PANEL III.
ENFORCEMENT OF FOREIGN JUDGMENTS

MODERATOR

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PANELISTS

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OUTLINE OF DISCUSSION:
- —Identifying a Foreign Judgment
- —Policies Concerning Enforcement
- —Practicial Effect of Enforcement: Inflation
- —Recommendation: Combine the Foreign Country Money and the Enforcement of Foreign Judgments Act
- —Recommendation: Court-Certified Experts to Authenticate Mexican Judgments
- —Ignorance of Foreign Law
- —Preparation of Documents

José Luis Siquieros
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- —Both the United States and Mexico are Federations
- —Mexican Rules Governing Execution of Foreign Judgments
- —Jurisdiction in Cases Involving the Enforcement of Foriegn Judgments
- —Competence to Enforce Foreign Judgments

Francisco Acuña Griego
- President of the Supreme Tribunal of Justice, Sonora, Mexico [at the time of the Symposium]

OUTLINE OF DISCUSSION:
—Competence to Enforce Foreign Judgments
—Recognition of Judgments in Sonora
—Objections to the Execution of a Foreign Judgment
—Recommendations: Establish Uniform Procedural Laws for Mexico; Negotiate a Bilateral Treaty

Alfredo Marquez
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OUTLINE OF DISCUSSION:
—Problems in Enforcing Judgments in the U.S.
—Factors Considered When Executing a Foreign Judgment
—Recommendations: Negotiate a Bilateral Treaty

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OUTLINE OF DISCUSSION:
—Reasons for Choose Arbitration
—Advantages of Arbitration
—Choosing Arbitration Rules
—Enforceability of Arbitration Awards

For papers presented in conjunction with the following discussion, *see:*

Furnish, *Foreign Judgments in Mexico and the United States*, p. 173 of this volume.

Siqueiros, *Enforcement of Foreign Civil and Commercial Judgments in the Mexican Republic*, p. 149 of this volume.

FURNISH: We've already got a good discussion going regarding judicial cooperation, but I hope that I can create a little more discussion. I would particularly like to hear from the judges as to my suggestions, but I hope practicing lawyers will talk seriously about them. I think the moment is drawing near, as some of our panelists have mentioned, when connections between Mexico and the United States interlock to the degree that we cannot do without the judicial cooperation that this conference addresses.

IDENTIFYING A FOREIGN JUDGMENT

I want to confront two basic problems. None of us has too much problem identifying a foreign judgment. That is the Arizona judgment that you take to Sonora and try to enforce there. There is another thing that I would classify as a foreign judgment, because it is handled in the same way. That grows out of, let us say, an Arizona case, between Arizona parties, involving Arizona witnesses, circumstances and facts, which in its final resolution says: "Party loser, you must turn over your *fideicomiso* right in a Mexican beachfront property to the party winner." The above "Arizona" judgment can only be accomplished through some sort of Mexican process or Mexican document; hence it is equivalent to a foreign judgment that must be enforced through foreign proceedings.

POLICIES CONCERNING ENFORCEMENT

Given these circumstances, we have the anatomy of a problem that we must frame in the context of judicial cooperation. Floating throughout this entire conference has been the dichotomy between theory and practice. I am concerned with practice in the area of foreign judgments, because in the area of foreign judgments, most states in the United States and Mexico have an official policy of welcome. Neither state would say, "We will not help you execute your judgments." If you go to Mexico for an explanation of the Mexican policy on the matter, you will discover in the statutes an official policy of enforcing U.S. judgments in Mexico. If you ask in the United States, "Do you enforce Mexican judgments?" the answer will be "Of course." We want to enforce Mexican judgments—that's our official legislative policy.

PRACTICAL EFFECT OF ENFORCEMENT: INFLATION

From my experience, however, the practical effect of enforcement is so far from helpful that we might as well have a policy of official hostility. Let me give you one specific example.

Consider inflation in Mexico. A judgment of 215,000 pesos ten years ago was a substantial judgment. Today, in practical terms, it is worth nothing; it is probably not worth enforcing. Yet, any Arizona lawyer worth his salt can probably resist a Mexican judgment for 215,000 pesos for eight or ten years, thereby rendering the judgment ineffective.

Several laws in the United States deal with this matter. One is the Foreign Country Money Judgment Act, which at least 12 states have adopted, including California and Texas. There are also a series of

states on the Canadian border which have adopted it. The title has little value other than as a starting point. First, the Act is limited to money. I think that may be a problem, but it is not the major problem. Second, the Act is very bland and innocuous. It doesn't even go as far as the case law in most states. To cite one example: when they adopted it in Texas, they used it to take a step backward and require reciprocity, which is not a requirement in the United States generally for the enforcement of foreign country judgments.

RECOMMENDATION: Combine the Foreign Country Money Judgment Act and the Enforcement of Foreign Judgment Act

I propose a wedding of the Foreign Country Money Judgment Act and the Enforcement of Foreign Judgments Act, which 25 states in the United States have adopted. The latter is obviously more popular than the Foreign Country Money Judgment Act, and it makes the enforcement of a sister state judgment exceedingly simple. You merely register your judgment when you bring it into the new state.

Arizona, for example, has adopted this national legislation. If you bring a sister state judgment to Arizona, you register it. Once it is registered, it becomes an Arizona judgment. No other judicial proceeding is necessary; you can now enforce it. Objections on jurisdictional grounds still arise. There may also be other objections, but, in principle, it is as good as a local judgment. This cuts through literally years of bureaucratic entanglement. By setting up a simple registration system for Mexican judgments in Arizona, you get by the first mountain of hurdles.

RECOMMENDATION: Court-Certified Experts to Authenticate Mexican Judgments

However, a second hurdle is certification of that Mexican judgment. It is, after all, in Spanish and comes from a different legal system. How could we bring the Mexican judgment under some certification process for registration in Arizona? The Supreme Court of Arizona should certify a list of experts. They could be people from anywhere in the United States and Mexico who are expert in the laws of both countries and who can explain law across the border. The winning party, the one wishing to register the Mexican judgment in the United States, should hire at least two of the experts, one from each nation. The experts would prepare an English summary of the Mexican judgment, setting out the bases for jurisdiction, the facts and the equities as established on the Mexican side and all the points of the

decision, with the legal bases for them with analogy to American law. The U.S. court, once it takes that judgment, can then understand what went on in Mexico, what the decision means there and, finally, what remedies are available for the execution of that judgment in Mexico and the corresponding remedies available in the United States.

IGNORANCE OF FOREIGN LAW

That is my whole proposal. I am going to give you one more justification that I think applies to a lot of the things I have heard here today. I have a colleague who used to teach Chinese law. He always said that when you teach Chinese law, you walk into class and tell the students anything, and they will write it down. You can say that in China the sun rises in the west and sets in the east, and they will write it down and not question it. In my experience, this is also true when you deal with Mexican law.

Judges, by and large, are very intimidated by foreign law, about which they do not pretend to possess any expertise. When the case comes before the court, it's in an adversary posture. One witness says the sun rises in the east; the other witness says the sun rises in the west. If it were strictly a U.S. question, the court would say the latter witness is nuts. However, under circumstances involving competing claims and judges unfamiliar with and uncomfortable with foreign law, the court will frequently hedge its position. The judgment debtor can play on that. All the judgment debtor wants is to seriously delay the judgment creditor. If the judgment debtor wanted to pay, she would have paid on the Mexican judgment in Mexico long ago; she fights the battle and wins it, by delaying.

Independent experts could give the judge the confidence to cut through the delay and make enforcement effective by certifying the particulars of the judgment at an objective stage. Why do you use that certified list of experts? Because they are objective and do not depend on being paid by a side which has a defined interest; they will give an impartial opinion or certification concerning the issues or the judgment before it gets to an adverserial posture.

PREPARATION OF DOCUMENTS

The other area in which certified experts could facilitate judicial cooperation would be in the preparation of documents. For instance, take the Arizona judgment, involving Arizona parties, in which there is a need to transfer land or property in Mexico. The losing party stands before the court, which can make that party sign a document. However, the document can't be a quitclaim deed in English, since the

transfer ultimately must take place in Mexico and a foreign document in English has no value there. Certified independent experts could prepare a proper document in Spanish for the Arizona court. Then, by signing the document, the losing party attests to the validity of the U.S. judgment and gives the judgment creditor a means of filing a simple transfer in Mexico.

SIQUEIROS: This is one of my favorite subjects, one on which I could talk forever. However, I feel constrained by time limitations and would like to make this a very brief presentation. I feel that some of my thoughts may overlap with Professor Furnish's presentation.

BOTH THE U.S. AND MEXICO ARE FEDERATIONS

First, of course, is the similarity between the two countries in that both have a federal constitution and a federal system, pursuant to which the states, under such legal framework, have to give full faith and credit to the public acts, judgments, and other records which have been issued in sister states. Thus, in Mexico, we have exactly the same principles in Article 121 of the Mexican Constitution that exist in Article IV, Section 1, of the U.S. Constitution.

MEXICAN RULES GOVERNING EXECUTION OF FOREIGN JUDGMENTS

The rules of the game regarding judgments rendered outside the Mexican Republic are not as clearly established as those involving sister state judgments. The rules dealing with foreign judgments are embodied in laws other than the Constitution. However, we will see, in this brief comment, that there are numerous discrepancies and differening theories on this subject. Even the decisions of the Mexican Supreme Court are seemingly inconsistent. There are three avenues of law applicable to the recognition and enforcement of foreign judgments. First is the federal procedural code. Second is the procedural code for the federal district. Third is the procedural code in force in each of the 31 Mexican states.

The federal code is very brief and laconic; it establishes general principles providing that foreign judgments from abroad will be given effect, and will be recognized, if they are not offensive to the laws and the public policy of the Mexican Republic. However, I think we can disregard the practical importance of this provision based on the assumption that the Congress, in 1942, when this statute was enacted, was aware of the specific provisions already in effect in the code of civil procedure for the federal district which date back to 1932, and which establish, with more detail, that judgments rendered abroad

would have effect in the Mexican Republic subject to certain enumerated conditions.

JURISDICTION IN CASES INVOLVING THE ENFORCEMENT OF FOREIGN JUDGMENTS

Lastly, there is the possibility of applying the particular codes of each of the Mexican states. Within this possibility, there are also three categories. One group of codes completely abstains from enforcing foreign judgments. A second group bases enforcement strictly on federal law. The third group, which seems to comprise the majority of codes, holds that the judgments from abroad may be enforced and will be recognized in the state according to specified conditions.

Does the federal court or the local court have jurisdiction at this stage? Which of the two will be the one able to accept and to enforce the foreign sentence in Mexico? According to the Constitution, it would appear to be the federal courts. But, following the principle of concurrent jurisdiction, it becomes possible, in a private party suit, for the plaintiff to take the matter to a court of general jurisdiction, a local court, rather than to a federal court. As I noted previously, this is a subject so full of turns and unanswered questions, that it is very difficult in 20 minutes to try to even make a brief explanation. I hope, however, that this description will assist in developing your questions and comments as we pursue the topic.

ACUÑA GRIEGO (translation by Kozolchyk): First, I would like to thank José Luis Siqueiros for shortening my presentation. I would like to set forth the principle that Mexico, as was stated earlier by Dale Furnish and by José Luis Siqueiros, abides by the principle of *exequatur*, the welcoming of the foreign judgment based upon a verification of the form of the judgment, as opposed to the substance of the judgment. In that respect, the key problem is one of the competence of the court. By that, I refer to what Fernando Flores Garcia explained earlier; that is to say, there are varying apportionments of power within the broad notion of jurisdiction. The predominant position is that the enforcement of foreign judgments is basically federal in nature. This view was developed by the Spanish procedural lawyer Alcalá Zamora, whose teachings continue to influence most Mexican procedural lawyers. [A. Zamora, *Examen Critico del Codigo de Procedimientos Civiles de Chihuahua* 148-49 (1959).] However, as José Luis Siqueiros remarked, there are numerous state code provisions for the enforcement of foreign judgment [Codigo de Procedimentos Civiles de Sonora (C. Civ Proc. Son.), arts. 475-84, (1980)].

COMPETENCE TO ENFORCE FOREIGN JUDGMENTS

It is significant that, in view of questions regarding which court is competent to enforce a foreign judgment, the State of Sonora has the distinction of having had a Sonoran Supreme Court case appealed to the Supreme Court of Mexico precisely on this point 28 years ago [5 Semanario at 121]. In 1956, there was a constitutional appeal from a Sonoran court decision based on the argument that the Sonoran Code of Civil Procedure did not have a constitutional mandate to enforce any rules concerned with the enforcement of foreign judgments because the matter was a federal matter dominated by the Mexican Constitution. In addition, it was argued that, since the parties involved were foreigners, this matter had to be regulated by the foreign law of immigration and naturalization, which was federal in subject matter.

The Supreme Court of Mexico said that the enforcement of a foreign judgment was not a federal matter. It held that the provision in the Sonoran Code of Civil Procedure merely establishes the elements of the formal regularity of a judgment; it does not belong to the area of international law, but to local procedural law. The Court did not address the question of whether the dispute involved foreigners *per se* as opposed to locals. The Court concluded that the provision in the Sonoran Code of Civil Procedure was not unconstitutional, and that it was properly applied by the Sonoran Supreme Court.

RECOGNITION OF JUDGMENTS IN SONORA

Beyond that decision, Article 475 of the Civil Procedure Code of Sonora is an interesting provision. It establishes the fact that a foreign judgment can be recognized or deemed valid either by a judge or through the diplomatic route. It is necessary, or advisable, to divide the issue into two points. First is the recognition of the validity of the judgment; second is its enforcement. Once it is recognized as valid through these two stages, by the judge or through diplomatic means, then that implies that the judgment enjoys the same status as any other judgment in the Mexican Republic. It then becomes self-executing. So, those are the two stages: recognition by a judge or by the diplomatic route, and analogizing the foreign judgment to a local judgment.

The second stage is the stage that deserves the status of summary execution. Such status is similar to the one that is accorded various executory or executive instruments such as, for example, negotiable instruments. This is done in a very quick, expeditive process. There is a five-day notice period, then there is a brief term of 15 days or so for the gathering of evidence, and then there is a short time for a hearing. It all takes place very quickly.

In addition to the fact that it is a legal judgment, that is to say, that it has the elements of requisite validity and that it does not violate the public interest of the Mexican forum, there are three additional requirements imposed on the foreign judgment. The first may be the most important. It holds that the judge who dictated the judgment abroad must be a competent judge. Secondly, execution requires that the judgment not be contrary to any Mexican judgment on the same subject matter in the same kind of litigation. Third, the execution must not concern an issue which is currently, or concurrently, being litigated in Mexico.

OBJECTIONS TO THE EXECUTION OF A FOREIGN JUDGMENT

If a foreign judgment does not meet all the above requirements, a litigant can protest its execution in Sonora. In my judicial capacity, I regard the terms "objections" or "exceptions" to the enforcement of a judgment as, first of all, those dealing with the formalities of the judgment itself. Is it formally what it is supposed to be? That is part of the notion of *exequatur.* Secondly, one must question how appealable the decision is, as well as how appealable the decree enforcing the judgment is. If the decision can be appealed in the state where it was rendered, then the Mexican decree enforcing the judgment is suspended; it cannot be executed. If the Mexican decree enforcing a foreign judgment is appealable, then the case is remanded, so to speak, with the whole record being sent down to a lower Mexican court in order for it to proceed. So, there is an appeal, and the appeal, depending on the nature of the interlocutory decree, could be, as we say in Mexico, with one effect or two effects; that is to say, just suspending it, or reversing and remanding.

The provisions in the Code of Civil Procedure for Sonora that deal with objections to the enforcement of foreign judgments bear attention [*see* C. Civ. Proc. Son. art. 357]. The Sonoran Code of Civil Procedure is one of the few Mexican codes which deals with the question of nullity, or *res judicata* situations, and whether a *res judicata* effect can be nullified.

RECOMMENDATIONS: Establish Uniform Procedural Laws From Mexico; Negotiate a Bilateral Treaty

I propose a point for discussion. In light of the problem that Mexico has, which is the problem of not knowing whether the state or the federal codes apply to the enforcement of foreign judgments, I would suggest that Mexico itself get its house in order by developing more

uniform rules on the subject. Second, I suggest that the best way for our two countries to deal with the matter is by subscribing to the Casad theory, resolving it by way of a bilateral treaty. A meeting such as the one that we have held here is very educational. I propose that we continue the dialogue by bringing in people from the judiciary, from the practicing bar, and from the legal teaching profession. Then we can get a better grasp on the deep, profound problems, that exist on both sides and that are as numerous as spires on a Gothic church.

MARQUEZ: I do not think that our Mexican colleagues are aware of the problem, or the extent of the problem, that we, in the U.S., have in enforcing judgments. It is not limited to enforcing judgment from other countries.

PROBLEMS IN ENFORCING JUDGMENTS IN THE U.S.

One of the most interesting areas developing in our country right now is whether judgments issued by Indian courts should be enforced in the states. As you know, under our system, the Indians are nations; the reservations are nations. They now have their own courts, and they are issuing judgments and trying to enforce them in state courts. Even our courts are not in agreement on how to accomplish such enforcement.

We also have problems in enforcing judgments from other states, from sister states. We get into questions of jurisdiction, principally whether the court has jurisdiction. So, you can see the complexity of the problem. I agree that these conferences are vital and very important. However, I think the goal should be to reach some kind of a treaty, a bilateral treaty that establishes some guidelines. Otherwise, we will be talking about this same problem for 50 years.

There are many decisions in the United States where our courts have recognized and enforced foreign judgments. The recognition of Mexican divorce decrees is one example. There are cases dating back to 1895 in which our Supreme Court enforced a judgment obtained in France against some U.S. citizens.

FACTORS CONSIDERED WHEN EXECUTING A FOREIGN JUDGMENT

Presently, the judge that is looking at the foreign judgment focuses on the question of whether the judgement comported with the notion of due process. Was there fraud in obtaining the judgment? Did the defendant have proper notice? I suspect that the only way we're going

to get any consistency in enforcing judgments, not only in the United States, but also in Mexico, is through a treaty.

RECOMMENDATION: Negotiate a Bilateral Treaty

I suspect that today, even if you comply with all the requirements of obtaining a valid judgment in Mexico and you come to the United States, or *vice versa*, that the bottom line is going to be, does that judge want to enforce that judgment? I am not impugning the honesty of judges. I think that most judges are not familiar with foreign law, or with the foreign system under which that judgment was obtained. Most have a natural reluctance to enforce a foreign judgment against a citizen of their own country. It is just natural. Unless there are some guidelines, I suspect that we will be talking about the same subject down the road, never arriving at a solution. So, I really think these meetings should continue. The goal of the meetings should be to create a framework for a bilateral treaty beginning with the suggestions that Professor Furnish has proposed.

FRANKLIN: I have learned a great deal more than you are probably going to learn from me. The only thing Boris forgot to tell me was that, since this is not New York, you don't have to dress like a mortician.

I have been involved with Latin American commercial, corporate and banking transactions for the past 15 years, principally in New York. I am a corporate lawyer. However, because I work within the Western Hemisphere, and have worked with a certain number of Latin American clients, both in the public and the private sector, I have become involved in several arbitrations. Today, I would like to focus on these.

REASONS FOR CHOOSING ARBITRATION

When I was taking a look at my files to determine the nature of the arbitrations and why they were arbitration proceedings rather than litigation, I came to the conclusion that they principally involved sales contracts for goods moving from, in the cases that I have worked on most recently, Mexico, Argentina, and Bolivia to Europe, to the United States, or to Canada. Some of them had to do with rather complicated construction contracts. In almost every case, the parties involved were either large multinational corporations or state entities of Latin American governments. So, I asked myself, why were these particular cases in arbitration? Why did these people elect to include an arbitration clause in their contracts rather than submitting their agreement to the jurisdiction of the courts?

I think that there are a series of reasons why large multinatonal corporations, for instance, or companies which trade a great deal with

Latin America, prefer to submit to arbitration rather than to the laws of a particular jurisdiction. In effect, most of these reasons have to do with the problems of the enforcement of judgments that we have been examining this afternoon; now I see Boris's reasoning in including the subject of arbitration in this panel.

OBJECTIVITY OF JUDGMENTS RENDERED BY FOREIGN COURTS

First of all, and this is not necessarily a very pretty theme, I want to remind you that the majority of my clients are Latin American. There is a great deal of concern about the objectivity of judgments rendered by Latin American courts and of the ability to obtain judgments free from political pressure.

As an extreme example of this, I should mention an entirely different kind of contract, the Euro-dollar loan. One of the largest U.S. banks came to a group of us two years ago. The bank had had so many problems in trying to enforce a loan agreement, especially in a remote city in Colombia, that they had decided to ask three different law firms in New York City to undertake a study of replacing the submission to New York law or English law that are customarily found in Euro-dollar transactions with arbitration clauses. After the study, they decided to stick with whichever law was specified in the agreement. Objectivity has been a problem, as has been the perception of bias, whether that bias is real or not. I think the conclusion the bank reached was that arbitraton was most appropriate in cases where elaborate or extensively complicated facts had to be determined. In most loan agreements, however, there is only one question to be determined: Is the amount due and payable?

ADVANTAGES OF ARBITRATION

Commercial arbitration affords the parties to an agreement the chance to determine mutually agreed-upon procedures. Under the rules of the International Chamber of Commerce (ICC) Court of Arbitration, for example, the parties meet with the arbitrators to determine the terms of reference of the arbitration. In Spanish, they call this the *acte de mision*. The *acte de mision* not only includes the issues to be established and the answers to be given by the arbitration, but it can also include procedural rules: rules as to whether cross-examination will be allowed and whether there will be documentary discovery. The field is open; the parties and their counsel can decide upon such matters with the arbitrators. In a commercial environment, that can often times be very helpful.

There is, of course, another series of reasons that is usually given for selecting arbitration. It is supposed that the cost is usually relatively inexpensive. It is also presumed to be a speedier alternative to adjudication in United States courts. As I mentioned before, these sales contracts usually involve complex facts. I have been involved with some that required a great knowledge of physics, which I certainly do not have; the expert witnesses had to go on for days. Thus, it is extremely important that the people acting as judges, the ones deciding the case, be familiar with the subject matter involved. Under the rules of the ICC or the American Arbitration Association, depending upon the clause used to select arbitration in the original contract, the parties have the ability to appoint one arbitrator each. These two arbitrators or, depending upon the rules involved, the court of arbitration, then appoint the third, chief arbitrator, the *intermedor*, as he or she is called in Spanish.

The final reason for choosing arbitration concerns the commercial reputation of the parties. Since reputation is an important element of international sales contracts, the parties feel that arbitration's lack of publicity and lack of a published record is quite advantageous. Take, for example, a Mexican mining company selling concentrates to an international trading company. In the mining business, the pricing clauses in contracts are quite complicated, and the amount of money that a trader is actually making can only be determined by someone who knows the market very well. It certainly can't be determined by looking at the contract. That kind of information is something that these companies want to keep confidential. They, of course, would prefer to avoid even arbitration.

The objectivity sought by the parties and the ability to settle upon the procedures to be used strike me as relevant to the problems of enforcement of decisions that we have been discussing today. If the commercial reputation of a party is important and if, therefore, moral suasion can be used in enforcement, then arbitration becomes a more secure means of reaching an enforceable award.

CHOOSING ARBITRATION RULES

I would like to mention two other items. As a lawyer, once you have made the decision to recommend arbitration to a client entering into a sales contract, you also have to decide which rules you would like to apply to the arbitration. Despite the fact that I have spent 15 years dealing with Latin American business, I have yet to see an arbitration take place under the rules of the Inter-American Convention. I have seen the International Centre for Settlement of Investment Dispute (ICSID) rules used; I have also seen United Nations procedural

rules used. However, the principal rules used are those of the International Chamber of Commerce and the American Arbitration Association (AAA).

ENFORCEABILITY OF ARBITRATION AWARDS

I think that if you compare the language in the ICC rules about finality and enforceability of the award with those set forth in the Inter-American Convention, you might see the reason that the rules of the Inter-American Convention are not favored. Article 24, Section 2, of the ICC rules says that, by submitting the dispute to arbitration by the International Chamber of Commerce, the parties shall be deemed to have undertaken to carry out the resulting award without delay and to have waived their right to any form of appeal insofar as such waiver can validly be made. The Inter-American Convention lays out a roadmap for opposing counsel to attack the award. Article 5(d) provides the means to attack the award procedurally on two grounds. First, it may be attacked on the grounds that the composition of the arbitral tribunal or the arbitration procedure was not carried out in accordance with the terms of the agreement as signed by the parties. In the absence of such an agreement, the award may be attacked on the grounds that the composition of the arbitral tribunal or the arbitration procedure was not carried out in accordance with the law of the state in which the arbitration occurred.

Let me give you one example of how this effort at trying to insure enforcement can backfire. I was involved in an ICC arbitration between a Spanish smelter and an exporter which was a state entity from Latin America. In that case, we didn't have a large multinational corporation on the buying side. The Spanish smelter was owned by the Marquez consorts, whose principal owner had borrowed a great deal of money from public and private banks in Spain. In order to stay alive, he sued the exporter in arbitration. We represented the respondent, the state mining company. The claim was for about $20 million; we counterclaimed for about $4 million. We won the arbitration according to the ICC rules under vague Spanish law. Spanish law was agreed upon, because it permits unilateral recision of contracts without going to court. The law of the Latin American country in question did not.

Despite the fact that the decision was extremely favorable, and despite efforts by several well-known Spanish lawyers to enforce it in Spain, I should note that we were dealing with a person with a great deal of political power and a great deal to lose. The award was attacked on the bases of the Inter-American Convention that I just ex-

plained. It took over two years to finally obtain enforcement of the award—by settlement.

AUDIENCE (question): How are validly recognized judgments executed in Mexico? Where do you go to seek enforcement? How do you get the judgment executed?

FURNISH (comment): Aside from listening to what the Mexican participants will tell you, Vernon Penner has written a chapter in a book called *Arizona Civil Remedies* dealing with that question. I would recommend that you read it.

ACUÑA GRIEGO (comment, translation by Kozolchyk): The procedure is rather simple assuming that you are beyond the stage of recognizing the validity: the judgment must be recognized as valid; it must also be the kind of judgment that involves personal property instead of one involving immovable property in Mexico, since that would be subject to a different regime. The claim must be liquid in the sense that its amount is easily ascertainable.

Enforcement proceeds to an attachment of the goods, an assessment of the value of the goods by a court-appointed assessor, evaluator or expert witness, and then to a public sale. In a variant thereof, an adjudication to the creditor is also possible.

FURNISH (comment): Let me point out that self-help via Uniform Commercial Code (U.C.C.) Sec. 9-514 is not available in Mexican law; hence, collection of the judgment must be done through a court proceeding. Justice Acuña Griego pointed out that, against the attachment procedure, you can only appeal the final decree ordering the foreclosure or the sale of the goods. Thus, it is subject to very few appeals.

SIQUEIROS (comment): I was involved in two recent execution of judgment situations in Mexico; although they involved arbitral awards from the United States and France, they pertained to the same phase of the procedure involved in an execution of a foreign judgment. Consequently, I would say that, with the exception that in matters involving arbitral awards, the United States and Mexico are parties to a multilateral convention, a situation which does not prevail in regard to ordinary court judgments, enforcing an arbitral or court judgment involves pretty much the same thing.

The first case involved an International Chamber of Commerce award in Paris, and the second dealt with an award issued by the American Arbitration Association. In the first case, the enforcement

of the award was objected to on the ground that the service of process was effected by certified mail. The Superior Court (Higher Court of Appeals) of Mexico City established that since the sentence was an arbitral award, and the parties had agreed to that particular procedure, the court would uphold the validity of service of process effected in such fashion.

One of the cases [*Presse Office v. Centro Editorial Hoy*] involved a rather interesting foreclosure procedure, because it involved pornographic materials. In the second one, the debtor was totally insolvent and nothing was obtained [*Malden Mills v. Hilaturas Lourdes S.A.*]

AUDIENCE (question): Would both of the Mexican panelists comment on the enforceability of a judgment rendered in the United States where service was pursuant to a long-arm statute. Also, could you comment about the enforceability of a default judgment in the United States against, say, a company in Mexico?

ACUÑA GRIEGO (comment, translation by Kozolchyk): My short answer is that the situation would be very problematic. In the case of an *exorbitante* type of jurisdiction, I would have troubles with the *exequatur* in Mexico because, in Mexico, service of process has to be personal. This requirement is strictly interpreted. I recognize that it is a rather formalistic criterion, but it is highly traditional and ingrained. So, I would see it as a highly problematic situation.

Also, in the case of a default judgment entered in U.S. courts, there were some older Mexican codes that specifically refused to recognize such U.S. judgments. The present trend, however, is to ignore that rule, since it has been assumed that it would be too easy and expedient for the defendant to flee to Mexico, thereby avoiding execution of the U.S. judgment. Without this view toward recognizing foreign default judgments, the defendant would be insulated from judgments.

SIQUEIROS (comment): One of the cases that I mentioned earlier, *Presse Office v. Centro Editorial Hoy*, was a default judgment. The defendant did not appear, nor did it answer the complaint. Hence, the arbitral award was rendered in default. I had two real problems to overcome: first was the fact that the judgment was in default; second was the fact that notification, or service, had been done through certified mail. Fortunately, as I mentioned before, the *exequatur*, the enforcement decree, was granted. However, the matter went through various appeals and recourses, all the way to the Superior Court. It is published in extract form, in case you wish to refer to it, in a volume published by Southern Methodist University [Matthew Bender] called *Doing Business in Mexico*.

Regarding the long-arm situation, I agree entirely with Justice Acuña Griego. As the Code of Civil Procedure of Sonora establishes in Article 480, when the sentence is rendered abroad, it may only be recognized in Mexico when the court rendering the judgment has jurisdiction or should have had jurisdiction in accordance with the general principles governing this matter. Unfortunately, the Code of Civil Procedure for the Federal District does not embody these same principles. I am critical of that fact.

The theory of jurisdiction that is followed in the Sonoran Code might be referred to as "jurisdiction in the international sphere." It is a very difficult term to define; it is going to be the subject of discussions at the Third Conference of Private International Law, sponsored by the Organization of American States, to be held in La Paz, Bolivia, in about two weeks. The Code of Civil Procedure of Sonora establishes that sentences rendered abroad may only be executed if they would be recognized in Mexico, assuming, of course, that the foreign court had proper jurisdiction over the matter. This is what is now known as "jurisdiction in the international sphere."

CASAD (comment): I am just trying to get caught up on this question. When we talk about long-arm jurisdiction it does not necessarily connote what is described as exhorbitant jurisdiction in the European Common Market sense. Long-arm jurisdiction could include a case in which a Mexican company sold a product that was defective and caused injury after it passed through several hands and was sold in the ordinary course of trade in the United States. Under the long-arm statutes of most, if not all, states in the United States, the presence of the product, if there was a regular course of trade over a period of time, would subject the company to jurisdiction under our long-arm statute. That would be true even though the Mexican company had no office in the United States. Now, would that kind of a judgment obtained in that kind of case be unenforceable in Mexico?

SIQUEIROS (comment): I do not think it would be enforceable in Mexico because it is long-arm in accordance with the state laws of, say, Texas. Take the case of Ixtoc-I, the Mexican well oil that polluted the coast of Texas. In that case, the action against Pemex, Mexico's state-owned oil company, was initially dismissed on the theory of sovereign immunity. Permargo, the other Mexican company, was a private concern and was considered subject to the long-arm jurisdiction of Texas because the oil spill had affected fisheries, hotels, resorts and other property within Texas. Therefore, Permargo was hailed

into the federal court in Houston to respond to those damages. Was this company really subject to the jurisdiction of the Houston court? The Houston Federal District Court held that it was subject to its jurisdiction and venue. However, if Permargo, the Mexican company, doesn't have any assets in Texas, which is where the sentence will be rendered, the problem becomes whether that Texas judgment could be ultimately enforced in Mexico. Would the Mexican courts feel that the long-arm statute of Texas really had sufficient grounds for establishing jurisdiction against a Mexican company that is domiciled in Mexico?

RISTAU (comment): I would like to make one comment occasioned by the use of a buzz-word by the person who initially posed the question. It is a buzz-word that is again beginning to create a great deal of havoc in other jurisdictions, namely the silly little term, *long-arm jurisdiction*, that we coined in this country. I cannot allow our Mexican visitors to leave here without explaining to you what long-arm jurisdiction is, so we will not have the same problem we did with "pretrial" discovery. In fact, you ought to take solace in the fact that the theory behind what we call long-arm jurisdiction, developed in this country within the last half century, is an adoption of civil law jurisdictional theory. We have moved away from traditional English common law which, 400 years ago, required either the arrest of the defendant or, later on, a symbolic arrest which took the form of personal service. We have now gotten away from this, and have adopted the civil law notion that personal jurisdiction exists primarily on the basis of a party's contacts with the forum. If you perform certain acts within the forum state, those acts subject you to the *in personam* jurisdiction of the forum. As a consequence, we no longer have to serve the defendant personally within the court's territorial confines. We can give the defendant notice any place; we can reach out with our "long arm" to give him notice. It is not a jurisdictional prerequisite, so please do not be fearful of long-arm jurisdiction. It is not something that the United States has dreamt up to harass our brethern in the civil law jurisdictions. It is your theory.