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ADJUDICATIVE RESOLUTION OF COMMERCIAL DISPUTES BETWEEN NATIONALS OF THE UNITED STATES AND MEXICO

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I. INTRODUCTION

Mexico has emerged in recent years as one of the world's active trading nations. Approximately two-thirds of Mexico's trade is with the United States, and Texas, having almost 1000 miles of common border with Mexico, receives a sizeable share of this commerce.[1] A wild binge of spending concurrent with a decline in the

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1. *See, e.g.*, Baerresen, *The Value of Imports through U.S. Ports on the Mexican Border*, TEX. BUS. REV., Sept.-Oct. 1981, at 192 (Mexico is major market for United States products and most trade passes by way of countries' common border); Hansen, *Economic Growth Patterns in the Texas Borderlands*, 22 NAT. RESOURCES J. 805, 813-14 (1982) (Texas border cities primary recipients of Mexican retail trade benefits); *New Visa Procedures Facilitate U.S. Business Visits to Mexico*, BUS. AM., Sept. 6, 1982, at 28 (in 1981, United States supplied 64% of Mexico's imports and purchased 53% of Mexico's exports).

demand for crude oil crippled the Mexican economy in 1982,[2] but that condition must be regarded as temporary. After all, the massive oil reserves are still in the ground and it is reasonable to expect that the government, with the guidance of the International Monetary Fund, will regain both credit and prestige in the world markets.[3]

The United States businessman entering into a commercial transaction with a Mexican national for the first time may be unprepared for the levels of complexity which may be encountered in the event of litigation.[4] The Mexican legal system is based upon the civil law of the European continent rather than upon the English common law with which an American businessman is familiar.[5] Legal processes and substantive laws in Mexico are not unfair

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2. *See* Amazegar, *Oil Wealth: A Very Mixed Blessing*, 60 FOREIGN AFF. 814, 827-28 (1982); *see also* Tower, *Economy Is Adjusting After Peso Devaluation*, BUS. AM., Aug. 9, 1982, at 47 (increasing foreign indebtedness and collapse of oil market cause economic problems for Mexico). The adverse impact of oil wealth on the Mexican economy has been summarized as follows:

> In *Mexico*, oil has been considered responsible for bringing in massive economic imbalances—hyperinflation; a stagnation in tourism and non-oil exports; the highest balance-of-payments deficits in the country's history; one of the largest external debts for any developing country; towering interest rates; an explosion of consumerism; and a reduction of real purchasing power for "ordinary" Mexicans. [footnote omitted]

Amazegar, *Oil Wealth: A Very Mixed Blessing*, 60 FOREIGN AFF. 814, 820-21 (1982).

3. *See, e.g.*, Tower, *Economy Is Adjusting After Peso Devaluation*, BUS. AM., Aug. 9, 1982, at 47-48 (despite economic ills, Mexico to remain third most significant market for United States businesses); Turner, *Practical Advice on Exporting to Mexico*, BUS. AM., Nov. 15, 1982, at 18 (agreement with International Monetary Fund, additional money from Bank of International Settlements, adjustment of foreign debt payments, and assistance from United States to ease Mexico's exchange deficit); *Mexico Outlines Plan for Helping Firms Pay Debts*, Wall St. J., April 7, 1983, § 2, at 30, col. 1 (Mexican government to allow firms to purchase United States dollars at reduced cost to aid payment of foreign obligations).

4. *Cf.* Cogan, *Foreign Marketing: The Lawyer and His Client Travel Abroad*, in 1982 TEX. BAR ASS'N INT'L L.— EXPORT & IMPORT TRANSACTIONS, § C, at C-1 (manufacturer selling abroad begins "treacherous journey" involving different legal systems, specialized import and export laws, and cultural variations).

5. *See, e.g.*, Bridge, *A Different Legal System: Civil Law (Mexico) and Common Law (United States)*, in 1 DOING BUSINESS IN MEXICO § 1.01, at 1-1 (B. Carl ed. 1983); A. WATSON, THE MAKING OF THE CIVIL LAW 102 (1981); Oliver, *The Fundamentals of Doing Business in Latin America*, in 1979 TEX. BAR ASS'N—INT'L L. § A, at A-1 to A-2. *See generally* Pitts, *American Investment in Mexico*, 2 HOUS. J. INT'L L. 261, 266 (1980) (Mexico is civil law country and distinct from common law nation such as United States). The principal sources of Mexican law which bear upon the resolution of international commercial conflicts are the Constitution of the United Mexican States, Civil Code for the Federal District and Territories of Mexico, Commercial Code of Mexico, and Code of Civil Procedure for the

Federal District and Territories of Mexico. Relevant provisions of these instruments appear in the Appendices.

The Civil Code forms the heart of the Mexican legal system. *See* M. GORDON, THE MEXICAN CIVIL CODE at xx (1980). It is divided into four books covering persons, property, succession, and obligations. *See id.* at xxi; *see also* H. CLAGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 72 (1973) (Mexican Civil Code composed of four sections). The obligations section includes the subject of contracts. *See* H. CLAGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 74 (1973). The Civil Code does not, however, broadly encompass commercial law, a subject separately treated by the Commerical Code. The Mexican Commercial Code generally deals with commercial acts and transactions which are for pecuniary profit. *See* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 173-74 (1968); *cf.* Codigo de Comercio art. 75 (Commercial Code), *translated in* 2 FOREIGN TAX L. ASS'N, TAX LAWS OF THE WORLD 22 (1982) (Appendix C *infra*) (commercial transactions equated with acquisitions, leasings, and sales made with "purpose of commercial speculation"). Thus, contracts for transportation by land, drafts, bills of exchange, and other banking activities are governed by the Commerical Code to the substantial exclusion of the Civil Code. *See* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 173-74 (1968); *see also* H. CLAGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 130-31 (1973) (although displaced by numerous statutes, Commercial Code remains in force and controls commercial activities); *cf.* Codigo de Comercio art. 2 (Commercial Code), *translated in* 2 FOREIGN TAX L. ASS'N, TAX LAWS OF THE WORLD 1 (1982) (Appendix C *infra*) (civil law applicable to commercial transaction in absence of Commercial Code provision). Disagreement exists as to whether the Mexican Commercial Code affects contracts for shipment by sea. *Compare* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 174 (1968) (Commercial Code encompasses transportation of all types except by air) *with* H. CLAGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 131 (1973) (maritime commerce outside Commercial Code by virtue of Law on Navigation and Maritime Commerce of 1963). The hypothetical sales contract analyzed in this article is a contract for pecuniary profit within the scope of the Commercial Code.

Because there are some matters which are dealt with in both the Commercial and Civil Codes, some only in the Civil Code, and some in neither Code, rules have been established for determining whether a contract or an issue arising under a contract will be controlled by the Commerical or Civil Code. The principal guidelines seem to be: (1) the Civil Code provisions which detail the legal requirements respecting capacity of the parties and exceptions and causes which rescind or invalidate agreements apply to commercial contracts; (2) if the Commercial Code is applicable to a transaction or an issue derived from the transaction, its pronouncements prevail over any contrary provisions in the Civil Code; (3) the Civil Code will be invoked to cover "gaps" in the Commercial Code, i.e., the Civil Code may be applied to a purely mercantile transaction when there is no relevant provision contained in the Commercial Code; and (4) when no specific Commercial or Civil Code article is decisive, then "[j]udicial controversies of a civil nature shall be decided in accordance with the letter of the law or its juridical interpretation. In the absence of a law, they shall be decided in accordance with general legal principles." *See* Codigo Civil art. 19 (Civil Code), *translated in* M. GORDON, THE MEXICAN CIVIL CODE 4 (1980) (Appendix B *infra*); Codigo de Comercio arts. 2, 8 (Commercial Code), *translated in* 2 FOREIGN TAX L. ASS'N, TAX LAWS OF THE WORLD 1, 25 (1982) (Appendix C *infra*). *See generally* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 174 (1968) (once act within scope of art. 75, Commercial Code controls as supplemented by Civil Code when commercial

to foreigners, but they are certainly different.[6] The United States executive should know in advance the extent to which the legal processes and substantive laws of Mexico apply to suits arising as a result of a planned transaction so that the contract he signs will adequately protect his expectations.

This paper shall raise and attempt to answer many controversies arising under a contract for the sale of goods between a manufacturer-seller, all of whose operations are located in San Antonio, Texas, and a retailer-buyer, all of whose operations are located at Mexico City in the Federal District of Mexico.[7] A sales contract was selected as an example for two reasons: (1) at least eighty-five percent of all international business transactions are sales contracts, and (2) most of the typical problem situations arise in the seller-buyer setting. For ease of reference, the seller will be identi-

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law fails to make provision); H. CLAGGETT & D. VALDERRAMA, A REVISED GUIDE TO THE LAW & LEGAL LITERATURE OF MEXICO 131 (1973) (articles 2 and 81 of Commercial Code indicate civil law to be "background" of transaction and civil law to be controlling in absence of commercial provisions).

6. Mexico is still very cautious in its international dealings and has some protectionist laws which affect foreign enterprises. *See, e.g.*, UNITED MEX. STATES CONST. art. 27, § 1, *translated in* ORG. AM. STATES, CONSTITUTION OF MEXICO 1917, at 10 (1977) (Appendix A *infra*) (only persons born or naturalized as Mexican citizens, Mexican businesses, or approved foreign companies may own land; "forbidden zones" established in which aliens prohibited from direct ownership of property); Act for the Control and Registration of the Transfer of Technology and the Use and Exploitation of Patents and Trademarks of 1982, 370:6 DIARIO OFICIAL [D.O.] 15 (Mex.) (Jan. 11, 1982) (Ley para el Control y Registro de la Transferencia de Tecnologia y el Uso y Explotacion de Patentes y Marcas), *translated in* 2 DOING BUSINESS IN MEXICO J2A-1 to J2A-11, at J2A-1 to J2A-2 (B. Carl ed. 1983) (reporting to National Technology Transfer Registry mandatory for certain acts); Act to Promote Mexican Investment and Regulate Foreign Investment, 317:7 D.O. 5 (Mex.) (March 9, 1973) (Ley para Promover la Inversion Mexicana y Regular la Inversion Extranjera), *translated in* 2 DOING BUSINESS IN MEXICO I2-1 to I2-9, at I2-3 (B. Carl ed. 1983) (foreign investors restricted to maximum of 49% ownership of business entity absent other relevant ceiling). *See generally* R. TANCER & J. ZANOTTI, THE MEXICAN LAW OF FOREIGN REAL ESTATE INVESTMENT IN THE PROHIBITED ZONES: AN OVERVIEW, 1971-73, at 30-31 (1974) (discussing policies underlying creation of "forbidden zones" in which foreign ownership restricted); Hyde & Ramirez de la Corte, *Mexico's New Transfer of Technology and Foreign Investment Laws—To What Extent Have the Rules Changes?*, 10 INT'L LAW. 231, 233 (1976) (Technology Law designed to permit Mexican government to monitor terms of acquisition of foreign technology); Inman, *A View of Mexican—U.S. Trade*, 6 INT'L TRADE L.J. 190, 190 (1980-1981) (Mexico favors protectionist approach to commerce).

7. Mexico is a federally integrated republic consisting of thirty-one states, a federal district, and a federal government. *See* J. HERGET & J. CAMIL, AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 19 (1978). Thus, the Federal District of Mexico resembles the District of Columbia under the Constitution of the United States of America. *Cf. id.* at 19 (Mexican government resembles American system in most respects).

fied as "Texas Seller" or *TS* and the buyer will be cited as "Mexican Buyer" or *MB*.

So that there may be some practical underpinning to the dispute between the parties, assume that *MB* alleges that the products do not comply with the specifications that were supplied in English and which were accepted by *TS* without comment. Assume further that the language upon which *MB* relies bears out his position as written in the original Spanish, but *TS* is clearly in compliance with the English translation.[8]

TS and *MB* try to solve the problem at the bargaining table but fail. Even after they call in their lawyers, they are unable to work out a compromise. *MB* notifies *TS* in writing that he is cancelling the contract because *TS* is in default for having delivered defective products. *TS*, on advice of counsel, decides to sue *MB* for breach of contract.[9]

II. First State of Facts

The contract fails to include a choice-of-forum or choice-of-law

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8. Language is an important consideration in international business transactions. *Cf.* J. Castel, International Law 948 (3d ed. 1976) (quoting A. Gotlieb, Canadian Treaty-Making (1968)) (texts of treaty in different languages may be difficult to reconcile); J. Wheless, Compendium of the Laws of Mexico at xi (2d ed. 1938) (translation of Mexican legal and technical phrases at times impossible); *United Nations Report of the International Law Commission*, 59 Am. J. Int'l L. 434, 460 (1965) (articles 72, 73 & commentary) (plurilingual texts of treaty raise questions regarding effect on interpretation of document). *See generally* Pope, *Fundamentals of Negotiating Cooperation Agreements*, 10 Int'l Law. 27, 29 (1976) (parties to use "common-sense language" which facilitates finding "common ground of interest and principles" to close gap between distinct legal systems). It is usually better to execute the contract in one dialect, but sometimes the parties cannot agree on a single language and enact two official versions of the agreement, one in each language. *MB* ultimately caused his own difficulties by furnishing *TS* with an English translation of the specifications.

9. Merchants—sellers and buyers of goods in international trade—are better at settling their differences by negotiation than any other contracting parties. *See* L. Trakman, The Law Merchant: The Evolution of Commercial Law 2-3 (1983); *cf.* R. Henson, Handbook on Secured Transactions Under the Uniform Commercial Code § 2-2, at 13 (2d ed. 1979) (commercial law rarely litigated as parties "more interested in amicable solutions"). This is a carry-over from the ancient law merchant. *See* L. Trakman, The Law Merchant: The Evolution of Commercial Law 2-3 (1983). The law merchant was administered by "merchant" judges in a speedy and informal manner. These judges tried to give something to each party when there was an honest difference of opinion in order to avoid disruption of their business relationship. *See id.* at 12-15. Modern merchants still tend to rate money damages as a poor substitute for performance, but the buyer is less amenable to compromise when, as here, he believes the seller is delivering an item he cannot use.

provision affecting adjudication of a dispute arising under the contract.[10] *TS* brings suit in Texas.

If the amount in controversy exceeds $500.00, a state district court (e.g., the District Court of Bexar County in San Antonio) has subject matter jurisdiction.[11] If the amount surpasses $10,000.00, a United States district court (e.g., the United States District Court, Western District of Texas, San Antonio Division) may have subject matter jurisdiction.[12]

If *MB* chooses to ignore the suit, obtaining personal jurisdiction can be more complicated as none of the traditional jurisdictional grounds—domicile, presence, or consent—exist. Nevertheless, personal jurisdiction may be obtained under the Texas long-arm statute.[13] Article 2031b provides in pertinent part that a foreign person who engages in business in Texas shall be deemed to have appointed the Secretary of State of Texas as his agent upon whom service of process may be made in any suit arising out of such business.[14] If suit is brought in the state court, service of process may be accomplished under the statute by delivering two copies of the petition with the name and address of the home or home office of the nonresident defendant to the Secretary of State.[15] The Secre-

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10. The Supreme Court of the United States has said:

> [U]ncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974). While the logic of that statement seems uncontestable, it is an unfortunate truth that international business contracts seldom contain choice-of-forum and choice-of-law clauses.

11. *See* TEX. REV. CIV. STAT. ANN. art. 1906 (Vernon 1964).

12. *See* 28 U.S.C. § 1332(a) (1976).

13. *See, e.g.*, Jetco Elec. Indus. v. Gardiner, 473 F.2d 1228, 1234 (5th Cir. 1973) (article 2031b is attempt to fully utilize "expanding limits of in personam jurisdiction"); Dotson v. Fluour Corp., 492 F. Supp. 313, 314, 318 (W.D. Tex. 1980) (Saudi Arabian subsidiary subject to Texas court's jurisdiction by virtue of article 2031b); Murdock v. Volvo of Am. Corp., 403 F. Supp. 55, 57 (N.D. Tex. 1975) (article 2031b to reach as far as due process allows in securing in personam jurisdiction over foreign entities); *see also* TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964 & Supp. 1982-1983) (foreign corporation "doing business" in Texas subject to reach of Texas courts). *See generally* Bishop, *International Litigation in Texas: Service of Process and Jurisdiction*, 35 SW. L.J. 1013, 1021 (1982) (long-arm statute to extend as far as due process requirements permit).

14. *See* TEX. REV. CIV. STAT. ANN. art. 2031b, § 1 (Vernon 1964).

15. *See id.* § 5.

tary will then forward one copy of the petition to the defendant by registered mail, return receipt requested.[16] "Engaging in business" in Texas, for purposes of the long-arm statute, includes entering into a contract with a resident of Texas, by mail or otherwise, which is to be performed in whole or in part by either party within the state.[17]

The Texas long-arm statute also affords the route by which a United States district court may acquire jurisdiction over the person of the Mexican defendant. Under Rule 4 of the Federal Rules of Civil Procedure, service of a complaint upon a nonresident defendant may be made under the circumstances and in the manner prescribed by any relevant state statute authorizing service upon an absent party.[18] As already noted, the Texas long-arm statute allows just that. Rule 4, when triggered by the Texas long-arm statute, lists several acceptable methods for service in a foreign country:

> (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction, or
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> (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or
>
> (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or
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> (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or
>
> (E) as directed by order of the court.[19]

In view of the fact that the Texas Seller may find it necessary to seek recognition and enforcement of a favorable judgment in a Mexican court, he may save himself later difficulty by utilizing a

16. *See id.*

17. *See, e.g.*, Walker v. Newgent, 583 F.2d 163, 166 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); Atwood Hatcheries v. Heisdorf & Nelson Farms, 357 F.2d 847, 852 (5th Cir. 1966); Mitsubishi Shoji Kaisha, Ltd. v. MS Galini, 323 F. Supp. 79, 81-82 (S.D. Tex. 1971); *see also* Pizza Inn, Inc. v. Lumar, 513 S.W.2d 251, 253-54 (Tex. Civ. App.—Eastland 1974, writ ref'd n.r.e.); TEX. REV. CIV. STAT. ANN. art. 2031b, § 4 (Vernon 1964 & Supp. 1982-1983).

18. *See* FED. R. CIV. P. 4(e).

19. *Id.* 4(i).

letter rogatory and the foreign authority's method of process (the second alternative provided in Rule 4). *TS* should select the appropriate court in Mexico[20] where he will bring the enforcement action and prepare a letter rogatory[21] to be sent by the clerk of the United States district court to the pertinent Mexican court. The letter rogatory should request instructions regarding the preferred manner of service upon *MB* and *TS* should then meticulously follow such instructions. If the method of service recommended by the Mexican authority does not guarantee that *MB* will be personally served, *TS* may be well advised to arrange for an accredited process server in Mexico City to accomplish actual service in addition to following the instructions of the Mexican court.[22]

After suit has been initiated and service has been completed, if the Mexican Buyer elects to appear and defend on the merits,[23] he

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20. In view of *MB*'s location in Mexico City, a Civil Court of First Instance in the Federal District would be a logical choice.

21. As described by one federal court:

> Letters rogatory are the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist the administration of justice in the former country; such request being made, and being usually granted, by reason of the comity existing between nations in ordinary peaceful times.

Tiedeman v. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941). Forms relating to letters rogatory may be found in 7 WEST'S FEDERAL FORMS §§ 11565-11575, at 566-75 (M. Crutcher 3d ed. 1977). Responsive action by Mexican courts to letters rogatory received from foreign jurisdictions is detailed in Codigo de Procedimientos Civiles arts. 108, 109 (Code of Civil Procedure) (Appendix D *infra*). In the event *TS* elects to bring suit in a Texas state court, it is recommended that he likewise employ this method of serving *MB*. Subsequent problems may arise in enforcing a favorable judgment in Mexico, but a failure of *MB* to actually receive notice of the suit should not be one of these difficulties.

22. Unfortunately, unlike the United States, Mexico has not adopted the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. *See* 8 MARTINDALE-HUBBELL LAW DIRECTORY 4619, 4631 (1982); *see also* Bishop, *International Litigation in Texas: Service of Process and Jurisdiction*, 35 SW. L.J. 1013, 1017 n.43 (1982) (Mexico not included in list of nations signing Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters). The full text of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters appears in 28 U.S.C.A. § 1781 (West Supp. 1983). The form for the Request for International Judicial Assistance which is furnished with the latter Convention may be helpful in preparing a letter rogatory to a Mexican court.

23. Under the facts stated, a special appearance pursuant to Fed. R. Civ. P. 12(b)(2) or Tex. R. Civ. P. 120a to contest in personam jurisdiction would avail *MB* nothing. *See* Product Promotions, Inc. v Cousteau, 495 F.2d 483, 489, 492, 499 (5th Cir. 1974).

will have submitted expressly to the jurisdiction of the court after having been personally summoned to appear.[24] If *MB* ignores the summons and fails to defend, he will almost assuredly suffer a default judgment.[25] In either instance, the trial will proceed as if a domestic dispute were involved. There will be no legal problems peculiar to the international transactions under consideration with the exception of the possible application of Mexican law to all or part of the issue in controversy, a matter which will be discussed later.

There is, however, the possibility that *MB* will appear to defend and attempt to invoke the doctrine of *forum non conveniens* on a motion to dismiss, claiming that a Mexican court is a more appropriate forum. Regardless of whether plaintiff filed in a federal or state court in Texas, both of the threshold requirements for application of the doctrine remain the same: (1) the court in which plaintiff has commenced his action does, in fact, have jurisdiction and venue and (2) there is at least one other forum in which the defendant is amenable to process.[26]

The federal view regarding the application of the doctrine of *forum non conveniens* is set forth in *Gulf Oil Corporation v. Gilbert*.[27] The *Gulf Oil* Court held that when a defendant seeks dismissal of a suit on the basis of the doctrine, a court is to weigh all practical considerations that make trial of a case "easy, expeditious and inexpensive, . . . [b]ut unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[28] Without attempting to exclusively list all important considerations, the Court did mention availability of evidence, means to compel the appearance of reluctant witnesses, the ex-

24. *See, e.g.*, Bullock v. Land, 443 S.W.2d 60, 61 (Tex. Civ. App.—Eastland 1969, writ ref'd n.r.e.) (nonresident filed answer and submitted himself to jurisdiction of court); Carter v. G & L Tool Co., 428 S.W.2d 677, 681 (Tex. Civ. App.—San Antonio 1968, no writ) (nonresident party gives court in personam jurisdiction by making appearance); TEX. R. CIV. P. 121 (answer equivalent to appearance and dispenses with need for service of citation).

25. *See* TEX. R. CIV. P. 239.

26. *See, e.g.*, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 507 (1947); Van Winkle-Hooker Co. v. Rice, 448 S.W.2d 824, 826-27 (Tex. Civ. App.—Dallas 1969, no writ); Cole v. Lee, 435 S.W.2d 283, 285, 287 (Tex. Civ. App.—Dallas 1968, writ dism'd); *see also* Forcum-Dean Co. v. Missouri Pac. R.R., 341 S.W.2d 464, 466 (Tex. Civ. App.—San Antonio 1960, writ dism'd).

27. 330 U.S. 501 (1947).

28. *Id.* at 508.

pense of securing the attendance of witnesses, possibility of visiting the scene of the action if appropriate, effectiveness of a judgment if one is entered, and administrative difficulties such as the backlogging of cases and imposition of jury duty upon a community which is unfamiliar with the matter in controversy.[29] In the hypothetical situation under examination, the relevant considerations are divided fairly equally between the home territory of each party. Consequently, the defendant's motion to dismiss on inconvenient grounds clearly would not meet the federal test.[30]

If plaintiff elected to sue in a Texas state court, *MB*'s chances for success under the *forum non conveniens* theory are nonexistent. When there is at least a remote relationship between the par-

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29. *See id.* at 508-09.

30. *See, e.g.*, Blumenthal v. Management Assistance, Inc., 480 F. Supp. 470, 474 (N.D. Ill. 1979) (transfer to be denied if equities only slightly favor movant); Bastille Properties, Inc. v. Hometels of Am., Inc., 476 F. Supp. 175, 182 (S.D.N.Y. 1979) (where convenience to parties and witnesses equal, transfer refused); Stephenson v. Jordan Volkswagen, Inc., 428 F. Supp. 195, 198 (W.D.N.C. 1977) (if inconvenience to defendant equal to inconvenience of plaintiff if transfer allowed, change of venue not permitted). The federal change of venue statute, incorporated into the United States Code in 1948, provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1976). Note that the statute provides for removal of a lawsuit to another federal court rather than dismissal of the action as under traditional *forum non conveniens* theory. *Compare* Collins v. American Auto. Ins. Co., 230 F.2d 416, 418 (2d Cir.) (under section 1404(a), remedy is transfer, not dismissal), *cert. denied*, 352 U.S. 802 (1956) *and* Blake v. Capitol Greyhound Lines, 222 F.2d 25, 27 (D.C. Cir. 1955) (if forum inappropriate, action to be transferred, not dismissed) *and* Burges v. Proctor & Gamble Defense Corp., 172 F.2d 541, 542 (5th Cir. 1949) (section 1404(a) allows transfer as opposed to dismissal) *with* Michell v. General Motors Corp., 439 F. Supp. 24, 26 (N.D. Ohio 1977) (if section 1404(a) inapplicable, court may dismiss under doctrine of *forum non conveniens*) *and* Sohns v. Dahl, 392 F. Supp. 1208, 1216 n.11 (W.D. Va. 1975) (*forum non conveniens* only allows dismissal, not transfer) *and* Harrison v. Capivary, Inc. 334 F. Supp. 1141, 1142 (E.D. Mo. 1971) (if foreign court more convenient site, dismissal under doctrine of *forum non conveniens* proper). Section 1404(a) has been described as a revision of the *forum non conveniens* theory and not merely a codification. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981); Norwood v. Kirkpatrick, 349 U.S. 29, 32 (1955); *Ex parte* Collett, 337 U.S. 55, 62 (1949); *see also* Cain v. Bowater's Newfoundland Pulp & Paper Mills, Ltd., 127 F. Supp. 949, 950 (E.D. Pa. 1954). In any event, the statute has not replaced the common law doctrine in the federal courts. *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 253 (1981) (section 1404(a) transfers distinct from dismissals based on *forum non conveniens*); Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880, 882 (2d Cir. 1978) (affirming dismissal of action on grounds of *forum non conveniens*); Michell v. General Motors Corp., 439 F. Supp. 24, 26 (N.D. Ohio 1977) (section 1404 does not prevent dismissal of suit on basis of doctrine of *forum non conveniens*). *See generally* Annot., 10 A.L.R. FED. 352, 366-68 (1972) (noting cases upholding dismissal on grounds of *forum non conveniens*).

ties and the forum, dismissal will be denied.[31] As a consequence, Texas courts seldom apply the *forum non conveniens* theory.[32]

Having determined that a federal or state court in Texas may be an appropriate forum under the assumed facts, questions concerning applicable law then arise. Regardless of whether suit is implemented in federal or state court, this issue involves the conflict-of-law rules of the State of Texas. If *TS* sues in federal district court, the federal court will apply Texas conflict law under the principles enunciated in *Erie Railroad v. Tompkins*[33] and *Klaxon Co. v. Stentor Electric Manufacturing Co.*[34] The Texas choice-of-law rules for contracts provide, unless the parties intend otherwise, that: (1) the law of the place where the contract is made and to be performed generally applies; (2) when a contract is made in one place to be performed in another, the law of the place of performance applies; and (3) when a contract is to be performed in more than one place, the law of the place of making then applies.[35] No

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31. *See* Van Winkle-Hooker Co. v. Rice, 448 S.W.2d 824, 828 (Tex. Civ. App.—Dallas 1969, no writ); *see also* Garrett v. Phillips Petroleum Co., 218 S.W.2d 238, 240 (Tex. Civ. App.—Amarillo 1949, writ dism'd) (*forum non conveniens* inapplicable when party contracts for performance in forum county). *See generally* 60 TEX. JUR. 2d *Venue* § 252, at 178 (1964) (court will not dismiss if "slight connection" between parties and forum). In McBride Produce Co. v. Denver & Rio Grande W.R.R., 227 F. Supp. 399 (S.D. Tex. 1964), the plaintiff's main office was located in Hidalgo County, Texas, and the court denied the defendant's motion to dismiss on the grounds of *forum non conveniens*. *See id.* at 400. Instead, the court transferred the action to the federal district court in Colorado pursuant to section 1404(a). *See id.* at 400. The authors of *Texas Jurisprudence 2d*, in citing the *McBride* decision as support for their understanding of the Texas *forum non conveniens* rule, apparently feel that federal courts in Texas are obligated to abide by state court rulings regarding application of the theory under the *Erie* doctrine. In fact, the United States Supreme Court has never ruled on this point. The Court of Appeals for the Second Circuit, however, has held that federal courts are not bound to follow state court decisions construing the *forum non conveniens* theory. *See* Gilbert v. Gulf Oil Corp., 153 F.2d 883, 885 (2d Cir. 1946), *rev'd on other grounds*, 330 U.S. 501 (1947). In deciding *Gulf Oil* on the merits, the Supreme Court specifically side-stepped the *Erie* doctrine issue. *See* Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947).

32. *See, e.g.*, Van Winkle-Hooker Co. v. Rice, 448 S.W.2d 824, 827 (Tex. Civ. App.—Dallas 1969, no writ) (doctrine sparingly employed in Texas); Cole v. Lee, 435 S.W.2d 283, 285 (Tex. Civ. App.—Dallas 1968, writ dism'd) (*forum non conveniens* rarely applied); Forcum-Dean Co. v. Missouri Pac. R.R., 341 S.W.2d 464, 465 (Tex. Civ. App.—San Antonio 1960, writ dism'd) (theory of *forum non conveniens* seldom utilized by Texas courts).

33. 304 U.S. 64 (1938).

34. 313 U.S. 487 (1941).

35. *See, e.g.*, Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493, 496 (5th Cir. 1973); Teas v. Kimball, 257 F.2d 817, 823 (5th Cir. 1958); Edward E. Morgan Co. v. United States, 230 F.2d 896, 902 (5th Cir.), *cert. denied*, 351 U.S. 965 (1956). *See generally*

assumption was made as to where the sales contract under consideration was made, but it was to be wholly performed in Texas. The law of Texas, therefore, would apply under Texas conflict law.[36]

There is an additional reason why a court sitting in Texas would decide that Texas law governs controversies arising under this contract. The hypothetical agreement concerns the sale of goods by a Texas seller who manufactured the goods in Texas. According to state statute, when a business dealing is reasonably connected to Texas and another jurisdiction, the participants may agree that the laws of either place may govern their rights and obligations under the transaction.[37] Absent such an arrangement, however, Texas law is to apply issues which are related to the state.[38]

The analysis thus far has established that subject matter jurisdiction exists for suit by *TS* in a federal or state court, that personal jurisdiction over *MB* in the court selected is obtainable, that *MB*'s defense of inconvenient forum would fail, and that Texas law would be applied in a trial on the merits. Assume now that *TS* wins a money judgment. *MB* has no assets outside of Mexico City and refuses to pay the amount of the judgment. Where does this leave *TS*?

TEX. JUR. 3d *Conflict of Laws* §§ 9, 11, 12, at 311-16 (1981) (restating above conflict-of-law rules).

36. *See, e.g.*, Cockburn v. O'Meara, 141 F.2d 779, 782 (5th Cir. 1944) (contract to be executed in one state controlled by law of state of performance); Castilleja v. Camero, 414 S.W.2d 424, 426 (Tex. 1967) (law of place of performance governs contract made in other jurisdiction); Shreck v. Shreck, 32 Tex. 578, 588 (1870) (validity of agreement judged by laws of state of performance). In Hudson v. Continental Bus. Sys., 317 S.W.2d 584, 589 (Tex. Civ. App.—Texarkana 1958, writ ref'd n.r.e.), the court, quoting *Corpus Juris Secundum*, stated:

> *"[I]t has been held that a contract cannot be construed with reference to a foreign law, unless the intent of the parties to be governed by such law is evidence[d] from the instrument itself without the aid of extrinsic evidence." . . . There is nothing in this record to indicate any intention on the part of the parties that the law of the foreign country of Mexico would apply. [emphasis in original text]*

Id. at 589. *Hudson* involved a United States citizen who had purchased a round-trip tour ticket to Mexico in a Texas city from a United States bus company. *See id.* at 585. Ramirez v. Autobuses Blancos Flecha Roja, S.A. de C.V., 486 F.2d 493 (5th Cir. 1973), on the other hand, involved a Mexican national who bought a one-way pass to Mexico, printed in Spanish, in Laredo from a Mexican transportation company which did not operate elsewhere in the United States. *See id.* at 496. The *Ramirez* court felt that these facts implied that the parties arguably "assumed" Mexican rather than Texas law controlled the transaction. *See id.* at 496. The court found it unnecessary to resolve the issue, however. *See id.* at 496.

37. *See* TEX. BUS. & COM. CODE ANN. § 1.105(a) (Vernon Supp. 1982-1983).

38. *See id.*

The best course of action is for *TS* to seek recognition and enforcement of his Texas judgment in an appropriate court of Mexico. Because all of *MB*'s assets are in Mexico City, the action should be brought in a court of ordinary jurisdiction in the Federal District.[39] Whether that court will recognize and enforce the judgment depends upon the interpretation of some ambiguous and even conflicting provisions of the Mexican Code of Civil Procedure.

Under the Mexican Code, the recognition and enforcement of foreign-country judgments is governed by the terms of any pertinent treaty between Mexico and the particular foreign country; however, if no such treaty exists, the principle of reciprocity is applicable.[40] Because there is no treaty between Mexico and the United States dealing with foreign judgments, Mexican courts will require proof of reciprocity by United States courts and such reciprocity indeed exists.[41] That requirement presumably having been

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39. Like the United States, Mexico has a dual system of federal and state courts, even in the Federal District. Concurrent jurisdiction between the two levels of courts exists in most cases which involve private matters. There is, however, a controversial view that recognition and enforcement of foreign judgments, because of their effect upon international relations, should be controlled in Mexico by federal procedural law in the federal courts. *See* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 234-35 (1968).

40. *See* Codigo de Procedimientos Civiles art. 604 (Code of Civil Procedure) (Appendix D *infra*). Reciprocity in this sense means that a United States court would accord a Mexican judgment the same faith and credit that is being sought in a Mexican court for a United States judgment.

41. In Cruz v. O'Boyle, 197 F. 824 (M.D. Pa. 1912), the court satisfied itself that Mexico had adopted the principle of reciprocity and then indicated that Mexican judgments which met the minimum requirements of "international due process" as construed in Hilton v. Guyot, 159 U.S. 113 (1895), would be enforced in the United States. *See id.* at 829. Today, however, on the basis of *Erie* and *Klaxon*, United States federal courts no longer follow the *Hilton* standards regarding reciprocity, but apply the law of the state in which they are located. Most states have rejected reciprocity as a prerequisite to recognition and enforcement of a foreign-country judgment. *See* Royal Bank of Can. v. Trentham Corp., 491 F. Supp. 404, 415 (S.D. Tex. 1980). Thus, for example, a federal or state court in Minnesota would enforce a Mexican judgment if international due process standards were met without looking to see whether the Mexican court would recognize a Minnesota court decision. In the *Royal Bank* case, the federal court concluded that, although there were no Texas decisions addressing the issue of reciprocity, the Texas Supreme Court "would adopt the modern, and majority, rule and ignore reciprocity as a requirement for enforcement of a foreign country's judgments." *Id.* at 416. In eliminating reciprocity per se, this rule really does more than reciprocity requires, i.e., the court adopting this standard recognizes and enforces foreign judgments of courts which may not give similar treatment to its rulings. More recently, the Texas Legislature has removed all doubt as to enforcement of foreign judgments by enacting the Uniform Foreign Money-Judgments Recognition Act. *See* TEX. REV. CIV. STAT.

met to the satisfaction of the Mexican court, *TS*'s judgment will be enforced[42] subject to compliance with the other provisions of the Code of Civil Procedure.

Article 602, which applies to "foreign" judgments involving Mexican states rather than those involving foreign countries, requires: (1) the demand be for a sum certain; (2) the judgment was recovered in a proceeding to which *MB* expressly submitted or personal jurisdiction over *MB* existed by reason of his domicile within the territorial jurisdiction of the court issuing the judgment; and (3) *MB* was personally served with summons.[43] The first requirement is clearly satisfied and the third requirement would probably be met if the steps previously suggested were followed by *TS*.[44] A serious problem is presented by the second requirement if *MB* had ignored the summons of the United States court and made no appearance whatsoever. If express submission to the jurisdiction of the foreign court is necessary pursuant to article 602, the Mexican Federal District court will not enforce this judgment.

Leaving that question for the moment, consider article 605 wherein it is provided that foreign judgments, in the foreign-country sense, will be granted enforceability subject to the following requirements:

> I. That the formalities of submission comply with the requirements of the Code of Civil Procedure;
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> II. that the judgment was issued in personam;
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> III. that the obligation upon which the judgment is founded is legal in Mexico;
>
> IV. that defendant was personally served with the summons to

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ANN. art. 2328b-6, §§ 1-10 (Vernon Supp. 1982-1983) (effective June 17, 1981). Pursuant to section 3, a Mexican money judgment is enforceable "in the same manner as the judgment of a sister state which is entitled to full faith and credit." *Id.* § 3.

42. Although both recognition and enforcement of the judgment are involved in the case under examination, as a shorthand expedient, only reference to enforcement shall henceforth be made.

43. *See* Codigo de Procedimientos Civiles art. 602 (Code of Civil Procedure) (Appendix D *infra*).

44. This equivocal statement is based upon language of the Supreme Court of Mexico to the effect that "there is no provision in our procedural law that a person, national or alien not domiciled in Mexico, would enjoy any exemption from jurisdiction or from procedural law." 30 Seminario (6a ep.) 10, 15 (1960). It is reasonable to believe that a United States court, following a Mexican court's advice as to the manner in which it would serve a nonresident in the situation described by the quotation, would obtain personal jurisdiction over a Mexican national in the reverse situation.

appear in the foreign court;

V. that the foreign judgment qualifies for enforcement;

VI. that the judgment meets requirements necessary for its authenticity.[45]

Unless the requirement of express submission to the jurisdiction of the foreign court is incorporated by reference in section I as being part of the "formalities of submission," the foreign-country judgment would apparently satisfy the terms of article 605.

It is arguable, however, that foreign-country judgments are subject to the whole of article 602 "since the latter requirements are, even though imposed in regard to judgments on the interstate level, couched in general terms so as to cover also foreign judgments."[46] This position may not be persuasive, but it casts enough doubt upon the enforceability of the Texas judgment in a Mexican court to suggest the desirability of searching for other solutions.

III. SECOND STATE OF FACTS

The facts remain the same as previously set forth except that *TS* brings suit in the appropriate civil court in the Federal District.

TS, although a foreigner, is guaranteed access to the courts of Mexico under the Mexican Constitution.[47] Thus, the Texas Seller will be afforded the opportunity to appear and present his case through witnesses, documents, and exhibits just as he would in a United States court.[48] *TS* is not, however, assured of the application of Texas law to the facts even though the contract was per-

45. Codigo de Procedimientos Civiles art. 605 (Code of Civil Procedure) (Appendix D *infra*).

46. *See* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 237 (1968).

47. *See* UNITED MEX. STATES CONST. art. 17, *translated in* ORG. AM. STATES, CONSTITUTION OF MEXICO 1917, at 5 (1977) (Appendix A *infra*). Professors Bayitch and Siqueiros have said: "No alien is prohibited to bring an action to which he is entitled, in Mexican courts provided they have jurisdiction." S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 70 n.138 (1968) (citing 75 Seminario (6a ep.) 34 (1965)). Since suit is now brought in *MB*'s district and the court having subject matter jurisidiction is the court in which *TS* will bring suit, the jurisdictional requirements will be met. Further details regarding the right of *TS* to sue in Mexico are contained in Codigo de Procedimientos Civiles art. 44 (Code of Civil Procedure) (Appendix D *infra*).

48. There is, however, one significant difference. Discovery as practiced in common law jurisdictions, especially in the United States, is practically nonexistent in civil law countries.

formed[49] in Texas. Contracts entered into outside of Mexico which involve a Mexican person will be governed by the law of Mexico whenever they are "carried out in the territory of the Republic."[50] "Carried out" as used in the Mexican Civil Code includes payment.[51] In this case, the final payment would have been mailed from Mexico City to *TS* in San Antonio. There is a sufficient contact with Mexico City, therefore, to permit the Mexican court to rule that Mexican law governs the controversy.

If Mexican law is controlling, the ultimate result would not be drastically altered. The Mexican law with respect to commercial contracts is not very different from Texas law.[52] *TS* would be just as likely to prevail in a Mexican court as he would be in a Texas court. Nevertheless, there are unknowns connected with a Mexican forum. Rules of procedure, composition of the tribunal, the Texas Seller's local lawyer, the language, and the locale are strange to the Texas Seller. A trial in Mexico City would be time consuming, costly, and very inconvenient. This is not the most desirable resolution of the problem from *TS*'s viewpoint.

IV. THIRD STATE OF FACTS

The contract contains a clause providing that all disputes arising out of or in connection with the contract which are not otherwise resolved shall be finally settled in court in the State of Texas, United States of America. The agreement is, however, silent as to governing law.

The Mexican Buyer has, by virtue of the contract, submitted to the jurisdiction of a Texas court.[53] There is no doubt that a federal

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49. When the issue is whether a manufactured item conforms to specifications, the place of performance is clearly the place of manufacture.

50. Codigo Civil art. 13 (Civil Code), *translated in* M. GORDON, THE MEXICAN CIVIL CODE 3 (1980) (Appendix B *infra*).

51. *See id.; see also* S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 135 (1968) (according to article 13, Mexican law to apply whenever payment or performance within Republic).

52. In this connection, see Codigo Civil arts. 1792-2139 (Civil Code), *translated in* M. GORDON, THE MEXICAN CIVIL CODE 329-89 (1980) (Appendix B *infra*), dealing with contracts generally, and Codigo de Comercio arts. 75-88, 371-386 (Commercial Code), *translated in* 2 FOREIGN TAX L. ASS'N, TAX LAWS OF THE WORLD 22-27, 39-42 (1982) (Appendix C *infra*), dealing with commercial transactions specifically.

53. The effectiveness of choice-of-forum clauses in the United States, especially in international business transactions, is best stated in M/S Bremen v. Zapata Off-Shore Co., 407

or state court in Texas would say it has in personam jurisdiction over *MB* with respect to controversies arising under the contract. Ultimately, however, if a judgment in favor of *TS* is submitted to a civil court in Mexico City for enforcement, the same questions regarding enforceability of the foreign-country judgment arise. Does article 602 of the Civil Code of Procedure apply? If so, did *MB* expressly submit to the Texas suit?

A broad provision in a contract expressly stating that all disputes under the contract shall be decided in the courts of Texas would seem to fall short of the Mexican Code requirement. Under a strict interpretation of article 602, *MB* must have expressly submitted to the particular proceeding in which the judgment to be enforced was issued. The civil law countries tend to adhere rather strictly to the principle of *actor sequitur forum rei,* i.e., the plaintiff must pursue the defendant in the defendant's forum. Some exceptions to this rule have been adopted, one of which occurs when the defendant consents to some other forum. Frequently, however, the consent must occur after an action is brought.[54] That is literally what is required before there can be an express submission to the jurisdiction pursuant to article 602.

Nevertheless, in ordering enforcement of a foreign arbitral award, a Mexican court has said:

> [T]he parties, upon including the arbitral submission within the publishing agreement, tacitly waived the formalities which are established in Mexican procedural legislation, specially as refers to Article 605, section IV of the aforesaid procedural statute which provides for personal summons (in case of enforcement of foreign judgments) [and] had voluntarily agreed to submit themselves to the regulations of the Court of Arbitration and national French law.[55]

U.S. 1 (1972) (quoting National Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)): "[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court . . . ." *Id.* at 11.

54. *See* Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis,* 79 HARV. L. REV. 1121, 1138 (1966).

55. Presse Office, S.A. v. Centro Editorial Hoy, S.A., in 1 DOING BUSINESS IN MEXICO § 18.07, at 18-20 to 18-21 (B. Carl ed. 1983) (translating portion of judgment of Feb. 24, 1977, Eighteenth Civil Court of Mexico City, Mexico, *aff'd,* judgment of March 12, 1979, Higher Court of Appeals of the Federal District, Mexico). It should be mentioned here that the common law rule of *stare decisis* has no application in the civil law according to legal "folklore." Professors Bayitch and Siqueiros have stated:

Because this case involved a foreign arbitral award rather than a foreign court judgment and addressed the requirement of personal service under article 605 rather than express submission to jurisdiction of a court under article 602, it is not necessarily determinative of the effect that will be given to a choice-of-forum clause. With respect to the effect to be given to contractual consent, however, the Mexican Supreme Court has indicated:

> If in a contract of lease entered into in one State, it is provided that the contracting parties expressly submit to the jurisdiction of the courts of another State for any litigation arising out of the lease, renouncing the forum of their domicile, the competency to hear the suit in question belongs to the State Judge stipulated in the contract . . . .[56]

Legal rules applied by the Mexican courts in the process of disposing of individual litigation (*jurisprudencia*) have, as a matter of principle, no authority as rules of law (precedents). According to an express provision in the federal Civil Code (art. 19), the principle of *stare decisis* does not obtain since civil controversies "shall be decided in accordance with the text of the law (*letra de la ley*) or with its juristic interpretation (*interpretacion juridica*)." [footnote omitted]

S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 17-18 (1968). The authors go on to say that this does not preclude courts from being impressed by references to earlier decisions, but they are not bound by precedents. *See id.* at 19. *See generally* Oliver, *The Fundamentals of Doing Business in Latin America*, in 1979 TEX. BAR ASS'N—INT'L L. § A, at A-2 (judicial rulings, particularly in Mexico, not "entirely without effect as precedents"). Professor Woodfin L. Buttre has commented:

> This leads us to another feature of the common law which is often pointed out as perhaps the significant difference setting it apart from the civil law: [T]he common law judge is bound by the rule of *stare decisis;* the civil law judge decides only the case before him (i.e., it is the *civil* law which is truly sensitive to the facts of each particular case).
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> . . . . . .
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> On the civil law side, while it is perhaps hard to guess which is cause and which is effect, it has always been true that if counsel could find a reported decision in point on his side, the court would be inclined to give it a good deal of weight. And as reporting systems get better, so that counsel can find the cases, one gets the impression that court and counsel alike now give more weight to a judicial precedent in point than to the writings of a learned commentator. Mexico, for example, now provides by statute that a rule of decision properly laid down by the highest court in the land is to have binding force on all lower courts.

W. BUTTRE, SELECTED MEXICAN CASES (1970) (unpublished textbook available at University of Texas Law Library).

56. Francisco Cassis Sacre, 93 Seminario (6a ep.) 1, 26 (1965). The court also noted that jurisdiction (competency) cannot be conferred by the parties upon a court which would not otherwise have jurisdiction because of the subject matter of the suit, amount in controversy, or gravity of the issue. *See id.* at 26. Additional material regarding this point is contained in Codigo de Procedimientos Civiles arts. 144, 149 (Code of Civil Procedure) (Appendix D

On the basis of these decisions, it appears that Mexico will accord effect to a contractual agreement between a Mexican businessman and a foreign national which designates a foreign court as the forum to decide controversies arising under the contract. At the least, there is some reason to believe that, in deciding whether to enforce foreign-country judgments, Mexican courts will apply only the personal service requirement of article 605 and not the additional express submission requirement of article 602.

V. Fourth State of Facts

The contract contains the same choice-of-forum clause as in the third state of facts. Additionally, the agreement includes a provision stating that, in the resolution of all disputes arising out of or in connection with the contract, the governing law shall be the law of the State of Texas, United States of America.

The drafting of an effective choice-of-law clause is not as easy as it may seem.[57] Choice-of-law provisions too often simply state that the contract shall be "governed by the law of *X*." A court, whether of *X* or elsewhere, could construe the phrase "law of *X*" to refer to the whole law of *X*, including its conflicts rules. This interpretation would result in an application of the law of *Y* if, for example, most of the significant factors related to the controversy occurred in *Y*.[58] Of course, a court could determine that the "law of *X*" only incorporates the domestic or local law of *X* to the exclusion of its conflicts rules.[59]

If the clause reads "laws of *X*" rather than "law of *X*," a court might say that use of the word "laws" indicates an intent to apply *X*'s statutes to the exclusion of *X*'s decisional law.[60] Other similar

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infra).

57. "It is difficult enough to predict the effects of a choice-of-law clause in a domestic contract; but to do so in an international contract involves so many imponderables that it sometimes seems more like predicting the result of a lottery than a law suit." Nurick, *Choice-of-Law Clauses and International Contracts*, in 1960 Proc. Am. Soc. Int'l L. 56, 56. The situation has improved to some degree since Mr. Nurick's 1960 declaration.

58. *See* Vita Food Prod., Inc. v. Unus Shipping Co., 1939 A.C. 277, 291-92 (P.C.).

59. *See* Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 194 (2d Cir. 1955). This is, of course, what *TS* would have intended.

60. *See* Gruson, *Governing Law Clauses in Commerical Agreements—New York's Approach*, 18 Colum. J. Transnat'l L. 323, 324 n.3 (1980). This restrictive interpretation is probably more supportable when the word "laws" is capitalized as in "governed by the Laws of England."

refinements of construction of choice-of-law clauses have caused courts to hold that a statement of governing law does not apply: (1) to questions of the validity of the contract;[61] (2) to tort issues arising under the contract;[62] (3) when the chosen state has no apparent relationship to the parties or the transaction;[63] or (4) when there is any ambiguity or uncertainty in the selection of the governing law.[64] Treatment of the whole subject of governing law clauses is beyond the scope of this paper; however, the above references to some of the pitfalls illustrate that care is necessary in the draftsmanship of such clauses.

It has already been noted that the Supreme Court of the United States strongly endorses choice-of-law clauses in international contracts.[65] Uncertainty exists, however, in predicting how Mexican courts will react to a choice-of-law clause when the chosen law is that of a foreign country. Professors Bayitch and Siquieros have observed that "[c]ompared with American courts, Mexican courts seem to be reluctant to permit contracting parties to specify governing law."[66] This is not true, of course, when the contracting par-

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61. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971). Subsection one provides that the particular law chosen by parties to govern their contract will be applied if the issue "is one which the parties could have resolved by an explicit provision in their agreement." *Id.* § 187 (1). Subsection two provides that even if the issue is one which the parties could not have resolved by an express provision (and validity is listed as such an issue), the law chosen by the parties to govern will be applied unless, inter alia, this law would be contrary to a "fundamental policy" of a state having a materially stronger interest in the outcome than would the chosen state. *See id.* § 187(2). It is under this exception that a court of *Y* might refuse to apply the law of *X* when the contract's validity is in question. *See* Joy v. Heidrick & Struggles, Inc., 403 N.Y.S.2d 613, 616 (Civ. Ct. 1977). *See generally* Note, *Commercial Security of Uniformity Through Express Stipulations in Contracts as to Governing Law,* 62 HARV. L. REV. 647, 649-54 (1949) (determining validity of agreement under above circumstance).

62. *See* Fantis Foods, Inc. v. Standard Importing Co., 406 N.Y.S.2d 763, 767 (App. Div. 1978).

63. *Cf.* Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 408 (1927) (although choice-of-law clause upheld, if selected law lacks "normal relation" to transaction and was attempt to avoid otherwise relevant law, clause would be invalidated).

64. *See* Randolph Eng'g Co. v. Fredenhagen Kommandit-Gesellschaft, 476 F. Supp. 1355, 1357 n.1, 1359 (W.D. Pa. 1976). The court said that a clause providing that the contract would be governed and construed "according to the laws of the State from which this order is issued" was too ambiguous and indefinite to be enforced. *See id.* at 1359.

65. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 516 (1974); *cf.* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11 (1972) (settled law that parties may consent to choice-of-forum clause).

66. S. BAYITCH & J. SIQUEIROS, CONFLICT OF LAWS: MEXICO AND THE UNITED STATES—A BILATERAL STUDY 136 (1968).

ties have elected arbitration as the means of settling their disputes.[67]

VI. Fifth State of Facts

The contract contains a clause providing that all disputes arising out of or in connection with the contract which are not otherwise resolved shall be referred to binding arbitration.

Both the United States and Mexico are Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as the "Arbitration Convention" or the "Convention"). The United States has been a party since 1970[68] and Mexico since 1971.[69] Under the federal constitutions of both nations, the Arbitration Convention is incorporated as part of each country's supreme law.[70]

The Convention deals with the recognition and enforcement of arbitral awards made in a Contracting State which is not the place where enforcement is sought and which arise out of differences between legal entities.[71] In becoming a party to the Convention, a State may predicate recognition and enforcement of foreign arbitral awards on the existence of reciprocity and may restrict application of the Convention to disputes derived from contractual relationships which are classified as commercial arrangements by the participating State.[72] The United States has, in fact, adopted both of these exceptions, but Mexico accepted the Convention without

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67. *See* Presse Office, S.A. v. Centro Editorial Hoy, S.A., in 1 Doing Business in Mexico § 18.07, at 18-20 to 18-21 (B. Carl ed. 1983) (translating portion of judgment of Feb. 24, 1977, Eighteenth Civil Court of Mexico City, Mexico, *aff'd*, judgment of March 12, 1979, Higher Court of Appeals of the Federal District, Mexico).

68. *See* 9 U.S.C. §§ 201-208 (1976). The Convention is set out in 2 Doing Business in Mexico F2-1 to F2-7 (B. Carl ed. 1983).

69. *See* Siqueiros, *Resolution of Commercial Disputes: Enforcement of Foreign Arbitral Awards in Mexico*, in 1 Doing Business in Mexico § 18.01[2], at 18-2 (B. Carl ed. 1983). Approval of the Convention by the Mexican Senate occurred on October 15, 1970, and the implementing decree of the President was issued on June 1, 1971. *See id.*

70. *See* U.S. Const. art. VI; United Mex. States Const. art. 133, *translated in* Org. Am. States, Constitution of Mexico 1917, at 64 (1977) (Appendix A *infra*).

71. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 1, § 1, *reprinted in* 2 Doing Business in Mexico F2-1 (B. Carl ed. 1983). Adopting the terminology of the Convention, the word "State" when capitalized indicates a country and not a division of a federalized nation. "Contracting State" means a State which is a party to the Arbitration Convention.

72. *See id.* § 3, *reprinted in* 2 Doing Business in Mexico F2-1 (B. Carl ed. 1983).

any limitations.[73]

A Contracting State is obligated to recognize a written contractual provision which specifies that the parties intend to submit any disagreements to arbitration.[74] The contractual clause is to be likewise enforced if it specifies that, at the request of either party, the parties are to be compelled to submit to arbitration unless the dispute relates to subject matter not capable of settlement by arbitration or the arbitration clause itself is void or unenforceable.[75] Contracting States are to give effect to foreign arbitral awards in accordance with the rules of procedure of the originating foreign territory and are not to impose more onerous conditions or increased fees or charges than those required for domestic arbitral awards.[76] A party applying for enforcement must supply a properly authenticated copy of the award and of the arbitration agreement.[77] The movant must also furnish a certified translation of the required documents if they are not in the official language of the State where enforcement is sought.[78]

Article V of the Convention sets forth the limited circumstances under which enforcement may be denied. The first section of the article specifies that enforcement may be refused if the contesting party furnishes evidence that: (1) the parties to the arbitration agreement were under some incapacity or the arbitration agreement was invalid under the law which the parties agreed would govern or, failing such agreement, under the law of the State where the award was entered; (2) the contesting party did not receive proper notice of the arbitrator's appointment or the arbitration proceedings or was otherwise unable to appear and present a defense; (3) the award arose out of a controversy not contemplated by the parties or which did not fall within the scope of the arbitration agreement; however, if part of the award was based upon a

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73. *See* Siqueiros, *Resolution of Commercial Disputes: Enforcement of Foreign Arbitral Awards in Mexico*, in 1 DOING BUSINESS IN MEXICO § 18.01[2], at 18-2 to 18-3 (B. Carl ed. 1983).

74. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II, § 1, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-1 (B. Carl ed. 1983).

75. *See id.* § 3, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-2 (B. Carl ed. 1983).

76. *See id.* art. III, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-2 (B. Carl ed. 1983).

77. *See id.* art. IV, § 1, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-2 (B. Carl ed. 1983).

78. *See id.* § 2, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-2 (B. Carl ed. 1983).

disagreement within the ambit of the contract, this portion may be enforced; (4) the arbitration board's composition or the arbitration procedure did not comply with the agreement of the parties or, absent an agreement concerning these issues, did not comply with the law of the country where the arbitration occurred; (5) the award is not binding or has been set aside by a proper authority of the State or law of the State in which the award was entered.[79] The second section of article V provides that enforcement may also be refused if the court determines that: (1) the subject matter of the controversy is not a proper one for arbitration under the pertinent law of the State in which enforcement is sought; or (2) giving effect to the settlement would violate the public policy of the State in which enforcement is sought.[80]

It will be noted that there are a total of seven reasons for refusing to enforce an arbitral award under the Convention. By the specific language of part one of article V, any of the first five reasons for denial would be raised by the party opposing enforcement and this party bears the burden of proving the validity of his contention. The remaining two grounds of refusal relate to the public order of the country in which enforcement is requested. The second of these, which permits rejection upon a finding that enforcement would be contrary to the public policy of the country, gives the enforcing court the greatest latitude.[81] While the second section of article V does not expressly state which party is to assert these reasons for denial or which party bears the burden of proving these reasons, the contesting entity is likely to raise either of these grounds for denial and necessarily must go forward with the evidence just as he must do under the first five.[82]

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79. *See id.* art. V, § 1, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-2 to F2-3 (B. Carl ed. 1983).

80. *See id.* § 2, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-3 (B. Carl ed. 1983).

81. The first reason for denial of enforcement, as already mentioned, permits the court to refuse recognition of the arbitral award when the subject in dispute is incapable of resolution by arbitration under the law of the State where arbitration took place. An example under Mexican law would be where the dispute related to child support, divorce, nullity of a marriage, or personal status. *See* Codigo de Procedimientos Civiles art. 615 (Code of Civil Procedure) (Appendix D *infra*).

82. This may not be the case, however, when the objection is that the subject matter arbitrated was an improper issue for arbitration under the law of the State in which enforcement is sought. In this instance, the court might take judicial notice of its local law and refuse enforcement of its own cognizance.

Despite the breadth of the public policy exception, the courts of all of the Contracting States have demonstrated a definite willingness to uphold enforcement whenever possible. By way of example, the United States Court of Appeals for the Second Circuit has said: "The public policy limitation of the Convention is to be construed narrowly and to be applied only where the enforcement would violate the forum state's most basic notions of morality and justice."[83]

In one hundred cases applying the Arbitration Convention, as reported through Volume IV (1979) of the Yearbook of the International Council for Commercial Arbitration, enforcement of a foreign arbitral award under the Convention was refused on public policy grounds only three times and there were not many more refusals on any other grounds.[84] If there is one consistent pattern running through the enforcement decisions, it is the acceptance by the Contracting States of an international order of due process which requires only the basic elements of fair play and is not disturbed by the absence of the special embellishments which the enforcing State applies when reviewing its domestic decisions.[85]

Two decisions of Mexican courts relating to the enforcement of foreign arbitral awards under the Convention are significant.[86] The cases indicate that Mexico has adopted the liberal majority view which favors enforcement. *Presse Office, S.A. v. Centro Editorial Hoy, S.A.*[87] involved an exclusive license granted by Presse, a French company, to Centro, a Mexican company, for the publishing of the French magazine *LUI* in Mexico and other places. The license was given in exchange for Centro's obligation to pay speci-

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83. Copal Ltd. v. Fotochrome, Inc., 517 F.2d 512, 516 (2d Cir. 1975). One situation in which a United States court is likely to apply the public policy limitation is when the arbitration agreement was exacted by duress. *See* Transmarine Seaways Corp. v. Marc Rich & Co., 480 F. Supp. 352, 358 (S.D.N.Y. 1979).

84. *See* Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269, 271 (1979).

85. *See id.* at 271.

86. *See* Malden Mills, Inc. v. Hilaturas Lourdes, S.A., in 2 DOING BUSINESS IN MEXICO F3-1 to F3-2 (B. Carl ed. 1983) (summary of judgment of Aug. 1, 1977, Higher Court of Appeals of the Federal District, Mexico); Presse Office, S.A. v. Centro Editorial Hoy, S.A., in 2 DOING BUSINESS IN MEXICO F4-1 to F4-3 (B. Carl ed. 1983) (summary of judgment of Feb. 24, 1977, Eighteenth Civil Court of Mexico City, Mexico, *aff'd*, judgment of March 12, 1979, Higher Court of Appeals of the Federal District, Mexico).

87. Appendix F4 of 2 DOING BUSINESS IN MEXICO F4-1 to F4-3 (B. Carl ed. 1983) contains a synopsis of the *Presse Office* decision worded in English.

fied royalties to Presse. Included in the license was an arbitration clause which provided that disputes were to be submitted to arbitration under the rules of the International Chamber of Commerce (ICC) and before an arbitration committee sitting in Paris, France, applying French law. Because of the alleged failure of Centro to pay royalties, Presse referred the matter to the ICC for arbitration and a final arbitral award favorable to Presse was issued. Presse sought enforcement of the award in Mexico under the Arbitration Convention.

Centro raised three objections: (1) according to the French Code of Civil Procedure, French arbitral awards must be authenticated by a court order of execution (homologation) to be legally enforceable and that formality was omitted; (2) Mexican public policy as well as the Arbitration Convention[88] required that the initial notice of complaint be personally served upon the respondent and, in this case, service was mailed pursuant to ICC rules of procedure; and, finally, (3) the arbitral award should have been directly sent to the Mexican court by the French court via a formal letter rogatory as required by the Rules of Civil Procedure for the Federal Distict.

In overruling the first objection, the Mexican court said that local judicial homologation applied only to domestic arbitral awards which were to be enforced by French courts. International enforcement of French arbitral awards is governed by the procedures of the Arbitration Convention, to which France is a Contracting State. The authentication or homologation provisions of the Convention, not French domestic law, control. The second contention was rejected because the parties, by agreeing to arbitration, had expressly adopted the ICC rules of procedure. Further, the Mexican Code of Civil Procedure allows parties to adopt procedures for arbitration which are less formal than courtroom procedures.[89] The last argument was overruled on essentially the same basis as the previous objections, i.e., when nationals of two Contracting States to the Arbitration Convention agree to submit controversies arising under a commercial contract to arbitration, the provisions of the Convention are determinative, not the local law of either country.

88. A reference to the requirement of "proper notice" to the contesting party is made in article V, section (1) on the Arbitration Convention.

89. *See* Codigo de Procedimientos Civiles art. 619 (Code of Civil Procedure) (Appendix D *infra*).

The second decision, *Malden Mills, Inc. v. Hilaturas Lourdes, S.A.*,[90] dealt with a contract for the purchase of cotton yard[91] by Malden, a Massachusetts corporation, from Hilaturas, a Mexican textile manufacturer. The parties agreed in writing that disputes would be submitted to arbitration in Boston or New York City, the site to be selected by Malden. The arbitration proceeding was to be conducted under the rules of the American Arbitration Association (AAA) or of the General Council of Arbitration for the Textile Industry, also at the election of Malden.

Hilaturas failed to supply the contract quantity to Malden because of price fluctuations in the textile market and Malden submitted the matter to arbitration before the AAA in New York City. A final award granting monetary damages to Malden was issued by the arbitrators. Malden subsequently sought enforcement of the arbitral award before the Civil Court of First Instance in the Federal District.

The Civil Court denied enforcement of the award, reasoning that Hilaturas was not properly notified of the arbitration proceedings because all notices had been sent by mail. The Higher Court of Appeals, however, reversed the lower court, stating that when parties agree to submit disputes to arbitration, the arbitration rules control in lieu of the court's ordinary procedural norms.[92] The court also noted that the procedural provisions of the Convention take precedence over domestic laws in case of conflict.[93]

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90. Appendix F3 of 2 DOING BUSINESS IN MEXICO F3-1 to F3-2 (B. Carl ed. 1983) contains a synopsis of the *Malden Mills* decision worded in English.

91. The translated summary uses the term "cotton yard." Actually, however, "cotton yard goods" may be the correct translation.

92. The Higher Court of Appeals applied the same reasoning in rejecting the respondent's objection to Malden's submission of a copy of the arbitral award directly to the Mexican court, pursuant to article IV of the Convention, rather than it being sent by means of a letter rogatory from a New York court.

93. The Mexican Constitution, federal laws, and treaties made by the President "shall be the supreme law for the whole Union. The judges of each State shall conform to such Constitution, the laws, and treaties, notwithstanding any provisions to the contrary which may appear in the constitutions or the laws of the States." UNITED MEX. STATES CONST. art. 133, *translated in* ORG. AM. STATES, CONSTITUTION OF MEXICO 1917, at 64 (1977) (Appendix A *infra*). The *Malden Mills* summary contains the statement that the Higher Court of Appeals, in reversing the lower court, held the mandatory provisions of the Convention enjoy "preeminence over other federal and state laws" under article 133 of the Mexican Constitution. Either the summary, the translation of the Mexican Constitution, or the Higher Court of Appeals is in error on this point.

Based upon these rulings, all of the doubts previously discussed in connection with obtaining recognition and enforcement of a United States court judgment in Mexico appear to be eliminated when the underlying commercial contract contains an arbitration clause.[94] Therefore, during the negotiation of a proposed contract between a Texas entity and a Mexican business, a Texas attorney representing the domestic client should attempt to include an arbitration clause in the contract. The practitioner might recommend the rules of procedure of any of the numerous, internationally recognized arbitration societies in existence (each organization's rules are substantially the same). As a first choice, the attorney should urge use of the rules of the United Nations Commission on International Trade Law (UNCITRAL), which was adopted in 1976 by the United Nations General Assembly[95] for the settlement of dis-

94. The reservations and declarations of any Contracting State in ratifying the Arbitration Convention (as allowed by article I, § 3) are further affected by article XIV. Article XIV provides that "[a] Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention." United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. XIV, *reprinted in* 2 DOING BUSINESS IN MEXICO F2-6 (B. Carl ed. 1983). This rather inartfully drafted provision was intended as a general reciprocity clause and provides a Contracting State with a defensive right to take advantage of another Contracting State's reservations. *See* Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 307-08 (1959).

Assume, for example, that *A*, a United States chemical engineer, enters into a contract of employment with *B*, a Mexico City company, to perform services for *B* in Mexico City. The contract includes an arbitration clause which provides that Mexico City is the place of arbitration if *A* demands such and that San Antonio is the place of arbitration if *B* demands such. Under the national law of both countries, the legal relationship of *A* and *B* would be considered noncommercial.

In adopting the Convention without reservations, Mexico has affirmatively expressed a national policy decision to apply the Convention to noncommercial as well as commercial settlements. Thus, if *B* obtained an award in San Antonio against *A* and sought enforcement in Mexico City, the Mexican court would not likely use article XIV as a shield against enforcement of the noncommercial award simply because the United States does not apply the Convention to noncommercial awards. This supposition is particularly apt when, as here, the applicant for enforcement is a Mexican national.

On the other hand, an award obtained by *A* in Mexico City would not be enforceable against *B* in San Antonio due to the United States' reservation against noncommercial settlements. *A* would, however, logically elect a Mexico City court if judicial action were necessary to enforce the arbitral award because *B*'s assets are located there. *A* would not be able to apply for enforcement in Mexico City under the Convention since his Mexico City award is not a "foreign arbitral award." *A* could proceed under the rules regarding the enforcement of Mexican domestic arbitral awards, however.

95. The UNCITRAL Arbitration Rules may be found in 27 AM. J. COMP. L. 489, 489-503 (1979).

putes arising, in particular, under international contracts and also adopted by the Interamerican Commercial Arbitration Commission of which both the United States and Mexico are members.[96]

A Texas lawyer would prefer that the site of arbitration be a city in Texas, that the governing law be Texas local law, and that the language of the proceedings be English, but he should be flexible on these matters and ready to trade-off one against another as becomes necessary. One suggested compromise is that the site of arbitration for any specific controversy be the home city of the party not requesting arbitration. This tends to encourage solution of disputes at the bargaining table.

VII. CONCLUSIONS

Adequate choice-of-forum and choice-of-law language is an essential contractual ingredient to the United States national who enters into an international business transaction with a Mexican national. When adjudication is necessary to settle a dispute connected with the transaction, the absence of such language will frequently cause problems for the United States businessman. An American executive may win a judgment in a United States court; however, he may be unable to obtain satisfaction of the judgment if he must seek enforcement in Mexico against a defendant who did not make a court appearance to contest the action. This is not a matter of denying justice to the "outlander," but results from the fact that Mexican requirements for in personam jurisdiction, as in most civil law states, are different from those in the United States. If the American businessman files in Mexico, he will avoid such enforcement problems and will not be disadvantaged by the application of Mexico's substantive law. The United States national may, however, consider the inconvenient forum to be undesirable in other aspects and wish to avoid this alternative.

If the United States businessman succeeds in securing choice-of-forum and choice-of-law clauses in the contract, designating Texas in each case, the likelihood of obtaining enforcement of a Texas judgment in Mexico is increased. It is not, however, a certainty that the Mexican court will agree that personal jurisdiction existed

96. Other logical rules would be the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris or the Commercial Arbitration Rules of the American Arbitration Association.

over a non-appearing defendant in the Texas action. The Mexican court may find that the "express submission" requirement of article 602 of the Code of Civil Procedure is applicable. Those who consider this view too cautious and prefer courtroom proceedings over arbitration should heed the previously mentioned caveats about care in drafting governing law clauses.

The safest and surest solution to the problems discussed is arbitration. The United States and Mexico have adopted the same arbitration enforcement law[97] for international business transactions as part of their "supreme law." Both United States and Mexican courts have demonstrated a willingness to apply the law broadly, giving fair recognition to the procedural due process requirements of foreign countries which differ from their own standards. Consequently, the inclusion of an arbitration clause in international commercial contracts will overcome the procedural impediments that might exist under other contractual arrangements.

97. There are, of course, a few differences in ratification and implementation. Those relating to Mexico's accession without reservation and the United States' accession with reservation have previously been discussed. It is interesting to note that the United States Congress, in implementing the Arbitration Convention, made the Convention apply to domestic as well as foreign arbitral awards arising out of commercial relationships in which at least one party is not a United States citizen. *See* 9 U.S.C. §§ 2, 202 (1976). Various examples of arbitration clauses are contained in Aksen, *Appropriate Arbitration Clauses for International Arbitration Between Private Parties and Governments*, in 1982 PRACTISING L. INST.—INT'L ARB. BETWEEN PRIVATE PARTIES & GOV'TS 347, 352-58.

APPENDIX A

CONSTITUTION OF MEXICO*

TITLE I

Chapter I

INDIVIDUAL GUARANTEES

Article 1. Every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided.

. . . . . .

Article 4. Men and women are equal before the law. The law shall protect the organization and development of the family.

Every person has the right to decide in a free, responsible and informed manner on the number and spacing of their children.

Article 5. No person can be prevented from engaging in the profession, industrial or commercial pursuit or occupation of his choice, provided it is lawful. The exercise of this liberty shall only be forbidden by judicial order when the rights of third parties are infringed, or by administrative order, issued in the manner provided by law, when the rights of society are violated. No one may be deprived of the fruits of his labor except by judicial decision.

The law in each state shall determine the professions which may be practiced only with a degree, and set forth the requirements for obtaining it and the authorities empowered to issue it.

No one can be compelled to render personal services without due remuneration and without his full consent, excepting labor imposed as a penalty by the judiciary, which shall be governed by the provisions of clauses I and II of Article 123.

Only the following public services shall be obligatory, subject to the conditions set forth in the respective laws: military service and jury service as well as the discharge of the office of municipal councilman and offices of direct or indirect popular election. Duties in relation to elections and the census shall be compulsory and un-

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paid. Professional services of a social character shall be compulsory and paid according to the provisions of law and with the exceptions fixed thereby.

The State cannot permit the execution of any contract, covenant, or agreement having for its object the restriction, loss or irrevocable sacrifice of the liberty of man, whether for work, education, or religious vows. The law, therefore, does not permit the establishment of monastic orders, whatever be their denomination or purpose.

Likewise, no person can legally agree to his own proscription or exile, or to the temporary or permanent renunciation of the exercise of a given profession or industrial or commercial pursuit.

A labor contract shall be binding only to render the services agreed on for the time set by law and may never exceed one year to the detriment of the worker, and in no case may it embrace the waiver, loss, or restriction of any civil or political right.

Noncompliance with such contract by the worker shall only render him civilly liable for damages, but in no case shall it imply coercion against his person.

Article 6. The expression of ideas shall not be subject to any judicial or administrative investigation unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order.

Article 7. Freedom of writing and publishing writings on any subject is inviolable. No law or authority may establish censorship, require bonds from authors or printers, or restrict the freedom of printing, which shall be limited only by the respect due to private life, morals, and public peace. Under no circumstances may a printing press be sequestered as the instrument of the offense.

The organic laws shall contain whatever provisions may be necessary to prevent the imprisonment of the vendors, newsboys, workmen, and other employees of the establishment publishing the work denounced, under pretext of a denunciation of offenses of the press, unless their guilt is previously established.

. . . . . .

Article 11. Everyone has the right to enter and leave the Republic, to travel through its territory and to change his residence without necessity of a letter of security, passport, safe-conduct or any other similar requirement. The exercise of this right shall be subordinated to the powers of the judiciary, in cases of civil or criminal

liability, and to those of the adminstrative authorities insofar as concerns the limitations imposed by the laws regarding emigration, immigration and public health of the country, or in regard to undesirable aliens resident in the country.

. . . . . .

Article 14. No law shall be given retroactive effect to the detriment of any person whatsoever.

. . . . . .

Article 17. No one may be imprisoned for debts of a purely civil nature. No one may take the law into his own hands, or resort to violence in the enforcement of his rights. The courts shall be open for the administration of justice at such times and under such conditions as the law may establish; their services shall be gratuitous and all judicial costs are, accordingly, prohibited.

. . . . . .

Article 25. Sealed correspondence sent through the mail shall be exempt from search and its violation shall be punishable by law.

. . . . . .

Article 27. Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity.

The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them and to ensure a more equitable distribution of public wealth. With this end in view, necessary measures shall be taken to divide up large landed estates; to develop small landed holdings in operation; to create new agricultural centers, with necessary lands and waters; to encourage agriculture in general and to prevent the destruction of natural resources, and to protect property from damage to the detriment of society. Centers of population which at present either have no lands or water or which do not possess them in sufficient quantities for the needs of their inhabitants, shall be entitled to grants thereof, which shall be taken from adjacent properties, the rights of small landed holdings in operation being respected at all times.

In the Nation is vested the direct ownership of all natural resources of the continental shelf and the submarine shelf of the island; of all minerals or substances, which in veins, ledges, masses or ore pockets, form deposits of a nature distinct from the components of the earth itself, such as the minerals from which industrial metals and metalloids are extracted; deposits of precious stones, rocksalt and the deposits of salt formed by sea water; products derived from the decomposition of rocks, when subterranean works are required for their extraction; mineral or organic deposits of materials susceptible of utilization as fertilizers; solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons; and the space above the national territory to the extent and within the terms fixed by international law.

In the nation is likewise vested the ownership of the waters of the territorial seas, within the limits and terms fixed by international law; inland marine waters; those of lagoons and estuaries permanently or intermittently connected with the sea; those of natural, inland lakes which are directly connected with streams having a constant flow; those of rivers and their direct or indirect tributaries from the point in their source where the first permanent, intermittent, or torrential waters begin, to their mouth in the sea, or a lake, lagoon, or estuary forming a part of the public domain; those of constant or intermittent streams and their direct or indirect tributaries, whenever the bed of the stream, throughout the whole or a part of its length, serves as a boundary of the national territory or of two federal divisions, or if it flows from one federal division to another or crosses the boundary line of the Republic; those of lakes, lagoons, or estuaries whose basins, zones, or shores are crossed by the boundary lines of two or more divisions or by the boundary line of the Republic and a neighboring country or when the shoreline serves as the boundary between two federal divisions or of the Republic and a neighboring country; those of springs that issue from beaches, maritime areas, the beds, basins, or shores of lakes, lagoons, or estuaries in the national domain; and waters extracted from mines and the channels, beds, or shores of interior lakes and streams in an area fixed by law. Underground waters may be brought to the surface by artificial works and utilized by the surface owner, but if the public interest so requires or use by others is affected, the Federal Executive may regulate its extraction and utilization, and even establish prohibited areas, the

same as may be done with other waters in the public domain. Any other waters not included in the foregoing enumeration shall be considered an integral part of the property through which they flow or in which they are deposited, but if they are located in two or more properties, their utilization shall be deemed a matter of public use, and shall be subject to laws enacted by the States.

In those cases to which the two preceding paragraphs refer, ownership by the Nation is inalienable and imprescriptible, and the exploitation, use, or appropriation of the resources concerned, by private persons or by companies organized according to Mexican laws, may not be undertaken except through concessions granted by the Federal Executive, in accordance with rules and conditions established by law. The legal rules relating to the working or exploitation of the minerals and substances referred to in the fourth paragraph shall govern the execution and proofs of what is carried out or should be carried out after they go into effect, independent of the date of granting the concessions, and their nonobservance will be grounds for cancellation thereof. The Federal Government has the power to establish national reserves and to abolish them. The declarations pertaining thereto shall be made by the Executive in those cases and conditions prescribed by law. In the case of petroleum, and solid, liquid, or gaseous hydrocarbons or radioactive minerals, no concessions or contracts will be granted nor may those that have been granted continue and the Nation shall carry out the exploitation of these products, in accordance with the provisions indicated in the respective regulatory law. It is exclusively a function of the nation to generate, conduct, transform, distribute, and supply electric power which is to be used for public service. No concessions for this purpose will be granted to private persons and the Nation will make use of the property and natural resources which are required for these ends.

The use of nuclear fuels for the generation of nuclear energy and the regulation of its application to other purposes is also a function of the nation. Nuclear energy may be used only for peaceful purposes.

The nation exercises in an exclusive economic zone situated outside the territorial sea and adjacent thereto the rights of sovereignty and jurisdiction as determined by the laws of the Congress. The exclusive economic zone shall extend two hundred nautical miles, measured from the base line from which the territorial sea is

measured. In those cases in which that extension results in a superposition on the exclusive economic zones of other States, the delimitation of the respective zones shall be made as this becomes necessary, by agreement with those States.

Legal capacity to acquire ownership of lands and waters of the Nation shall be governed by the following provisions:

I. Only Mexicans by birth or naturalization and Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances, or to obtain concessions for the exploitation of mines or of waters. The State may grant the same right to foreigners, provided they agree before the Ministry of Foreign Affairs to consider themselves as nationals in respect to such property, and bind themselves not to invoke the protection of their governments in matters relating thereto; under penalty, in case of noncompliance with this agreement, of forefeiture of the acquired property to the Nation. Under no circumstances may foreigners acquire direct ownership of lands or waters within a zone of one hundred kilometers along the frontiers and of fifty kilometers along the shores of the country.

The State, in accordance with its internal public interest and with principles of reciprocity, may in the discretion of the Secretariat of Foreign Affairs authorize foreign states to acquire, at the permanent sites of the Federal Powers, private ownership of real property necessary for the direct services of their embassies or legations.

II. Religious institutions known as churches, regardless of creed, may in no case acquire, hold, or administer real property or hold mortgages thereon; such property held at present either directly or through an intermediary shall revert to the Nation, any person whosoever being authorized to denounce any property so held. Presumptive evidence shall be sufficient to declare the denunciation well founded. Places of public worship are the property of the Nation, as represented by the Federal Government, which shall determine which of them may continue to be devoted to their present purposes. Bishoprics, rectories, seminaries, asylums, and schools belonging to religious orders, convents, or any other buildings built or intended for the administration, propagation, or teaching of a religious creed shall at once become the property of the Nation by inherent right, to be used exclusively for the public services of the Federal or State Governments, within their respec-

tive jurisdictions. All places of public worship hereafter erected shall be the property of the Nation.

III. Public or private charitable institutions for the rendering of assistance to the needy, for scientific research, the diffusion of knowledge, mutual aid to members, or for any other lawful purposes, may not acquire more real property than actually needed for their purpose and immediately and directly devoted thereto; but they may acquire, hold, or administer mortgages on real property provided the term thereof does not exceed ten years. Under no circumstances may institutions of this kind be under the patronage, direction, administration, charge, or supervision of religious orders or institutions, or of ministers of any religious sect or of their followers, even though the former or the latter may not be in active service.

IV. Commercial stock companies may not acquire, hold, or administer rural properties. Companies of this kind that are organized to operate any manufacturing, mining, or petroleum industry or for any other purpose that is not agricultural, may acquire, hold, or administer lands only of an area that is strictly necessary for their buildings or services, and this area shall be fixed in each particular case by the Federal or State Executive.

V. Banks duly authorized to operate in accordance with the laws on credit institutions may hold mortgages on urban and rural property in conformity with the provisions of such laws but they may not own or administer more real property than is actually necessary for their direct purpose.

VI. With the exception of the corporate entities referred to in clauses III, IV, and V hereof, and the centers of population which by law or in fact possess a communal status or centers that have received grants or restitutions or have been organized as centers of agricultural population, no other civil corporate entity may hold or administer real property or hold mortgages thereon, with the sole exception of the buildings intended immediately and directly for the purposes of the institution. The States, the Federal District, and all Municipalities in the Republic shall have full legal capacity to acquire and hold all the real property needed to render public services.

The federal and state laws, within their respective jurisdictions, shall determine in what cases the occupation of private property shall be considered to be of public utility; and in accordance with

such laws, the administrative authorities shall issue the respective declaration. The amount fixed as compensation for the expropriated property shall be based on the value recorded in assessment or tax offices for tax purposes, whether this value had been declared by the owner or tacitly accepted by him by having paid taxes on that basis. The increased or decreased value of such private property due to improvements or depreciation which occurred after such assessment is the only portion of the value that shall be subject to the decision of experts and judicial proceedings. This same procedure shall be followed in the case of property whose value is not recorded in the tax offices.

The exercise of actions pertaining to the Nation by virtue of the provisions of this article shall be made effective by judicial procedure, but during these proceedings and by order of the property courts, which must render a decision within a maximum of one month, the administrative authorities shall proceed without delay to occupy, administer, auction, or sell the lands and waters in question and all their appurtenances, and in no case may the acts of such authorities be set aside until a final decision has been rendered.

VII. The centers of population which, by law or in fact, possess a communal status shall have legal capacity to enjoy common possession of the lands, forests, and waters belonging to them or which have been or may be restored to them.

All questions, regardless of their origin, concerning the boundaries of communal lands, which are now pending or that may arise hereafter between two or more centers of population, are matters of federal jurisdiction. The Federal Executive shall take cognizance of such controversies and propose a solution to the interested parties. If the latter agree thereto, the proposal of the Executive shall take full effect as a final decision and shall be irrevocable; should they not be in conformity, the party or parties may appeal to the Supreme Court of Justice of the Nation, without prejudice to immediate enforcement of the presidential proposal.

The law shall specify the brief procedure to which the settling of such controversies shall conform.

VIII. The following are declared null and void:

a. All transfers of the lands, waters, and forests of villages, *rancherias,* groups, or communities made by local officials (*jefes politicos*), state governors, or other local authorities in violation of

the provisions of the Law of June 25, 1856, and other related laws and rulings;

b. All concessions, deals or sales of lands, waters, and forests made by the Secretariat of Development, the Secretariat of Finance, or any other federal authority from December 1, 1876 to date, which encroach upon or illegally occupy communal lands (ejidos), lands allotted in common, or lands of any other kind belonging to villages, *rancherias,* groups or communities, and centers of population . . . .

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XVIII. All contracts and concessions made by former governments since the year 1876, which have resulted in the monopolization of lands, waters, and natural resources of the Nation, by a single person or company, are declared subject to revision, and the Executive of the Union is empowered to declare them void whenever they involve serious prejudice to the public interest.

Article 28. In the United Mexican States there shall be no monopolies or restrictions to free competition (estancos) of any kind, nor exemption from taxes, nor prohibition under the guise of protection to industry, excepting only those relating to the coinage of money, the mails, telegraph, and radiotelegraphy, to the issuance of paper money by a single bank to be controlled by the Federal Government, and to the privileges which for a specified time are granted to authors and artists for the reproduction of their works, and to those which, for the exclusive use of their inventions, may be granted to inventors and those who perfect some improvement.

Consequently, the law shall punish severely and the authorities shall effectively prosecute every concentration or cornering in one or a few hands of articles of prime necessity for the purpose of obtaining a rise in prices; every act or proceeding which prevents or tends to prevent free competition in production, industry or commerce, or services to the public; every agreement or combination, in whatever manner it may be made, of producers, industrialists, merchants, and common carriers, or those engaged in any other service, to prevent competition among themselves and to compel consumers to pay exaggerated prices; and in general, whatever constitutes an exclusive and undue advantage in favor of one or more specified persons and to the prejudice of the public in general or of any social class.

Associations of workers, formed to protect their own interests,

do not constitute monopolies.

Nor do cooperative associations or societies of producers constitute monoplies, which in defense of their interests or of the general interest, sell directly in foreign markets the domestic or industrial products which are the main source of wealth in the region in which they are produced, and which are articles of prime necessity, provided that such associations are under the supervision and protection of the Federal or State Governments and that they were previously duly authorized for the purpose by the respective legislatures, which latter of themselves or on proposal of the Executive may, when the public need so requires, repeal the authorizations granted for the formation of the associations in question.

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Chapter III

Foreigners

Article 33. Foreigners are those who do not possess the qualifications set forth in Article 30. They are entitled to the guarantees granted by Chapter I, Title I, of the present Constitution; but the Federal Executive shall have the exclusive power to compel any foreigner, whose stay he may deem inexpedient, to abandon the national territory immediately and without the necessity of previous legal action.

Foreigners may not in any way participate in the political affairs of the country.

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Title V

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Article 120. The governors of the States are required to publish and enforce federal laws.

Article 121. Complete faith and credence shall be given in each State of the Federation to the public acts, registries, and judicial proceedings of all the others. The Congress of the Union, through general laws, shall prescribe the manner of proving such acts, registries, and proceedings, and their effect, by subjecting them to the following principles:

I. The laws of a State shall have effect only within its own

territory and consequently are not binding outside of that State;

II. Real and personal property shall be subject to the laws of the place in which they are located;

III. Judgments pronounced by the courts of one State on real rights or real property located in another State shall have executory effect in the latter only if its own laws so provide.

Judgments on personal rights shall be executed in another State only when the defendant has expressly or by reason of domicile submitted to the court that pronounced it and provided he has been personally cited to appear at the judicial hearing;

IV. Acts of a civil nature done in accordance with the laws of one State shall have validity in the others;

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TITLE VII

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Article 133. This Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, notwithstanding any contradictory provisions that may appear in the constitution or laws of the States.

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APPENDIX B

THE CIVIL CODE*

For the Federal District and Territories of Mexico

Plutarco Elias Calles, Constitutional President of the United Mexican States, To Their Inhabitants, Know Ye:

That in the exercise of the power which the Honorable Congress of the Union has seen fit to confer upon me by Decrees of January 7 and December 6, 1926, and of January 3, 1928, I issue the following:

CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES IN ORDINARY MATTERS, AND FOR THE ENTIRE REPUBLIC IN FEDERAL MATTERS.

PRELIMINARY PROVISIONS

Article 1. The provisions of this Code shall govern in the Federal District and in the Federal Territories in matters of an ordinary nature, and in the entire Republic in matters of a Federal nature.

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Article 5. No law or Governmental disposition shall be given retroactive effect to the damage of any person.

Article 6. The will of private persons cannot exempt from the observance of the law, nor alter it nor modify it. Private rights which do not directly affect the public interest may be waived only when the waiver does not impair rights of third parties.

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Article 12. The Mexican laws, including those which refer to the status and capacity of persons, apply to all the inhabitants of the Republic, whether nationals or foreigners, and whether domiciled therein or transient.

Article 13. The juridical effect of acts and contracts made in a

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* Reprinted with permission of Professor Michael Wallace Gordon, Professor of Law and Latin, University of Florida, Gainesville, Florida. References to antecedants have been omitted. A complete translation of the Civil Code for the Federal District and Territories is contained in M. GORDON, THE MEXICAN CIVIL CODE (1980).

foreign country, which are to be carried out in the territory of the Republic, shall be governed by the provisions of this Code.

Article 14. Real property situated in the Federal District, and personal property found therein, shall be governed by the provisions of this Code, even though the owners be aliens.

Article 15. Juridical acts in everything relating to their form shall be governed by the laws of the place where they are executed. Nevertheless, Mexicans or aliens residing outside of the Federal District are at liberty to subject themselves to the forms prescribed by this Code, when the act is to be carried out in the said demarcations.

Article 16. The inhabitants of the Federal District are under the obligation to carry on their activities and to use and dispose of their property in such form as not to harm the community, under the sanctions established in this Code and in the respective laws.

Article 17. When any person, taking advantage of the supreme ignorance, notorious inexperience, or extreme poverty of another, obtains an excessive profit which is evidently disproportionate to the obligations assumed by him, the person damaged has the right to demand the rescission of the contract and, if this be impossible, an equitable reduction in his obligation.

The right granted by this article continues for one year.

Article 18. The silence, obscurity, or insufficiency of the law do [sic] not authorize the judges or courts to refrain from deciding a controversy.

Article 19. Judicial controversies of a civil nature shall be decided in accordance with the letter of the law or its juridical interpretation. In the absence of a law, they shall be decided in accordance with general legal principles.

Article 20. When there is a conflict of rights, in the absence of an express law applicable to the matter, the controversy shall be decided in favor of him who tries to avoid damage for himself, and not in favor of him who seeks to obtain profit. If the conflict should be between rights which are equal or of the same kind, it shall be decided by observing the greatest possible equality between the parties in interest.

Article 21. Ignorance of the laws does not excuse compliance therewith, but the judges, taking into account the notorious intellectual backwardness of some persons, their remoteness from means of communication or their wretched economic situation,

may, if the Department of Public Prosecution is in accord, exempt them from the sanctions which they may have incurred for failure to comply with a law of which they were ignorant or, if possible, grant them a period to comply therewith; provided the laws in question are not laws which directly affect the public interest.

Book First of Persons

Title First

Of Physical Persons

Article 22. The juridical capacity of physical persons is acquired by birth and lost by death; but from the moment an individual is conceived he comes under the protection of the law and is considered as born for the effects declared in the present Code.

Article 23. Legal minority, the state of interdiction, and the other incapacities established by law, are restrictions on juridical personality; but incompetents may exercise their rights or contract obligations through their representatives.

Article 24. A person of legal age has the right freely to dispose of his person and of his property, except for the limitations established by law.

Title Second

Of Artificial Persons

Article 25. The following are artificial persons:

I. The Nation, the States, and the municipalities;
II. Other corporations of a public character, recognized by law;
III. Civil and mercantile companies;
IV. The syndicates, unions and other associations referred to in section XVI of Article 123 of the Federal Constitution;
V. Cooperative and mutual associations;
VI. Associations different from those above mentioned, having political, scientific, artistic, recreational, or any other legal objects, provided they are not disallowed by the law.

Article 26. Artificial persons may exercise all the rights which may be necessary to realize the object of their establishment.

Article 27. Artificial persons act and obligate themselves through the organs representing them, whether by provision of the law, or in accordance with the respective provisions of their articles of in-

corporation and of their by-laws [sic].

Article 28. Artificial persons are governed by the laws pertaining to them, by their articles of incorporation, and by their by-laws.

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TITLE THIRD

OF DOMICILE

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Article 33. Artificial persons have their domicile at the place where their administrative office is established.

Those which have their administrative office outside of the Federal District, but which execute judicial acts within the said circumscriptions, shall be considered domiciled at the place where they may have executed the same, in all matters relating to such acts.

Branches operating in places different from that where the home office is established, shall have their domicile in those places for compliance with the obligations contracted by such branches.

Article 34. A conventional domicile may be designated for compliance with specific obligations.

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BOOK FOURTH OF OBLIGATIONS

PART FIRST

OF OBLIGATION IN GENERAL

TITLE FIRST

SOURCES OF OBLIGATIONS

Chapter I

CONTRACTS

Article 1792. An agreement is the accord of two or more persons to create, transfer, modify or extinguish obligations.

Article 1793. Agreements which produce or transfer obligations and rights take the name of contracts.

Article 1794. For the existence of a contract there are required:

I. Consent;

II. An object to which the contract may relate.

Article 1795. A contract may be invalidated:

I. By legal incapacity of the parties or of one of them;
II. By defects of consent;
III. Because its object, or its reason or purpose is illicit;
IV. Because consent was not manifested in the form established by law.

Article 1796. Contracts are perfected by mere consent, except those which must appear in a form established by law. From the time they are perfected they obligate the contracting parties not only for compliance with what was expressly stipulated but also for the consequences which, according to their nature, are required by good faith, use or law.

Article 1797. The validity of and compliance with contracts cannot be left to the will of one of the contracting parties.

Of Capacity

Article 1798. All persons not excepted by law are competent to contract.

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Of Consent

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Article 1804. Every person who proposes a contract to another, designating a period for acceptance, is bound by his offer until the expiration of the period.

Article 1805. When the offer is made to a person who is present, without designating a period for acceptance, the author of the offer is released if acceptance is not given immediately. The same rule applies to the offer made by telephone.

Article 1806. When the offer is made without designation of a period to a person not present, the author of the offer is bound for three days, in addition to the time necessary for the regular going and returning of the public mail, or the time which may be considered sufficient, if there be no public mail, according to the distances and the facility or difficulty of communications.

Article 1807. The contract arises at the moment when the proponent receives the acceptance, being bound by his offer according to the foregoing articles.

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FORM

Article 1832. In civil contracts each one obligates himself in the manner and conditions in which it appears he desired to obligate himself and no specific formalities are required for the validity of the contract except in the cases expressly designated by law.

Article 1833. When the law requires a specific form for a contract, it shall not be valid so long as it does not appear in that form, unless otherwise provided; but if the will of the parties to make the contract appears in a convincing manner, either of the parties may demand that the contract be given the legal form.

Article 1834. When the written form is required for the contract, the respective documents shall be signed by all the persons upon whom that obligation is imposed.

If any of them is unable or does not know how to sign, another shall sign in his place and the fingerprint of the interested party who did not sign shall be impressed on the document.

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CLAUSES WHICH CONTRACTS MAY CONTAIN

Article 1839. The contracting parties may include the clauses they consider advisable; but clauses which relate to essential requisites of the contract, or are consequences of its usual nature, shall be considered as included although not expressed, unless such consequences are waived in the cases and periods permitted by law.

Article 1840. The contracting parties may stipulate a certain prestation as penalty in case the obligation is not complied with or is not complied with in the manner agreed. If such stipulation is made there can be no further claim for damages and losses.

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INTERPRETATION

Article 1851. If the terms of a contract are clear and leave no doubt as to the intention of the contracting parties, the literal sense of its clauses shall be followed.

If the words should appear contrary to the evident intention of the contracting parties, such intention shall prevail over the words.

Article 1852. Whatever be the general nature of the terms of a contract there shall not be considered comprised therein things or cases different from those as to which the interested parties in-

tended to contract.

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Article 1856. The use or custom of the country shall be taken into account for interpreting the ambiguities of contracts.

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Final Provisions

Article 1858. Contracts which are not specifically regulated in this Code shall be governed by the general rules of contracts, by the stipulations of the parties, and in so far as these are lacking, by the provisions of the contract with which they have most analogy among the contracts regulated in this Code.

Article 1859. The legal provisions relating to contract shall be applicable to all agreements and other juridical acts, in so far as they are not in conflict with the nature of the same or with special provisions of the law regarding them.

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Title Second

Special Aspects Of Obligations

Chapter I

Of Confidential Obligations

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Article 1949. The right to annul obligations is explicitly understood in reciprocal obligations for the case where one of the parties obligated does not comply with his obligation.

The injured party may choose between demanding compliance with the obligation or the annulment thereof, with indemnity for damages and losses in both cases. He may also demand annulment, even after having chosen compliance, when the latter is found impossible.

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TITLE FOURTH

EFFECTS OF OBLIGATIONS

I. EFFECTS OF OBLIGATIONS BETWEEN PARTIES

PERFORMANCE OF OBLIGATIONS

Chapter I

OF PAYMENT

Article 2062. Payment or performance is the delivery of the thing or amount owing, or the performance of the service which was promised.

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Article 2079. Payment shall be made at the time designated in the contract, except in the cases in which the law expressly permits or directs otherwise.

Article 2080. If the time when payment is to be made has not been determined, and obligations to give are concerned, the creditor cannot require payment until after thirty days following a formal demand, made either judicially, or extrajudicially, before a notary or before two witnesses. In the case of obligations to do, payment shall be effected when the creditor requires it, provided the necessary time has elapsed for the fulfillment of the obligation.

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Article 2086. The costs of delivery shall be for account of the debtor, if not otherwise stipulated.

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NONPERFORMANCE OF OBLIGATIONS

Chapter I

CONSEQUENCES OF NONPERFORMANCE OF OBLIGATIONS

Article 2104. He who is obliged to perform an act and fails to perform it, or does not perform it in accordance with the agreement, shall be liable for damages and losses under the following

terms:

I. If the obligation was a time obligation, the liability shall begin upon the termination of such time;

II. If the obligation does not depend on a specific time, the provisions of the final part of article 2080 shall be observed.

He who violates an obligation not to do a thing shall pay damages and losses for the mere fact of such violation.

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Article 2108. By damages is understood the loss or deterioration suffered by property through failure to fulfill an obligation.

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Article 2110. The damages and losses must be the immediate and direct consequence of the failure to perform the obligation, whether they have been caused or must necessarily be caused.

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TITLE ELEVENTH

OF ASSOCIATIONS AND COMPANIES

Chapter VI

OF FOREIGN ASSOCIATIONS AND COMPANIES

Article 2736. In order that foreign associations and companies of a civil character may carry on their activities in the Federal District, they must be authorized by the Department of Foreign Affairs.

Article 2737. The authorization shall not be granted to them if they do not prove:

I. That they are constituted in accordance with the laws of their country and that their bylaws contain nothing which might be contrary to the Mexican laws of public policy;

II. That they have a representative domiciled at the place where they are to operate, sufficiently authorized to respond for obligations contracted by such artificial persons.

Article 2738. After the authorization has been granted by the Department of Foreign Affairs, the bylaws of foreign associations and companies shall be recorded in the registry.

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APPENDIX C

THE COMMERCIAL CODE OF MEXICO†

with pertinent sections of the Civil Code and other laws and general commentaries*

Book One

Preliminary Title

Article 1. The provisions of this Code are applicable only to commercial acts.

Article 2. Failing provisions in this Code, those of civil law shall be applicable to commercial acts.

Title I

Merchants

Article 3. According to law, merchants are:

I. Persons who, having legal capacity to engage in commerce, make of it their ordinary occupation.

*In general, a merchant is legally defined as a person who has a legal capacity to engage in commerce and practices his customary occupation. Foreign companies and their branches or agencies fall under this definition if they are organized in accordance with the Mexican Mercantile Laws and perform commercial acts within the national territory.

II. Companies constituted in conformity with the mercantile law.

*The Mexican General Law of Mercantile Companies provides for four types of business organizations. The one most generally used as a business corporation in [sic] the Sociedad Anonima, the equivalent of the U.S. business corporation. General prerequisites

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† Reprinted with permission of the Foreign Tax Law Association, Inc. A complete translation of the Commercial Code of Mexico is contained in 2 Foreign Tax L. Ass'n, Tax Laws of the World (1982).

* The author must point out that extraneous matter and comments which are not part of the official text of the Commercial Code have been prefaced by an asterisk.

include at least five incorporators, each of whom must subscribe to one share of stock; capital must not be less than 25,000 pesos and must be fully subscribed; at least 20% of the value of each share of stock payable in cash must be paid in; and all shares of stock payable in whole or in part in things other than money must be fully paid. The term "Sociedad Anonima" or its abbreviation, "S.A.", must be part of the corporation name. Another form of business organization is the Sociedad de Responsabiladad Limitada. This form of business organization is widely used in Europe and many parts of Latin America but is not used extensively by U.S. corporations. It does not have an exact counterpart in the United States nor in the corporation laws of the various States. This form of organization is organized in the same manner as the Sociedad en Nombre Coletivo described below. For a limited partner when a limited organization is formed, his capital must be wholly subscribed and 50% of each portion paid in. The organization's capital must be at least 5,000 pesos divided into portions which may be of varying amounts to provide different kinds of rights. It must be in 100 pesos or a multiple of 100 pesos. The liability of all parties is limited to the amount of their contribution, and there may not be more than 25 partners. Other forms of Mexican business organizations are the Sociedad en Nombre Colectivo and the Sociedad en Comandita. These are partnership organizations.

III. Foreign companies, or their agencies and branches, which engage in commerce within the national territory.

*In regards to civil companies[,] Article 2738 of the Mexican Civil Code states that foreign associations and companies can engage in activities in Mexico if authorized by the Ministry of Foreign Affairs. To obtain the authorization, the foreign association must show they are organized in accordance with the laws of their respective domicile in the place where their association tends to operate. The distinction between a civil company and mercantile company is a nebulous one. Article 2695 of the Mexican Civil Code states that the companies which are civil in character but have the form of mercantile companies are still subject to the Commercial Code and therefore subject to mercantile legislation. This means, in effect, that companies that are civil in form and perform commercial acts as a part of their business are in reality mercantile or commercial companies.

Article 4. Persons who casually, with or without a fixed estab-

lishment, perform some commercial operation, although they may not be merchants by law, nevertheless thereby become subject to the mercantile laws. Therefore, farmers and manufacturers, and, in general, all those who have established a warehouse or store in any town for the sale of the crops of their farm of [sic] the manufacture [of] products of their industry or labor, without making any alteration thereto, shall be considered merchants on selling same, so far as concerns their warehouses or stores.

Article 5. Every person who, according to the ordinary laws, is capable of contracting and binding himself, and who is not expressly prohibited by said laws from following a commercial occupation, has legal capacity to engage in trade.

It should be noted here that there are general restrictions. However, the "Diario Oficial" of May 26, 1945 and regulated by a Decree in the "Diario Oficial" of January 30, 1947, states generally that professionals who practice in Mexico are required to be Mexican by birth or naturalization; to obtain a license to practice. The term "profession" includes actuaries, architects, maternity nurses, economists, notaries, aviation pilots, school teachers, as well as doctors and attorneys.

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Article 13. Foreigners shall be free to engage in trade, in accordance with the terms of the Treaties made with their respective countries and the laws regulating the rights and obligations of foreigners.

*Nevertheless, there are certain restrictions on foreign companies. Foreigners are forbidden to seek concessions nor can they enter into contracts with municipalities or other local officials or divisions of the Federal government. They must conform with Article 7, item I of the Constitution in order to own property, or to obtain concession for the exploitation of mines or mineral fuels owned by the Republic. They can, however, get permission from the Ministry of Foreign Affairs to own property if they waive the protection of their own government. Article 27 of the Constitution also forbids under any circumstances, the ownership of property by foreigners within 100 kilometers along the frontier or 50 kilometers along the coast. Foreigners are also forbidden to own shares in companies with such property. There are other restrictions regarding the ownership of national merchant ships and general exploitation of public utilities. Additional restrictions are imposed upon

foreign banks and insurance companies. In general, however, these restrictions are little more than compliance with domestic banking and insurance laws.

Article 14. Foreign merchants shall be subject to this Code and the other laws of Mexico in all the commercial transactions in which they intervene.

*It should be noted here that the Federal Labor Law (Article 9) states the following rules for percentage of foreign workers that are permitted to work in companies or any other enterprises:

*1. An employer may not hire less than 90% of Mexican workers in each skilled or unskilled category, unless they [sic] have permission from the Board of Conciliation and Arbitration to do likewise.

*2. The above restriction in No. 1 applies only when the total number of workers employed is more than five; if not, the proportion will be 80%.

*3. The provisions of Article 9 are not applicable to managers, directors, administrators, superintendents and general foremen. Article 53 of the General Population Law, states that members of professions shall only be admitted according to the provisions of the Law regulating Article 4 of the Constitution, the professions and scientific research investigators will be admitted into the country for remunerative work only to the extent that the protection of Mexican nationals so engaged will allow. In this latter case, however, the application for admission must be made by the company or enterprise that employs them. Foreigners who are to engage in the direction, management, administration, representation or other position of responsibility in the employ of corporations or individuals already domiciled in Mexico, are generally admitted freely into the country, especially if it is shown difficult to secure men of their caliber of Mexican origin. Foreigners who are nationals of the United States will be requested to post a bond of 500 pesos when admitted to the country. Foreigners may maintain a domicile in Mexico for all legal purposes without losing their nationality.

*The Decree of June 29, 1944 provides that foreigners who have their main source of business or investments in Mexico and have sufficient residence therein to establish a domicile. The foreigner must also acquire the special permission of the Ministry of Foreign Affairs to secure and assume control over any business already in existence in the country or to acquire property. Under the Law of 1944 mentioned above, some businesses must have at least 51%

Mexican ownership and the requirement that the majority of directors and partners be Mexican. So far, however, this rule has only affected such industries as radio broadcasting, production of motion pictures, maritime, air and land transport services, advertising and publishing and the beveraging of certain drinks.

Article 15. Companies legally constituted in foreign countries which become established in the Republic of Mexico, or have therein any agency or branch, may engage in trade, subjecting themselves to the special provisions of this Code in everything concerning the formation of their establishments within Mexican Territory, their mercantile operations and the jurisdiction of the tribunals of the country.

They shall be subject to the provisions of the corresponding Article under the title of "Foreign Companies" in everything relating to their capacity to contract.

TITLE II

OBLIGATIONS COMMON TO ALL WHO ENGAGE IN TRADE

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Chapter II

THE REGISTRY OF COMMERCE

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Article 24. Foreign companies which desire to become established or to create branches in the Republic of Mexico shall present and enter in the Registry, in addition to proof of protocolization of their bylaws, contracts and other documents referring to their formation, the inventory or last balance sheet, if any, and a certificate of their having been duly constituted and authorized in accordance with the laws of the respective countries, given by the Minister which the Republic of Mexico may have accredited or, there being none, by the Mexican Counsul [sic].

*An American firm may register itself to conduct business in Mexico by direct registration of its company. This registration is effected by making application to the appropriate local court. The application must show that the company has been constituted in accordance with the laws of the country in which it is a national.

This may be obtained by filing a copy of the company's corporate charter (or partnership agreement) together with a copy of the company's inventory and last balance sheet; the contents of the articles of incorporation to a Mexican diplomatic or consular representative in the United States. This application will be authenticated by the signature of a United States notary, certified by the County Clerk of the county of the notary and the signature must in turn be certified by the Mexican Counsul's [sic] for the district. The Mexican Ministry of Foreign Affairs will authenticate the Counsul's signature and the documents need then only be translated into Spanish. When the company's corporate documents are approved by the Court and by the Ministry of National Economy, registration will be ordered in the Public Register of Companies.

*This is not the best method of doing business in Mexico. First consideration must be made to the tax problems involved by direct registration; i.e., allocation of the profits and losses to the Mexican phases of the company's business, and again the profits of the Mexican branch may be taxed in the United States when realized. Every consideration should be given to the possibility that foreign judgments in Mexico may be rendered against the company's United States assets. On the other hand, the registration of a foreign subsidiary of a foreign company would result in favorable tax treatment if the subsidiary corporation could qualify as a Western Hemisphere trade corporation in the terms of Section 109 of the U.S. Internal Revenue Code.

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Chapter III

Mercantile Bookkeeping

Article 33. A merchant is obliged to take and maintain an adequate system of accounting. This system may be kept by means of instruments, resources and entry systems and processing which best accommodates the particular characteristics of the business, but in every case it must satisfy the following requirements:

A) It shall permit identification of individual transactions and their characteristics, as well as connect such individual transactions with their original substantiating documents.

B) It shall permit an audit of the progression from individual

transactions to their aggregation resulting in the final accounting figures, and vice-versa.

C) It shall permit the preparation of statements which shall be included in the financial information of the business.

D) It shall permit the connection and audit between the figures of such statements, aggregations of the accounts and the individual transactions.

E) It shall include the systems of internal control and verification necessary for impeding the omission of the recording of the transactions, for assuring the correction of the accounting records and for assuring the correction of the resulting figures.

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Article 43. However, the communication, delivery or general recognition may be decreed, on petition of a party, of the books, records, vouchers, letters, accounts and documents of the merchants, except in the cases of universal succession, dissolution of the company board of directors or commercial management on account of another or because of bankruptcy.

Article 44. Outside of the cases set forth in the preceding article, the books, records and documents of merchants may only be decreed to be exhibited on petition of a party or de officio, when the person to whom they belong has an interest or liability in the matter from which the exhibition proceeds.

The examination shall be made in the place in which the books, records or documents are habitually kept or guarded, or in the place the parties set forth by common agreement, in the presence of the merchant or of the person whom he has commissioned and shall be concerned exclusively with the points which have a direct relationship with the suit, including nevertheless, those which are foreign to the special account for which the examination was requested.

Article 45. If the books are not at the place where the court which orders their examination sits, such examination shall be made where said books are without compelling their transference to the place of the law suit.

Article 46. Every merchant is obliged to preserve the books, records and documents of his business for a minimum period of ten years. The heirs of a merchant are under the same obligation.

Chapter IV

CORRESPONDENCE

Article 47. Merchants are obligated to keep the letters, telegrams and other documents duly filed, which they receive in relationship with their transactions and business, as well as copies of those which they send.

Article 48. In the case of the copies of the letters, telegrams and other documents which merchants send, as well as those which they receive which are not included in the following article, the file may be integrated with copies obtained by whatever method: mechanical, photographic or electronic, permitting their whole reproduction afterwards, and their consultation or audit if necessary.

Article 49. Merchants are obligated to keep the originals of those letters, telegrams or documents in which they consign contracts, agreements or commitments creating rights or obligations, and they must keep them for a minimum period of 10 years.

Article 50. The tribunals may decree de officio, or on petition of a legitimate party, that the letters that have a relationship with the matter under obligation be filed in court, as well as make an official copy of the respective copies written by the litigants, clearly setting forth beforehand, for the party soliciting them, those which have to be copied or reproduced.

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BOOK TWO

COMMERCE ON LAND

TITLE I

COMMERCIAL TRANSACTIONS AND MERCANTILE CONTRACTS IN GENERAL

Chapter 1

COMMERCIAL TRANSACTIONS

Article 75. The law regards as commercial transactions:

I. All acquisitions, alienations, and leasings made with the object of commercial speculation, of necessaries, articles, movables (personal property) of merchandise, whether in their natural state or after having been manufactured or worked.

II. Purchases and sales of immovable (real) property made with said purpose of commercial speculation.

III. Purchases and sales of interests in and shares and bonds of mercantile companies.

IV. Contracts relating to the obligations of the State, or other negotiable instruments used in commerce.

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VI. Undertakings for selling provisions and supplies.

VII. Undertakings for factories and manufacturing.

VIII. Undertakings for the transportation of persons or goods by land or water, and tourist concerns (travel agents).

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XXIV. All other acts which are of a similar nature to those mentioned in this Code.

In case of doubt, the commercial nature of an act shall be defined by judicial decision.

Article 76. Purchase of articles or merchandise which merchants effect for their own use or consumption or for that of their family do not constitute acts of commerce, nor resale by workmen, when a natural consequence of their work.

Chapter II

Mercantile Contracts In General

Article 77. Unlawful agreements give rise to no obligation nor cause of action, even when they involve commercial operations.

Article 78. In mercantile contracts each one binds himself in the manner and terms in which it appears that he wished to bind himself the validity of the commercial transaction not depending upon the observance of formalities or specific requisites.

Article 79. The following are excepted from the provisions of the preceding Article:

I. Contracts which, in conformity with this Code or other laws, should be reduced to public writings or require forms or solemnities for their efficacy.

II. Contracts entered into in foreign countries in which the law requires writing, specific forms or solemnities for their validity, although same may not be required under Mexican law.

In both cases, contracts which do not fulfill the respective prescribed conditions shall produce no obligation nor give rise to judicial proceedings.

Article 80. Mercantile contracts entered into by correspondence are perfected from the time of the reply accepting the proposal or the conditions by which the latter may be modified.

Telegraphic correspondence shall only give rise to an obligation between the contracting parties who have previously agreed to this method in a written contract, provided always that the telegrams or cables meet the conditions or conventional terms previously arranged by the contracting parties, if they have so agreed.

Article 81. Subject to the modifications and restrictions of this Code, the provisions of civil law with reference to the capacity to act of the contracting parties, and the exceptions and grounds which may rescind or invalidate contracts, are applicable to mercantile transactions.

*The Civil Code provides that most contracts must be in writing. Among these are the contracts for the sale of real estate, leases if the rent exceeds one hundred pesos per year. Agreements to make a future contract must also be in writing. If a mortgage exceeds five thousand pesos, the instrument must not only be in writing but must be notarized; i.e., a public instrument; likewise, where rentals exceed five thousand pesos a year or the sale of real property exceeds five thousand pesos. The Civil Code also provides that if the acceptance is not absolute, it is considered as a new offer. If the offer and acceptance are made at different places, and the time within which the acceptance must take place is not stated in the offer, the offer is considered as remaining open. The offerer is bound for three days in addition to the time necessary for the regular passage of mail between the two places or the time deemed sufficient in case there isn't any public mail, taking into consideration the distances and the difficulty of communications.

Contracts are not void due to mistakes in law. A mistake in arithmetic does not void a contract, it only makes it subject to correction.

Article 82. Contracts in which brokers intervene are perfected when the parties sign the corresponding record, in the manner pre-

scribed in the document.

Article 83. Where no period has been fixed by the parties or by the provisions of this Code, obligations shall be enforceable on the tenth day following the bargain, if they only give rise to ordinary action, and immediately if they involve like execution.

Article 84. Days of grace or courtesy are not recognized in mercantile contracts. In all computations of days, months, and years, it shall be understood that a day means twenty-four hours; months, as designated in the Gregorian calendar; and a year, three hundred and sixty-five days.

Article 85. The consequences of delay in the fulfillment of mercantile obligations shall commence:

I. For contracts which have a day fixed for their fulfillment by agreement of the parties or by law: on the day following maturity.

II. For contracts which have no fixed day: from the day in which the creditor makes a demand in court, or an out of court demand on the debtor before a Notary Public or witnesses.

Article 86. Mercantile obligations must be fulfilled at the place specified in the contract, otherwise at that which must be considered suitable for the purpose according to the nature of the business or the intention of the parties, by reason of their consent or by judicial decision.

Article 87. If the kind and quality of the goods to be delivered are not specified in the contract with absolute clearness, the person obligated cannot be forced to deliver any other than goods of average kind and quality.

Article 88. In the mercantile contracts in which a penalty is fixed as compensation in case of its non-fulfillment, the party injured may either exact fulfillment of the contract or the prescribed penalty; but the resorting to one of these two actions shall extinguish the right to the other.

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TITLE VI

MERCANTILE SALES AND EXCHANGES AND THE TRANSFER OF COMMERCIAL CREDITS

Chapter I

PURCHASE AND SALE

Article 371. The purchase and sales to which this code gives that character, shall be considered mercantile, as well as all those which are made with the direct and preferential object of trade.

*The Commercial Code governs the sale of mercantile property; the Civil Code on the other hand governs the sale of real property and personal property. A sale is consummated between the parties when they have agreed as to the object of the property and the price to be paid. No consideration is necessary and delivery can be made at a future date. It may be stipulated, however, that the seller will retain title to the property until the price is paid.

Article 372. In mercantile purchases and sales the contracting parties shall be subject to all the lawful stipulations which they may have agreed upon.

Article 373. The purchases and sales which may be made according to samples, or qualities of merchandise determined and known in commerce, shall be held perfected by the mere consent of the parties.

In case of disagreement between the contracting parties, two merchants, one appointed by each party, and a third nominated as umpire, shall decide as to the conformity or non-conformity of the merchandise with the samples or qualities which formed the basis of the contract.

Article 374. Whenever the object of the purchases and sales is merchandise which has not been seen by the purchaser and cannot be classified with a specific quality known in commerce, the contract shall not be considered perfected until the purchaser has examined and accepted the goods.

*The Civil Code states that sales reserving the right to repurchase are prohibited. It can be stipulated that the seller shall have a preferential right to purchase at the same price offered by a third person when the buyer wishes to sell. Such right, however, must be

exercised within three days after he is notified of the third person's offer, in the case of movable or personal property. In the case of real property, he must exercise his right within ten days.

Article 375. If the delivery of merchandise of a specified quantity and at a specified time has been agreed upon, the purchaser shall not be obliged to receive it upon any other terms; but if he accepts partial deliveries, the sale shall be consummated as regards the partial deliveries.

Article 376. In mercantile purchases and sales, once the contract is perfected, the contracting party who complies shall have the right to demand from the party not complying the rescission or fulfillment of the contract, and furthermore, compensation for the amount of loss and damages.

Article 377. Once the contract of purchase and sale is perfected, the loss, damages or diminution in value which affect the merchandise sold shall be for account of the purchaser, if it has already been actually, legally, or virtually delivered; if it has not been delivered in any of these ways, same shall be for account of the seller.

*In cases of negligence, criminal offence or fraud, in addition to the criminal action which is applicable against those responsible, they shall be liable for the loss, damages or diminution in value which the merchandise may suffer through their conduct.

Article 378. From the moment the purchaser agrees that the merchandise sold may remain at his disposal, he shall be held to have virtually received it, and the seller shall then have the rights and obligations of a mere depositee.

Article 379. If no time has been set for its delivery, the seller must hold the merchandise sold at the disposal of the purchaser for twenty-four hours following the contract.

Article 380. The purchaser must pay the price of the merchandise sold to him on the terms and at the time agreed upon. In default of any agreement, he must pay cash. Delay in the payment of the price shall give rise to an obligation to pay interest on the amount owing, at the legal rate.

*The Civil Code provides some provisions for installment sales. The Civil Code provides that the installment sale shall be deemed rescinded if any installment is not paid. The seller, however, has little recourse against the third party unless the object sold is real property or the third party should have realized by the personal nature of the object [that it] would warrant investigation and pro-

vided the sale to the third party was recorded in the Public Registry. The seller has no recourse against third parties acting in good faith when the object sold cannot be clearly identified. When an installment sale is rescinded, the buyer and the seller must restore to each other the thing sold and the price paid for it but the seller may demand rental for the thing sold and indemnity for its deterioration. The buyer, on the other hand, may demand interest on the money paid to the seller. The amount of rental and the indemnity may be determined by third party experts. It can be stipulated that the seller retain title of the goods until the price is paid and this stipulation will be effective as to third parties if it is recorded in the Public Registry if the objects are clearly identified. In this case, the buyer is regarded as a lessee.

Article 381. Unless there be an agreement to the contrary, sums paid by way of fulfillment with mercantile sales shall be presumed to be paid on account of the price.

Article 382. Delivery expenses in mercantile sales shall be:

I. Payable by the seller all those that are occasioned until the merchandise, weighed or measured, is placed at the disposal of the purchaser.

II. Those of its receipt and removal from the place of delivery shall be for account of the purchaser.

Article 383. The purchaser who does not make a claim, in writing, within five days following the date of receipt of the merchandise, in respect of defects of quality or quantity of same or who, within thirty days, reckoned from its receipts, does not make a claim on account of inherent defects, shall lose all cause of action and right against the seller to compensation in respect of said causes.

Article 384. The seller, in the absence of an agreement to the contrary, is obliged to warrant the title in mercantile sales.

Article 385. Mercantile sales shall not be rescinded on account of injury; but the injured party, in addition to the criminal proceedings which he is entitled to take, shall also have a right to recover for loss and damages against the contracting party who has acted with fraud or malice or intent to defraud in the contract or in its fulfillment.

Article 386. While the merchandise sold is in possession of the seller, even though it be merely on deposit, the seller shall have preference thereto with respect to any creditor, for payment of an-

ything owing on account of its price.

Article 387. Deposits and public sales in connection with purchases and sales shall be made by the judicial authorities.

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TITLE XIII

MONEY

Article 635. The Mexican peso is the basis of mercantile money, and on this basis all operations of commerce and foreign exchange shall be made.

Article 636. The same basis shall serve for contracts made in foreign countries which must be fulfilled in the Republic of Mexico, as well as for drafts drawn on other countries.

Article 637. Foreign money, whether in cash or otherwise, shall have no greater value in the Republic of Mexico than its market value.

Article 638. No one can be obliged to receive foreign money.

Article 639. Foreign paper, bank notes and titles of debt cannot be the subject-matter of mercantile transactions in the Republic of Mexico, but they shall be considered as simple merchandise, although they may be the subject-matter of purely civil contracts.

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BOOK FOUR

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TITLE II

LAPSING

STATUTE OF LIMITATIONS OR PRESCRIPTION PERIOD

Article 1038. The rights of action derived from commercial acts shall be subject to lapsing in accordance with the provisions of this Code.

*The lapsing of time to bring suit is called the Prescription Period or in terms of the English Common Law, the Statute of Limitations. Lapsings or periods of prescription in commercial transactions are provided in the Commercial Code and the Commercial

Laws. Since the Commercial Laws and the Commercial Code affect all of the Mexican states, as well as the Federal district, the Statute of Limitations mentioned here governs the whole Nation. Where the action is not governed or covered by a commercial transaction, the Civil Code of the particular jurisdiction has to be applied. The Prescription Period or the Statute of Limitation states that failure to perform or extinguish obligations incurred by the acquisition of property or their inherent rights will end any cause of action which the plaintiff may wish to bring. The Civil Code provides a five-year Prescription Period for the following actions:

A. To collect salaries, wages or other compensations for services rendered;

B. To collect rents and pensions;

C. To demand an accounting.

*The Civil Code also provides a three-year Statute of Limitations for actions on personal property. A two-year Statute of Limitations is provided for:

1 - Hotel keepers for the price of lodging and food;

2 - To collect salaries, wages and other compensation for services;

3 - For merchants who wish to collect for goods sold to persons when not for resale;

4 - For damages for libel or slander.

*In general, the Prescription Period is interrupted if the possessor is deprived of possession over a year, if the person in whose favor the Prescription is running acknowledges the right of the person against whom the debt is running; or the institution of a suit or judicial demand against a suit, or unless the Court overrules the demand. Prescriptions cannot run against incapacitated persons unless they have an appointed guardian or against soldiers in active service at time of war.

Article 1039. The periods fixed for the enforcement of rights of action arising from mercantile acts shall be definite unless restitution against same is made.

Article 1040. In negative mercantile lapsing, time-limits shall be reckoned from the date on which the action may be legally brought in a Court of Law.

Article 1041. Lapsing shall be interrupted by the bringing of a suit or by any other kind of judicial interpellation made upon the

debtor; by the acknowledgement of obligations, or by the renewal of the document on which the right of the creditor is based.

Lapsing shall not be considered interrupted by judicial interpellation if the plaintiff desisted from it or his request for suit was not admitted.

Article 1042. The new period of lapsing shall commence, in the case of acknowledgment of the obligation, from the date of the acknowledgment; in case of renewal, from the date of the new document, and if the period for fulfillment of the new obligation has been extended in same from the date that such period expired.

Article 1043. The following shall lapse in one year:

I. The causes of action of retail dealers in respect of retail sales made by them on credit, the time of each item being reckoned separately from the day the sale was made, except in the case of a current account entered into with the parties in interest.

II. The causes of action of commercial employees to exact payment of their wages, the time-limit being reckoned from the day they leave their employment.

III. All causes of action derived from contracts for transportation by land or sea.

IV. Actions to enforce the responsibility of the Stock Exchange or commercial brokers for the obligations incurred due to their occupation.

V. Actions derived from insurance contracts for life insurance or marine or overland insurance.

VI. Actions arising from services, works, provisions or the supplying of effects or money for building, repairing, equipping or provisioning ships or for the crew.

VII. Actions for the expense of the judicial sale of ships, cargoes or effects transported by sea or overland, as also those of their custody, deposit and preservation, and navigation dues, port charges, pilotage charges, salvage charges and to obtain help.

VIII. Actions to exact compensation for loss and damages suffered through fouling and averages.

Article 1044. The following shall lapse in three years:

I. (Repealed by Transitory Article 3 of the Law of Negotiable Instruments & Credit Operations.)

*The Law Of Negotiable Instruments provides for Statute of Limitations for three years to collect promissory notes and coupons of corporate bonds, actions on bills of exchange and actions

on warehouse certificates, explained elsewhere.

II. Actions derived from loans on bottomry contracts.

Article 1045. The following shall lapse in five years:

I. Actions derived from the articles of association of corporations and corporate operations, insofar as they refer to the rights and obligations of the partnership or company towards its members, or of the members towards the partnership or company, or of the members among themselves on account of the partnership or company.

II. Actions which may be brought against the liquidators of partnerships or corporations due to their position as such.

Article 1046. Action to recover the property in a ship shall lapse in ten years, even when he who possesses it lacks title or good faith.

The captain of a ship cannot acquire this action by virtue of lapsing.

Article 1047. In all those cases in which this Code does not establish a shorter period for lapsing, ordinary lapsing in commercial matters shall be completed in ten years.

Article 1048. Lapsing in mercantile matters shall be applicable against minors and incapacitated persons, but their rights to claim against their guardians or curators shall be preserved.

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APPENDIX D

CODE OF CIVIL PROCEDURE FOR THE FEDERAL DISTRICT*

Pascual Ortiz Rubio, Constitutional President of the United Mexican States, **KNOW ALL MEN:**

That in exercise of the extraordinary powers vested in me by decree of the H. Congress of the Union of December 31, 1931, I have issued the following:

CODE OF CIVIL PROCEDURE FOR THE FEDERAL DISTRICT

TITLE I

ABOUT RIGHTS OF ACTION AND EXCEPTIONS

Article 1 The exercise of a private right of action requires:

I. The existence of a right;

II. The violation of a right or the disavowance of an obligation, or the necessity of declaring, preserving, or establishing a right;

III. The legal capacity to exercise the right of action by oneself or legitimate representative;

IV. An interest of the Plaintiff, in its exercise.

The requisite interest is lacking when the purpose of the right of action cannot be achieved, even though a favorable holding could be obtained.

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* Translated by Rosemary B. Konen, Attorney at Law, Practicing Immigration Law in San Antonio, Texas, and reviewed by Carlos R. Valencia Barrera, Associate, Sanchez-Mejorada y Velasco, Mexico City, Mexico. Mr. Valencia Barrera cautioned that the translation was a strict one, almost literal. The use of "apparent" synonyms which could possibly distort the true meaning and structure of Mexican adjective law was avoided.

TITLE II

GENERAL RULES

Chapter I

ABOUT LEGAL CAPACITY AND LEGAL PERSONALITY

Article 44. Everyone who according to law has full legal capacity to exercise his private rights may appear in Court.

Article 45. Those persons not included in the preceding article, shall appear by court appointed representative or by those who according to law must substitute their incapacity. Absentees or unknown persons shall be represented as prescribed by Title XI of the first volume of the Civil Code.

Article 46. Interested parties and their preceding article, shall appear by court appointed representative or by those who according to law must substitute their incapacity. Absentees or unknown persons shall be represented as prescribed by Title XI of the first volume of the Civil Code.

Article 46. Interested parties and their legal representatives may appear in Court for themselves or by retained counsel with sufficient authority.

Article 47. The Court shall examine the legal personality of each party as its sole responsibility; nevertheless the litigant has the right to contest his decision when there are reasons for doing so. Against the decree of the judge which repudiates the legal personality of the Plaintiff and disavows his petition, the recourse of complaint (*queja*) is available.

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Chapter IV

ABOUT *Exhortos* and Dispatches

Article 108. Letters rogatory sent to foreign jurisdictions and those received from them shall comply with respect to the formalities with the corresponding provisions of the Federal Code of Civil Procedure.

Article 109. Tribunals may order that those letters rogatory and

dispatches decreed be delivered, to have them reach their destination, to the interested party petitioning the court's action, who shall have the duty to return same executed if by his conduit are to be returned.

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Chapter VI

JUDICIAL TERMS (TERMS OF COURT)

Article 132. The text of the decrees shall include a record of the day in which the term begins to run and that at which it should be concluded.

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Article 135. Judicial terms which by law or by the nature of the case cannot run independently, shall run concurrently.

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Article 137. When the Code does not provide a term for the execution of a certain judicial proceeding or the exercise of some right, the following shall govern:

I. Five days to appeal a final sentence;

II. Three days to appeal a decree;

III. Three days to hold meetings, acknowledge signatures, present documents, opinions of experts; unless the judge due to special circumstances deems just to extend a term, up to three additional days.

IV. Three days for the remaining cases.

Article 137b. Dismissal for lack of prosecution of a suit will operate de jure regardless of the state of the proceedings from the time of service of citation until before the conclusion of hearing of evidence, allegations, and final holding; and if one hundred and eighty business days lapse from the date of notification of the last judicial decree without either party having acted upon it. The effects and form of declaration shall be subject to the following:

I. The dismissal of the suit is a matter of *ordre public* and cannot be subject to agreement by the parties;

II. The dismissal extinguishes the lawsuit but not the cause of action, in consequence one may initiate a new proceeding without prejudice to those governed by provision V of this article;

III. The dismissal at trial court level renders ineffectual the ju-

dicial proceeding and the state of things must be brought back to the state in which they were before the presentation of the claim and temporary and protective orders lifted. Exempted from the above are firm resolutions concerning venue of the court, lis pendens, connection of different trials, legal personality, and legal capacity of the parties, which will remain in force in subsequent proceedings, if pursued. Any evidence introduced in the extinguished proceeding may be called for in a subsequent proceeding if offered and specified according to the required legal form.

IV. The dismissal of the trial on appeal renders the appealed decision final. This shall be declared by the appellate Court.

V. The dismissal of collateral proceedings because of the lapse of one hundred and eighty day period counted from the notification of the last judicial decree without activity shall only affect those collateral proceedings and not what was acted upon in the trial court even though suspended to act upon the others.

VI. For the purposes of Article 1168, Section II of the Civil Code, the rejection of the claim shall be considered as a dismissal due to lack of prosecution.

VII. Repealed

VIII. Dismissal shall not operate in:

a. Bankruptcy Courts and Probate: except those which arise out of and relate to same and have independent course;

b. in non-adversarial matters;

c. in suits for alimony or those provided for in articles 322 and 323 of the Civil Code;

d. actions followed before a Justice of the Peace.

IX. The running of the term to dismiss for lack of prosecution shall only be interrupted by motion of a party, or those carried out before different judicial authorities as long as they have an immediate and direct relation to the lawsuit.

X. Stay of proceedings stops the running of the term to vacate. Stay of proceedings shall be granted:

a. because force majeure prevents the Judge of parties from acting;

b. in those cases where a connected or previous issue must be resolved, by the same Judge or by other authorities.

XI. Against the declaration vacating a proceeding the only recourse available is that of revocation in those proceedings where appeal is not available. It shall be substantiated with a written

pleading by each party in which evidence shall be submitted, and a hearing where evidence shall be received, allegations heard, and final holding pronounced. In those proceedings subject to appeal, execution of the [trial court's] holding may be suspended. If the declaration is made on appeal, reposition shall be admitted. On appeal against the declaration as well as in reposition proceedings, the procedure shall be limited to one written pleading by each party in which evidence shall be submitted and one hearing in which evidence shall be received, allegations made and final holding handed down. Against the [court's] refusal to declare vacancy in those proceedings which are also subject to review, non-suspension [of the trial court's decision] appeal may be had following the same procedure.

XII. The costs shall be borne by the plaintiff but they may be compensated with those to be charged to the defendant in those instances where provided by statute, and, moreover those which involve counter-claims, set-off, and suits to obtain a declaration of nullity, or, in general, exceptions which tend to vary the legal relationship among the parties prior to the filing of plaintiff's original petition in the presentation of a claim.

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TITLE III

ABOUT JURISDICTION

Chapter I.

GENERAL PROVISIONS

ARTICLE 143. ___. Every claim should be filed with a competent Judge.

Article 144. The jurisdiction of the tribunals shall be determined by the subject matter of the suit, the amount in controversy, level of the court (e.g., trial court, court of appeals, etc.), and the territory.

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Article 149. Jurisdiction by reason of territory is the only type which may be extended (or altered by the parties). An exception is made in the case when the court of appeals has cognizance of an

appeal against an interlocutory decree, and the parties agree to the trial on the merits. The trial shall be disposed of pursuant to the applicable rules to its kind, and followed before the superior court.

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Article 152. There exists express submission when interested parties clearly and undoubtedly renounce the forum provided to them by law and with all precision designate the Judge to whom they submit.

Article 153. Tacit waiver is construed when:

I. The Plaintiff files an original petition in that jurisdiction;

II. The Defendant files an answer to a lawsuit in that jurisdiction;

III. A party having asserted that the jurisdiction is improper, later withdraws his objection;

IV. An opposing third party or any other appears in the proceedings.

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Chapter II.

Rules for the Determination of Jurisdiction

Article 156. The Jurisdiction of a court shall be determined:

I. By the place designated by debtor to be judicially demanded for payment;

II. By the place of performance of a contract. In this instance and the preceding, jurisdiction is provided not only for the completion or execution of the contract, but also for rescission or annulability.

III. By the location of the res, if a real right is exercised over real estate. The same shall be observed when the action involves matters arising out of a lease of real property.

IV. By the place of residence of the defendant if the action involves personalty or personal actions.

Where there are several defendants with different domiciles, venue lies in the forum chosen by the Plaintiff.

V. In probate proceedings, jurisdiction lies in the last domicile of the testator; if the last domicile is unknown or if testator had no domicile, the situs of the real estate subject to probation; if there is no real estate or domicile, jurisdiction shall lie in the place of

death of the testator. The same shall be observed in cases of absentees.

VI. Those in whose territory a probate proceeding is taking place, for the trial of the following:

a. Applications for declaration of heirship;

b. Will contests before partition and adjudication of the estate;

c. Actions referent to annulability, rescission of instruments, or eviction of the estate partition.

VII. In Bankruptcy proceedings, [jurisdiction lies in] the court of debtor's domicile.

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IX. In matters related to the guardianship of minors and incompetents, the court of the place where they reside in cases for the determination of the guardian, and, in other proceedings, where the guardian resides.

X. In matters related to the exercise of parental authority or impediments to enter into a marriage contract, jurisdiction lies where the applicants filed.

XI. In deciding differences between spouses and in actions for annulment of marriage, jurisdiction lies in the domicile of the spouses.

XII. In divorce actions, jurisdiction is in the place of residence of the spouses; in the case of abandonment, where the deserted spouse resides.

Article 157. In determining the jurisdiction of a claim by the amount in controversy, it shall be taken into consideration what is being claimed by the Plaintiff. Proceeds, damages, and other losses caused shall not be included to determine jurisdiction if such are subsequent to the claim even though they are included therein.

When a suit concerns a lease agreement or specific performance of an obligation consisting of periodic payments, the governing amount shall be composed of a year-amount total of periodic payments; except those which have matured, in which case, they shall be computed as prescribed in the first paragraph of this article.

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Chapter III.

About Substantiation and Determination of Jurisdiction

Article 163. The issues of jurisdiction may be brought to the attention of the court by the filing of a disqualification petition or by declinatory exception.

The disqualification petition is filed before the Judge who is considered to have jurisdiction, requesting him to forward a decree to the one not considered to have jurisdiction so the latter inhibits himself and remits the court file.

The declinatory exception of jurisdiction shall be raised before the Judge which the objecting party believes not to have jurisdiction, asking him to abstain from any further action and to remit the case to that considered to have jurisdiction.

The declinatory shall be substantiated pursuant to the regulations in Chapter I, Title Six.

Jurisdiction may never be brought into issue on the Court's own motion; but a Judge is allowed to remove himself from the proceedings, the resolution being appealable with suspension of its effects.

Article 164. If from the evidence filed in the cause or from the record it appears that the litigant who filed the disqualification petition, or the declinatory exception has submitted himself to the jurisdiction of the tribunal having cognizance of the action, it shall be dismissed, and the matter shall continue its judicial course.

It shall also be flatly dismissed any question of jurisdiction which lacks the purpose to decide which must be the court or tribunal to take cognizance of a matter.

Article 165. When two or more Judges refuse to try a certain matter, the aggrieved party may solicit the Superior Court to intervene and order the Trial Judges to forward the case records including record of their refusal.

Once the Superior Court has received the case records, it shall cite the parties to a hearing of evidence and allegations which shall take place within three days and in which a final holding shall be rendered.

Article 166. The Judge to whom the disqualification petition was presented shall issue an order to the Judge allegedly without jurisdiction to abstain from the proceedings and remit the records of

those proceedings to the requiring Judge, with notice to the parties.

As soon as the Judge receives notice of the disqualification decree, he shall order the suspension of the proceeding and forward the record of same to the superior with a notice to the parties.

When the case records are received by the tribunal to decide the issue of jurisdiction, the tribunal shall cite the parties to a hearing to take place within three days from the date of citation at which allegations and evidence shall be heard and a decision rendered. In those suits which involve a family law decision, the opinion of the public defendant's office shall be heard.

Having determined jurisdiction, the record shall be sent to the Judge deemed competent, accompanied with a certified copy of the determination. Against the determination (of jurisdiction) no recourse may be exercised, except that of responsibility.

Article 167. The litigant who having opted to exercise one of the means of recourse to challenge the jurisdiction of a Court may not abandon the one exercised and adopt the other; nor may he use them successively.

In those cases where a contest to the jurisdiction is found to be groundless or unavailable, the party so alleging shall be fined no less than three thousand pesos for the benefit of the colitigant.

Article 168. Each and every Court is required to stay proceedings after the disqualification petition has been filed or as soon as notice thereof is received. Same as when a writ of prohibition has been filed.

Article 169. Violation of the preceding article will result in the nullity of the procedure therefrom. In this case, the tribunal shall be responsible for the damages and losses suffered by the parties, and shall incur sanctions prescribed by law.

TITLE IV

ABOUT DISABILITIES, CHALLENGES AND EXCUSES

Chapter I

ABOUT DISABILITIES AND EXCUSES

Article 170. Every magistrate, judge, or Court clerk will have

compulsory disability from participating in the following cases:

I. In matters in which they have a direct or indirect interest;

II. In those matters which are of likewise interest to their spouses or (blood) relatives, ascendents and descendents without limitation, collaterals to include the Fourth Degree, or by marriage to include the Second Degree;

III. Whenever the official, his wife, or his children, and any one of the interested parties are acquainted intimately due to a secular or religious act, sanctioned and respected by custom.

IV. If there is a blood or marriage relationship of the attorney or legal representative of one of the parties in the same degree provided for in Part II of this article;

V. When he/she, his/her spouse, or any of his/her children are heirs, legatees, donors, donees, associates, creditors, debtors, sureties, lessees, tenants, principals, dependents, or regular guests of one of the parties or administrator of his estate;

VI. If one has made promises, threats, or has manifested, in any way, a hatred or affection for any of the litigants;

VII. If one assists or has attended social events especially given for him/her or paid for by one of the litigants, following the commencement of the lawsuit, or if he/she is well acquainted with one of them, or lives with him/her in the same house;

VIII. When following the commencement of the action he/she has admitted, or his/her spouse or child has taken or accepted gifts or favors from one of the parties;

IX. If he has been a lawyer, legal representative, expert or witness in the matter which is now at issue;

X. If he/she is familiar with the matter as a judge, arbiter, advisor, resolving a point which affects the substance of the issue in the same instance or in another;

XI. When he/she, his/her spouse, or any of his/her relatives of linear relationship, without limitation of proximity, or those of collateral relationship of the second sanguinity or first by affinity, has taken civil action against one of the parties within one year of the action at hand, or has pressed criminal charges as their accusor, complainant, or informant; or has filed a civil action for damages on a criminal complaint against one of them;

XII. When one of the litigants or his lawyer has been an informant, complainant, or accusor of a court official, or of his/her spouse, or of one of his/her immediate relatives, or has initiated a civil ac-

tion for damages following on a criminal complaint against one of them and the Office of the Attorney General has exercised criminal action (indicted);

XIII. When the court official as may be the case, his/her spouse, or one of his/her family as specified above has an interest contrary to one of the parties in an administrative matter and creates a conflict of interest;

XIV. When he/she, his/her spouse, or one of his/her immediate family as specified above asserts civil or criminal actions in which one of the litigants is judge, agent of the Attorney General, or arbitrator;

XV. If he/she was guardian or curator of one of the parties within three years of the action.

Article 171. The magistrates, judges, and court clerks have the duty to remove (excuse) themselves from the cognizance of the cases in which when one of the above described situations occurs or in a situation analogous to the above, even if the parties do not object. The excuse must state the grounds upon which it is founded.

One has a duty to immediately disqualify oneself of cognizance of a cause which presents an impediment without prejudice to dictating orders in the case which conform to the prescribed rules of the Code, when a cause for disability becomes evident or within twenty-four hours of the occurrence or knowledge of that cause.

When a judge or magistrate excuses himself without legitimate reason, either of the parties may bring up the matter with the President of the tribunal whom upon finding the unjustifiable abstention may impose disciplinary sanctions.

Chapter II

About Objections

Article 172. When those magistrates, judges, or Court clerks do not disqualify themselves in spite of the existence of one of the express grounds for disqualification, objection, founded upon legal grounds, should follow. An objection without grounds against the judges shall only proceed when it is raised by the defendant in his answer.

Article 173. In Bankruptcy proceedings, only the legal represen-

tative of the creditors may raise the objection, and in those matters which affect their interest in general. In those matters which affect the interest of one of the creditors in particular, the interested party may bring the objection, but the judge shall not be disqualified more than to the point of the matter. When the matter is resolved the Judge is rehabilitated.

Article 174. In the Probate proceedings, the objection may only be brought by the auditor or executor.

Article 175. When a matter involves various parties before a common representative has been named in conformity with Article 53, they shall be deemed as being one for purposes of raising an objection. In this case, the objection will be given course when the objection is raised by the majority of the parties, qualitatively.

Article 176. In collegiate tribunals, objection to magistrates or judges, only applies to the ones expressly objected to (and not the entire tribunal).

Chapter III

Matters in Which Objection Shall Not Be Had

Article 177. Exception shall not be had:

I. In pre-judicial matters;

II. In the carrying out of letters rogatory or dispatches;

III. In the execution of court acts as requested by other courts or judges;

IV. In mere judicial acts of enforcement; except those of mixed execution, that is, when the Judge sought to enforce a judgment must resolve the objections made;

V. In proceedings which do not attach jurisdiction, nor involve cognizance of a matter.

Chapter IV

About the Term Within Which to Raise An Objection

Article 178. In enforcement proceedings and in those proceedings which begin with the imposition of a lien or levying of property objections shall not be heard, except after the attachment once property has been levied or set free, as may be the case, or after the real estate lien notice has been posted. Objection shall

not be heard once the hearing for evidence and allegations has begun.

Article 179. A founded objection may be made from the time an answer to the petition has been filed until ten days before the hearing on the merits, except when during the hearing or after the citation to hear final holding, the court personnel has been changed.

Chapter V

Effects of the Objection

Article 180. During the consideration of the objection the jurisdiction of the objected court or tribunal is suspended, without prejudice to enforcement procedures underway.

Article 181. When the exception is granted the jurisdiction of the magistrate or judge terminates.

Article 182. Once the objection has been made, the objecting party may not withdraw it at any time, nor change the grounds.

Article 183. If the objection is overruled, or the objecting party has not met his/her burden of proof, he/she may not file another objection, even though the objecting party alleges there exists subsequent grounds or he/she did not have knowledge of the grounds until that time, unless the court personnel has been changed, in which case, objection may be raised regarding the substitute magistrate, judge, or clerk.

Chapter VI

About the Substantiation and Decision of the Objection

Article 184. The tribunals shall flatly overrule all objections:

I. Not made at the proper time;

II. When they are not based upon one of the grounds listed in Article 170.

Article 185. All objections shall be made before the judge or tribunal trying the case, expressing with total clarity and precision the grounds upon which it is made.

Article 186. The objection should be decided without adversarial proceedings, and decided in an incidental proceeding.

Article 187. In the incidental proceeding of objections, all forms

of evidence as prescribed by this Code are admissible and, moreover, the admissions of the objected official and of the adversary party are admissible.

Article 188. The magistrates and judges that hear the objection are immune from objection themselves, but for only this limited purpose.

Article 189. When the objection has been overruled or the objecting party did not meet the burden of proof, the objecting party shall pay a fine of up to two thousand pesos if it was regarding a Civil Judge or a Family Judge; and up to three thousand pesos if it was regarding a magistrate. No objection shall be heard unless the objecting party deposits or files a bond in the amount of the maximum fine, which, if applicable, will be paid to the colitigant, by means of indemnification or, in non-adversarial proceedings turned over to the tax authorities.

Article 190. Of the objection to a magistrate shall be cognizant the Chamber in which the magistrate seats, to be integrated pursuant to law; when the objection is to a judge, the Chamber with jurisdiction.

Article 191. If, as part of the holding, the objection is upheld, the case file shall be returned to the Court of its source together with an authentic copy of the decision, in turn, the Court shall forward said file to the corresponding Judge. In the case of a tribunal, the challenged magistrate remains separate from the trial of the case, the tribunal to be integrated as prescribed by law.

If the grounds for the objection are declared to be insufficient, the record of the case shall be returned together with an authentic copy of the resolution to the original Court so that proceedings may continue. If the official challenged be a magistrate, he shall continue to try the case in the same Chamber as before the objection was made.

Article 192. The objections to the clerks of the Superior Tribunal, of the Civil Courts or the Family Courts and Peace Courts, shall be substantiated before the Courts or Judges with whom they are associated.

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TITLE VI

ABOUT THE ORDINARY PROCEEDING

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Article 271. After the term to file an answer has expired and no answer has been filed, a Declaration of Contempt shall be entered exofficio and the case opened for submission of evidence in accordance with the provisions of Title Nine.

Before the Declaration of Contempt is entered, the Judge shall carefully examine, under his most strict responsibility if the citation issued and previous notifications made were lawfully served.

If the Judge determines that the citation was not properly performed he shall order it be cured and impose sanction on the court employee responsible.

Allegations in the petition not responded to by the Defendant shall be deemed admitted; except in those cases that the lawsuits concern family matters or the personal status of the parties, in which case, the allegations will be deemed denied.

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Chapter III

Article 327. The following are public documents:

I. Certified and notarized copies of public deeds executed pursuant to law and their originals;

II. Authentic documents prepared by an official who performs in his/her official capacity and is prepared in that scope of capacity;

III. Authentic documents, minutes, books, statutes, registers, and records which are found in the public archives or in the branches of the federal government, state government, municipal governments, or the government of the Federal District;

IV. Certifications of civil status issued by the Judges of the Civil Registry in regard to existing evidence in the registry;

V. Certified copies of records found in the public archives issued by the officials concerned;

VI. Certified copies of records entered in the records of parishes of the Church which refer to events which took place before the establishment of the Civil Registry, which must always be compared to the originals and acknowledged to be true copies by a No-

tary Public or his substitute according to law;

VII. The ordinances, statutes, regulations, charters of corporations or associations, universities, all having been approved by the federal government or that of the states, and the certified copies obtained from them;

VIII. Records of judicial proceedings of all kinds;

IX. Certifications issued by mercantile exchanges or mineral exchange houses authorized by law and those issued by commercial notaries pursuant to the Commercial Code;

X. All others which are recognized the same character by statute.

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Chapter IV

Of the Enforcement of Decisions and Other Resolutions Issued by Tribunals and Judges From Sister States and Foreign Jurisdictions

Article 599. The Judge who receives *exhortos* with the necessary requisites, conforming to law for the execution of a sentence or other judicial resolution, shall comply with the request of the petitioning judge, so long as what is sought to be enforced is not contrary to the laws of the federal district.

Article 600. The executing Judges may not hear or try objections when they are filed by one of the original litigants before the petitioning Judge, except in the case of a question of jurisdiction raised by an interested party.

Article 601. If, upon the execution of the particulars of a decree a third party objects, the executing judge will summarily hear the objection and will evaluate the objection according to the following rules:

I. When an intervenor that had not been heard by the requiring judge and is in possession of the subject matter of the judgment, the execution shall not be affected and the *exhorto* shall be returned altered by insertion of an additional decree in which the new resolution is recited and the grounds upon which it is founded;

II. If the intervenor presents himself/herself before the executing judge, but does not prove sufficient title over the subject mat-

ter to be executed pursuant to the *exhorto*, shall be sentenced to satisfy the costs, damages, and losses caused. Against this resolution the only recourse available is that of Complaint.

Article 602. Judges shall not enforce foreign judgments except when the following conditions are met:

I. That they deal with liquidated sums or individually determined goods;

II. If they concern rights on real property or real property within the confines of the Federal District, the same conform with local law;

III. If they concern personalty or personal actions or actions concerning the marital status, the losing party by reason of domicile or by agreement submitted himself/herself to the forum where the judgment was taken;

IV. The party against whom the judgment was had must have (service of process) been personally notified to appear in court.

Article 603. The judge that receives the dispatch or order from his superior for the execution of whatever diligence required, is merely an executor of the judgment and shall not hear any exceptions introduced by the parties, but shall make a notation of same before returning the executed judgment.

Article 604. Sentences and other judicial resolutions emanating from foreign jurisdictions shall be given in the Republic the force to which they are entitled pursuant to the corresponding treaties and, in the absence of a treaty, international reciprocity shall govern.

Article 605. Only final foreign judgments which meet the following requisites, shall be enforced in the Mexican Republic:

I. That the requisites prescribed by article 108 have been met;

II. That it has been entered pursuant to the exercise of a personal action;

III. That the obligation sought to be enforced be legal in Mexico;

IV. That the Defendant was summoned personally to appear in the proceeding from which the order came;

V. That it be a final judgment pursuant to the law of the jurisdiction from which it was issued;

VI. That it meets the necessary formalities to be considered authentic.

Article 606. The judge who would have had jurisdiction over the

cause under Title Three has jurisdiction to execute a foreign decree.

Article 607. After the final judgment has been translated in the manner prescribed by article 330, it shall be presented to the court with jurisdiction for its execution previous examination of its authenticity and of the question of whether or not it should be enforced pursuant to the laws of the nation have been complied with. It shall be substantiated by a writing by each party with the intervention of the Office of the Attorney General. The resolution shall be decreed within three days, regardless of whether the parties or the Attorney General appear or not, and is appealable if the execution is refused, no stay being granted; if the execution is ordered, stay of the proceeding shall be granted if appealed. The appeal shall be brought in a summary proceeding.

Article 608. Neither the lower court nor the Superior Tribunal may examine nor decide the justice or injustice of the verdict nor the fundamentals of fact or law on which it is supported, and are limited to the examination of the authenticity and whether it should be enforced or not in compliance with Mexican law.