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FIRST ANNUAL INTERNATIONAL BUSINESS LAW SYMPOSIUM INTRODUCTORY REMARKS

WELCOME BY DEAN JEFFREY LEWIS OF THE UNIVERSITY OF FLORIDA, COLLEGE OF LAW

This symposium is being sponsored by The Florida Journal of International Law. The topic is very timely. We have a very distinguished panel of speakers. We appreciate your presence here. It means a lot to us. I would like to especially thank the student editors of the Journal and Professor Gordon, of course, who is the long-term spirit behind the Journal. With no further ado let me introduce the Editor-in-Chief, Sarah Sharpe.

WELCOME BY MS. SARAH SHARPE, EDITOR-IN-CHIEF, FLORIDA JOURNAL OF INTERNATIONAL LAW

On behalf of the Board of the Journal, co-Editor-in-Chief Ozzie Schindler and I welcome you to the Journal's first Annual International Business Law Symposium, "Comparative Perspectives on Private, Commercial Dispute Resolution: Canada, Mexico and the United States." The Journal's first issue appeared in 1984 thanks to the enthusiasm of students and the support of the faculty and administration. Our continued enthusiasm and the College of Law's continued support have provided for the Journal's growth. We are very proud to have the opportunity to assist this symposium. We are also very grateful to Dean Lewis, Dean Calfee, and Dean Currier for enabling us to do so. Above all, we are grateful to our faculty advisor, Professor Gordon, who has been instrumental in the success of the Journal and the creation of this symposium. Now I would like to introduce Professor Gordon.

"COMPARATIVE PERSPECTIVES ON PRIVATE, COMMERCIAL DISPUTE RESOLUTION: CANADA, MEXICO AND THE UNITED STATES"

PROFESSOR MICHAEL W. GORDON:

Thank you very much. It is a delight for me to have two old friends and one new friend here for this program. I was reading Dr. Seuss last night — that helps after you have read law all during the day — and noted that one of his books starts off with, "[We're] in pretty good shape for the shape [we] are in."[5] I thought that would be appropriate for me to start with.

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5. DR. SUESS, YOU'RE ONLY OLD ONCE (1986).

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Ben Franklin said that, "No nation was ever ruined by trade."[6] To listen to some talk show hosts today, the proposed North American Free Trade Agreement, or NAFTA, is surely to be the ruin of the United States. But like mirrors, these talk show hosts should reflect a little bit before throwing back images.[7] Images of Mexico have never been very good. We have been handicapped by myths. Images of Canada may be less mythical or incorrect, but they are not discomforting because they are images of ourselves. Neither Canada nor Mexico have long been in our direct vision. They have both existed on the edges of our periphery while our true focus was towards Europe. A North/South vision existed only to control or to reprimand. The true focus was always East/West. The Mexican author Octavio Paz noted that "the East-West opposition has always been considered basic and primordial, it alludes to the movement of the sun, and is therefore an image of the direction and meaning of our living and dying."[8] The Monroe Doctrine, which may have been expressed by President Monroe, had been firmly a part of the territorial philosophy of John Quincy Adams, Thomas Jefferson and George Washington. The Monroe Doctrine was an East-West expression. Europeans stay in Europe. The United States would be a caretaker of this hemisphere. Caretaker, but never partner. John Quincy Adams said that "there is no community of interest or of principles between North and South America."[9] Could one expect our policy regarding Mexico in 1846, or leap-frogging Canada to acquire Alaska, to be any different than it was in view of the early assumption that the hemisphere was ours? In 1823, John Quincy Adams said, as Spain left the hemisphere, that

> these islands (Cuba and Puerto Rico), from their local position are natural appendages to the North American continent. . . . It is scarcely possible to resist the conviction that the annexation of Cuba . . . will be indispensable to the continuance and integrity of the Union itself.[10]

Contiguous parts of the hemisphere, including Mexico and Canada, are no longer viewed as *political* appendages, but they are thought by many to be *economic* appendages. Sources of natural resources and cheap labor to continue an America of the 1950s and 1960s. But this past ought not be the future's slave.[11] There are signs that it will not be.

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6. BENJAMIN FRANKLIN, THOUGHTS ON COMMERICAL SUBJECTS.
7. JEAN COCTEAU, DES BEAUX-ARTS.
8. Octavio Paz, *Reflections*, THE NEW YORKER, Sept. 17, 1979.
9. *See* 2 THE WRITINGS OF JOHN QUINCY ADAMS 373 (W. Ford ed. 1913).
10. J. MOORE, VI INTERNATIONAL LAW DIGEST 381 (1906).
11. "The Poor Old Past, The Future's Slave" from Herman Melville, *Battle Pieces*, THE CONFLICT OF CONVICTIONS 1860.

In the last decade we have turned more North-South in our thinking and hopefully in our great capacity to understand. We are struggling to understand why Mexicans burn effigies of Uncle Sam on avenues named Roosevelt and Kennedy, why Canadians see a natural resource as something to be eulogized rather than synthesized.

One who sleeps in continual noise is awakened by silence.[12] It has taken me years to understand there is more about Canada and Mexico than what I was taught as a young boy in a New England schoolroom. Canada was where you went when you got married, to Niagara Falls. But you did not venture further North or you froze. Mexico was where you went when you got "unmarried," to the divorce mills of the border towns. But you did not venture further south or you got sick. In 27 years of teaching, with one exception, a brief conference in 1974 to chastise Canada and Mexico for their drug policies, I have not attended a conference on international trade with significant Canadian or Mexican representation, until the past few years. When a conference did address issues involving Mexico or Canada, it was a United States participant who spoke about the other nations' policies. Even now too many conferences fail to tap the rich human resources in Canada and Mexico when hemispheric issues are the subject. Canadians and Mexicans are far better qualified to speak of our system than we are of theirs. I could not count the number of Canadians and Mexicans who have graduate law degrees from the United States. I suspect I could count on the fingers of one hand the number of United States law faculty with graduate degrees from Canada or Mexico. Hopefully this law school will seek to cure that, partly by a program now in the development stage with the Escuela Libre de Derecho in Mexico, allowing our students to finish their law degree by spending their last term in Mexico and receive both the J.D. degree from here, and a Masters degree from the Escuela Libre.

This day's session, much the product of Dean Lewis' foresight and the energy of the group that runs and propels the Florida Journal of International Law, has a goal to destroy myths, to be understood and even to be admired, but not to achieve that worst tragedy of being admired through being misunderstood.[13]

Our subject is both narrow and expansive. We are to focus on a simple commercial transaction. Viewed through your eyes as a law student versed in domestic law, the issues ought to be quite familiar, and perhaps thought not to be very complex, no matter how hard our

12. WILLIAM DEAN HOWELL'S, PORDENONE IV.
13. JEAN COCTEAU, LE RAPPEL A L'ORDER (1926).

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conflicts teachers have tried to make them appear unintelligible. We would like to open your eyes to the world of international commercial litigation. The answers are not to be found in the Canadian-United States Free Trade Agreement, nor in the proposed NAFTA. Free trade is more a product of attitude than written agreement. But with free trade, meaning more trade, there will be more disputes. We are in need of a clear understanding of the questions which arise in international litigation. We now turn to our guests for those answers. Let me introduce them to you.

On your far left is Professor Joost Blom from Canada and the University of British Columbia, where he received both his B.A. and LL.B. He also received a BCL from Oxford in England and has been on the faculty at British Columbia since 1972. We now have a faculty exchange with British Columbia, with a visiting professor we are honored to have here this term. Professor Blom has been a professor at Osgood Hall in Toronto and at the University of Victoria. He is the past president of the Canadian Association of Law Teachers. He has recently written an article on Canadian private international law, appearing in the Netherlands Law Review.

Next is Professor and practitioner Dr. Leonel Pereznieto Castro from Mexico, where he received his license in law at the National University of Mexico in 1968. He went on to do higher study in public administration in Madrid, and to Paris where he received his doctorate from the University of Paris under a very famous private international law professor, Henri Batiffol. He has worked at the Institute of Juridical Investigations at the National University of Mexico (UNAM), a very renowned institute. He has been a professor in the faculty of law at UNAM, in the Center for International Relations of the Faculty of Political Science. He has written a number of books, including what has become my bible of Mexican private international law, "Derecho Internacional Privado." He has been a visiting professor at the University of California at Davis, at the Hague Academy in the Netherlands, and is a frequent lecturer at law programs. He is also a member of the very prestigious Academia Mexicana de Derecho Internacional Privado y Comparado, and was a partner at Ogarrio y Diaz in Mexico City, from which the main partner, Alejandro Ogarrio, is a frequent visitor and a long-time friend to this law school, for some 24 years. He has been appointed Commissioner at the Mexican Competency Commission, which has responsibilities essentially combining those of our Federal Trade Commission, International Trade Commission, and the Antitrust Division of the Department of Justice.

Immediately next to me is Professor Friedrich Juenger, who has come from the University of California at Davis. He began his law work when he did his Referendar exam in Germany in 1955. Later he came to the United States to do an M.C.L. at Michigan, staying

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on to do a J.D. at Columbia. He practiced in various parts of the world as an associate of Baker & McKenzie and has taught at Wayne State and, since 1975, at the University of California at Davis. He has frequently returned to Germany, particularly to Freiburg, where he has recently held the Humboldt Chair. He also was an Eason-Weinman visiting professor at Tulane, an Allen, Allen & Hemsley Fellow at the University of Sydney and a visiting professor in Tahiti. His most recent book is "Choice of Law and Multistate Justice." He has written extensively on private international law as well as foreign and comparative law. He is currently President of the American Society of Comparative Law, to which this law school belongs, and he is an honorary member of the Academia Mexicana de Derecho Internacional Privado y Comparado.

We would like to do this symposium a little differently than usual. It will not be a presentation of papers, and we would like also to have you ask questions at any time. The problem, which most of you have read, involves a company in Toronto, Canada, called *Canfibre*, which has manufactured fiber and sold that fiber to a company in the United States in Tampa, called *Universal Pipe*. That company in return has sold the finished product, insulation, to a company in Mexico which we will call *Mexobuilders* (*Mexo*), which is a builder of industrial facilities which has used the product in the installation and the building of a factory. The insulation did not match well with the metal and has caused extensive damages. We are not going to talk about tort injury, but rather breach of contract. The facts as you have read them have some problems. They are not all that clear. We have a bit of the battle of the forms which you are familiar with — and buried in that battle of the forms is something that might be part of the offer or acceptance — a statement that says this contract is governed by the laws of Florida. Mexo believes that Universal was responsible for its damages. Universal disagrees. It is of the opinion that if it *is* responsible, however, the real responsibility lies north of the border in Canada with Canfibre. I would assume that the most likely answer that each of you would give here is that if you had your choice you would have your own forum apply and your own law apply. That may be a grave error. I would like to start this off with the likelihood that Mexo is going to be the one which starts the proceedings. Mexo has a choice of starting those proceedings, it would seem, in any one of the countries. What would it do if it were to start them and could it start the suit in Mexico?

DR. PEREZNIETO CASTRO: First, I would like to point out some aspects of Mexican law. In Mexico, commercial law is *federal* law. That means we have only one body of legislation all around the country, which is the Federal Commercial Code. In *procedural* matters we have also, in commercial issues, to apply the Federal Procedure Codes

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That means that in addressing commercial matters we have just one substantive law and one law on procedure.

In this case we have a breach of contract, and article 4, section 2, of the Federal Commercial Code refers to the place of performance. That means that in terms of the Mexican jurisdiction rules, in this case, the merchandise was delivered in Tampa. In this particular case the price was paid in Tampa. The obligation was completed in Tampa — merchandise delivered — price paid. According to the Mexican law, therefore, Tampa is the place of performance. In general terms and under the principle in article 4, section 2, the jurisdiction has to be in Tampa. That means that the Federal Procedure Code sent the jurisdiction to Tampa.

GORDON: What about catching someone from Universal who happens to be in Mexico?

PEREZNIETO CASTRO: I have to tell you that in Mexico, in corporations, we don't have this point of contact that you have here with respect to a representative who is doing business, just doing business in Mexico, without establishing domicile in Mexico. It will not produce *in personam* jurisdiction. What happens is this. The basic concept of Mexican law, contrary to the U.S. or Canada, was that Mexico was a closed country for commerce and for legislation. Mexico was really trying to be closed to foreign influence until 1989, when we changed our legislation. Also, Mexico joined the GATT in 1986. In those few years we began our openness in commerce and in legislation. That means that we are not developed in jurisprudence in the international commerce field. We don't have as developed a system as in the United States or in Canada. We have the classical codified law, and this is what exists now.

JUENGER: You will hear me banter about three words in the discussion that follows, and I hope it will be a discussion. I always find it more difficult to stimulate than to control, so if there's any question whatsoever, especially a question of understanding, please interrupt us. There is nothing sacrosanct about our talking. But let me start off with three terms I am going to be using throughout. One is the term "international risk." Those of you who have had either international business transactions or conflict of laws will realize that although laws differ, the assumptions of business people remain the same. Because of the fact that laws vary from one state or nation to another, there is a risk of their transactions being invalid. Let me give you an example. There must be thousands of joint ventures that contemplate the formation of a corporation. In most civil law countries, to form a corporation you need a notarial document. Even a contract envisaging the formation of a corporation has to be in notarial form. An American or Canadian party, unless the party is from Quebec, will not even know what a civil law notary is. When they think notary, they think

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notary public. This is just one of the many legal traps that pervade the international scene. To give another example, a futures contract, perfectly valid in New York, may be invalid in Germany, as reported cases have held.

The next term I am going to be using is "party autonomy." That sounds pretty high-falluting, but it means nothing other than the parties have the power to designate the battlefield and the rules of warfare for potential future disputes in advance by means of arbitration, forum-selection, and choice of law clauses. Addressing Professor Gordon's hypothetical, I would say that counsel committed malpractice, because the first version of the hypothetical doesn't contain *any* of such clauses. Counsel goofed. And that takes me immediately to the third term, which is a very important one you all know, having heard about it already in your first year of law school. That is "forum shopping." Forum shopping, as a member of the House of Lords said, is a "dirty" word. But it's only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favorably presented; this should be a matter neither for surprise nor for indignation. Similarly, in *Keeton v. Hustler Magazine, Inc.*, Chief Justice Rehnquist was unfazed by what he called the "litigation strategy of countless plaintiffs."

Let me start off with forum shopping. Here is a Mexican corporation which has suffered a big loss. Where is it going to go to commence litigation? The natural instinct is to sue at home. Is there jurisdiction? There very well may be, even though you do have some performance in Tampa (that is where the goods were delivered to the carrier, and let us also assume it's where the purchase price was to be paid), because the terms of the Mexican Code are far from clear. But isn't there also a warranty running with the goods? Wasn't that warranty breached *in Mexico*, where the goods turned out to be bad? I would venture to argue this to a Mexican court. Moreover, there is also a potential tort cause of action (you didn't want us to discuss it, but for purpose of jurisdiction that's a helpful cause of action because the injury occurred in Mexico). Certainly you can characterize — remember the word characterization from the conflict of laws — the plaintiff's claim as a tort cause of action, similar to an air crash of a plane taking off in New York that crashes in Massachusetts. They used to have a rule in that Commonwealth which limited wrongful death recovery to $15,000 per corpse. It was a bad rule, and how do you get around it? Well, counsel argued that the defendant breached the contract to transport her dear departed carefully. Northeast Airlines said they'd get him safely there, but they didn't. Thus, counsel recharacterized the matter as one of contract, hoping to avoid the *lex loci delicti* rules that involved the sub-standard Massachusetts law.

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The point is that in dealing with conflicts law you need to use your imagination. Lawyering is not just learning rules; it's being able to play with them, to put them to good use. Forum shopping *is* a dirty word. But don't you have a duty as counsel to maximize your client's chances? Don't you have an obligation to go forum shopping?

Now, if I were advising Mexo Corporation, I'd say sue in Mexico. Why? Facing a suit there will strike the American party as something to worry about. Foreign law is as awe-inspiring as a foreign language. That alone already provides a certain leverage, helping perhaps to settle the case. Secondly, there's an implied threat. If defendant's counsel says "let's not go to Mexico because according to American rules there is no jurisdiction," he tells his client to incur a major risk, namely an unsatisfied judgment south of the border that hangs over the defendant like the sword of Damocles. Moreover, Universal may be barred forever from doing business in Mexico. This is why I would advise Mexo to start the action there and, if need be (before the statute of limitations runs out), to file another action in Florida. If the American defendant does not appear in the Mexican proceedings, there will be a default judgment and there's a chance — an outside chance perhaps, but nonetheless a chance — that a Florida court might enforce it. You have leverage once again, which might induce a settlement of that unsatisfied Mexican judgment. Now notice one thing that's better about *foreign* judgments, in contrast to a *sister state* judgment: a judgment from abroad does not merge the cause of action. Rather, according to American law, you may proceed on *either* the judgment *or* the underlying cause of action. You therefore lose nothing by first suing in Mexico, other than court costs and what you pay the attorney.

Let me add one final thought about forum shopping. Mexico may not be the only place in the world to harass the American defendant. Consider Germany. Germany has, of course, nothing to do with the transaction between Mexo and Universal. But Germany has a rule, which is still on the books, to the effect that if you have any assets whatsoever in Germany, there is full *in personam* jurisdiction. Let us say you have five marks in a bank account in Germany. A German court could render a $1 million judgment. This is not like the Oregon statute in *Pennoyer*, which limited the recovery once to the value of the asset. There once was a paternity suit brought in Austria, which has a statute similar to the German one, against Jean Claude Killy, the skier, who had forgotten his underwear in an Austrian hotel room. The presence of that "asset" was the jurisdictional basis for this suit, about which my colleague David Siegel has written a poem. Similarly, American corporations (I can't tell which because the Germans won't give the names of the parties) sued a Saudi Arabian bank in Germany

on the sole ground that it kept deposits in a German bank in Frankfurt, an international banking center. So until quite recently, when the highest German court reinterpreted its jurisdictional basis to narrow its scope, there was a chance to sue somebody in a far away forum that may be highly inconvenient for the defendant. And if you get a judgment in Germany, you bar the defendant from ever doing business. Where? Not just in Germany, but in the entire European Community because of the Brussels Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters. Once you have a German judgment, any member state of the EC has the obligation to recognize and enforce this judgment. Moreover, the Lugano Convention broadens the scope of enforcement by including the EFTA countries. So, when you do forum shopping, bear in mind that there are some exotic places and some exotic rules. The Germans have changed theirs, but the Danes still have asset-based jurisdiction. Just the hassle of translating foreign proceedings may be worth taking a flier and suing abroad. In other words, it takes some thinking right at the outset to choose the right forum, however far away it may be. Now put yourself in the position of the defendant. Can you see the malpractice committed by lawyers who failed to hedge against that contingency, not to have adorned the contract with a forum-selection or an arbitration clause. So for starters, when you advise parties engaged in international transaction think about *where* they can sue and be sued.

GORDON: We've left out Canada. It may well be that Mexo thinks that Canada would take jurisdiction.

BLOM: If you consider a claim against the Canadian party, that's the obvious one to bring in Canada. The jurisdictional problems really are not that complex. Let me just say briefly an introductory word about the Canadian judicial setup because it's like the United States, but not quite. The big difference is that we have, for all intents and purposes, no federal court role in disputes like this. The federal court has very limited jurisdiction — it's limited to certain areas of subject matter. Unless you happen to be dealing with a maritime case, a copyright case or a case that involves the federal government in some way, you are unlikely to be in the federal court. There is no equivalent to the United States diversity jurisdiction at all. Nor, unlike Mexico, is there any element of federal law in the resolution of international commercial disputes. So you are dealing with the provinces. Dealing with the court system of the provinces as the sole jurisdictions in Canada simply translates into: "Can the courts in any particular province take jurisdiction in the case?" As far as Mexo's potential claim against Canfibre is concerned, which would have to be presumed to be a tort claim, Ontario is an obvious forum because that's where Canfibre is on the facts, and that's where they have their headquarters.

So there's service in the jurisdiction. There are provincial rules of jurisdiction, except for Quebec, which are not unlike the United States rules. If you serve someone *in* the jurisdiction, there is almost automatic jurisdiction. If you want to sue somebody who is not present in the province — if it's a company and they don't have a place of business in the province — then you have to fit yourself within one of the grounds for service outside the jurisdiction; it's a long arm jurisdiction. You might be able to sue Canfibre in any other province in which Canfibre does business. You would be met with the argument of *forum non conveniens*. That doctrine, within Canada, is assuming a very large role in the common law provinces. I will say something about Quebec in a minute. The pattern in the common law provinces is that the rules for when a court can take jurisdiction on nonresident defendants are very liberal. But over the last ten years or so, the courts have become much more aggressive in declining to accept jurisdiction and say, "We will not take jurisdiction even though we think we can because this case is more appropriately heard elsewhere." That is quite a change in attitude. The English traditional approach was that if you could possibly take jurisdiction you did, at least if the defendant was in the jurisdiction. Another English judge, to complement the quote that Professor Juenger read, said not so long ago, in a case in which somebody was served with process at a race track while he was over on a visit from Paris, that "this may be bad form but it's perfectly good service." The case had very little connection with England at all, except that the plaintiff lived there. Another judge said, "well, you can call it forum shopping if you like, but if England is the forum, it's a good place to shop." Hence, so the traditional attitude was if you could get your defendant in the forum, you were more or less home free. That rule, in England and now in Canada, has changed. So even if you have somebody in the jurisdiction there will be a very strong argument, a potential argument for *forum non conveniens* that is all the stronger if you have somebody who was not present in the jurisdiction. If you sued Canfibre in Ontario, the province where they are based, it is very hard to see an argument for *forum non conveniens* made successfully.

You might sue in any of the other provinces, but you are unlikely to do so for reasons of differences in the substantive law since the laws are pretty uniform. But, if for whatever reason, such as Professor Juenger's tactical reasons, you decided to sue them in the Yukon Territory just to cause a little excitement, it would probably be fairly easy, even if there's some presence in that territory, for Canfibre to say, "Look, this is not the appropriate forum, the evidence isn't here. Admittedly, we have a place of business in this province, but this case is totally unconnected with the province." Nowadays the courts

of the common law provinces would almost certainly say that in a case like that, if there is not a connection of the facts with the province, "we're not going to take jurisdiction even though we could."

The one exception is Quebec. Quebec, as you know, has a legal system based on a modified version of the Code Napoleon. The court system is a mix of common law and civil law. The procedural framework is basically common law, but the jurisdictional basis is more on the civil model. There is a code of civil procedure which has a certain number of bases for jurisdiction. You do not have to be served in Quebec to take advantage of Quebec. But you can sue in Quebec if there's a defendant who is domiciled or has corporate presence in Quebec, if the contract you are suing on is made in Quebec or if the whole cause of action arose in Quebec. An important point is that Quebec does not have a doctrine of *forum non conveniens.* Quebec takes the position that since the code of civil procedure expressly gives the court jurisdiction, it is not for the judges to take it away. If you find a way to get into a Quebec court, you are in for sure. There is no discretion in the judges to decline jurisdiction. The common law process, as I have said, is quite a different situation. Ontario is the only conceivable Canadian forum in an action against Canfibre.

With regard to an action against Universal, I can't see an immediate advantage for Mexo to sue Universal in a Canadian court. Then you would have a much tougher time establishing jurisdiction in the first place. Assuming Universal has no business presence in a Canadian province, you would have to have some basis for the service outside the jurisdiction. And unless you can point to one of the grounds for such service, such as there was a contract made or a contract broken in the province, and so forth, it is very difficult to establish jurisdiction. As far as Universal is concerned, the chances of taking them into a Canadian court are very limited.

GORDON: If Mexo and Universal had contractually chosen the Canadian court, would there be enough of a link with the product — the fiber, having originated in Canada — for a Canada court to accept jurisdiction? In other words, does Canada allow the rather slim link as is the case in England, even with Order 11 in place? There's a wonderful case dealing with what I think was a coffee contract which had no connection with England other than the contract was in English and coffee was sold on the coffee exchange in England. That was enough.

BLOM: If you agree to the jurisdiction of the court, there certainly is that power to take jurisdiction but there is still the discretion to decline.

JUENGER: You were wondering why anybody would want to sue in Canada. There is a very simple reason. The United States lacks a loser-pays-all rule. In other words, you can considerably reduce transaction costs by suing in some jurisdiction other than the United States that follows the English rule. Let me also say a word about jurisdiction in other common law countries. For the longest time the English didn't know what their jurisdictional law was all about. For instance, in older English authorities, you read that England does not have a *forum non conveniens* rule. This was true in the sense that if the defendant was served within England, the courts would invariably adjudicate the case. But when the Supreme Court decided *Pennoyer v. Neff*, the English had already had on the books the Common Law Procedure Act. This Act established, in effect, a long-arm statute, except that the English spoke in terms of "service outside the jurisdiction" and such service was in the discretion of the court. In view of this discretion, the British really did have a doctrine of *forum non conveniens* all along, but the English thought that there was a natural God-given kind of jurisdiction, that is to serve somebody within the state, and then the anomalous Order 11. Incidentally, some of the heads of jurisdiction in Order 11 are highly dubious and would not meet our due process standards. For instance, an English court can claim jurisdiction to adjudicate a contract that is governed by English law. Therefore, a choice of law clause, in effect, amounts to a forum-selection clause.

GORDON: Where would you bring suit if you were representing Mexo? Would that *forum non conveniens* concept mentioned by both others apply? Is it recognized in Mexico?

PEREZNIETO CASTRO: Listening to Professor Juenger, I remember when a friend of mine asked me why I wanted to be involved in conflicts. I said that it was the branch of law where your imagination has more space to run. In national law and local law, you have rules, certain rules, and you have to move between these certain rules. In private international law, everything is open and imagination has to perform. I told you about the principle in Mexico regarding the place of performance, and I agree with what Professor Juenger said. I would recommend to Mexo, of course, that we look for Mexican jurisdiction because it is a more familiar jurisdiction and we will be in our own territory. It will be less expensive. Tampa courts will be more expensive than Mexican courts. Even to employ a lawyer in Tampa would be expensive for my client, Mexo. I have to advise him that we look for a Mexican jurisdiction. How are we going to find Mexican jurisdiction? I think there are two problems to solve. First, it's how to convince Mexican courts to take jurisdiction. Second, it's how I will en-

force a Mexican award in the United States courts. The Mexican Federal Procedure Code, in article 24, section 2, states the place of performance for jurisdiction. The legal place of the performance was in Tampa. The delivery of the merchandise and the payment of the price was in Tampa. This is the legal, mutual place of performance. But as Professor Juenger suggested, I agree that the performance requires that the seller not only deliver the goods, but the goods must meet the use for which they are meant. In this particular case, of course, the purchaser checked the goods, or was supposed to check the goods when he received them in Tampa at the time of delivery. But the merchandise did not ultimately serve the purpose for which it was meant. What happened is that the problem arose in Mexico. I have to convince the Mexican court that ultimately the breach of contract arose in Mexico the moment the merchandise did not serve its purpose. This is one point. I have to *move* this place of performance to what I could call the real or the concrete place of performance: from Tampa to Mexico. I have to move in that way. That is not the only point. If I finally arrive before the Mexican court or arrive at the conclusion that the Mexican court is going to take jurisdiction, what is going to happen? This is the second part. What will happen with an award? I will have a Mexican award. But this Mexican award will have to be enforceable in the United States because, if not, that will be malpractice again. I will recommend to my client to go to the Mexican jurisdiction, and finally I will have an award that will be only a paper. There is basically one point that I have to be precise on. Will the United States courts accept the Mexican jurisdiction and award? I will have to check what is the criteria of United States courts on that issue. Professor Juenger gave us a broad idea of the point of contacts in order to obtain jurisdiction in the United States. I have to search the point of contacts in order to know if my award will be enforceable in the United States.

Let me tell you just one more idea. I told you that in Mexico commercial law is federal. That's true, but there is concurrent jurisdiction. That means always federal commercial code is applicable, but in matters of procedure, the local procedure could be applicable. That means if there is a commercial problem that arose in the State of Jalisco or the State of Chihuahua, local laws of procedure could be applied by the local court, but the local court *has* to apply the *federal* Commercial Code always. You can go to the local court or to the federal court, but the court *always* applies the federal Commercial Code. Each state has its own procedural code. You go to federal court and they are always going to apply the federal procedure code.

GORDON: Is all this really very important or do we have a lot of false conflicts involved? After all, all three nations have signed the

Vienna Convention on the International Sale of Goods (CISG). So I suppose the substantive contract rules that are going to be applied in any court are going to be the same rules unless, of course, the courts acknowledge the provision that said, "The law of Florida shall apply." Perhaps we could look first at whether the courts in each of these three countries are likely to apply the law selected by the parties. If they do not, what will the rules direct them to?

BLOM: Assume that there *has been* a contractual choice of law to Florida law. Assuming there has been such a choice, will the Canadian court give effect to the choice? The answer most certainly is yes. There has never been a case where Canadian courts have refused to give effect in Canada to an express choice of law clause. The leading Canadian case, which is actually from the Privy Council, is called the *Vita Foods* case, which you may or may not have run into. It says that the parties intention is definitive and they are free to choose the law of any jurisdiction whether or not it is connected with their contract. There is academic debate as to what extent that is true, but it is pretty clear that if they can state with *any* plausible reason why they want that law to apply, the court will respect their choice. So if there has been an effective choice of Florida law, then it would certainly be given effect. This is subject, of course, to local statutes which may override the chosen law. For example, you may find that you are in a jurisdiction which says, "Yes, we give effect to this choice of law, and we regard this as a Florida contract," but you may also find that you are in a jurisdiction which says, "We give effect to this choice of law and we regard this as a Florida contract. However, we have this *local* statute." This is not too common in commercial contracts. This arises more in consumer protection cases than in other situations. If a local statute says that the consumer has to be protected, you can't get out of that just by choosing Florida law. You must be aware of local laws.

GORDON: What do you suppose the court would do with this provision that says the law of Florida shall apply? Does that mean the CISG or does that mean UCC in Florida? I do not think the party knew when they put that clause in that the CISG existed.

BLOM: That is a tricky point. It is a choice of the law of Florida. The law of Florida includes the Vienna Convention. It's even trickier because of the way in which the Vienna Convention was adopted. Again, a word of explanation. In Canada we are more provincially-minded than Americans who are state minded in implementing treaties. A treaty must be implemented by each province if the subject matter of the treaty is provincial. It can not be done by federal law. So each province has implemented the Vienna Convention, and they have done it all in slightly different ways. In Ontario, they have done

it by saying the Vienna Convention will apply in an Ontario court unless both parties have excluded the Vienna Convention, or unless they have chosen the internal law of some other jurisdiction to apply. So you are out of the Vienna Convention if the contract says the Vienna Convention shall not apply, the law of Ontario shall apply, or the law of Florida shall apply, apparently. That particular clause is in Ontario's implementing statute. So if it came up in British Columbia, for example, they might well say a choice of the law of Florida is a choice of the law of Florida *including* the Vienna Convention. In Ontario, presumably they would have to say, because of the statute, a choice of Florida law *excludes* the Vienna Convention.

JUENGER: Correct me if I'm wrong, I read the Vienna Convention, to say that a designation of, for example, Mexican law or Florida law, would mean you have selected a law you had no intention of selecting at all: that is, you have selected the provisions of the Convention. So you must watch out because the Vienna Convention says that if you select the law of a member state or a subdivision of a member state like Florida or New York, the rules of the Vienna Convention apply and these rules may be very different from those you had in mind, namely Article 2 of the Florida or New York Uniform Commercial Code. Are not the Mexicans smarter than we are? Why do we have a Uniform Commercial Code that is not uniform? Why couldn't Congress simply have enacted it? More sense seems to prevail south of the border than north of it. As far as specific statutes are concerned, one type that crops up with considerable regularity, and will cause problems even if the Vienna Convention applies (I don't think they thought of it properly), is the protective variety, not only consumer protection law, but laws favoring distributors. For instance, in Puerto Rico and in Minnesota, as well as in some other states and in many foreign countries, it is difficult to terminate distributors' contracts because of mandatory rules out of which you cannot stipulate.

GORDON: You have some new rules in Mexico that are going to deal with choice of law, do you not, which are a revision of the Mexican Civil Code? I wonder if you would make comment on the fact that you have a number of civil codes which one might apply.

PEREZNIETO CASTRO: Let me say a few words on the Vienna Convention first.

GORDON: Let me just tell you that our law faculty is not saying even a word on the Vienna Convention. I polled some of our contracts teachers and none of them has ever mentioned the Vienna Convention in class.

JUENGER: That's a case of educational malpractice.

PEREZNIETO CASTRO: That happened very often in Mexico with my colleagues, lawyers, when I asked them, "Do you know that in

your contract the applicable law is the Vienna Convention?" They say, "The Vienna Convention?" "Yes, Mexico is a party to the Vienna Convention." Some of them don't know. They haven't even read the Vienna Convention. In this case the Vienna Convention is applicable. It was a proposal, in this case, from Mexo to Universal; a proposal to buy some merchandise. Universal's answer to Mexo included a new element which altered it under the provisions of the Vienna Convention. It altered Mexo's original proposal. These new elements constitute, in my opinion, a counter proposal. A counter proposal in the terms of Article 19 of the Vienna Convention means that the counter proposal of Universal constitutes a new agreement. Like Professor Juenger said, it has a lot of international consequences. What does it mean? Had the original proposal of Mexo been answered by Universal by the same terms, in that moment the agreement would be perfected.

This is an agreement in terms of Article 19 of the Vienna Convention. But the answer from Universal was altered because Universal introduced a new element. The new element was goods sold as is and with all faults. That is the new element. This alteration of the original proposal constitutes a counter proposal. Mexo never answered this. That means that the original proposal was not accepted and, therefore, the agreement wasn't perfected. What could happen? It doesn't happen, but could it happen? Universal sent to Canfibre to produce all the materials; Universal finished with the merchandise and called to Mexo saying, "Hello, everything is ready," and Mexo says, "I don't know you. I don't have an agreement with you. My agreement wasn't perfected, because your proposal, your answer, was a counter proposal and I didn't answer it." You see the consequences. I don't know if I'm clear in this. This is because such is in the Vienna Convention.

Let me give you a very brief example, with reference to consumer protection. Consumer protection is just the point of the iceberg, what we call in conflicts, *ordre publique* or public policy. We have the best contract, a very good deal for a client, thinking in American law, or thinking in Mexican law. What will happen to this contract if it has to be performed in Germany, or in Canada, or elsewhere? We can have problems with this public policy. Let me give you an example. You are doing a contract with Mexico. Your client, Universal, is going to make a contract with Mexo in Mexico. In the contract that you sign, it says that the payment will be in dollars. The payment will be in dollars paid in Mexico. In the terms of American law, no problem. But when you are going to perform the payment in Mexico, article 8 of the Mexican Monetary Law says an obligation acquired in foreign currency could be paid in that currency or in Mexican pesos. If you pay in Mexican pesos, it has to be paid at the exchange rate on the date of the performance of the obligation, or the day of the payment.

What happens is you are expecting dollars, and you receive pesos and you cannot do anything. You can say I have an agreement, you signed it, but that has nothing to do with classical public policy law, which is this article. This is very important.

I will say some words on the articles of the Civil Code that have been modified in Mexico. As I told you, in 1986, Mexico entered the GATT. Secondly, Mexico has to review its legislation and one of the first steps which has been done in Mexico is to modify the Civil Code of Mexico City (that is the Distrito Federal; you have the D.C.). The Civil Code was being modified in terms to introduce rules on conflict of laws. This is the first time we have them since many years ago. We had conflict of laws rules in the last century, but we lost them. Now we have conflict of laws rules, very criticized by Professor Juenger, but that is a beginning. I hope we will perfect these rules. There is one state (Queretaro) which has changed its own civil code adopting these D.F. rules. Three other states in the country are in the process of changing their rules. I am convinced that Mexico is going in the right direction. The right direction is to open its commercial transactions, its international transactions, and NAFTA could be one of the ways. I think NAFTA for Mexico could be very important, because it will be the agreement which contributes to the opening of the others' doors with more clients. Mexico for the U.S. was the third client. Now it is second. But for us, the U.S. accounts for eighty percent of international commerce. Thus, an agreement like NAFTA could facilitate the commercial transactions more.

GORDON: Mexico just moved to number two for exports from the United States. Canada is the number one location of exports. Japan has traditionally been number two, but in the last two or three weeks Mexico has moved from three to two. I think we want to talk a little bit about service of process.

JUENGER: I need to mention something to the students that may have passed them by. The Federal District of Mexico is not at all similar to Washington, D.C., which is a nice place to visit; but it doesn't have any of the significance that *Distrito Federal* has. Within it lies one of the largest cities in the world. Moreover, Mexico is highly centralized. A lot of the transactions move through Mexico City. While the various Mexican states have their own codes, they tend to copy those of the federal district. Thus, if there's a law reform in the Federal District's Civil Code, chances are that after a while, all other states will follow suit. Moreover, in Mexico City you find the cream of the crop of the bar. So do not draw an analogy between the Mexican Federal District and our District of Columbia. It's a very different thing.

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PEREZNIETO CASTRO: I'm sorry I said it in constitutional legal terms, and also I agree with Professor Juenger that the civil codes of the states follow the Civil Code of the federal district in these kinds of matters. But there are other matters where the civil codes of the states have their own way, like family law. In family law, they go by their own way; they are more liberal than in the federal district. Hidalgo, the Estado de Mexico and Tamaulipas have developed a very important theory on marriage and child abduction. They have developed other things, but it is correct that in international matters, or this kind of matter, the civil codes follow the federal district.

GORDON: A couple of things before we break for lunch that we might want to talk about. Assuming that we now have a case commenced, if the case were in the United States, we may very well have a jury trial. We certainly are going to have some extensive discovery, and we're going to work this discovery to the point that we have our main event, the trial. I don't think we are going to face that if we are in Mexico in terms of a jury trial, extensive discovery, or a main event. What's the nature of the proceeding going to be like if the suit is brought in Mexico?

PEREZNIETO CASTRO: You asked before about service. As Professor Juenger said, the difference in legal systems is really very profound. We can see in these cases, in these particular points, what you said about the notary public. You have a notary public here in the U.S. In Mexico, we have what we call a Latin public notary, which extends to all of Latin America and, of course, to all of Europe, except England. The public notary is a person who is a lawyer and who has very specific skills in order to have his license to be a public notary. I'll give you an example. In Mexico City, to be a public notary, they offer one or two posts a year and there are two thousand lawyers who go to the examination for those posts a year. You can imagine how prepared in its field a public notary has to be in Mexico. There is a big difference here, in the U.S., where a notary public could be a gentleman who owns the local grocery store. The sole skill that is required for a U.S. public notary is that he can certify that someone is the same one who signed a certain paper or document. His skills are different.

JUENGER: Sometimes they do crazy things in Brazil. There are people running for king there, and one of them — who would be next in line — actually had an ancestor who abdicated. In addition to the argument that his ancestor abdicated at a time when Brazil had already abolished kings (how could he abdicate from a position you don't have?), he raised the issue that the instrument in which his ancestor abdicated was not in notarial form.

PEREZNIETO CASTRO: The point is the civil code systems — not because south of the border we are brighter than you, but the first code in the 18th century was German, then came the French civil code. But in our codified system *formality* is the point. Formality is okay with you, in your common law system, but it is not a basic question.

For service we have the procedural codes of Mexico, including the federal procedure code. Service has to be very formal. It has to be done by an official, under the instructions of a judge or a court. And not only that, this official has to arrive and to follow a checklist and do certain things; if he doesn't follow certain rules, the service is not valid. It is really very formalistic.

JUENGER: The service of process is another potential source for malpractice. There are quite a few attorneys who are blissfully unaware of the Hague Service Convention with which you need to comply. One of the proud achievements of my legal career was when I was able to get the California legislature to include in our civil procedure code a line to the effect that if you're suing aliens, you may have to comply with the Hague Convention. You do not find such a reference, incidentally, in the Federal Rules of Civil Procedure. You could lose a case if you fail to comply with the Hague Service Convention, which is in effect between Canada and the United States, but not between the United States and Mexico. We have, however, ratified a separate convention, with which you have to comply when suing a Mexican party, the Inter-American Convention on Service of Process and Letters Rogatory.

BLOM: One point we keep stressing is the importance of anticipating all these difficulties. The more international a transaction is, the more exponentially the difficulty or the risks increase and you may not be aware of this or that accord. To what extent can you limit your risks by stipulating, for example, this case must be heard in Florida? Just to get the Canadian line on it, if the contract between Universal and Canfibre had said not only that it is governed by the law of Florida, but also that Florida shall have jurisdiction, that would not in any way help you in keeping it out of an Ontario court. It has to say *exclusively* subject to the jurisdiction of the Florida courts. Even then you're not guaranteed that it will stay out of an Ontario court, because the rule is that you can't oust the court's jurisdiction. So an Ontario court very well may say we still think this is an appropriate case to be heard in Ontario. In that way it's an odd contrast, or at least a contrast, with the current line on arbitration, where there is automatic, more or less, deference to arbitration clauses, but there is not automatic deference to choice of court clauses like that.

JUENGER: To make matters worse, there is a particularly silly decision by the Florida Supreme Court which says you cannot stipulate to the jurisdiction of Florida courts unless there are certain minimum contacts with the state. This is, of course, ridiculous, but that's what the Florida Supreme Court has said. So do not ever stipulate to the jurisdiction of Florida courts, if you can help it, because who knows what "minimum contacts" are? I have been teaching the subject of jurisdiction for decades and am still not sure what they are. If your clients, nevertheless, insist on resolving their dispute in Florida, you may recommend *arbitration* rather than a forum-selection clause. Somebody should, however, have told the Florida judges that consent — ever since *Pennoyer* — has been a good basis of jurisdiction, and that the U.S. Supreme Court agreed with that proposition in the *Bremen* case.

GORDON: The law in Florida has deteriorated since FSU opened a law school. We ought to ask if you do have any questions. One of the problems that we are going to address this afternoon is, once a judgment is to be rendered, a court has to decide what currency to render that judgment in. Will there be rules in the country that will mandate rendering the judgment in local currency? There certainly have been. England did not change until a case just a few years ago. We're then also going to look at the difficult problem of the enforcement of a foreign judgment, which, in the United States, is not federal law, but state law. We have worlds to go in that area, not only in making it federal law, but in making it international law ultimately. Then I think we will turn to arbitration and raise questions about would it be appropriate to choose arbitration, where might we choose arbitration, and also would an arbitral award be enforced. We will see you in two hours, at 1:30.

AFTERNOON SESSION

GORDON: We will now assume that Universal, and I think we also should assume that about Canfibre, were sued in Mexico, served and had a proper opportunity to be heard. The Mexican court rendered a default judgment for 100 million pesos. We're going to ask if they might have rendered it in another currency in a moment, which was the equivalent of $1 million at the time of the loss. To pay the 100 million pesos, Universal would have to convert $1.2 million (U.S.) to pesos now, because the peso has strengthened against the dollar since the loss. Mexico has to bring a suit on the judgment both in the United States (presumably in Tampa), and in Canada (presumably in Toronto). They would like to be able to collect the $1.2 million (U.S.), plus

interest, costs, punitive damages and outrageous attorneys' fees. So one of our questions will be to ask whether a court in the United States or Canada would enforce that suit. Why don't we turn to Professor Juenger, and see what the United States might do with this.

JUENGER: They might give a judgment in pesos or in dollars.

GORDON: Rule? Authority? Juenger law?

JUENGER: While I believe there is federal authority on point, I actually wonder why litigants would ask for foreign currency. I would never have the temerity to ask a court to give a judgment in a foreign currency. You can always ask for adjustments to reflect current rates of exchange, and who knows which currency will go up and which currency will go down. I think the ability of the court to award a judgment in francs or pesos, for instance, is more theoretical than real. Most litigators, I'm quite sure, would prefer the kind of cash that is used in the country, so I would think that this is a nonproblem.

GORDON: To some extent the damages which were incurred in Mexico to the factory are largely going to be peso costs. So they're probably going to want pesos.

JUENGER: I'm not sure about Mexico, but many civil law countries allow courts to say, "You rebuild the factory." In other words, to issue something like a decree for specific performance. The judgment debtor must come up with whatever sums are necessary to put the plaintiff in the position in which that person was before.

GORDON: What about Canada? Can they give a judgment in foreign currency?

BLOM: The Canadian courts have kind of followed English precedent here. In England, as you may know, in 1976, the House of Lords reversed a decision it made fifteen years before when it said England can now give a judgment in foreign currency, giving the plaintiff the alternative of payment in sterling at whatever exchange rate it takes to get the defined amount of foreign currency at the time of payment. So the plaintiff is guaranteed to get whatever the foreign currency is, and a judgment for foreign currency will be awarded according to the English rule, whenever the loss the plaintiff has suffered is best quantified in that currency. So the question is to what extent has that been applied in Canada? Well, the complicated factor is the federal statute which says that any statement as to money in a federal proceeding has to be in Canadian dollars. Some judges are inclined to read that as meaning we have to say at the time of judgment exactly how many Canadian dollars we can get. So those courts will give judgment on the foreign Mexican judgment. If it were enforceable, they would say, "Okay, this many pesos today when we give judgment in Canada is worth this many Canadian dollars, then here you are." The English rule would say, "You, judgment debtor, must pay this many pesos,

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or how many Canadian dollars it will take to do that when you actually pay." One Canadian court has said the federal statute isn't worded so as to preclude that. So in some provinces some courts have gone all the way to the English rule. In other provinces they are saying, "No, it's got to be converted at the date of judgment, so you get a defined dollar figure." And then other province courts have said, "We're bound by precedent, very old Supreme Court of Canada precedent, to say, no, it's got to be converted as of the date the judgment was rendered in the foreign country, because that's the date in which the obligation arose." There are statutory modifications in two provinces just to complicate things further. British Columbia has passed a statute, not yet in force for reasons I don't know, that says you must use the English rule. No option. If it's a foreign currency debt, it must be converted at the time of payment. Ontario has done the same thing, but says if the court believes that it would be inequitable to convert the payment as of that date, you can choose another conversion date. So the short answer to the question is if the judgment is in pesos, the Canadian court could give judgment probably for the Canadian dollar equivalent, at least at the time of the Canadian judgment.

GORDON: This is really quite recent law both in Canada as well as England, coming out of the 1976 *Miliangos* case in which Lord Denning led the way, but had absorbed another rebuke from the House of Lords for his adventuresome decision. But the Lords came back to approve the idea of another currency, and it wasn't terribly long after that (1988) our *In re Oil Spill by Amoco Cadiz* case was decided, where the court said the injury was in francs, the contract was in francs and the judgment ought be in francs. I think it is pretty firmly affixed in our mind that you can give judgment in a foreign currency. One of the difficulties that arises is the problem of the date of conversion. If you do have a conversion issue, will it be the date of the wrong complained of, the date of the judgment, which is what New York chose when it adopted a statute a few years ago, or the date of payment, which is in the new Uniform Foreign Money Claims Act? It has been adopted in a few states, not very many, about a half dozen in the U.S. The Restatement (Third) of Foreign Relations, does not fix the date specifically, but applies the date which will "best serve the ends of justice," so that you don't have delays encouraged by one party in order to benefit from currency movements that are going on. I believe Mexico has a rather strict rule about rendering judgment in pesos.

PEREZNIETO CASTRO: Yes, in Mexico we have the same criteria that Professor Juenger said. But, specifically, we have a rule in the federal procedure code, and I think in most of the procedural codes of the states, that says that the judge *has* to render his award in a

specific and liquid form. The meaning in Spanish of liquid is that it has to be in money. It is interpreted that the money in Mexico is the peso. We have a monetary law in Mexico that provides that the current money in Mexico is the peso, and the judges and the courts have to render their awards in pesos. But you raise a very important question. We have some problems dealing with conflict of laws. When we talk about conflict of laws we talk of space or territory — Mexico, Canada, U.S. But there is another kind of problem that we deal with, in this special case: we have *time* conflicts or temporal conflicts. This is the time of the obligation, when the award is given in Mexico by the Mexican courts, or when it will be enforceable in Canada, because the devaluation of the peso could happen, or a change of position of the Canadian dollar could happen. If the award amount is very high, a change of a few cents might be a fortune. My opinion, in this specific case, is the time is when the award is enforceable, because it is when the obligation becomes *real* in Canada, or is *real* in Mexico. It could happen that the Canadian courts will not accept the Mexican award. And what happens with the litigation created by the Mexican courts? Nothing. It's real and enforceable because we are in the borderline of public policy. Monetary questions are on the borderline of the public policy. Each country has its own and specific rules that they apply without any consideration of international factors or contacts. I remember a case in the Cour de Cassation in France which dealt with an international contract with a gold clause. At that time, in the 1950s in France, it was forbidden to contract with gold clauses. However, the Cour de Cassation said because the contract was really international and has all the international contacts, they would accept the gold clause in this case. That is the exception, not the rule. Currency always is on the borderline of public policy.

AUDIENCE QUESTION: I just want to make sure I understand this. What you're suggesting is that once Canada accepts the Mexican judgment, that's when the valuation should be set in pesos?

PEREZNIETO CASTRO: No, when the award is rendered in Mexico.

AUDIENCE QUESTION: When the award is rendered in X amount of pesos, that's the point where you say value it in dollars? That's what you're saying?

PEREZNIETO CASTRO: No, I said that the award rendered in pesos by a Mexican court has it's own value, but if you have to enforce that award in the U.S., the real moment will be at the time that award could be enforceable in the U.S.

AUDIENCE QUESTION: We haven't really talked about it but what is the U.S. law, for instance, when you have a Mexican judgment enforced in the U.S.? What's the law as far as a Tampa court enforcing that judgment?

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GORDON: That's where we are heading to, because what we may have is a Mexican judgment that was rendered in pesos that the American court is asked to enforce or the Canadian court is asked to enforce. Or we may have a judgment that was rendered in dollars.

AUDIENCE QUESTION: Does it make a difference?

GORDON: It may make a difference because this Uniform Foreign Money Claims Act has one provision in it that deals with enforcement of foreign judgments where there has been the use of a different currency. So one, I think, could find a situation where the court would enforce the judgment, but they would not enforce the conversion rate. They would not accept that.

AUDIENCE QUESTION: They would accept the judgment?

GORDON: Yes, they would accept the liability.

AUDIENCE QUESTION: But it is going to be determined by the U.S. court?

GORDON: Certainly, because it seems to me that they've got to look at such aspects as punitive damages, whether they'll accept the award of costs, and in this case there's one more thing, whether they'll accept the time of conversion.

One problem is what if the Mexican party has delayed in presenting the judgment to the U.S. court? You know that the U.S. party will have to pay dollars. They don't have pesos, and it may be unfair to them for the U.S. court to say, "We enforce the judgment and we will enforce it in the amount of pesos rendered by the Mexican court." They may want to take a look at and render this in dollars. Give a conversion figure that may be based on fairness, the view of the Restatement. It seems to me it could be the date of the wrong complained of, the date of the judgment in Mexico, the date of the enforcement in the United States, or the date of the final payment.

JUENGER: I think we're putting the cart before the horse. The first question is, is the Mexican judgment enforceable here? Do we recognize it and will it be enforced? First, you have to talk about the principle, then you can talk about the price. And I think the important thing to realize is that this country is really liberal in recognizing foreign judgments, if, of course, the foreign court had jurisdiction as seen through our eyes, as we conceive of jurisdiction. Now most civilized states in this country have adopted the Uniform Foreign Money Judgments Recognition Act.

GORDON: Would you say that again?

JUENGER: Most *civilized* states in this country have . . .

GORDON: Florida has not.

JUENGER: But I was assured by Professor Gordon that it will, and it's about time. The reason is that many foreign countries require *reciprocity* for recognition. The easiest way to show reciprocity is to

have a statute on the books in Florida. In this fashion, you guarantee the recognition of *Florida* judgments abroad, only *if* you have such a statute. Why the legislature of this fine state hasn't gotten around to doing what it should have been doing about fifteen or twenty years ago, when we enacted the Uniform Foreign Money Judgments Recognition Act in California, I do not know. Considering that Florida is the gateway to Latin America, maybe not Gainesville but certainly Miami, you ought to have such legislation on the books and I'm very pleased to learn that you're pushing for it. But even if you don't have the statute, there's case law in this state which is quite permissive as regards the recognition of foreign country judgments. This country has been very good about it. I suppose the reason is that because the full faith and credit clause requires the recognition of judgments rendered outside the state, courts are habituated to the recognition of foreign judgments. If the courts every day enforce foreign judgments even from civil law jurisdictions, like Louisiana, they are prepared to enforce foreign country judgments as well. In any event, the United States has an exemplary attitude when it comes to enforcing foreign country judgments. This is not the case everywhere else in the world. But recognition of foreign country judgments is one thing, actually enforcing them is quite another. There is, of course, quite a difference between having a mere piece of paper and money in the pocket. Also, enforcement will always cost you money, and it's often difficult to find a practitioner who's sophisticated enough to handle the case. If you find one who charges by the hour, he may spend a lot of time researching that question. A contingent fee arrangement will also cost you quite a bit. So it's not the happiest of things to appear with a foreign judgment. I'd rather have a judgment of the jurisdiction in which I try to collect. Still, all in all, the tendency in the United States is very liberal, and it will improve even more in this state if Florida adopts the Uniform Act. Until the 1960s in France, for instance, they would not recognize a foreign country judgment. They have what they call *revision au fond*; you once again have to litigate the *merits*. That is, of course, *non*-recognition. In Germany, you still have to show *reciprocity*. In other words, we're ahead of the rest of the world in judgment recognition. And if, in our case, the Mexican court is considered to have jurisdiction seen through the eyes of the Florida court, there's no question about the recognition of the Mexican judgment.

GORDON: A lot of this comes from an early U.S. Supreme Court case, *Hilton v. Guyot*. That case gives some troubling language of reciprocity, which many states have picked up and made a matter of state law. Florida required reciprocity until recently. There is really no assurance, even though some recent cases suggest otherwise, that the Florida court might not turn to reciprocity again. We looked at

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a number of decisions, in doing a casebook, in states that have not adopted — uncivilized states in Professor Juenger's definition — the Uniform Act, and looked at the language of those states. Then we looked at states which have adopted it, and surprisingly found that the language of the decisions really was not all that different. The Act wasn't having a lot of effect, but it was giving you some focus. However, there is a decision in the state of Washington which is the kind of decision we would like to see. They acknowledged the existence of the Act, they turned to it, they mentioned the number of items which you have to go down and they actually went down the list. But in other states that have adopted the Act, courts have mentioned its existence, but have not applied it very carefully. They go on and use the old applications.

JUENGER: Let me add just a little wrinkle. If you have a foreign country judgment, what you may do first is take it to New York or California. Then you get a judgment on the foreign judgment, and that is, of course, entitled full faith and credit recognition throughout the United States. Then take it to Florida. So you can avoid the problem of possible nonrecognition quite simply. Let me say one more thing. I have been asked for advice about enforcing foreign maintenance decrees, which are not covered by the Uniform Foreign Money Judgment Recognition Act because family law matters are not included. But the California courts have been very liberal in applying, by analogy as it were, the Uniform Act, and *extending* it. This is a sound approach premised on the principle of *res judicata,* to give recognition to foreign child and spousal support decrees.

GORDON: This area is one where you future lawyers may be helpful in developing, because the reason we will see this Act adopted is because a group of lawyers in the International Law Section of The Florida Bar proposed the change a few years ago. The American Trial Lawyers Association Florida Section opposed it initially. They thought this would hurt their income. The International Law Section started about a year and a half ago to convince that group. They were successful. They went before the Board of Governors of The Florida Bar; they have approved it. The issue then turned into two questions. One is how do you get the business community behind you. And so you really have to think more than just as lawyers. You've got to think how are you going to convince businesses that this is going to be good for business in Florida. And the second question, the reason it's not yet enacted. I wanted to get it through before Professor Juenger came, but the reason we didn't was we did not know the procedures to go about in the state legislative process. It's very complex. You've got to get it into certain kind of legislative bill "hoppers" in the beginning, and hope it will work its way through, or get people behind it.

But we are certain that it will pass in another year. We should have it. There's no question. But we really should be looking for an international resolution to this issue. The matter is now being considered at The Hague.

AUDIENCE QUESTION: I wanted Professor Juenger to expand a little bit on the issue and claims preclusions aspects of these foreign judgments.

JUENGER: Let me give it to you in a nutshell. There's nothing in the Uniform Foreign Money Judgment Recognition Act, nor is there anything in foreign law, because there is no such thing in most civil law systems as collateral estoppel. This shouldn't stop an attorney from arguing that there is. Indeed, there are several American decisions that have given issue preclusion a collateral estoppel effect to judgments from France and Germany, an effect which these judgments never had at home. I don't want to go into this at great length, let me just say that in civil law tradition countries the rules of evidence are much more relaxed. Because you don't have civil juries, there's no need for issue preclusion: you can always ask for the dossier of the earlier action and use its contents as evidence. Therefore, it is unnecessary to go the all or nothing route of either disregarding the foreign judgment entirely or giving it full effect as regards the facts found.

GORDON: What about Canada, by rule and by inclination, to get a judgment enforced in Canada?

BLOM: Canada is at an interesting state at this moment because of judge-made change rather than a legislative-made change. Until recently, Canada stuck to the English rule, which was basically the foreign court had to have jurisdiction, and jurisdiction means either you are served there or you agreed to submit. That meant that for anything based on long-arm jurisdiction, there was no enforcement possible, unless there was submission. So the advice every lawyer gave clients, who got notice they were being sued on the basis of long-arm jurisdiction, was to do nothing. And this applied as between Canadian provinces too, because there's no full faith and credit clause in our constitution. So if you got notice in British Columbia that you were being sued in Ontario, the lawyers would say whatever you do — unless it would be inconvenient to you to have a default judgment outstanding against you in Ontario, which it might well be — the best thing is don't appear, don't do anything, and they'll get a judgment in default, but they can't do anything with it here.

In 1990, a Supreme Court of Canada case, involving an Alberta foreclosure judgment trying to be enforced in British Columbia, confronted this defense — "I was not there. I did not submit." The Supreme Court said all these traditional rules about jurisdiction, these

very narrow rules that you've either got to be there or you have to submit to it, are based on outdated concepts. Private international law, they say, is based on comity, which we define as a need to facilitate the orderly movement of wealth, property and people across boundaries in a fair and reasonable way. And so in the light of this new comity and in the light of the Canadian constitutional setup, which involves its provincial legal systems all subject to the control of the Supreme Court of Canada, which involves the common market, the obvious intention is to have one integrated legal system. In the constitution, it isn't so obvious at all, but the court said that this was the intent of the framers of the constitution. The court said we don't need a full faith and credit clause because we, the court, now declare that there shall be recognition of all provincial judgments as long as they take jurisdiction on a reasonable basis. They did not proceed to define just what that meant. They said we're deciding this only for judgments from within Canada, but they didn't say we're not going to apply this to foreign judgments; they were just leaving that one open. So we've got two problems. We don't quite know what the rule is in Canada for default judgments. You've got to have what looks suspiciously like minimum contacts with the jurisdiction of the originating court. If there's been a tort committed in the foreign jurisdiction or a contract that's reasonably connected with a foreign jurisdiction, a default judgment, at least in Canada, obtained in that jurisdiction is enforceable now without any submission or anything else. So the first problem is exactly determining what the rule is. The second is does it apply to the U.S. judgments, Mexican judgments or other foreign country judgments? I would have predicted and did predict that it would not extend to those because of the heavy emphasis that the Supreme Court put on the constitutional nexus, the constitutional context in which this was being decided. The trial judges immediately applied it to foreign judgments, however, and said "fair is fair and if it is a U.S. court (they've all been U.S. cases so far, taking jurisdiction on a reasonable basis) we will enforce it." At the moment of course you have a nice transitional problem because all of this is retroactive. All the lawyers who gave this wonderful advice, which was perfectly correct before December 1990, and said, "don't go there," are now being phoned by their clients or their former clients who say, "wait a minute, I am now being sued on this and it looks like I am going to lose." So in the Mexican example, if you got notice of a Mexican action being commenced against Canfibre, Canfibre would have to decide if it doesn't appear there is a risk that a default judgment will be given in Mexico. And if this *Morguard* Supreme Court of Canada case extends to the Mexican judgment, and it well may, we're going to be sued in Canada on this judgment without any possibility of a

defense because the preclusive rule is still there. If it is an enforceable foreign judgment, you cannot raise the merits, except in Quebec where they have the French doctrine of *revision* referred to. So it's a real calculation now — you're dealing with an uncertain state of the law, presumably you have to advise them. You're taking a big chance if you don't appear because a default judgment might be an irretrievable loss for you. All of this has happened, as I say, in the last couple of years. It has changed the picture completely. If we took jurisdiction and there is a reasonable basis to enforce it, it presumably does apply to a tort action by Mexo in Mexico. The tort was committed there, the damage was done there, and if they get a default judgment presumably it would be enforceable under that category.

GORDON: What could they say to deny enforcing a Mexican decision? Open up the jurisdiction issue?

BLOM: It's tough to see any real way — they might play around with due process. It's fair procedure in some way. But if Canfibre got proper notice of the proceeding, that's not really an argument. They could say that *Morguard* doesn't apply outside Canada. But if they say *Morguard* does not apply outside Canada, they can't very well say it does apply to the United States, but not Mexico.

GORDON: There is an interesting decision in Texas, dealing with one of the Hunt brothers, and there is a comment in the Texas decision about enforcing a judgment of an English court which essentially says, "Where else could you get such wonderful justice but in England, and, of course, we will enforce it." If there's a sort of imperialism built into that in enforcing judgments in the U.S., one might say yes to a U.S. decision but no to one from Mexico. They would essentially be taking a slap at the Mexican legal system. I find that difficult. What about Mexico's rule on enforcing judgments of Canada or the U.S.?

PEREZNIETO CASTRO: Mexico has very defined rules enforcing judgments, because of the procedural codes. This is a rule of concurrent jurisdiction. It could be federal, it could be local, it depends on the court. We have a list of causes for recognizing and not recognizing foreign judgments. In general, I could say first, the defendant has to have had service. If it is a judicial service, it has to be *in personam*; if it is arbitration, it is what the parties in arbitration decided. But, over all, the defendant must have the opportunity to be heard. Second, we have the question of exclusive jurisdiction. We don't recognize any foreign judgment on Mexican real property, or on the other matters where Mexico reserves exclusive jurisdiction. Third, the foreign judgment has to be in accordance with the Mexican *ordre publique* (public policy), which is a matter of interpretation, but with some limitations.

Finally, the foreign judgment has to be rendered in a precise, liquid amount.

GORDON: What about reciprocity?

PEREZNIETO CASTRO: And reciprocity.

GORDON: So a decision of one state of the United States might be enforced and that of another state might not be?

PEREZNIETO CASTRO: Yes.

JUENGER: Two points. First, you can see how important it is to have the Uniform Act enacted in Florida, because it is very easy to show reciprocity when you point to the Uniform Act. Second, reasonable nations differ with respect to jurisdiction. I have already mentioned to you the former German *exorbitant* jurisdictional basis of asset-based jurisdiction. With five Marks in a German account, or a basket of flowers in Germany, a foreign defendant could be sued in Germany for a million dollars. Or think of Article 14 of the French Civil Code, another exorbitant basis of jurisdiction, which permits French plaintiffs to bring all of their actions *in* a French court. Assume now that you have a foreign judgment ostensibly based on one of those jurisdictional heads, like plaintiff's nationality or the presence of assets. But in fact there were, as seen through *our* eyes, minimum contacts. It's just that the foreign court never got around to talking about them because the judges there rely on their own jurisdictional basis. Can such a judgment, rendered ostensibly on an exorbitant jurisdictional basis, be recognized in the United States under the Uniform Foreign Money Judgments Recognition Act? The few people who have thought about it tend to conclude that the answer is "yes." Remember Jean Claude Killy and the paternity suit? The jurisdictional basis for the paternity suit was the suitcase left in an Austrian hotel room. Could that judgment be recognized in California? Probably. Reason? We have the Uniform Paternity Act that uses intercourse within the state as a basis for jurisdiction. So if there was intercourse in Austria as a result of which the child was born, there would be jurisdiction as a matter of California law. The mere fact that the Austrian court may state in its judgment that "we base our jurisdiction on the presence of assets" would be irrelevant.

PEREZNIETO CASTRO: Let me say something. I think that in all this, the major point is the jurisdiction of the foreign court. Whether it is U.S. courts, Canadian courts, or Mexican courts, it is how they define *whether* the foreign court had jurisdiction. That is the main point. We tried to solve this problem with the Inter-American Convention, that I hope soon Canada will ratify. The U.S. hasn't ratified this yet — the Inter-American Convention on Foreign Jurisdiction. Because this Convention is an international instrument which gives you

the certainty and precision of what are the jurisdictional bases, we can say, in order of acceptance by the U.S. and Canada, those bases become international for those countries. It is a question to check, in this international instrument, if the foreign judge accepts jurisdiction on this basis and immediately you have an answer.

JUENGER: The United States will not ratify it, nor will Canada. For the simple reason that at the moment, as Professor Gordon pointed out, the United States is busy in The Hague, as is Canada, negotiating a full faith and credit clause for the world. So that will considerably detract from any other recognition treaty.

GORDON: We've been very concerned with the exorbitant jurisdiction idea. Assume you've hit a French exchange student who is here. That student sues you when arriving home in Paris on the jurisdictional basis of the nationality of the *plaintiff*. They get a judgment against you and that is now going to be enforceable even though it was based on exorbitant jurisdiction, I understand, throughout the European Community. The United States has negotiated with England to have a sort of nonrecognition in England of those judgments, but without success. So I think what we're doing is we're trying to bring ourselves into something like the Brussels Convention, perhaps expand the Brussels and Lugano Conventions and make this a world-wide convention.

JUENGER: The proposed agreement with England went nowhere for two reasons. The English insurance lobby was quite concerned about the size of our jury verdicts and the possibility of treble and punitive damages. The other reason is that what we submitted as a draft was utterly confusing, because we tried to draft around the confusing Supreme Court case law on jurisdiction. In contrast, Canada succeeded in negotiating such a convention with the United Kingdom.

BLOM: It was relatively easy then because our rules for jurisdiction were similar.

GORDON: When we are talking about Mexico, we're talking about rules. In comments that you have made, including the Canadian comments, there's a sort of *spirit* of enforcement. In looking at Mexican decisions, is there a spirit to agree to enforce?

PEREZNIETO CASTRO: This is not uniform in Mexico. It depends on the city, and it depends on the court.

GORDON: Can you give us a list of places and courts?

PEREZNIETO CASTRO: There are many questions involved. In Mexico City, the judges are informed and they know about foreign judgments. They recognize and they enforce foreign judgments quite easily. Cities like Guadalajara or Monterrey also do but not so easily as in Mexico City. But outside of these cities, the judges don't know anything about the foreign issues.

JUENGER: Like in California.

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PEREZNIETO CASTRO: I remember years ago a lawyer asked me to go and explain to a judge in a little town about recognition of judgments and awards. I called the lawyer from this little town and said, "Look I have to stay here longer because this judge doesn't know anything about judgment enforcement law." That happened. This is one point. The other is corruption. In Mexico, there exists corruption. And it could happen that maybe the defendant has more money than the plaintiff and, therefore, you could find problems.

GORDON: I think you have to define what we might refer to as corruption in judicial decisionmaking, as a sort of preference for family and person over property. I think that in Latin American courts, where there is a family issue at stake, there is more likely to be a ruling against property interests.

PEREZNIETO CASTRO: I don't know, but I define corruption as giving money to the judge or to the officials who work with the court.

AUDIENCE QUESTION: In Mexico you said one of the rules to enforce a foreign judgment is that it has to be liquid, which is monetary. In the U.S. or Canada, will they enforce foreign judgments that call for specific performance or types of injunctions?

JUENGER: That's a troublesome question. For a while it was uncertain, even among sister states, whether decrees for specific performance would be entitled to full faith and credit. The answer nowadays is yes. While the Supreme Court has never ruled on that point, the Restatements and the literature say so. With respect to foreign country judgments, the Uniform Foreign *Money* Judgments Recognition Act is, by its terms, *not* applicable. I still think, although I might not want to take that case on a contingent fee arrangement, that there's a good argument to be made that foreign decrees for specific performance are enforceable in the United States precisely because of our liberal attitude. In part, it's an attitudinal thing, and, as I pointed out before, our liberal spirit results from the fact that American judges so often enforce "foreign" judgments. I, therefore, think nowadays they would be inclined to enforce a non-monetary decree. For instance, let us say there is a decision out of France awarding a divorced wife or husband half of the property in California. Although the French court still has no power to divide property, it can still order a person who is before the court to do so and an American court may well respect such a decree. Again, I cannot say that with certainty because I don't know of any cases, but I think there is a good argument to be made. I don't know how it is in Canada.

BLOM: The Canadian position is easier to answer. You can't enforce anything other than a money judgment. That's mainly because the theory behind the enforcement of judgment was that it was a debt. There was an action on a debt, the judgment itself created the debt.

Obviously, only money judgments create a debt. An order for specific performance was considered a personal order made against the person of the defendant, and that's something for the original court to enforce if it can, but not for foreign enforcement. The Supreme Court of Canada has really gotten on this comity kick, not just in this case, but in one last month which involved an antisuit injunction against Texas. It was asbestos litigation. But the court didn't give the injunction and one of the reasons they said it shouldn't be given was because they said a certain amount of deference to legal systems is essential; it's not for Canadian courts to sit there and stop litigants, even Canadian litigants, from going down to Texas and getting a judgment so long as we think the Texas court is taking jurisdiction on a reasonable basis. So that comity argument might, if it's taken far enough, leave the Canadian courts to say, "Why not enforce specific performance orders or orders for the division of matrimonial property, because it helps facilitate the orderly flow of people, et cetera, across state boundaries." So if they're creative enough, there's no reason they couldn't do it.

JUENGER: In the United States, antisuit injunctions are not entitled to full faith and credit. The other day in my international litigation class I talked about antisuit injunctions and was surprised to learn that none of my students had ever heard that word. This is one of the trump cards in the forum shopper's arsenal. This is, you might say, a negative *forum non conveniens*. The court tells the parties, "Don't go there and litigate, we're the convenient forum." This is of great practical importance. There is a famous international case, that of Sir Freddie Laker, whom we can thank for being able to fly across the Atlantic cheaply these days. However, Sir Freddie didn't make any friends in the airline industry by cutting prices, and they ganged up on him and drove him out of business. Sir Freddie, or rather his trustee in bankruptcy, sued in the United States, arguing that the airline cartel had violated the Sherman Act. The airlines got an antisuit injunction in England against Sir Freddie, which told him not to litigate in the United States. At this point, the American court issued an antisuit injunction against the airlines barring them from litigating in England. This international stalemate was resolved by the House of Lords, which ultimately lifted the English antisuit injunction and permitted Sir Freddie to proceed in the United States. At that point, the case was settled. The point I'm trying to make is that would-be forum shoppers must bear in mind that there is such a thing as an antisuit injunction which, de facto (although it only operates *in personam*), can deprive a foreign court of jurisdiction, which is why American courts will use it rarely.

GORDON: The House of Lords left standing the lower court order on the blocking, which they continue to do. Harold Green's decision, saying it was not for English courts to make jurisdictional decisions, was interesting. I have argued this with some British professors, and their feeling is that *where* a corporation is chartered is a privilege granted to you by the state and the state has control over you.

JUENGER: The English would argue that way.

GORDON: This is the English argument that thereby Laker was granted the privilege of being an English corporation, and along with that privilege apparently came the *privilege* of only being able to litigate and have your day in court in the nation where you have obviously the best judiciary in the world, that is England. And they said *we* can tell you where to litigate, but Harold Green looked at this as a kind of order to the U.S. court to stop the proceedings. His language is, "You're not telling us in the United States whether we can go forward with a matter in the U.S. court or not." It's a fascinating little episode in the history of our international litigation.

BLOM: The Canadian Supreme Court case I mentioned involved asbestos suits brought by a bunch of people who worked in British Columbia. The litigation was really being run by the workers' compensation board, which was subrogated to their claims. They began an action in Harrison County, Texas, which is apparently Valhalla.

JUENGER: It's where the real money is.

BLOM: The litigation was against a bunch of U.S. asbestos corporations, and they began proceedings in British Columbia to get an antisuit injunction against the workers' compensation board. They also wanted an injunction against the workers' compensation board getting a Texas antisuit injunction against this antisuit injunction, so that the actual suit that was being considered was an anti-anti-antisuit injunction. The British Columbia courts were actually persuaded to grant it to the U.S. asbestos companies, preventing a British Columbia group from enriching themselves at U.S. expense, contrary to your own interests. But the British Columbia courts were outraged by what they were told was the practice of the Texas courts to reject all arguments of forum non conveniens. And they said this is impossible, and this is abusive, to take people into such a forum. The Supreme Court of Canada reversed and said who cares whether they do or don't entertain these notions of forum non conveniens. Do we think that they are in fact an acceptable forum against American companies? They're just as connected with Texas as they are with British Columbia, why not sue them there?

GORDON: Just as the money judgment that we're talking about (we've sort of distinguished between money judgments and non-money

judgments) includes an element for the injury, it also has costs, and it might have punitive damages. Would the United States recognize a judgment where there was included the view that the loser pays all costs, no question about it?

JUENGER: There are American cases, enforcing awards of attorneys' fees. Increasingly the plaintiffs get fees in the United States. Therefore, there is no public policy against such enforcement. Another problem is our punitive damages. There has just been a German Supreme Court opinion refusing to enforce such damages — you can read all about it in the American Journal of Comparative Law. Although there is also a Swiss opinion enforcing an American punitive damages judgment, most foreign countries will not enforce the punitive portion. The German case did, however, enforce the remainder of the judgment.

GORDON: Let's look at Canada and Mexico. An interesting thing about costs in the United States is that Alaska has adopted rules that the loser pays all. They've adopted the English view and it has worked out really very well. There is a problem trying to fit that into contingency fee litigation. What about the punitive damages in Mexico and Canada? Will Mexico, if they're going to enforce a judgment, enforce it if it includes punitive damages?

PEREZNIETO CASTRO: Yes, I think they could.

GORDON: If they didn't would they use the *ordre publique* as an argument against it?

PEREZNIETO CASTRO: It depends on the state. I think actually in Mexico City, yes, they will.

BLOM: No clear answer for Canada. The only clear thing they won't enforce is a penalty in the strictest sense, which is a criminal penalty pertaining to the interests of the state. Such little authority as there is, and it's mostly English, is that civil punitive damages will be enforceable as part of the civil debt. But it's never really been properly considered. There's been a blocking statute against triple damages passed by the federal parliament, that with ministerial discretion they can block a U.S. judgment for triple damages.

JUENGER: I think we should mention here, for the benefit of the students, that some foreign countries allow contingency arrangements, but most of them won't. In England, it's unethical and illegal to stipulate a contingent fee, and I think that this is also true in some Canadian provinces.

BLOM: Ontario is the last holdout; they still think it's improper. All the others have switched.

JUENGER: It's okay in Mexico.

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PEREZNIETO CASTRO: The contingent fee arrangement? In Mexico there are rules, official rules, and maybe you will have problems in that because the base is very low.

GORDON: It may come about in England. England has been considering it. I think they've had a White Paper, and I think the source of pressure to that end is from many of the people (solicitors) who have lost other territory. When the solicitors lost their monopoly over conveyancing about eight or nine years ago they had to look for other turf. I think the average was that thirty-five to forty-five percent of their work was just from conveyancing. Because a lot of it now goes to estate agents, solicitors were looking for other work. There were really two areas. There was an additional area of concern: greater rights of audience before the courts along with barristers.

JUENGER: I know in some countries you do have *de facto* contingent fees, even though they may be illegal. The arrangement is very simple: if I win your case you pay me X, if I lose it you pay me nothing.

GORDON: The comments you make about the Canadian law reminded me of the problem that arose with the Uranium litigation. Westinghouse Corporation was attempting to obtain discovery in Australia, also I think in Canada, in South Africa and in England, in suits against principally Rio Tinto Zinc, and that group. They might have gotten the discovery that they asked for in this civil suit, except for the fact that the Justice Department of the United States was waiting in the wings to get this information on which to base criminal actions. And so for the people who were bringing the civil litigation, this was a really serious problem for them, because I think the responses from the court (they're all very interesting to read because they are all very different in the way in which they turn us down) show that lurking in their minds was the use of this in a criminal case. The court will not enforce criminal laws of another nation, but they might enforce civil rules.

We need to move on and talk a little bit about arbitration. We did have in part III an assumption that were our disputes submitted to arbitration, the courts would enforce the arbitral award. We could ask two questions on that. Would the matter that is at issue be a proper matter for arbitration? I think we will find it fairly easy to respond to, and be able to turn to the second question: would an arbitral award be enforced in each of the countries? I'm kind of curious, if you were representing clients, where would you suggest that arbitration take place?

JUENGER: There are a lot of mistakes made in drafting arbitral clauses. Let me give you just an idea. Very often the parties omit to

say in what *language* the proceedings will be conducted. The failure to settle this point can mean tens of thousands of dollars spent on translations. Also it's usually advisable to stay away from *ad hoc* arbitration. Chances are you want to have *institutional* arbitration, according to the rules of the International Chamber of Commerce in Paris, usually. They have all the facilities to move matters along. London is another possibility, although until recently they had some pretty silly rules about "case stated." They don't have those anymore but still there is Lord Mustill who has maintained that the parties cannot stipulate that the law merchant governs their agreement. This makes me worry about the English mentality. In any event, you may be better off to arbitrate in Geneva, where they have good lodging, good food and a much improved substantive and procedural law on arbitration. At any rate, it is important to pick the place carefully, to think of the language, and to make provisions on how the arbitrators are selected. In other words, there's a lot of detail to think about when you draft what may turn out to be the most important clause in your agreement. For instance, there are cases where parties designated an applicable law according to which their agreement would be illegal. In the United States, the question arose whether the arbitrators award punitive damages. Now some states have a rule that outlaws punitive damages across the board — Washington for instance. Others, like New York, have a rule that the court can award punitive damages, but arbitrators can't. Sometimes counsel drafting arbitration clauses don't think about these fine points. But is very important to think about them especially because the U.S. Supreme Court favors arbitration even in cases that really should be litigated. For instance, brokerage agreements usually contain an arbitration clause and, according to the Court, even though the brokers are the experts, that clause is enforceable. But then you should at least be able to collect punitive damages for blatant misfeasance, such as churning your account.

GORDON: Where are you going to take arbitration?

PEREZNIETO CASTRO: Let me answer this question. In this case, I recommend to my client that the arbitration take place in Mexico because of the New York Convention, to which the United States and Mexico are parties, and because of the Panama Convention, also to which the United States and Mexico are parties. Because, if the award is rendered in Mexico, it will be automatically recognized by the United States. If the award is rendered in the United States, it could be considered a domestic arbitration, not protected under the New York Convention and not protected under the Panama Convention. And Professor Juenger said something that may motivate the students in international affairs, which is a very profound point. That is, interna-

tional business gives you the opportunity to eat well, live well, and be around to meet many interesting people and to open yourself to a wider group of ideas. This kind of motivation is especially strong for young people.

GORDON: What would you suggest regarding Canada?

BLOM: One thing you've got to bear in mind when you're deciding where to arbitrate is, how secure are we from court intervention? There's no point in going into arbitration if you're going to be fighting in court the whole time about whether you're agreeing to arbitration. The situation in Canada, until the middle 1980's, was that it was a lousy place to go to arbitration because any party could go into court, and then when the other party says, "Wait a minute, you said you'd arbitrate," they could say, "Well, we have some reason why we think the court should decide this." The judges on the whole were quite ready to listen to these arguments. The judges say, "I'm sure we can do this better than any arbitrator," and so arbitration clauses were actually unenforceable in a lot of cases. That's all changed. For some reason a wave of arbitral enthusiasm swept over Canada in every province in about 1986 - 1987. Canada adopted the UNCITRAL Model Law on International Commercial Arbitration, which has a very stringent provision in it which says if a case comes before a court and there is an arbitration agreement, the court *must* stay the proceedings; it cannot go on except in very limited circumstances. So that's the law now. That's made Canada a more attractive forum.

GORDON: Are there similar provisions in the Panama Convention and the New York Convention that essentially require a court to stay the judicial proceedings and send it to arbitration?

BLOM: Yes. Now we're getting uniform on that. The second thing I guess to bear in mind is that there is a possibility of a neutral arbitral forum, where neither party wants to give the other party the advantage of being in their jurisdiction. You can offer a neutral forum, and Canada hopes that it obtains some arbitration business, because we see ourselves as a neutral forum for United States, Asian, and European contracts — because we are kind of in the middle.

PEREZNIETO CASTRO: But this is an expensive solution.

BLOM: That is the third point. Expense. And, of course, geography makes expense. All those fine meals in Geneva make for an expense. In fact, when I got on the plane to come here, one of my former students was on the flight to Los Angeles and we got talking. He'd done some work for me in the past on arbitration and he said they were advising their clients not to put in arbitration clauses because very recently there had been a few very expensive arbitrations in Canada. He said it worked out to a much slower and much more expensive dispute settlement than the courts.

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GORDON: It was designed because it was supposed to be cheap and it was supposed to be fast. And now, like equity, it has come up to be as troublesome as the law.

BLOM: And one of the chief difficulties is that it can happen that there's no way to hurry the process along. The potential for delay is greater with arbitration, depending on the rules.

GORDON: Do you sense that clients who feel they are right, if they had not agreed to arbitration, are not likely to want to agree to arbitrate? Isn't there a sense that arbitration has to have something for everyone? It has to be an equitable proceeding.

BLOM: It ought to be decided on strict rules in favor of one side or the other; it should not be something for everyone.

GORDON: When one of my co-authors was doing the arbitration chapter, he asked a lot of people who practice in arbitration about this. They said they were moving away from arbitration because they feel that there's too much of a sort of notion of fairness and not the application of rules in arbitral panels.

JUENGER: There are several points to consider. One of them is the expense and delay. You can give somebody a good run-around with arbitration. Don't just believe that it's much faster, not as expensive. It may well turn out to be more expensive because you, after all, pay for the arbitrators. Courts in this country come pretty much for free. There's one thing to be considered. The chair has a distinct interest in reaching a unanimous decision. To achieve unanimity, you may have to give the party arbitrators something. They may be quite impartial at heart, but they owe their appointment to a party — hence, what is known as "splitting the baby." There is, in other words, pressure on compromise. If you have one of those nasty clients who insists on one hundred cents on the dollar, you may be better off in court (especially in a court where the rule prevails that loser pays all) rather than in arbitration. The basic point I'm trying to make is that the choice of the means of dispute resolution depends on the facts of each particular situation. *Never*, simply as a matter of habit, put an arbitration clause in all of your agreements. This has to be a tailor-made decision to fit the case. Some disputes are better arbitrated; others are better litigated. It depends on what problems you foresee down the road.

PEREZNIETO CASTRO: Talking about expenses. The rules that Professor Juenger mentioned are rules of the American Arbitration Association, where there is an arbitrator from each side. Each party nominates its own arbitrator, and both designate the third one. I think it is less expensive because each party controls what they pay to their party arbitrator, and they control together what they are going to pay to the third. The more expensive arbitration is before the Inter-

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national Chamber of Commerce in Paris because they elect the arbitrators and they could be very expensive lawyers from around the world. I think that happens. Maybe in Canada or in the U.S., where you have a good justice system, you may have doubts whether you go in the way of arbitration or you go in the way of judicial jurisdiction. That makes it difficult. In Mexico *definitely* the best way is arbitration. Absolutely. I have no doubt, where the judicial system is extremely slow and sometimes there exists corruption.

GORDON: Well the former — delay — is true of Florida. The civil calendar for the federal courts has essentially stopped. If you want to get anything done you're going to have to arbitrate. Only criminal cases are coming up. Civil cases in the federal courts are being moved to arbitration. The point is they just won't get to court. Why? Because the judges are tied up with drug cases on the criminal side. So, to hope to get some kind of resolution, the judicial process may no longer be available to you for that reason.

I think we're coming to an end and what I thought I would do is give each of you perhaps a minute or two to comment on the statement I made first by Dr. Seuss, that we're in pretty good shape for the shape we are in. Aren't we?

BLOM: I guess we are in better shape than we were. If you look at what's happening, the increase of international legal business is really making an impression. Arbitration is internationally a far more familiar phenomenon now. We now have Canadian judges, Mexican judges, and so on who are being routinely confronted with arbitration clauses, enforcing them and enforcing arbitration awards. In handling non-arbitration lawsuits, the courts are getting more internationally minded. I mentioned those Canadian examples; I think it's true in all three of the countries. But as the courts become a little more familiar with the international law problems, then they can begin to adapt the rules better for it. It's probably true that we're not in bad shape compared with what we were, but if you look at North America as a single economic entity — as NAFTA is supposed to make it — there's a long way to go in terms of making the national units function as efficiently as possible in the legal sphere. You've heard all the comments today about, there's this problem if you sue here, there's this if you sue there, there's this uncertainty about what happens here or what happens there. All of that uncertainty is a cost that the system has to bear. So, I suspect, if we had this conference again in ten years time, we probably would see quite a different picture than what we see now.

PEREZNIETO CASTRO: I agree totally with Professor Blom. Next week, we are going to have a formal meeting in order to create the Canadian and Mexican branches of the American Arbitration Associ-

ation. The American Arbitration Association remains very close just to the United States, with some international links. But now, from the following week, we'll have a Canadian branch and a Mexican branch. That means that arbitration is growing. One of the best points is that NAFTA could create more uniform rules on commerce, like what has happened in Europe. In Europe, the uniformity in various issues was created by the Treaty of Rome. The court was at the beginning just handling political or international public affairs, and later on, they created, at the same time of the Brussels Treaty, another court for especially the cases we are seeing now — the commercial ones. Today you can see a great development in legislation, jurisprudence, and uniform conventions in the European Community. I believe that NAFTA could be the first step of what could be, in the future, the legal framework of what happens in reality — Mexico with the United States, the United States with Canada. They have a lot of commerce and we are now beginning with the legal framework that will develop very fast, and for you as young people who will live as lawyers and see all these developments, this is important for you to watch and study. I think that the initiative of Professor Gordon to have this kind of meeting — this is the first — will be workable in the future and, at the same time, is of practical support to the development of Comparative Law. Thanks to this kind of initiative, the knowledge of our three countries will be advanced.

JUENGER: Before I agree with my colleagues, Professor Blom and Pereznieto Castro, let me tell you what a great pleasure it is to attend the First Annual International Business Symposium. I always remember first occasions, especially the first *Seminario Nacional de Derecho Internacional Privado*, which Professor Pereznieto Castro organized some 18 years ago. That was a good beginning, and much came of it. So there is hope for this new endeavor. And, of course, Florida is a beautiful place. It is also full of Canadian snowbirds and serves, at the same time as the gateway to Latin America. This is the right place to talk of how we ought to deprovincialize ourselves and our laws. International transactions among our countries are steadily increasing, and even if NAFTA should not be ratified by the United States, we are still neighbors. And I'm pleased to see, on this Friday at 3:00 p.m. when you could be doing so many things, I'm pleased to see so many students listening to us. I do think we are building something — a new law merchant that transcends national boundaries. To the extent that we succeed, we reduce what I chose to call the international risk. Of course, in order to assist your future clients well, you have to be aware of party autonomy — the power to select the law that governs, to include forum-selection or arbitration clauses, to make a good product for your client, to reduce the international risk.

GORDON: Alberto Szekely, who is a colleague of yours from Mexico, Professor Pereznieto Castro, was here teaching about a month ago, and we were talking about this program. He was very pleased we were doing something like this, and made the suggestion which the Dean and I subsequently talked about — bringing perhaps five or six people from the Mexican Academy and from Canada and from the United States to one of the Florida resort areas, lock them up for three or four days, feed them very well, and see if we couldn't address one of these issues with the idea of presenting a protocol to the NAFTA — hoping that the NAFTA goes through. The NAFTA doesn't really address this area very well. It does address the arbitration area in a few provisions and in the international investment provisions. But for the common, garden variety commercial transaction that we've talked about today, the NAFTA doesn't really give us very much help. These subjects have all been written about by each of our guests and the articles will be revised and appear in a symposium edition.