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SOME PROBLEMS INVOLVING ENFORCEMENT OF CONTRACTS AND SECURED FINANCING: PANEL DISCUSSION PART ONE

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THE PROBLEM

Phillip Rogers owns an art gallery in Dallas, Texas. It is a Texas corporation, named Rogers Gallery, Inc. Most of the art for sale is the work of Mexican artists, ranging from pre-Columbian ceramics to such well known contemporary Mexican artists as Rafael Coronel and Alfredo Castañeda. Rogers frequently travels to Mexico for pleasure and business. Sometimes he acquires items from Mexico which his gallery sells in Dallas. Much of what he acquires for sale in his gallery are pieces obtained by auction in New York, or from Mexican collectors who bring their items to Dallas for direct sale to the gallery, or to be left on consignment.

A decade ago, while visiting in Mexico City, Rogers met a young Mexican painter, Rodrigo Sanchez de Vega. His works, which are portraits of Mexican people with a stylized thinness reminiscent of Modigliani, and quite the opposite of the popular contemporary Colombian painter Botero, have brought increasing prices over the past few years from his sales in Mexico, causing him to believe that he was ready to become known by a larger, international market. He asked Rogers to market his work in Dallas at the Rogers Gallery, Inc. Rogers agreed to purchase a dozen paintings from Sanchez de Vega. A fifteen year contract was agreed upon, after several meetings in both Mexico and Dallas over a two year period. The contract, signed in Mexico, expressed values in U.S. dollars. It called for a purchase price of a guaranteed $14,000 per painting ($7,000 paid upon delivery, which in some cases was when Rogers received paintings while on a trip to Mexico, and in others in Dallas when Sanchez de Vega brought work to Rogers Gallery), plus 50 percent of any amount

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Rogers gallery received over $50,000 per painting. Rogers Galley would establish the price according to the market. Sanchez de Vega agreed to produce at least ten paintings per year during the duration of the contract, and Rogers would exhibit no more than one painting of any other living Mexican artist during the contract period. Rogers Gallery, Inc., would take title to the works upon delivery and pay Sanchez de Vega the initial $7,000. The remaining guaranteed $7,000, plus any owed percent beyond $50,000, under the above arrangement, would due within 30 days of sale.

Rogers has also agreed to enter into a joint venture arrangement with Galeria del Arte in Monterrey, owned by Rafael Ortiz, a friend of Sanchez de Vega. It is the gallery where Sanchez de Vega previously sold his works. Rogers will leave 2 or 3 of the dozen paintings he acquires from Sanchez de Vega at the Galeria del Arte, and also place on consignment in that gallery a number of other works from Rogers' gallery in Dallas. The Monterrey gallery will sell the art for pesos, but must pay Rogers Gallery, Inc., in U.S. dollars at the exchange rate at the date of the sale. Rogers Gallery will then pay Sanchez de Vega the appropriate amount owed.

The arrangement functioned very successfully for about a decade. Sanchez de Vega's works increased in price so that now they sell for about $200,000 per painting. That means Sanchez de Vega receives $89,000 ($14,000 plus 50% of the amount above $50,000, or another $75,000, with the total $89,000). Rogers Gallery, Inc., receives the remaining $111,000, from which it must pay very considerable expenses in exhibiting, promoting and marketing the paintings. Rogers Gallery has only two Sanchez de Vega paintings in its current stock, both owned by Rogers Gallery, Inc., according to the above arrangement. For these paintings Sanchez de Vega has been paid the initial $7,000. There are several prospective buyers at about $200,000 to $210,000 each.

In the past two years Rogers has become friends with a Cuba born artist, Gloria Jimenez, who emigrated to Mexico in the 1960s as a political refugee. She remains a legal alien in Mexico. She has painted in Mexico for the past three decades and Rogers has been exhibiting her work in the Dallas gallery. Her work is exclusively on Mexican subjects, mostly landscapes in the tradition of Velasco.

Rogers Gallery, Inc. owns art work which it has placed on consignment in the Galeria del Arte in Monterrey worth about $300,000, mainly pre-Columbian ceramics. There are no Sanchez de Vega paintings currently for sale at the Galeria del Arte.

In the last year the friendly and profitable relationship between Phillip Rogers and Rodrigo Sanchez de Vega has been disrupted. Rogers' wife, a talented artist in her own right, has left Rogers and moved in with Sanchez de Vega at his studio outside Monterrey. There is no likelihood of reconciliation; Rogers is in the process of obtaining a divorce.

Sanchez de Vega has completed eight paintings in the last year, but they remain in his studio. He has been discussing their sale with a gallery owner in New York, who is offering Sanchez de Vega a much larger initial payment, and a higher percent of any amount beyond $50,000

than under the contract with Rogers. Sanchez de Vega has refused to send the paintings to Rogers, and has stated that these are his last works, he is finished with painting. He plans to retire with his new companion to Puerto Vallarta. He claims Rogers has breached the contract by selling the paintings of Jimenez.

Sanchez de Vega's friend Raphael Ortiz, who owns the Monterrey gallery, has also developed a conflict with Rogers. Several pre-Columbian ceramic pieces on sale in Monterrey were discovered to have been stolen about eight years ago from the archaeology museum in Jalapa. Ortiz, who claims these pieces were obtained from Rogers, was arrested and briefly jailed. He was fined and the suspect ceramic pieces taken by the government. He told Rogers that he will keep all remaining pieces of art he received from Rogers and sell them, and retain the proceeds as damages for what Rogers has done to get him in trouble.

A. PHILLIP ROGERS AND ROGERS GALLERY INC.

Rogers has retained you in Dallas to represent him. He has agreed that for the most part the above is true. However, he has shown you certification by Sotheby's in New York, where he obtained the suspect pre-Columbian ceramic pieces at auction over fifteen years ago, documenting that all the pieces Rogers has sent to Monterrey were in a collection owned by a German count whose father had obtained the pieces legally while in Mexico as the German Ambassador in the 1930s. He had not sent this information to the authorities in Monterrey because he did not know of the arrest of Ortiz. After learning of Ortiz's problems, the comments by Ortiz about Rogers, and what he planned to do, Rogers gave a number of interviews printed in various Dallas and Mexican newspapers stating that Ortiz did not receive the ceramics in question from Rogers, but that Rogers was always of the belief that the gallery owner was a thief, and known by the art world to deal in illegal art from various parts of the world. Rogers admits he had no basis to make these comments, but made them in anger.

Rogers wants you, as his Dallas attorney (or Mexican attorney retained to bring an action in Mexico), to bring separate actions against Sanchez de Vega, the Monterrey Galeria del Arte, and Ortiz. He believes Sanchez de Vega should be required to do the following:

1. Sell Rogers Gallery, Inc. the eight paintings in Sanchez de Vega's art studio in Mexico, and deliver them to the gallery in Dallas;
2. Be enjoined from entering into a contract with the New York gallery;
3. Be required to produce the agreed upon ten paintings per year for the duration of the contract;
4. Pay Rogers the estimated profit for the two paintings Sanchez de Vega is short this year, and for any paintings which are not produced during the remaining years of the 15 year contract; and
5. Take any other action you believe to be appropriate.

Rogers also believes Ortiz and the Galeria del Arte should be required to:

1. Return all items on consignment which are the property of Rogers Gallery, Inc.; and
2. Pay some form of damages for breach of the implied agreement to sell such items.

B. RODRIGO SANCHEZ DE VEGA

Sanchez de Vega wants you, as his Mexican attorney (or United States attorney retained to bring an action in the United States), to initiate action against Phillip Rogers and the Rogers Gallery, Inc., and believes they should be required to do the following:

1. Pay Sanchez de Vega immediately for the full market value of the two paintings remaining in the hands of Rogers;
2. Declare Rogers to have breached the contract because of exhibiting paintings of Jimenez, and pay substantial damages; and
3. Take any other action you believe to be appropriate.

C. GALERIA DEL ARTE and RAFAEL ORTIZ

Ortiz wants you, as his Mexican attorney (or United States attorney retained to bring an action in the United States), to initiate action against Phillip Rogers and the Rogers Gallery, Inc., and believes they should be required to do the following:

1. Pay damages for the untruthful statements which constitute defamation;
2. Take any other action you believe to be appropriate.

THE PURPOSE OF THIS PANEL IS TO EXPLORE SOME ISSUES REGARDING THE ABOVE LITIGATION, FROM THE PERSPECTIVE OF ACTIONS:

1. Are the causes of action which the parties wish their counsel to initiate recognized civil causes of action in each nation?

2. For those causes of action which might be initiated in either nation, in which nation would you recommend they be brought?

3. Would a federal court or a state court have subject matter jurisdiction in the United States? In Mexico?

4. For actions in the United States, in which state or in which federal district could they be brought?

5. For actions brought in Mexico, in which state or in which federal court could they be brought? Might they be brought in the Distrito Federal (federal district)?

6. Would the courts of each nation recognize a choice of forum clause in the contract? A choice of law clause?

7. What conflicts rules would the Texas court use - Texas U.C.C. Or Restatement of Conflicts? What conflicts rule in Mexico?

8. Assuming that there were no such choice of forum or choice of law clauses included in the contracts, how would the courts approach (what law would apply and how would it be applied) the choice of forum issue? The choice of law issue?

9. Assume that the choice of law decision concluded that the law of Texas should apply, would that mean the U.C.C. based Texas sales provisions, or the Convention on the International Sale of Goods (CISG)? What would the answer be in Mexico, the Mexican Commercial (or Civil) Code, or the CISG? If the answer is the CISG in either nation, might the judge rejects its application for any reason?

10. Are the contracts clearly commercial contracts under Mexican law? If Rogers separately purchased a painting from Sanchez de Vega for Rogers' personal collection in his home, would that be a commercial or civil contract? Does it really make any difference with regard to proper court, applicable law, remedies, etc.?

11. Would the courts apply a forum non conveniens doctrine and remove the matter to the other nation? Might a Texas court refuse to move the matter to Mexico solely because there is considerably less discovery available in Mexico?

12. How would personal jurisdiction be obtained in each court?

13. When process is served, what is the applicable law? For a case initiated in Texas, could Sanchez de Vega be served while on vacation in Texas and passing through the Dallas airport? For a case initiated in Mexico, could Rogers be served while on vacation in Mexico and passing through the Monterrey or Mexico City airport?

14. Assume cases have been commenced in Dallas and Monterrey. The Dallas judge issues an extensive discovery order. How should it be presented in Mexico and what would be the result? Would the Mexican judge in the case initiated in Mexico be likely to issue any discovery order for the production of documents in the United States? Does international law help in the matter of discovery?

15. If Sanchez de Vega has commenced an action against Rogers and Ortiz for antitrust law violations.in Dallas (price fixing), might a Mexican court, at the request of Ortiz, issue an anti-suit injunction ordering Sanchez de Vega to sue Ortiz in Mexico rather than the United States? Would a United States court honor such injunction were it to be granted?

16. Rogers wants a jury in all cases he is involved in. Sanchez de Vega and Ortiz do not. What result in the United States? In Mexico?

17. All the contracts have been in United States dollars. Would a Mexican court issue a judgment in dollars? If it issues the judgment in pesos, at what date would it establish the damages for the purpose of conversion to pesos? Might it simply convert all figures from dollars to pesos at the date of the contract or sales?

18. What would be the route of an appeal in the United States? In Mexico?

19. How would a judgment be enforced in the nation in which it is issued? Could the judgment be affected by the judgment debtor filing bankruptcy after the judgment?

THE DISCUSSION

Michael W. Gordon: The way the contract was formed in the hypothetical problem is sufficiently complex to create problems in terms of

choice of law and choice of forum. The Texas person sells pre-Columbian items through the Galeria del Arte. Some items appear to have been stolen and there are problems with the Mexican government. There are some suggested causes of action and remedies which are not going to be appropriate under the particular rules of the two jurisdictions.

Mr. Rogers and the Rogers Gallery want Mr. Sanchez de Vega to: (1) deliver the paintings that are remaining in the studio in Mexico to the gallery in Dallas; (2) be enjoined from entering into a contract with another gallery in New York until Mr. Sanchez de Vega's contract has run out with the Rogers Gallery; (3) produce paintings because they agreed upon ten paintings per year for the duration of the contract; (4) pay the estimated profit for the two paintings Mr. Sanchez de Vega did not paint this year and for any other paintings not produced during the remaining fifteen years of the contract; and (5) be bound by any other action that Mr. Rogers and the Rogers Gallery believes to be appropriate. Mr. Rogers also expects payment from Mr. Ortiz and the Galeria del Arte.

Mr. Rogers wants Mr. Ortiz and the Galeria del Arte to be required to return all the items that were put on consignment and to pay some form of damages for the breach of an implied agreement to sell the paintings.

Mr. Sanchez de Vega wants his Mexican attorney to: (1) get Mr. Sanchez de Vega damages for the full market value of the two unsold paintings that are in Dallas and any other appropriate damages; (2) declare Mr. Rogers to have breached the contract because of Mr. Rogers' exhibition of paintings by another Mexican painter, Ms. Jimenez (query: whether Ms. Jimenez was a Mexican painter or not because her origin is Cuban but now she lives in Mexico); and (3) take any other appropriate action necessary.

Finally, the owner of the Galeria del Arte wants damages for the untruthful statements that constitute defamation and to take any other appropriate action necessary. These causes of actions will be brought in the United States or Mexico by either Mr. Rogers, Mr. Sanchez de Vega, or Mr. Ortiz. We will begin the analysis with a series of pre-judgment questions.

The first pre-judgment question is what civil causes of action the parties wish to initiate in each nation? However, we must consider that it might not be worthwhile to bring any action at all.

Michael Owen: Although I am not a litigator, I have been involved with Mexican work for about twenty-five years, mostly helping to oversee and pursue litigation in Mexico. An initial question you have to decide with your clients when practicing cross-border litigation is to what extent a lawsuit is worth pursuing due to the major costs involved. Depending on the complications of the case, I have seen a Mexican cause of action go higher than three times what a U.S. cause of action costs. Mr. Rogers' claims, however, involve potentially enough money that it might be worth pursuing further. Litigation by any of the other claimants may not be plausible.

Gordon: I want to ask the U.S. attorneys if there are possible causes of action for the Mexicans in the U.S. courts, and for the U.S. attorney in their own courts. Then we will ask Licenciado Cesar Garcia Mendez if there are any causes of action in the Mexican courts, either by Mr. Rogers preferring to sue in Mexico, or by Mr. Ortiz or Mr. Sanchez de Vega. Are any or all of these claims appropriate causes of action for Mr. Rogers or the Mexicans to bring?

Hope Camp: First, we need to define what causes of action we will discuss. Disregarding for the moment any claims that Mr. Rogers may have against the Galeria del Arte, the appropriate causes of actions that could be brought are breach of contract for damages and injunctive relief. In the case of the Mr. Sanchez de Vega, there might be fraud—deliberate deceitful actions designed to mislead which caused damages.

In interviewing my client, I would ask the question, "Had the parties ever discussed a means of resolving disputes outside the courts?" There is no arbitration clause in the agreement. That does not mean, though, that these issues could not be submitted to arbitration by a special side agreement. It should also be noted to the client that it does not appear that the parties have made a choice of law in the contract. Therefore, we are left with applying the choice of law rules that apply in the United States and probably Mexico as well.

I would tell my client that there is enough of a significant relationship between the actions taken by the prospective defendant, Mr. Sanchez de Vega, for a court in Texas to assume jurisdiction. Mr. Sanchez de Vega delivered and paid money for paintings in Texas and there has been a measure of performance of the contract in Texas. The mere fact that the contract was signed in Mexico should not preclude jurisdiction in the United States. The major activities with respect to the performance of the contact were in the United States. Therefore, based upon that initial analysis, we would have a basis for showing a significant relationship.

The next question is whether we bring this suit in the federal or state court of Texas. If you are going to proceed with a jury trial on these kinds of matters and the plaintiff is in the United States, it is preferable to be in the state court of Texas. From my experience, juries tend to be more liberal in state courts than in the federal district courts. However, if a judge decides that the Convention on Contracts for International Sale of Goods[1] (CISG) is applicable rather than usual Texas commercial law or the Uniform Commercial Code, you may be better off in the federal court because federal judges are better acquainted and accustomed to dealing with treaties.

Gordon: The CISG is clearly the law in the United States and Mexico.[2] Mr. Camp would prefer to have the federal court apply the CISG.

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1. Apr. 10, 1980, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* S. TREATY DOC. No. 98-9, (1983) and Mar. 17, 1988, 19 I.L.M. 668.
2. *Id.*

However, we are not finding a good reception of the CISG in some courts.

About a year ago two instances occurred in Florida. First, a state court judge in Miami refused to apply the CISG in a case involving a clearly international contract where the judge should have applied the CISG, on the grounds that he could not believe that the United States would enter into a treaty creating laws with foreigners covering contracts. I told my students in my International Trade class last year that it was something I had not thought about and that it deserved more attention.

Second, a student came into my office who clerked for a state court judge in Tampa this past summer who confronted a similar instance. The student tried to persuade the judge that he had to apply the CISG. The judge said, "Maybe the federal courts will apply that, but I am sure not going to apply that in my court. I am going to apply the Uniform Commercial Code of Florida." Therefore, there is an acceptance problem by judges in the United States, at least on the state court level. There is a greater likelihood that federal courts are going to recognize that maybe the CISG is a federal law, and that the federal court judges have to apply it. Of course, the CISG is a treaty, which is the law in the smallest hamlet in Florida.

Camp: I also would point out to my client that we have to obtain service under the Inter-American Convention on Letters Rogatory.[3] The judgment we obtain in the United States may not be enforceable in Mexico unless we obtain service of process by following the letter rogatory route with personal service by a clerk or secretary of a Mexican court on the Mexican defendant. We would have to carry out discovery under the Hague Convention,[4] which would require the appropriate letters of request to the Mexican Ministry of Foreign Relations. Hopefully there is enough money involved in the case to justify all of this procedure.

David Epstein: One comment on federal jurisdiction. Under the federal rules you would need diversity jurisdiction to proceed with the law suit. Such diversity exists in this case because Mr. Sanchez de Vega is a citizen of a foreign country and Mr. Rogers is a citizen of the United States and the claim is over $75,000.

Owen: Another important element to consider when deciding whether you go to a state or federal court in the United States is whether that will effect which court you appear before in Mexico. Professor Jorge A. Vargas has said that he has more confidence in federal judges in Mexico than state judges, and that has been my experience also. If we go before the federal courts in the United States, then when we go to Mexico, we are likely to be able to go before the federal courts in Mexico. But if we are in a state court in the United States, we are more likely to go before the state courts in Mexico.

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3. Inter-American Convention on Letters Rogatory, done Jan. 30, 1975, 14 I.L.M. 339.

4. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, *reprinted in* 28 U.S.C.A. § 1781 (West 1994).

Matthew H. Adler: Because there are some extra-territorial problems in this case there is another cause of action. To get around the extra-territorial problems the attorney should file a U.S. suit against a U.S. party. The suit would be in the courts of New York against the New York gallery owner for tortious interference in the contract. I would seek an injunction to prevent the New York gallery from doing business with the Mexican painter. This does two things: it is probably going to prevent the New York gallery owner from entering into the proposed contract, and it is going to put pressure on Mr. Sanchez de Vega because it shuts off an alternative source of income. The point is that counsel should look for a way to solve the problem using the U.S. courts to limit Mr. Sanchez de Vega's funds from the United States.

Gordon: What about Rogers' chances in Mexico? Is there enough of a connection of this contract with Mexico for Mr. Rogers to sue in Mexico. What would be the standard in Mexico for determining the connection and what would be the source of law of that connection?

Cesar Garcia Mendez: Of course there is a chance for Mr. Rogers to sue in Mexico. An important issue would be to locate the assets, however, I believe actions should be brought in the nation of the nationals being sued. That is, an action against U.S. parties should be brought in the United States and the action against Mexican parties should be brought in Mexico. The remedies that would be sought are damages resulting from the noncompliance with the agreement. The applicable laws in Mexico, would be local state laws and the Código de Comercio[5] [Code of Commerce]. The Code of Commerce is a federal law and therefore, you would have an excellent chance to go to the federal court in Mexico.

Gordon: The case seems to involve a commercial contract and a commercial art gallery, which means that the applicable law in Mexico will be primarily federal law. What would have happened if Mr. Rogers had said to the Mexican painter, "I want to buy a painting from you for personal use." That seems to be an individual transaction. Would that move the case into a Mexican civil code, and would that be the Civil Code of the State of Nuevo Leon where Monterrey, Mexico is located?

Mendez: Contracting to sell a painting for personal use could be construed to be a personal act, and that would not necessarily be considered a commercial act. Therefore, it could be that the Civil Code of Nuevo Leon would be applicable.

Gordon: In this case, it seems quite important whether it is considered a non-commercial transaction so that the Civil Code of Nuevo Leon is applied or whether it is a commercial transaction in which case the federal law, the Code of Commerce, applies. The commercial law in Mexico is a single federal law unlike the United States where there are fifty state commercial laws.

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5. "Código de Comercio," [CÓD. COM.], D.O., 4 de junio de 1889 (as amended).

Is there a possibility of a civil suit for defamation in Monterrey under Mexican law?

Mendez: Yes, it is possible to bring a civil suit for defamation in Mexico. But in this case there is a high probability that it would be unsuccessful.

Camp: With respect to Mr. Ortiz, the proprietor of the Galeria del Arte in Monterrey, would you counsel Mr. Rogers to file a criminal action in Mexico against Mr. Ortiz as a means of pressuring Mr. Ortiz to return the paintings?

Mendez: I would not do that, nor would I recommend that. The penalties involved in this case would be so small that they would not have a large impact. However, criminal actions frequently are sought in Mexico because they threaten the freedom and personal security of the defendant.

Camp: But are not the amounts involved here sufficient to make it almost impossible for Mr. Ortiz to get a *fianza* [bail] if he is detained?

Mendez: Do you mean in an action for fraud?

Camp: Yes.

Mendez: Yes. In the case of fraud, it would be impossible to get bail for those amounts. It would be wise to bring a criminal action as well because it is another means of pressure.

Camp: I would like to raise an ethical question for the U.S. lawyers. To what extent should U.S. lawyers participate in bringing a criminal action in Mexico. Doing that in the United States would be counseling commission of a crime, which is an unethical act under the U.S. rules of ethics. You can argue that we are not lawyers in Mexico so we are not practicing law and what we say does not matter, and therefore we are not guilty of an ethics violation. Suppose you ask the question to a Mexican attorney and the attorney says, "Yes, it could be done."

Epstein: In Mexico, it is the party who initiates the criminal complaint and not the attorney, right? If the party is authorized to do that under Mexican law, I think that there would be no ethical violation.

Owen: In California, it is illegal to counsel or tell the other side that if they do not come into agreement with your client then you are going to bring a criminal suit against them or file a criminal complaint. But it is not an ethical violation if you file a criminal complaint and the action is brought without threatening the opposing party.

Mendez: I would like to comment on that. In normal Mexican commercial transactions, there may be times when some of the parties might be violating criminal law which would somehow allow the other party to bring a criminal action. However, in Mexico it is not a criminal act to let the opposing party know what the situation means at a certain point. Whoever in Mexico has knowledge of any criminal action being committed has an obligation to bring it to the attention of the Mexican *Ministerio Publíco* [Public Prosecutor].

Gordon: Would the courts of each nation recognize a choice of law or choice of forum provision. Would the U.S. courts recognize such a clause if it were in the contract?

Camp: I think either nation would recognize either provision. If the parties had agreed in this instance on the courts of Texas or Mexico, the U.S. courts would recognize their choice of law. Certainly, the U.S. courts would recognize the choice of Texas law. A Texas judge would embrace it with ardor.

Gordon: We will come back to that when we discuss forum non conveniens. What about the choice of law under Mexican law?

Mendez: In this specific case, in which no jurisdiction is specified in the contract, a Mexican court would probably be willing to sustain their jurisdiction.

Gordon: What would be the Mexican court's source of law?

Mendez: It would be either the Federal Code of Commerce or the Civil Code of the state in which the action is brought.

Epstein: Would Mexico recognize the request for specific performance relief and injunctive relief that would be sought in some of these actions?

Mendez: There are no such procedures in Mexico, so they would not be recognized.

Epstein: There are really two different claims, one to force the painter to paint and the other to prevent the painter from sending the paintings to New York?

Mendez: The performance of what we call *actos personalismos* [very personal acts] cannot be enforced. The remedy to be sought in that case would be damages and losses for noncompliance. As for the injunction against sending the paintings to New York, I think that would be unconstitutional under the Mexican Constitution.

Gordon: If we assume that the CISG does apply in this situation, as I believe it does, and that the case is brought in Mexico, it would seem that the Mexican judge and attorneys would review it in quite a different manner than in the United States. What would a Mexican judge look for as a source of law to interpret a provision of the CISG? Would the Mexican judge look at treaties written in Mexico or in Spain; or look at a Kansas case interpreting that provision in the CISG; or look at a German case interpreting that article?

Mendez: The only source of law would be the Federal Code of Civil Procedure.[6]

Gordon: But the judge has to interpret a specific provision of a treaty. What would the Mexican judge do? Just look at the language?

Mendez: Yes, the Mexican judge would only go by the language.

Gordon: Where is a U.S. court going to look in trying to interpret a particular provision of the CISG? Currently, it is a problem, especially with the CISG being relatively new.

Epstein: If you are talking about interpretation of treaties, many U.S. courts follow the Vienna Convention, which means that you look to the language and not to the treaty history.

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6. *See* "Código Federal de Procedimientos Civiles, D.O.," 26 de marzo de 1926 (entered into force D.O., 1 de Septiembre de 1932).

Adler: Would that be an issue of federal common law? Would a court look to the decisions of any other federal court or would they look to state court decisions?

Epstein: Probably federal court, but I do not think it is clear what law is being followed in the United States with respect to interpretation of treaties. Although the Vienna Convention is the customary international law, I am unsure that all courts follow it. Some courts will get into the meaning of the treaty language, the treaty history, and the negotiating history. While other courts would only look to those criteria if the words are not clear.

Gordon: Do you think a judge, particularly in a U.S. state court, might just pull out the Uniform Commercial Code and see if the provisions are reasonably the same? And if the provisions are, would the judge go to the history of the Uniform Commercial Code in that state?

Camp: I am representing the defendants in a case where the major concern of this particular U.S. state court judge is whether or not the plaintiff will be out of court if foreign law is applied. The answer to the question is yes, the judge is going to apply both the foreign law and Texas law.

Gordon: Mr. Epstein is absolutely correct in the way it *ought* to be done, but this is quite distant from the way it is *going* to be done.

Owen: United States counsel may encounter a major problem in obtaining service of process outside of Mexico City, especially in any little town like Zihuatanejo, Mexico. We have been trying for at least two and one-half years to obtain service of process in a small town in one of the northern states of Mexico, and we are still not there yet. We have retained a top firm in Mexico to assist us.

This is an egregious case. We are simply trying to obtain a notarized statement that we had delivered notice of the action to somebody. We were not trying to enforce a judgment and we were not trying to obtain a personal judgment. We are just trying to initiate a California action to enforce a claim against California property. We simply needed a notarized statement that a courier had actually delivered the service of process to the party. The people we were trying to serve actually control this town; therefore, we could not use any local law firm. We finally found a really top-flight notary who agreed to help us. We were working very closely with the notary getting ready to obtain the documents needed for him to certify, when suddenly the main individual of this family that we were trying to serve appeared in the notary's office and informed the notary that the Governor of the State wanted to have breakfast with him. The notary had breakfast with the Governor of the State the next morning and came back with an ashen face and said that he was sorry but he could not continue to help us. We then changed gears and went forward saying, "OK, let us try to obtain service of process so that possibly we can enforce this claim in Mexico." We went through all the processes that have been described by Lic. Mendez this morning.

One of the first big hurdles was the translations. Although the courts finally upheld what we did, we mistakenly employed a translator in

Mexico City. The translation was initially rejected by the court in the Northern state, saying that it needed to be a translator of the court in that state. However, the translations we used were finally upheld by the court. Finally, when we went through all the hoops and got the service of process, an *amparo*[7] proceeding was commenced. Now we are in the *amparo* process.

The *amparo* was filed by both the companies, the individuals, and the labor unions for the companies. No matter how good the procedures seem to be on paper and no matter how good the Mexican counsel, if the opposing parties are powerful where you are trying to enforce a claim, you will have major problems. Nevertheless, I am delighted to hear about the stories of recent successes, that is, service of process only taking six to twelve months.

Gordon: One thing I think we have learned is that it makes quite a difference if you are bringing a suit in a small rural area of Mexico. Our hypothetical involves Dallas and Monterrey which are areas that have very sophisticated bar associations and courts, as compared to much smaller areas. Professor Pereznieto Castro told me some years ago about an experience he had after he had been involved in the passage of certain legislation and treaties.

A judge in a rural area of Mexico telephoned him and asked him to explain some of these treaties that the judge was going to apply in his court. Professor Castro went down on Sunday, and on Monday he had to call back to his office to tell them he would have to stay there awhile longer. Professor Castro found that a very substantial educational process was necessary to simply explain to the judge the nature of these laws. My earlier example from Florida shows that we sometimes have the same problem in the United States.

The forum non conveniens concept presents the same type of problem. In the last few months, an attorney called me and said that a Florida judge had refused to remove a matter to a foreign country which was clearly appropriate under principles of forum non conveniens. The judge had refused to remove the case on the grounds that the other country did not have extensive discovery rules that were parallel to those rules in the United States. I responded by saying that the judge had just nullified the doctrine of forum non conveniens with regard to most other countries in the world.

What about forum non conveniens? It has been a very difficult and evolving issue in Texas over the last decade. Would one of our hypothetical cases be likely to be moved under Texas law?

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7. In Mexico, the legal concept of *amparo* involves legal protection of rights specified in the Law of Amparo by procedural remedies. It has been described as having "five diverse functions: (1) protection of individual guarantees; (2) testing allegedly unconstitutional laws; (3) contesting judicial decisions; (4) petitioning against official administrative acts and resolutions; and (5) protection of farmers subject to the agrarian reform laws." H. Fiz Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 CALIF. W. INT'L L.J. 306, 316 (1979).

Camp: In Texas, under forum non conveniens, I do not believe that this case would be transferred to Mexico. It is doubtful that the parties would get a fair hearing in Mexico or that any judgment would be enforced. This could be supported with a lot of anecdotal evidence.

At least two of the three parties in the case have operations and assets in the United States, and the painter Mr. Sanchez de Vega signed the contract in the United States. Furthermore, Mr. Sanchez de Vega took action in the United States that amounted to execution. Therefore, a Texas court would rule in favor of Mr. Rogers and retain jurisdiction.

Gordon: Would that be true both for a suit brought in the United States by Mr. Rogers and a suit brought in the United States by Mr. Ortiz? Would you say any one of those suits would not be sent to Mexico?

Camp: To be consistent, all suits ought to be kept in the United States. But, if Mr. Rogers wanted to bring his claim in Mexico, that would make a difference to a Texas judge.

Gordon: In Mexico we have any one of three different suits. One brought by Mr. Rogers; one by Mr. Ortiz; and the third by Mr. Sanchez de Vega. Would there be any chance that a Mexican court would remove one of those cases under forum non conveniens principles?

Mendez: No. I believe Mexican courts would declare themselves jurisdictional forums.

Owen: I think that application of the forum non conveniens doctrine would depend on what judge was hearing the case, specifically whether it was a sophisticated or unsophisticated judge. Under the test for forum non conveniens, the court first looks to the adequacy and availability of the alternative forum. A liberal minded judge might look at the particular action and say that Mexico provides an adequate alternative forum, even if it might not be as appropriate as the U.S. court.

Epstein: In Montana's *Butte Mining Plc. v. Smith,*[8] there was an anti-suit injunction in London, and the court in London decided it was the proper forum solely on the grounds of the oppressive nature of the American legal system. The judge did not proffer any of the traditional reasons for determining which was the proper forum, such as location of witnesses and similar matters, although he considered them. One of the questions would be whether the Mexican judge should go outside of the traditional tests, such as where the witnesses are and where the parties have assets, and focus on the same kinds of things as the British court did. The British court in its judgment very clearly focused on the U.S. practice of using civil juries, charging contingent fees, imposing very high punitive damages, (damages that are often increased by juries or believed to be increased by juries because they know about the contingent fee) and subjecting parties to extensive discovery. The British court noted how costly the legal process is in the United States. Could these all be

8. 76 F.3d 287 (9th Cir. 1996).

reasons for a Mexican court not wanting to send one of its own citizens out of their country to face the American legal system?

Mendez: Not necessarily. What happens in Mexico is that we have very specific jurisdictional rules that govern in all cases. Even if the contract provided for disputes to be referred to a foreign tribunal, there should always be a competent Mexican tribunal. That competence stems from the rules of jurisdiction in Mexico. In this case it would be the domicile of the Mexican parties.

Camp: I think that the very things that Mr. Epstein listed are further argument for why a Texas judge, either federal or state, would not find the Mexican court as a convenient forum. The two underlying ideas of forum non conveniens, as I understand them, are fairness and convenience. Fairness takes into account all of these issues about access to a jury and the ability to get the damages that are expected in a U.S. court. Many of those important damage features, including injunctive relief, are simply not available in Mexico. Fairness to the U.S. litigant under traditional U.S. norms would not be available in Mexico.

Gordon: One thing I have found that has been successful in some litigation where there is a Mexican plaintiff who has come into the United States, is not to argue that Mexico would be a more convenient forum, but rather to argue the application of Mexican law. If you can get Mexican law to apply, you will have substantially limited damages in comparison with those applied in the United States. Mexico will not apply punitive damages. In Mexico, injuries like pain and suffering, that is damages other than those resulting from tangible injuries to property or to the person, are called "moral damages." As applied in Mexico they are considerably lower than in the United States. It may be that compensatory damages, at least the medical portions, have already been taken care of through the Mexican social security system; therefore you end up with a low damage amount.

Let us assume that U.S. counsel have determined what the damages would be in Mexico (about $7,000 in cases of personal injury) and simply offered that as a settlement. That worked out fine in one case where there were 25 people who may have had some linkage to the location of the damage. But immediately afterward a new suit was filed by about 250 people who now lived in the immediate vicinity. The company was prepared to go through the same process. I said, "If you do, you are going to have a third suit which will be brought by all Mexicans whoever thought of moving to that area, but never did." Had they moved there they would have been injured, consequently seeking another $7,000 in damages. Therefore, the choice of law can become very important and it is necessarily intertwined with the doctrine of forum non conveniens. Is there personal jurisdiction in the United States over Mr. Ortiz and Mr. Sanchez de Vega?

Camp: You could get jurisdiction over Mr. Sanchez de Vega in Texas because he has had enough contact with Texas. You would use the Inter-

American Convention on Letters Rogatory,[9] and serve Mr. Sanchez de Vega in Mexico. Mr. Ortiz has assets in the United States and is doing business in the United States. Therefore, you have a contact that could justify another proceeding under the Inter-American Convention. Of course, it would be clearer if you could serve both Mr. Ortiz and Mr. Sanchez de Vega personally at the airport in Texas.

Epstein: If Mr. Ortiz is in a joint venture, I have a problem with jurisdiction over Mr. Ortiz. The law provides that there is jurisdiction where the joint venture members are transacting business. Mr. Ortiz was not transacting business in the United States. Mr. Ortiz seemed to be in the opposite situation because Mr. Rogers was going to the Galeria del Arte in Monterrey.

Adler: I would agree with Mr. Epstein about Mr. Ortiz. However, under any analysis of international jurisdiction which happened to involve foreign litigants, it would not be unreasonable for the painter, Mr. Sanchez de Vega, to be hailed into a U.S. court upon sending paintings to the United States. But, I was shocked last year by a case involving a client who had a contract of reinsurance with a French reinsurance company.

My client had moved from the State of New Jersey, U.S.A., to the State of Delaware, U.S.A., and had a contract of reinsurance with a French reinsurance company. The Delaware court held that it was unreasonable at the time the contracts were made for the French reinsurance company to be hailed into the Delaware courts and dismissed the case on the basis of *Asahi Metal Indus. v. Superior Court of California*.[10] Therefore, always look to those "law school 101 cases" on jurisdiction, especially when you are dealing with foreign litigants.

Gordon: There is an article worth reading by Friedrich K. Juenger called "A Shoe Unfit for Globetrotting."[11] It is essentially about *International Shoe Co. v. State of Washington*.[12] Mr. Juenger's thesis is that we cannot get the doctrine of personal jurisdiction straight in the United States because of the intersection of state sovereignty competing against individual liberties of due process. Mr. Juenger is probably correct; the Supreme Court does not have a very good record of a clear line of judgments. When these concepts are applied to foreign defendants, it raises the question whether we should have something that is similar to the concept of full faith and credit for sister state judgments. When the United States is trying to enforce judgments abroad, there are a different set of rules. Should not the United States have a different set of rules when seeking jurisdiction?

Although the United States still has to live with the *Asahi* ruling, does Mexico? Is there sufficient reason for the Mexican court to assume

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9. Inter-American Convention on Letters Rogatory, done Jan. 30, 1975, 14 I.L.M. 339.
10. 480 U.S. 102 (1987).
11. Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027 (1995).
12. 326 U.S. 310 (1945).

jurisdiction over Mr. Rogers in terms of service of process. Assuming there might not be, what if Mr. Rogers is found in the airport at Monterrey on the way to Mexico City? May Mr. Rogers be served with process in order to get jurisdiction over him?

Mendez: Let me comment on a finding of personal jurisdiction by a Texas court in the case of Mr. Sanchez de Vega. I agree that courts may find enough grounds to sustain personal jurisdiction over Mr. Sanchez de Vega, but that would only apply to any assets that Mr. Sanchez de Vega could have in the United States. I disagree that any Mexican court would execute a judgment rendered on those bases in Mexico. A Mexican court would not recognize that kind of personal jurisdiction.

Gordon: In order to be recognized, what kind of personal jurisdiction would Mexican courts require?

Mendez: Domicile.

Gordon: Essentially you are saying that tag jurisdiction is not recognized as a basis for jurisdiction in Mexico. The fact that there was service of process in the Monterrey airport does not give personal jurisdiction.

Mendez: Yes.

Gordon: This is probably the case in most countries. In fact, tag jurisdiction has been abolished in England.

Epstein: The United States is unpopular sometimes because in some cases the United States allows tag jurisdiction. Other jurisdictions probably would not object to tag jurisdiction if a foreign business person were related to the lawsuit.

Gordon: Whether in the United States or in Mexico, Mr. Rogers obviously wants a jury. Does Mr. Rogers, however, receive a jury?

Camp: Mr. Rogers receives a jury if he stays in the United States, but Rogers receives no jury if he stays in Mexico.

Gordon: Would Mr. Rogers face a single judge or collegiate body in Mexico?

Mendez: A single judge.

Gordon: What would be the experience of that judge? Would that person have become a judge immediately upon coming out of law school, or by a later appointment after several years of practice?

Mendez: If you are talking about local jurisdiction, it depends on the local legislation. If you are talking about federal jurisdiction, you first have a requisite number of years in practice before becoming a judge.

Gordon: This is another reason why U.S. litigants prefer the federal courts in Mexico.

Mendez: Yes, and there is a minimum age for judges in the federal and state courts.

Gordon: All the contracts have been in U.S. dollars. Would a Mexican judge issue a judgment in U.S. dollars or would it be issued in pesos?

Mendez: Mexican courts are allowed to issue judgments in U.S. dollars or any other type of currency. But the execution of the judgment would either be in the currency stated in the contract or in Mexican pesos at the rate on the day of the execution.

Gordon: Then with the lower Mexican peso, Mr. Rogers should delay as long as possible because he would be better off.

Mendez: I do not think so, instead he would be worse off.

Gordon: It is easier to get pesos for fewer dollars if the peso is devaluing.

Camp: But, if the peso is devaluing, Mr. Rogers would be paying more in dollars.

Gordon: So you have two choices, either the execution date of the contract or the judgment date.

Camp: Discovery is a problem in these cases. You are going to want to take the depositions of Mr. Ortiz and Mr. Sanchez de Vega, and you will have to use the Hague Convention on Taking of Evidence Abroad[13] to get the depositions. The question you may ask is what about a voluntary deposition taken in Mexico? I do not know whether a Mexican court would enforce a judgment based on that kind of deposition testimony. If you get the discovery done through the Hague Convention, Mexican courts are bound by treaty to not disregard that evidence.

Gordon: Would a deposition taken in a voluntary appearance be an interference with the Mexican judicial process because it was done outside the convention process?

Epstein: Under the United States State Department guidance instructions, voluntary depositions are permitted in Mexico. I think many U.S. litigants go to the United States consulate or the United States embassy in Mexico to take testimony under U.S.-style depositions on a consensual basis. But in reading some of the material for this Conference, I began to wonder if that could be raised against the party trying to enforce the judgment in Mexico.

Mendez: In Mexico, depositions cannot be taken outside of the judicial process. Whatever consensual or spontaneous depositions are taken are not considered in the trial. In fact, even depositions given before a Mexican public prosecutor in a criminal action would not be considered in a civil action.

Gordon: I think that is an important question. You better be able to execute the judgment in the United States after you have received a judgment in the United States because Mexico is not going to recognize the judgment.

Camp: I do not think you would have a problem with executing a judgment against Mr. Ortiz in the United States. But you probably would have a problem executing a judgment in Mexico where you are relying on testimony taken through other means than the treaty arrangements of the Hague Convention on Letters Rogatory.

QUESTIONS AND COMMENTS

Don Hernandez, Mexico City, Mexico: If a voluntary deposition is taken in a Mexican consulate in the United States and the consul acts

13. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 4.

in a notorial capacity, it becomes a public instrument under Mexican law which has total evidentiary value.

Camp: The problem I have is getting the Mexican witness to come to the United States. We could get a judge in Mexico to order that the individual submit themselves to a deposition in Mexico under the Hague Convention on Letters Rogatory. But we would have a harder time getting a judge in Mexico to order the other party to come to the United States to give their deposition, even if it is in the Mexican consulate.

Owen: If a voluntary deposition is done in Mexico, then it could be done before a Mexican notary.

Epstein: What if there was a voluntary appearance before the consulate's office at the United States Embassy where the United States consulate was acting as a notary?

Hernandez: When the deposition is rendered voluntarily before a Mexican consulate in the United States, the consul has the functions of a notary and it is a public instrument. It does not have testimonial value for the trial but it is a public document which the judge will consider as evidence.

Gordon: The question is whether that is enough so that you could have a judgment enforced. Once you received a judgment in the United States using that process, would a Mexican court enforce the judgment?

Hernandez: Maybe; it depends on the contents of the document and many other circumstances.

Gordon: Are you talking only about the voluntary appearance by a Mexican citizen who gives his deposition before a Mexican consulate in the United States?

Hernandez: No, the public appearance of anyone before a Mexican consulate.

Gordon: But if a Mexican citizen were deposed in the United States, the deposition is normally going to be taken in a law office, and will be used in a U.S. court. Are you saying that any U.S. judgment using a deposition by a Mexican citizen taken under normal U.S. processes in the United States will not be enforceable in Mexico?

Hernandez: I cannot answer that.

Epstein: What I think we are talking about is a standard procedure used around the world. The State Department has canvassed all of the foreign ministries and foreign justice departments and it has issued instructions to the U.S. public. The instructions specify by country as to which countries allow voluntary depositions in their country in the United States consulate, where you have an oath administered by the U.S. consul and then a U.S. style deposition is taken. Of course it is very favorable to the U.S. litigants to get that because that is the only way you are going to get U.S. pretrial discovery. Mexico responded to the State Department that this was permissible in Mexico. So this voluntary-type deposition is conducted all the time in Mexico, but it does not necessarily answer the question as to its eventual validity before the courts of Mexico.

Mendez: As Licenciado Hernandez was saying, the deposition given in such a way by someone before the Mexican consulate would be a public

instrument, but it would not have probatory value in the trial in Mexico. The deposition would take place before the Mexican consul and would have only what we call persuasive value in that trial.

Adler: I want to make sure that I am not confused because maybe I won a motion last year that I should not have won. Mr. Camp said that a U.S. court could order a deposition to be taken in a foreign country whether it was voluntary or not. I thought that even under the Hague Convention on Letters Rogatory, the U.S. judge would have to make reference to foreign law to see whether it was appropriate there. I was representing some smaller defendants, several of which were Israeli, against a larger company. There were twelve depositions in Israel. I said, "Look, two depositions involved parties here. We will give you those voluntarily. The other ten are ridiculous and are just being taken to harass us." I included an affidavit (this goes to the battle of the experts in a way) from a Tel Aviv lawyer that said that they do not have pretrial depositions in Israel. The judge threw out the other ten depositions and consequently it was one of the rare times that I received everything I wanted. In that case, the judge did not order the discovery to be taken in another country. Israel acceded to the Hague Convention on Letters Rogatory in terms of providing evidence, but I thought that the countries can still reserve their own internal systems in terms of providing that evidence. That is what we argued in the motion because it is one thing to give evidence as you would give evidence under Israeli law but it is another thing to argue that by acceding to the Hague Convention, Israel would grant U.S. style depositions. Does the U.S. judge have to make reference to the foreign law before ordering an involuntary deposition in a foreign country?

Epstein: Are you saying that since Israel does not recognize pretrial evidence proceedings, and that is what you were seeking, it would have been in violation of their law?

Adler: Yes.

Epstein: Usually that issue is finessed in the U.S. courts by U.S. lawyers being very careful in the way they frame their letters of request. The letters say that the testimony is needed in relation to a trial, and everybody looks the other way.

Gordon: However, some courts are not using the Hague Convention on Letters Rogatory, either because of ignorance or because the Hague Convention is perceived as being an alternative form. We have to distinguish between the capacity of a U.S. court to give the order and what will be the effect of that order if the parties comply with it and whether the parties do so voluntarily or as the result of an order abroad. We have learned that if we end up in a foreign judgment case there are many different levels of quality of evidence. We may feel very comfortable using the deposition obtained abroad back in the United States, but we may find that we erred when we want to enforce the judgment abroad. That may become key for the judgment not being enforced abroad.

Camp: Accordingly, we are now into the *homologación* aspect of enforcing a judgment under the new Mexican Federal Code of Civil

Procedure. Even if you go through all those eight or nine points in the Code and you satisfy every one of them, the judge can still throw it out because he did not like the judgment.

Dave Spencer, Seattle, Washington: There is a new website on jurisprudence under the CISG.[14]

Gordon: I assume, the website will enable access to the jurisdictions in their original language?

Spencer: They are translating parts of decisions but the decisions are also available in their original language.

Guillermo Marrero, San Diego, California: I was involved in a case where we needed to take testimony from Mexican experts in a consensual case. We did a video-conference of the depositions with a court reporter in San Diego and the witnesses in Mexico City. We recorded the deposition by video and by reporter and submitted it to a U.S. court where it was accepted.

In the case of service according to the Hague Convention on Letters Rogatory which, best case scenario takes six months and worst case scenario takes two years, what do you do about the need for provisional or injunctive relief during the time you are trying to effectuate service of process over the defendant?

Camp: Professor Vargas says that you could not get provisional relief in Mexico even if you had jurisdiction over the foreign individual or foreign entity.

Epstein: You are talking about injunctive relief in the United States?

Marrero: Absolutely

Epstein: My only advice is to find the fastest way to serve in Mexico and then while your papers are wandering through the Inter-American Convention on Letters Rogatory, you can tell the judge that you effected service. That might satisfy U.S. standards, not necessarily Mexican, but it might get you your injunction.

Marrero: So you go through both routes, the Hague Convention on Letters Rogatory in order to ultimately enforce the judgment, but also whatever route is reasonable to get the matter before the U.S. court.

Adler: You probably would do that whether seeking injunctive relief or not. You are going to try both.

John Liebman, Los Angeles, California: As one of the many non-litigators in the room, my recollection is, however, that you can get temporary relief at least in California, by telephone notice. And if you file a certificate with the court that you have given telephone notice to the defendant, you can get a Temporary Restraining Order (TRO) without actually perfecting service of process on the defendant. However, under California rules of court, the TRO only lasts fifteen days which leaves us with a substantial shortfall on the times that I have heard today.

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14. *CISG Online: The Dynamic Website on CISG* (last modified Mar. 13, 1997) <http: // www.jura.uni.uni-freiburg.de/iprl/cisg/title.htm>.

Adler: It also depends on the nature of the relief sought. If you are seeking to keep the defendant from doing something as opposed to commanding him to do something, I think the judge is going to be more sympathetic. I am reminded that my partner is always fond of saying, "There is no party like ex parte."