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Introduction

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INTRODUCTION

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The staff of the Florida Journal of International Law is a comparatively small group, yet possessed with enormous enthusiasm. That enthusiasm has led to the project which is completed with the publication of this issue. This issue adds to the work of the Journal a new annual project. It is a symposium edition on an international business law topic of current interest to Florida lawyers specifically, and lawyers throughout the nation and abroad more generally. This issue includes papers written by the participants plus the symposium dialogue. That dialogue explores some of the issues in the separate articles in greater depth, and serves to allow for an exchange of ideas among the participants.

The topic for the symposium was chosen in the Fall term of 1992, and a hypothetical problem was drafted.[1] This symposium is entitled "Comparative Perspectives on Private, Commercial Dispute Resolution: Canada, Mexico and the United States." The problem was given to the symposium participants in the late Fall, who had several months to write an initial paper. Those papers were brought to the symposium in Gainesville in April, and made available to other participants and persons attending the symposium. The format for the symposium, held on a Friday late in the term, is a group discussion rather than a seriatim presentation of papers. Members of the audience are urged to ask questions during the dialogue. The audience is nearly exclusively composed of students. The symposium is not formally advertised to the practicing Bar, although members hearing of it are welcomed to attend without charge. The program is a project of the Journal principally for the benefit of the law school community, especially students and faculty interested in international trade and investment issues. After the symposium was concluded, the participants were given two months to rewrite their papers for publication. During this time, the dialogue was transcribed from the videotape of the proceedings.[2] The final product is this issue.

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1. The hypothetical problem is included *infra*.
2. The videotape has been made part of the library collection of international materials.

The topic chosen for this symposium deals with how the three nations, Canada, Mexico and the United States, govern different aspects of private, commercial litigation. Considerable discussion involving these three nations has occurred during the past few years. It has centered upon the negotiation and adoption of the North American Free Trade Agreement (NAFTA). The symposium topic presupposes that with or without the adoption of the NAFTA, trade and investment among the three nations will continue to expand. The reason is because of the changes in Mexico's restrictive foreign trade and investment laws and policies prevailing in the 1970s, when Mexico sought leadership of the "Third World." Those restrictive laws and policies began to be dismantled by Mexican President Miguel de la Madrid and especially by his successor President Carlos Salinas de Gortari, in the 1980s and 1990s, when Mexico sought entry into the developed world. For the past several years barriers to commercial trade and foreign investment in Mexico have diminished dramatically. The United States has long been the most important trading partner for Canada and Mexico. Canada is the most important trading partner of the United States; Mexico has only recently moved into the number two position, replacing Japan. That is largely because of the removal of trade restrictions during the past few years. The adoption of NAFTA will accelerate this trade, and its rejection will not stop it. Mexico is determined to be a world trade player.

One consequence of increased commercial transactions across borders of any nations is increased disputes arising from those commercial agreements. This means United States lawyers will have to deal with litigation not in the familiar surroundings of their own home courts, but in courts in Canada and Mexico. Most United States lawyers receive little training in law school in international litigation. There are many surprises waiting for these lawyers when they initiate suit abroad, attempt to enforce a domestic court judgment abroad, or participate in international arbitration. This symposium is an introduction to some of the methods by which the three nations address several issues which will confront lawyers representing clients with a claim against a foreign party, or having to defend against the claim of a foreign party.

The hypothetical problem presented to the participants is a typical commercial transaction involving a Canadian company which manufactures fiber, a United States company which buys that fiber and uses it in manufacturing insulation for ducts, and a Mexican construction company which uses that ductwork in building a factory in Mexico. The ductwork proves incompatible with the metal with which it is in contact in the new factory in Mexico and considerable damage results. The issue is principally commercial; it addresses the suitability or

unsuitability of the fiber and ducts provided by the Canadian and United States companies, respectively.

The questions raised during the dialogue begin with deciding which forum is appropriate, the best choice for litigation, and which courts within that forum, whether federal, state or provincial, will have jurisdiction. Both subject matter and personal jurisdiction are discussed. Once jurisdictional issues are discussed, the proper venue and *forum non conveniens* issues are considered.

The court which is to go forward with the matter will have to decide what law to apply. The parties consider some of the different approaches to resolving the choice of law issue. Then they question whether it matters which law applies, because each of the three nations have adopted the Convention on the International Sale of Goods (CISG). But how domestic courts in each of the three nations might interpret applicable provisions of the CISG, and especially to what sources each might turn to for interpretation, may make the choice important.

Procedure in a civil law suit in a civil law tradition nation is quickly recognized as very different from a civil suit in a common law tradition nation. Mexico and the United States are relatively clearly labeled civil and common law systems, respectively. However, in Canada, the choice of province assumes new importance, because some provinces have common law and some have civil law foundations. The lack of a true trial in a civil law system, the use of a jury, the extent of allowed discovery, the oral versus written role of the process, the allocation of costs, and the ability to be granted punitive damages all illustrate very different characteristics of civil litigation.

When the court renders a judgment in each nation, must it render it in the national currency? If it gives judgment in a foreign currency against a domestic defendant, that defendant will have to convert domestic currency to the foreign currency of the judgment.

Currency fluctuations may mean the defendant will pay a great deal more or a great deal less than the rate of exchange of the currencies when the contract was executed or the damage occurred. Are there any circumstances when a court would determine a date for conversion, such as the date of the wrong, the date of the judgment or the date of the payment? In each of these areas, the symposium participants discuss the source of their nation's law, whether it is a domestic law unique to the jurisdiction, a "uniform" law, or an international treaty.

The second part of the symposium, comprising the discussion in the afternoon session, assumes that a judgment has been rendered in each jurisdiction and explores the issues relating to the enforcement of the judgment in the other nations. Do the courts of each nation

enforce foreign judgments? If so what are the sources and rules for such enforcement? Enforcement of foreign judgments in the United States is usually quite confusing to foreign counsel, being state law based rather than federal. A uniform law is helping to decrease the variations among the states. Mexico has made changes to its enforcement rules recently, and there is a movement towards an international convention to establish an international rule.

The final part of the session considers arbitration, urged as an appropriate dispute resolution mechanism in NAFTA.[3] The parties consider a very basic provision which calls for binding arbitration of disputes involving the agreement. Is the provision sufficient to be accepted by each nation's courts and to force the parties to arbitrate? If so, how would one choose the forum and rules for arbitration if not previously selected? The appropriateness of different centers of arbitration, i.e., Paris, London, or New York, may be viewed differently from each of our three participant's nations. If parties view the appropriate rules of arbitration through lenses coated with their own nation's civil trial procedures, they may have very different views on such aspects of the procedure as whether discovery is allowed in arbitration.

Arbitration is only useful if the arbitral decision is enforceable. Each nation's courts may have different ideas regarding whether arbitration deprives parties of their right to a "day in court." That will affect what the court finds arbitrable, ranging from only very specific issues of contract interpretation to any element of dispute between the parties. Some answers may be found in participation in international arbitration enforcement conventions. But it is the national courts of each of the three nations which will have to interpret those conventions, and the harmonization thought to be achieved by international agreement often is not fully realized.

One day devoted to considering issues with respect to how three different nations, each a federation of states or provinces with their own laws, may expect to achieve no more than to touch the outer skins of bodies of laws of some nations with which most persons at the symposium are totally unfamiliar. The goal is not so much to educate the participants in the substance of the relevant laws applicable to the issues described, as to dislodge any comfortable feelings that since we know "our" law, we therefore know what the law ought to be most anywhere else. If one learns anything in comparing how different legal systems approach a common problem, it is how very different paths to solutions are formulated in different cultures. For

3. NAFTA, art. 2022(2).

the most part, we tend to accept the other paths as being acceptable societal solutions, although we may continue to prefer our own solutions for many reasons — some sound and some less so. If we have met our goal in conducting this symposium, we have at least created an awareness that we need to learn more if we are to successfully counsel clients involved in litigation across borders.

The enthusiasm with which the staff of the Journal has undertaken this issue has led Dean Lewis to assure support for a similar project in the Spring of 1994. The staff has that project well underway as this issue is placed on the shelf next to the last. Next April, the Journal will host a symposium involving a United States corporation with affiliates in several foreign nations, all wishing to trade with Cuba. The enactment in 1992 of the Cuban Democracy Act by the United States clashes with such trading aspirations. The symposium will explore legal issues regarding such trade.

AN INTERNATIONAL TRANSACTION: INSULATION TO MEXICO[4] PART ONE

Officers of Universal Pipe, Inc., a small Florida manufacturer of pipe insulation, attend an international trade fair in Mexico City, where they meet an agent of Mexobuilders, S.A. (Mexo), a builder of industrial facilities from Monterrey, Mexico. Mexo is interested in Universal's insulation for use in a refinery in Mexico, which fact the Mexo agents explain to Universal. Universal's representative gives Mexo's agent a price list which states that Universal's "Standard Pipe Insulation Product A" is priced at $200 per 100 lb., F.O.B., Tampa, Florida.

One month later, Mexo sends Universal a telegram: "We order today 5,000 lb. Universal Standard Pipe Insulation Product A for $10,000 F.O.B. Tampa for immediate delivery to Monterrey, Mexico. Mexo."

That same day Universal responded by sending one of its Order Acknowledgement Forms to Mexo's office. That form stated: "We accept your order to buy 5,000 lb. Universal Standard Pipe Insulation Product A for $10,000 F.O.B. Tampa. Goods sold as is and with all faults. This contract is governed by the laws of Florida." The form was signed by an authorized agent of Universal.

Universal next prepares the insulation order. The fiber used in the insulation is produced by Canfibre, Ltd., a company in Toronto.

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4. This hypothetical is adapted from two problems in RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 1193 (2d ed. 1991).

Universal enters into a contract with Canfibre to purchase sufficient insulation fiber for the contract with Mexo. Universal's negotiations with Canfibre include a similar exchange of documents with the same provision regarding governance by Florida law.

Universal receives and pays for the fiber material from Canfibre, prepares the pipe insulation and ships the goods and bills Mexo. Mexo accepts the goods and pays for them.

Mexo uses the insulation in constructing the refinery. The insulation corrodes the metal of the refinery piping, which piping is government mandated and customarily used in all such facilities in Mexico and South America. Universal has sold this product throughout the United States and Canada, and has never encountered a similar problem before. However, the type of piping used in North America contains different critical alloys from that normally used in Mexico.

Mexo incurs a $1 million loss due to the corrosion of the refinery piping. There is some question as to whether the standard commercial insurance of Mexo, Universal or Canfibre covers the loss, because the insulation was not necessarily "defective," but might instead be "unsuitable." Thus, any damage might not arise out of product liability (tort/delict) concepts, which are more likely to be covered by insurance, but might arise out breach of contract concepts, which are less likely to be covered by such insurance.

Mexo believes Universal is liable for its damage. Universal disagrees with Mexo, but is of the opinion that if it is liable, that the real responsibility ought to lie with Canfibre.

What are Mexo's alternatives?

If Mexo sues Universal, in what court might it sue?

What law will apply?

Would the forum non conveniens rule be important?

If Mexican law applies, what is that law?

If U.S. law applies, what is that law?

Could Universal join Canfibre in a suit by Mexo in Mexico? In the U.S.?

If Universal wishes to sue Canfibre, where might it sue?

What law will apply?

Would the forum non conveniens rule be important?

If Canadian law applies, what is that law?

Would the answer be any different if the case is brought in Quebec?

Assume that in each contract there is the following provision: "All disputes under this agreement shall be settled by arbitration. Such arbitration shall be final and is not subject to appeal."

What law would an arbitration panel choose?

Would an arbitration panel render a judgment in a foreign currency?

How would the panel deal with the date of conversion issue? How will the courts of each nation address this arbitration provision if the

challenged party states the matter is not an arbitral subject? Would the courts accept a suit in view of the existence of the arbitration provision?

PART TWO

Universal failed to appear in the suit commenced in Mexico City by Mexo. Universal was served by the Mexican court by certified mail which Universal accepted in Tampa. The service was in Spanish but a copy of an English translation was attached at the end. Universal never saw the English part. The Mexican court rendered a default judgment for one hundred million pesos, which was the equivalent of the $1 million dollars at the time of the loss. To pay the one hundred million pesos, Universal will have to convert $1.2 million (dollars), because the peso has strengthened against the dollar since the loss occurred. Mexo has brought suit in Tampa to collect the $1.2 million, plus interest, plus costs (including attorney's fees), plus punitive damages allowed by Mexican law amounting to fifty percent of the judgment.

Will a Florida court enforce the Mexican judgment? All parts of it?

If Universal has assets in other U.S. jurisdictions, would they enforce the Mexican judgment?

Would Canada enforce the Mexican judgment if Universal has assets in Canada?

Could the Mexican court have rendered the judgment in a foreign (i.e., $ U.S.) currency?

If a United States court renders a judgment in favor of Universal against Canfibre, will a Canadian court uphold the judgment? A Quebec court?

Would it allow costs, interest and punitive damages?

Had the decision been rendered in a U.S. or Canadian court, could it have been given in Mexican pesos?

PART THREE

If each of the two above disputes were submitted to arbitration and the arbitration tribunal rendered a decision, would the courts enforce the award? Would it matter in which arbitration tribunal the award was given?