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Civil Lawsuits Involving a United States Corporation and Individuals from Various Foreign Nations - With an Emphasis on Mexico

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PROCEEDINGS SEVENTH ANNUAL INTERNATIONAL BUSINESS LAW SYMPOSIUM:

CIVIL LAWSUITS INVOLVING A UNITED STATES CORPORATION AND CORPORATIONS AND INDIVIDUALS FROM VARIOUS FOREIGN NATIONS — WITH AN EMPHASIS ON MEXICO

PANEL:

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The following hypothetical is adapted from Folsom, Gordon, & Spanogle, International Business Transactions: A Problem Oriented Coursebook (Fourth Edition, West Publishing Company)

I. HYPOTHETICAL PROBLEM

The Company

GROWFAST CHEMICALS, INC. (GROWFAST) is a Delaware chartered corporation with principal administrative offices in Tampa. It has manufacturing facilities in several states, including Florida and Texas. It also has wholly owned subsidiaries in Canada, Mexico (GROWMEX), and Germany. GROWFAST manufactures many different pesticides and fungicides used by commercial growers of ornamental plants. One of the fungicides is Sollate™. For nearly two decades Sollate™ has been used extensively by commercial and home growers of many tropical plants. It has long been considered the only successful fungicide to control several serious fungi. Some of the ingredients in Sollate™ come from companies in England and Japan.

The Commercial Claims

GROWFAST has sold Sollate™ throughout Latin America. The Sollate™ sold in Latin America is manufactured in Mexico from

ingredients shipped from the Tampa and Texas plants. Several years ago the Sollate™ that was delivered throughout Latin America contained some chemicals poisonous to plants. The result was that many Latin American commercial growers lost their entire stocks of ornamental plants. The Sollate™ which caused the damage was purchased using standard documentary transactions, and each included a provision that the goods were sold "as is, with all faults" and the contract would be governed by the law of Florida. The name GROWFAST appeared on the invoices. GROWFAST believes that the Sollate™ was mixed improperly in Mexico and misapplied in many instances by the growers, and therefore that GROWMEX, and/or the growers are responsible. Or at least that *force majeure* should be applied to excuse GROWFAST from responsibility. Assume that the only claims that are brought are based on breach of contract grounds. While there may be product liability claims raising tort/delict issues, torts will be the subject of the separate problem below. The claims considered under this part of the problem address such contractual issues as the "suitability" of the delivered Sollate™.

The Tort Claims

Totally unrelated to the facts giving rise to the contract issues above, a serious accident occurred at the GROWMEX, S.A., plant in Veracruz. While transferring Sollate™ concentrate into vats for dilution and packaging, supervised by both Mexican employees and two technicians "on loan" from GROWFAST in Tampa, an unexplained explosion occurred. One of the U.S. technicians and thirty-five Mexican employees were killed. Serious injury was suffered by dozens of other employees. The smoke from the explosion drifted over Veracruz and adjacent towns, causing serious burns to several hundred more people, including a number of foreign tourists (two U.S., one French, and one German citizen). A statement by the president of GROWFAST made in Mexico City shortly after the accident blamed the accident on corrupt Mexican government officials who demanded and accepted payoffs during the plant construction, which resulted in contractors not installing adequate safety walls in the dilution room. Unfortunately, the statement was repeated in newspapers throughout Mexico and the United States. The president apologized in a statement released by the company.

II. THE FOLLOWING LEGAL ACTIONS HAVE BEEN FILED (COMMERCIAL CLAIMS)

A. *Actions Initiated in the United States*

1. Every Latin American commercial grower who purchased Sollate™,

which allegedly caused the loss of plants, has sued GROWFAST in federal district court in Tampa.

B. *Actions Initiated in Mexico*

1. Every commercial grower who purchased the Sollate™ has sued GROWFAST and GROWMEX in state court in Veracruz, and in federal court in Mexico City. The GROWMEX plant is in the state of Veracruz, but the company has offices in Mexico City.

III. THE FOLLOWING LEGAL ACTIONS HAVE BEEN FILED (TORT CLAIMS)

A. *Actions Initiated in the United States*

1. The U.S. citizen who was a tourist and the personal representative of the U.S. citizen who was a GROWFAST employee who was killed in the plant by the explosion, have both filed suits against GROWFAST in state court in Tampa.

2. The second U.S. citizen who was a tourist is a resident of New York City and has filed a suit against GROWFAST in the federal district court in New York City. GROWFAST has an office in Buffalo that is mainly for Canadian business. The company is registered to do business in New York.

3. The German tourist who was injured has filed a suit against GROWFAST in the south Texas city where GROWFAST has a plant.

4. A Mexican government official, who the president of GROWFAST suggested had taken payoffs, has brought suit for defamation against GROWFAST and the company's president in federal district court in Tampa.

The above lawsuits filed in the United States all ask for the application of U.S. law, seek extensive discovery, request jury trials, and demand punitive damages. They all have been filed by attorneys who have signed contingent fee contracts with their clients.

B. *Actions Initiated in France*

1. The French tourist who was injured has filed a suit against GROWFAST and GROWMEX in the court of first instance in Paris, where the French plaintiff is domiciled.

C. *Actions Initiated in Mexico*

1. Nearly 100 Mexicans (employees and area residents) who were injured and representatives of the thirty-five who were killed, have filed suit against GROWFAST and GROWMEX, in Monterrey, Mexico. They have asked for compensatory damages, and for moral damages in an amount, which would be equivalent to punitive damages in the United States.

2. Two other Mexican government officials with the same grievance against the president of GROWFAST have brought suit in Mexico asking for substantial damages in dollars.

GROWFAST in Tampa believes that the two companies in England and Japan, which had supplied some of the ingredients to manufacture Sollate™, may be partly responsible for the explosion and damages. GROWFAST nevertheless intends to argue that the explosion was the fault of Mexican employees who disobeyed instructions given by U.S. supervisors. The two companies from which GROWFAST purchased the ingredients in England and Japan have both denied any responsibility. GROWFAST is prepared to bring a claim against both of these foreign companies in federal district court in Tampa.

IV. ISSUES RAISED BY THE VARIOUS ACTIONS

A. *In the Commercial and Tort Actions in the United States*

1. What is your thinking from a strategy perspective on attempting to remove these suits to Mexico under the theory of *forum non conveniens*?

2. Are there any legal obstacles to such removal?

3. Would the court apply the same legal reasoning for such a removal request as it would to a request to remove a matter from one state to another within the United States?

4. If the courts refuse removal, do the facts provide enough to conclude that the subject matter and personal jurisdiction requirements have been met?

5. Assuming removal is not requested, or if requested is not granted, should GROWFAST ask the court to apply Mexican law? What are the

considerations the court is likely to face and wish to discuss before it rules on this choice of law issue?

6. In proving Mexican law in the U.S. court, who would you seek as experts? Who might the court prefer to have appear as experts?

7. If the U.S. court applies Mexican law, could it nevertheless grant punitive damages?

8. If GROWFAST needs discovery in Mexico, what obstacles might it face?

9. In the commercial actions, if the court rules that U.S. law applies, what is the source of that law?

10. In the same suits, if the court rules that Mexican law applies, what is the source of that law?

B. *In the Tort Action in Paris*

1. Would you recommend to GROWFAST and GROWMEX that it ignore the suit? After all the basis of jurisdiction seems extraordinary.

2. Would the French court grant a request to move the case to Mexico or the United States on grounds similar to *forum non conveniens*?

3. What law would the French court apply — Mexican, U.S., or French?

4. Assuming the French court applied Mexican or U.S. law, how would it prove such law?

5. Were the French court to apply U.S. law, would it award punitive damages?

C. *In the Commercial and Tort Actions in Mexico*

1. Would you recommend to GROWFAST that it ignore the suits, leaving the defense and liability to GROWMEX, knowing that GROWMEX has few assets and believing GROWFAST would not be responsible for a judgment against GROMEX?

2. Should you know anything about the federal and state court structure of Mexico? What Mexican courts might have jurisdiction? Does it matter?

3. What law would a Mexican court apply?

4. Does Mexican commercial and tort law roughly parallel that in the United States?

5. Does Mexican defamation law roughly parallel that in the United States? Are Mexican constitutional free speech protections applicable? Is truth a defense to defamation?

6. Does the fact that there were "workers" involved affect the tort litigation?

7. Would Mexico grant punitive damages?

8. How would a Mexican court determine moral damages? Are they available in both commercial and tort cases?

9. Is a class action allowed in Mexico?

D. *If the English and Japanese Companies that Were the Source of Some of the Chemicals Were Added as Parties to the Tort Action in the United States*

1. What would be the principal issues in bringing them into the litigation in the United States?

2. If the English company were to be brought into the U.S. litigation as a party sharing liability with GROWFAST, and one of the plaintiffs was an English citizen (another tourist in Mexico), how would you react to the English defendant company going into the UK court in London with a request that the court enjoin the English plaintiff in the United States from pursuing the litigation in the U.S. court?

V. ENFORCEMENT OF FOREIGN JUDGMENTS

Assume judgments have been rendered against GROWFAST in the United States, and against GROWFAST and GROWMEX in France and Mexico. The judgments in the U.S. included the Japanese and UK suppliers of ingredients of the Sollate™. We know that GROWFAST has assets in various parts of the United States, Mexico, and Germany. Consider some of the following:

A. Commercial and Tort Judgments in the United States Against GROWFAST

1. Enforcement in the United States.

2. Enforcement in other nations where GROWFAST has assets.

B. *Tort Judgment in France Against GROWFAST and GROWMEX*

1. Enforcement in the United States.

2. Enforcement in Germany.

3. Enforcement in Mexico.

C. *Commercial and Tort Judgments in Mexico Against GROWFAST and GROWMEX*

1. Enforcement in the United States.

2. Enforcement elsewhere.

D. *Tort Judgment in the United States Against the Japanese Company*

1. Enforcement in the United States.

2. Enforcement in Japan.

E. *Tort Judgments in the United States Against the English Company*

1. Enforcement in the United States.

2. Enforcement in the UK in view of the issuance of an English court of an injunction ordering the English plaintiff not to proceed with the action in the United States, followed by a U.S. rejection of the injunction.

3. Enforcement in Germany.

VI. REMARKS

WELCOME BY DAVID JONES, EDITOR-IN-CHIEF, *FLORIDA JOURNAL OF INTERNATIONAL LAW*:

I would like to welcome everyone to the Seventh Annual International Business Symposium — Civil Lawsuits Involving a United States Corporation and Corporations and Individuals from Various Foreign Nations with an emphasis on Mexico. Many of you probably know the moderator for this Symposium. He is the Chesterfield Smith Professor of Law at the University of Florida and faculty advisor to the *Journal*. He has been the journal's advisor since the inception and was key to its establishment. In addition, we have him to thank for being able to bring this annual Symposium to the University. Please welcome Professor Michael Gordon.

PROFESSOR GORDON:

I really have not been advising since its inception. I was dismissed a couple of years ago for a period of about a year and half. But I'm back doing it, and I like doing it very much. I appreciate your comments, David. I also appreciate very much the efforts of Brian Bull, who is the member of the Journal who has been in charge of this and was a delight to work with. This is the seventh symposium of this forum. It started seven or eight years ago when the Journal asked me to think of what the Journal might do to fill three issues a year. At that time trying to produce three issues a year from whatever came over the mail with so many international journals being formed, it was pretty hard to get three editions out of that nature. I had seen over the years in being asked to not only read journals but also asked to write for them that I routinely throw out the letters that simply come that say will you do something for our journal and have written only when there is some kind of symposium that has been involved in an area which I have an interest. I have also noticed that those are the journal editions that I took the most interest in and would purchase various copies. I thought maybe we could do something of that nature that would be useful. I had just come back from teaching at the Duke Law School where they had a journal named, Law and Contemporary Problems, which takes exactly that format having people come and discuss an issue, do some papers, and have all the proceedings and papers published. We have been doing that every since. This is our seventh year and we have just about the same number of students attending today as we usually have. We did have one slight aberrational year with 350 to 400 people attending along with CNN and ABC. A very considerable number of security guards attended as well. That was the year I invited three faculty members from

the University of Havana in 1995 to come visit us. A few of our exiles in Miami and the legislature took issue with that. It was the budget week for the university system, and they stopped the budget process holding it up for a week pending my dismissal and the cancellation of this program. I was labeled at the time the pink professor from Gainesville. Which is interesting because I am probably the only registered Republican on this faculty. Any event, that is a little of the background.

The problem we are doing today revisits what we did the first year in a very small fashion. In that year we looked at something on enforcement in Mexico, Canada, and the United States. It was the time we knew we had NAFTA coming into existence, and we knew there would be increased litigation. And indeed there has been. You look at the face of Mexico twenty years ago. There were relatively few foreign hotels where American visitors would be inclined to stay. There really was not anyone booking them from here and getting injured there. There were relatively few American food franchises in Mexico twenty-five years ago where Americans might become ill. There was simply far fewer tourists in Mexico at that time and also far fewer American business doing business in Mexico, which had very restrictive laws at that time. Consequently there arose fewer issues of employees of American firms being injured in the workplace or people in the immediate area being injured. Combined with the very infancy of tort law development in Mexico it is not surprising that the changes in society and the increase in the number of people traveling to Mexico has put a great deal of stress on the relatively infant tort system.

Mexico's commercial law system is less developed than in the United States in many ways as well, but it has obviously been around much longer than some of the theories of tort, with these theories of commercial law being considerably closer to ours than are their tort theories. Indeed about ten to fifteen years ago while I was doing some work on some Mexican cases filed in the United States on torts, I was called by the lawyers for Sheraton and Best Western. One of them sent me a letter saying they had several injuries in Mexico that had happened to some U.S. tourists and Mexicans, and they saw a deeper pot in the United States. The U.S. tourists brought suit in the United States against the hotels. The lawyers asked if I would respond to the following questions, which were three or four pages of very detailed questions about "assuming that Mexico had strict liability," "assuming that Mexico had contributory negligence," and "assuming Mexico had a court system very much like our own . . . ." They asked me all these very specific questions. To which I was able to answer it very easily by essentially saying, "In regard to your question which you have imposed in your four page question 'I don't know.'" Mexico tort law was at such infancy at that time that no one really knew much about the system. It was only in the last few years that we have seen any articles

appearing in the literature in the United States about the tort system in Mexico. Mexico's developing system is very interesting because Mexico has civil codes in which tort liability is found in each of the states of Mexico, thirty states now plus one in the federal district. There is an overall nature to that one in the federal district because it sometimes carries with it a federal law nature. The other difference in dealing with Mexico is the nature of the court system.

When we did our program seven years ago the professor who was here from Mexico, Leonel Pereznieto Castro, was asked about dealing with the resolution of commercial disputes in Mexican courts. He said that you never want to go to the Mexican courts. Someone asked why. And he said because they are so corrupt. Thinking that he may not want that on record because it was to be published, I said, "Do you mean that there is an idea that there is a different culture in Mexico, and judges may tend to favor family members or something?" He said, "I don't mean that! I mean money! I mean moving money around!" So that did get on record.

Well, recently enter NAFTA. What we talk about NAFTA in a number of courses is why is there a substantial dispute resolution process in NAFTA when there is no process that addresses tort issues and there is no process that addresses standard commercial contracts. The complex dispute resolution process in NAFTA addresses trade issues. Chapter 19 deals exclusively with dumping and subsidies. Chapter 20 controls for many other trade issues and essentially the interpretation of the agreement itself. Chapter 14 controls for financial services disputes and investment disputes if they are from the financial services within Chapter 11 dealing with investment disputes. Only under Chapter 11 is an individual private party given standing to bring a suit and that quickly gets out of NAFTA because it is essentially referred to international arbitration under UNCITRAL or ICSEC. So NAFTA is not intended to participate in resolution of individual disputes. It does however have a single provision that suggests the use of the desirability of the use of alternative dispute resolution methods for the settlement of commercial disputes. But it does not go any further than simply making that statement. Because NAFTA has generated so much more trade not just in products and services but essentially a trade in people, a movement of people back and forth, there obviously has been a great deal more litigation generated involving Mexico in the last few years.

Several of our panelists have been involved in this in one way or another, and I would now like to introduce them. One of them is in a car right now somewhere between Jacksonville and Gainesville. Unless he is overwhelmed by the culture of Starke, and does not pass quickly through there he should be here in another half an hour. On my immediate right is someone many of you know already, Professor Trevor Hartley from the London School of Economics. He is visiting here for three weeks in the

foreign enrichment course dealing with the European Union. In addition to the EU, his other principal area of interest is international litigation which he teaches at LSE. Principally to graduate student students?

PROFESSOR HARTLEY:

That is right, entirely graduate students.

PROFESSOR GORDON:

The London School of Economics is one of the very extensive graduate programs in the world for international business. Next to Professor Hartley is Adolfo Jimenez who is a partner with Holland & Knight in Miami, Florida, which is the largest firm in the southeast. Holland & Knight has been a very kind to this law school. Adolfo and I have worked on a case dealing with Mexico recently, which has just been settled and sealed. What we can talk about in that case are things on public record.

Next to Adolfo is David Epstein. David is Director of the Office of Foreign Litigation, Civil Division, Department of Justice in Washington, D.C., where he sees a great many things of considerable interest. Basically, if it has happened in the past few years, David has seen it because it has likely come through that office. David is also, and is not aware that I am going to do this, the author of what I think is the best volume in the United States on international litigation. It is a guide to jurisdiction practice and strategy written by David and two other co-authors. Fortunately in the last few years we have had a much greater focus on writing on international litigation and there are several other books which all seem to be quite good and quite useful. Typically, I find myself turning to David's book more than any of the others.

We have another guest coming, Jose (Tony) Santos who is a partner at Broad & Cassel in Miami, Florida. Tony has worked on commercial cases. For those of you in my International Business Transactions class, he is the lawyer in the case we talked about where a judge in South Florida refused to acknowledge the existence of the CISG. This has been working its way through the courts, and I understand now that there is a petition for certiori on the federal level because the Federal Circuit Court finally said there is a CISG, which is a convention and conventions happen to be American law. The other side is unhappy about this and would like to challenge it. On what grounds I am not sure, but it may be the same kind of grounds brought in a Tampa Court where a judge said, in referring to an international treaty, "The CISG may be federal law, but it sure isn't state law," which I thought was a very interesting comment. But Tony has been working on that.

You should all have the problem. I think they were available coming in. It is a problem that has both tort and commercial matters. We listed some of the commercial claims first. Those commercial claims may be

familiar to you a little bit. We are looking not at tort issues of the product gone bad but rather a lack of suitability of the product, which has caused a great deal of injury to growers who have lost much of their stock. The other is a tort claim. The tort claim is taken a bit from the *Bhopal* incident, a rather serious commercial accident. Since I now see we have Dean Matasar here could we ask him to come forward and say hello to us? I know he has a busy day with the Board of Trustees.

WELCOME BY DEAN RICHARD MATASAR, UNIVERSITY OF FLORIDA, LEVIN COLLEGE OF LAW:

One of the beauties of being at a law school as exciting as this one is that we have more activities than rooms and people. Mike I am glad that you asked me to come by. To the panelists, I am so happy you could join us today. For all of our students and guests who are here this is incredible. This day is incredible. What you are doing has extraordinary value to this educational process at the law school. I am going to reflect for a second. Catchy titles! We can say that we are hosting Civil Lawsuits Involving a United States Corporation and Corporations and Individuals from Various Foreign Nations with an emphasis on Mexico. Punchy! But why is that a topic, and why is that something that is in fact very much catchy? The title is catchy because it captures substance. That is the purpose of this conference. We talk about international affairs, international business, and international relations as if they are some amorphous thing. We treat the world of law as if it is a world of ideas that bears no connection to reality. But this kind of discussion, this kind of panel that focuses itself on real world things that are going on with real life conflicts that have significant impact on the lives of everyday citizens and takes the theory that all of us have been studying and thinking about our whole lives and applies them to rigorous statutes that those things which will have an extraordinary impact on our country and on the world. That is what legal education is about and that is what this law school stands for. So to our panelists each of your contributions cannot be underestimated and we cannot give you enough appreciation for sharing with us your thoughts. Mike obviously you have carried this load for as long as any one I can remember at the law school. To the members of the *Journal* it takes a lot for students to commit themselves to someone else's project. And this is someone else's project. I would like to thank all of you for being here today and participating. The purpose of this kind of conversation is to give of yourself to others and to communicate with others. You have to do it. Your ticket's not punched for just sitting around and hanging out. It is participatory. Whether it is out loud or inside your head. It is your thinking through the issues that are raised. That is your obligation. So on behalf of all my colleagues at the law school and on behalf of the *Journal*, I must tell you that you are engaged

in something that is incredibly exciting.

PROFESSOR GORDON:

To emphasize the participatory nature that Dean Matasar mentioned we would like you to feel free to ask questions at any time during the proceeding. We are not going to save a question period at the end although we will ask at the end of each session if there are additional questions. I thought it would be best if we looked a little bit on the tort areas because Tony has worked more on the commercial aspects and he will be joining us later. If you notice the way the materials go after the hypothetical there is an indication of the commercial claims brought followed by the tort claims that have been brought. So we have commercial claims in the United States and Mexico, and tort claims in France and in Mexico. Then we have a series of issues raised by the various actions. The first seems to be applicable to both commercial and tort actions in the United States. They are put somewhat in the order of the thinking that a lawyer is going to have to deal with. In a number of cases that I have dealt with I have come into the situation after the first question has already been answered. Either because it was not really thought of very carefully, the idea of arguing *forum non conviens* or that it was argued unsuccessful and the U.S. court decided to keep the matter rather than transferring it. But certainly that is a matter that ought to be thought of by the lawyers. And that is really going to be our first question. Looking at these various suits what is your thinking from a strategy perspective on attempting to remove them to Mexico under the theory of *forum non conveniens*? Also, is there likely to be any obstacles to in removing these matters. So let's open it to comments. Adolfo?

MR. JIMENEZ:

Regarding removal, the first thing you have to do is really find out what does Mexico offer as far as being a more favorable venue for you as a defendant in a lawsuit. Mexico on first blush is enticing. It is enticing because if you speak to local attorneys the damage awards in Mexico are somewhat on the low side. So your knee jerk reaction is to go there because after all that is what it is all about. How much is this going to cost your client? On the other side of the ledger is assuming that it can be removed to Mexico is what is the other side. On the other side there are some huge difficulties. Number one, assuming that Mexican law applies there maybe some very strong political concerns, potential bias of a Mexican system, and Anti-Americanism that may or may not persist in Mexico. You need to be careful that the system will provide you with a fair hearing. Those are some types of issues you need to be careful with. If Florida law applies and you really want to enforce Florida law, Mexico may not be a good place to interpret and enforce Florida law. Those are the

principles you want to maintain. At the end of the day, the lack of predictability that a Mexican forum may or may not provide is just too large. I am not sure where I would end up, but I think I would end up allowing the case to remain in Florida because litigating the case in Mexico presents too many issues, too many unknowns, and too many things that can go wrong to a big U.S. corporation. After all that is who you are representing, a huge U.S. conglomerate.

PROFESSOR GORDON:

Are you thinking along with this that you are likely to get a U.S. court to apply Mexican law? Thus get the benefit of the lower damages that would be applied in Mexican law but maintain control of the whole process by keeping it in your court.

MR. JIMENEZ:

That is the other part of why Mexico is enticing because you know that a Mexican court will typically provide certain benefits in the award of damages. The award of damages is tied in to the minimum wage that is provided by the federal labor law in Mexico. So having that is a huge upside because it is not certain how a U.S. court will handle damages assuming Mexican law applies in the U.S. forum. Will the U.S. court enforce that provision in the damage award? I believe it should. Mexico is enticing but again the lack of predictability and corruption need to be considered. I hate to use the word because I think it is too broad of a brush, but corruption is inherent in the system in Mexico. When you are a large U.S. corporation I think it is a real issue that you need to examine, and you need to examine it with a Mexican counsel. A good Mexican attorney will tell you how long this will take and what the final outcome will be. Additionally, a Mexican attorney can tell you how much of a bias there is going to be against you. I think that is a real issue. On the other side you should also factor in that there may be a benefit of having GROWFAST, a large Florida corporation, on its own turf. There is favorable bias in the State of Florida towards hometown type defendants. The danger there of course is the damage award. How is a U.S. court going to handle the application of foreign law and specifically the award of damages?

PROFESSOR GORDON:

I think the funeral directors of Mississippi would agree with you that there may be a hometown advantage. David, one of the questions that Adolfo raised was a question of whether this case can be removed. So we got a question under what law should be applied, federal law or state law. What is the law of removal on *forum non conviens* generally in the United States? Does your office see different views? Does the law tend to be federalized?

Mr. EPSTEIN:

Well, the work that I do for the Justice Department is really more foreign based. It is when the United States gets sued in a foreign jurisdiction. So technically we do not get involved in this type of issue unless the State Department contacts the Justice Department about a U.S. case. In those situations, a private lawsuit gets filed usually by the big U.S. firms that know their way around Washington and inside the government. Some of the attorneys may have worked inside the agencies at one time or another and know what each office does, which is sometimes pretty hard to figure out. So they know that if they can press their side of the story and make a foreign relations connection to the case they will call the State Department or the Justice Department. They will say, "There is an issue here that I think you should participate in." Then my office looks to see if there is a reason for getting this case out of the United States and removing it to the foreign jurisdiction or if there is a reason for keeping it in the United States, whatever the issue might be.

The way we would get involved is if the State Department thought that this case presents a foreign relations problem and that we should file a limited brief in the U.S. proceeding. This is called a suggestion of interest, or an amicus brief, where we would state our concerns. We don't tend to file an amicus brief in the *forum non conviens* area because the issues are too common and they are not really foreign relations issues. Further, I think that the court will deal with the foreign relations aspect anyway because looking at the case law in *forum non conveniens*, the court is going to consider the interests of Mexico. If the parties properly raise *forum non conveniens*, I think that is one of the factors that would be involved here because you have a situation of balancing the U.S. interests and Mexican interests. However, the accident happened in Mexico and the alleged perpetrator of the accident GROWMEX, the subsidiary, is in Mexico. I think there is a slant toward the events happening in Mexico. The witnesses are there and the evidence is there. Under the public interest analysis that the courts have been engaging in this area, I think the court could analyze the interest of Mexico in product liability matters or in the safety of products that are manufactured and distributed in Mexico and factor this in the *forum non conviens* analysis. In federal courts, the Supreme Court in particularly, consider *forum non conviens* a matter of federal law.

PROFESSOR GORDON:

What case is significant? Has the *Bhopal*[1] case come into your office before the U.S. court ruled on the issue of *forum non conveniens*?

MR. EPSTEIN:

No, the only way I believe we were involved in that case was that there was consideration of our intervention being made by the State Department.

MR. JIMENEZ:

I believe in this particular scenario that this is a very close call of whether this would be removed or not. But I agree with David that at the end of the day this would probably be removed simply because U.S. courts have been more and more loath to just accept what is in essence foreign litigation. But the reason that I think this is a close call is because GROWFAST is headquartered in Florida.

MR. EPSTEIN:

But there is a way that courts have handled that problem in the *forum non conveniens* area where you have a parent-subsidiary relationship and the alleged tortfeasor is the subsidiary as it is here. The subsidiary is in Mexico, and the parent is in the United States. Many of these *forum non conveniens* cases in order to equalize the situation have conditioned the removal of the case to foreign jurisdiction. In this case the parent company GROWFAST, might have to agree to be subjected to personal jurisdiction in Mexico along with other conditions as well to equalize the situation. GROWFAST might have to agree to waive the Statute of Limitations if that's an issue. They also might have to agree to allow for evidence to be taken of its company because the evidentiary rules and discovery rules are very different in Mexico. So they might have to open up their office for review of documents. Further, they also might have to agree to comply with any judgment that is entered by a Mexican court. And these would all be conditions for removing the case from the Florida court.

MR. JIMENEZ:

David, the other aspect is that the plaintiff's choice of forum is supposed to be given a great deal of deference. But I think you are finding less and less deference being provided. There is a funny story that came out a few weeks ago concerning Bolivia. The Bolivian government filed an action in Galveston, Texas against a tobacco company. The judge gave a scathing opinion about why the plaintiff would file this in Galveston,

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1. *In re* Union Carbide Corp. Gas Plant at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd as modified*, 809 F.2d 195 (2d Cir.), *cert. denied sub nom.*, Union of India v. Union Carbide Corp., 484 U.S. 871, (1987).

Texas. The city did not even have a Bolivian restaurant. That kind of deference seems like it is less and less so. With regards to what law applies, Florida or federal law, I believe they are one and the same now with *Kinney Systems,*[2] ruled on a few years ago that basically adopted the same analysis that federal courts have on *forum non conveniens.*

PROFESSOR GORDON:

I guess we do not have many states left that do not allow *forum non conveniens* dismissal with the Texas reversal in the Texas legislature and Florida's reversal in Florida courts. We were in involved in preparing legislation to reverse the earlier Florida decision when *Kinney Systems* came out which we really kind of applauded. I think? I do not think that there are many states that are left on this. However, the view may be very different in Europe concerning *forum non conveniens*?

PROFESSOR HARTLEY:

I think that the English courts are not too different than American courts. But if you cross the channel to Germany or France, they are totally opposed to it. But my guess is that Latin American countries might follow the continental European idea that *forum non conveniens* is a denial of justice. I have even heard the Germans say that it might actually be contrary to their constitution to remove a case on *forum non conveniens* grounds because their constitution guarantees everybody their right to a lawful judge. If you choose a German judge then the question of dismissing the case on grounds of *forum non conveniens* could be regarded as against their constitution. In fact, this is exactly in the Hague negotiations. So there is a very different idea in continental Europe that when you choose a court you have a right to sue there. England is quite similar to America.

What you may not know is that *forum non conveniens* was invented in Scotland then taken over by America. The English did not initially want to know about it. Then England got it partly from Scotland and partly from America. So now it is quite widespread in England but not France or Germany.

PROFESSOR GORDON:

Being of Scottish heritage it is nice to see a Brit admit to something being started in Scotland. Although Professor Hartley is not technically a Brit, he is from South Africa.

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2. Kinney Sys., Inc. v. Continental Ins. Co., 674 So. 2d 86 (Fla. 1996).

PROFESSOR HARTLEY:

A lot of things started in Scotland. Golf as well. Golf and *forum non conveniens*.

PROFESSOR GORDON:

And single malt scotch.

PROFESSOR HARTLEY:

Oh yes, the most important of the three.

PROFESSOR GORDON:

The comment that Adolfo made is very important both in the context of Florida joining most of the rest of the country in being willing to grant *forum non conveniens*. The second side is as you suggested. Florida essentially federalized the view not from the federal government having adopted any mandate that states follow *forum non conveniens* but essentially by the state feeling that the case law coming out of the federal government, principally the *Piper Aircraft*[3] case and the *Bhopal* case are sensible approaches to *forum non conveniens*. Interestingly enough, as David was talking about, the conditions the court will impose on the American party requesting removal often can be very difficult. Certainly the last one you mentioned that a judgment be accepted by the American company and paid would be a difficult one to accept. The *Bhopal* case went even further in this but was overturned because some of the requests almost kept the American court involved in kind of providing constitutional protections throughout the process that took place in India. I think it was simply too intrusive on the part of the court in the United States to establish these conditions. These are just some of the difficulties that we are seeing arise.

Another matter that has arisen very recently which is related to another comment Adolfo makes, and the comment by Trevor, concerns a matter being moved from Latin America to here because Latin America has the continental view. I do not see very much in the way of cases coming to the United States that have been in Latin America on a *forum non conveniens* ground. I think they don't move this way for several reasons. First, the doctrine has not been developed very well. It has not been terribly long in Mexico that Mexico now allows the choice of foreign law as opposed to Mexican law in a case. Second, to some degree, if the parties are thinking of the damages they are not going to initiate the suit first in Mexico. They are going to move it here rather than there. That is for a couple of reasons, one is the low damages. The other, as Adolfo concurs, is the wanting to

3. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

keep matters out because of the problem of corruption in the courts. You could probably go into U.S. case law dealing with every Latin American country and find cases that have talked about this very sensitive issue of the corruption of foreign courts. There is a very recent one that deals with Bolivia that absolutely rips the Bolivian justice system apart. What has happened is that this is all very new. Recently Latin Americans have looked at a new possibility, and they have come up with a theory of adopting a law in a Latin American nation that prohibits the acceptance in that country of a case that has been dismissed under *forum non conveniens* in the United States. This has been tested by two Latin American states so far in the United States. Essentially the law of one of the countries states that if a suit is commenced in the United States and it involves a Ecuadorian.... In this case it happened to be an Ecuadorian, and has been in each of these cases I'm thinking of, one in Hawaii, one in Mississippi, and now one here. If the suit is commenced in the United States and was dismissed on *forum non conveniens* grounds, it cannot be filed in the other country, which happened to be Ecuador in this case. Why have they done that? Presumably so the United States will be reluctant to dismiss the case on *forum non conveniens* if there is not a proper forum in which to bring the case in a foreign country. This is rather troubling, I think. What do you think about this kind of development?

PROFESSOR HARTLEY:

Well, that is really a foreign country trying to tell America which cases it can hear and which cases it cannot hear. I would have thought that American courts would object to that?

PROFESSOR GORDON:

Well, you remember that Harold Green objected to that with the British *Laker Airways*[4] decision.

MR. EPSTEIN:

My gut reaction is that these laws will not work here. In the U.S. courts there seems to be momentum gathering that there is too much forum shopping. The difference between these systems is why do you see these cases come here. As Professor Gordon said it is damages primarily. Punitive damages are not recognized by and large outside the United States. The potential for damages are much greater here so there is more incentive to sue here. But I think that U.S. courts are not going to buy these laws. They are coercive, and they are just going to add to the fuel that U.S. courts already regard as forum shopping.

4. Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

PROFESSOR GORDON:

It seems that in the last decade or so, certainly with the initiation of the *Laker Airways* case and the development of the antisuit injunction idea, there has been a certain amount of belligerency from one judicial system to another. I am concerned with that because we have the situation where courts are talking very untactfully about the judicial system of another country. We have seen German courts talk about contingency fees and punitive damages. We have seen an English court speak out about the jury system in civil cases. The problem I see in that respect is the judges are not being very tactful in many of these cases making comments about other systems. Harold Green's comments were very strong and perhaps stronger than they needed to be in the *Laker Airways* case. The legislatures are certainly not moderating their extraterritorial reach of laws either, to wit Helm-Burton. I am not sure where that leaves that situation. Maybe with the need for some kind of diplomatic effort. I am worried a little bit about the belligerency that we are seeing develop across borders. Maybe it is simply because there is so much more cross border activity that we are bound to see some of this.

MR. EPSTEIN:

But, on the other the hand, if you study the U.S. cases on *forum non conveniens* the court is supposed to first consider whether the foreign jurisdiction provides an adequate alternative forum. By and large most U.S. courts are going to consider the foreign legal system to be adequate. Despite what you said about corruption in Mexico, you could almost guarantee that if a U.S. court were looking at this case they would consider the Mexican legal system to be adequate under the factors that have been outlined in U.S. precedent.

PROFESSOR GORDON:

I agree. It is kind of a dilemma. On some cases you want to argue on behalf of your client that it is a perfectly good legal system abroad to have it removed to and in other instances that the system is so corrupt that what is happening there should not be enforced or a judgment coming out of that system should not be enforced. We often talk two different ways about the very same legal system.

PROFESSOR HARTLEY:

I think by and large, certainly in England and I think elsewhere that courts are very reluctant to criticize other courts as being corrupt. Even if they know that they are, they still do not like to say so in public. They certainly do not like lawyers to get up and say that. So I think there could be a very serious problem in this case here if one of the parties wanted to

object to removal to Mexico on those grounds. The court might well be unhappy saying straight out that Mexico is corrupt.

PROFESSOR GORDON:

What was interesting in *Bhopal* was that effectively the Indian government said that the Indian court system was too corrupt to handle the case.

PROFESSOR HARTLEY:

Yes. I think the facts in the American *Bhopal* decision actually bear that out because apparently the American company paid out quite a lot of money. It was given to the city authorities in *Bhopal* and I was told none of it so far has reached the Indian persons. That was ten years ago, I think. I think that the Indian government statements about the failings of the Indian court system may well have been justified.

MR. JIMENEZ:

I think that this is mostly a result of an increase in the amount of trade that is really occurring. There have been U.S. companies in Latin America and Europe for decades. But in the last ten to twenty years the amount of communication has increased, things like the internet, television, and programming are now truly reaching all over the world. This increase in communication is really opening up a whole level of information that did not exist not too long ago. I think that is a major difference. Looking at it from a different perspective in Latin America U.S. courts are viewed as being ludicrous. The fact that you have punitive damages, the fact that you would have a jury determine certain issues, or the manner of determination of certain issues are foreign all together. You can see by looking at it from that perspective that there is a real cultural and systemic rift between the two systems, which causes some of these comments from both systems.

PROFESSOR GORDON:

We may see a very interesting discussion of the system if a case from Mississippi that I know of does go to international arbitration because it essentially challenges the nature of Mississippi justice — high damage award and contingent fees and all that. It could end up probably where it should not be, mainly in international arbitration. However, I was going to ask the third question. I think we answered that. And that is whether or not the analysis would be the same in talking about removal of this case to Mexico as it would talking about the removal from Florida to Missouri or to New York. We have been very much focusing on the nature of the legal system, and I think there is not that concern at all about the nature of moving the matter to another part of the United States. Certainly we know that systems vary state to state. State courts in certain areas of the United

States are probably less efficiently run and honest than others. But certainly there is not a real suspicion or fear of those systems as if we crossed international borders. I think that your comments are well taken. We find very often a lack of desire to talk about other systems which I think we see leading in cases like the *Hunt*[5] case where they are talking about the enforcement of judgments of how we always enforce them from civilized legal systems. And, of course, it sort of hopes it does not have define uncivilized legal systems.

MR. JIMENEZ:

One interesting thing is that corporate counsel often times are very concerned about going into a jurisdiction where they have no prior experience. Removing a case into a jurisdiction where they do not know the nuances or the peculiar rule that may exist in that jurisdiction makes corporate counsel very uneasy.

MR. EPSTEIN:

I was going to say that despite the fact that I think Mexico would be considered an adequate legal system it could go either way. There are U.S. cases where if the party seeking to remove the case is clever enough and a discrete issue is raised about preventing removal or even the other way that if experts are hired and the discrete issue is presented in favor of going one way, removing or not removing it, the court will consider it despite what happened in *Bhopal*, which had a lot of discussion about India being an adequate legal system. There is a recent Third Circuit case, *Bhatnagar*[6] case, where a minor brought a personal injury action arising on a ship. The suit was brought in the United States and efforts were made to remove it to India. The issue became delayed in litigating in India. Experts were hired on both sides to present that issue to the court, and the court finally ruled that the case should be kept here. They sided with the plaintiff's experts because the plaintiff's experts showed that it would take fifteen to twenty years to litigate the case in India, which as you said is like the *Bhopal* situation. But there was considerable expert testimony, which was very convincing and persuasive the way the expert presentation went. Based on my experience in litigating in India I would say fifteen years is conservative.

PROFESSOR GORDON:

Were the plaintiffs Indian citizens?

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5. Hunt v. BP Exploration Co. (Libya) Ltd., 492 F. Supp. 885 (N.D. Tex 1980).
6. Bhatnagar v. Surendra Overseas Ltd., 52 F. 3d 1220 (3rd Cir. 1995).

MR. EPSTEIN:
Yes.

PROFESSOR GORDON:
That makes it all the more remarkable. What is one your attitude towards these cases? Even though we have an American who was killed. Is there a different attitude on removal when the plaintiffs are Americans who wish the U.S. forum that have been injured as tourists in Mexico or abroad?

PROFESSOR HARTLEY:
Surely the answer is yes. Since the plaintiff is American the American courts will be much less willing to remove the case to Mexico.

PROFESSOR GORDON:
But if the matter was an automobile accident which took place in Missouri would not they remove it to Missouri?

PROFESSOR HARTLEY:
Well maybe, it would be different with Mexico. But certainly I have seen American District Court judgments concerning American plaintiffs and English defendants where the tort has taken place in England. They say if the New York plaintiff wants to sue in New York then she can sue there even though all the evidence was in England. So I would have thought where the plaintiffs are Americans, the defendants are Americans, or the subsidiary American that it would be much more difficult to remove the case than if the plaintiff was Mexican.

PROFESSOR GORDON:
So I guess one rule to follow if you are in a tour group and get hurt and you were the only American in that tour group is that you might want to carve your suit out and bring the suit someplace where removal would be unlikely and try to keep it in the United States. We had an interesting problem with a case brought here dealing with some people who worked with Industrias Asociadas Maquiladoras just across the border in Mexicali, Mexico and brought suit in Texas. It was a nightmare trying to figure out who these people were and what was their citizenship. By the time suit had been brought some of them had become legal immigrants in the United States. They just crossed the border. Others were illegal immigrants in the United States. Others were still Mexican residents. You could see that the closer that those people could get themselves to being U.S. citizens the more sympathy the court was obviously showing to them. So we were really trying to show that they were not American citizens, and they did

not have enough nexus to the United States to justify keeping them in the suit.

PROFESSOR HARTLEY:

I would have thought of the three German tourists suing in south Texas. That seems a bit like the case with a foreign plaintiff and the tort committed in a foreign country. Then I would have thought that they would have quite a good argument for dismissing the case here and telling them to go to Mexico.

PROFESSOR GORDON:

We already introduced Jose Santos. We were worried that you would have been overwhelmed by the delights of Starke or Waldo on your way through and stay there. It is just like running a gauntlet through Florida. In any event we have been talking about *forum non conveniens* all of this time, and we are just really about to work our way through to the next question regarding issues of jurisdiction. Are there any questions of subject matter jurisdiction or personal jurisdiction that might come up in any of these actions? Certainly one of which might be raised is what about this action that has been brought against GROWFAST and GROWMEX in the court of first instance in Paris by the French tourist who was injured.

PROFESSOR HARTLEY:

Well under French law, the French court surprisingly enough would have jurisdiction because the French Civil Code has a provision that grants the French citizen the right to sue. I think it was doctored right from the very beginning when the French Civil Code was first adopted at the beginning of the last century. Article 14 of the French Civil Code permits every French citizen the right to sue in the French courts. Under French law the French tourist, assuming he is a citizen, can sue in France. That may seem shocking to you. It seems shocking to me actually. It seems shocking to many French lawyers, but still the nationality of the plaintiff would give the French courts jurisdiction. There is nothing the American defendant could do about it unless he tries to get some sort of antisuit injunction. But since the plaintiff is French I don't think that will work out.

PROFESSOR GORDON:

Wait and assume the judgment would not be enforced in the United States?

PROFESSOR HARTLEY:

Correct, but then I understand that GROWFAST has assets in Germany. Maybe that is a question to consider later on.

PROFESSOR GORDON:
Would that make a difference?

PROFESSOR HARTLEY:
Sure, because the German courts would recognize the judgment. The German courts would be obliged to recognize it under the Brussels Convention. No matter how outrageous jurisdiction was, if the defendant was American and not from another EC country, then they would recognize it.

PROFESSOR GORDON:
Then it would be a question of whether Germany would consider these to be German assets or American assets?

PROFESSOR HARTLEY:
No, they would recognize that judgment, and the French plaintiff could collect out of those assets in Germany. The American defendant can not argue any of the jurisdictional protections in the Brussels Convention because he is American. You can only argue if you are domiciled in another EC country or another Brussels country, which is the EC plus Norway, Switzerland, and Uganda. It is only then that you can argue the European equivalent of minimum contacts. That only applies to somebody from another convention country.

PROFESSOR GORDON:
If this was British company?

PROFESSOR HARTLEY:
Then they would be ok. They would not be allowed to use Article 14 against a British company, Dutch company, or Danish company. But they can use it against American, Canadian, and Japanese companies. When this first happened there is a kind of let out provision in the Brussels Convention, which allows third countries to negotiate exceptions to that. The United States and Britain negotiated some on that but it never came into force. So that is maybe why they are now negotiating in The Hague for a worldwide convention which will solve all these problems.

PROFESSOR GORDON:
Well since both you and David are on our respective countries delegations in talking to The Hague that is something the two of you can amicably solve. It would seem to me that the British experience and the experience within the European Union has been helpful to the United States in the sense that they have recognized that they are not going to

accept everybody's jurisdiction within the European Union, and we are certainly not prepared to recognize French jurisdiction, I think, in a jurisdiction that judges convention.

MR. EPSTEIN:
Not that kind of jurisdiction, no.

PROFESSOR GORDON:
Or something like what I guess has changed since the former German asset-based jurisdiction in the famous case of Jean Claude Killy whose underwear left in a hotel was sufficient in a paternity suit to get the total amount.

MR. EPSTEIN:
On the flip side of The Hague, the European delegates are wrestling with the U.S. based jurisdiction, all of the due process notions of stream of commerce, and other Supreme Court tests that they do not understand. They are trying to write a consensus of how to understand U.S. jurisdiction and what would be acceptable to them in the treaty.

PROFESSOR GORDON:
I am curious about this French thing. Tony? Adolfo? What would you tell a client that has come to you? GROWFAST has come to you and said we are being sued in France for this injury that took place in Mexico will the United States enforce this judgment? Would you tell them do not go to France?

MR. JIMENEZ:
There is a real issue of whether this is enforceable. If they get a judgment, is that judgment going to be enforceable?

PROFESSOR GORDON:
Sure of course, as Trevor suggested, the company may have assets in countries where it will be enforceable. So that is a danger. Is there just a sort of seat of the pants feeling that you do not want to tell a client don't show up?

MR. JIMENEZ:
That is correct. The worst thing for a litigator is telling them, "Let it happen. You are safe." But in this particular case, and sitting here I would not necessarily advise it without learning more but it may be the proper course of action to let a default judgment be entered. Or do you go in and oppose personal jurisdiction, but as you stated you have no basis to defend it. So the best thing might be a default judgment similar to what Bill

Clinton should have done. Let a default judgment be entered in the personal jurisdiction case, but it is so difficult for a litigator to say, "Just go in and play dead."

MR. EPSTEIN:

I would advise a different strategy. If you look at U.S. case law, I think you are on safer ground advising GROWFAST to hire a lawyer in France to appear in the French case to contest jurisdiction because default judgments have been enforced in the United States. If you do not appear, you run a real risk that it will be enforceable here. Whereas if you appear and contest jurisdiction then you can show that you participated and objected in the French proceeding. Then when the case is brought into the United States you appear and contest it saying this is what you did in France and that should work.

MR. JIMENEZ:

But there is a waiver issue. Do you waive it by not raising the objection?

MR. EPSTEIN:

I think a lot of courts would hold that you waive it if you do not appear.

MR. SANTOS:

But as corporate counsel I would stick to the same theory as advocated by Adolfo because clearly you do not want to have your client not show up at a legal proceeding. I would definitely go and find a pretty good legal talent in Paris and really go to the mat on it, particularly jurisdiction.

PROFESSOR GORDON:

If you lose on the jurisdiction would you come home? Or do you stay and contest it?

MR. SANTOS:

I still think you need to fight it because I think substantively you can still battle the case within the parameters of the French judicial system. I do not think it is something you should shy away from.

PROFESSOR HARTLEY:

But surely if you defend on the substance, then that judgment would be recognized in America.

MR. SANTOS:

But in Florida particularly, where principles of comity are very well accepted by the courts, you are not going to have a problem bringing that

judgment over here. And that is probably your greatest fear. Even clients who have been sued for the most nefarious claims in Latin America, I tell them go do a little battle down there. Fight at least a little battle. If you do not you are willing to get a nasty surprise if they come up here and really go to the mat on it. Because if they dot their I's and cross their T's down there or in Paris at least summarily, they are going to prove their enforceability of that judgment here.

PROFESSOR GORDON:

Also if you do go there other issues surface. We see issues of I will not go there. I do not know anything about the system. I do not want to know. I just will not show up.

MR. SANTOS:

At that point the process was so tainted that the notion of fairness that the United States applies when it starts to look at comity in the U.S. courts is going to apply.

PROFESSOR HARTLEY:

I do not think that would really apply in France. I think the French legal system is pretty fair by and large. You lawyers certainly would not be threatened. You simply would just lose as fair as the jurisdictional point was concerned.

PROFESSOR GORDON:

But in many ways would not you be pleased to go through that because I assume the damages for personal injury in France would be much less lower than they would be compared to what they might be in the United States.

PROFESSOR HARTLEY:

That is probably true.

MR. JIMENEZ:

The one defense you are going to have as far as enforcement here in the United States is the fact that it would be in contravention of public policy and against U.S. constitutional principles to enforce that judgment that is in France in the United States. In this particular case, with this type of client, it would be moot though because of the German assets that exist.

MR. EPSTEIN:

Well it depends on the size and extent of the assets in Germany because the assets may be insufficient requiring them to come back to the United States to enforce the balance of it. Then you have to go back to this

issue as to whether you should appear in French court to contest jurisdiction.

PROFESSOR HARTLEY:

On the other course of practice, the French tourists would be better advised to sue in American courts than to sue in France because you would almost certainly get a greater amount of damages.

PROFESSOR GORDON:

I would think so. I would also assume there would probably be some American lawyers over in Paris knocking on his door trying to convince him exactly of that point.

PROFESSOR HARTLEY:

You get a jury trial here. You get discovery here. The French discovery system is very limited. There is no jury trial in a civil case in France. So he would be much better off really suing here. We are assuming that he wants to sue in France. If I was advising that Frenchman, I would say, "Give up in France. Come to America."

PROFESSOR GORDON:

Are there any other issues of jurisdiction that we should be talking about? That is certainly the one that stands out the most.

Audience:

Assuming that you are trying to block personal jurisdiction, to what extent are you submitting to subject matter jurisdiction when you hire a local lawyer in a foreign court? If in essence you do not show up at all and you get a default judgment, at least you are not sending a message to the foreign court or submitting jurisdiction to the foreign court by actually having a presence at all? Is it then just a question of where the assets are, where the most witnesses are, where it actually happened because it seems to me that if you show up to contest at all in even personal jurisdiction you are in essence submitting to the subject matter jurisdiction.

PROFESSOR HARTLEY:

Well I think different countries have different views on that but many countries take the view that if you simply fight on jurisdiction you are not submitting. But if you fight on the substance or on the merits then you have waived all your objections to jurisdiction. That is a reasonable approach I think. After all if you fight on the substance and win then you want to benefit from that judgment. So if you fight on the substance and loss you should not be allowed to say that the court never actually had jurisdiction.

MR. EPSTEIN:

And also countries differ on the issue of enforceability of default judgments. Here in the United States there is a sort of consensus that default judgments are enforceable. So if you do not show up you are really running the risk that the judgment can be enforced against you.

MR. SANTOS:

You also got to have a little bit of faith in that legal system. All legal systems developed somewhat parallel recovery avenues. Unless you are in the middle of a tribal system somewhere not on par to western civilizations legal systems. You have to put a little faith in that system. If you do go to the mat substantively you are going to have many similarities in terms of defenses available, but of course you have to look at each case differently. But you got to have a little faith that the local law will give you something. Otherwise their own economy would not operate well. There would be all kinds of different problems. You got to look at it at in a kind of bigger picture as to what you would do if you submit yourself to the French law and fight this case on the substantive merits.

MR. JIMENEZ:

Trevor, mentioned something earlier, which is that the French citizen would be better off suing in the United States. Why not take that particular gift that you were given having whatever benefits that you may have in that jurisdiction? I think that is the biggest problem that litigators often face. You are so inclined to just fight that sometimes, as in this particular case, the best thing to is to defend in that jurisdiction where the monetary damages are going be low enough to where it is to your benefit even if you hire a local attorney. You have to factor in the amount of time the case may or may not take. Those are things to consider and fighting jurisdiction is not necessary always the best course of action.

PROFESSOR GORDON:

The president of GROWFAST here has made an untactful statement blaming the problem of the explosion on corrupt Mexico government officials who demanded and accepted payoffs during the plant construction which resulted in inadequate safety walls being put up. If that action, which seems to be an action of defamation, were to be brought in the United States would we assume subject matter jurisdiction over that action? Fortunately, we have someone preeminently qualified to talk about Mexican defamation law here. Why might there be a problem with a U.S. court assuming subject matter jurisdiction over a defamation case?

MR. JIMENEZ:

The problem here is that this is a Mexican official. A government official raises certain questions that you need to examine. We are dealing with the substantive law of Mexico. We are also assuming that Mexican law would apply, and I believe in fact it would because the injured party is in Mexico. Under the conflict of law principles you would have a situation where unless you can show some other relation to the United States the place of damage would be in Mexico. So assuming Mexican law applies, in Mexico the laws of Mexico have all sorts of problems as far as enforcement, by U.S. courts. First of all, the civil defamation law is not very well developed in Mexico. In fact, we claim it is non-existent. I believe that is true. There is not yet any civil remedy for defamation in Mexico. In Mexico defamation is a crime, and it is covered by Article 351 of the Mexican Penal Code for the federal district.

PROFESSOR GORDON:

Then would a U.S. court enforce the criminal law of another country? That seems to be an old standing refusal.

MR. JIMENEZ:

That is correct. I do not think a U.S. court ordinarily would enforce the penal laws of a foreign country. Those principles come from old tax cases where U.S. courts refused to enforce penal laws involving collection of taxes in foreign countries. The other aspect of Mexican defamation law is that it raises two critical issues. Number one, what is the law of defamation? The law of defamation in the United States is so wedded to First Amendment principles that you have to see what extent are those principles consistent with Mexican defamation law. Under Article 351, defamation is any statement that is really derogatory. All it has to be is negative about anyone whether true or not, it doesn't matter. You could call someone a drug dealer. If that person is a drug dealer then that is still no defense to you as a defendant. So at that substantive matter there are some serious issues raised with regards to the enforcement by a U.S. court of Mexican defamation law simply because it does cover true statements. The second aspect, which I already covered, is the penal aspect of the law.

PROFESSOR GORDON:

The point is that it essentially says that if you are subject to a suit in the United States that is traditionally civil in the United States and might be kept in the United States do not assume that it may be civil exclusively in the foreign country because in many instances in many countries defamation has roots in criminal law. Indeed even in the UK, defamation is one of those very unique areas that seem to be apart from other civil wrongs that the UK court will allow a jury in that case. England is sort of

in between these two. Some courts consider it exclusively criminal, some exclusively civil, and some sort of teetering. Mexico is kind of teetering on this right now.

MR. EPSTEIN:

I agree that as a general principle you can not enforce a criminal judgment here, but some commentators have questioned the wisdom of that general rule. In fact, a Florida state court decision several years ago enforced a foreign tax judgment. I could say that there could be an argument that even though defamation may be classified as criminal under Mexican law that we recognize it as civil and that there is an issue as to whether it should be barred on that ground.

PROFESSOR GORDON:

I think it was a VAT tax case that ended up in Florida in the enforcement of debt. Of course we can blame all of this on the early English cases dealing with trading between France and England.

PROFESSOR HARTLEY:

That is right, smuggling.

PROFESSOR GORDON:

Yes, smuggling and all of this problem is traceable to that case.

PROFESSOR HARTLEY:

But even if you are willing to enforce foreign tax judgments to enforce a foreign criminal judgment, I do not know what the Mexican court would do whether it would put the defendant in jail or if it would fine him. But even if its only a fine would an American court really enforce a fine in which the Mexican state comes to the American court saying, "We fine this guy so many million pesos. Will you enforce this?" I would find that very hard to believe.

PROFESSOR GORDON:

I do not think so. But one thing that happened which is very interesting in this country was a murder that occurred in Miami a few years ago by an Italian who then fled to Italy. Extradition proceedings were brought against the Italian and the Italian government said we will not extradite him because you have capital punishment, the reason many countries will not extradite. It is pretty difficult for a court to say that, since the matter is in the hands of the jury, we will be assured that he will not be executed. Certainly in that case, you are not going to enforce judgments of execution. The end result of that is that we held an Italian trial in Miami. The Italian prosecutors came over and Italian judges came over. So

somewhere down there, I guess in the federal court building down in Miami, they had a trial.

MR. SANTOS:
In the main courtroom.

PROFESSOR GORDON:
Essentially, if a tourist had walked in there and seen that they would have been very confused.

PROFESSOR HARTLEY:
Were the judges American or Italians?

PROFESSOR GORDON:
Italians. It was an Italian court session that took place in the United States. One of the reasons was that the witnesses were here and the occurrence of the murder took place here. That may be something that we will see more of in the future. That was a very unique way of dealing with the conflict.

Assuming that removal is not requested or if it is requested and is not granted the next question would be something that we looked at very briefly. That is should GROWFAST ask the court to apply Mexican law? And what are the considerations the court is likely to face now? And which to discuss before it rules on the choice of law issue? In fact what is it that a court is going to be concerned about before it says yes we are going to apply Mexican law?

MR. EPSTEIN:
Well if it is in federal court I would assume that if the jurisdiction is based on diversity of citizenship then it would apply if the jurisdiction is based on diversity of citizenship then the conflict laws would be applied according to state law. So it depends upon what Florida state law is. Under the choice of law analysis and conflict analysis I'm not sure what the test is here whether it is significant relationship test. In other words assessing who has the most significant contacts whether it is Mexico or Florida. Or whether it is the lex loci where the accident occurred.

PROFESSOR GORDON:
How do you think it would come out? Tony?

MR. SANTOS:
I am not too familiar with the conflict of laws application here in Florida. But I would say that a Florida court is going to be very much in favor in bringing in Mexican law and applying it. That is my reading on

it and Adolfo may have a better handle on that. But I would certainly take full account and act accordingly.

MR. JIMENEZ:

I think Mexican law is probably one of the few things that are clear, which is that Mexican law would likely be applied to this particular case. The damages occurred in Mexico. Mexico is the place where many of the facts took place. It is similar to a convenience test in some respects when you apply the conflict of law analysis. I think that too many of the facts deal with Mexico. The injury occurred in Mexico. The parties who are interested are Mexican. The one problem is that of the contract and that depends on whether we are dealing with commercial or tort and how that is going to be defined. The contract in this case has Florida law applying. In the commercial setting it is likely that you are going to have the application of Florida law, and that provision would be enforced.

PROFESSOR GORDON:

What is the Florida contract law that would apply in this case? Where would we seek to learn about this contract law? Uniform Commercial Code? Tony?

MR. SANTOS:

No, this is an issue near and dear to my heart. It is really a federal issue more than anything else. Unless this contract did something to pull itself away from the Convention on the International Sale of Goods ("CISG"), I think the CISG is going to apply to this contract.

PROFESSOR GORDON:

What do you think the parties meant? They said the law of Florida. Is that enough to pull it away from the Convention?

MR. SANTOS:

Not from what I know. I certainly would never take that position. In fact when the CISG came out, as I shared with you, the first thing I did because I did not know anything about it was say, "Forget it. I'm excluding everything from the CISG right know until I learn more about the law." That is what I did as a practitioner when I was developing contracts just like these.

PROFESSOR GORDON:

I asked, as you know, some couple of years ago about a hundred judges in Florida about that question. Whether or not a provision that said the law of Florida shall apply would be construed in their court to mean that the parties intended that CISG did not apply? I also asked about a hundred

practitioners about the CISG. Tony was one of the few exceptions to that two hundred people. He was one of the only who understood it. But almost all of the judges, in fact I think all the judges said the U.C.C. would apply in that case because the law of Florida is the U.C.C. even though the law of Florida is the CISG. This really raises a very difficult question. If you are traditionally using the law of Florida, how do you know what the law is? In many cases people are simply and totally unaware that this Convention on the International Sale of Goods does exist and that has created a problem. In fact, Tony had experience with a court in south Florida.

MR. SANTOS:

As a matter fact they are requesting certiorari with the Supreme Court now. By the way, Mexico is a signatory to the CISG. That is what I was basing this on. So is the United States. That creates the nice convention to bring the CISG into play. But in my situation, that was a very interesting case where a Magistrate decided that it was going to really make it very difficult for the case to proceed on the basis of a motion for summary judgment by a U.S. importer of Italian marble and tile who had entered into a series of contracts essentially through the use of purchase orders and invoices. It had the typical U.C.C. contract formation behavior. And a problem arose with the quality of the goods. Some discussions were had out in Italy that settled the matter between the two companies, between the principal of the U.S. company and the principals of this company in Italy. Then the Italian company went into receivership and tried to recover the money from our client in the United States. What we did was take a preemptory strike against the Italian company and sued them for breach of warranty. We immediately brought into the play the CISG. Moreover we also said that this matter had already been resolved and therefore they could not claim anymore damage beyond that we had already agreed to pay. A kind of novel theory some people would think that we were overlawyering it. But what we were trying to do was, we were trying to avoid them bringing a claim in Italy. This was key. We did not want to be in Italian court. First of all because, like the Mexican case here brings up an interesting concept with the defamation claim, we did not want to be accused of fraud. There is nothing worst in a civil system to land in jail until you get this matter resolved.

PROFESSOR GORDON:

And this happens in Italy?

MR. SANTOS:

I have heard a couple of cases.

PROFESSOR GORDON:

Because this is something I do not think you really learn in first year contracts class. But a friend of mine in San Antonio took his client down to Mexico City to negotiate a settlement of a contractual dispute, and his client was charged with criminal fraud. He was put in jail until he paid the full amount the Mexican wanted.

MR. SANTOS:

The lawyer is lucky he did not end up in jail as a co-conspirator in the fraud because he would wind up in jail as well.

PROFESSOR GORDON:

I am not sure how long that attorney-client relationship lasted after all of this because the lawyer went back home to San Antonio while his client probably sat in jail for a month or so.

MR. JIMENEZ:

But the case was quickly resolved?

PROFESSOR GORDON:

Very so!

MR. SANTOS:

You can use that to your advantage the other way around whenever you are in an international business transaction. When somebody from another country takes advantage of you and you can create some connectivity with lets say Brazilian law or whatever. Pick and hire your lawyer down there and throw that guy in jail. You can then watch how quickly your own dispute, will get resolved. If you got fraud, you got to have certain elements that need to be met in order to be able to do that. It is not all bad but the first thing I do whenever we have an international dispute particularly where the people are on the opposite extremes of the spectrum in terms of arguments, claims, and defenses, is tell my client that you will not travel to that country. And this president after he made that comment in Mexico, the first thing I would tell him is that you are not going back to Mexico for a while. Because the first thing that is going to happen is that if they want to be smart with him, I mean smart in a sharp sense, is they are probably going to try to make his life a little difficult. Whether they succeed in getting him into jail or not, that is another story, but the risk is certainly there. But the CISG is definitely applicable in this case and it is something to contend with. Moreover it gets into the issue of warranty and how you are getting that. To finish the story about the case in Miami, real quickly to bring it back full circle, what occurred was that in the motion for summary judgment we filed some affidavits on behalf of

the U.S. company in support of the motion for summary judgment. These were uncontroverted affidavits; in other words they did not come up with affidavits that would somehow dispute what we had to create the factual points of contention to avoid the motion for summary judgment. Magistrate Garber in the Southern District of Florida decided that the U.C.C. principles were going to be very helpful and applicable in this case. On the basis of the parol evidence rule, he said we could not have affidavits that were based upon hearsay and oral discussions that occurred outside the context the contractual relationship introduced. He basically disallowed the evidence and denied the motion for summary judgment. The district judge did adopt the magistrate's findings and issued the motion for summary judgment in favor of the defendant, now the counter plaintiff — the Italian company. In what I think was a stunning reversal, the Eleventh Circuit Court of Appeal came squarely on the side of the CISG in a decision that has had commentators throughout the country right now talking. In my opinion had the Eleventh Circuit not done that, first of all, we would have needed to have gone to the Supreme Court. Second of all, I think it would have been a travesty for the United States and international commerce because every other country would look at this decision and say, "What are you talking about? Do you not have any control over your judiciary system? You have no control over your jury system! Now you don't even have control over your judiciary!" This provincial thing needs to stop. I think it would have been a very significant step back for this country in terms of treaty enforcement and treaty interpretation.

PROFESSOR GORDON:

That is consistent with one of the judges who responded to my inquiry from Tampa. When I asked him whether or not he would apply the CISG in court. His answer was "Not in my court." He said, "I do not believe in world law. Period!" A rather strong statement and that troubled me a good deal. Even if the CISG does apply rather than the U.C.C. or the Mexican Commercial Code, does that make it pretty certain as to where we are going to head? Would an American court apply it in a different way than a Mexican court would apply? What would we look to apply the CISG in a court?

MR. SANTOS:

There is scant case law on the CISG. What is nice about the CISG, it has a nice set of comments to it not unlike the U.C.C. What is also nice about it is UNCITRAL has several rapporteurs around the world who are collecting decisions on the CISG. Now when we started this in 1992 this body of law was not exactly out there to tap into on the internet the way we do it today. Today there is a wonderful CISG database at Pace

University. But you got case law being reported in Germany ad nauseam on the CISG. They are fierce believers in the CISG because there was a predecessor to the CISG that the Germans had adopted and created a nice little body of law that then allowed them to catapult into the CISG. And we took a little bit of look at German law. We certainly scanned the entire spectrum of U.S. law and found nothing, which was the most troubling aspect of this. Then what we did was read the CISG. We read a lot of the documents UNCITRAL had collected during the negotiations of the CISG and brought in pieces of that commentary of those proceedings into some of the analysis and some of the rationale for our decision in the pleadings. Fortunately, the Eleventh Circuit saw to it to adopt what we put into that pleading.

PROFESSOR GORDON:

We need to end up our morning session, but I sort of wondered in a case like that if you had found a case in Germany — in your clients' view very well written — whether an American court might not give it more weight than the German court would have. The German court would have certainly looked at it as it does any other German, case but, an American court might have said, "here is something I can hang my hat on," and might really give it more weight than it is intended.

MR. SANTOS:

It would be no different than bringing a case from Pittsburgh, another German enclave.

AFTERNOON SESSION

PROFESSOR GORDON:

Assuming a U.S. court has decided to apply Mexican law, one of the issues for attorneys will be where do you learn about Mexican law. What are the problems associated with proving the Mexican law in an American court or proving foreign law? I think all of you have gone through that and have that kind of experience. What do you think is important?

MR. JIMENEZ:

One of the things you need to look at, definitely if you have a trial in America where we learned this, is that you tend to want to go with somebody who knows the most about Mexican law. Your first reaction might be let us find somebody in the forum state. In this case let us say Mexico, you need to find somebody who is dealing with Mexican law, perhaps a practitioner. What you need to do in order to establish what Mexican law is in a U.S. court is that you need to prove it. And that is very difficult. It is very different from when you are just using U.S. law. There

is only one provision that I am aware in the Rules of Civil Procedure, 44.1, which cover application of foreign law. It is one paragraph. It gives a judge very little guidance into how to apply foreign law or what its standards should be expected in proving up foreign law. Once the judge decides and is committed that a foreign law applies, that judge is now out on a limb because that judge has to determine and make rulings based on foreign law. What happens? My experience has been that they rely on the attorneys, and each of the attorneys has their own experts. As in so many issues you have what becomes a battle of the experts between this person saying, "Yes, there is a cause of action," and this person is saying, "No, there is no cause of action." Or even in the most minute cases, "Yes, Mexico generally does not apply punitive damages, but under these circumstances you could find it." However, in practice it is not realistic. I think it is very important to find someone who can educate the judge, who understands that judge's psyche, and what that judge's frame of mind is. Sometimes a foreign practitioner can not do that. They cannot bridge the gap. Basically they can't educate a U.S. judge who does not have even the basic understanding of a civil law system. That's where sometimes I think it is preferable and often times it is preferable to go with a U.S. professor, someone like Professor Gordon, who understands the foreign law, can testify as to what it is, and be able to educate that judge as to how it should be applied by a U.S. judge because the U.S. judge is starting from a point which you have to assume is zero. The judge is free to hear whatever evidence is out there. The judge is free to pick up the phone and call anyone that he or she may decide could provide guidance. There is that much freedom, in truth, because of the dockets they have. Because of the limited time that judges can really apply, they are really relying on the litigants to provide that sort of guidance. I think you really need to find someone that has a certain level of prestige in that particular area. Someone who has the knowledge, and someone who can address that judges background, legal background, in addressing foreign law. I think those things are critical.

MR. EPSTEIN:

Some jurisdictions, I do not know whether Florida is one of them, allow for foreign legal consultants to practice on a limited basis in the law of their country. I do not know whether that applies to Florida or to this case.

PROFESSOR GORDON:

We do that in Florida.

MR. EPSTEIN:

So there might be Mexican lawyers or people knowledgeable about Mexican law who are practicing in Florida, so that is another source.

PROFESSOR GORDON:

Tony and I are on the group that admits these people in, the Bar Commission. I do not think we have had that many of them that have become foreign legal consultants. Not as many as we think are out there practicing foreign law at least.

MR. SANTOS:

Everybody is practicing foreign law. That is the problem.

PROFESSOR GORDON:

Yes, those that are not registered. They may not want to come in and tell you that they are a foreign legal consultant unless they are registered, but I think that is a good source of people. Have you had experience on getting experts on foreign law?

MR. SANTOS:

I second Adolfo's comments because I think the key is educating the judge. This might seem a little bit inappropriate in this forum but you almost need to bring a law school professor to the table, to the judge, or to the chamber to talk to the judge and say this is how it is and this is what you need to do. And I think it needs to be a comparative law specialist with a good base in U.S. common law or U.S. jurisprudence. So that when they do speak they speak in a way that they have a dialogue with the judge rather than necessarily pontificate as might happen with somebody from overseas. Every time I brought people from overseas, I mean those from Mexico and Latin America, whether they are going to come in and lecture, you got to understand their entire methodology utilized to teach them is so different than what we are accustomed to that you might find it difficult to follow them until the very end of the story. And that often happens. And U.S. judges are trained to take sound bites. The whole system is required to create sound bites or little synopses throughout the pleading so things can be picked up quickly and readily and you can move the process along. It is designed to be efficient so you may lose something in the translation. I tend to agree with Adolfo. I think the comparative law mentality is probably an additional factor.

PROFESSOR GORDON:

Ten years ago I would have been surprised to hear you say that, but I am not at all now. I say that from the other end, from being called upon to be an expert. Although I have a graduate degree from Mexico, I was

trained in the common law first and I think when you learn one system first you never are going to think the same way as someone who has learned the other legal system. That is true both ways. My view has always been when someone would call me that they should get a lawyer from that country, but I think your comments are very true in many cases. I know some people now in Mexico that I would never want to have come into court. Although I think they are brilliant academicians, but they have not had any training in the U.S. legal system, even though they speak very, very good English. But they really do not understand the nature of a common law system. They do not understand what is necessary and proof. They also come from a system in many cases where the expert is retained by the court and not by individuals. So they do not understand those subtleties that you really are a hired gun that the client will not want you if you say things they don't want. Probably half the time I get asked to be an expert and when I talk initially to them they say, "We are not so sure we want you if that's your view on the subject. Is there any way you might be able to modify that view a little bit?" And I think if you are going to be honest you are going to say, "no, that is what I think about the subject." It can be hard to find people. I know probably only four or five people in this country who I think can really do a good job as Americans in a court testifying on Mexican law. Another one is American and the other two are Mexicans who have lived in this country for a very long period of time. They can do it. And very often what happens is people will call you, and they will think, well they heard, that you had some experience in Latin America and they have a case dealing with Bolivian law and want your expert opinion. And you say, "Well my experience is with Mexico." They say, "Oh, I mean isn't it the same down there?" The answer is no, it is not the same. And you can indeed play on that because a recent situation where I was involved in Mexican law, the person on the other side brought a person who really wrote from the perspective of being an Argentine person. A very good person who I would go to without any question for Argentine law, but I think made some assumptions based on the nature of the way which Argentine law had developed which were really inappropriate to Mexican law. Another curious thing that came about if you recall some years ago, maybe fifteen years ago, was a very bad oil spill called the Ixtoc oil spill. This deals with the problem of getting a foreign lawyer to testify, in this case a Mexican lawyer. The Mexican Ixtoc oil well released oil and it covered a good deal of San Padre Island in Texas. The U.S. Justice Department initiated a suit against the Mexican government for the damages caused by this, and they wanted an expert on the Mexican Civil Code. The Mexican Civil Code has a very large section dealing with responsibilities. It does not matter whether that responsibility flows out of a commercial action or a tort action. It is all in that portion of the Code. They called me and asked me if I would do it. That was really

the first call I had, and I said no. I translated the Code and that is why they were interested. I said that I had translated the Code because I wanted to learn something about civil code. I had not done the graduate work that I later did, and I did not feel that comfortable. They asked me if I would give them some names of Mexicans who can testify. I said, "I'll give you a whole list of them." And I gave them about six. They came back the next week and said we called them all and they all declined. I said, "why?" They said in each case the Mexicans stated that this was too political an issue for them to become involved in. So if you have an issue that is something that gets into the papers like an oil spill, then that can be a serious problem. A very good friend in Mexico, Enacio Gomez Palatizo who has written a great deal about Mexican law, testified in San Antonio about twenty years ago, 1977, I think it was, representing a U.S. party, and laid out the Mexican laws dealing with national property with regard to archaeological sites. These were two cases called the *Maclean* cases, I think. In the first case, there had just been terrible testimony as to when Mexico claimed property as national property. This case dealt with a number of pots that had been taken from a site and taken out of Mexico. While Mexico had claimed the sites in the 1870's, they had not claimed the pots, the things which were removable from the sites, until about the 1970's. These items had been removed in the 1960's. He gave testimony so clearly that there is a footnote in the case that they relied on his testimony because other people were coming in as experts saying, "I remember my teacher in high school told me all that stuff was ours. It belonged to the Mayans and so." He went back home and he was just ripped apart in the press for having sold Mexico down the river because he testified against the Mexican interest of getting this pottery back. So in sensitive cases I think it would be a real serious problem going and getting somebody from another country and having them come to the United States to testify. It is a difficult area and these comments that you have to really be thinking about the judge are really very important. And I think it is necessary to read their cases. If you have a case in Miami where you have a number of cases coming up and you have a judge, like Judge Davis, who has had a lot of foreign cases, you want to read his cases and see how sympathetic he is going to be to foreign law. Additionally, you want to see just what kind of personal biases you are going to get. I also assume that you would need to ask around. You did this growing up and practicing in New England years and years ago. If you were representing somebody with a divorce, you find out if the judge is Catholic or not. And we had lists of judges who were very pro divorce and other ones even though the law allowed divorce would never grant a divorce. They just did not believe in them. So it is not that you are just saying who would be the best person. Well obviously a Mexican should be the best person to testify on Mexican law.

MR. JIMENEZ:

If I can just go on something that you touched upon, the issue is critical. The selection of an expert on foreign law is critical. Because once you have gotten that person and you are far along in litigation they are as important as the attorney that is on the case. To touch on another point, I will relate a comment that a judge made in a case that we were involved with where he stated and he actually inserted the University of Florida in the record. He said, "When I went to the University of Florida forty years ago, I learned that every wrong has a remedy." Based on that premise he would not accept our argument that there is no civil cause of action for what the plaintiff was claiming. He was completely opposed to just disregarding that premise in his thinking. So it goes down to a core belief, which he has as a jurist, that is very difficult to fight. That is why it so important to have someone that understands that premise, knows how to address it, and reconcile it with foreign law.

PROFESSOR GORDON:

Which means you were not terribly unhappy when that case was reassigned to a new judge.

MR. JIMENEZ:

No, I was not.

PROFESSOR GORDON:

I sort of emphasize. There are times when you go in as an expert and you know in a sense you have done too well. You convinced him to do something that you may have some doubts about. I talked to students about appearing in a court in Cincinnati dealing with the Lloyds' insurance litigation where American parties became names in Lloyds and signed what we called suicide or standby letters of credit. And this family now was being called upon by Lloyds' to make payments of 250,000 pounds, 500,000 pounds, and another. They began to be suspicious and they wanted to have the bank ordered not to pay the Lloyds company on these letters of credit that they were collecting. The judge said, "I don't have the faintest idea about international letters of credit. You better bring somebody here to teach me that." And I went in and actually set up a blackboard up in front of the bench. The judge said, "how long is this going to take me to learn about letters of credit?" I said, "probably about 50 to 60 minutes, because based on class schedules we are programmed as professors to speak in that period of time." I probably would just come to the end and he would begin to walk out. And indeed it took me between 50 to 60 minutes at that time. And the other side offered no testimony whatsoever. They did not do a good job and we got the only injunction that

was granted in the United States over a fairly long period of time on that particular issue, preventing the bank from paying. But as a caveat, to be honest, I have to admit, also as I admitted to my students, that was the same judge who had granted the injunction against the World to keep their hands off Pete Rose. If you recall when he was banned from baseball the judge said, "Not in my town, Pete Rose is still the manager of the Cincinnati Reds." So he was an injunction granting judge. But I agree if you get the person who just makes the match in that can be very very important. That is very different in a lot of other parts of the world. Does this make a lot of sense talking about American procedure? Is it all comparable?

PROFESSOR HARTLEY:

Entirely yes. Entirely yeah. I also think it best if you can to get the expert from the country where the judge is rather than the country whose law is being applied because you want an expert who can really speak the language of the judge. I do not mean that literally only, but also the way he thinks. If you were to get a Mexican lawyer before an American judge, his whole way of thinking would be different than the American judge. The judge would not feel very confident with that but if you get an American lawyer who happens to know Mexican law then he can explain Mexican law in terms, which the common law judge can understand. And that is a much better idea. In England, I have friends that were involved in some cases concerned with Arabic law — Islamic law. And if you get somebody from Iraq or somewhere he might be the biggest expert, but the way he thinks is so different than the way the English judge thinks that the English judge somehow does not want to accept what he says because it is not put in a way in which he can understand. My friend was actually an American lawyer who happens to be an expert on Islamic law but who lives and teaches in London. He goes before the judge and he thinks in the same way that the judge thinks so he can explain these concepts in language that the judge can accept. That is much better, and he is always very successful with his evidence.

PROFESSOR GORDON:

I have only seen one instance where judges actually told the attorneys to get me an American on Mexican law where they had Mexicans come in. They were good Mexicans, faculty, that were brought in as faculty-practitioners. The judge said, "There is one on one side and one on the other, I want an American before my court to tell me about Mexican law." That sounds strange but it is not all inconsistent with what goes on.

MR. EPSTEIN:

I think one of the problems in this area is that American lawyers may not have to rely on foreign law experts very often. They may litigate cases where this requirement never comes up. So they tend to minimize the importance of it. If they need to prove foreign law they will get the name of someone, which as the panelists have said, without really understanding how important it is. This case I mentioned this morning, the Third Circuit case, *Bhatnagar*, involving the delays in the Indian system. If you want to read that decision, you will see how it turned into a real battle of the experts because one side hired an Indian lawyer with very high sounding credentials. The Indian lawyer introduced his affidavit, which said there would not be these delays in the Indian system. The other side relied on American lawyers with charts and graphs, and who really went into it and obviously had spent a lot more money on presenting there side. They really outmatched the Indian lawyer. So you better be very careful, as everyone has said here, if you have that issue come up in one of your cases. If you minimize the importance of it, you do not know what your opponent's going to do.

PROFESSOR GORDON:

I think in many ways it is easier for an American lawyer to approach the kind of issue that Adolfo has been trying to explain. The problem with Mexican defamation law is that truth is not a defense. To a Mexican that just may be part of the law which they grew up with. They find it hard to find the words adequate to explain it because they do not approach it from the first amendment-free speech issues. But you can see that.

One thing came up that was interesting when Adolfo and I were working on this case regarding defamation. At this time there were some articles in the New York Times appearing where there were New York Times reporters in Mexico who were arrested because of defamation. They were writing about the bankers in Mexico and had linked them with some of the drug lords. The bankers brought suits against the New York Times people. They were essentially saying, "It doesn't matter if we are linked to them or not, you have dishonored us." There is a saying in Mexico that if you call a crook a crook that is a violation of the law of defamation. That can be a hard kind of thing to explain to a judge when you are trying to prove foreign law. To prove concepts like that are hard but it is essential that it gets done. We started talking a little bit about damages. We made some reference to punitive damages. I think we will hold that for a minute and put it into context with Mexican tort law. But one thing we have not raised at all and that is if GROWFAST needs to do discovery in Mexico. If the case is in the United States and there is a need to discover documents in Mexico will it face obstacles?

MR. EPSTEIN:

Well, Mexico is a member of The Hague Evidence Convention. Being an entirely different legal system than a common law system, more like a civil code country, they would have entirely different notions about discovery. They would not recognize American pretrial discovery and our unlimited exchange of documents. So the whole system is different. If GROWFAST wanted compulsory testimony for example, they would have to file a request through the treaty, through this Hague Evidence Convention and the witness would be examined. As I understand it, if it operates like in Europe, the witness would be examined by a Mexican judge. There would not be any exchange of lawyers the way it is here. In Europe the judge is the one who conducts the examination of the witness and there is no verbatim testimony. There is no transcript. There is no stenographer. There is no right of cross examination. The attorneys do not participate. Unless you get special permission from a judge it is much more limited. As for documents, as I said, there is no unlimited production of the documents. In The Hague Evidence Convention there is an article that restricts pretrial discovery and production of documents. Some countries have made reservations to that either making it an absolute prohibition, no production of documents, or they will allow a limited production of documents if you can that show they are related to the trial. Mexico has a limited reservation so you would be able to get specified documents but not unlimited production.

PROFESSOR GORDON:

How does England feel about our discovery?

PROFESSOR HARTLEY:

Well, the English are not too happy about American discovery. English discovery is really half way between the U.S. system and the continental system. So the English are not too happy about the range of American discovery, and they suspect that sometimes it is abused to try to force a settlement justly or unjustly. But that is what they think. When American litigants use The Hague Convention to get documents the English tend to limit it to documents which can actually be used in evidence or which will be used or tentatively used in evidence at the trial and not the more background documents which may lead to other documents. They do not like that wide of range of documents.

PROFESSOR GORDON:

There is also the interesting experience in the Rio Tinto Zinc case — the Iranian Cartel case — when the United States wanted documents for a case that was brought by Westinghouse against the various alleged cartel members. Lurking in the background was the United States Justice

Department thinking that whatever might be found in civil discovery could then be used as the basis for criminal prosecution. So essentially by helping the discovery process in the civil case you might really be helping the United States enforce criminal laws, which were all tied into, of course, our antitrust laws. These laws are not that well liked particularly when you talk about treble damages parts to the antitrust laws which are obviously a civil side of it. So that is another side of the difficulty with discovery.

MR. EPSTEIN:

This is a classic area of problem in international litigation. What we tell everyone in this area, when you have discovery in another country you just do not make a discovery request here and let it sail across the seas and wait and see what comes back. You can do it that way. You can fill out the form and send it to the foreign port or the foreign central authority under the treaty. But the better way to do it is to hook up with a foreign counsel in the country where your discovery request is. Because, like in England when we send a request for production of documents, the solicitors know the lingo that will be acceptable to a English court. And you cannot say, the way you can say in the United States, "any and all documents," in a document request. You have to specify the documents you are after. You also have to say that they are related for use of the trial and how they are going to be used. It is the same thing in Germany. If you are dealing with countries that are very restrictive about discovery you may be very surprised and disappointed with what you get back.

The same thing applies to testimony. If you want testimony from someone overseas you need to hire foreign counsel. If you do not hire a lawyer at the other end, then the request is going to go to the foreign judge. The foreign judge will then conduct the evidentiary proceeding in this limited fashion and you can end up with testimony that is damaging to your case. So we recommend in these situations that you get a lawyer at the other end. Have the lawyer go into the foreign court to see if the foreign judge will accommodate your request to let either the American attorney or the foreign attorney participate in the proceeding.

MR. JIMENEZ:

Each country definitely has its own rules and quirks. One example is a deposition we needed to take was in Salzburg, Austria. Because we hired a local attorney, we discovered that it was very difficult to obtain a deposition of that person in Austria. What we did was employ a German lawyer. Through that German lawyer we were able to get that person to Munich. We were then able to obtain a deposition in Munich. The other side never knew why we took the deposition there. They just thought it was a more convenient place right across the border. Actually they could

have unraveled the entire deposition which was critical in the trial that we had.

Two things I want to mention concerning discovery. I think there are two issues you need to examine in these cases. Number one: is there going to be a jury because a jury may somehow affect the type of discovery or the quality of discovery that you are going after? Secondly, are there summary judgment issues that you need to support or oppose because that will also have an impact on how aggressively you go after discovery or not? Further, I really believe that there is no substitute for getting on a plane and going there often times to just sit down with local counsel and actually finding the best way of getting whatever information you need.

MR. SANTOS:

The local counsel aspect of it cannot be underestimated because it is probably your singularly most important step in a discovery process. I'm sure Adolfo and the others here have seen where there are maybe even foreign litigants in the U.S. forum with U.S. counsel each. The U.S. counsel will call each other go ahead, schedule the deposition of the principal executive in Mexico, and say, "we will go to Mexico City and do this." And they will do it just like that. If the Mexican company is the least bit savvy it will look at this and say this is heresy. It is not going to work that way. But time and time again it will occur that way. What you are setting yourself up for is the unauthorized practice of law possibly in another country and that is a real problem because you will go to jail for that one. You got to keep in mind that UPL issue can be very hot even if you have local counsel. I know of stories of lawyers hightailing it to the airport in plaintiff cases where they are defense counsel and personal injury cases where they are defense counsel or actual plaintiff lawyers. Because what has happened is that either local business interests are so opposed to U.S. lawyers rounding up — lets say the plaintiffs — that they have then turned around and created a problem for that plaintiff's lawyers to come into the country and take testimony. Many times they are not taking testimony. They are just simply going around and doing some fact gathering. The local opposition will go to the local bar and file a formal complaint. At that point a potential criminal process begins. It goes along the lines of fraud. Basically coming out and saying who you are when you are not, is how they portray it.

The other issue I think is pretty important in depositions is to ensure, as Adolfo pointed out, that you get in the right forum so you can avoid some of these things. I can tell you one thing that is real nice is that you will find that many people who need to be involved in the judicial system in a U.S. court willing to come to the United States to give you their testimony. If you are able to time it right, you might even catch them during a side trip through the United States to somewhere else. That may

not be so bad. That allows to you to sit them down for a full day and examine the heck out of them. It is hard to do.

In this CISG case, which seemed to have every discovery issue imaginable, one of the things we had was that the two people that ultimately gave affidavits in support of the motion for summary judgment were willing to come to the United States to give their depositions. One thing we did tell our client, who was "Mr. Man about the town" and wanted to just go out and absolve himself, was, "don't go there," for all the other reasons the panelists have previously said. But he felt that he could just get into town in order to do whatever he needed to do. We said, "it is not going to work that way." So the reality of where you take that deposition I think is very important.

PROFESSOR GORDON:

I would like to go back to something Adolfo said. Do not assume that because our two practicing guests are from large cities that you can take yourself off to Lake City, Florida, and avoid this kind of practice. Although there may be no foreigners living in Lake City, which to Lake City someone who lives in Live Oak, Florida, is a foreigner, these things happen. Several years ago a young woman was injured in a Volkswagen on Interstate 75. A Lake City case in Lake City courts commenced and they sued all the ones you read about in WWW Volkswagen plus Volkswagen AG in Germany. The judge asserted jurisdiction over all of them and then gave a discovery order that was the "any and" all terminology that David used. "Any and all records of the Volkswagen company which relate to any way to the original design and continued development of the Beetle." Now there are pictures of the Beetle with Hitler standing next to it. It was developed in the early 1930's, the Volkswagen, the people's car. One of the unfortunate parts about this is that under *Aerospatiale*,[7] a Supreme Court case, the use of The Hague convention, which David mentions, is optional. So a court can really give an order based on its own procedural rules. I asked the attorney — I said, "well, but he was a little certain." He called me, "I think there is some problem here because I now have this order to go get discovery." I said, "What are you going to do?" He said, "Well I'm going to fly to Stuttgart, go to the Volkswagen factory, give it to them, and plan to spend some time going through there records." I said, "You are really kidding. Aren't you? Let me sit down with you for a few hours and tell you a little bit about what's going to happen. I can tell you very quickly what's going to happen to you. They are going to refer you to their attorneys there and their

7. Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522 (1987).

attorneys are going to give you a lesson in taking evidence abroad, which I can perhaps give you an introduction to in just a few minutes."

You can not avoid it. There may be more of this practice in Miami. David certainly sees this coming out of his neck of the woods.

MR. EPSTEIN:

Well what I see in Washington, in the Justice Department, is usually an American attorney who goes to a country like Switzerland or Germany and conducts unauthorized discovery or serves papers incorrectly. This often rises to the diplomatic level if they are caught. Switzerland is the worst of all. In Switzerland, it is a violation of the Swiss penal code to do evidence gathering on Swiss soil. You can be arrested. There is a story that is always told in these seminars about an attorney who is arrested on Swiss soil for interviewing a witness. What I see is if papers are served incorrectly by mail, it's a service by mail issue. Then the legal attaché at the Switzerland embassy in Washington will get the ambassador to sign a letter. That letter is mailed to U.S. court where the action is pending. The letter protests the way the service was conducted. I do not know what the judges do with these letters, but these letters are all over the place. However, if the foreign government is upset enough with the process, it will protest to the State Department.

PROFESSOR GORDON:

What will the State Department do in turn?

MR. EPSTEIN:

I do not think they do anything directly, but these things become foreign relations irritants.

PROFESSOR GORDON:

The State Department probably would not contact the courts, but would they contact the attorneys?

MR. EPSTEIN:

I am not sure but they certainly become a subject of governmental discussions. How offices like mine should advise bar groups and practitioners about the do's and don'ts that we are talking about here?

MR. JIMENEZ:

The State Department is a valuable first step in getting information on a foreign country. The consular division actually has information sheets on just about every country. And they will tell you. That is how I discovered that in Switzerland it is illegal for me to actually send a letter requesting information. Had I not done that I would have probably

committed a crime in Switzerland unknowingly, but I am not sure if that would be a defense. There is a lot of information that rests with the State Department that is very easy to get. You can even obtain it automatically by fax.

MR. EPSTEIN:

It is also available on the Internet.

PROFESSOR GORDON:

Let us turn if we can to our tort issues. We looked at the application of Florida law issue. We looked at the application of the CISG. We did not look very much into what law might apply if it were to have been Mexican law because we had assumed that the CISG would be likely applied.

When we deal with tort law presented by the accident here we are not as likely to find that there is an international convention dealing with negligence. Indeed looking at the tort after looking at the contract it tells us a good deal about another legal system. I think this brings in the question of how do you learn about this legal system, because at this point you may not feel you are in need of an expert that might be an expert witness. In this case you may just have no knowledge about the nature of that foreign legal system. In Mexico, the commercial law that we would be talking about, were Mexican law to be applied, would be the Mexican Federal Commercial Law. If we are talking about a tort we are in a very different area because tort is part of the area of the responsibility that comes out of the civil codes of each of the states in Mexico plus the civil code for the federal district and in matters which may be federal.

So now if we have an accident in Veracruz and if we had a commercial question in Veracruz we have federal law for the commercial matter but we have civil law for the tort matter. If this were to be in a state, I believe there is only one, that essentially federalized its tort law for foreigners, you then have a really interesting situation. If you had gone down to visit a friend in Mexico and you had both been involved in an accident in Cancun, then the Mexican would go into Mexican courts using the state's civil code as the basis of liability, but the American would go in with the basis of the federal district code under a special provision of the court that has essentially brought in that federal code as the applicable code for foreigners. So you really have two different treatments. I think it simply illustrates the complexity of a different system — of learning about a different system.

I think the best we can do in our courses of comparative law is to just sort of throw a lot of red flags up and say, "don't believe that other systems are at all like our system even if it is a federation of states as Mexico is. It has an extraordinary different framework of law." It probably does not get any different than when you get to the area of the application

of damages. I think the damages are in many ways the most important driving factor in where litigation starts. Why is the United States such a popular forum? Is it because we have judges that are so learned and so fair? Is it because we have a wonderfully extensive discovery and all of that? No. It is because we have punitive damages and because we have a bar that has contingent fees as well. All are certainly interrelated. What has now been happening is that when our courts in the United States are looking at a tort case now and decide that Mexican law applies. Those of us who are working on the defendant's side breathe a great sign of relief. Why?

MR. JIMENEZ:

Number one in a large part there is no recovery for pain and suffering in Mexico, besides the punitive damages aspect that is a huge relief as far as damages. The other aspect is that inexcusable negligence, which is commonly called contributory negligence, is a complete bar to recovery for the most part. It used to be, just a few decades ago in the United States, that if you showed any negligence on the part of the plaintiff, you would recover nothing. That has long been extinguished in the United States. But in Mexico it is still the case. In most accidents there is some level of provable contributory negligence that exists, and that is a huge benefit to your side.

MR. SANTOS:

There is an interesting development in Guatemala. In the last couple of years, Guatemala emerged from thirty-plus years of horrible little civil wars. In the attempt to do a little grassroots reform on the legal side, they have introduced a few things, such as limited use of jury trials. One of the things that they have been studying very carefully, and I know that it is occurring in Columbia as well, is that they are looking at whether they should modify their concept of what they call moral damages to start including something a little more akin to the U.S. system in attempt to placate the people, mainly being the poorer people, who are most burdened by the rather tougher parts of the law. You might call it a bit of a socialist reform movement and an attempt to keep the masses happy. I do not know where it is going to go, but I have seen it debated in several forums already. I was little surprised to see it beginning to raise its head. I am not sure where it is going to go.

PROFESSOR GORDON:

One issue that I see that I have in talking to people is when they ask the question, "Do they have punitive damages in this country or could they interpret moral damages as being punitive damages?" I do not feel comfortable at all in saying no, because all it takes is one shot to have that

happen and see that these damages are given. Indeed there was a case — Caesar Chavez case in Mexico. It was important as a defamation case. He asked the Mexican court for twenty-five million dollars. He did not ask for, or he did not want pesos. He wanted it in dollars, which created some problems under Mexican law. But he specifically said twenty-five million dollars, and I believe it was from one of the large newspapers in Mexico, which had been talking about linking him, the boxer, to the drug traffickers, some of the drug lords. He sued for defamation using the moral damage provision, this developing idea, which has not yet really been accepted by the courts in Mexico that there is a civil cause of action for damages. But interestingly, in this case they never referred to his request for those damages in the judgment. They instead gave him what traditionally was the response when you filed a criminal petition, which was the state stepping in and demanding a retraction from the party who made the statement and also then offering a publication of the judicial declaration that the person had been defamed, and that was considered to be enough. But the worry I think is to become the sort of *Texas Gulf Sulfur*,[8] the insider trading case, of moral damages. You do not want to be the one representing the client who has the first huge moral damages claim brought against you.

We worked not long ago with your firm, Holland & Knight, on a case dealing in Aruba. Aruba did not have a provision for moral damages. Well, it had a modest one of the old time moral damage provisions, i.e., a certain percent of the compensatory judgment. Holland & Knight had gotten letters from Aruban attorneys saying that because Aruba does not have a specific provision for punitive damages, a court could order them. The attorneys stated as long as they are not specifically prohibited in our damage provisions, a court could order them. Could they? The answer is yes. They could if the court wanted to be really adventuresome. Would they be likely to? The answer to that was very clearly no. We were successful in convincing the court that there was no such thing as punitive damages.

I think what is a very important point in that case, and also in the defamation case we have talked about, is try to convince an American judge who is applying foreign law that they ought not to be the adventuresome court. If Mexico wants to create punitive damages out of moral damages, let them do it in a Mexican court first. Do not have the big case be in Miami where an American court sees no reason why Mexican law cannot be so interpreted. So I feel more comfortable in letting the Mexican court create law. This goes back to our very first question: should we ask for *forum non conveniens*? If it goes to Mexico that could happen.

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8. Securities & Exch. Comm'n v. Texas Gulf Sulfur Co., 401 F.2d 833 (2d Cir. 1968).

If it stays in the United States, we have some control over it. I think that is something you need to use all the time where you try to convince the judge not to do anything more than judges have already done in the country whose law you are applying.

MR. JIMENEZ:

The danger with the moral damages statute in Mexico is its own language. It almost opens the door. Because one is liable for moral damages if one commits an illicit act or acts against good custom. To a U.S. judge that almost sounds like wanton and willful conduct, which in the United States would justify punitive damages in many cases. So it is again that difficulty. That is why there is a temptation by a U.S. judge to apply punitive damages.

PROFESSOR GORDON:

The Mexico City provision, which is surely new within the last decade, says that moral damages is understood as the impact that a person suffers in feelings, affections, beliefs, decorum, honor, reputation, private life, character, and physical aspects or how perceived in the opinion of others. Moral damages shall be presumed when a person's freedom or physical or psychological integrity is unlawfully violated or restricted. Now that does not trouble me as much as long as the state still has in effect the traditional damage response to moral damages. That is invariably something that would say 365 times the then current daily wage rate. You are talking seven or eight thousand dollars in some of those cases, or alternatively 1/3 or 1/4 of the compensatory damages, which were never high. They were never high partly because if some of the damages were to compensate for injury they were never paid because the social security program took care of all the medicals involved. So you really have very low damages after that. This is the real concern in Mexico. I am pretty certain and I do not have a copy of the code of the State of Veracruz but if we are dealing with this case in Veracruz they have the traditional low fixed percentage of moral damages. So if you lose on the face of the merits do not worry about the fact of whether there are moral damages or not. Let them calculate the damages. That will not be a problem, it would be very low. But if they in someway interpret this law in a different way because it is a foreigner that the federal district code should apply then we got the new provision from the federal district of Mexico that does not limit moral damages. Of course what we would then have to argue is that it may not limit them, but the courts do not seem to be willing to increase them over what were the other traditional forms. But damages are terribly important. What about punitive damages in England? Punitive damages in Europe?

PROFESSOR HARTLEY:

Well punitive damages in Europe, on the continent, I think are unknown. In England they are possible, but they are only available in very rare cases like cases involving constitutional rights. If a police officer beats you up you can get punitive damages. There are few other special cases, but they are very rare.

There is a lot of hostility in Europe towards American punitive damages, particularly some of these famous cases. I think some of the enormous punitive damages have really frightened Europeans very much, particularly European insurance companies, of course, because they are the guys who have to pay them.

MR. EPSTEIN:

Chances are that a European court would not enforce an American judgment with punitive damages in it. There is a decision in the Supreme Court of Germany that deals with that. How about the UK?

PROFESSOR HARTLEY:

Well the UK it is not certain. There is a dictum, which says maybe they would enforce it? Although I do not know of any case in which they actually have.

MR. EPSTEIN:

It is also a big issue at the negotiations for this multilateral convention on the enforcement of judgments. The European countries certainly do not want punitive damages included in any of the concepts.

PROFESSOR HARTLEY:

That certainly is true. Very much so.

PROFESSOR GORDON:

There is a provision in something that I was just looking at. It is in Chapter 11 of NAFTA that deals with the method of resolution of investment disputes within NAFTA. It refers things to arbitration, but in the provision with regard to damages there is a specific provision that says in any of these Chapter 11 cases which go to arbitration there shall be no punitive damages. So we are really seeing that philosophy regarding punitive damages being written in and evidencing that view. We will come back to that — judgment enforcement. We have a couple of cases from Germany that indeed have been concerned with that. One of the questions that arises, which I am sure you have seen David, is: will the court enforce the remainder of the judgment, or will the imposition of punitive damages essentially destroy the whole? Let us hold that thought for a minute.

I wanted to move onto another question where we had brought on the

English and Japanese companies in the suit. They were brought in for a specific purpose, partly because Professor Hartley is here and the Japanese partly because of a particular case.

I raise the question from the English perspective. What would happen if the English company was to be brought into a defendant along with GROWFAST and we have a British tourist who was an injured party? The British tourist now sued GROWFAST and sued the English company in a U.S. court asking for punitive damages. Is there anything that the English company might do back in the English courts?

PROFESSOR HARTLEY:

Are you thinking antisuit injunctions?

PROFESSOR GORDON:

Yes, I am.

PROFESSOR HARTLEY:

Well English courts do sometimes grant antisuit injunctions, which prevent English people or people with some connection with England from suing in foreign countries. The foreign country most commonly involved is the United States. In fact most of them involve the United States.

PROFESSOR GORDON:

Do you have to have a closer connection that they require, for the benefit of clarity?

PROFESSOR HARTLEY:

Well recently since the *Laker Airways* case, English courts have been rather careful about granting antisuit injunctions. I will not say they won't grant them, but they are careful that they do not want to feel that they are upsetting America. They try to think carefully. They will not just grant them automatically. They will try to think of reasons why they should not grant them. I would think there is a very strong case of would they grant them. Maybe this might be a strong case if the English company has no reasonable connection with America at all and the English tourist is just suing them there because it is convenient or that they think they can get more money. I guess if the English company went to an English court they might grant an injunction against the English tourist. Also if I was counsel for the English company and they had no assets in America, I would say do not fight it. It would not be enforced in America. Not unless we have The Hague Convention, which would change everything. Because right now English courts will not enforce foreign judgments, say American judgments, unless there is either some sort of contractual agreement, choice of forum agreement, or unless the defendant was served in

America, was a resident in America, or if the defendant defended the case on the merits in America. If he does that, it would be enforced in England. If he simply comes to America and defends it on jurisdiction and then if he loses — walks out — the English courts won't enforce that. So advising your English client that is the way you want to think. If he has no assets in America, do not defend in America unless he is sure of winning.

PROFESSOR GORDON:

I raised the English situation in the *Laker Airways* case at the Sante Fe Institute in New Mexico a couple of years ago where there were a number of Mexican lawyers present. I asked, "Do you think Mexico might use an antisuit injunction in appropriate circumstances?" They all said, "Yes!" They all thought it was true. Do you find in your experience, David, that you come across antisuit injunctions? I do not see it being used in many other areas. It is an interesting procedure by which the foreign court is essentially saying we have governing authority over your British parties and it is a better forum to come into England. The antisuit injunction that was granted in the *Laker Airways* case was ultimately overturned by the House of Lords but with a reservation saying that we are not overturning the concept of antisuit injunction but rather in this particular instance we feel it was inappropriate.

MR. EPSTEIN:

I have seen a few instances. There is one that is pending right now that gets back to what I said this morning where a private litigant has gone to the State Department. It is an antisuit injunction matter involving England. The State Department asked the Justice Department to file a brief in the U.S. proceeding opposing the English action.

PROFESSOR GORDON:

Did not the *Butte Mining* case come up some years ago in your department? It may have been a law firm of someone. But there is another instance about six or seven years old where it got to be not only an antisuit injunction but also an anti-antisuit injunction.

PROFESSOR HARTLEY:

That happened in *Laker Airways* as well because two English airlines got antisuit injunctions in England and then the Americans got counter antisuit injunctions in America against the other airlines who had not been quick enough to get antisuit injunctions in England. But if you talk about antisuit injunctions to German or French lawyers, they are absolutely baffled and quite shocked about the idea. How can you possibly do this? I do not know if the Mexicans have the same philosophy as civil lawyers in Europe. But certainly a French lawyer, a German lawyer, and an Italian

lawyer would regard an antisuit injunction as particularly wrong, improper, and unthinkable.

PROFESSOR GORDON:

I think this raises an interesting aspect because although we think of Mexico as civil law in its basis, the largest number of Mexican lawyers who have been trained outside of Mexico have been trained in the United States. They so frequently come here for their education, and they are quite comfortable in dealing with American concepts. As I said, I think they are a little more sympathetic to this. Curiously, in the antisuit injunction area the American court may find this unattractive because essentially the foreign court is trying to take jurisdiction away from the American court. Judge Harold Green, the federal district court judge in Washington, did not like that in the *Laker Airways* suit. Whereas in this other area that we talked about very early in the *forum non conveniens* and the Ecuador law. In that case the foreign country is attempting to thrust jurisdiction upon the United States, which I do not think the courts are going to like either. These are two areas we need a lot more thinking about rather than developing hostility.

MR. EPSTEIN:

We have not said a lot about personal jurisdiction, but in this question that you asked Trevor, I think even if the UK company appeared here and contested jurisdiction here, that the UK court would not recognize it.

PROFESSOR HARTLEY:

No, but if they defended the case on the substance they would recognize it.

MR. EPSTEIN:

Yes on the merits. But they would not recognize the stream of commerce or the *Asahi*[9] tests?

PROFESSOR HARTLEY:

No.

MR. SANTOS:

What would that do to concepts of comity? If you had a similar situation where somebody maybe didn't show up and a default judgment was obtained and they tried to enforce it over here?

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9. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

PROFESSOR HARTLEY:

I'm afraid the English have a double standard. In other words you have an American sued in England. If they have jurisdiction under their long arm statute which is Order 11 of the Rules of the Supreme Court and even if you do not show up, they will take jurisdiction. They will then hear the case and award the damages against you. In other words, I am sorry to say that England claims more jurisdiction for itself than its willing to accord foreign countries.

MR. SANTOS:

The United States would never do that.

PROFESSOR HARTLEY:

The United States actually is much more generous in recognizing foreign judgments than most foreign countries.

MR. SANTOS:

But could not we overcome a British judgment based on a default situation by bringing in principles of comity and really disparaging treatment? Perhaps we could get a court here to say we are not going to enforce this based on a lack of fairness or the lack of equal treatment.

MR. EPSTEIN:

No. If you get a foreign judgment you better appeal it.

PROFESSOR GORDON:

I do not want to pick on the British, but . . . .

PROFESSOR HARTLEY:

I do not mind if you do.

PROFESSOR GORDON:

It is fascinating how they confer jurisdictional basis, because it essentially says that if you have any connection with Britain, they will assume jurisdiction. I think it was Tom Denning that dealt with a coffee contract between Spain and Belgium and was found that Order 11 was satisfied because the language of the contract was in English, the common parties were involved, and world coffee prices are priced on the London Coffee exchange.

PROFESSOR HARTLEY:

I think probably what happened in that case was that they said that governing law was English, and they used those arguments to suggest that there was an implied choice of English law. Under Order 11, if the

applicable law in a contract is English, then the English courts have jurisdiction. I admit that is rather exorbitant. That will disappear if The Hague Convention comes into force. That will be given up. And England has already had to give up all that with regard to the Brussels Convention countries.

PROFESSOR GORDON:

England sort of works on the basis that everyone ought to have their day in court in an English court. That means everyone around the world ought to, at some time in their life, have their day in English court. But going back to the antisuit injunction, this is exemplified in the language in the *Butte Mining* case, which is another one of the antisuit injunctions. Perhaps Professor Hartley can tell us about this. The English judge in that case, I think both in the High Court and then in the first appeal of the Court of Appeal, indicated that English parties should not have to face a suit in a foreign nation where that suit was either that vacuous or oppressive. They ruled in that case that they did not find that the American legal system to be vacuous, but they certainly found it to be oppressive. They then went into rather a litany of objections to the American legal system, more specifically contingent fee, punitive damages, discovery, jury system, and a whole group of things which said that this was an oppressive system for the party to confront.

When you raised the word comity, I immediately thought of the language there. That is one of the things that is worrying me about some of these tit for tat kind of things in two judicial systems. How can we moderate that conflict? Maybe we begin to moderate it with an international convention.

We want to spend some of the time on enforcement of judgments and we already looked at these a little bit. Let us assume that we have had judgments rendered against GROWFAST in the United States and judgments against GROWFAST and GROWMEX in France and Mexico, and they all include the Japanese and UK suppliers of the ingredients and that we know that GROWFAST had assets in various parts of the United States, Mexico, and Germany. So we now have on the last page a whole series of possible enforcements for the commercial and tort judgments that were rendered in the United States against GROWFAST. We have a question about enforcement in the United States and we assume that this would not be a terribly difficult thing to do. It would be whatever assets were in the United States. But the question would be what about the likelihood of enforcement of U.S. commercial and tort judgments in other nations where GROWFAST has other assets. In this case one of those would be the question of enforcement in Germany. You mentioned a bit already, Trevor, that you might have to ask a question about this judgment.

PROFESSOR HARTLEY:

German courts would not enforce punitive damages. I think you previously mentioned a case in which the German courts said that punitive damages are not really civil rather more criminal in nature. There is a rule in Germany that you do not enforce foreign criminal law. Therefore, they would not enforce the punitive element.

MR. EPSTEIN:

They could enforce the rest of it, and I think the German decision makes that distinction. It did not enforce the punitive element, but it did enforce the compensatory element.

PROFESSOR GORDON:

I think there is a decision that dealt with the question of service of process. It was challenged on the grounds that it was a service of process for a case that was claiming punitive damages. Therefore the service of process should be considered invalid. The German court said, "No, we are not going to do that." That is an entirely separate issue of the properness of service under The Hague Service of Process Convention, so that should not be a problem.

The tort judgment in France, if we had a judgment rendered by this Paris party that has gone home after suffering injury, would it be enforced in the United States?

MR. EPSTEIN:

No.

PROFESSOR GORDON:

Because? No personal jurisdiction and no due process?

PROFESSOR HARTLEY:

No minimum contacts assuming the facts are as we see here.

PROFESSOR GORDON:

You have not mentioned the word reciprocity.

MR. EPSTEIN:

It is not a very important factor. You will see it mentioned in cases but you will also often see cases discount its importance. But certainly in this situation reciprocity is not as important as the lack of due process.

PROFESSOR GORDON:

Enforcement of the French tort judgment within the European Union?

PROFESSOR HARTLEY:

It would be enforced. Under the convention lack of jurisdiction is no defense. It would automatically be enforced.

PROFESSOR GORDON:

So the only time for them to contest that jurisdiction would have been in the suit itself.

PROFESSOR HARTLEY:

Yes, except that due to France's very wide jurisdictional rules they would not really have much of a possibility of doing that either.

PROFESSOR GORDON:

So they would have lost going into the French courts?

PROFESSOR HARTLEY:

Yes, they would have lost going into the French courts and whether they go into the French courts or not, it will be enforced in Germany. And I think that is a very unfair aspect of the Brussels Convention system, because if you have say a British defendant or German defendant in the French court, the French are not allowed to use all those excessive rules. They can only use the reasonable rules of jurisdiction laid down in the Brussels Convention. Those rules say either that the defendant must be domiciled in France or the tort must be committed in France. There are various rules but those are all reasonable kind of rules. But those rules only apply to a French defendant or a defendant domiciled in another Brussels Convention country. So a defendant domiciled in Sweden, Germany, or Italy can get the benefit of that jurisdictional protection. However, a defendant domiciled outside those countries does not get the benefit of that protection, but all French judgments, both against European defendants and non-European defendants, all have to be recognized throughout the whole Brussels Convention area. You can't raise a jurisdictional defense. There are few small exceptions, but in general terms you can't raise the defense in Germany that France took jurisdiction over me on the unfair ground that plaintiff was a French citizen. The Germans have got to enforce it and there is no escaping that. There are a few limited rules — you must be served in adequate time — but basically there is no way of escaping that. In this case, GROWFAST better say goodbye to its German assets.

PROFESSOR GORDON:

I guess the answer is that we need to join the convention and get the benefit of participation. You are involved with that. Is not that one of the sticky issues now coming up with the convention?

MR. EPSTEIN:

Well it is. Trevor outlined the basic problem. For the United States it is a sensitive issue, because it is easier to enforce judgments here than it is to enforce an American judgment in a European country. So the issue is for the United States in this treaty is: what is our leverage? In other words, a lot of Europeans might say there is nothing in it for us because we can get our judgments enforced in America anyway. We are the ones who have the problem. So, what can we offer in this deal?

PROFESSOR GORDON:

Finally, the tort judgment in France against GROWMEX to the extent it is against GROWMEX, and the possible enforcement of that in a Mexican court. Possibly any judgment enforced in a Mexican court will run into the theory of the enforcement of foreign judgments. In the last decade, the Mexican law has a relatively changed attitude, but in a practical matter it may be very difficult to get it enforced. Leonel Pereznieto Castro when he was in here several years ago said he was called by a Mexican judge from Veracruz, which is the area we are dealing with. This judge had said, "I have something before me that is called a request for an enforcement of a foreign judgment, and I don't have the faintest idea what they are talking about. Could you help me?" Leonel said that he told his partner that he was going down to Veracruz and spend the day on Monday trying to explain this issue to the judge. And he called his partner late Monday afternoon and said, "I'm going to be here the rest of the week teaching the judge about foreign judgments." If you are in Mexico City, perhaps even in Monterrey, you may find sufficient sophistication to have a judgment enforced, but do not count on the enforcement of foreign judgments in many other countries. I do not know whether you get into this at all David, but there is an awful lot of frustration of judgments that we get in the United States and want to enforce them in other countries.

MR. EPSTEIN:

Well again this is one of the problems in this multilateral treaty. Because if you go to an international litigation seminar you will hear it said that this is one of the most important issues in international litigation. U.S. litigants cannot get their judgments enforced. But then if you ask for actual experience, you do not come up with very much which gives rise to the question of what American lawyers advise their clients at the beginning. It is really involved with what we are talking about today — where should you sue initially? In other words, if the American lawyer is knowledgeable about international litigation he or she will tell their client, "don't sue in a jurisdiction where you may have to enforce the U.S.

judgment in another country." Go directly to the jurisdiction where the assets are located. You do not get a lot of war stories out there. I think that is one of the problems, there is not this groundswell of concern that there should be.

PROFESSOR GORDON:

I think that is true. I accepted a call from Guatemala where an American attorney wanted to bring suit against someone in Guatemala concerning a business that had broken up, and they were concerned about good justification. The Guatemalan was a Guatemalan and their client was an American who had lived in Guatemala for a while. They went into business. It was very successful. The American came home and the Guatemalan said, "Don't bother coming back; I'm keeping all of the business." The question arose of where to bring the suit. We thought we could get jurisdiction over the party here. We thought we could get him here to negotiate a sort of tag jurisdiction, which works. However, we certainly did not think a tag jurisdiction case would be enforced in Guatemala. One thing that I used, which was used successfully in this case, but I have not had a chance to use it much, is that I cannot believe any wealthy Guatemalan or Mexican does not have a condo somewhere in the United States. We found one in Texas. Now the Internet may be of help in finding property of people. But that fits into what David said, unless you can find assets do not waste your time bringing suit in a country where you are likely to get a judgment but where the judgment would be an empty judgment for you.

What else do we have? We have the tort judgment against the Japanese company. I raised this issue simply because of an experience in a casebook that I have been using called the *Deutche v. West Coast Machinery Co.*,[10] and it just adds something that is a little bit different. This was a machinery company in Japan that sold the machine to someone in the United States and an employee lost their hand operating the machine and the matter went into court in this country. There was a jurisdictional issue. The Japanese were concerned about this. While the suit was being processed in the United States, the Japanese company went into a Japanese court and got litigation commenced there. Essentially, they wanted to get a judgment indicating that they would not be liable in this case. So it was really to get a decision on the substance, and they did. They got it very quickly, so by the time the judgment was rendered in the United States and taken to Japan, it ran into what I would assume is a rule that you do not enforce conflicting judgments on the substance. In this case the Japanese would not enforce the judgment. So I suppose it raises that as a tactical

10. 497 P.2d 1311 (Wash. 1972).

device for a foreigner who is brought into U.S. court. Would that be available?

MR. EPSTEIN:

My feeling about Japan, which is not based on personal experience, but I think Japan is one of those countries like you described Mexico that would be so shy about enforcing a foreign judgment that they would look for any excuse not to do it. And that is the problem we have with Japan. It is a problem right now if you look at the American case law. There is a big issue of whether you can serve process by mail on a Japanese company. In other words American litigation where the Japanese company is a defendant and Japan is a member of the Hague Service Convention whether you can serve by mail on the parent company in Japan. Japan has addressed this issue because the State Department had asked them for clarification whether service by mail is appropriate. There is so much litigation involved here with Japanese companies. The answer that Japan gave at the 1988 meeting of The Hague Service Convention was, "Yeah you can serve by mail, but if you do it we won't enforce the judgment." So they are very sticky over there.

PROFESSOR GORDON:

Are there any other countries like that?

MR. EPSTEIN:

Well I think yes, I think that could easily come up as an issue if you serve by mail in Switzerland, one of the countries that was very strict about notions of judicial sovereignty. Germany? Maybe France? You have to observe the amenities in service of process or even in obtaining evidence because if you do not do it right the first time you may run into problems on the other end when you are trying to enforce the judgment.

PROFESSOR GORDON:

One last thing we might make note of is if there is tort judgment in the United States rendered against the English company as one of the ingredient suppliers would that judgment be enforced in Germany? Let us assume the English company has some assets in Germany and they are concerned about an American judgment being enforced in England, would that be enforced in England or would it be used quite at most as prima facie evidence?

PROFESSOR HARTLEY:

American judgments would be enforced in England if the American court has jurisdiction in English eyes. England has a rather narrow view of jurisdiction but if the defendant was served in America for example or

contested on the merits then that judgment would be fully enforced in England. It would not simply be evidence it would be enforced as a judgment. The procedure is you bring a new action. The new action is on the judgment and all you have to prove is that it is a judgment and that the American court had jurisdiction and there was not any fraud or come into public policy then they would enforce it.

PROFESSOR GORDON:

Then taking it to Germany if there were assets of the English company, the convention would apply?

PROFESSOR HARTLEY:

If you are taking it to Germany you would be taking the American judgment. You would not be enforcing the English enforcement in Germany; you would be enforcing the original American judgment and that would depend on German law, and I am not sure exactly what their rules are.

PROFESSOR GORDON:

See, I had the first step if there were not many assets in England, but if you thought England would enforce the judgment go and get a judgment enforced in England to use a basis to take to Germany.

PROFESSOR HARTLEY:

I am not sure you can do that. I am not sure you can go to Germany on the English judgment. I think the Germans would look to the original American judgment. I guess they would enforce it in some cases, but I am not sure exactly what their rules are.

MR. EPSTEIN:

I think you are right; they would not enforce the punitive part.

PROFESSOR HARTLEY:

Yeah, that is assured.

MR. EPSTEIN:

But it would not be a Brussels situation.

PROFESSOR HARTLEY:

No, it would not involve Brussels at all.

PROFESSOR GORDON:

Pain and Suffering? Is that enforceable in Europe?

PROFESSOR HARTLEY:

It is enforceable in England. I think it is enforceable in most European countries. Certainly in England pain and suffering is the normal of tort damages

MR. EPSTEIN:

But there is one aspect that is related to when you are talking about punitive damages. My experience in other countries is that aside from punitive damages there is a lower level of understanding regarding compensatory damages.

PROFESSOR HARTLEY:

That is true.

MR. EPSTEIN:

Human life is not worth as much as it is here. So they might enforce pain and suffering, but maybe not up to the limit of the U.S. judgment, because they may feel that it is set too high. Therefore, it might violate their public policy.

PROFESSOR GORDON:

What have we left out? Anything that anyone wants to make comment on that we left out in international litigation that seems important? Anything you would like to ask questions about?

MR. SANTOS:

I would like to reinforce David's earlier comment about not being afraid to litigate elsewhere. I think I said this in the morning session, but right now, and I may be in the minority, I did not know there was a minority of this type of practitioner, but when I work on joint ventures overseas we pick and choose our battles on jurisdiction as well as forum and certain parts of the venture which, involves usually two, three, four, five, or six different agreements. Different agreements will be litigated in different forums depending on what it is we are trying to accomplish. And it is not an unlikely scenario that we would submit the U.S. entity or non-native entity to jurisdiction in that country, whether it be Mexico. We just did it. We just closed a venture two days ago in Mexico based on a concession. Of the eight agreements we had, two are definitely going to land in Mexican courts if we have a dispute, two will be in arbitration in Miami, one will be in arbitration in San Antonio, and the rest will be in litigation wherever we can get jurisdiction. Why? We just had to do it that way; they are willing to give on some things but not on others.

All we had to do is essentially educate the client. It is a process we undertake, at least I undertake, fairly frequently in making sure that the

client knows there are some aspects of the law that may not be so good and the importance of having good legal counsel on the ground in that particular country. I try by and large to tell clients that. Typically clients who are a little more sophisticated will understand that and certainly go forward on that basis. I think that a key element of international litigation that needs to be kept in mind is forum shopping to make sure you do not have a battle enforcing the judgment later on — to make sure you do not have battle when you are in proceedings — and to make sure you do not have other discovery problems. And sometimes you want to go to another jurisdiction simply because if you ever need to be in a defensive posture the other side would be disadvantaged. Which of course has been done many times. For example, if you happen to land in the Cayman Islands for jurisdiction, where they would not enforce anything.

MR. JIMENEZ:

Sometimes you have no choice. You want to secure a transaction of property, particularly real estate. It is a mistake to have a Florida law provision that applies in that type of transaction. I have seen it happen where they actually put in foreign law to secure real estate in that country and that leads to unfortunate results.

PROFESSOR GORDON:

This is all quite different than litigation in the United States. How well do you define the bar that is prepared to deal with these kinds of issues? You and I have talked about that.

MR. SANTOS:

Not one bit. To me it is the most frustrating experience while we manage litigation. I manage litigation. I am not a litigator, and I have to sit there and watch these pleadings show up. It is not just the CISG cases. There have been some others — some letter of credit cases and foreign venture cases. I see some of the things that come forward to the court. The risk I see is that you may have a judge who is going to bite off on one of those articles. The judge will say, "My goodness gracious — this is so contrary to anything and everything that we have been taught that we need to be sure to push forward." In many cases you will bring forward all of the logical important precedent that the judge needs to follow. And the judge will still do the seat of the pants thing by following the errant lawyer who has put forth the argument that is really contrary to what I would consider world public policy. In some cases they really go to the point where they are almost violating treaties. I find that our nation as a whole is wholly unprepared for globalization. We are at a distinct disadvantage because we have had a wonderful sixty to eighty years of economic growth, but we better learn real quickly.

PROFESSOR GORDON:
Agreed.

MR. EPSTEIN:
Yes, unfortunately I think that is true. That is an accurate presentation of what occurs in U.S. courts. American lawyers, based on my experience, what I see at the Justice Department, and the telephone calls I get on these kind of issues is that American lawyers only see things through the U.S. litigation perspective. They have very little awareness of how different the other systems are, and they are uncreative in exploring or enlarging their perspective. They are too used to this system to care. Then when you explain to them what it is like to litigate in another country or how other countries see these issues, they are outraged. "How can that be?" is the usual reaction. They are reluctant to sit down and learn the different rules and the implications of these issues.

PROFESSOR GORDON:
We used to give an award here thirty years ago in a legal writing course essentially based on the theory of why cannot others be more like us in their legal systems. I find a little bit of this in the tort area, particularly the plaintiffs' attorneys, since they are often likely to be individuals and who work in small firms and are far less prepared. At least if you got a pretty sophisticated commercial contract you probably got a lot more experience than you would actually see in some of the torts. It is just amazing. Of course some of the trial attorneys cannot imagine the system being any different.

MR. JIMENEZ:
The goal often times for a plaintiff's attorney is to get before a jury as quickly as possible and let the chips fall where they may. It is that simple. Judges are overburdened, and judges have very crowded dockets. It is difficult for our system to really meet the needs of foreign law right now the way it is structured, based on the demands. Sometimes a ten minute hearing on an issue is not going to resolve it, and to get thirty minutes before a judge will take you ten months here in the United States.

PROFESSOR GORDON:

I cannot help but think that I will probably find out that the judge to whom the defamation case was transferred in Miami did just not heave a great sigh of relief when that matter was settled.

MR. JIMENEZ:

For the first time ever, I never experienced this previously, but I got a call from the judge's chambers thanking U.S. for settling the defamation case.

PROFESSOR GORDON:

Those kinds of cases are the most complex things we can imagine in international litigation. Thank you for staying so long. This has always been an exciting time for me. It is always exciting to get together with friends and talk about issues that people are actively working on. We hope the proceedings will look as good in print as I sensed they were in the oral.