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Introduction

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PANEL II. CIVIL JUSTICE REFORM IN THE AMERICAS: LESSONS FROM BRAZIL, GUATEMALA, AND MEXICO

INTRODUCTION

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The focus of my comments, and what I asked my panelists to talk about is the breakdown of the civil justice system and some of the causes of that breakdown in individual countries. I think as the day evolves, we will be looking at what can be done about this.

I was taken by Dennis Jett's remarks because they provided some justification for comments I want to make that I was not sure would fit very well. I particularly wanted to note that we have some problems in our own civil justice system that need correction. That is what I would like to develop.

The development of the rule of law is not advanced by the immigration of litigation. Development must come from within, from the development of a viable civil justice system in each of the Latin American nations, that at the same time does not encourage litigation in the United States.

Over the past two decades my focus on international business transactions has narrowed to international civil dispute resolution, both commercial and tort. My role as an academic has provided me the time to study and think about issues, but it has been participation in actual international dispute resolution cases on several levels that has changed many views that I developed as an academic and might have retained without this practical experience.

The first level of that has been international civil litigation and the opportunity to consult on dozens of cases, from working with the Department of Justice and the civil litigation that followed the infamous kidnapping of Alvarez-Machain in Mexico, the alleged assassin of U.S. drug enforcement agent Enrique Camarena, to working with DuPont on the Benlate cases in Costa Rica; with BASF and Ciba Geigy on the shrimp cases in Ecuador, and currently serving as consultant in Bridgestone/Firestone for the Texas and Florida tire tread separation cases arising from accidents in Mexico and Venezuela.

The second level has been participation in international arbitration. The third is service on NAFTA bi-national panels. I sat last week in Mexico

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City as a panel in place of a Mexican federal court, acting essentially as a Mexican federal judge would have acted in applying Mexican law. With two other Americans and two Mexicans we had to determine whether or not the Mexican Secretary of the Economy had violated Mexican trade law. I will soon sit on a contentious steel dispute between Canada and the United States.

In each of these cases I have been impressed with the fairness of the solutions achieved; justice being done as well as justice seen as being done. I have been impressed with the quality of the lawyering skills and the unbiased decision-making by my fellow NAFTA panelists, but I am concerned with the way we reached these solutions, especially in the civil litigation cases. I have always enjoyed Monopoly. Now I play on a much larger game board. They are similar games in many ways. Monopoly is intended to reward the lucky drawer of cards or thrower of dice. International civil litigation has some similar rewards. But international civil litigation should not be a game of chance. At several procedural stages, specifically upon the filing of motions to dismiss for an improper choice of forum, for lack of subject matter or personal jurisdiction, for *forum non conveniens*, or a motion for the application of foreign law, one might better prepare by rolling dice than reading cases. That is an indictment of the system. That is a breakdown of civil justice in this country that has profound implications abroad in the nations with which the litigation is linked. We all know that rolling the dice is costly. That is so with these stages of civil litigation. I believe that in many cases lawyers avoid one or more of these procedural issues because the cost of rolling the dice when the outcome is so unpredictable cannot be justified.

Let me make a brief comment on several of those areas, each of which could be explored much more in depth. The first is the choice of forum. Plaintiffs forum shop. A recent example in Texas is illustrative where plaintiffs initiating some fifty asbestos cases representing several hundred individuals filed four cases in the Texas court. Those cases are then randomly given to different districts. Upon one of those cases being given to a district which has a reputation for favoring plaintiffs and giving large jury awards, the lawyer dismissed the three other cases, transferred those plaintiffs and added the remaining three hundred plaintiffs to that one case. The judge did not tolerate this forum shopping and fined the law firm $500,000.

Forum shopping is the first litigation game of chance. The outcome to a challenge of the plaintiffs' choice of forum is very unpredictable. Choice of forum clauses are common in commercial cases and in some cases where personal injury arises out of a contract relation. But selecting a forum ahead of time is impossible in most tort litigation. In international

litigation most cases involving injuries occurring abroad with the slimmest of links to the United States are brought in the United States for one simple reason – the attorneys for the plaintiff will forum shop and the shopping is usually best in the United States. As Lord Denning of England stated, "[a]s a moth is drawn to the light, so is a litigant drawn to the United States."[1] U.S. plaintiffs' lawyers often aggressively seek out injured parties abroad. After the Bhopal incident in India in 1984, American plaintiffs lawyers flocked to India to engage injured persons as clients. It was an embarrassing experience for most U.S. lawyers. Still another occurred after the crash of a Turkish airliner near Paris when American attorneys conducted seminars in London to persuade English solicitors to send their clients' cases to the United States. Some 1,100 plaintiffs filed suits in Los Angeles where procedures are far more sympathetic to the plaintiffs than in Turkey or France or England.

There are no universal standards for determining the proper forum. No one can fault a plaintiff from seeking the best forum, but one can fault many attorneys for the methods used to assure that forum is where the trial occurs. As in the Texas case, no good advocate will select the fairest forum. Rather, the forum to be selected is the forum that is most favorable to the client. Should we not advocate rules that direct cases to the former, the forum most favorable to the preservation of the rule of law?

The next card we draw in our game of litigation Monopoly is that of personal jurisdiction. There is no doctrine less understood by my students than personal jurisdiction. Not because it is not well taught by my colleagues in civil procedure but because the comments of the late Friedrich Juenger of California at Davis have so much merit. He wrote that

> American jurisdictional law is a mess. Split opinions, loaded footnotes, and convoluted opinions larded with a fanciful vocabulary that attempts to give half baked concepts an aura of reality by dressing them up as political science or presenting them in the garb of folksy similes signal the Justices' inability to devise a satisfactory approach to the simple question of where a civil action may be brought.[2]

The two Supreme Court cases that offer us the most guidance in international litigation were decided in 1984 and 1987, the *Helicopteros* and *Asahi* cases. Some fifteen years have elapsed without further clarification. I know from experience that U.S. defendants' lawyers often do not make a challenge to personal jurisdiction but rather turn directly to a motion for dismissal based on *forum non conveniens* grounds. If that

1. Smith Kline & French Labs Ltd. v. Bloch, 1 W.C.R. 730, 733-34 (C.A. 1983).

2. Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1027 (1995).

motion fails, sometimes personal jurisdiction will be challenged. The personal jurisdiction game of chance is so unpredictable that the lawyers often prefer to head for a different game table where the odds may be more predictable. But at that game table, to which I turn now, we play *forum non conveniens*, which is itself another game of chance.

Forum non conveniens, a doctrine unknown in most civil law tradition nations, involves a motion to dismiss the case because there is a more convenient or appropriate forum elsewhere, or perhaps more correctly because the current forum is less convenient. There are few reasons for not filing this motion. One that has some validity is that control of the case is less certain when initiated in a foreign nation and is under the control of foreign attorneys. The client is likely to prefer that its traditional U.S. law firm handle the case. But I believe that there are few times when control is such an issue that the motion is not filed.

Why is the *forum non conveniens* motion so important to the defendant? Because it usually ends the case. In the famous *Piper* decision the successful *forum non conveniens* motion dismissed the case in Pennsylvania, leaving it to be re-filed in Scotland. It was never filed in Scotland. In the Bhopal litigation, after the U.S. court dismissed the U.S. case and sent it off to India, the Indian plaintiff soon settled. The usual consequences of a successful *forum non conveniens* motion is the withdrawal of the U.S. plaintiff's attorney. That attorney almost certainly had a contingent fee contract with the plaintiffs and hopes of a large jury award with a third or more share of the fee.

Another little mentioned reason that a judge may grant a *forum non conveniens* dismissal motion is because he or she does not want to have to deal with a case where the appropriate law is foreign and must be proven using translations and experts. These can be difficult cases when they involve complex issues of foreign law. Another reason may be the frustration of the judge at the foreign plaintiff's forum shopping in the United States and a disinclination to allow a perpetuation of the process. There is a rather interesting case that deals with Bolivia.[3] It was filed in Texas a couple of years ago, an action to recover from tobacco companies. In part, the judge said,

> This is one of at least six similar actions brought by . . . [t]he governments of Guatemala, Panama, Nicaragua, Thailand, Venezuela, and Bolivia . . . in the geographically diverse locales of Washington, D.C., Puerto Rico, Texas, Louisiana, and Florida, in both state and federal courts. Why none of these countries seems to have a court system that their own governments have confidence in is a mystery to this Court.

3. Republic of Bolivia v. Philip Morris Cos., Inc., 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

> Moreover, given the tremendous number of United States jurisdictions encompassing fascinating and exotic places, the Court can hardly imagine why the Republic of Bolivia elected to file suit in the veritable hinterlands of Brazoria County, Texas. The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel. . . . [T]he capacity of this court to address the complex and sophisticated issues of international law and foreign relations presented by this case is dwarfed by that of its esteemed colleagues in the District of Columbia [where the defendants were asking to have it transferred.] . . . Such a Bench, well-populated with genuinely renowned intellects, can certainly better bear and share the burden of multi district litigation than this single judge division, where the judge moves his lips when he reads. . . . Plaintiff has an embassy in Washington, D.C. and thus a physical presence and governmental representatives there, whereas there isn't even a Bolivian restaurant anywhere near here![4]

Forum non conveniens is certainly another game of chance in this great litigation casino. Another game is the choice of law. The final opportunity for a defendant to effectively end a case is often to request that the foreign nation's law be applied. The argument will be that the wrong occurred in the foreign nation and that the applicable law should be the provisions of the appropriate foreign civil code that imposes torts or extra-contractual liability. This argument is based on the theory of *lex loci delicti* — that the tort occurred in the foreign nation, and the law of the location of the occurrence of the tort should govern. But perhaps the negligent act occurred in the United States, such as negligent design or manufacture. That might be the tort that caused the injury. There are no very clear rules regarding the determination of the applicable law. The case law in the United States seems to favor the former view — the tort occurring at the location of the accident. But was the Piper aircraft in the *Piper* decision negligently manufactured or negligently piloted? Was the product of Union Carbide in the Bhopal litigation negligently designed in the United States or negligently processed in India? What if it is unclear whether the tort occurred abroad or in the United States? Could it be an international tort, an area that we have given very little thought to developing?

You may remember the Alvarez-Machain civil litigation that followed his acquittal on criminal charges in Los Angeles. Alvarez-Machain was a Mexican citizen whom the U.S. Drug Enforcement Agency believed murdered Enrique Camarena. Alvarez-Machain was kidnapped by the DEA in Guadalajara and flown to El Paso. When acquitted of the criminal charges, Alvarez-Machain sued the four individuals who had kidnapped

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4. *Id.*

him, as well as the Department of Justice. What was the tort? Kidnapping? Where? If so, under what law? The judge determined that there was an international tort of kidnapping. But if the tort was international, might not the damages also have been international and subject to determination or creation by the judge? The judge rejected the application of Mexican law in that case but granted very, very nominal damages. They were much lower than the judge in Miami dealing with the Brothers to the Rescue case.

The U.S. court might apply foreign substantive law and find negligence or strict liability, and then apply U.S. damages law and render a very large award including pain and suffering and punitive damages. We really have not worked out any adequate rules that indicate which law will apply to the substance of the tort and which law may apply to the damages. Such possibility again emphasizes the importance of the *forum non conveniens* motion where the matter is moved abroad. It is most likely that the foreign nation would apply local law, including the law of damages that likely provides very limited damages in contrast to damages in the United States.

The decision as to the proper law should be made without regard to the difficulty of applying foreign law in contrast to applying U.S. law. But I am not at all convinced that it works that way in practice. Most judges prefer to apply U.S. law. It's easier to know. No translation is needed. No experts need be accepted. There is thus a danger to deciding that no *forum non conveniens* motion to dismiss need be made because the foreign law seems most clearly to be the applicable law. The court may simply apply the law of the forum, its own domestic law.

The last of our games of chance is proof of foreign law. It is complex and far more difficult than proof of U.S. law. Under U.S. law, foreign law must be proved, while U.S. judges are deemed to know U.S. law. There are problems with the use of experts to render opinions on foreign law. Who is best able to render an opinion on Latin American law in a U.S. court? A Latin American practitioner or professor? A U.S. practitioner with experience in Latin American law? Or a U.S. professor whose principal interest is Latin American law? Maybe it is time to think about adopting the European model using many more court appointed experts.

International litigation to some extent takes place in a great casino, where lawyers move from game to game trying their luck. No one really wins at each game, but merely is allowed to play a new game and another round, to argue another issue. It is a lucrative game for lawyers but a costly one for clients. International litigation increases the costs over domestic litigation. We are not moving towards a more predictable procedure. We continue to move around the Monopoly board, trampling the occupants of Ventnor and Park Place and rarely going to jail. Cross border litigation

within this hemisphere is increasing in dramatic fashion as trade increases, and human contacts increase. I am not at all sure that the application of the rule of law is increasing as rapidly as the rule of chance. That is not as it ought to be.