until the jurisdiction question is resolved by the court and then if you lose the jurisdiction issue you have to answer the complaint. But, in Mexico you answer the complaint and you challenge jurisdiction in the same brief.

AUDIENCE MEMBER/ROGERS: The risk seems to be that if you challenge jurisdiction and you lose, then you are stuck. Then you have to continue, because you have already answered the complaint.

LOPERENA: Yes, but you may argue in the United States that you are not subject to the Mexican court’s jurisdiction. Although you answered on the merits, you did it because it was your duty to do it. But you didn’t want to be tried by a Mexican court and, although you objected to the jurisdiction, the Mexican court

37. *Amparo* is used to protect rights deemed infringed by a legal ordinance or state action. To oversimplify a complex legal doctrine, *amparo* is a type of judicial proceeding by which an aggrieved party may challenge the acts, decisions, or omissions of state authority, including all branches of government, but usually only after all ordinary means of redress have been exhausted or are not available. It is typically used as a means of appealing lower court decisions. See 1997 WL 685237, *7 (West). For further reference, see, e.g., Bruce Zagaris, *The Amparo Process in Mexico*, 6 U.S.–MEX. J. 61 (1998) and other articles therein.
assumed jurisdiction. When you have the enforcement issue abroad, you can argue that you never submitted to the foreign court's jurisdiction and the outcome is subject to foreign law.

EPSTEIN: I agree with that. If you set forth the Mexican procedure, you show that you had to go so far and then you got out. I think you have fully protected your interest.

JIMENEZ: Basically, I think the key is that you want a record that you contested jurisdiction. The risk is that if you do not contest jurisdiction, when enforcement time comes in the United States, the court may find that you waived jurisdiction. That is what you are trying to avoid, so there should be a record of objecting to the jurisdiction of that forum.

AUDIENCE MEMBER/ROGERS: Isn't there some minimum level of notification that would have to be made? If there are no assets, no presence of Growfast in Mexico?

EPSTEIN: Or if they named Growfast in the Mexican litigation, Growfast would have to be served properly in accordance with the Inter-American Convention on Letters Rogatory, 38 of which both countries are members. If there is not proper service of process, that's a defense to the enforcement action in the United States.

AUDIENCE MEMBER/BAUMAN: How long does it normally take a Mexican court to determine in the first instance whether there is jurisdiction?

LOPERENA: Probably a couple of months. Let me describe the procedure for the jurisdiction issues. It is the same in commercial cases as in civil cases, at least in Mexico City. If you are served with a complaint in Mexico, you have nine working days to answer the complaint. If you are served in the United States, you will be entitled to an extension of time because of the distance. That is why, when I am granted a power of attorney, I always ask my foreign clients to expressly limit the power of attorney not to be able to receive service of summonses in order to obtain the extension of time to answer the complaint. I prefer for my foreign clients to be served in their own country, for instance, in France, which will give me 90 extra days to answer. That allows me to travel to Paris or my client to Mexico to review all the documents needed for the defense.

When you answer the complaint, you challenge jurisdiction. The judge does not stay the proceedings. He goes on with the proceedings even though there has been a challenge of jurisdiction. The challenge of jurisdiction is resolved by the court of appeals. Certified copies of all the documents of the lower court are sent to the court of appeals, which tries the jurisdictional issue. If you are the one objecting to the jurisdiction, you don't have to file any extra arguments. As it is a point of law, the court of appeals analyzes the case in a month, maybe a month-and-a-half, and they rule on jurisdiction. If the challenge is accepted, the case is dismissed. If it is rejected, the case is over and you can challenge it before a federal district judge through an amparo. It would take more than two months, maybe three, before the decision of the district court. Then, the appeal to the circuit court could take between a month and five months. But if the court of appeals approves your motion of lack of jurisdiction, the case is over and the plaintiff would be the one to challenge the jurisdiction issue before the supreme court directly.

AUDIENCE MEMBER/BAUMAN: Let's take this hypothetical case where you may have 90 days before you have to answer the complaint in the foreign court. Has anybody ever considered going into a U.S. court and stating that you have an issue that is ripe for declaratory judgment and the issue is whether or not this foreign court could exercise jurisdiction over you?

GORDON: There is a case that is pretty close to that which dealt with a Japanese company in America that was sued in a product liability case and they refused to enter an appearance and immediately filed in a Japanese court for a declaratory judgment as to their liability. They didn't file a petition to deny enforcement of any judgment that might be rendered but they asked for a decision that would clearly be a conflicting decision with any finding of liability in the United States. They received that decision and it put a kind of chilling affect on the American case. It was never enforced in Japan. I think that is an interesting question.

EPSTEIN: There is a recent district court decision where someone filed an action for declaratory judgment that a foreign judgment would not be enforceable. The purpose was to try and stop the foreign action from proceeding. I remember that the case was dismissed.

GORDON: I think the U.S. court would be very reluctant to deal with the foreign case and say we won't enforce that judgment, whatever it is. I think you really have to make your case a separate case that will then constitute a conflicting substantive opinion with the other.

Let's raise one final question of the panelists. It's something that maybe in another year we will have to explore. We know that Mexico will enforce U.S. judgments. Mexico has changed its law to allow the enforcement of U.S. judgments. It is a federal rule. Many states have adopted the Uniform Foreign Money Judgments Recognition Act. Mexico requires reciprocity. Perez Nieto Castro says that reciprocity is satisfied if a State has adopted that Act. But I think the important question right now is, are Mexican courts enforcing U.S. judgments and are American courts enforcing Mexican judgments? Mr. Epstein has a very interesting case that was handed out to you that addresses the second question.

EPSTEIN: In general, American courts are very liberal about enforcing foreign judgments and you hear all the time that we are more liberal than foreign courts are in enforcing American judgments for the reasons that we have discussed this afternoon. They do not like the American system, jury awards, contingency fees, punitive damages, in particular. But the Southwest Livestock & Trucking case is an interesting decision from Texas where a Texas court enforced a loan agreement. Actually, it was the borrower who went into court to try and challenge the amount of interest that was being assessed under this agreement with the Mexican party, about a fifty percent interest rates. What they were saying was that the American court should

40. See Basic v. Fitzroy Engineering Ltd., 132 F.3d 36 (7th Cir.(Ill.) 1997).
42. Southwest Livestock & Trucking Co. v. Ramon, 169 F.3d 317 (5th Cir. 1999).
not enforce any judgment from Mexico which would recognize this interest charge. The argument was that it would violate Texas public policy against usury. The public policy exception is one of the standard factors in any court considering the enforcement of a foreign judgment. The U.S. District Court in Texas refused to recognize the Mexican judgment as against public policy, even though the court stated that the Mexican court had personal jurisdiction. Surprisingly, the Court of Appeals ruled that you have to show under the factors in the state statute that the cause of action itself violates public policy, not the judgment. The court said there is nothing repugnant to the public policy of Texas about a cause of action based on a promissory note. The parties freely entered into this contract, the borrower knew the amount of interest that would be charged, there was no coercion, and the amount of interest was allowable under Mexican law. Thus, the Court of Appeals enforced the judgment applying the Uniform Foreign Money Judgment Recognition Act and found no violation of public policy. I think that is an example of the liberal attitude towards enforcing foreign judgments in this country.

With regard to the negotiations for a treaty on recognition and enforcement of foreign judgments, the issue of punitive damages is one of the main stumbling blocks. There will be a treaty eventually despite the debate over punitive damages, but I think it is pretty clear that there is not going to be any bargaining about punitive damages. It is going to be out. So, American judgments will be enforceable in accordance with the rules of this Convention, but not the punitive damages part.

LOPERENA: Last April, there was a seminar at New York University, organized by Professor Lowenfeld about the proposed Hague Convention on Jurisdiction and Enforcement of Foreign Judgments. I think there are a lot of problems with this Convention. But the most important part, in my view, concerns issues of jurisdiction, not issues of enforcement of judgments, because Mexico enforces foreign judgments without many obstacles. The rules are very clear in the Commerce Code, as well as in the Civil Procedure Code, and the Inter-American Convention. The main problem is jurisdiction. I understand that American courts are assuming jurisdiction on many factors that are unknown in Mexico. These long arm statutes are very favorable for American courts to take jurisdiction over Mexican nationals, Mexican residents, for acts which happened in Mexico. I currently have a tort case in Mississippi. A Mexican boat was in Mexican waters and allegedly caused damage to an American company. The U.S. Federal Court in Mississippi assumed jurisdiction because the Mexican company, who was the defendant, had some contracts in Mississippi absolutely unrelated to the facts that gave rise to the action of the boat. But the American court said that U.S. admiralty law was not applicable because the cause of action was on board a Mexican vessel with a Mexican flag in Mexican waters, and was property of a Mexican company. These issues of jurisdiction are very important and very sensitive. I have another case today of an aircraft accident that occurred in Mexico, with a Mexican company renting their craft, insured by a Mexican insurance company. The Mexican insurance company was sued in the United States. The

challenge to jurisdiction was not accepted by two Texas courts, one local and one federal. It is very urgent that we have clear rules on jurisdiction because Mexican rules on jurisdiction are in the statutes and the long arm statutes for American courts are allowing them to assume jurisdiction over Mexican defendants without any connection to the United States. I want to tell you that the victims in the aircraft accident were Mexicans. The insurance company is Mexican. The airline, their carrier, was Mexican. But, the aircraft was the property of an American company and that is why the Texas courts are assuming jurisdiction for something that is absolutely out of the United States because the defendant is the Mexican insurance company.

GORDON: Assuming the jurisdiction is satisfactory to Mexico, are Mexican courts enforcing American judgments?

LOPERENA: Yes, but the foreign judgement must have the character of res judicata in the country in which it was issued, the action in which the judgment was issued may not be the subject of pending litigation in Mexico between the same parties, and the obligation which is to be performed may not be contrary to the public policy of Mexico.  

BIографICAL SUMMARIES

Professor Michael W. Gordon teaches international business transactions, corporation law and comparative law at the University of Florida College of Law in Gainesville. A Director of the United States–Mexico Law Institute, he is co-author of INTERNATIONAL BUSINESS TRANSACTIONS COURSEBOOK, 4th ed., NAFTA COURSEBOOK, and INTERNATIONAL BUSINESS TRANSACTIONS, HORNBOOK SERIES, all published by West, as well as author of many articles on international trade law. In addition, he is a member of the advisory board of the Public Financial Training Institute of the Chinese Ministry of Finance, and has been appointed by the Clinton Administration to the World Trade Organization and the NAFTA dispute panel rosters. He earned his B.S. and J.D. from the University of Connecticut, his M.A. from Trinity College, Connecticut, the Diplome de Droit Compare from the University of Strasbourg, and Maestria en Derecho from the Universidad Iberoamericana, Mexico.

Carlos Loperena is a member of Loperena, Lerch y Martín del Campo, S.C. in Mexico City, focusing on corporate law, mercantile contracts and litigation. He has participated in several international commercial arbitration cases under the rules of the ICC, the UNCITRAL, and the IACAC, and is a member of both the Mexican and the American Bar Associations and the Institute for Transnational Arbitration. In addition, he was an Advisor to the Mexican negotiating team for NAFTA on the subject of dispute resolution. Lic. Loperena earned his law degree from the Escuela Libre de Derecho in Mexico City.

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APPENDIX A

INTERNATIONAL CIVIL LITIGATION – INVOLVING CORPORATIONS AND INDIVIDUALS FROM FRANCE, GERMANY, JAPAN, MEXICO, THE UNITED STATES AND THE UNITED KINGDOM


THE HYPOTHETICAL

The Company

GROWFAST CHEMICALS, INC. (GROWFAST) is a Delaware chartered corporation with principal administrative offices in Dallas. It has manufacturing facilities in Texas. It also has a wholly owned subsidiary in Veracruz, Mexico (GROWMEX, S.A.). GROWFAST manufactures many different pesticides and fungicides used by commercial growers of ornamental plants. One of the fungicides is Sollate™. For nearly two decades Sollate™ has been used extensively by commercial and home growers of many tropical plants. It has long been considered the only successful fungicide to control several serious fungi. Some of the ingredients in Sollate™ come from companies in England and Japan.

A. The Commercial Claims

GROWFAST has sold Sollate™ throughout Latin America. Until recently all the Sollate™ sold in Latin America was manufactured in Texas and shipped direct. Several years ago the Sollate™ which was sold to growers throughout Mexico contained some chemicals poisonous to plants. The result was that many Mexican commercial growers lost their entire stocks of ornamental plants. The Sollate™ which caused the damage was purchased using standard documentary transactions, and each included provisions that the goods were sold “as is, with all faults” and the contract would be governed by the law of Texas. The name GROWFAST appeared on the invoices. GROWFAST believes that Sollate™ was both mixed improperly and misapplied by the growers in Mexico, and therefore that the growers are responsible. Or at least that the force majeure should be applied to excuse GROWFAST from responsibility. Assume that only the claims that are brought are based on breach of contract grounds. While there may be product liability raising tort/delict issues, product liability is the subject of the separate problem below. The claims considered under this part of the problem address such contract issues as the “suitability” of the delivered Sollate™.

B. The Tort Claims

Totally unrelated to the facts giving rise to the contract issues above, a serious accident occurred at the GROWMEX, S.A. plant in Veracruz. This plant only recently began to make Sollate™. While transferring Sollate™ concentrate, obtained from the Texas plant, into vats for dilution and packaging, supervised by
both Mexican employees and two technicians "on loan" from GROWFAST in Texas, an unexplained explosion occurred. One of the U.S. technicians and 35 Mexican employees were killed. Serious injury was suffered by dozens of other employees. The smoke from the explosion drifted over Veracruz and adjacent towns, causing serious burns to several hundred more people, including a number of foreign tourists (two US, one French, and one German citizen). A statement by the president of GROWFAST made in Mexico City shortly after the accident blamed the accident on corrupt Mexican government officials who demanded and accepted payoffs during the plant construction, which resulted in contractors not installing adequate safety walls in the dilution room. Unfortunately, the statement was repeated in newspapers throughout Mexico and the United States. The president apologized in a statement released by the company.

THE DISCUSSION

The Commercial Claims

A. Contract Actions Initiated in the United States

Some of the Mexican commercial growers which purchased the Sollate™ which allegedly caused the loss of plants have sued GROWFAST in federal district court in Brazoria, Texas.

B. Contract Actions Initiated in Mexico

The remaining Mexican commercial growers which purchased the Sollate™ have sued GROWFAST and GROWMEX in state court in Veracruz, and in federal court in Mexico City. The GROWMEX plant is in the state of Veracruz, but the company has offices in Mexico City.

THE TORT CLAIMS

A. Tort Actions Initiated in the United States

1. The two U.S. citizens who were tourists, and the personal representative of the U.S. citizen who was a GROWFAST employee and who was killed in the plant by the explosion, have filed suit against GROWFAST in state court in the south Texas city where GROWFAST has a plant.

2. Some of the nearly 100 Mexicans (employees and area residents) who were injured, and some of the representatives of the 35 who were killed, have filed suit against GROWFAST in the same state court in south Texas.

3. A Mexican government official, who the president of GROWFAST suggested had taken payoffs, has brought suit for defamation against GROWFAST and the company's president in federal district court in Dallas, Texas.

4. The German tourist who was injured has filed a suit against GROWFAST in the same state court in south Texas.

The above lawsuits filed in the United States all ask for the application of US law, seek extensive discovery, request jury trials, and demand punitive damages. They all have been filed by attorneys who have signed contingent fee contracts with their clients.
B. Tort Actions Initiated in Mexico

1. The remained of the nearly 100 Mexicans (employees and area residents) who were injured and the remainder of the representatives of the 35 who were killed, being the parties who did not file suit in Texas, have filed suit against GROWFAST and GROWMEX, in Veracruz, Mexico. They have asked for compensatory damages, and for moral damages in an amount which would be equivalent to punitive damages in the United States.

2. Two other Mexican government officials with the same grievance against the president of GROWFAST have brought a civil suit in Mexico asking for substantial damages in dollars.

GROWFAST in Texas believes that the two companies in England and Japan which had supplied some of the ingredients to manufacture Sollate™ may be partly responsible for the explosion and damages. GROWFAST nevertheless intends to argue that the explosion was the fault of the Mexican employees who disobeyed instructions given by the U.S. supervisors. The two companies from which GROWFAST purchased the ingredients in England and Japan have both denied any responsibility. But GROWFAST is prepared to bring a claim against both of these foreign companies in federal district court in Texas.

3. Tort Action Initiated in France

1. The French Tourist who was injured has filed a suit against GROWFAST and GROWMEX in the court of first instance in Paris, where the French plaintiff is domiciled.

ISSUES RAISED BY THE VARIOUS ACTIONS

A. In the Commercial and Tort Actions in the United States

1. What is you thinking from a strategy perspective on attempting to remove these suits to Mexico under the theory of forum non conveniens.

2. Are there any legal obstacles to such removal?

3. Would the court apply the same legal reasoning for such a removal request as it would to a request to remove a matter from one state to another within the United States? Would the courts be more likely to grant removal where the plaintiffs are Mexican than where they are U.S. citizens? What about the German person who was injured, shouldn’t that be removed to Mexico, or at least Germany?

4. If the courts refuse removal, do the facts provide enough to conclude that the subject matter and personal jurisdiction requirements have been met?

5. Assume removal on forum non conveniens grounds is granted. But Mexico has adopted a law that states when a Mexican plaintiff, with a choice of initiating suit in Mexico or abroad, initiates the suit abroad, if there is a dismissal on forum non conveniens grounds that action may not thereafter be commenced in Mexico. The plaintiffs apply to reinstate the case in Texas because there is no available and adequate forum in Mexico. What result?

6. Assuming removal is not requested, or if requested is not granted, should GROWFAST ask the court to apply Mexican law? What are the considerations the court is likely to face and wish to discuss before it rules on this choice of law issue?
7. In proving Mexican law in the United States court, who would you seek as experts? Who might the court prefer to have appear as experts?
8. If the U.S. court applies Mexican law, could it nevertheless grant punitive damages?
9. If GROWFAST needs discovery in Mexico, what obstacles might it face?
10. If the commercial actions, if the court rules that U.S. law applies, what is the source of that law?
11. In the same suits, if the court rules that Mexican law applies, what is the source of that law?
12. In the tort action, if the court rules that U.S. law applies, what is the source of that law?
13. In the same tort action, if the court rules that Mexican law applies, what is the source of that law?
14. In the defamation action, if the court applies Mexican law, does that law roughly parallel that in the U.S.? Even though Mexican law is applied, will the U.S. court allow the U.S. defendant the free speech protections of the U.S. Constitution? Is truth a defense to defamation in Mexico?

B. In the Commercial and Tort Actions in Mexico?
1. Would you recommend to GROWFAST that it ignore the suits, leaving the defense and liability to GROWMEX, knowing that GROWMEX has few assets and believing GROWFAST would not be responsible for a judgment against GROWMEX?
2. Should you know anything about the federal and state court structure of Mexico? What Mexican courts might have jurisdiction? Does it matter?
3. What law would a Mexican court apply?
4. Does Mexican commercial and tort law roughly parallel that in the U.S.?
5. Does Mexican defamation law roughly parallel that in the U.S.? Are Mexican constitutional free speech protections applicable? Is truth a defense to defamation?
6. Does the fact that there were “workers” involved affect the tort litigation?
7. Would Mexico grant punitive damages?
8. How would a Mexican court determine moral damages? Are they available in both the commercial and tort cases?
9. Is a class action allowed in Mexico?

C. In the Tort Action in Paris?
1. Would you recommend to GROWFAST and GROWMEX that it ignore the suit, after all the basis of jurisdiction seems extraordinary?
2. Would the French court grant a request to move the case to Mexico or the United States on grounds similar to forum non conveniens?
3. What law would the French court apply-Mexican, U.S. or French?
4. Assuming the French court applied Mexican or U.S. law, how would it prove such law?
5. Were the French court to apply U.S. Law, would it award punitive damages?
D. If the English and Japanese companies that were the sources of some of the chemicals were added as parties to the tort action in the United States:

1. What would be the principal issues in bringing them into the litigation in the United States?
2. If the English company were to be brought into the U.S. litigation as a party sharing liability with GROWFAST, and one of the plaintiffs was an English citizen (another tourist in Mexico), how would you react to the English defendant company going into a UK court in London with a request that the court enjoin the English plaintiff in the U.S. from pursuing the litigation in the U.S. court?

ENFORCEMENT OF FOREIGN JUDGMENTS

Assume judgments have been rendered against GROWFAST in the United States, and against GROWFAST and GROWMEX in France and Mexico. The judgments in the U.S. included the Japanese and U.K. suppliers of ingredients of the Sollate™. We know that GROWFAST has assets in various parts of the U.S., in Mexico, and in Germany. Consider some of the following:

A. Commercial and Tort Judgments in the U.S. against GROWFAST.
   1. Enforcement in the U.S.
   2. Enforcement in other nations where GROWFAST has assets.

B. Commercial and Tort Judgments in Mexico against GROWFAST and GROWMEX.
   1. Enforcement in the U.S.
   2. Enforcement elsewhere.

C. Tort Judgment in France against GROWFAST and GROWMEX.
   1. Enforcement in the U.S.
   2. Enforcement in Germany.
   3. Enforcement in Mexico.

D. Tort Judgment in the U.S. against the Japanese Company.
   1. Enforcement in the U.S.
   2. Enforcement in Japan.

E. Tort Judgment in the U.S. against the English Company.
   1. Enforcement in the U.S.
   2. Enforcement in the UK in view of the issuance by an English court of an injunction ordering the English plaintiff not to proceed with the action in the U.S., followed by a U.S. rejection of the injunction.
   3. Enforcement in Germany.