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Foreign Law, Politics & Litigants in U.S. Courts: A  
Discussion of Issues Raised by *Transportes Aereos  
Nacionales, S.A. v. de Brenes*

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## CASENOTES

### FOREIGN LAW, POLITICS & LITIGANTS IN U.S. COURTS: A DISCUSSION OF ISSUES RAISED BY *TRANSPORTES AEREOS NACIONALES, S.A. V. DE BRENES*

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## I. INTRODUCTION

On Saturday, October 21, 1989, TAN-SAHSA airlines flight 414 took off from San José, Costa Rica.<sup>1</sup> After a stop in Managua, Nicaragua, the Boeing 727 headed for Tegucigalpa, Honduras.<sup>2</sup> The jet, owned by Continental Airlines and leased to TAN-SAHSA,<sup>3</sup> crashed on its final approach to Tegucigalpa's Toncontin Airport at about 7:30 A.M. local time.<sup>4</sup> One hundred thirty-one passengers were killed, making it the worst air disaster in Central American history.<sup>5</sup> The captain and first officer, survivors of the crash, were tried and acquitted of criminal negligence in Honduras.<sup>6</sup> The families of the deceased brought suit; *Transportes Aereos Nacionales, S.A. v. de Brenes* consolidated thirty-one wrongful death actions filed in the Circuit Court for Dade County, Florida.<sup>7</sup> The parties stipulated that TAN-SAHSA airlines was liable for compensatory damages arising from its

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1. Wilson Ring, *U.S. Officials Aid Probe of Honduran Air Crash*, CHI. TRIB., Oct. 23, 1989, at 5, available in LEXIS, Nexis library, News File.

2. *Id.*

3. *Id.*

4. Henry Tricks, *111 People Killed in Honduran Air Crash*, REUTER, Oct. 21, 1989, available in LEXIS, Nexis Library, News File.

5. Ring, *supra* note 1.

6. *Transportes Aereos Nacionales, S.A. v. de Brenes*, 625 So. 2d 4, 5 (Fla. 3d Dist. Ct. App. 1993), *rev. denied*, 632 So. 2d 1025 (Fla. 1994), *cert. denied*, 114 S. Ct. 2711 (1994).

7. *Id.* The Florida Supreme Court recently rejected the *forum non conveniens* doctrine developed by the lower courts on the basis of dictum in *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), and explicitly adopted the federal *forum non conveniens* doctrine, as first outlined in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1946). The Court unanimously decried the practice of forum shopping, writing, "The use of the Florida courts to police activities even in the remotest parts of the globe is not a purpose for which our judiciary was created." *Kinney System, Inc. v. Continental Ins. Co.*, 21 Fla. L. Weekly S43, S46-S47, (Fla. Jan. 25, 1996). As a result of this decision, a case like *TAN-SAHSA v. de Brenes* would probably be dismissed on *forum non conveniens* grounds were it brought today.

negligence<sup>8</sup> and that the case would be decided under Nicaraguan law.<sup>9</sup> The only disputed issue was whether Nicaraguan law permitted the recovery of moral damages.<sup>10</sup>

This case raises important questions regarding transnational litigation. This note will address *TAN-SAHSA v. de Brenes* and the problems that arise when foreign law is litigated in the United States. Part II paints a broad picture of the legal and procedural history of this wrongful death action. Part III considers whether the Florida courts correctly interpreted Nicaraguan law. Part IV explores the theories and doctrines available to a court deciding a case governed by foreign law, and applies them to *TAN-SAHSA v. de Brenes*.

## II. BACKGROUND

In *TAN-SAHSA v. de Brenes*, the dispute centered around the recoverability of *moral damages*, a civil law concept meaning non-material damages. These damages generally compensate for emotional harms — pain and suffering — caused by wrongdoing.

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8. Record of Evidentiary Hearing at 38, *Transportes Aereos Nacionales, S.A. v. de Brenes* 625 So. 2d 4 (Fla. 3d Dist. Ct. App. 1993), *sub nom.* *Escobar v. Transportes Aereos Nacionales S.A.* (No. 90-23264), *rev. denied*, 632 So. 2d 1025 (Fla. 1994); *cert. denied*, 114 S. Ct. 2711 (1994).

9. *Id.* at 38. The parties agreed not to apply the Nicaraguan Air Code, which would otherwise have been determinative. Plaintiffs most likely wished to remain outside of the Air Code because of the limits on liability contained therein. See *Código de Aviación Civil de Nicaragua*, arts. 214, 220 (setting specific limits on liability). By agreeing to determine the case according to the Civil Code, *TAN-SAHSA* avoided exposing the jury to evidence of intentional misconduct (*dolo*), which would be necessary to remove the liability limits under the Air Code. Interestingly, the scope of damages in cases of *dolo* is not defined within the Air Code, and consequently the court would have to resort to the Civil Code to resolve the moral damages issue in either case.

Furthermore, the parties probably agreed to apply Nicaraguan law because each thought they could persuade the court to agree with their own assessment of damages. See Record of Evidentiary Hearing at 38, *Transportes Aereos Nacionales, S.A. v. de Brenes* 625 So. 2d 4 (Fla. 3d Dist. Ct. App. 1993), *sub nom.* *Escobar v. Transportes Aereos Nacionales, S.A.* (No. 90-23264), *rev. denied*, 632 So. 2d 1025 (Fla. 1994), *cert. denied*, 114 S. Ct. 2711 (1994).

The Warsaw Convention did not apply to this case because Nicaragua is not a party to it. See Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 29, 1934, 49 Stat. 3000, T.S. 876. See also *Nicaragua*, in 1 FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD (Thomas H. Reynolds & Arturo A. Flores eds., 1989).

10. *Id.*

Moral damages can encompass pain suffered by the victim or the victim's family for crimes or torts against the life, health, honesty, integrity, or emotional well-being of the victim.<sup>11</sup> Moral damages are distinguishable from pecuniary damages, which can be more precisely calculated and compensated for in monetary terms.<sup>12</sup> Compensatory damages are intended to restore the injured party to the position or condition he or she was in prior to the injury; these include what is described in the civil law tradition as moral damages.<sup>13</sup> In *TAN-SAHSA v. de Brenes*, Judge Ferguson of the Florida Third District Court of Appeal referred to material damages as compensatory, economic, or pecuniary, and non-material damages as damages for pain and suffering, or moral damages.<sup>14</sup>

The plaintiffs maintained that the Nicaraguan Civil Code provided for recovery of both pecuniary and moral damages, while the defendant-airline TAN-SAHSA argued that moral damages were unrecoverable.<sup>15</sup> The trial court determined that both pecuniary and moral damages were recoverable under the law of Nicaragua.<sup>16</sup> The *de Brenes* plaintiffs were awarded stipulated pecuniary damages of \$1,000,000 and a jury verdict of \$1,500,000 in moral damages.<sup>17</sup> In *Transportes Aereos Nacionales, S.A. v. Crow*,<sup>18</sup> the Plaintiff was awarded pecuniary

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11. ROSA MARIA ABDELNOUR GRANADOS, *LA RESPONSABILIDAD DERIVADA DEL HECHO PUNIBLE* 330-58 (1984).

12. *Ellis v. Crockett*, 451 P.2d 814, 820 (Haw. 1969); BLACK'S LAW DICTIONARY 392 (6th ed. 1990).

13. The term *compensatory damages* is synonymous with *actual damages* and *general damages*. *Northwestern Nat. Cas. Co. v. McNulty*, 307 F.2d 432, 434 (5th Cir. 1962); BLACK'S LAW DICTIONARY 390 (6th ed. 1990). See also Saul Litvinoff, *Moral Damages*, 38 LA. L. REV. 1, 27 (1977).

14. See also *Young v. Ford Motor Co.*, 595 So. 2d 1123, 1128 n.8 (La. 1992) (citing Litvinoff, *supra* note 13). Note that the Third District Court of Appeal fails to make the distinction that pecuniary and economic damages are not the same as compensatory damages. According to the usage of the court, compensatory damages are more or less synonymous with pecuniary damages and do not encompass moral damages. This is not the manner in which Saul Litvinoff defines them, i.e., as including moral damages. See Litvinoff, *supra* note 13, at 27.

15. See Initial Brief for Appellant at 13, *Transportes Aereos Nacionales, S.A.*, 625 So. 2d 4 [hereinafter Appellant's Initial Brief]; Appellees' Motion for Rehearing *en banc*, *Transportes Aereos Nacionales, S.A.*, 625 So. 2d. 4, (Nos. 92-01408, 92-00925) [hereinafter Appellees' Motion for Rehearing].

16. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d at 5.

17. *Id.*

18. As previously noted, *Transportes Aereos Nacionales, S.A. v. de Brenes* represents a consolidation of thirty-one separate actions. *Transportes Aereos Nacionales, S.A. v. Crow* was one of those actions consolidated on appeal. *Transportes Aereos*

damages of \$144,000 and moral damages of \$1,494,000.<sup>19</sup> The Third District Court of Appeal subjected the trial court's ruling to plenary review<sup>20</sup> and reversed, holding that the laws of Nicaragua did not permit the recovery of moral damages.<sup>21</sup>

The only issue on appeal was whether the language of Article 2509 of the Nicaraguan Civil Code — and the entire applicable corpus of Nicaraguan law — permitted recovery of moral damages. That Article provides that those who negligently or intentionally cause injury to another must redress those injuries.<sup>22</sup> Relying on Article 1835 of the Civil Code,<sup>23</sup> which provides that legal obligations only arise where the code specifically creates such an obligation,<sup>24</sup> the court held that moral damages could not be recovered because Article 2509 does not expressly encompass them.<sup>25</sup>

In reaching this conclusion, the court looked to Article 1865 to define "injury."<sup>26</sup> Article 1865 states that indemnification encompasses both the loss suffered as well as lost profits.<sup>27</sup>

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*Nacionales, S.A.*, 625 So. 2d 4.

19. *Id.*

20. The trial court's determination of foreign law constitutes a ruling on a question of law, which gives the appellate court the power of plenary review over the case. See *Aboandandolo v. Vonella*, 88 So. 2d 282 (Fla. 1956); *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955); FLA. STAT. § 90.202 (1993).

21. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d 4.

22. "Whoever by intentional misconduct, fault, negligence or imprudence, or by malicious act causes damage to another is obligated to redress it along with the harms." CÓDIGO CIVIL [C.CIV.] art. 2509 (Nic.) (notes omitted) (all translations by author unless otherwise indicated).

In Spanish: "Art. 2509. Todo aquel que por dolo, falta, negligencia o imprudencia o por un hecho malicioso causa a otro un daño, está obligado a repararlo junto con los perjuicios." *Id.*

23. "Legal liabilities may not be presumed. Only those liabilities expressly created by this Code or in Special Laws are enforceable, and such liabilities will be governed by the precepts of the law that created them, and in those cases where this was not foreseen, by the dispositions of the present Book." C.CIV. art. 1835.

In Spanish: "Art. 1835. Las obligaciones derivadas de la ley no se presumen. Sólo son exigibles las expresamente determinadas en este Código o en las leyes especiales, y se regirán por los preceptos de la ley que las hubiere establecido, y en los que ésta no hubiere previsto, por las disposiciones del presente Libro." *Id.*

24. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d at 6.

25. *Id.*

26. *Id.*

27. "Indemnification of damages includes not only the amount of the loss that has been suffered, but also that of the creditor's lost profits, except for the provisions contained in the following articles." C.CIV. art. 1865.

The court also looked to the Costa Rican Civil Code — from which Nicaraguan Civil Code Article 2509 originated — for evidence of legislative intent. The court found the Costa Rican Code's failure to recognize moral damages at the time of its drafting<sup>28</sup> persuasive as to the interpretation of the Nicaraguan Code provision.<sup>29</sup>

Noting that the revised Nicaraguan Penal Code of 1974 permits recovery of moral damages after a criminal conviction,<sup>30</sup> the court found that absent a similar revision the Civil Code did not include moral damages.<sup>31</sup> Since the airplane captain and first officer were acquitted of criminal charges, the Penal Code provisions on damages could not be applied to this case. Furthermore, because the Nicaraguan Civil Code does not expressly provide for recovery of moral damages, the court reasoned that moral damages may not be awarded in a wrongful death suit.

While the appeal was pending in the Third District, on October 5, 1992 the *Corte Suprema de Justicia de Nicaragua* (Supreme Court of Justice of Nicaragua) issued an Advisory Opinion addressing this question.<sup>32</sup> The opinion came in response to a request by the Chief Judge of the Nicaraguan criminal court for a determination of whether moral damages were recoverable under Article 2509 of the Civil Code. The Supreme Court replied that the Civil Code of Nicaragua allowed recovery of moral as well as material damages.<sup>33</sup> After the Third District made its decision, Appellees brought the Advisory Opinion to the court's attention in their motion for rehearing *en banc*.<sup>34</sup> However, the court denied the motion without reference to the Advi-

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In Spanish: "Art. 1865. La indemnización de daños y perjuicios comprende no sólo el valor de la pérdida que haya sufrido, sino también el de la ganancia que haya dejado de obtener el acreedor, salvas las disposiciones contenidas en los artículos siguientes." *Id.*

28. ABDELNOUR GRANADOS, *supra* note 11, at 336.

29. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d at 6.

30. *Id.*

31. *Id.*

32. See Appendix to Appellees' Motion for Rehearing *en banc*, *supra* note 15, at 5. See also Advisory Opinion of Oct. 5, 1992, *Corte Suprema de Justicia* [Supreme Court] (Nic.) [hereinafter Advisory Opinion]. The Advisory Opinion is reproduced, *supra*, in Appendix A.

33. Advisory Opinion, *infra* Appendix A.

34. See Appellees' Motion for Rehearing *en banc*, *supra* note 15.

sory Opinion.<sup>35</sup>

On March 23, 1993, twelve days after the Third District Court of Appeal filed its opinion, the *Asamblea Nacional de Nicaragua* (National Assembly of Nicaragua) issued an *Interpretación Auténtica de la Ley* (Authentic Interpretation of the Law),<sup>36</sup> in which it interpreted Articles 2509, 1837, 1838, 1865, and 3106 of the Civil Code, and Article 1123 of the Code of Civil Procedure as permitting recovery of moral damages.<sup>37</sup> The following day, March 24, 1993, the plaintiffs filed a motion for rehearing *en banc* in which they brought this development to the court's attention.<sup>38</sup> The plaintiffs' petitions for rehearing and rehearing *en banc* were both denied.<sup>39</sup> The Third District Court of Appeal did not acknowledge this act of the Nicaraguan National Assembly.

Subsequently, plaintiffs petitioned the Supreme Court of Florida<sup>40</sup> and the United States Supreme Court for certiorari.<sup>41</sup> Both petitions were denied.

### III. AN ANALYSIS OF NICARAGUAN LAW: WAS THIS DECISION CORRECT?

#### A. *Nicaraguan Law in Context: Problems with the System*

Within the civil law tradition, the legislature is the only binding source of law. As there exists no principle of *stare decisis* as such, the judiciary has virtually no formal role as lawmaker in a civil law country.<sup>42</sup> Therefore, Nicaraguan law may be

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35. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d 4.

36. The *Asamblea Nacional* (National Assembly) has the power to issue such *Interpretaciones Auténticas* (Authentic Interpretations) under Article 138(2) of the Nicaraguan Constitution of 1987. CONSTITUCIÓN POLÍTICA DE NICARAGUA DE 1987 [Constitution], art. 138(2) (Nic.) [hereinafter NIC. CONST.].

37. Ley No. 157, EL NUEVO DIARIO, Mar. 26, 1993, at 10 (Nic.) [hereinafter Authentic Interpretation]. See *infra* Appendix B.

38. Appellees' Motion for Rehearing *en banc*, *supra* note 15.

39. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d 4.

40. *de Brenes v. Transportes Aereos Nacionales, S.A.*, 632 So. 2d 1025 (Table) (Fla. 1994); *Crow v. Transportes Aereos Nacionales, S.A.*, 632 So. 2d 1025 (Table) (Fla. 1994).

41. *de Brenes v. Transportes Aereos Nacionales, S.A.*, 114 S. Ct. 2711 (1994).

42. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 23-14 (1969) (only the legislature can make law in civil law systems); Albert Tate, Jr., *Civilian Method-*



found only in the Constitution of Nicaragua and in the codes and laws promulgated by the National Assembly.<sup>43</sup>

Despite the seemingly organized appearance of the codes, extrinsic factors complicate interpretations of Nicaraguan law. The Civil Code of Nicaragua was promulgated in 1904, and has never been significantly revised.<sup>44</sup> By contrast, the Penal Code was completely rewritten in 1974.<sup>45</sup> Most recently, the Sandinista government promulgated a new constitution in 1987. Since the Codes have never been reconciled, there are many areas where the 1987 Constitution, the Civil Code, and the Penal Code contradict each other. For example, the 1987 Constitution prohibits capital punishment.<sup>46</sup> The Penal Code, however, establishes death as one of the eight principal penalties for the punishment of crimes.<sup>47</sup> Under the principle of constitutional supremacy,<sup>48</sup> the death penalty provision of the Penal Code is unconstitutional, despite the fact that it remains on the books.

These contradictions create obstacles to understanding the actual content and meaning of Nicaraguan law because there is no uniform underlying concept.<sup>49</sup> While this problem is not unique to Nicaragua — U.S. law contains many such instances of contradiction — it serves to illustrate the problems a U.S. court may experience in attempting to find meaning for one

*ology in Louisiana*, 44 TUL. L. REV. 673 (1970) (the basis of all law is legislative in civil law systems); Richard Wilson, *Criminal Justice in Revolutionary Nicaragua*, 23 U. MIAMI INTER-AM. L. REV. 269, 281-82. (1992) ("The study of civil law is the study of codes. No other source of law — judicial decisions, treatises, regulations, custom, or practice — carries the central significance of the code as the correct organized, coordinated, unified expression of governing principles.").

43. See MERRYMAN, *supra* note 42; Tate, *supra* note 42; Wilson, *supra* note 42.

44. *Nicaragua*, in 1 FOREIGN LAW: CURRENT SOURCES OF CODES AND BASIC LEGISLATION IN JURISDICTIONS OF THE WORLD, *supra* note 9.

45. *Id.*

46. NIC. CONST., art. 23.

47. CÓDIGO PENAL [C.PEN.] art. 53 (Nic.).

48. NIC. CONST., art. 182. "Art. 182. The Political Constitution is the fundamental charter of the Republic; all other laws are subordinate to it. Any laws, treaties, orders or provisions that oppose it or alter its provisions shall be null and void." *Id.*

In Spanish: "Arto. 182. La Constitución Política es la carta fundamental de la República; las demás leyes están subordinadas a ella. No tendrán valor alguno las leyes, tratados, ordenes o disposiciones que se le opongan o alteren sus disposiciones." *Id.*

49. In fact, the values underlying the Constitution, Civil and Penal Codes of Nicaragua differ radically. Nicaragua was governed by three different philosophical, legal, and governmental regimes at the times of the promulgation of the Civil Code of 1904, the Penal Code of 1974, and the Constitution of 1987.

Nicaraguan code within the provisions of another.

*B. Interpreting the Codes of Nicaragua*

Article 2509 of the Civil Code states: "Anyone who, by intentional misconduct (*dolo*), fault, negligence, or imprudence or through a malicious act causes damage (*daño*) to another is obliged to redress it, along with the harms (*perjuicios*)."<sup>50</sup> The article refers to pecuniary damages, but does not mention punitive or moral damages.<sup>51</sup> TAN-SAHSA argued, and the Third District Court agreed, that the failure of the code to state specifically that moral damages may be recovered precludes their recovery.<sup>52</sup>

Since Article 2509 of the Nicaraguan Civil Code was taken from the Civil Code of Costa Rica, the defendants argued that the legislative history of the Costa Rican provision was informative as to its Nicaraguan counterpart.<sup>53</sup> Because there was no recovery of moral damages under Costa Rican law at the time of adoption, defendants argued, there could be no recovery of such damages under Nicaraguan law.<sup>54</sup> Subsequent to its adoption by Nicaragua, however, the Costa Rican Civil Code provision was interpreted by the Supreme Court of Costa Rica to encompass moral damages.<sup>55</sup>

50. C.Civ., art. 2509.

51. The Spanish *daños y perjuicios*, which appears throughout the Nicaraguan codes, derives from the Roman law concepts of *damnum emergens* and *lucrum cessans*. The former refers to the victim's out-of-pocket loss, while the latter refers to the victim's future loss of profits. R. LEE, THE ELEMENTS OF ROMAN LAW 387 (3d ed. 1952). *Daños y perjuicios* is usually translated as "damages."

52. Appellant's Reply Brief at 1, *Transportes Aereos Nacionales, S.A. v. de Brenes*, 625 So. 2d. 4 (Fla 3d Dist. Ct. App. 1993) (No. 92-01408, 92-00925), *rev. denied*, 632 So. 2d 1025 (Fla. 1994), *cert. denied*, 114 S. Ct. 2711 (1994) [hereinafter Appellant's Reply Brief].

53. C.Civ. art. 2509.

54. Appellants' Reply Brief, *supra* note 52, at 10. Nicaragua modified the article slightly by addition of one clause, indicated below in italics. "Everyone who by intentional misconduct, fault, negligence or imprudence, *or by malicious act* causes injury to another is obligated to repair it along with the harms." C.Civ. art. 2509, (notes omitted) (emphasis added).

In Spanish: "Todo aquel que por *dolo*, *falta*, *negligencia* o *imprudencia* o *por un hecho malicioso* causa a otro un *daño*, está obligado a repararlo junto con los *perjuicios*." *Id.*

55. ABDELNOUR GRANADOS, *supra* note 11, at 330-58.

French law, from which the Costa Rican provision was drawn, also allows for recovery of moral damages.<sup>56</sup> The *Cour de Cassation* (Supreme Court of France) interpreted language in its Civil Code, similar to that found in the Costa Rican Code, to permit recovery of moral damages.<sup>57</sup> Prior to *TAN-SAHSA v. de Brenes*, however, neither the Nicaraguan courts nor the legislature had provided an interpretation expanding the notion of damages in Article 2509 to include moral damages.

Plaintiffs argued that the provisions of the various Nicaraguan codes should be read together in order to interpret the damages referred to in Article 2509. They maintained that "damages" should be read in light of its significance in the Penal Code, where recovery of moral damages is permitted. Furthermore, plaintiffs posited that several different Civil Code provisions read together would enable the heirs of plane crash decedents to recover moral damages in an action for wrongful death.

Article 3106 of the Civil Code provides that the "business person [business person] . . . shall always be [liable] for indemnification of the damages in conformance with the provisions of the Penal Code."<sup>58</sup> Article 3110 establishes the Nicaraguan equivalent of *respondeat superior* in cases involving the transportation of goods or passengers.<sup>59</sup> Article 3121 establishes that any contractual rights the parties may have will not be extinguished by death, but will be passed on to their heirs.<sup>60</sup> Accord-

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56. Litvinoff, *supra* note 13.

57. *Id.* at 4.

58. "The business person [owner] will not be responsible for the misdemeanors to which the previous article refers [providing that the passengers and vehicle owners shall not be liable for traffic violations committed by the driver. C.Civ. art. 3105] as far as the penalties, unless the [business person] was at fault; but the [business person] shall always be [liable] for the indemnification of the damages in conformance with the provisions of the Penal Code." C.Civ. art. 3106.

In Spanish: "Arto. 3106. El empresario no será responsable de las faltas de que trata el artículo que precede, en cuanto a las penas, sino cuando tuviera culpa; pero lo será siempre de la indemnización de los daños y perjuicios conforme a las prescripciones de Código Penal." *Id.*

59. "The business owners of carriages or public transportation [vehicles] have the responsibility set forth in Art. 3106 even though they are not themselves the driver, except for their right against the latter in the event that they are found guilty of the damage." C.Civ. art. 3110.

In Spanish: "Arto. 3110. Los empresarios de carruajes o transportes públicos tienen la responsabilidad expresada en el art. 3106 aunque no sean ellos mismos los conductores, salvo su derecho contra éstos en caso que resulten culpables del daño." *Id.*

60. "The death of the carrier or of the passenger does not terminate the con-

ing to the plaintiffs, these provisions together invoke the definition of damages as understood in the Penal Code.

Article 10 of the Penal Code defines "quasi-delict"<sup>61</sup> "as an action or damaging omission by an agent for whose actions a person is liable by virtue of the civil relationship that links him with said agent, as determined by law. Quasi-delicts result only in civil liability."<sup>62</sup> The Penal Code thus covers not only criminal liability and civil liability for those convicted of criminal offenses, but also civil liability under *respondeat superior*. The definition of quasi-delict found in the Civil Code indicates that the concept lies somewhere between civil liability and criminal liability, approximating a common law tort.<sup>63</sup>

tract; the obligations are transmitted to the respective heirs, without prejudice to the defense of *force majeure* or act of God." C.CIV. art. 3121.

In Spanish: "Art. 3121. La muerte del acarreador o del pasajero no pone fin al contrato; las obligaciones se transmiten a los respectivos herederos, sin perjuicio de lo dispuesto generalmente sobre fuerza mayor o caso fortuito." *Id.*

61. The following explanation by Bruce W. Frier provides a clearer understanding of this confusing concept.

Quasi-delict is a murky category that was probably not accepted until the postclassical period, although the law teacher Gaius seems to know it already in mid-second century A.D. The category collects several types of liability, all established in classical law, that for one reason or another are not easily explained as delicts. In all of them, one person has suffered loss, and another person is held liable for that loss even if he or she did not directly inflict it; the defendant may not be at fault, but at least had the opportunity to prevent the loss from occurring. Since the defendant's fault is not necessarily involved, the liability is not delictual; rather, it is said to arise "as if from a delict" (*quasi ex delicto*).

The Praetor's Edict established that if something was poured or thrown from an upstairs dwelling onto a public way, and it caused damage to persons or property beneath, the principal occupant of the dwelling was liable even though he or she was not the culprit. In this sort of situation, a victim may find it difficult to establish the culprit's identity; but whether this is possible or not, the occupant is held liable, perhaps on the theory that he or she had failed to exercise sufficient oversight . . . .

Quasi-delict is mainly interesting for the ways in which it begins to go beyond the classical principles of delictual law, in order to establish liabilities based not on demonstrable fault (*dolus* or *culpa*), but on imputed failure of oversight — a form of strict liability that has become far more prominent in modern law.

BRUCE W. FRIER, A CASEBOOK ON THE ROMAN LAW OF DELICT 227 (1989).

62. C.PEN. art. 10. In Spanish: "Arto. 10. Constituye cuasidelito la acción u omisión dañosa de un agente de cuyos hechos es responsable una persona en virtud de relación civil que la liga con dicho agente, determinada por la ley. Los cuasidelitos sólo producen responsabilidad civil." *Id.*

63. See also Ferdinand Fairfax Stone, *Tort Doctrine in Louisiana: The Materials*

Turning to the Penal Code section defining damages, Article 46 specifically mentions moral damages: "The indemnification of damages will be prudently determined by the Court, if there is lack of evidence of the value of the material or moral harm caused by the punishable action, especially the harm caused to the industry or business, life, health, honor or reputation of the offended party."<sup>64</sup> As under the Civil Code, the rights of the offended party or victim are passed on to the family of that party.<sup>65</sup>

Plaintiffs' interpretation of damages according to the Penal Code would be very persuasive were it not for Article 1122 of the Code of Civil Procedure. That Section provides: "The judgment rendered in a criminal proceeding can be applied in civil cases, provided that the defendant is convicted."<sup>66</sup> This means that the issues litigated in a criminal trial will be considered *res judicata* in a subsequent civil trial so long as a conviction results.<sup>67</sup>

Articles 1837 and 1838 of the Civil Code specify where the Penal Code may be invoked for the purpose of determining the nature and extent of civil liability. Article 1837 provides: "Civil obligations that arise from delicts or misdemeanors will be governed by the provisions of the Penal Code."<sup>68</sup> This indicates that civil liability arising from delicts and misdemeanors are de-

*for the Decision of a Case*, 17 TUL. L. REV. 159, 161 (1942).

64. C.PEN. art. 46.

In Spanish: "Arto. 46. La indemnización de perjuicios de hará determinado prudencialmente el Tribunal, a falta de prueba, el valor de perjuicio material o moral originado por el hecho punible y especialmente el perjuicio causado en la industria o negocio, en la vida, salud, honra o reputación del ofendido." *Id.*

65. "The obligation to restore, repair the damage or to indemnify the prejudices, is transmitted to the heirs of the responsible [one]; and the action to ask for restitution, reparation, or indemnification, is transmitted equally to the heirs of the prejudiced." C.PEN. art. 49.

In Spanish: "Arto. 49. La obligación de restituir, reparar el daño o indemnizar los perjuicios, se trasmite a los herederos del responsable; y la acción para pedir la restitución, reparación o indemnización, se trasmite igualmente a los herederos del perjudicado." *Id.*

66. CÓDIGO DE PROCEDIMIENTO CIVIL [C. PROC. CIV.], art. 1122 (Nic.). In Spanish: "Art. 1122. En los juicios civiles podrán hacerse valer las sentencias dictadas en un proceso criminal, siempre que condenen al reo." *Id.*

67. TAN-SAHSA argued that this Article creates a prerequisite of criminal liability before the cross reference of Article 3106 of the Civil Code may be applied. See Appellant's Initial Brief, *supra* note 15, at 17.

68. C.CIV. art. 1837. In Spanish: "Art. 1837. Las obligaciones civiles que nacen de los delitos o faltas, se regirán por las disposiciones del Código Penal." *Id.*

terminated according to the Penal Code, Book I, Title II, Chapter VI, "Rules to Determine Civil Responsibility." Article 1838 of the Civil Code deals with quasi-delicts: "Those [civil obligations] that arise out of acts or omissions in which non-criminal fault or negligence intervenes, will be determined according to the dispositions of Title VIII Sole Chapter [of the Civil Code]."<sup>69</sup>

Title VIII, Sole Chapter of the Civil Code begins with Article 2509, which establishes that the actor causing a quasi-delict must repair the harms by paying damages. Article 2520, also found within that Chapter, indicates that the disposition of civil obligations resulting from delicts or misdemeanors will be made according to the Penal Code.<sup>70</sup> In the final analysis, the Penal Code does not directly cover civil liability arising from quasi-delicts absent a criminal conviction, and thus the meaning of the term *perjuicios* (damages) as used in Article 2509 remains unclear.

In order to determine whether TAN-SAHSA may be liable for moral damages in a wrongful death action, where the surviving pilot and first officer of the aircraft were acquitted of criminal wrongdoing,<sup>71</sup> one must determine the nature of that wrongful death obligation. The Penal Code provisions on liability would only apply to TAN-SAHSA's quasi-delictual liability if that liability were incurred through the criminal actions of the company's agents or employees. Corporations may not be convicted of criminal offenses in Nicaragua; consequently, the definition of quasi-delict comprehends vicarious corporate liability for the wrongful acts of its employees. Where a company's employee or agent has been convicted of a crime, liability for a quasi-delict may be determined according to the damages provisions of the Penal Code. However, given the fact that the captain and first officer of Flight 414 were acquitted of criminal

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69. C.Civ. art. 1838. In Spanish: "Art. 1838. Las [obligaciones civiles] que derivan de actos u omisiones en que intervenga culpa o negligencia no penadas por la ley, quedarán sometidas a las disposiciones del Título VIII Capítulo único." *Id.*

70. "With reference to civil responsibility for delicts and misdemeanors which are the subject of criminal trial, it will be [governed] by the dispositions of the Penal Code." C.Civ. art. 2520.

In Spanish: "Art. 2520. En cuanto a la responsabilidad civil por los delitos y faltas de que se conozca en juicio criminal, se estará a lo dispuesto en el Código Penal." *Id.*

71. *Transportes Aereos Nacionales, S.A.*, 625 So. 2d at 5.

charges, TAN-SAHSA's vicarious liability arises from mere negligence, which falls under Article 1838 of the Civil Code.

It may be possible to refer to the Penal Code with the limited purpose of learning how the term "damages" is defined within that Code. However, it is difficult to argue persuasively that the 1974 Penal Code could shed any light on the intent of the drafters of the 1904 Civil Code. It seems that absent some definitive governmental action or authoritative interpretation, moral damages were not recoverable at the time of the TAN-SAHSA litigation.

### *C. The Advisory Opinion of the Nicaraguan Supreme Court*

The TAN-SAHSA case stirred interest in Nicaragua among the friends and family of the decedents as well as among members of the government. Additionally, plaintiffs' expert witness was a former chief justice of the Supreme Court of Justice of Nicaragua.<sup>72</sup>

The Nicaraguan Supreme Court issued an Advisory Opinion addressing the controversy before the Third District Court of Appeal. The opinion responded to a request for clarification by Germán Vasquez C., a judge from the First Criminal District of Nicaragua.<sup>73</sup> Judge Vasquez inquired whether damages in Article 2509 of the Civil Code included only material damages or whether it also encompassed moral damages.<sup>74</sup> Judge Vasquez also inquired as to who may inherit the right to recover damages under Article 288 of the Civil Code.<sup>75</sup> The Supreme Court, in an Advisory Opinion dated October 5, 1992, responded:

The Civil Code of Nicaragua, in Articles 2509, *et seq.*, establishes civil liability for damages in their totality, without exclusion, which is to say that it encompasses material dam-

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72. Alejandro Montiel Arguello, Judge of the Inter-American Court of Human Rights, former Nicaraguan Ambassador to the United Nations, former Secretary of State of Nicaragua, former Nicaraguan Ambassador to Panama, former President of the Corte Suprema de Justicia. See Record of Evidentiary Hearing at 214-15, *Transportes Aereos Nacionales, S.A. v. de Brenes* 625 So. 2d 4 (Fla. 3d Dist. Ct. App. 1993), *sub nom.* Escobar v. Transportes Aereos Nacionales, S.A. (No. 90-23264), *rev. denied*, 632 So. 2d 1025 (Fla. 1994), *cert. denied*, 114 S. Ct. 2711 (1994).

73. See Advisory Opinion, *infra* Appendix A.

74. *Id.*

75. *Id.*

ages as well as moral damages. There exists no provision in the law referring to damages which limits them [damages] to strictly material damages, and that excludes moral damages.<sup>76</sup>

The opinion refers the reader to several cases decided by the *Corte Suprema de Justicia*. Though cases have little precedential value within the civil law tradition, they may be persuasive when several reach the same conclusion.<sup>77</sup> Unfortunately these cases offer little insight. Although they included requests for recovery of moral damages, only one case actually awarded such damages, but not for wrongful death. None of the opinions explained the reasoning for denying an award of moral damages. The Supreme Court never indicated that moral damages were not recoverable under Nicaraguan law; nor did the Court limit its decision to any particular factual situation.<sup>78</sup> The following discussion of the cases referred to in the Advisory Opinion further illustrates the difficulty of determining the law within the civil law tradition as it exists in Nicaragua.

In *Obando de Gomez v. Compañía Eléctrica de Granada*,<sup>79</sup> the intermediate appellate court awarded moral damages for negligence resulting in the electrocution of one of the plaintiffs.<sup>80</sup> In that case, the plaintiff recovering moral damages did so on an action for disfigurement. When the case was appealed to the Nicaraguan Supreme Court, the Court never specifically addressed the award of moral damages.<sup>81</sup> It should be noted, however, that another plaintiff suing for wrongful death never received moral damages, for reasons unstated.<sup>82</sup>

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76. *Id.*

In Spanish: "El Código Civil de Nicaragua en sus Artos. 2509 y siguientes establece la responsabilidad civil por daños y perjuicios en su totalidad, sin exclusión, es decir, que comprende tanto daños materiales como morales. No existe provisión alguna de la ley, al referirse a los daños y perjuicios que las limite a daños estrictamente materiales, que excluya los daños morales." *Id.*

77. MERRYMAN, *supra* note 42.

78. Advisory Opinion, *infra* Appendix A.

79. Judgment of Sept. 28, 1956, Corte Suprema de Justicia [Supreme Court], Bol. Jud. 18,234 (Nic.).

80. *Id.*

81. *Id.*

82. *Id.*



In *Burgos Chamorro v. Ferrocarril del Pacifico de Nicaragua*,<sup>83</sup> a consolidated action for injuries resulting from a railroad accident, the trial court simply stated that there are no moral damages, and the Supreme Court stated that the "claim for moral damages . . . is inadmissible."<sup>84</sup> In other cases referred to in the Advisory Opinion, the Nicaraguan Supreme Court either neglected to address the issue or dismissed the claims seeking such damages without any specific reference to moral damages.<sup>85</sup>

*D. The Authentic Interpretation by the Nicaraguan National Assembly*

Under Article 138 of the Nicaraguan Constitution, the *Asamblea Nacional* (National Assembly) has the power to "authentically interpret" the law of Nicaragua.<sup>86</sup> The doctrine of authentic interpretation finds its roots in Roman law. The Emperor Constantine first reserved for himself the power to interpret the law.<sup>87</sup> Under the rule of Justinian, only the Emperor could interpret the codes, and such interpretations had the "perfect force of law."<sup>88</sup>

Interpretation by a tribunal was based upon a delegation of the legislator's interpretive power to that court. Such interpretation was limited to the case in which it was rendered, thus preventing the tribunal from usurping the power. The doctrine that only the legislator could interpret the law gave the power of interpretation to the king of France prior to the French Revolution, and to the legislature after the Revolution.<sup>89</sup> When a disputed issue of law reached the *Cour de Cassation* for the third

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83. Judgment of Jan. 12, 1965, Corte Suprema de Justicia [Supreme Court], Bol. Jud. 8 (Nic.).

84. *Id.*

85. See Judgment of Apr. 2, 1968 (*Carazo Olivier v. Texaco Caribbean, Inc.*), Corte Suprema de Justicia [Supreme Court], Bol. Jud. 8 (Nic.); Judgment of Aug. 7, 1949 (*Renato Vivas v. Esso Standard Oil Co.*), Corte Suprema de Justicia [Supreme Court], Bol. Jud. 56 (Nic.).

86. NIC. CONST., art. 138(2).

87. *A Symposium on Legal and Political Hermeneutics: Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics, with Remarks on Precedents and Authorities, Note E: Authentic Interpretation*, 16 CARDOZO L. REV. 2069 (1995) [hereinafter *Symposium*].

88. *Id.* at 2070.

89. *Id.* at 2071-72.

time, the Court was directed to inform the legislature, which would then pass a declaratory resolution interpreting the law. This interpretive act constituted a new law interpreting an old law, and had retroactive effect.<sup>90</sup>

On March 23, 1993, Nicaragua's National Assembly responded to a request<sup>91</sup> for an authentic interpretation of the meaning of "damages" as it appears in Article 2509 of the Civil Code. The request was filed by Representative Reynaldo Antonio Tefel, *et al.* of the National Assembly "[f]or the purpose of dispelling erroneous interpretations which could give rise to unjust and contradictory judicial decisions to the harm of private parties . . . ."<sup>92</sup> The decree of the National Assembly states that:

Civil liability for damages referred to in Article 2509, *et seq.*, of the Civil Code . . . , in its entirety and without exception, encompasses both material as well as moral damages. There exists no provision in the law whatsoever which limits them to damages which are strictly material and excludes moral damages.<sup>93</sup>

As the legislature is the definitive source of law under the civil law tradition, and as the Authentic Interpretation is a law enacted by the legislature, the decree is authoritative.<sup>94</sup> Clearly the laws of Nicaragua currently provide for recovery of moral damages. However, the applicability of the Authentic Interpretation to *TAN-SAHSA v. de Brenes* is not as clear. Defendant TAN-SAHSA argued that the Authentic Interpretation actually expanded the damages recoverable under Article 2509, and therefore its application to the case *sub judice* would have constituted an impermissible retroactive law.<sup>95</sup> As the 1987 Consti-

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90. *Id.* at 2072.

91. Requests for authentic interpretations may come from the President of the Republic, the Supreme Court of Justice, the Supreme Electoral Council, or five members of the National Assembly. See Martha I. Morgan, *Founding Mothers: Women's Voices and Stories in the 1987 Nicaraguan Constitution*, 70 B.U. L. REV. 1, 47 n.192 (1990).

92. Appellant's Notice of Supplemental Authority at 2, *Transportes Aereos Nacionales, S.A.*, 625 So. 2d 4.

93. Authentic Interpretation, *infra* Appendix B.

94. See generally MERRYMAN, *supra* note 42.

95. Appellant's Notice of Supplemental Authority at 3, *Transportes Aereos Nacionales, S.A.*, 625 So. 2d 4.

tution prohibits the enactment of retroactive laws,<sup>96</sup> application of this expansive interpretation would not pass constitutional muster.

This issue is not easily resolved. The very name of the act seems to indicate that the National Assembly thought that it was interpreting existing law, rather than creating new law. Furthermore, the doctrine of Authentic Interpretation historically allowed for retroactive effect of an interpretive law.<sup>97</sup> However, as the law did not permit recovery of moral damages for a quasi-delict, the "interpretation" bears an uncanny resemblance to expansion of legal rights and liabilities. Additionally, the structure of the interpretive law more closely resembles that of a judicial opinion rather than a legislative enactment. Generally speaking, laws do not contain explanations or justifications in their text; any legislative history is separate from the law itself.

#### IV. FOREIGN LAW, U.S. COURTS, AND *TAN-SAHSA V. DE BRENES*

This case raises many interesting and complicated questions regarding the litigation of foreign legal claims in the U.S. The most compelling question, however, is who should have the final word on the meaning of Nicaraguan law. There are several legal doctrines and tools used in addressing foreign law when it appears in U.S. courts, many of which were neglected by the Third District Court of Appeal.

##### A. *Judicial Notice of Foreign Law*

Since the introduction of Rule 44.1 of the Federal Rules of Civil Procedure, foreign law has been a matter of law for the determination of a judge in the federal courts.<sup>98</sup> Trial court decisions on a question of foreign law will be subjected to plenary review by appellate courts, and decisions of courts in the U.S. on matters of foreign law have precedential value.<sup>99</sup>

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96. NIC. CONST., art. 38.

97. *Symposium*, *supra* note 87, at 2072.

98. FED. R. CIV. P. 44.1.

99. The Notes by the Advisory Committee on the Adoption of Federal Rule 44.1 indicate that the intent of the sentence, "[t]he court's determination shall be treated

This significantly altered the common law approach, under which foreign law was a matter of fact to be pled and proven by the parties.<sup>100</sup> Rule 44.1 provides that the court "may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence."<sup>101</sup> The Restatement (Second) Conflicts of Law indicates that the local law of the forum determines the manner for addressing foreign law.<sup>102</sup> Since the adoption of the Uniform Judicial Notice of Foreign Laws Act,<sup>103</sup> which has been superseded by Florida Statute Section 90.202,<sup>104</sup> Florida has turned away from the common law approach. The revised Florida Evidence Code provides that a Florida court may take judicial notice of the laws of foreign nations.<sup>105</sup> Thus the interpretation of foreign law becomes a question of law, to be determined by the court.<sup>106</sup>

Under Section 90.202, Florida courts treat foreign law much as federal courts do under Rule 44.1 of the Federal Rules of Civil

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as a ruling on a question of law," was to enable appellate courts to review such rulings *de novo*, thus removing the "clearly erroneous" standard of review imposed on determinations of fact by Fed. R. Civ. P. 52(a). *Id.*; see also WILLIAM B. STERN, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CAL. L. REV. 23 (1957).

100. Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602 (1975).

101. FED. R. CIV. P. 44.1.

102. RESTATEMENT (SECOND) CONFLICT OF LAWS § 136 (1971).

103. FLA. STAT. § 92.031, repealed by Laws 1976, ch. 76-237, § 2.

104. *Id.*

105. *Id.*

106. FLA. STAT. § 90.202 (1993), Law Revision Council Note (1976). Perhaps the tort case of *Walton v. American Arabian Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956), best illustrates some of the problems experienced under the common law regime. In that case, the Second Circuit found that the conflict of law rules of the State of New York followed the principle of *lex loci delicti commissi*. Since the location of the injury was Saudi Arabia, and the plaintiff failed to plead and prove Saudi law, the case was dismissed for failure to prove all elements of the cause of action. Even though New York law permitted judicial notice of foreign law at the time, the court held that the party seeking to rely on that law must provide notice of their intent to rely upon the foreign law, and proof of the content of the relevant portions of the foreign law. As the plaintiff was an Arkansas resident who was merely visiting Saudi Arabia when injured, he had relatively little knowledge of Saudi law. The defendant, on the other hand, was an oil company with extensive contacts with Saudi Arabia and extensive experience with Saudi law. Thus the court reached an unjust result that could have been avoided by taking notice of Saudi law *sua sponte*, or by requiring American Arabian Oil Company to provide the necessary information. *Id.*

Procedure.<sup>107</sup> The party seeking to rely upon foreign law must provide sufficient notice of the intent to invoke foreign law,<sup>108</sup> and must plead it in order to obtain judicial notice.<sup>109</sup> Parties may provide evidence of foreign law to aid the court through the use of expert witnesses, documentary evidence, official reporters and other officially recognized sources.<sup>110</sup> Florida courts have broad discretion as to what sources they may consider in determining foreign law. Florida statute Section 90.204 provides that the courts may use "any source of pertinent and reliable information, whether or not furnished by a party, without regard to any exclusionary rule except a valid claim of privilege."<sup>111</sup> The statute also provides that the parties must be afforded the opportunity to challenge the information.<sup>112</sup>

In the absence of sufficient information about the foreign law or a request to take judicial notice thereof, Florida courts may presume that the foreign law in question is the same as that of the forum.<sup>113</sup> Florida law additionally provides that the court may be compelled to take judicial notice of foreign law where a party requests it do so. In this circumstance, that party must provide notice to the adverse party along with sufficient information to enable the court to take judicial notice of the foreign law.<sup>114</sup> In any case, should the court find that the parties have not provided sufficient evidence of the foreign law, the court is not required to take judicial notice.<sup>115</sup>

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107. *Charter Crude Oil Co. v. Petroleos Mexicanos*, 93 Bankr. Rep. 286, 289 (M.D. Fla. 1988).

108. *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955).

109. Robert A. Jefferies, Jr., *Recognition of Foreign Law by American Courts*, 35 U. CIN. L. REV. 578, 614 (1966).

110. STERN, *supra* note 99. See also *Application of Chase Manhattan Bank*, 191 F. Supp. 206, 209 (S.D.N.Y. 1961).

111. FLA. STAT. § 90.204(2) (1993).

112. *Id.* § 90.204(3).

113. See *id.* § 90.202, sponsor's note (1993); *Charter Crude Oil Co. v. Petroleos Mexicanos*, 93 Bankr. Rep. 286 (M.D. Fla. 1988); *Ganem v. Ganem de Issa*, 269 So. 2d 740 (Fla. 3d Dist. Ct. App. 1972).

114. FLA. STAT. § 90.203 (1993).

115. *Id.* Florida choice of law doctrine prescribes that parties must provide evidence of the foreign law upon which they seek to rely. Failure to do so may result in the court assuming that the foreign law is identical to that of the forum. *Aboandandolo v. Vonella*, 88 So. 2d 282 (Fla. 1956); *Kingston v. Quimby*, 80 So. 2d 455 (Fla. 1955); *Aetna Casualty & Surety Co. v. Ciarrochi*, 573 So. 2d 990 (Fla. 3d Dist. Ct. App. 1991).

Judicial notice statutes allow a court to investigate foreign law *sua sponte*; the court does not have to rely upon representations of the parties to determine the meaning and content of foreign law.<sup>116</sup> However, practice has shown that as most courts lack access to and experience with foreign law, they look to the parties to provide the necessary information and interpretations of the law in question.<sup>117</sup>

*B. Judicial Notice and TAN-SAHSA v. de Brenes*

The Third District Court of Appeal clearly took judicial notice of Nicaraguan law. The court studied several provisions of the law and announced its interpretation in its opinion. Given the court's failure to mention the Advisory Opinion or Authentic Interpretation, the court probably did not take judicial notice of those acts, despite requests from the plaintiffs to do so.<sup>118</sup>

Generally, an official declaration of foreign law, emanating from a governmental source, suffices as proof of that foreign law where the parties seek judicial notice by a U.S. court.<sup>119</sup> In *TAN-SAHSA*, the Advisory Opinion and Authentic Interpretation comprised two such declarations.

Some scholars question reliance on such potentially partial declarations. In cases where the foreign state or entity is a party in U.S. courts, a declaration of foreign law may be self-serving and thus less reliable.<sup>120</sup> Here, though not a party, the interest of the Nicaraguan government possibly lay in increasing the recovery of its citizens, as such a sum would undoubtedly affect the Nicaraguan economy. The timing of the two actions in relation to the progress of the Florida litigation certainly brings motivation into question.

Notwithstanding the foregoing, these declarations constitute the law of Nicaragua,<sup>121</sup> and as such there is a benefit to be

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116. FLA. STAT. § 90.202 (1993); FED. R. CIV. P. 44.1.

117. See Alexander, *supra* note 100.

118. See Appellees' Motion for Rehearing, *supra* note 15.

119. See, e.g., FED. R. CIV. P. 44(a)(2).

120. Walter A. Rafalko, *Pleading, Proving and Obtaining Information on Foreign Law*, 43 U. DET. L. REV. 95, 97 (1965); Jefferies, *supra* note 109, at 597.

121. Though the weight of authority accorded the Advisory Opinion may be de-

derived from their use as authoritative sources of Nicaraguan law. As such, the declarations from the judicial and legislative branches of the Nicaraguan Government merited consideration by the Court.

### C. Comity

An alternate method of dealing with foreign law in U.S. courts is the modern doctrine of comity. By use of this doctrine, U.S. courts may extend full recognition to the acts of a foreign executive, legislature, or judiciary. The early case of *Hilton v. Guyot*<sup>122</sup> describes comity in detail:

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends on what our greatest jurists have been content to call 'the comity of nations.'<sup>123</sup>

Courts extend comity to the judicial or legislative acts of foreign sovereigns "not as a matter of obligation, but out of deference and mutual respect."<sup>124</sup> Comity will generally be extended where no interest of the forum would be injured by giving effect to the foreign act.<sup>125</sup>

Certain requirements must be met before a U.S. court will extend comity to the judicial orders and judgments of a foreign court. Generally, a foreign judgment must have been rendered by a court with jurisdiction, in a proceeding where all concerned had adequate notice, and where there was no evidence of fraud or deceit.<sup>126</sup> Recognition of a decision from a foreign court

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bated, the Authentic Interpretation clearly constitutes a duly enacted law with undisputed authority. As discussed earlier, there is some question as to the nature of that law; if it was merely an interpretation, then it applies to the case *sub judice*. On the other hand, if the National Assembly expanded the damages recoverable under Nicaraguan law, then the Authentic Interpretation has only prospective effect, and does not bear on this case.

122. 159 U.S. 113 (1895).

123. *Id.* at 163.

124. BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

125. *Hilton*, 159 U.S. at 164.

126. *Id.* at 166-67.

through comity makes that decision *res judicata* as to the forum jurisdiction.<sup>127</sup> As a general rule, U.S. courts seek to ensure that a foreign judgment withstands a due process inquiry before extending recognition.<sup>128</sup>

Although the U.S. Constitution requires that state courts extend full faith and credit to the judgments of a sister state's courts,<sup>129</sup> this requirement does not apply between a court in the U.S. and a court of a foreign nation.<sup>130</sup> Thus, U.S. courts recognize and enforce foreign acts out of courtesy rather than obligation.

In *Herron v. Passailaigue*,<sup>131</sup> the Florida Supreme Court established the modern doctrine of comity in Florida. In discussing the doctrine, the Court remarked as follows:

The comity of nations cannot be recognized as capricious — as depending upon arbitrary whims or tyrannic impulses. It has grown into a system whose sanctions are reason, religion, and the common interests of all, for the violation of which states are amenable to the public sentiment of the world. The rules admitted by civilized states upon this subject are founded not only in convenience, but in necessity; without them, commerce could not exist between the states . . . . The whole system of agencies, purchases and sales, mutual credits, and transfers of negotiable instruments depends upon the *jus gentium*. In fact, nothing so much distinguishes civilized from savage states as this comity of the nations.<sup>132</sup>

In *Herron*, the court decided that comity was properly extended in cases of marriage and divorce.<sup>133</sup> This doctrine sur-

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127. *Id.*

128. *Id.* See also *Cardenas v. de Solis*, 570 So. 2d 996, 998 (Fla. 3d Dist. Ct. App. 1990).

129. U.S. CONST., art. IV, § 1. It should be noted that judgments of courts of sister states may be challenged on the basis of due process. The jurisdiction in which enforcement is sought may refuse to enforce a judgment where the affected party was not accorded due process. However, the potential for challenging a judgment of a sister state ends there. See *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981); *Thompson v. Whitman*, 85 U.S. 457 (1873); *Herron v. Passailaigue*, 110 So. 539 (Fla. 1926).

130. *Aetna Life Ins. Co. v. Tremblay*, 223 U.S. 185, 190 (1912).

131. 110 So. 539 (Fla. 1926).

132. *Id.* at 544 (citing *Cox v. Adams*, 2 Ga. 158 (1847)).

133. *Id.* at 544.



vives today.<sup>134</sup> In Florida, courts may grant comity to judgments of foreign courts, but usually do so only in the case of final orders.<sup>135</sup> Generally, however, Florida will grant comity to foreign judgments unless there exists a paramount public policy to the contrary.<sup>136</sup>

There are, however, several Florida cases which extend comity to non-final orders of foreign courts. In *Belle Island Investment Co., Ltd. v. Feingold*,<sup>137</sup> the Third District Court of Appeal extended comity to an order of St. Vincent and the Grenadines,<sup>138</sup> appointing a private receiver for Belle Island Investment and granting a temporary injunction to prevent the officers of the company from disposing of partnership assets.<sup>139</sup>

The Third District Court of Appeal also extended comity to foreign interlocutory judicial acts in *Cardenas v. de Solis*.<sup>140</sup> In that case, the Third District Court of Appeal upheld a temporary injunction freezing assets in a Dade County bank. The circuit court entered the injunction at the request of a Guatemalan court which had a domestic relations case pending before it.<sup>141</sup>

The Third District Court of Appeal recently indicated that it remains amenable to extending comity to foreign interlocutory orders in *Nahar v. Nahar*.<sup>142</sup> The court upheld an order extending comity to a non-final order of the Hague.<sup>143</sup> The Third Dis-

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134. See, e.g., *Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604 (Fla. 1953); *Ogden v. Ogden*, 33 So. 2d 870 (Fla. 1947); *Belle Island Inv. Co., Ltd. v. Feingold*, 453 So. 2d 1143 (Fla. 3d Dist. Ct. App. 1984).

135. *Cardenas v. de Solis*, 570 So. 2d 996 (Fla. 3d Dist. Ct. App. 1990).

136. *Belle Island Inv. Co., Ltd. v. Feingold*, 453 So. 2d 1143 (Fla. 3d Dist. Ct. App. 1984).

137. *Id.*

138. An independent state within the British Commonwealth. *Id.* at 1143.

139. *Id.*

140. 570 So. 2d 996 (Fla. 3d Dist. Ct. App. 1990).

141. The court acknowledged the general rule against granting comity to non-final orders of foreign courts, explaining that it would be an "undue burden for American courts to become entangled in the otherwise unfamiliar intricacies of foreign court practice by recognizing or enforcing the temporary court orders of another country, orders which are subject to being vacated, withdrawn, or superseded." *Id.* The court also indicated, however, that there is a particular public policy interest in granting comity to non-final orders which seek to protect a spouse or child in a domestic relations suit or seek to protect a creditor in collecting on a valid debt. *Id.*

142. 656 So. 2d 225 (Fla. 3d Dist. Ct. App. 1995).

143. The case involved a suit brought by six adult children to enforce an antenuptial agreement between their father and his second wife. The agreement provided that no community property would exist between the parties. At the time of dece-

strict Court of Appeal decided the case on the basis of the Restatement (Second) Conflict of Laws, Section 98. The court wrote,

[a]s used in the Restatement of this Subject, "judgment" is a general term which includes not only judgments at law but also the orders, injunctions or decrees of equity and the judgments of probate courts, admiralty courts and other special courts . . . ." Consequently, it appears that any foreign decree should be entitled to comity, where the parties have been given notice and the opportunity to be heard, where the foreign court had original jurisdiction and where the foreign decree does not offend the public policy of the State of Florida.<sup>144</sup>

Recognition and enforcement will also be extended through the doctrine to foreign legislative acts. Often a forum court applies the substantive provisions of a foreign law to a cause of action before that court through the extension of comity. Generally, the question of extending comity to legislative acts of a foreign jurisdiction arises where a forum must determine whether to apply its law or that of another jurisdiction to an action pending before it.<sup>145</sup> Where a potentially applicable foreign law conflicts with the law of the forum, the choice-of-law analysis should seek to reconcile the central policy consider-

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dent Roebi Nahar's death, he was living in Miami with his second wife, Glenda, and their three dependent children. His six adult children lived in Aruba, Netherlands Antilles. Roebi Nahar died intestate in Miami, and within nine days of his death, Glenda effectively closed five of Roebi's six Dade County, Florida bank accounts. The six adult children petitioned the court of first instance (in Aruba) to have Roebi's Aruban properties and Dade bank accounts administered under the law of the Netherlands Antilles. Glenda appeared to challenge the petition, and the court ruled in favor of the six adult children. Glenda appealed to the Court of Cassation of the Netherlands, commonly known as the Hague, and lost. The Court of Cassation declared that Dutch law, rather than Florida law, controlled in a suit to settle the decedent's estate. The Florida trial court ruled the Hague decision *res judicata* and granted summary judgment in favor of the six adult children. On appeal to the Third District, the trial court order extending comity to the Hague decision was affirmed. *Id.* For a criticism of the Third District's resolution of *Nahar*, see Andrew Reiss, Note, *The Impact of Nahar v. Nahar on Comity in Florida: It's Just Not Funny Anymore*, 27 U. MIAMI INTER-AM. L. REV. 203 (1995).

144. *Nahar*, 656 So. 2d at 229 (citations omitted).

145. *Societe Nationale Industrielle Aerospatiale et al. v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 482 U.S. 522, 555 (1987).

ations underlying both laws.<sup>146</sup> Such analysis should consider the foreign interests, the interests of the forum jurisdiction, and the "mutual interests of all nations in a smoothly functioning international legal regime."<sup>147</sup> Where a foreign jurisdiction's law could apply to an action, the forum will consider which jurisdiction's policy interests will be advanced more by the application of their law. Typically, a forum will apply a conflicting foreign law so long as that law does not contravene a clear policy of the forum jurisdiction.<sup>148</sup>

In the early case of *Canada Southern Railroad Company v. Gebhard*,<sup>149</sup> the U.S. Supreme Court gave effect to a Canadian bankruptcy law that conflicted with the U.S. principle of freedom of contract. The Court determined that the U.S. citizens had entered into a contract with an entity governed by foreign law, and that they "impliedly subject[ed] [themselves] to such laws of the foreign government."<sup>150</sup> Florida courts have applied foreign law to contract disputes where the contract entered into force under the laws of a foreign jurisdiction.<sup>151</sup> In fact, Florida courts must apply the law of a foreign jurisdiction applicable under the forum's choice of law rules<sup>152</sup> unless that law contra-

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146. *Id.*

147. *Id.* The Court further explained:

Choice-of-law decisions similarly reflect the needs of the system as a whole as well as the concerns of the forums with an interest in the controversy. "Probably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and of the community of states."

*Id.* note 11 (citing RESTATEMENT (SECOND) CONFLICT OF LAWS, §6, cmt. d, p. 13 (1971)).

148. *See id.*; *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981).

149. 109 U.S. 527 (1883).

150. *Id.*

151. *See Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981) (upholding a "choice of law provision designating foreign law in an interstate loan contract which calls for interest prohibited as usury under Florida law but supportable under the chosen foreign law."); *In Re Estate of Santos*, 648 So. 2d 277 (Fla. 4th Dist. Ct. App. 1995) (applying law of New York to enforce contractual provisions that would be usurious under Florida law).

152. Florida has adopted the rational significant relationships test, as set forth in the Restatement (Second) Conflicts of Law, Sections 145-46 (1971) to determine the applicable law where there exists a conflict between the law of the forum and a

venes a clear public policy of the state.<sup>153</sup> Florida courts consider the interest of the foreign sovereign in determining whether an extension of comity is proper.<sup>154</sup>

In *Kroitoro v. Chase Manhattan Bank, N.A.*,<sup>155</sup> the court applied Panamanian bankruptcy law to a suit brought by a Panamanian debtor against his U.S. trustee in bankruptcy. The court found that the bankruptcy laws of Panama, though different from those of the United States, did not offend any policy of the U.S. or the state of Florida and therefore principles of comity suggested application of the foreign law.<sup>156</sup>

#### D. Comity and *TAN-SAHSA v. de Brenes*

The Third District Court of Appeal could have recognized the acts of the Nicaraguan Supreme Court and National Assembly through the doctrine of comity. However, the Advisory Opinion of the Nicaraguan Supreme Court is neither a final judgment nor a non-final order, removing it from the most common ways in which the doctrine is employed as to foreign judicial acts. The U.S. Supreme Court established that comity should be extended where no interest of the forum would suffer as a result of its extension.<sup>157</sup> In *TAN-SAHSA v. de Brenes*, the interest of the forum may be served by extending comity to the Advisory Opinion. Given the difficulty of interpreting the codes and laws of Nicaragua, the Advisory Opinion may have proved useful in assisting the court in its resolution of the case, as it offers a clear, unambiguous interpretation of Nicaraguan damages law.

This informative character, however, does not account for the missing jurisdictional and representational aspects of the Advisory Opinion. Florida courts will not grant comity to a judicial act where the parties did not have notice and opportunity to

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foreign law. Under that approach, the place of the wrong is no longer determinative. See *State Farm Mutual Automobile Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981).

153. *Brown & Root, Inc. v. Ring Power Corp.*, 450 So. 2d 1245 (Fla. 5th Dist. Ct. App. 1984).

154. *Gustafson v. Jenson*, 515 So. 2d 1298 (Fla. 3d Dist. Ct. App. 1987).

155. 522 So. 2d 1061 (Fla. 3d Dist. Ct. App. 1988).

156. *Id.*; see also *Wilkinson v. Manpower, Inc.* 531 F.2d 712, 715 (5th Cir. 1976).

157. *Hilton v. Guyot*, 159 U.S. 113, 164 (1895).

be heard.<sup>158</sup> Even under the broadened notion of comity as stated in *Nahar v. Nahar*,<sup>159</sup> the Supreme Court of Nicaragua still lacked original jurisdiction over the matter. Additionally it is unlikely that the parties had notice and opportunity to be heard, a procedural necessity for the extension of comity.<sup>160</sup>

The Third District Court of Appeal could have granted recognition to the Authentic Interpretation without concern for the jurisdictional and notice problems associated with the Advisory Opinion. Florida has a clear policy of extending comity to applicable foreign law where such extension would not interfere with the public policy of Florida.<sup>161</sup>

In *TAN-SAHSA v. de Brenes*, the Authentic Interpretation constitutes a clear legal expression of Nicaraguan damage law, by which the parties agreed to be bound. There is harmony between the Florida wrongful death statute and the damage policy underlying the Authentic Interpretation.<sup>162</sup> In fact, the Florida Supreme Court indicated in *Hopkins v. Lockheed Aircraft Corp.*<sup>163</sup> that Florida's policy on wrongful death disfavors enforcement of foreign statutory damage limitations in wrongful death actions.<sup>164</sup> In that case, the Court declined to enforce the *lex loci delicti*, Illinois wrongful death limitation, because it was contrary to Florida public policy.<sup>165</sup>

Conversely, there is an apparent tension between the issuance of the Authentic Interpretation and the general U.S. policy of prohibiting the legislature from "prescrib[ing] rules of decision" in cases pending before the courts.<sup>166</sup> The Authentic In-

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158. *Nahar*, 656 So. 2d at 229.

159. *Id.* at 225.

160. *Hilton v. Guyot*, 159 U.S. at 166-67.

161. See *Continental Mortgage Investors v. Sailboat Key, Inc.*, 395 So. 2d 507 (Fla. 1981); *State Farm Mutual Automobile Ins. Co. v. Olsen*, 406 So. 2d 1109 (Fla. 1981); *Hopkins v. Lockheed Aircraft Corp.*, 201 So. 2d 743 (Fla. 1967); *Kroitiro v. Chase Manhattan Bank, N.A.*, 522 So. 2d 1061 (Fla. 3d Dist. Ct. App. 1988); *Gustafson v. Jensen*, 515 So. 2d 1298 (Fla. 3d Dist. Ct. App. 1987); *Wilkinson v. Manpower, Inc.*, 531 F.2d 712 (5th Cir. 1976).

162. FLA. STAT. § 768.19 (1995).

163. 201 So. 2d 743 (Fla. 1967).

164. *Id.*

165. *Id.* at 747.

166. *Memorial Hosp. v. Heckler*, 706 F.2d 1130, 1137 (11th Cir. 1983) (citing *U.S. v. Klein*, 80 U.S. (13 Wall.) 128 (1872)). See also *U.S. v. Rojas*, 53 F.3d 1212 (11th Cir. 1995). There is also a policy prohibiting the legislature from commanding the judiciary to reopen final judgments, as such a command would interfere with

terpretation could thus be perceived as an improper attempt to dictate the outcome of the appeal pending before the Third District Court of Appeal.

Another contrasting policy compels a court to apply a new law which intervenes between judgment and appeal.<sup>167</sup> If the Authentic Interpretation was issued to clarify an ambiguity in Nicaraguan damage law revealed by the Third District Court of Appeal's analysis, then it constituted an intervening law which the Court would have to apply under general principles of U.S. jurisprudence and comity. If, however, the Authentic Interpretation was an improper attempt to dictate the outcome of the appeal, then principles of U.S. jurisprudence clearly prohibit the recognition and enforcement of that law.

### *E. The Act of State Doctrine*

The act of state doctrine as established in *Underhill v. Hernandez*,<sup>168</sup> comprehends that the "courts of one country will not sit in judgment on the acts of another, done within its own territory."<sup>169</sup> The U.S. Supreme Court established that the proper redress for acts of a foreign sovereign lies with the political branches of the U.S. government.<sup>170</sup> This doctrine was expanded in a line of cases dealing mostly with the expropriation of property.<sup>171</sup> The fundamental notion of the doctrine appears

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judicial independence. *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995).

167. *Memorial Hosp.*, 706 F.2d at 1137 ("Until appellate rights are exhausted, even an otherwise valid judgment may be negated by supervening legislation."); *American Int'l Group, Inc. v. Pfizer, Inc.*, 657 F.2d 430, 442 (citing *U.S. v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103) ("[I]f subsequent to the judgment and before the decision of the appellate court a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied."); *DeRodulfa v. U.S.*, 461 F.2d 1240, 1250 (D.C. Cir. 1972) ("but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."); see also *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 795 (1947) (modifying *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947) (on June 16, 1947, the Supreme Court remanded the case originally decided on May 5, 1947, to the District Court for consideration of issues raised by the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-263, approved May 14, 1947).

168. 168 U.S. 250 (1897).

169. *Id.*

170. *Id.*

171. See *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682

## in the Restatement (Third) Foreign Relations Law:

In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there.<sup>172</sup>

The application of this principle to the case under consideration would effectively bar a U.S. court from considering the motives of the Supreme Court and National Assembly of Nicaragua in promulgating their respective acts. There may be a question as to the applicability of this federal common law doctrine to the courts of the several states. However, the Supreme Court in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*<sup>173</sup> indicated that the states were in fact bound: "The act of state doctrine is not some vague doctrine of abstention but a 'principle of decision binding on federal and state courts alike.'<sup>174</sup> Justice Scalia, writing for the court, continued, "[a]ct of state issues only arise when a court must decide — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign."<sup>175</sup> The outcome in *TAN-SAHSA v. de Brenes* certainly turned upon the validity of the Nicaraguan government's acts, for if valid, they indicate that moral damages were recoverable under Nicaraguan law and the plaintiffs were thus entitled to an additional three million dollars.

The act of state doctrine operates in conjunction with comity, in a sense forcing the U.S. court to give effect to the acts of the Nicaraguan sovereign.<sup>176</sup> It extends to intangible property, even though the situs of that property may be difficult to ascertain.<sup>177</sup>

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(1976); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

172. RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 443(1) (1986).

173. 493 U.S. 400 (1990).

174. *Id.* at 406 (citing *Sabbatino*, 376 U.S. at 427).

175. *Id.* at 406.

176. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW, *supra* note 172, reporter's note 1.

177. *Id.* reporter's note 4.

A concurrent principle, known as the public judgments doctrine,<sup>178</sup> may preclude giving effect to the Advisory Opinion.<sup>179</sup> This doctrine reflects the general unwillingness of U.S. courts to give effect to public law judgments<sup>180</sup> of foreign courts.<sup>181</sup> The doctrine also results from a reluctance to scrutinize the judicial acts of a foreign sovereign. Under the public judgments doctrine, as contrasted with the act of state doctrine, the reluctance to scrutinize usually results in nonrecognition of the foreign judicial act.<sup>182</sup> Neither the act of state doctrine nor the public judgments doctrine would preclude a U.S. court from giving effect to the Authentic Interpretation.

#### F. Certification of Questions of Law

Since the landmark *Erie Railroad v. Tompkins*,<sup>183</sup> federal courts have frequently been compelled to resolve issues by applying the law of the state in which they sit. In cases involving an unsettled or unclear issue of state law, federal courts have relied upon the abstention doctrine to avoid answering a question.<sup>184</sup> Under this doctrine, litigants would then file for a declaratory judgment in state court, appeal to the supreme court in that jurisdiction, and then return to the federal court where they originally filed.<sup>185</sup> The Uniform Certification of Questions of Law Act of 1967 enables federal courts to certify determinative questions of state law to that state's supreme court.<sup>186</sup> Florida recognizes this procedure<sup>187</sup> and permits a court to cer-

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178. *Id.* reporter's note 10.

179. *Id.*

180. These generally deal with penal, fiscal or other public law matters. *See id.*

181. *Id.* reporter's note 10.

182. *Id.*

183. 304 U.S. 64 (1938).

184. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941); *Ex Parte Young*, 209 U.S. 123 (1908); *United Serv. Life Ins. Co. v. Delaney*, 328 F.2d 483, 484-85 (5th Cir.) (en banc), *cert. denied*, 377 U.S. 935 (1964).

185. *See Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).

186. UNIF. CERT. QUESTIONS OF LAW ACT § 1, 12 U.L.A. 52 (1967). For a discussion of certification generally, see John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411 (1988); Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717 (1969).

187. FLA. R. APP. P. 9.150; *Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735 (1961).



tify a question either *sua sponte* or by motion of a party.<sup>188</sup> Once the question has been certified, the parties then submit briefs on their positions to the deciding state court.<sup>189</sup>

Perhaps it would have been possible for the Third District Court of Appeal to certify the question of whether moral damages may be recovered under Nicaraguan law to the courts of Nicaragua. This would allow the parties to file briefs arguing their positions as well as providing an authoritative ruling on a disputed aspect of Nicaraguan law. This would have resulted in an Advisory Opinion issued upon consideration of the arguments and interpretations of both parties. Such a procedure tends to allay the fears of most courts granting comity to foreign decisions as the parties would be granted both notice and an opportunity to be heard.<sup>190</sup>

Some critics of the certification procedure frown upon the issuance of advisory opinions; others point to difficulty in properly formulating the question.<sup>191</sup> Furthermore, practical difficulties U.S. courts encounter in dealing with alien law would make an international certification process difficult to manage. Such problems include language barriers,<sup>192</sup> differences in legal traditions,<sup>193</sup> and limited access to foreign legal materials.<sup>194</sup> It is less practical for a U.S. court to await a decision by a foreign court on an unsettled aspect of law than for a federal court to await a state court ruling. In the international context, U.S. courts lack the constitutional and federalist incentives to respect the role of foreign law and foreign legal institutions. Yet many of these reasons also justify a policy of deferring to the determinations made by the legal institutions that are created by the law they interpret. *TAN-SAHSA v. de Brenes* exemplifies this problem, and indicates that perhaps the courts of Florida should look to the legislature and courts of Nicaragua as the true experts on Nicaraguan law.

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188. FLA. R. APP. P. 9.150(a).

189. *Id.*

190. See *Nahar v. Nahar*, 656 So. 2d 225 (Fla. 3d Dist. Ct. App. 1995).

191. *Corr & Robbins*, *supra* note 186, at 423.

192. John C. McKenzie & Antonio Rosas Sarabia, *The Pleading and Proof of Alien Law*, 30 TUL. L. REV. 353 (1956).

193. For a discussion of the difference between the common law and civil law traditions, see MERRYMAN, *supra* note 42.

194. STERN, *supra* note 99.

## V. CONCLUSION

*TAN-SAHSA v. de Brenes* presented a unique combination of political and legal issues, which made it an unusually complicated case. Even the most basic understanding of Nicaraguan law proved daunting. Aside from the obvious language barrier, relatively few common law attorneys fully comprehend the civil law foundation of the Nicaraguan legal system. Unfortunately, the court did not address the case to the fullest extent possible, making it difficult to criticize its legal reasoning. In its very brief opinion, the court took judicial notice of Nicaraguan law and decided that moral damages were not recoverable under Article 2509 of the Civil Code. There was no indication of the extent to which the court researched Nicaraguan law beyond the information presented by the parties. The court gave no indication as to whether it was troubled by the Advisory Opinion or Authentic Interpretation. The paucity of explanation in the opinion probably makes this decision a poor precedent for future cases.

Perhaps the timing of the pronouncements emanating from the Nicaraguan institutions caused the court to consider their reliability suspect. It is quite possible that the Nicaraguan Supreme Court and National Assembly acted to influence the outcome of pending litigation. It may also be that the court's failure to address the legal declarations was a thinly-veiled attempt to avoid a consideration of their validity altogether. If the court had taken up the issue of the motivation behind the Nicaraguan acts, it would have been required to decide the issue in a published opinion. This would have left the court in the awkward position of either giving effect to the potentially questionable acts of a foreign sovereign or explaining in writing that it did not find such acts trustworthy. This is certainly an unenviable position, given the foreign policy ramifications of such a determination.

However, notions of comity and self-determination require a U.S. court to respect a foreign country's right to determine its own laws. In *TAN-SAHSA v. de Brenes*, the court's silence as to the Advisory Opinion and Authentic Interpretation effectively denied Nicaragua the right of legal self-determination. Though

the proclamations may have been suspect, U.S. courts are not the proper forum for determination of that issue. Had the Third District Court of Appeal viewed the Authentic Interpretation as an impermissible attempt to dictate the outcome of a pending case, the Court should have clearly articulated the *U.S. v. Klein* policy of judicial independence and declined recognition on the basis of public policy. At minimum, such treatment would leave no room for interpreting that the Court considered itself more qualified to determine Nicaragua's laws than that nation's own legal institutions. Respect for a nation's legal institutions and laws provides the foundation of the relationship between two nation-states. This principle must also guide the courts as they consider issues of foreign law, foreign politics, and foreign litigants.

WILLIAM H. WHITE, JR.\*

## VI. APPENDIX A\*\*

### ADVISORY OPINION OF THE NICARAGUAN SUPREME COURT OF JUSTICE, OCT. 5, 1993

#### CERTIFICATE

The undersigned Secretary of the Honorable Supreme Court of Justice hereby certifies the inquiry included herein and says verbatim the following:

Managua, October 5, 1992. Doctor Germán Vasquez C., Chief Judge of the Criminal Court. Managua. Dear Judge Vasquez.

In a letter dated 8-20-92, you inquire as to the following: "Whether under the laws of Nicaragua only material damages are recoverable, or if moral damages are also, in accordance with

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\* J.D. Candidate, 1996, University of Miami School of Law. The author would like to thank Professor Keith S. Rosenn for his guidance and criticism; Professor Bernard H. Oxman for his advice; Felicity A. McGrath for her patience and encouragement; and William H. White and Ann B. White for their love and support.

\*\* The appendices are provided for the reader's convenience. All translations are by the author; the original Spanish is reproduced verbatim.

Article 46 of the Penal Code. And with the end of determining who may claim indemnification for such damages, whether it is understood that this right corresponds with the people that have the right to ask for support from the injured, in accordance with the Civil Code, pursuant to the precepts in Article 48 of the Penal Code and Article 288 of the Civil Code.”

I have received instructions from the Judges of the Supreme Court of Justice to respond in the following manner:

The Civil Code of Nicaragua, in Articles 2509, *et seq.*, establishes civil liability for damages in their totality, without exclusion, which is to say that it encompasses material damages as well as moral damages. There exists no provision in the law referring to damages which limits them to strictly material damages, and that excludes moral damages. For a more in-depth explanation of this subject, see judgment date 9-28-1956, case Obando vs. Cía. Eléctrica de Granada, and judgment date 8-12-1965, case Burgos Chamorro vs. Ferrocarril del Pacífico de Nicaragua.

The Nicaraguan Civil Code, in the chapter referring to delicts and quasi-delicts, establishes civil liability for damages caused by a punishable act, and in Article 3106 C.Civ. it says that civil liability for a public transportation accident will always be governed by the Criminal Code.

Article 2 of the Penal Code sets out as punishable, the act described and punished by law, caused by imprudence, lack of skill, negligence or violation of laws or regulations; and that any person criminally liable is also civilly liable. (Article 34 C.Pen.).

The Penal Code of Nicaragua, in the chapter on Rules to determine Civil Liability, in Article 46, requires the payment of material and moral damages caused by a punishable act. Material and moral damages may be demanded pursuant to Articles 46 and 48 of the Penal Code, by those people that have a right to demand food according to Article 288 of the Civil Code.

Article 10, C. Pen., indicates that a damaging act or omission by an agent for whose actions a person is responsible, by virtue of a civil relationship binding him to such agent, constitutes a quasi-delict. Civil liability proceeding from a quasi-delict is not extinguished as a consequence of a dismissal of the crimi-

nal liability of an agent. Said civil liability may be attributed [to the principal for] material damages as well as moral damages. See the cases of Engracia Martinez vs. Rafael Cabrera & Co., judgment date 12-21-1957; Vivas vs. Esso Standard Oil, judgment date 8-17-1949; Cuadra Mendoza vs. Camilo Barberena Deshon & Co., judgment date 12-9-1969.

This is in reply to your inquiry. Alfonso Valle Pastora. Secretary. Supreme Court of Justice.

Let it also be recorded that the judgment issued by the Supreme Court of Justice, in this case, does not contain a dissenting vote because the opinion was issued by unanimous vote of all the Magistrates, Judges Orlando Trejos Somarriba, Orlando Corrales Mejía, Rafael Chamorro Mora, Ramón Romero Alonso, Alba Luz Ramos Vanegas, Rodrigo Reyes Portocarrero, Enrique Villagra Morales, Santiago Rivas Haslam, Adrian Valdivia Rodríguez.

At the request of Doctor Alvaro Ramirez Gonzalez, this was issued in the City of Managua, on the ninth day of December, nineteen hundred and ninety-two.

[Signed by Alfonso Valle Pastora, Secretary, Supreme Court of Justice].

## CORTE SUPREMA DE JUSTICIA

### CERTIFICACIÓN

El infrascrito Secretario de la Excelentísima Corte Suprema de Justicia certifica que la consulta que integra y literalmente dice:

Managua, 05 de Octubre de 1992. Doctor Germán Vásquez C. Juez Primero de Distrito del Crimen, Managua. Estimado Doctor Vásquez.

En nota del 20-08-92, consulta Ud., lo siguiente: "Que si son demandables bajo las leyes de Nicaragua solamente los daños materiales, o si también lo son los daños morales de acuerdo con lo establecido en el Arto. 46 del Código Penal. Y si para los efectos de determinar quienes pueden reclamar la indemnización de tales daños se entiende que les corresponde ese derecho a las personas que tienen derecho a pedir alimentos al ofendido

conforme el Código Civil, según lo preceptuado en el Arto. 48 del Código Penal y en el Arto. 288 del Código Civil.”

He recibido instrucciones de los señores Magistrados de la Corte Suprema de Justicia, para responder de la forma siguiente:

El Código Civil de Nicaragua en sus Artos. 2509 y siguientes establece la responsabilidad civil por daños y perjuicios en su totalidad, sin exclusión, es decir, que comprende tanto daños materiales como morales. No existe provisión alguna de la ley, al referirse a los daños y perjuicios que las limite a daños estrictamente materiales, que excluya los daños morales. Para profundizar sobre el tema ver sentencia del 28-9-1956, caso Obando de Gómez VS. Cía. Eléctrica de Granada y sentencia del 12-8-1965, caso Burgos Chamorro VS. Ferrocarril del Pacífico de Nicaragua.

El Código Civil Nicaragüense, en el Capítulo referente a los delitos y los cuasi-delitos [sic] establece la responsabilidad civil por daños causados por un hecho punible, y en el Arto. 3106 C., se dice que la responsabilidad civil por accidente de transporte público será regida siempre por el Código Penal.

El Arto. 2 del Código Penal, señala como punibles el hecho calificado y penado por la ley, ocasionado por imprudencia, impericia, negligencia o violación de leyes o reglamento, y toda persona responsable penalmente, lo es también civilmente. (Arto. 34 Pn.).

El Código Penal de Nicaragua en su Capítulo sobre Reglas para Determinar Responsabilidad Civil, en el Arto. 46, estipula el pago de perjuicios materiales y morales causados por el hecho punible. Los daños materiales y morales pueden ser reclamados conforme los Artos. 46 y 48 Pn., por quienes tienen derecho a reclamar alimentos según el Arto. 288 del Código Civil.

El Arto. 10 Pn. indica que constituye cuasi-delito [sic] la acción u omisión dañosa de un agente de cuyos hechos es responsable una persona en virtud de relación civil que la liga con dicho agente. La responsabilidad civil proveniente de un cuasi-delito [sic] no se extingue como consecuencia de un sobreseimiento por la responsabilidad penal del agente. Dicha responsabilidad civil es imputable tanto a daños materiales

como morales. Ver casos de Engracia Martínez Vs. Rafael Cabrera y Cía. Ltda., sentencia del 21-12-1957; Vivas Vs. Esso Standard Oil, sentencia del 17-8-1949; Cuadra Mendoza Vs. Camilo Barberena Deshon & Co., sentencia del 9-12-1969.

Así queda evacuada su consulta. ALFONSO VALLE PASTORA, SECRETARIO, CORTE SUPREMA DE JUSTICIA.

Asimismo hace constar que el dictamen emitido por la Corte Suprema de Justicia, en este caso, no tiene voto contrario pues la consulta fue evacuada por decisión unánime de todos los señores Magistrados Doctores Orlando Trejos Somarriba, Orlando Corrales Mejía, Rafael Chamorro Mora, Ramón Romero Alonso, Alba Luz Ramos Vanegas, Rodrigo Reyes Portocarrero, Enrique Villagra Morales, Santiago Rivas Haslam, Adrián Valdivia Rodríguez.

A solicitud del Doctor Alvaro Ramírez Gonzalez, extendiendo la presente en la ciudad de Managua, a los nueve días del mes de Diciembre [sic] de mil novecientos noventa y dos.

[Firmado por Alfonso Valle Pastora, Secretario, Corte Suprema de Justicia].

## VII. APPENDIX B

### LAW NO. 157

The National Assembly of the Republic of Nicaragua, in exercise of its powers, has enacted the following Authentic Interpretation of Articles 2509, 1837, 1838, 1865, and 3106 of the Civil Code and paragraph 2, Article 1123 of the Code of Civil Procedure.

Article 1. Consider the following to be an Authentic Interpretation of Articles 2509, 1837, 1838, 1865, and 3106 of the Civil Code and paragraph 2, Article 1123 of the Code of Civil Procedure:

- a) civil liability for damages as referred to in Article 2509 C.Civ., *et seq.* (Title VIII, Sole Chapter on Delicts and Quasi-delicts) in its entirety, and without exception, encompasses both material as well as moral damages. There exists no provision in the law whatsoever which limits them to damages which are strictly material and excludes moral

damages.

If there were any doubt whatsoever, Article 46 of the Penal Code of 1974 in setting forth the Rules to Determine Civil Liability, establishes “. . . indemnification for the value of the material or moral damages” and if there exists any other disposition contrary to the precept of the Penal Code, it was expressly or impliedly abrogated by that set forth in Article 564 of the same Code.

Nevertheless, a review of Nicaraguan legislation reflects that there does not exist any express disposition in the law which opposes indemnification for all damages, material or moral, incurred as a result of a delict or a quasi-delict, either in the Penal Code or in the Civil Code.

- b) the provision set forth in Article 1865 C.Civ. is not applicable to “. . . civil obligations arising out of delicts or misdemeanors, which are governed by the dispositions of the Penal Code,” as established by Article 1837 C.Civ. nor is it applicable to obligations arising from “. . . acts or omissions not penalized by law . . . ” those which are subject to the dispositions of Title VIII, Sole Chapter, as contemplated by Article 1838 C.Civ.

Article 1865 C.Civ. applies only to obligations arising from other types of contractual actions, debts or matters relating to property.

- c) with respect to Articles 3106 C.Civ. and 1123, paragraph 2) C. Proc. Civ., in cases of damages arising as a consequence of an accident involving a public transportation vehicle, the carrier shall always be liable, without exception, for indemnification corresponding to the quasi-delict, as defined in Article 10 C.Pen., and which in accordance with said norm only produces civil liability.

With regard to that set forth in said norms, in plain agreement with that established in Article 392 C.C., as a result it should be deduced that civil liability by public transportation enterprises arising from a delict or quasi-delict, is not extinguished as a consequence of a dismissal of the agent's criminal liability nor by a lack of criminal conviction when only civil liability is sought.



This interpretation is also in accord with the precepts of Article 52 C. Pen. which expressly contemplates the renouncement of the criminal action in favor of the civil [action] in pursuit of indemnification of damages or reparation of the harm caused, in the same manner as included in Article 2509 C.Civ., without specifying nor excluding material damages or moral damages. It does not preclude, therefore, the civil action in the case of a criminal acquittal or in the case of a lack of conviction which in the criminal context declares the responsibility of the accused for such indemnification.

- d) In conformance with Articles 46 and 48 C.Pen., material and moral damages may be sought by those people entitled to receive food [and support] in conformance with the provisions of the Civil Code and its amendments, according to the case.

**Article 2.** The present law shall enter into force upon its publication in any mass media, without prejudice to its publication in La Gaceta, Diario Oficial. May it be published.

Enacted in the City of Managua in the Hall of Sessions of the National Assembly, this twenty-third day of the Month of March, Nineteen hundred and ninety-three.

[Signed by Gustavo Tablada Zelaya, President of the National Assembly, and Francisco J. Duarte, Secretary of the National Assembly].

#### LEY NO. 157

La Asamblea Nacional de la República de Nicaragua, en uso de sus facultades, ha dictado la siguiente: Interpretación Auténtica de los Artículos 2509, 1837, 1838, 1865, y 3106 del Código Civil y el No. 2) 1123 del Código de Procedimiento Civil.

- Arto. 1. Téngase como interpretación auténtica de los Artos. 2509, 1837, 1838, 1865 y 3106 del Código Civil y del numeral 2) del Arto. 1123 del Código de Procedimiento Civil, la siguiente:

- a) la responsabilidad civil por daños y perjuicios a que se refiere el Arto. 2509 C. y siguientes (Títulos VIII, Capítulo Único sobre Delitos y Cuasidelitos) es en su totalidad, sin exclusión, comprendiendo tanto daños materiales como morales. No existe provisión alguna de la ley que las limite a daños estrictamente materiales y que excluya los daños morales.

Por si hubiera alguna duda, el Arto. 46 del Código Penal de 1974 al consignar las Reglas para Determinar Responsabilidad Civil, establece “. . . la indemnización por el valor del perjuicio material o moral” y, de existir cualquier otra disposición que se opusiere a este precepto de Código Penal, fue expresa o tácitamente derogada por lo dispuesto en el Arto. 564 del mismo Código.

No obstante, una revisión actualizada de la legislación nicaragüense refleja que no existe ninguna disposición expresa de la ley que se oponga a la indemnización por todos los daños, materiales o morales, ocasionados por un delito o cuasidelito contemplado en el Código Penal o en el Código Civil.

- b) lo dispuesto en el Arto. 1865 C. no es aplicable a “. . . las obligaciones civiles que nacen de los delitos o faltas, que se regirán por las disposiciones del Código Penal,” como lo establece el Arto. 1837 C. y tampoco es aplicable a las obligaciones que se derivan de “. . . actos u omisiones en que intervenga culpa o negligencia no penadas por la ley . . . ” las que se someten a las disposiciones de Título VII, Capítulo Único, como lo preceptúa el Arto. 1838 C.

El Arto. 1865 C. se aplica solamente a las obligaciones que nacen de otro tipo de actos contractuales, deudas o asuntos relativos a la propiedad.

- c) respecto a los Artos. 3106 C. y 1123 Pr. numeral 2), en los casos de daños ocasionados como consecuencia de un accidente de un vehículo de transporte público, el portador será siempre responsable, sin excepción, por la indemnización correspondiente al cuasidelito, definido en el Arto. 10 Pn., y que al tenor de dicha norma sólo produce responsabilidad civil.

De lo dispuesto en dichas normas, en plena coincidencia con lo establecido en el Arto. 392 C.C., debe en consecuencia colegirse que responsabilidad civil de las empresas públicas de transporte proveniente de un delito o cuasidelito, no se extingue como consecuencia de un sobreseimiento por la responsabilidad penal del agente ni aún por la falta de un encauzamiento criminal cuando sólo se demanda por la responsabilidad civil.

Esta interpretación es además coincidente con lo preceptuado por el Arto. 52 Pn. que contempla expresamente la renuncia de la acción criminal para intentar sólo la civil en las gestiones para la indemnización de daños y perjuicios o reparación del daño causado, en la misma forma inclusiva del Arto. 2509 C., sin especificar ni excluir daños materiales o morales. No precluye, por tanto, la acción civil en caso de una sentencia absolutoria en lo penal o a falta de una sentencia condenatoria que en lo criminal declare la responsabilidad del culpable para tales indemnizaciones.

- ch) Conforme los Artos. 46 y 48 Pn., están legitimadas para reclamar los daños materiales y morales, las personas con derechos a reclamar alimentos conforme las prevenciones pertinentes del Código Civil y sus reformas, según el caso.

Arto. 2. La presente ley entrará en vigencia a partir de su publicación por cualquier medio de comunicación masivo, sin perjuicio de su publicación en La Gaceta, Diario Oficial. Publíquese.

Dado en la Ciudad de Managua en la Sala de Sesiones de la Asamblea Nacional, a los vientes días del mes de marzo de mil novecientos noventa y tres.

[Firmado por Gustavo Tablada Zelaya, Presidente de la Asamblea Nacional, y Francisco J. Duarte, Secretario de la Asamblea Nacional].