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PANEL DISCUSSIONS ON ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRATION: THE VIEWS FROM MEXICO AND THE UNITED STATES

INTRODUCTION

The following discussions were originally presented on October 30, 1993, in Santa Fe, New Mexico, and have been edited by the staff of the *United States-Mexico Law Journal*. The discussions also have been reviewed and updated (as of April, 1994) by the moderator and participants in the original program. The moderator for both Parts I and II was Professor Michael W. Gordon.

The following hypothetical problem, designed by Professor Gordon, will be the focus for questions to be discussed in both parts of this review.

THE HYPOTHETICAL PROBLEM

National Insulators, Inc., is a small Dallas-based manufacturer of air conditioning duct insulation. National is incorporated in Delaware. Several of its sales representatives attended a trade fair in Mexico City and exhibited National's products. They met representatives of Industriales Jalapa, S.A., a builder of commercial buildings in Jalapa, Mexico. Jalapa subsequently purchased insulation from National for use in the construction of a museum in Veracruz. The purchase was a documentary transaction using a letter of credit opened by a Veracruz bank and confirmed by a Dallas Bank. National was paid upon presenting the documents to the Dallas bank.

Unfortunately, about six months after the insulation was installed in the museum, the insulation began to corrode the metal alloy air conditioning ducts. The ducts were manufactured according to Mexican government and industry association specifications, and were similar to many ducts made by Jalapa in the past. National has sold the same kind of insulation throughout the United States and in Europe, but never before in Mexico. Apparently, the ducts commonly used in Mexico and South America contain an alloy different than that used in the United States. This alloy, in combination with the insulation material, resulted in the corrosion.

Jalapa incurred a 10 million peso loss (the cost of repairs) due to the corrosion of the duct work. National refused to assume responsibility under either contract or tort theory. Jalapa publicly denounced National's product and at several subsequent trade fairs presented literature describing its construction projects and assuring potential customers that it would not use the products of National because they were "cheaply made from inferior fiber and caused serious damage."

THE LITIGATION

A. Suit By Jalapa In Mexico

Jalapa brought suit against National in Mexico. At the advice of counsel, National did not appear. National had been served in Dallas. The papers served on National were in Spanish with a brief English extract attached at the end. The Mexican court rendered a default judgment in the amount of 14 million pesos, representing the loss of 10 million pesos, plus 4 million pesos for interest and costs, including attorneys' fees.

Jalapa has brought suit to recognize and enforce the judgment in a Texas state court in Dallas, asking for the 14 million pesos. At the time of the loss, 10 million pesos were worth \$100,000 (U.S.). At the time of the judgment, 14 million pesos were worth \$126,000 (U.S.), the peso having weakened about 10 percent against the dollar. By the time the Dallas court was asked to rule, however, the peso had reversed and strengthened against the dollar, recovering the lost 10 percent and gaining another 10 percent—14 million pesos being worth \$154,000 (U.S.).

B. Suit by National in Texas

National brought suit against Jalapa in Dallas state court for libel and slander. On the advice of counsel Jalapa did not appear. The papers served in Mexico on Jalapa were in English with a brief Spanish extract at the end. The Texas court rendered a default judgment in the amount of \$1,000,000 (U.S.), representing \$400,000 (U.S.) lost business, \$400,000 (U.S.) punitive damages and \$200,000 (U.S.) costs and attorneys' fees. National has brought suit to recognize and enforce the judgment in Veracruz, asking \$1,000,000 (U.S.). At the time of the loss (if such time is identifiable) \$400,000 (U.S.) were worth 40 million pesos. At the time of the judgment in Texas \$1,000,000 (U.S.) were worth 110 million pesos, the peso having weakened against the dollar. At the time the Mexican court is asked to rule, the peso has reversed and strengthened against the dollar, \$1,000,000 (U.S.) being worth 90 million pesos.

QUESTIONS FOR DISCUSSION

We have two suits which will allow us to ask some questions about the law in Mexico and the law in the United States relating to the recognition and enforcement of judgments.

1. What will be the source of law used by the Dallas court to consider recognition and enforcement of the Mexican judgment?
2. Is the law selected by the court the same law as would have been used by a court in another state? By a federal court in that state? By a federal court in another state? Does the presence of the Uniform Foreign Money Judgments Recognition Act in a state in the United States seem favorable to Mexican counsel when considering in which state to seek enforcement?

3. Would the applicable law result in recognition? Enforcement?
4. What is the basis for the law of foreign judgment enforcement?
 - a. Public international law source such as comity? Reciprocity? Is citizenship important?
 - b. Private law—common law concepts of creation of vested rights or obligations that deserve being upheld? Public interest in ending litigation? Thus citizenship may be immaterial.
5. Should Mexico really enforce judgments from a country with juries, contingent fees, fishing expedition discovery rules and enormous damage awards?

Should the United States enforce judgments from a nation where there are no juries in civil actions and where there seems to be less fact specific hearings and examination of witnesses?

Should these elements be part of the list of criteria in considering enforcement?

6. If public policy, or *ordre publique*, is a reason not to enforce a foreign judgment, does it mean the same thing in the United States and Mexico?

7. What are the criteria to apply in recognition and enforcement?

8. What role does reciprocity play? What national (or state) interest is promoted by applying reciprocity?

9. We have been discussing two situations, each where the plaintiff is a national of the country rendering the initial decision, and the defendant is a foreigner and resident of the country in which the decision is under consideration for recognition and enforcement. Would any of the following situations lead to a different attitude regarding enforcement?

a. a suit between two nationals of the country of the original suit, and to be enforced in a second country where the losing defendant now resides or has property.

b. where the plaintiff is the foreigner and the losing defendant a national of the country of the original suit and a court in the plaintiff's nation is asked to enforce the judgment.

10. Some nations, such as the Netherlands, will not enforce a judgment in the absence of a treaty. Would the Mexican or Texas law require a treaty? Would any other state law in Mexico or in the United States require a treaty? Are any treaties under consideration?

11. Would the recognition and enforcement outcome be different if the defendant had appeared and defended, i.e., were the judgment not a default judgment?

12. Does the law distinguish between money and other judgments? With regard to money judgments, would a court enforce the foreign judgment portion relating to costs? Attorney's fees? Punitive damages?

13. Is it fair to say that United States judgment enforcement law is not uniform among the states and involves considerable judge-made law?

Is it fair to say that Mexican judgment enforcement law is essentially uniform throughout Mexico and not judge-made law?

14. Will the court enforce a judgment in pesos or dollars?

15. If a court enforces a judgment rendered in the foreign currency, meaning the currency of the original judgment, at what date will the

enforcing court convert the currency to local currency? What is the source of law?

- a. Day of loss?
- b. Day of foreign judgment?
- c. Day of recognition and enforcement?
- d. Day of payment?