United States - Mexico Law Journal

Volume 2 *Current Issues in U.S.-Mexican Business Law*

Article 15

3-1-1994

Rendering and Enforcing Foreign Judgments in Mexico and the United States: A Panel Discussion

Michael W. Gordon

David Epstein

Ignacio Gomez-Palacio

Charles T. DuMars

RENDERING AND ENFORCING FOREIGN JUDGMENTS IN MEXICO AND THE UNITED STATES: A PANEL DISCUSSION

PROFESSOR MICHAEL W. GORDON,* MODERATOR;
DAVID EPSTEIN, ESQ.,**
LIC. IGNACIO GOMEZ-PALACIO,***
PROFESSOR CHARLES T. DuMARS****

THE DISCUSSION

Professor Michael Gordon: The purpose of this review is really not to answer questions quite so much as it is to explore how the legal cultures of the two countries look at the issues which we are presenting and their very different perspectives. We are not attempting to determine whether the ways that the systems function are good or bad, but simply how they are different.

The first question is, when a Dallas court, or a Mexican court, is asked to recognize and enforce the judgment, where will they turn? To what source of law will they look in order to enforce the judgment? What will happen in the United States? Related questions which we will consider include: (a) should Mexico really enforce judgments from a country with juries, contingent fees, "fishing expedition" discovery rules and enormous damage awards?; (b) should the United States enforce judgments from nations where there are no juries in civil actions, and where there seems to be no fact specific hearings and examinations of witnesses?; and (c) should these elements be part of the list of criteria in considering enforcement?

---

* Chesterfield Smith Professor of Law, University of Florida School of Law; Of Counsel to Ogarrio y Diaz, México City; Editor (with Folsom and Spanogle), INTERNATIONAL BUSINESS TRANSACTION (American Casebook Series, 1991); Editor, DOING BUSINESS IN MEXICO (4 vols.) Transnational Juris Publications (1993). B.S. and J.D., University of Connecticut; M.A., Trinity College, Ireland; Dipl. de Droit Comparè, Strasbourg, France; Visiting Professor, London School of Economics, 1992; Maestría en Derecho, Mexico; Graduate Resident, University of Iberoamericana, Mexico, 1978-79; admitted to Connecticut Bar, 1963.

** Director, Office of Foreign Litigation, Civil Division, United States Department of Justice, Washington, D.C.; trial practice with Civil Division of Justice since 1973; Lecturer in International Litigation, Washington College of Law, American University; author *International Litigation: A Guide to Jurisdiction, Practice and Strategy*, Prentice Hall, 1993. J.D. and LL.M., Georgetown University Law Center.

*** Of Counsel, Jauregui, Navarrete, Nader & Rojas, S.C., Mexico City; Author, *Ley de Inversión Extranjera y su Reglamento Comentado*, Editorial Themis, S.A., 1989 and several law review articles; lecturer on Foreign Investments, U.N.A.M., Consultant, Center of Transnational Corporations, United Nations. Licenciado en Derecho, Universidad Nacionál Autónoma de México, 1965; LL.M., University of Michigan Law School; admitted to Mexican Bar, 1966.

**** Professor of Law, University of New Mexico. Author, *Liberalization of Foreign Investment Policies in Mexico: Legal Changes Encouraging New Direct Foreign Investment*, 21 N.M. LAW REV. 251 (1991); Member, National Academy of Sciences; Chief Counsel, Mexican-American Legal Defense of Education Fund, 1972-76. B.S., University of Oregon; J.D., University of Arizona School of Law; admitted to bars of Arizona, 1969, and New Mexico, 1970.

Professor Charles DuMars: It is very important to understand the difference in the two legal systems and why the law unfolds the way it does. As strange as it may seem to people from Mexico, the methodology for deciding what law is applicable in the United States under the facts of our problem is essentially a question of state law. It requires reference to the conflict of laws rules, that is, what at one time were called private international law rules. In *Hilton v. Guyot*,[1] the Supreme Court addressed the circumstance where there is no statute. We would look to see whether the state has passed a statute, possibly the uniform acts,[2] that covers this situation or whether the state will look at its own conflict of laws rules to allocate among a number of policy considerations what it might do. In either case, the judgment—if it meets these criteria—will be enforced, but we will look primarily at state law and we will look to see whether the state has passed, in this case, the Uniform Foreign Money-Judgments Recognition Act[3] that, in fact, has been passed in Texas. The state court will evaluate the judgment, and will look to see whether the state legislature has a statute which regulates how and under what circumstances it should be enforced. If there is a statute, the court will follow it. If not, the court will look to the case law of the United States Supreme Court and case law of other jurisdictions to determine the criteria under which the judgment will be evaluated.

Now, let us assume that you have a judgment of a Mexican court in your hand and you give it to a state court judge in Texas. What criteria might he apply to evaluate the enforcement of that judgment?

Mr. David Epstein: Under Texas laws and under the laws of most other state jurisdictions, you are dealing with the same framework that was established almost 100 years ago in *Hilton v. Guyot* which is basically a due process standard. The court will consider whether there was a reasonable opportunity to be heard and whether there was fraud connected with the judgment. Public policy factors which might render the judgment offensive to the enforcing jurisdiction also may be considered. *Hilton v. Guyot* also talks about reciprocity, but if you look at the articles and books on this subject today,[4] you will see that reciprocity is no longer a criterion in the United States. Nevertheless, some states still follow it and you will see it crop into decisions now and again. Texas, in its uniform act,[5] has incorporated reciprocity as a standard, but its use is generally spotty. The key word is comity. You have a situation where every enforcement case is reviewed on a case-by-case basis by state and federal courts and the states vary in how they interpret these traditional

---

1. 159 U.S. 113 (1895).

2. These are uniform acts published by the American Law Institute, a group of experts who compile the case law into what Mexican attorneys would probably call *La Ley de la Provincia*.

3. TEX. CIV. PRAC. & REM. CODE ANN. § 36.001-36.008 (West 1985), UNIF. FOREIGN MONEY-JUDGMENTS RECOGNITION ACT 13 U.L.A. 261 (1986).

4. *See, e.g.*, ROBERT C. CASAD, CIVIL JUDGMENT RECOGNITION 155 (1981); William C. Honey & Marc Hall, *Bases for Recognition of Foreign Nation Money Judgments in the U.S. and Need for Federal Intervention*, 16 SUFFOLK TRANSNAT'L L.J. 405 (1993).

5. *Supra* note 3.

criteria. Generally, I think, the criteria applied are consistent. But, since the courts are following the common law, they are going to vary a bit. This is one reason I believe that a treaty to regulate these matters would be a good idea. We are getting involved in too much litigation to justify such a variable approach.

Prof. Gordon: We have been talking about using a Dallas state court, what about an enforcement proceeding brought in a federal court? Will the change in jurisdiction make any difference?

Prof. DuMars: The change from state to federal court will not make a fundamental difference. This situation is a good example of comparative law and my answer will necessarily be oversimplified. The United States federal courts are allowed to assert jurisdiction under the diversity provisions of the United States Constitution.[6] Yet, the federal court will look to state law in the area to determine what law to apply. There are a number of individuals, because of a desire for uniformity, who would like to see a common federal rule applied to this situation. However, the United States Supreme Court decided in *Erie R.R. Co. v. Tompkins*[7] that federal courts should follow the substantive laws of the state where the cause of action accrued.

Let me also expand on the problem of diversity. If a client came into my office with our question, my answer might be different if the case were to be tried in California, New Mexico, Nevada or Texas. This is not because there is a large difference in the principles of procedural due process or because the company from Texas was present in Mexico. There may be, however, a different policy regarding the enforceability of certain contracts in one state compared to another. I am sure when we get into this hypothetical problem, we will look at a judgment for $4 million worth of pre-judgment interest as an example. The answer to your question is that one does not escape the problem by moving from the state court system into a federal court system.

Mr. Epstein: Do we really have, potentially, 50 different rules on enforcement of judgments? Because states in the United States have adopted the Uniform Act, we do not have such diversity in the rules of enforcement, even if each state interprets the Uniform Act according to its own definition of the provisions found in the act. It seems that state law will be applied regardless of whether we are in federal or state court.

Prof. Gordon: We know Mexico is a federation of states. Is it as confusing in Mexico to enforce a judgment? Where will the Mexican courts turn for the source of law to determine whether they will enforce a judgment?

Licenciado Gomez-Palacio: Let me give you some general thoughts about your question. In enforcing foreign judgments in Mexico, the first consideration that arises is the protection of individual rights under the

6. U.S. CONST. art. II, § 2.
7. 304 U.S. 64 (1938).

Mexican Constitution. In trying to explain the sources of law that the Mexican courts will use in considering recognition and enforcement of a Texas judgment there is a practical obstacle because the resolution of the issue will go through a bottleneck of the central Mexican authority, the Ministry of Foreign Affairs. I am a practitioner and, therefore, I know if I have to enforce a judgment of an American court in Mexico, it is going to go through conventions of Mexican service of process. I do not want to get involved in the service of process area. If the issue proceeds to federal court which in turn means the use of the United States State Department, it will be sent to the Ministry of Foreign Affairs in Mexico which, *de facto*, will make an analysis of the judgment to determine if there has been a violation of individual rights under our Constitution.

Although service of process is not what we are going to focus on in this review, it is the first matter that is going to be looked at by the Mexican Ministry of Foreign Affairs. You have to go through the legal department of the Ministry and if the Ministry considers that there has been a violation of individual rights because of failure to comply with the requirements for a proper service of process, then the matter is vacated. There is a mechanism by which Mexican law establishes that process has to be served properly, and, therefore, this becomes the number one issue. Our law calls for personal service of process by a government officer of the court who must serve process in a very particular way. It is not unusual to find Mexican attorneys seeking to enforce judgments that require the entire case to be retried in the United States *after* proper service. Our hypothetical case does not specify what procedures were followed for service of process, but this is an important issue in enforcement of judgments.

The second matter, of course, involves the Federal Code of Civil Procedure. In selecting the proper court, we must consider a series of matters: the subject matter of the case; the amount in controversy; the territory; and even the subject matter. What I mean by subject matter is whether the issue requires a civil or criminal proceeding. In addition, if the amount in controversy is not adequate then this too can affect the selection of a federal or state court. The duplication of these criteria allow you to arrive at the proper court. In many instances, the court will be selected by the central authority, the Ministry of Foreign Affairs, where letters rogatory[8] are used to enforce a foreign judgment. As counsel to the plaintiff, the first task will be to assume that the proper court is selected.

Mr. Epstein: I want to add a few comments about service of process because I agree that it is a very important prerequisite to enforce a

8. Letters rogatory are a device or form of international judicial cooperation used by the court of one nation to make a request to a court of another nation to do something, most often obtain testimony or other evidence from a person in the nation receiving the request. Rules governing letters rogatory (or letters of request) are contained in the Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters, but non-member nations (there are about two dozen signatories) tend to use similar rules.

judgment. First, in the United States, as opposed to Mexico, you cannot enforce a foreign judgment through the letters rogatory process. You must institute a proceeding under United States case law.[9] Even though you may end up with an abbreviated proceeding without relitigating the merits, you can not institute the proceeding by letters rogatory; there must be personal service. Second, we get a lot of calls in our Washington office from lawyers who want to bypass the service of process requirements in foreign countries when they are instituting an original suit, not an enforcement suit. The lawyers are considering the expense it will cost the client to comply with different treaties relating to service of process. The United States federal rules of civil procedure are fairly liberal and usually permit United States counsel to mail the complaint and that constitutes complete service of process. My office in Washington is very cautious about this type of service. We advise American litigants to think very carefully about ignoring an applicable treaty, and to make sure that they observe treaty requirements. Otherwise, they may later find themselves stuck with an American judgment that they can not enforce in the foreign country because there was no compliance with foreign law service requirements. Third, the Office of Foreign Litigation in the United States Department of Justice is the central authority for administering the letters rogatory conventions on service of process, including the Inter-American Convention on Letters Rogatory,[10] and Mexico is the biggest user of the Convention. There is some confusion whether this is the exclusive way to serve papers in Mexico. I must be candid in stating that not all the papers that have been served have gone through my office to Mexico. Furthermore, we have not received return receipts on all of the papers served. This has left some United States litigants in a quandary as to whether the service was properly made or whether there has, in fact, been any service, and therefore, whether the litigants will be able to enforce the judgment in Mexico.

Prof. Gordon: Although we do not want to focus on service of process, we are really forced to consider it because if you look at the reasons for non-enforcement, including those that are in the Uniform Act,[11] the grounds for non-recognition are divided into two areas. One area provides that "a foreign judgment is not conclusive" and the other states "a foreign judgment need not be recognized." The latter gives some discretion. Yet the mandatory requirement for personal jurisdiction involves service of process. In Mexico, service of process is a formal procedure undertaken by a Mexican official. Attorneys do not have the authority to serve process in Mexico as they can do in the United States. Fur-

9. *See* Sprague and Rhodes Commodity Corp. v. Insituto Mexicano del Cafe, 566 F.2d 861, 863 (2d Cir. 1977); *In re* Civil Rogatory Letters Filed by Consulate of the United States of Mexico, 640 F. Supp. 243 (S.D. Tex. 1986).

10. Inter-American Convention on Letters Rogatory, Jan. 30, 1985 T.S. No. 43.

11. Uniform Foreign Money-Judgments Recognition Act, § 4(a)(2) states: "A foreign judgment is not conclusive if . . . the foreign court did not have personal jurisdiction over the defendant; . . . ."

thermore, jurisdiction is not obtained by service of process in Mexico or, I think, in most civil law countries.

Another rather interesting question which deserves attention is reciprocity as a requirement for enforcement of a judgment. Mexico seems to require reciprocity. Is that not correct?

Lic. Gomez-Palacio: Generally speaking, I would say yes.

Prof. Gordon: Assuming that a Mexican court would require reciprocity, one Mexican practitioner told me recently that the adoption of the Uniform Foreign Money-Judgments Recognition Act by American states is sufficient to establish United States jurisdiction in order to enforce judgments in Mexico. This leads me to believe that the Uniform Act ought to be adopted in every state in the United States even though, in looking at cases in this country where the Act was and was not adopted, the end result turns out the same.[12] When two co-authors and I were preparing a section on this subject for a case book, we wanted to chart the jurisdictions that have not adopted the Act and those that have adopted the Act. We had difficulty with this project because the jurisdictions that have adopted the Act tended to ignore it.[13] Judges talked about the fact that the Act was in place in their state and then went on to look at the traditional rules that essentially had gone back to the *Hilton* case. There is a fairly recent case in Washington state, however, that announces Washington's adoption of the Act.[14] What seems to be important is that we eventually replace the concept of fifty different views with at least one federal view. I believe we should jump beyond that stage and develop a more international view. I would like David Epstein to comment on what is going on at The Hague with regard to foreign judgments.

Mr. Epstein: The United States has never been a member of a bilateral or multilateral convention on the enforcement of judgments. In the 1970s, there were negotiations for a convention between the United States and the United Kingdom. I understand the negotiations fell apart because of fear by the United Kingdom regarding the enforcement of high damage awards, as in product liability cases. And, as a result, I think this is one reason the United States has had trouble finding a partner in this area. You quickly find out with regard to this issue that there is a suspicion of the American legal system abroad; pre-trial discovery, fishing expeditions, punitive damages, high jury awards in tort cases, are all areas of the legal process in the United States that create anxiety for attorneys abroad. Currently, we are now without a convention, even though one has been proposed and is on the agenda at The Hague Confernce on Private International Law.[15] The United States initiated the

12. *Compare* for example, the factors applied in Koster v. Automark Indus., 640 F. 2d 77 (7th Cir. 1981) (non-Uniform Act jurisdiction), *with* New Central Jute Mills Co. v. City Trade & Indus., 318 N.Y.S.2d 980 (App. Div. 1971) (Uniform Act jurisdiction).

13. *See* RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS, 1193 (2d ed. 1991) (problem regarding enforcement of money judgments).

14. Bank of Nova Scotia v. Tschabold Equip., Ltd., 754 P.2d 1290 (Wash. Ct. App. 1988).

15. HAGUE CONFERENCE ON PRIVATE INT'L LAW, COLLECTION OF CONVENTIONS: 1951-1980 (1980).

proposed convention and Mexico is a member of the convention; it will be a benefit to all members who attend. The negotiations have not yet started, but the framework has been established. The planners have studied other multilateral treaties and came up with a variation on those conventions in which they are trying to achieve a consensus on jurisdiction. There will be three groups of jurisdictional factors: first, a white list of factors where jurisdiction must be recognized; second, a black list of factors such as those frequently referred to as exorbitant jurisdiction factors which usually are not traditionally recognized by states, where enforcement would not be recognized; and third, so as not to limit the treaty to black or white lists, the convention will propose a gray list. There is initial interest, certainly, in getting the convention started. It is on the agenda for discussion at The Hague. The Hague Conference will allow convention organizers to seek support from the European Economic Community (EEC) countries although this should not preclude organizers from soliciting support from countries throughout the world.

Prof. DuMars: There is no doubt that a multilateral treaty arrangement is crucial because it would truly reflect the policies of all participating countries, and reflect the important differences between those countries. It may, however, be at least ten years before a concrete treaty is established. My own view is that a uniform United States federal law passed by our Congress might, in fact, be worse than what we have because it may misinterpret both the views of other countries as well as how local states view their own public policy in terms of enforcement. On the other hand, it seems to me that we cannot leave things as they are because we cannot do business unless we calculate the risk. We cannot calculate risk and make a business choice unless we know what happens in the event of a misfortune or inability to perform. The more uncertainty there is, the more externalities there are, and the more the price fluctuates on the product and therefore less efficiency. As business grows between Mexico and the United States we cannot tolerate the lack of knowledge as to where things will wind up.

Passing a uniform law to govern enforcement of foreign judgments is not a simple matter because there is a substantial difference in terms of business risk between cases involving contracts claims and those involving torts claims. In a contracts case, people can evaluate risks: the risk of breach, and the risk of currency fluctuation. These risks can be calculated in the purchase price and, if the market is functioning, the costs will be passed on to people who buy the product. If there is too much uncertainty, the contracting parties will solve the problem through a negotiated price and the market will equilibrate. In a torts case, you are in a very different situation. Different societies frequently have very different policies for compensation of injured persons for the injuries suffered. I was an expert witness in a case, two years ago, involving a motor vehicle accident near Acapulco where an orthopedic surgeon was killed in a bus accident. A Mexican was the driver of the bus, but the bus was owned by a Hawaiian company. The lawsuit was filed in Hawaii against the Hawaiian company to try to recover damages for the accident.

In the choice of law discussion, the question became, which is the proper forum: is it Mexico, or is it Hawaii? And how should the court calculate the damages? Should the court apply the law of Mexico or the law of Hawaii? The disparity in recovery between the two countries was massive. If the law of Mexico was applied, the damages were very small compared to Hawaii. Why? Because in Mexico, the system is one of social compensation for the injuries consistent with what society and the social security system, including the labor system, can stand. Compensation is based upon the injured person's inability to produce. In Hawaii, damages are based upon the amount of wealth transfer that should take place between an insurance company and an individual who is no longer able to earn the income of a surgeon. The theory of liability and compensation are very different. Assume that a judgment was entered in Hawaii for $10 million against the Mexican bus driver. Assume, further, that the Mexican bus driver had a small business in Mexico and had insured himself for Mexican business risks consistent with local ideas of compensation which might result in $500,000 damages. That the Mexican driver nevertheless gets a judgment against his insurance company in Mexico for $10 million because he happened to be carrying with him an American orthopedic surgeon that went to Acapulco for the weekend. Should the Mexican court enforce the judgment of the Hawaiian court in Mexico, if there is service of process, the client is present, and there has been a full opportunity to defend?

Lic. Gomez-Palacio: I too have been an expert witness in the United States in a torts case which occurred in Mexico. There are a number of Mexican jurisdictions, for example, Quintana Roo, that have opened their tort law to what we call moral damages, which can be distinguished from physical damages. Moral damages may be imposed in unlimited amounts. Formerly, moral damages were limited to one-third of the physical damage. If, for instance, you broke an arm, you could recover a certain amount for hospital and medical expenses and also for moral damages. This is no longer the case in some jurisdictions, however. Quintana Roo is a jurisdiction where the legislature wanted to open the Code in order to protect tourism because it is essentially a tourist state. Currently, the problem is not the law; the problem is the judge. What is a Mexican judge going to give you for moral damages and what will an American judge give you for moral damages? The damage awards could be entirely different. In other words, it is a great law to put in the hands of an American judge. He says, "Well, all I have is moral damages and I am going to throw everything in there." Call it punitive, call it something else; the judge will call it moral and will render a large judgment against the defendant. On the other hand, a Mexican judge may be influenced by extra-judicial pressures and is not likely to render such a judgment.

This leads me to thoughts about our judicial powers, courts, and judges. In light of NAFTA, we must recognize that there is a difference between Mexico and the United States. In the United States federation there is a genuine division of powers including a separate judicial power.

In Mexico, we have three powers and they all lie in the executive branch of government. In the future we may have a growing legislative power. If you consider the amount of governmental money going to support the judicial power versus the executive power, it is staggering. Our judges are people that, first of all, do not have the respect of the society. In a Mexican restaurant, for example, you may find a table reserved for Notario Gonzalez, and you do not even argue because he is a very important person. But to this day, I have never gone to a restaurant to find a table reserved for Judge Garcia. It is sad. We do not pay the appropriate salaries to judges, nor do we provide them facilities to carry out their functions with the necessary solemnity to obtain the respect of society. I point this out because as the relationships between our countries grow, I think there will be support in Mexico for enforcing United States judgments. Because our executive powers are involved, and because enforcing American judgments will establish a good relationship with the government and the American community, United States judgments will tend to be enforced more and more. In other words, as a Mexican petitioner, I prefer to sue in the United States, if I can. In many cases, my Mexican counterpart or American counterpart is going to have assets in the United States. This provides some comfort to sue in the United States, even if some of the judgment must be enforced in Mexico. I will be very honest, we have to recognize in Mexico today sometimes justice is very difficult to attain. How easy is it for us to go to court and get justice? If justice is not available in Mexico, as in many cases, we revert to the American courts by inserting jurisdiction clauses that call for American jurisdiction because one of the parties is domiciled in the United States, or because part of the contract is going to be carried out in the United States. I anticipate that many Mexicans plan for reasons in order to seek review in the American courts. We know there is a legal cost to seeking jurisdiction in the United States, and this scares many Mexican citizens. But the fundamental problem in Mexico outweighs the cost problem. Some in Mexico believe it is better to have a bad deal than a good judgment. This should not be! We like to say, "Americans are very litigious people." Certainly, one of the reasons Americans are so litigious is because they believe that justice will prevail. Mexicans, on the other hand, have little confidence in our judges, particularly in criminal cases, and little confidence in our police. This is a reality, and one that must change together with the creation of a working three-power system that involves democracy. This topic is relevant to how American and Canadian judgments should be enforced in Mexico. I think the Americans and the Canadians should consider entering into treaties with Mexico to ensure that enforcement of judgments are carried out in an easier and more efficient manner.

Prof. Gordon: One area we have not yet raised is in which country the suit might be brought. Industriales Jalapa of Mexico could choose to bring the suit in the United States. When I present this hypothetical problem to my class, I tell my students that the left side of the classroom represents National, the seller, from the United States, and the right side

of the classroom represents Jalapa, the buyer, from Mexico. I will ask: "Where do you want to bring suit and what law do you want to apply?" Invariably, those representing the United States seller state, "U.S.; U.S. law. Home grounds." And the students representing the Mexican company state, "Mexico; Mexican law." I then respond by saying, "Well, I did not tell you everything but, with regard to the Mexican system and the Mexican law, there is a rule that says in any commercial contract, the seller always wins. And in the United States, there is a rule that says in any commercial contract, the buyer always wins." At this point, the students representing the buyer want to go to the United States and the students representing the seller want to litigate the suit in Mexico.

As Licenciado Gomez-Palacio notes, it may well be that it is better for Industriales Jalapa to go to United States courts, and many Mexicans would prefer to do this, particularly for tort claims. On the other hand, it may be better for the United States seller, National, to go to Mexico to initiate suit because the seller may feel it has a better chance in Mexico to receive a modest judgment without the type of damages that may be imposed in the United States.

Lic. Gomez-Palacio: I want to comment on Prof. DuMars' point about the enforcement of a large judgment against a small Mexican company. In fact, it is very seldom that a big case is tried in Hawaii, outside of Mexico, unless the defendant is a wealthy and powerful company or an individual with a deep pocket and is willing to pay the legal expenses. If a large judgment is imposed against a wealthy Mexican person in Mexico, there may be a problem under the Mexican Constitution. That is, if you claim damages for injuries which are not unusual in the United States and a variety of damages are imposed, you may have violated certain individual rights under our constitution. Tort is a very peculiar area. We do not have a law of torts as you know it in the United States. In Mexico, there are almost no tort lawyers. The reason that I have been involved in tort cases is because Mexican people who need assistance can not find anybody else to help. I am an international practitioner and every time I have a tort case, I have to rethink the law of torts and get into my files and go over the Code and see what I said in the last case. I do not regularly practice tort law nor do many other Mexican attorneys.

Mr. Epstein: I think we are jumping a bit when we go from the hypothetical example, which is a straightforward commercial transaction, to tort judgments with punitive damages which present all sorts of public policy problems. Sticking to the hypothetical problem and considering it under the proposed multilateral convention, there is consideration being given for a contract provision which would help to resolve the jurisdictional confusion over where you can sue on a contractual case similar to this situation. The point is that the litigant should have options on where to bring the suit. The claimant should not have to go to the United States and expose himself to the legal costs if he prefers to stay in Mexico, and if the jurisdictional factors are clear that he can sue in the country of origin and not worry about the risk of enforcing the

judgment because it is on dubious jurisdictional grounds. Therefore, I think we should start by focusing on commercial transactions and worry about the tort problems later.

Prof. Gordon: We have looked at a couple of areas regarding enforcement and non-enforcement of judgments, and particularly the Uniform Judgment Act. One area involved jurisdictional questions and one area discussed in the question of service of process. It is interesting that we have spent a lot of time addressing question five in our hypothetical: should Mexico really enforce judgments from a country with juries, contingent fees, fishing expeditions, discovery rules and, what we have been calling enormous damages? Or, should the United States enforce judgments from a nation where there are no juries in civil actions and where there seem to be less fact-specific hearings and examination of witnesses? These issues do not appear in the rules of the Uniform Act,[16] but they seem to determine if a court will enforce a judgment. I think the perception of the cost of litigating a case in the United States leads many people to arbitration, our last discussion in this morning's session.

One additional area that is troublesome to both cultures is where enforcement of a foreign judgment is against the public policy of the country. Translated into the European context, I think this would be the "*ordre publique.*" What is public policy? Would public policy play such a strong role as to create a reason not to enforce a judgment?

Prof. DuMars: There are as many definitions of public policy as there are political wills and political choices. Certainly, it would be against the public policy to enforce a contract that had an illegal purpose in the forum, or that was considered to be violative of the constitutional rights of a person of that forum. It could be against the public policy of the country where a forum sits to enforce a contract, even though the purpose may not be illegal, if the bargain is so unconscionable and so disparate between the parties that it would shock the conscience of the court. That will always be the case when you utilize the courts to enforce powers on a private level that are international in scope. One positive occurrence that is happening in this area is that private and public international law are beginning to merge. There is, as Mr. Epstein stated, a need for a multilateral definition of enforceability jurisdiction reflecting principles of jurisdiction at least in contract claims. To the degree that such a framework is developed, the question of public policy becomes easier because counsel for the parties do not have to go back to the parameters of the bargain or dwell on how the parties got to this step in the first place. The rules of risk are set and negotiated at the international level. Getting to this level is the problem.

Mr. Epstein: My experience with public policy is that very few United States courts will throw out an enforcement case on that basis. There must be something clearly illegal to fall into that category, and most likely the court will enforce punitive damages or some other concept of

16. UNIFORM FOREIGN MONEY JUDGMENTS RECOGNITION ACT, 13 U.L.A. 261 (1986).

damages that we may not recognize. Theoretically, it should not matter that we do not recognize a concept for enforcement purposes as long as the concept was proper in the foreign jurisdiction. On the other hand, I have seen examples where foreign courts have refused to enforce American judgments where punitive damages or contingency fees are involved because, under the rubric of public policy, those courts do not want to enforce the judgment. In fact, several years ago in Germany, my office had a problem serving American complaints that contained punitive damage counts. The German authorities would not serve the papers because they claimed that it took the case out of the civil and commercial definition under The Hague Service Convention and put the case into the criminal context.[17] My office argued to our counterparts in the German government that the important consideration should not be how they look at the case, but how we look at it; in the United States a punitive damage count is a civil case under American jurisprudence.

Lic. Gomez-Palacio: Article 568 of the Mexican Federal Code of Civil Procedure,[18] establishes areas which are within the exclusive competence of the Mexican courts. For example, matters involving land and bodies of water located within the national territory, including underground resources, air space, and the territorial sea; internal disputes of Mexican embassies and consulates; and aircraft and ships registered in Mexico. If issues involving these subjects were adjudicated by an American court, the judgment would not be enforced in Mexico because it is a matter of exclusive competence of Mexican courts. In this respect, I prefer the Mexican system because our law specifies more precisely what cases should be a matter of local competence. There is not a broad or general term used in American law which can be expanded into public policy.

Prof. DuMars: I am a civil procedure teacher and I torture my students with the question: when does a court have the judicial power to bring a party before it? This flows from your question. It is not a question of whether the person knows they are being sued because they had proper notice. Instead, it is a question of the power of the court to exercise jurisdiction in the procedural due process sense. American lawyers are familiar with a host of cases, such as *Asahi, Burger King*, and *World-Wide Volkswagen*, which raise issues of procedural due process.[19] They are, in a sense, power cases that depend upon relationships between states of the United States. And our courts, particularly, are obsessed with evaluating whether or not it is fair, in terms of questions of sovereignty, to exercise power over someone who may have only done one transaction in a particular state. At the international level, because we are involved

17. *See* Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965 arts. 1, 13, *reprinted in* HAGUE CONFERENCE ON PRIVATE INT'L LAW, COLLECTION OF CONVENTIONS: 1951-1980, at 77, 81 (1980).

18. Código Federal de Procedimientos Civiles [C.F.P.C. - Federal Code of Civil Procedure] art. 568.

19. Asahi Metal Indus. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).

in an international transaction, those cases are not technically applicable. Nevertheless, there are international principles of power and the ability to assert jurisdiction or to be competent to bring somebody before the court. In our hypothetical question, there is nothing that states Industriales Jalapa has been to Texas or has hurt anyone in Texas. The slander, if it existed at all, took place in Mexico. I wonder whether, in evaluating a judgment against Industriales Jalapa, the Mexican court would look to questions of presence? How would Mexico deal with such a claim?

Lic. Gomez-Palacio: If slander were present in Mexico, Mexican law would be applied. Any judgment obtained in Mexico may be very different from the kind of judgment you would obtain in the United States.

Prof. Gordon: Now we must move to some of the questions about rendering a judgment in foreign currencies. Both of the judgments in our hypothetical question were rendered in national currencies; the losses were accrued in pesos to Industriales Jalapa and in dollars to National. Is it possible for a United States court to render a judgment in a currency other than dollars? If Jalapa brought suit in the United States, but the court saw that the damages to Jalapa were really peso damages, could the court render a judgment in pesos? And, could a Mexican court render a judgment in dollars? If the courts do render judgments in a foreign currency, at what time would they set a conversion rate because, after all, the other party would be converting their own currency to pay the foreign currency? Let us consider such different times as the date of the loss, the date of the foreign judgment or the date of the payment. Is it, as an enforcement proceeding, the date of the recognition and enforcement? How do we deal with this issue?

Mr. Epstein: I really do not get involved with this topic in my work, but in reviewing the case material and the law in the area, I know there is a traditional view about currency conversion and a new rule. The traditional view, as stated in the Restatement of Foreign Relations Law,[20] is that if a foreign judgment is enforced in the United States, the foreign currency is converted into United States dollars.[21] The conversion is calculated at the date of the enforcing judgment. The exception, which is the new rule, is that the conversion is caculated at the date of payment rather than the date of judgment. This new rule is found in those states that have adopted the Uniform Foreign Money Claims Act[22] which is thirteen states[23] and Texas is not included as one of the thirteen.

Prof. Gordon: This is an important new law that has been adopted by an increasing number of states who use the date of the payment to

---

20. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 823 (1987).

21. This Restatement relates to the enforcement of judgments. The Restatement uses whichever date, that of the breach, judgment or payment, which will result in neither a penalty nor a windfall to the parties. *Id.*

22. UNIF. FOREIGN MONEY CLAIMS ACT, 13 U.L.A. 37 (1989).

23. The states that have adopted the Act include California, Colorado, Connecticut, Hawaii, Illinois, Minnesota, New Mexico, North Dakota, Oregon, Utah, Virginia, Washington, and Wisconsin. *Id.* at 35.

calculate currency conversion. New York adopted a provision that is quite different; it uses the date of judgment. Could a Mexican court give a judgment in dollars, or must it give it in national currency under the monetary law?

Lic. Gomez-Palacio: Mexico probably has more experience than the United States because of the fluctuation of the Mexican peso, especially over the last decade. In fact, there are a number of agreements that are done in Mexico using American dollars. It is not unusual in a normal lease of a flat or a house in Mexico, between two Mexicans, to provide for payment in dollars. The courts in Mexico accept the agreement in dollars and judgment is given in dollars. We cannot, however, deny the Mexican peso what we call liberatory power. In other words, the monetary law recognizes the sovereignty of our peso. Therefore, I can comply with any obligation in Mexico by payment in pesos. The peso has sovereignty in any obligation even if it is in foreign currency, gold, or some other type of payment. If I am condemned to pay $1,000, I can comply with my obligation if I render pesos at the rate of exchange at the moment of payment. You then have the option to change the pesos to dollars, gold, silver or gems.

Prof. Gordon: The Uniform Act refers to the date of payment,[24] while New York law refers to the date of judgment. And, the Restatement allows for a date that would be equitable to the parties.[25] The Restatement does not give a spcific rule because one of the problems facing parties is having a judgment in their favor and being able to play the currency exchanges and hold off paying if they have to convert on the date of payment.

Prof. DuMars: The commentary to the Uniform Foreign Claims Act helps to explain what it is trying to accomplish. The payment day rule referred to means that, when you get paid, you can take in either currency, and the rate of exchange is the spot market rate either 24 hours before or at that time. The commentary states:

> The payment day rule, on which the Act is based, meets the reasonable expectations of the parties involved. It places the aggrieved party in the position it would have been in financially but for the wrong that gave rise to the claim. States, which adopt it, will align themselves with most of the major civilized countries of the world.[26]

What it is trying to say, and not very well, is that it is probably a good idea in contracts cases, once the parties have agreed upon a common currency, to allow that choice of currency to leverage the risk involved. There are principles of contract law that allow you to get not only the expected damages, but also those damages which are foreseeable.[27] If,

---

24. UNIF. FOREIGN MONEY CLAIMS ACT, *supra* note 27, § 7(d).

25. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 (1987).

26. UNIF. FOREIGN MONEY CLAIMS ACT, *supra* note 27, prefatory note at 36 (Supp. 1993)

27. *See, e.g.*, Hadley v. Baxendale, 156 Eng. Rep. 145 (1854); *see also* 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1007 (1964).

for example, you contract in a particular currency, whether it is dollars or pesos, you can foresee the risk that there may be a market fluctuation. It is a fact of life. It is not like an earthquake. It is a reality of the modern international business world that currencies fluctuate in value. Therefore, under this principle, the act allows parties to make an agreement as to the money of payment and, once that decision is made, both parties agree to accept the risk of the currency going up or down. The harder part is after a breach of contract. Do you decide that people anticipate a breach and anticipate they are going to take a big hit because the contract has been breached and the currency has changed value, or do you decide that they get to keep the benefit of the value of the currency during the time of the actual contract? That is the issue that the act is addressing. It is very significant and it needs clarification. I think the act is important because, without it, one has a very hard time deciding what case law to follow in this country.

Lic. Gomez-Palacio: In Mexico there is only one currency. In other words, the dollar is not a currency in Mexico. The rest are not currencies; they are goods. It is a good that you can buy and sell. The only currency is pesos, so you comply with your obligation in pesos and then, whomever receives the pesos can, in turn, buy another currency. It seems to me, that the Uniform Act treats foreign currencies like currencies. In Mexico, we treat foreign currencies not like currencies, but like goods.

Prof. Gordon: Let me conclude this portion of our discussion by reading a few lines from Professor Andreas Lowenfeld's book on International Litigation.[28] It states,

> No state recognizes or enforces the judgment of another state rendered without jurisdiction of the judgment debtor. Some states require a treaty or proof of reciprocity (e.g., Germany); some have no such requirement (e.g., France). Some states reserve the right to review the merits of a foreign judgment, although they do not always do so (e.g., Belgium); other states do not enforce foreign judgments at all in the absence of a treaty (e.g., the Netherlands). Some states, (e.g., the United States) treat default judgments and contested judgments substantially alike for purposes of enforcement; others (e.g., Great Britain) enforce default judgments in limited circumstances only. Some states distinguish sharply between civil judgments ordering the payment of money and other judgments, such as those concerning divorce, adoption, custody, and the like; others treat different types of judgment essentially alike."[29]

I think this suggests that we need an international convention. I am a little distressed to think that ten years may be required to negotiate an agreement. I suggest that we do not negotiate this in Geneva or Amsterdam or Vienna. We should do it in Bangladesh so we have an agreement within the next year.

---

28. ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (1993).
29. *Id.* at 368 (footnotes omitted).

QUESTIONS AND COMMENTS

QUESTION, *Bob Hood, Dallas, Texas*: I would like to change your hypothetical and ask this series of questions. First, I would like to make the Texas corporation into a large, powerful United States company that sells its products throughout the world. And for the company's own internal purposes, whether it is for tax or operational purposes, it chooses to sell its products through subsidiaries that it establishes in each of the countries in which its products are sold, so that its selling contracts are always contracts between an entity incorporated in the foreign country.

In our hypothetical, the contract will be between the Mexican subsidiary of the Texas company and a Mexican buyer. Because the Texas company has a subsidiary in Mexico, it is often a buyer of goods and services from Mexican companies, for example, office supplies and cleaning services for its offices from smaller Mexican entities. I mention that because I want to draw a contrast between contracts in which the bargaining power is somewhat similar and contracts in which the bargaining power is dissimilar. In these contracts, instead of leaving it to the whims of courts, at least hopefully our Texas company chooses to insert choice of law and choice of forum provisions. Also, the United States parent, which is controlling all of these operations, specifies that in these contracts the law of Texas will apply and all disputes will be resolved in the courts of the State of Texas located in Dallas County.

I have three questions. First, in the event of a contract dispute with a Mexican service provider or supplier of goods, where the Mexican entity chooses to go to a local Mexican court to get relief, would a Mexican court recognize and enforce the parties' choice of forum and choice of law? Second, if the Mexican subsidiary of the Texas corporation goes to the court in Dallas County, will the court in Dallas County give a judgment on any of those contractual disputes? Third, is if the Mexican subsidiary of the United States corporation does get that judgment on the contractual disputes in Dallas, will the Mexican courts enforce those judgments?

ANSWER, *Prof. DuMars*: Are you familiar with the *Carnival Cruise Lines*[30] case that was decided in 1991? In both *Carnival Cruise Lines* and *Burger King*,[31] the United States Supreme Court was very supportive of choice of forum and choice of law principles, at least insofar as interstate conflict was concerned. Those are not technically applicable here, but I think the contracts would be enforced. This might not be true if there is something askew in the relationship; something more than the disproportionate size of the parties.

ANSWER, *Mr. Epstein*: I think the United States court would enforce the forum selection clause based on recent United States Supreme Court decisions.

---

30. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
31. Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

QUESTION, *Mr. Hood*: I am familiar with *Carnival Cruise* and, actually, that is why I added to the hypothetical the point that the Texas company operates throughout the world, and is interested in uniformity in the interpretation of its contracts. But does the fact that the Texas company chooses to establish a wholly-owned subsidiary under the laws of a foreign country change the equation?

ANSWER, *Prof. Gordon*: I have trouble with the answers here because if they are based on *Carnival Cruise Line*, there was a connection between the Carnival Cruise Line and Florida, which was the mandatory forum. But in this case, we have a contract which is entered into between two Mexican companies. The subsidiary is a Mexican company, entered into, presumably, in Mexico for performance in Mexico. Where is the subject matter jurisdiction in the Texas court?

ANSWER, *Prof. DuMars*: I was presuming the independence of a Mexican subsidiary formed solely to do business there, but really being connected to stock wholly owned by the parent. If, in fact, the Mexican subsidiary had Mexican stockholders and kept its accounts separate; did not use its United States credit leverage, and the United States parent did not control the amount of currency that went in and out, and the Mexican subsidiary did not use a Dallas bank account and, in fact, was separate from the parent, then, in that case, there would not be subject matter jurisdiction in Texas. But my perception of the way those relationships usually operate, is that most of the contacts of the Mexican subsidiary, from an accounting standpoint, are in the State of Texas, or where the parent is located, and the subsidiary is in Mexico oftentimes just to gain access to local products and to get tax breaks.

ANSWER, *Mr. Epstein*: To me the ambiguity in the hypothetical you raised is that the facts are missing as to the involvement of the parent in the operations of the subsidiary, because the enforcement jurisdiction might be more limited than the original jurisdiction; this is why I am uncertain as to the connection between the two.

QUESTION, *Mr. Hood*: In other words, the answer would vary depending on the extent of control exercised by the parent.

ANSWER, *Mr. Epstein*: Except, looking at it from another angle, it is very common for United States litigants to name everyone in a lawsuit. If you were the lawyer in Mexico for the plaintiff, you would name the United States parent in your complaint. Because if you had the subsidiary and the parent in the complaint, then you would have a good jurisdictional issue when the case came to the United States for enforcement. In other words, the foreign subsidiary and the foreign parent will be named, and if the relationship is well integrated, you always know that down the road if they can not collect the assets, they are going to go after the parent in the foreign country.

QUESTION, *Mr. Hood*: I think veil-piercing is a concern of mine. I was contemplating a situation where the Mexican subsidiary was wholly owned by the United States parent and the parent would exercise considerable control over the operations of the subsidiary, which I think is probably a realistic way of viewing how a large United States company

would operate through its subsidiaries. On the other hand, the choice to set up a subsidiary, in my hypothetical, was based on a choice that is designed to get all the benefits of corporate separateness and, in fact, every step would be taken by the United States parent to avoid piercing the corporate veil. I think this is also a realistic way to view the relationship of the parties. I do not know if that helps in answering the question.

ANSWER, *Prof. Gordon*: There was a very interesting series of cases in Argentina, the *Deltec*[32] cases of almost twenty years ago, when the court without reliance on a code or statute (Argentina is a civil law country) created the concept of the "conjunto economico," the economic unit. It was essentially their veil-piercing theory. The court said that if the subsidiary is wholly, or nearly wholly, dependent upon the parent for loans, technology or resources then that was justification in holding the parent liable, which the court did. The decision could not be enforced in the United States; the courts would not accept the Argentinian decisions. But this American parent also owned another dozen companies in Argentina and their other assets were applied to satisfy the judgment. Is there a similar Mexican view of veil-piercing?

ANSWER, *Lic. Gomez-Palacio*: Not that I am aware of. We also use the concept of the economic unit in a number of ways, but not to extend liability. Under the Mexican income tax law from the 1950s, payment is required at one time, not by the various affiliated corporations, but by the economic unit if it is proved that it, in fact, operated as an economic unit. Under the foreign investment law, a foreign investor is identified as an economic unit, not as a legal entity. We recognize in our Commercial Code what we call enterprises, and we talk about trust concerns and such that are economic units for various matters, but not for limited liability.

A very clear rule was established not long ago in the Mexican federal procedure code, to the effect that, while express choice of law and forum is accepted as a general principle, it will not be accepted if the choice of another forum operates in favor of only one of the parties to the agreement but not to all of the parties.[33] It seems to me that this is precisely the case that you are talking about. The choice of the Dallas court under the circumstances you described would be expressly prohibited under Mexican law.

QUESTION, *Mr. Hood*: The provision that you are referring to has to do with forum selection, if I am not mistaken. What about the choice of law, would the Mexican court apply Texas law?

ANSWER, *Lic. Gomez-Palacio*: The Mexican civil code, Article 15, paragraph 5, establishes the general rule that acts and contracts will be

---

32. Compania Swift de la Plata, S.A. Figorifica s/ convocatoria de acreedores [1973-19] Jurisprudencia Argentina 579, 151 Revista Juridica Argentina—La Ley 516 (1973); translated and discussed in Michael W. Gordon, *Argentine Jurisprudence: The Parke-Davis and Deltec Cases*, 6 LAW. AM. 320 (1974). *See also* Michael W. Gordon, *Argentine Jurisprudence: Deltec Update*, 11 LAW. AM. 43 (1979).

33. Código Federal de Procedimientos Civiles, *supra* note 18, at 567.

governed by the law of the place where they are to be executed, unless the parties validly designate another law.[34] To "validly designate" is a qualification, and how it is interpreted is not clear.

ANSWER, *Prof. Gordon*: I recently had a Mexican attorney correct something that I wrote on choice of law. He said, Mexican judges never apply foreign law. That was a pretty strong statement. I am looking forward to talking to him. I can not believe that it is that emphatic, and I welcome comments by Mexican attorneys counter to that statement.

ANSWER, *Lic. Gomez-Palacio*: There are some provisions in our Code for judges using foreign law.

QUESTION: I will be brief and hope that you will not charge me a fee for your answers. First is a comment on the lawfulness of paying with Mexican pesos, as opposed to foreign currencies, that Mr. Gomez-Palacio discussed earlier; the liberatory power is known as legal tenderness, I think, of the currency. I also want to clarify that the Supreme Court in Mexico has said, when the parties have contracted in a foreign currency, then any payment in that foreign currency will actually discharge the payor from its obligations under the contract, even if it is a good and it has no legal tenderness, in this case the dollar, you will be released from your obligations if you pay in dollars when that was the contract currency. This is just a clarification. In other words, if you had agreed on the dollar as a contract term, the party receiving dollars could not then say, "Well, these are goods and they are not actually discharging you from your obligations, as only pesos could have done that."

ANSWER, *Lic. Gomez-Palacio*: Yes, you can revert to pesos but, of course, a contract may be discharged by the monetary units which were contracted for.

ANSWER: Article 567 of the federal code of civil procedures in Mexico is a recent creation of our system. I am not aware of any court decisions interpreting the extent of this article, but it certainly brought a new set of issues to the table. Now, we have to consider it closely in every contract where we are choosing jurisdiction. In my area of specialization, financing transactions, it is very common to see foreign lenders bringing suits in New York, London or essentially wherever they please. The Mexican is asked to litigate in one of these foreign cities. This is not acceptable and we do not advise any of our clients to incorporate such language. There is a gray area, however, where we do not know whether a Mexican court would actually enforce a foreign judgment based on this new provision found in article 567. I hope Mr. Siqueiros will share some wisdom with us on this issue.

ANSWER, *Lic. Gomez-Palacio*: I am very glad you mentioned Jose Luis Siqueiros. Jose Luis will you give us an opinion because you are involved in this precise area?

ANSWER, *Jose Luis Siqueiros*: I think this falls into what we call the choice of forum, and specifically that parties may attempt to extend the

---

34. C.C.D.C. art. 15.

jurisdiction of any given court. There are two schools of thought: one is very liberal and feels that in international contracts the parties may choose the forum without any restrictions or any limitations. The second school is more restricted, and I think the second school is the one Mexico follows. The parties in principle can select the jurisdiction. For example, a Mexican bank contracts a loan with Citibank-New York, and the legal counsel for Citibank provides that any dispute about the interpretation or violation of the contract will be submitted to New York courts who will apply New York law. If the Mexican party accepts the application of New York law and the Mexican government has already accepted the restructuring of the debt, and if the dispute arises in New York, then the law applied to the case is New York law and this is a valid judgment. This determination will be enforceable in Mexico. The only problem is that, when enforcing the judgment in Mexico, there may be a reason other than jurisdiction which will be argued by the Mexican Bank. It could be that the borrower has no assets. The debt may not be enforced on grounds of public policy, but it will also be a jurisdictional problem. ANSWER, *Prof. Gordon*: Because of the absence of international court to deal with international commerce effectively, courts must assume a sort of super-subject matter jurisdiction and accept that the matter is an international commercial transaction which it might otherwise not accept.