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RESOLUTION OF AN INTERNATIONAL TRANSACTION UNDER MEXICAN CONFLICT OF LAWS PRINCIPLES

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I. INTRODUCTION

The case presented by Professor Michael Gordon shows the degree of complexity a matter having international connections can reach even when it apparently is a simple one. Simultaneously, Professor Gordon gives us the opportunity of choosing different options for interpretation, and as already mentioned by Professor Juenger, we now truly have become experts in putting together jigsaw puzzles.

In contrast to the United States and Canada, Mexico's legislation and binding precedents do not have a rich international experience to draw from because until just a few years ago Mexico's economy and legislation had been closed to foreign influence.[1] However, the need to increase international trade has finally forced Mexico to open up both its economy and legislation, and this trend will grow considerably stronger when NAFTA becomes effective. Nevertheless, given the inherent characteristics of Mexican law (which is a typical codified system), Mexican law as presently in force, and the international conventions to which Mexico is party,[2] it is possible to analyze this interesting case and suggest different solutions. I agree with Professor Juenger that special considerations must be given to determining which law applies and which court is to have jurisdiction. The case in question speaks loudly to these issues. Furthermore, due to the many alternative courses of action, counsel must analyze the case meticulously because the international implications can lead to a mistake which may have far-reaching and serious consequences.

I have been asked to approach this case as seen from the angle of Mexican law. Accordingly, I will first approach the problem from the standpoint of a Mexican lawyer. Later, I will give an overall view.

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1. The Civil Code for the Federal District was modified in 1988 adopting rules of conflicts. The Commercial Code was modified in 1989, introducing a new chapter on international commerical arbitration. A second modification of this Code arose in 1993 and in this occasion it was introduced de UNCITRAL rules on arbitration.

2. Mexico is a party, since 1971, of twenty-four international conventions on private international law and international commerical law.

II. CHOICE OF FORUM

In Mexico, business and trade law is federal and is ruled by the Commercial Code.[3] The Civil Code for the Federal District (Civil Code) is supplementary law for all things not regulated by the Commercial Code. In addition, the Federal Code of Civil Procedure (FCCP) rules matters of jurisdiction. My opinion, therefore, will be based mainly on these three codes.

Neither Mexobuilders (Mexo) nor Universal Insulators (Universal) made any choice of forum in the communications exchanged between them, and only Universal mentioned governing law. Under this context, we will now see how jurisdiction and governing law would be determined from the perspective of Mexican law.

Article 24 of the FCCP lists how jurisdiction is to be determined; I will, therefore, arrive at the determination of applicable law by using this article as reference. Professor Gordon has asked us to analyze whether the case involves breach of contract; and thus, I resort to section II of this same article which says that the courts "of the place agreed upon for the performance of the obligation to take place" will be "competent" (that is, the court will have lawful jurisdiction) to take cognizance of the case. Because three factors of performance relate to Tampa, Florida — where the goods were delivered FOB, where Universal conducted its principal place of business, and where (presumably) payment occurred — I conclude that the competent court would be the Florida court.[4]

Notwithstanding, Mexo may find that litigation in such a distant place is very costly, and therefore, Mexo must look at cost-benefit considerations in order to decide where to sue. Let us consider the benefits: First, Florida is the place where Universal's assets are located, and therefore a judgment favoring Mexo would be easily enforceable there. Moreover, since Universal designated the law of Florida as applicable, Mexo must consider if this law would favor its interests. If so, this could be another positive element because forum and governing law would coincide. Now let us consider the cost: For Mexo a Florida lawyer would be very costly, and the same can be said for the cost of preparing all the evidence and submitting it before a Florida court. Moreover, Mexo would be dealing with a law with which it is not familiar. In the event Mexo forgoes suit in Florida, it must consider other alternatives; and therefore, Mexo would have to look for other connecting factors.

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3. The thirty Mexican states only have local rules on civil matters and penal law, including procedures.

4. There will be a coincidence of the law of place of performance and the performance itself.

Unfortunately, there are only two other connecting factors available worth considering, both of which are weak: First, Universal established its relationship with Mexo in Mexico, and this is where it gave Mexo its price list. Second, the merchandise (the ducts) was installed in Mexico, and this is the place where the corrosion problems arose. Mexo must assess whether the Florida court (Florida being a place where Universal has a representative office) or the court of any other place where Universal has assets, would accept — for purposes of recognition and enforcement — a judgment rendered by a Mexican court, if that Mexican court asserted jurisdiction on the basis that Mexo and Universal first established contact in Mexico before the agreement was executed.[5] Mexo must also determine whether the Mexican court would take cognizance of the case; accordingly, Mexo would have to prove that those first contacts did indeed induce Mexo to enter into the agreement, that Mexo is domiciled in Mexico, and that it would be extremely costly for Mexo to litigate in the United States.

Professor Gordon's case illustrates how complex a case can become. The claim is that a breach of contract has taken place because the product delivered did not meet the specifications agreed upon and this occurred in Mexico after the ducts had been installed.

There is, however, a third connecting element which is important but which Professor Gordon has asked us to ignore, namely the damages caused by the allegedly defective product. Nevertheless, it must be stressed that these damages occurred in Mexico.[6]

III. CHOICE OF LAW

Now I will address the matter of choice of law. Just as in the case of jurisdiction, we must assess the different factors. We are aware that Universal did designate the law of Florida as the governing law. We must then see if this law will work in Mexo's interest. If it does, then Mexo can accept it as governing law and ask for it to be applied either by the Florida or Mexican court, depending on where the claim was filed. If as a result of this assessment, the law of Florida is found

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5. Since International Shoe Co. v. Washington, 326 U.S. 310 (1945), jurisdiction has been justified by weaker contacts, therefore, I believe Universal-Mexo contacts are enough for purposes of recognition and enforcement of a judgment rendered by a Mexican judge.

6. In a product liability action against the manufacturer, the key factor is the place of the wrong. Accordingly, with the Civil Code for the Federal District (Chapter V, art. 1913) the damages incurred from a defective product are considered illicit acts; and therefore, under the principle *lex loci commissi delicti*, the applicable law in this case should be the Mexican law. *See* MICHAEL W. GORDON, THE MEXICAN CIVIL CODE 349 (1980).

to be adverse to Mexo's interest, then Mexo should focus its attention on Mexican law and how it could be considered the applicable law.

According to article 13, section V of the Civil Code, there are two criteria for determining which law applies: The first one is that "the legal effect of the acts and contracts shall be ruled by the law of the place where they must be performed, unless (this constitutes the second criterion) the parties have validly[7] designated the applicability of another law." As regards the place of performance, it is clear that performance of the agreement took place in Florida since that is where the goods were delivered and the price was paid. We will call this the "legal performance" (cumplimiento jurídico). However, there is another type of performance which we will call "concrete performance" (cumplimiento material). In complying with legal performance, the seller complies by delivering the goods and the buyer by paying the price agreed upon. In contrast, concrete performance requires not only that the seller deliver the goods, but also for the goods to meet the use for which they are intended. Concrete performance can be verified at two different points in time: when the goods are delivered and when the goods are put to use. These two moments do not usually coincide. In the case under discussion, they were different. The purchaser inspected the goods in Florida at the time of delivery. Ultimately, however, the merchandise failed to serve the purposes for which it was intended. But Mexo did not discover this failure until the ducts were installed and did not function, causing the corrosion. Thus, the last concrete non-performance took place in Mexico and Mexican law could be applicable.

The second criterion — whether the applicable law was validly designated by the parties — would have no legal basis because the designation was made unilaterally by Universal. Later we will see the complexities of this question and how it can give rise to other problems.

We therefore come to the conclusion that no designation was made as to which courts were to have jurisdiction. Consequently, the former jurisdictional interpretations become applicable as do several possible differing interpretations of applicable law. This case illustrates how an error or a lack of knowledge of the law in international transactions can generate widespread uncertainty.

Putting aside the traditional method, the case can be approached by taking into consideration the United Nations Convention on Con-

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7. The term "validity" is not yet explained by the Mexican jurisprudence, but in this case it seems applicable because Florida law is connected with the contract as the place where the goods would be delivered.

tracts for the International Sale of Goods (Vienna Convention), which is applicable to our case because it has been ratified by Mexico[8] and the United States.

Mexo made Universal a proposal to enter into an agreement and this proposal was answered by Universal. Nevertheless, Universal's answer included a new element which altered, under the provisions of the Vienna Convention, Mexo's original proposal: this new element was "Goods sold as is and with all faults" (art. 19), which in fact constituted, by itself, a counterproposal made by Universal. As Universal did not receive any further answer from Mexo, the agreement was not perfected until Mexo received the goods and paid the price. I would like to point out that Universal's lack of knowledge of international laws could have caused it a very serious problem because Mexo would have been able to reject the merchandise on the grounds that the agreement had not been perfected, and Universal would not have had a right to any remedy against Mexo. Nevertheless, Mexo took delivery of the goods and paid the price, thereby perfecting the agreement. By so perfecting the agreement, Mexo tacitly accepted that the goods could be defective, and thus Mexo took the wrong course by accepting the merchandise under Universal's terms.

The goods supplied by Universal complied with specifications, fulfilling requirements for the use they are put to in the United States and Canada (art. 35). By taking delivery of the goods, Mexo accepted that the goods were not made of the metal used in Mexico and even though this resulted in corrosion, Mexo lost any right it would have had to any remedy. The conclusion we come to by applying the Vienna Convention is further confirmed by other articles of the same Convention, such as articles 38 and 39, which provide that the purchaser must examine the goods at the time of taking delivery and if within a reasonable period of time it does not inform the seller that the goods are defective, it loses the right to seek relief. Mexo did not do so and therefore forfeited its right.

The jurisdictional and choice of law analysis lead to the conclusion Mexo can only follow the traditional course, which is the most reliable option: filing a claim against Universal before a Florida court according to Florida law.

Professor Juenger has thoroughly analyzed service of process and recognition and enforcement of judgments, I therefore have no addi-

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8. Mexico acceded directly to the Convention on 29 Dec. 1987, with an effective date of 1 Jan. 1989. DANIEL B. MAGRAW & REED R. KATHREIN, THE CONVENTION FOR THE INTERNATIONAL SALE OF GOODS: A HANDBOOK OF BASIC MATERIALS 69 (1990).

9. Because in this case the recognition and enforcement ultimately will be in the United States or in Canada.

tional comments to make on these issues. However, for an in-depth discussion of the basic requirements for a foreign judgment to be recognized under the FCCP in Mexico, please see Fernando Alejandro Vásquez Pando, *Mexican Law of Judicial Competence.*[10]

IV. ARBITRATION

Arbitration is currently the best way to settle controversies that have their origin in international trade. As has already been pointed out by Professor Juenger for the case we are considering, this would have been the best course of action for Mexo and Universal, as both Mexico and the United States are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and to the Panama Convention in International Commercial Arbitration. Nonetheless, I would like to indicate that although the recognition and enforcement of a foreign arbitral award is not a complex matter in Mexico City, this is not the case in the rest of the country because judges are not used to having to recognize and enforce them. I have information in the sense that there have been cases which have met with serious obstacles. Unfortunately, no records exist of these cases given the private nature of arbitration.

V. NAFTA

The basic mechanism in the NAFTA for the settlement of controversies is panel arbitration (the provisions are contained in Chapters XI, XIV, XIX, and XX). Alternatively, NAFTA resorts to other arbitral procedures, as provided in Chapter XI, such as those of the International Center for Settlement for Investment Dispute of Controversies regarding investments (ICSID), to the Panama Convention or to the New York Convention. In any event, the NAFTA establishes uniform procedure for the settlement of disputes which will be a great aid to the trade which is to take place among the three countries.

On the other hand, NAFTA will nurture initiatives like this one organized by Professor Gordon, who is widely known in Mexico as an expert on Mexico, which brings together students and lawyers to gain a better understanding of our legal systems and enhances our knowledge on how to approach, examine, and solve cases like the one we have been discussing involving our countries.

I would like to take advantage of the opportunity of thanking Professor Michael Gordon for inviting me to this seminar, the University of Florida for its support, and everybody who attended for their valuable contributions to this discussion.

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10. *See* Fernando Alejandor Vásquez Pando, *Mexican Law of Judicial Competence*, 12 HOUS. J. INT'L. L. 337, 351-58 (1990).