

MIAMI CONFERENCE SUMMARY OF PRESENTATIONS

Transcribed and edited by John F. Molloy*

I. OVERVIEW OF KEY CONCEPTS IN PRODUCT LIABILITY LAW IN LATIN AMERICA TODAY

Professor Mosset Iturraspe:

Professor Mosset provides an eagle's eye view of products liability law in Latin America. Eighty percent of the population of the area is located in seven countries: Argentina, Brazil, Chile, Uruguay, Mexico, Costa Rica and Colombia. Each of these countries has its own products liability law, with the law of some countries having influence on the others. The law of Chile and Mexico has less influence than that of the other five countries. Most of these Latin American countries have set forth their products liability law in their Civil Codes. Brazil represents the only exception by having separate legislation labeled "Law of Consumer Protection." In all of these countries, and especially in Argentina, judicial interpretation of the statutory law is becoming very important. There are two basic themes common to these laws: (1) the concept of "good faith," adopted from extant German law, which tends to strike down as subterfuge the practices of product distributors who attempt to avoid liability for defective products by distributing them through irresponsible subsidiaries; and (2) the concept that the "hypo-sufficient" consumer – the unsophisticated consumer – is entitled to protection from reservations of liability contained in invoices and the like.

In applying these broad concepts of "good faith" and the "hypo-sufficient consumer," the role of the courts becomes very substantial. This is particularly true in Argentina, where the doctrine or *doctrina*, provided by legal commentators, is of considerable importance. The Argentine legal system is sensitive to international developments and follows closely what is being done by UNIDROIT, the Institute for the Unification of Private International Law, now located in Rome, Italy. Furthermore, Argentina also follows legislation drafted by UNCITRAL. These international entities are creating *lex mercatoria*, an emerging body of commercial merchant law, which steadily increases in significance and helps to address issues arising from the globalization of businesses. However, *lex mercatoria* is only going to succeed in Argentina and other Latin American countries to the extent their respective public policies allow its implementation.

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The manufacturers' "development risk" defense, described by Prof. Hernández as a possible defense in products liability cases, could turn into a sword to be used against consumers. In the case of Latin America, it would seem to be unfair to permit this defense in an entirely exculpatory fashion because some companies see Latin America as a place where new products are introduced into the market for the sole purpose of testing them there. The question then becomes whether such a testing company should be able to escape liability simply by showing that the injuries caused were the result of a "development risk" in the product.

The second defense that is based on these notions of good faith and public policy is the "act of a third party" defense, which is frequently relied upon by defendants. Separate entities, such as subsidiaries and franchises, are created to distribute the untested product and are used as shields against claims. There has been a recent movement to impose joint and several liability on all participants in the chain of distribution.

Finally, the defense of an act of the plaintiff himself (comparable to the U.S. defenses of contributory negligence and assumption of risk) are affected by the principle of "good faith" in Latin America, particularly that one should not operate under the assumption that the consumer *wanted* to be harmed. The assumption should be that the consumer does *not* want to be harmed. Nevertheless, the defense is recognized in certain situations. There are cases in which the degree of information provided to the consumer is such that there could be no question that the use of a product was harmful (e.g., the consumption of cigarettes, alcohol, etc.). In such cases, warning labels have shielded several manufacturers from liability in Latin America. Additionally, consumer protection statutes in Argentina took a very significant step in equating latent and patent defects. The Argentine Consumer Protection Statute no longer contains a dichotomy between latent and patent defects.

Do other courts in Latin America rely on or are they influenced by the decisions of Argentine courts in the area of product liability? Sadly, this is not the case. Latin American countries are very nationalistic with regard to judicial decisions. Even Argentina's immediate neighbors, such as Uruguay, do not follow our decisions. These other countries have their own sources of law. The same policy is enforced in Brazil. In trying to arrive at uniform laws in MERCOSUR, we have been unsuccessful on an individual level, because each country's legal tradition is considered to be unique and strongly rooted in public policy. Therefore, very little is accomplished with respect to judicial uniformity.

II. OVERVIEW OF LATIN AMERICAN COURT SYSTEMS AND PROCEDURES, WITH AN EMPHASIS ON ARGENTINA

Lic. Alberto Molinario:

Latin America is composed of over fifteen sovereign countries that have similarities and differences. Several differences can be found within each sovereign entity. As an example, I will explain briefly the procedure in my country, Argentina, where I actively litigate. Argentina has a population of thirty-seven million, and is comprised politically of twenty-three provinces plus a federal district; its geographical area covers over 2,700,078 square kilometers, and Argentina's annual GDP per capita is approximately \$9,000. Argentina is a Federal Republic. For all of you that are familiar with the American system, you will find something quite similar in Argentina. Why? The founding fathers of our country took inspiration from the U.S. Constitution. Thus, our system evolved in the same way as the U.S. system in that states, which we call "provinces," existed before the federal government. These provinces got together in a Congress and adopted a constitution. In contrast to Argentina, the governmental structure in Brazil, although also a federal republic, evolved in a different fashion. Brazil started as a monarchy, an empire, and turned into a federal republic.

Argentina has a federal government and provinces, each with its own constitution. We have a total of twenty-three constitutions. The national government is composed of the executive branch, headed by the president, and the legislative branch. The legislative branch is represented by the National Congress, with both a House of Representatives and a Senate. The judiciary consists of trial courts, courts of appeals, and a federal supreme court. The provinces are similar to the federal government in their governmental structure. The executive in each province is headed by a Governor. The legislative branch has one or two chambers, depending on how recent the constitution of that particular province is. The older constitutions provided for two chambers, but this has been changed recently to a uni-cameral system. The provincial judiciaries are comprised of state supreme courts, courts of appeal, and the trial courts.

Argentina is a civil law country and the courts are not empowered to create law, but merely to interpret statutory law. Argentine tort law is derived from the French Civil Code of 1800, or "The Napoleonic Code." The French Civil Code was the main source of our 1871 Civil Code. The French Civil Code essentially remained in its original form, with some amendments that have been introduced over time to update certain areas. Provisions pertaining to tort, real estate, and family law are some areas that have changed since the 19th Century.

We have laws enacted by Congress and regulations passed by administrative authorities. The role of the courts is to apply these laws. We do not have, as in the U.S. legal system, judge made law. Although legal reports exist, they do not include all court decisions, but only those considered of interest by the publishers. Furthermore, we do not have punitive damages; it is against our

legal thinking, up to this day, to award them. Although Argentina is a federal country, *all our basic law is national, enacted by the federal Congress*. The federal constitution provides that the Congress shall enact the Civil Code, the Criminal Code, the Commercial Code, the Bankruptcy Law, etc. These statutory provisions rule throughout the country and are applied or enforced by the authorities in the provinces (including the judiciary of each province). For our legal system, the opinions of legal writers are very valuable and normally carry more weight than court precedents. The opinions of European legal writers from other civil law countries, such as France, Italy, Spain, and Germany are also very important and sometimes relied upon by Argentine courts.

Argentina's federal Supreme Court is composed of nine justices, appointed by the President with the consent of the Senate. Originally, there were only five justices, but an amendment to the law in 1994 increased the number of justices to nine. Our judicial system does not provide for juries. Judges in the Federal Court of Appeals and in the lower federal courts used to be appointed by the same procedure as Supreme Court judges. Now, there is input from the judiciary regarding these nominations. The judiciaries of the provinces are similar to the federal judiciary in many respects. First, there are lower courts and courts of appeal. In certain venues, so-called collegiate courts are formed by more than one judge. This is the case in several jurisdictions within the province of Santa Fe. Ordinary appeals in Argentina are sent to the court of appeals, which applies both to the federal and provincial judicial systems. In some cases, the decisions of the court of appeals or of a provincial supreme court can be appealed to the Supreme Court of Argentina, *i.e.*, when there is a federal matter, or when a claim is based on a constitutional violation. Such an appeal renders the decision of the court of the province null and void.

Product liability law was enacted by the federal Congress. In 1994, Section 42 was incorporated into the Constitution, which provided for consumer protection and the right to information. The Federal Code of Civil and Commercial Procedure is applied by federal civil courts, and Federal Criminal Procedure is applied by federal criminal courts. The legislatures of the provinces pass the procedural law that regulates procedure in each province, such as the Codes of Civil, Commercial, and Criminal Procedure.

Product liability cases are subject to two different kinds of procedure that cover all civil cases: the "ordinary procedure," and the "summary procedure." Despite the fact that we have twenty-three provinces with twenty-three different procedural codes, plus the federal code, they are all very similar. In the provinces, the Federal Code of Civil Procedure has been the template that many, but not all, of the provincial procedural codes have followed.

In our judicial system, the competent court for product liability cases is the court with territorial jurisdiction over the place where the tort took place, *i.e.*, where the injury occurred, or the location of the defendant's domicile. The plaintiff is entitled to choose between these two if both jurisdictional principles apply in a specific case. In such a case, the plaintiff elects whether to sue in the

place where he suffered the damage or where the defendant-manufacturer, seller, or distributor is domiciled.

Argentine courts do not provide assistance to pre-trial discovery proceedings ordered by foreign courts, although Argentina, as well as the United States, has ratified the 1970 Convention for the Production of Evidence Abroad. Argentina and many European countries made a reservation with respect to the pre-trial discovery provisions of this Convention. Despite these limitations, if both parties may agree that evidence may be discovered in Argentina. I know of cases in which the pre-trial discovery was conducted privately with the assistance of lawyers for both parties, and sometimes with the assistance of civil courts in the City of Buenos Aires.

Argentina does not allow class actions. This position is in sharp contrast to the law of Brazil, Peru, and several other Latin American countries. In Argentina, the possibility exists to have multiple-party plaintiffs or defendants joining in litigation, and third parties may be called into a lawsuit in order to make a final decision.

The losing party pays judicial costs. In Argentine Federal Courts, “costs” are three percent of the amount of the claim and both parties’ attorneys’ fees. Also included in “costs” are the fees of court-appointed experts, the expenses incurred by the court, and the expenses of the parties in presenting the case in a reasonable manner before the court.

Regarding the burden of proof, the 19th century principle was that each fact must be proved by the party alleging the fact. Therefore, the plaintiff was required to prove the damage suffered and to establish a causal relationship with the defendant’s conduct. There since has been an evolution in the standard for the burden of proof. The burden in tort cases, according to Section 11.13 of the Argentine Civil Code and Section 14 of the Consumer Protection Act, is determined according to which party is in the best position to produce the evidence. For example, let us assume that we have a defective tire case; the plaintiff is suing because the tire exploded, causing him to lose control of the vehicle, resulting in an accident. According to the new Argentine doctrine, since the defendant-manufacturer of the tire or car is in a better position to show that the tire or car was not defective, evidence of non-defect must be produced by the defendant.

The pleadings, of course, consist of a complaint and a response. The complaint must be served at the defendant’s domicile, if the defendant is an individual. If the defendant is a company, then the complaint must be served at the registered domicile of that corporation. After the complaint has been served and answered, the production of evidence, the closing argument before the trial court, and then the court’s decision follow. The complaint and the response must contain all the relevant facts. In these pleadings, an attorney may include new parties. The argument between plaintiff and defendant is strictly limited to the contents of the complaint and the answer. All documentary evidence must be produced together with these pleadings or, at least if not in the possession of the

party, identified in these filings. Subsequent to the pleadings, the only way to include additional documentary evidence is by arguing that the evidence is after-acquired or that the producing party had no knowledge of the evidence at the time of the filing. In summary proceedings (as opposed to “ordinary” proceedings) the opinions of fact witnesses are of no value. Witnesses will only be able to testify about what they saw or heard.

Court-appointed experts provide expert opinions. Court-appointed experts are paid by the losing party. Although their reports are not binding on the court, they help inform the judge regarding matters not of common knowledge. Unlike the U.S. practice, there are no party-selected experts. Third parties who have medical records or documents related to the lawsuit may be requested to produce them. No party is required to provide opinions, but only to provide documentation or information it is able to produce. If a party offers evidence, the other parties are entitled to object to the evidence offered; the court subsequently rules whether the objection is proper. Trial court rulings denying the introduction of specific evidence may be appealed.

All oral testimony should be given at the courthouse, *sometimes* in the presence of the judge, although this normally does not happen. The judge is seldom present during these proceedings. Rather, judicial clerks are present. A record of testimony, not verbatim, is taken and the clerk determines what he/she considers to be important in the declarations of the witnesses. Thus, a trial lawyer must be careful to ensure that the essence of the testimony is documented, because the judge will read the deposition and derive conclusions from the clerk’s summary.

After the evidence is produced, the parties can file a brief with closing arguments. The purpose of this single brief is to summarize all the evidence produced and to argue that the pleading party has met its burden to prove or deny the allegations made in the pleadings. Neither party has the chance to answer the other’s filing. After the briefs have been filed, the court has between thirty and forty days to decide; forty working days in the case of “ordinary” proceedings and thirty days in the case of “summary” proceedings. A court’s decision is in writing and must contain an analysis of the case. The written decision must consider and decide all of the claims filed. If the court fails to comply with these requirements, the decision may be considered null and void on appeal.

These decisions also determine the fees of the attorneys and which party is going to bear the costs of the proceeding. As previously explained, the losing party usually bears the costs. In some cases, the court might decide that each party will bear their own costs. The court may also determine that fee-splitting is the appropriate solution, such as when the losing party had justification to bring the lawsuit because the case is very difficult or there is insufficient statutory law on the contested matter. In addition, there can be a request to litigate without court costs for individuals who do not have the means to pay. Such persons may be allowed by the court to litigate without paying the costs of the proceeding.

Parties can appeal almost any kind of decision within five days from notice of a decision. The arguments on appeal must be filed within five or ten days depending again upon whether the procedure is ordinary or summary. Parties are allowed to reply to the other party's arguments. The court of appeals must rule within fifty or sixty days. The appellate decision should resolve only the issues appealed.

There is a mandatory mediation procedure prior to starting a lawsuit that applies only to the courts of the City of Buenos Aires, to state and federal courts in that city, and to several federal courts in the country.

III. COMPARING AND CONTRASTING U.S. PRODUCT LIABILITY LAW, PROCEDURE, AND PRACTICE

Sara D. Schotland:

Procedural aspects of the U.S. product liability litigation climate are very different from the Latin American model. I will touch on a "baker's dozen" of differences between the U.S. and Latin American systems, and say a few words about some of the procedural aspects that may not be obvious. You all know about the notorious U.S. jury system. I do not recommend that you advocate this system for your countries, because it is the primary source of very, very high damages. One of the reasons for the high damage awards is the possibility of juries awarding damages for pain and suffering. In other words, damages awarded upon a finding of strict liability can include not only medical expenses, lost wages, future lost wages, and future costs of medical care, but also dollar amounts for past and future pain and suffering. In most states, the sky is the limit on the amount of pain-and-suffering damages than can be awarded as compensatory damages.

This brings me to the point that plaintiffs' attorneys in the United States often receive their compensation under a contingency structure, which can range from thirty to forty percent of the amounts recovered. This compensation becomes very, very generous in a class action setting because of the multiple plaintiffs who individually may have received very little, but collectively, there is a very large amount to be portioned off among the plaintiffs' lawyers. In such a case, the plaintiffs' lawyers may not do much more work on ten cases, or on a hundred cases, or on a thousand cases, than one lawyer might do on a first or a second case. Contingent fee compensation is the result of the fact that we have the most talented and aggressive plaintiffs' bar in the world. It is not unusual for plaintiffs' attorneys in our country to make seven figure or eight figure dollar compensation, year in and year out. However, in U.S. practice, attorneys' fees are not charged against the losing party as in Latin American practice.

Another aspect unique to the U.S. system is the extent of our "discovery." Discovery is obtained by written interrogatories, depositions, and the requirement to produce documents and other materials. Discovery can benefit both plaintiffs

and defendants. In the typical products liability case, the plaintiff's attorney seeks discovery against corporate defendants in order to determine what they knew about a risk and *when they* knew it. This is part of the plaintiff's effort to cause jury anger and possibly to obtain punitive damages.

Plaintiff's counsel conducts discovery of the defendant's files in order to demonstrate how much was known about a risk. For example, if an engineer has written a memorandum to an officer of a company saying: "I am worried that the gas tank is located too close to the steering wheel; what happens if there is a certain kind of collision?" If that memo is ignored, and there is evidence that safety features were not implemented in order to save costs, such evidence would obviously be grist for plaintiff's attorneys. However, defendants can also make good use of discovery. They are often able to show that while today the plaintiff complains that all of her injuries are due to the defendant's product, in fact a lot of her injuries may be due to prior incidents, such as skiing accidents, automobile accidents, a prior disability claim, or that her current distress may be the consequence of personal unhappiness or depression that pre-existed her consumption of the defendant's product. Thus, discovery is both a sword and a shield, and is aggressively used by both plaintiffs and defendants.

As you also have probably heard, we litigate at trial through the use of party-appointed experts, as opposed to neutral, court-appointed experts as in Latin America. There is often a battle of experts with respect to issues, such as whether the automobile design was safe, or whether a particular change in a company's manufacturing process contributed to product-defect. We all hear about the high punitive damages in the U.S. litigation system. Together with the high compensatory damages awarded, including those for pain and suffering, punitive damages are certainly a very significant reason for the high cost of doing business in the United States.

The availability of punitive damages is notorious. Over the last fifteen years, awards have gotten out of hand both in individual and class action cases. In my own observation, the problem with punitive damages is not so much that they are routinely awarded, since many defendants in individual cases are able to avoid a showing of clear *and convincing evidence of gross* or willful *negligence*. The problem arises when punitive damages do accrue; they are out-of-sight. In Texas, there have been awards of one and two hundred million dollars in punitive damages. Indeed, in the extreme cases, as in the tobacco litigation, we see juries awarding a hundred million dollars at a time. These punitive damages are simply unreasonable. When punitive damages are awarded in one case, plaintiffs are encouraged to go after punitive damages in another case, and the very *same conduct* of the defendant may be subject to repeated punishment.

We have no good system for mediating those awards. One system that we do have is the system of review by the trial judge. A defendant faced with an exorbitant punitive award can obtain a remittitur from the trial judge. Defendants can also appeal, and certainly state supreme courts are much less likely to allow high jury awards to stand. It is one thing to punish the maker of Dalcon Shield in

the first case, and maybe in the tenth case, but in the one hundredth case you may bankrupt the company before you get to the five thousandth plaintiff who is waiting to recover. This is what actually occurred in the Dalcon Shield breast implant cases. The early awarding of punitive damages bankrupted the company and left others uncompensated. This is something that we have not adequately addressed in our legal system.

Another feature of the U.S. litigation climate is the inconsistency between the various states. If concurrent proceedings, involving the same parties and the same subject matter, occur in multiple jurisdictions, it is difficult to predict what individual courts will allow. There are some novel theories. Plaintiffs are now trying to recover damages for having acquired a fear of contracting a disease, or a *fear* that a medical device might fail, or a fear of cancer from an exposure to a product. Plaintiffs are attempting to recover medical monitoring costs. State courts differ very much in their acceptance of such claims. A novel set of plaintiffs in the United States are the state and local governments seeking reimbursement for health care costs provided to their citizens by suing insurance companies. This began with lawsuits against the tobacco companies with state attorney generals seeking recovery of costs related to the care of those who had allegedly sustained tobacco related injuries. This novel theory has spread to a variety of other product liability litigation. Again the courts will very much differ on the receptivity to these theories.

Class actions are a very well publicized aspect of U.S. litigation procedure. Class actions can allow individual claims to be brought that, standing alone, would be too small to merit litigation. From the defendants' standpoint, class actions are both under and over inclusive. The over-inclusive aspect comes from the fact that class action aggregate, in a single trial court, multiple lawsuits raising common factual and legal issues. This means that a class action may allow plaintiffs with very minor injuries to get into court, who otherwise would not have litigable claims. At the same time, and this is the under-inclusive aspect, the class action procedure in the United States is not mandatory. For instance, one of the problems the defendants had in the breast implant litigation was that they found the most seriously injured plaintiffs *elected out* of the class and elected to pursue their own actions, particularly in states like Texas, which are very generous to plaintiffs. Consequently, whatever the amount the defendants offered by way of settlement in the nationwide class action was insufficient, and eventually the defendant could not withstand multiple suits in multiple forms. In other words, having a class action does not stop individual suits.

With respect to the election of judges in our state court system, the majority of state court judges are elected – a fact that has led to many problems at the trial court level. There are natural pressures on these state court judges to be generous in their treatment of plaintiffs' attorneys, some of whom have contributed to their campaigns or have even managed their campaigns. You can tell that you have a defense attorney talking to you. There is nothing illegal about these contributions. How much money an attorney, or anyone else, has

contributed to a state court judge's election campaign is often on file in the secretary of state's office of that particular state. Therefore, a judge can see who has helped him or her in the last election and plaintiffs' attorneys tend to be very generous contributors. This has meant that plaintiffs' attorneys can do very well in state courts. Defense attorneys generally try to get their cases into the federal court system where they hope to have a more impartial forum.

In defending a product liability case in the United States, it is very important to have a very sophisticated settlement strategy. This is not a "how-to" seminar, but it would be remiss not to mention settlement, given that ninety percent of cases settle in the United States. Settlements involve an assessment of the strengths and weaknesses of the individual plaintiff's claim. It also involves an evaluation of the potential jury verdicts in particular jurisdictions, which differ wildly. Furthermore, an adequate settlement strategy requires an evaluation of the particular judge who has been assigned to your case and of the verdict history of the particular jurisdiction. Settlements are increasingly facilitated in the United States by the use of mediation and by the use of arbitration. I strongly recommend to those of you who are involved in litigation in the United States that you make sure that your counsel is focusing on settlement as a way to reduce costs and to reduce exposure to a very high verdict. Professional mediators are now available.

In some instances, Magistrate Judges can be used as mediators and settlements result, which are part of the solution to the problem we have in the United States with verdicts spiraling out of control.

IV. JURISDICTION, SERVICE OF PROCESS, AND ENFORCEMENT OF JUDGMENT ISSUES IN ACTIONS AGAINST U.S. COMPANIES OR SUBSIDIARIES IN U.S. AND LATIN AMERICAN COURTS

William D. Wood:

In some countries, different branches of government have different opinions about whether cases ought to be brought to the United States, as in the tobacco, banana workers, and environmental/shrimp cases. Sometimes, members of the executive branch, *i.e.*, ambassadors, have written letters to U.S. courts and the U.S. State Department protesting that the United States should not address these claims because, as a matter of national sovereignty, these foreign countries want to handle such matters themselves. Other branches of the government, the legislature for example, may enact laws that attempt to prohibit U.S. courts from handling these cases. I will touch on a few scenarios here that will hopefully help you to understand some of the nuances.

Forum selection clauses address questions such as: "How do we protect ourselves from the occurrence of multiple proceedings or from the danger of being subjected to a lawsuit in a distant forum? How do we remain comfortable when we sell a product, or manufacture it and put it into the distribution stream, that we

will be treated fairly in another country?” I am familiar with Texas state practice; however, I am not particularly familiar with Florida practice. As in any business, you may be very familiar with your regulatory environment and your own business climate, but you are not comfortable that you will be treated fairly in another country. This is a business management risk that has to be weighed. Forum selection clauses typically would not be implicated in a personal injury action because the action is between the consumer and the supplier; thus, there is normally no contract to govern this tort, and there was, therefore, no opportunity for a forum selection clause.

Now, interestingly, Dr. Hernandez said that in some countries the very act of stepping on to a bus and giving your ticket is deemed to be an implied contract. Such a concept merges contractual and extra-contractual law, but, of course, unless the ticket has a lengthy forum selection clause, this is not going to help you either. You might ask, why are you wasting my time talking about forum selection clauses? Let me just suggest to you that in making your agreements, your franchise distribution agreements and the like, that you can negotiate for forum selection clauses in these agreements, just like you can negotiate for arbitration clauses. The question remains, what do forum selection clauses have to do with a product liability personal injury case?

Well, the claimant’s lawyer is typically not just going to sue a single company. If the claimant’s lawyer only sues one company, then be assured that, depending on strategy, the defendant company that is sued is going to bring other defendants into the litigation. For example, if I just sold a product, I am merely an innocent retailer. If I am being sued, I will immediately try to join the wholesaler, the distribution company, the exporting company, the transporting company, the manufacturer, or the research company as a party to the lawsuit. There are any number of defendants in the upstream chain. It is very likely that there were contracts negotiated [between these various entities] and therefore forum selection clauses may be helpful.

But you might continue to ask: “How are we going to wrap up a plaintiff in one of these forum selection clauses?” Well, you can often assert arbitration clauses, depending on the language of contracts between these suppliers, to bring in not only claims that were perhaps not originally contemplated but also, for example, tort claims against non-signatories to the arbitration agreement. I am not suggesting that this is ordinary or commonplace. I am merely giving you a possible creative solution to a vexing problem.

Think about your contracts with the people with whom you do have negotiations and the opportunity to bargain regarding your forum selection clauses. By and large, depending on the jurisdiction, they could be enforceable and that is precisely why you need competent counsel in Latin America, and certainly in the United States, to assist you in navigating through those enforceability issues. Regarding this point, I have to comment on an interesting development. Several creative lawyers have actually brought cases in the United States on behalf of Latin American claimants, even though they knew them to be

classic candidates for forum non conveniens dismissals, in order to get the judge in the United States to dismiss it but at the same time impose conditions upon the defendant, such as acceptance of service, jurisdiction, and judgment enforcement. This represents a long-term litigation strategy to help meet some of the practical difficulties that may be encountered in Latin America.

In the United States, the enforcement of judgments is in the purview of the States, and many States, with some variances, have adopted the Uniform Money Judgment Recognition Act. The most “uniform” feature I can comment on regarding the enforcement of foreign judgments is that U.S. courts will not enforce a judgment if it can be shown that this judgment was obtained through procedural or substantive infirmity. Consequently it is not the end of the world if you have a judgment rendered against you in a foreign country if you can prove that it was not obtained under the protections of due process and other fundamental protections recognized by our courts.

In Latin American countries, there are bilateral treaties and multilateral treaties that govern the enforcement of foreign judgments [treaties to which the United States is not a party]. Ultimately, however, I think you will still have to turn to the domestic law of each country in order to determine the various elements that will have to be met to enforce a foreign judgment. In the international conventions, you will find a sense of distrust. There is a sense of: “Well, you have to prove that this was really obtained with all the procedural protections that our country would use,” with “our country” being the country where the judgment is to be enforced. Finally, on the enforcement of judgments, the most important issue an American-based company has to consider when facing a class action or a multiple-plaintiff product liability action, one that we are *not* going to settle but we are going to try, is the question whether a win in the United States would prevent Latin American plaintiffs from suing in another country. The answer to that may well be “no.”

If you do decide to settle the case, it is also pertinent that your paper work is well prepared and that the settlement agreement precludes all future claims arising out of the particular cause of action. Sometimes, these agreements do not have extraterritorial effect. If you make a contract of release, then be assured the paper you prepare is done in such a way as to prevent this kind of a debacle. I am not going to address the issue of personal liability of directors and officers in-depth. Rather, I will simply say that I am not aware of that issue coming before Latin American courts. However, it is an important issue in the United States.

You must be aware of the possibility that your client may be involved in an environmental crime and may have no knowledge about its existence. Whether the individual has knowledge about the crime may not make any difference to the Department of Justice. Therefore, we must be concerned with managing these risks for our clients, and managing the risk for yourself and for those who are officers and directors of companies. From administration to administration, these things become potentially serious and the enterprise must have a good compliance

program. For example a foreign corrupt practices act compliance program, an antitrust program, or environmental law compliance program should be in place.

V. PRACTICAL ASPECTS OF LITIGATING PRODUCT LIABILITY CLAIMS AGAINST U.S. COMPANIES OR SUBSIDIARIES IN THE COURTS OF LATIN AMERICA

Joint presentation of Luis Pérez and Luiz Migliora

A. Director's Criminal Liability

Luis Pérez:

I am going to make some general remarks with respect to the law of Latin America. It is well known that every jurisdiction in Latin America is different not only regarding their procedural law, but also their substantive law. Therefore, some of the general remarks might not necessarily apply to one given country in Latin America.

As a continuation to the presentation by Mr. Wood, I will pick up on the theme of director's liability – a theme that may be near and dear to some in the audience who represent officers and directors of companies, or who may themselves be officers and/or directors. My experience in Latin America has been that there is liability for officers and directors, depending on the jurisdiction. I can certainly speak for Argentina and Venezuela in the environmental arena. In these countries, I had clients that were subjected to *criminal* prosecutions as directors of companies, which were charged with violating environmental regulations.

In Argentina, plaintiffs apply pressure in going after specific individuals. Piercing the corporate veil and getting through to the individual is a way of grabbing someone's attention. In Latin America, there may be a little more use of naming officers and directors in suits than in the United States, where the corporate shield is used to keep officers and directors out of litigation. Suing officers and directors is a strategy that is effectively used in Latin America to apply pressure on companies. Keep in mind that in Latin America, as in the United States, most plaintiffs' counsel are financing the suits that they are prosecuting themselves. It is certainly in their best interest to try to bring those suits to a prompt and successful resolution. Any pressure that they can bring to bear on the company is something that can precipitate an early resolution of the suit.

Luiz Migliora:

We can divide Brazilian law and practice into two areas. In the criminal area, its characteristics are basically as you have described, Luis [Pérez]. Officers and directors can be criminally prosecuted; I usually prosecute cases involving violation of consumer law or environmental law. It has become popular in Brazil to have prosecutions by what is called Health Surveillance, a Brazilian federal entity, equivalent to the U.S. Food and Drug Administration.

Whenever you put a product on the market without it being properly registered with the Ministry of Health, the person and/or company marketing the product can and will be criminally prosecuted. In Brazil, and as I understand, in most of the other countries in Latin America, criminal lawsuits can only be prosecuted against individuals. When the criminal charge is filed, prosecutors will find out who within the corporation is the officer responsible for the area related to the crime committed, *i.e.*, to the bad product, or to the consumer violation, [and will charge those persons].

Shifting to the civil area, suing officers and directors for damages is only possible when the victim seeking recovery of damages can prove that the targeted officer/director engaged in a fraudulent act. The typical example is a company that becomes insolvent and the creditor is able to prove that an officer of that company, in a fraudulent way, transferred assets to another company, or to himself.

B. Selection of Local Counsel

Luis Pérez:

My perspective is from the defense side. Luiz [Migliora's], I believe, is as well. We both have represented multi-national companies, typically U.S. companies doing business abroad, sued in a products liability or similar tort claim. The first question, of course, that one of these companies needs to address is: "When do I turn to my U.S. international counsel? And, why do I even need U.S. international counsel to help me manage this litigation that I may be facing abroad. Maybe I can just pick up the phone, look at the listings of the law firms, and pick the biggest firm to represent me?"

My experience is that most companies take what I consider to be the more practical and prudent view by hiring U.S. counsel to orchestrate multi-jurisdictional litigation that they might encounter throughout the world. As U.S. international counsel for these companies, we certainly try to come up with a defense team that we will use in the suits no matter where they are filed, taking into account that each jurisdiction will have certain peculiarities that we need to adjust. The selection of the defense team is something we conduct in conjunction with the particular company and with their in-house personnel in order to

determine who is to represent in the respective jurisdiction where we are confronted with this type of litigation. In addition, to help companies come up with a defense team, we, of course, are going to help the company select foreign counsel that will assist them in defending these suits.

The selection of local counsel in a specific jurisdiction is tricky. The U.S. type law firm is non-existent, for the most part, in Latin America. You are not going to find a large firm that has multi-disciplinary groups that can cater to all needs of a company, ranging from intellectual property law to litigation, to labor law, and everything in between. Typically, what we have to do in jurisdictions that are not “major economic powers” in Latin America is to assemble a team of law firms or attorneys that will serve as local counsel. Most of these companies that have been doing business abroad for a certain time will have their general corporate counsel in place; the in-house corporate counsel generally has an intellectual property element to it, but they typically will not have litigation specialists.

Litigation, as we know it in the U.S., is very different from litigation in Latin America. In Latin America, lawyers and/or their assistants must go to court every day to make sure their files are moving and that their documents are not getting lost, essentially shepherding the case through every stage of the proceedings. This is something that has to be done on an almost daily basis. Our role as the international counsel is sometimes to assemble the teams that are going to be the defense team locally for these companies. The other thing that we do, of course, is to train local counsel in what will be our defense themes and our defense strategies. Local counsels have their own views, which are always welcome. I am very appreciative of these, especially because they are the experts on the procedural and substantive laws in their *own* countries; however, what we are trying to do is to harmonize a position that the company is going to have, not only in a particular country, but sometimes throughout the region and sometimes throughout the entire world. We cannot always let overly enthusiastic local counsel determine how to best proceed with the case according to the peculiarities of their own jurisdiction. We have to adapt to the particularities of each jurisdiction, but we generally need to develop a defense theme, transmit this theme and defenses to local counsel, and work with them in presenting such defenses when we are confronted with litigation abroad. In addition, we provide oversight and supervision of all ongoing litigation.

Luiz Migliora:

I think it would be interesting to take the perspective of a local lawyer working with a foreign lawyer during the coordination of the litigation work. The usual reaction in approaching such cooperation is that the local lawyer tends to feel that the U.S. attorney does not have much to contribute to the process, and views his presence as an additional cost since the client is not familiar with the

local culture. When local attorneys start working with U.S. lawyers who are familiar with litigating outside the U.S., they will soon realize that the U.S. counsel actually significantly contributes to achieve an improved final product. It is common to face considerable friction when you start working with a local lawyer in another country, especially if this lawyer has not been exposed previously to this kind of cooperation. He or she often feels that the foreign lawyer is trying to teach him how to do his or her job. It helps if the foreign lawyer has experienced such a situation before and knows to be very careful in dealing with the local lawyer. It is a delicate situation that can turn into a big success if the international and the local lawyer can get along and work together. It can be a disaster if the opposite happens.

C. The Importance of a Personal Relationship

Luis Pérez:

One of the points that I would like to stress, when working in collaborative fashion with foreign counsel, is the benefit of meeting with them face-to-face on a regular basis. In the United States, we tend to depend too much on faxes, phone conversation, voice-mails, and video-conferencing. In Latin America, we have to be cognizant that personal relationships are extremely important, and this is the only way to build ties between North and South. Your client may be a little bit concerned about the costs, but the additional expenses are well spent. Meet with your client and with local counsel, bring them to the United States, and keep them in the loop as much as you.

I would like to discuss specific tips that might be helpful. The first thing that I learned in doing business in Latin America is that they have a completely different approach to litigation than in the United States. In Latin America, lawyers tend to look more favorably on an extra-judicial resolution and to try to settle the case, as well as to try to reach some agreement with the other side. Let us talk about it, let us find a way we can settle the case before it gets too expensive, before we involve the courts, before we get too far along in the process. United States companies, it seems to me, have a completely different attitude when they go to litigate in Latin America. Sometimes I have seen corporate officers take the approach: “How dare they sue me? How dare they bring me to their forum and bring a claim against me in Latin America? On what basis are they suing me?”

The first thing that I think we have to convey to our corporate client is: “Put that thought out of your head. Let us not get caught up in this emotional baggage that is not going to be helpful.” You need to understand that many clients get upset when we talk to local counsel, and local counsel’s first words were: “Let us sit down with the other side and see if we can settle.” There are some cases that cannot be settled. The corporate reputation, the corporate image of the

company, the product, or of the business strategies may be on the line, and such cases are not going to settle. We need to understand that we are going to be confronted in Latin America with: “Let us try to settle;” meanwhile our attitude from the north may be: “Let us engage in this fight.” We need to reconcile these two positions, and understand that that is the first hurdle we will encounter when litigating in Latin America.

Luiz Migliora:

It is a different game when you start litigating in Brazil. Settlement is something that is usually initiated later in the process. It is very difficult, and very unusual, to have a case settle at the very beginning. That is culturally accepted. You usually can expect your complaint to be answered. It is very unusual to start considering a settlement in Brazil before you have at least the first response. If you have a client who is uneducated in litigating in Latin America and faces a potential claim in Brazil, that client may sometimes be eager to start settlement negotiations. We have to make sure they understand that settlement negotiations sometimes will not be productive. Most of the time, that is precisely the case.

D. Ex Parte Communications

Luis Pérez:

Let me talk a little bit about some of the major differences that exist between the U.S. and the Latin American systems of litigation. In Latin America, for the most part, there is no jury. All cases are tried by a single judge and that judge has complete and absolute discretion over the case. You need to get used to the fact that in many jurisdictions of Latin America, the judge may be transferred and you may need to start with a new judge, possibly several times. My advice is to build a relationship with the judge and the court personnel.

One thing that blew my mind when I first started doing work in Latin America was when I was talking to my local counsel, and he said: “I have a meeting with the judge in a few minutes; I am going over there to talk with the judge to discuss our case.” My question was: “Do you have a hearing? Is there a motion set for hearing? Is there something going on?” He answered: “No. I’m just going to go down to the courthouse to try to catch him between proceedings or in between hearings. I’ll sit down with him and have a cup of coffee and talk to him about the case and try to educate him a little as to what our case is all about.” I asked him: “The other side is going to be there, of course?” He responded: “No, absolutely not, it’s just a one-on-one with the judge, sitting with and talking to him.” This practice, of course, initially shocked me. It still surprises my clients when I tell them that local counsel is on his way to meet with the judge and have a

cup of coffee. That is the way business is done in Latin America. It is expected and legitimate, there is nothing unethical or illegal about it. Keep this in mind: just as you are doing it, the other side is doing it too.

Luiz Migliora:

You are referring to an important difference. There are practical reasons for these contacts, arising from the method of pleading and proof. If you go by the law, all of our pleadings have to be in writing. You have very few occasions when hearings before the trial judge occur, or when you will personally address the court of appeals. Strictly speaking, you should not see the judge, but as a matter of practice, you do, because it does not hurt if you know how to do it. Judges are usually alone in their chambers. They like to receive a nice visit, have a cup of coffee, and talk about something. However, you must be very careful not to be too pushy and not to approach the judge on a daily basis, so that the judge does not end up trying to avoid you. This is a powerful tool for local litigation if it is used wisely. Depending on each judge, for each case you can stop by once and talk with the judge. Our experience shows that sometimes five minutes with the judge, in this fashion, is better than a fifty-page motion. That can make a big difference in the case, and this is a big difference from U.S. litigation.

E. The Importance of Written Procedures

Luis Pérez:

I cannot emphasize enough that in Latin America, everything is in writing. There is very little oral testimony and very few oral presentations to the court. Critical pleadings, the complaint, and the answer have to be complete. They have to contain all of your arguments. Any document that you want to introduce into the record has to be incorporated into the pleading you file or such evidence may not be able to be introduced later, unless you are doing so through an expert witness or through another witness that the court might allow with regard to newly discovered evidence.

Again, I am arguing from a defense perspective. Let me give you an example that I think will make my point clear. In Mexico, no amendments to pleadings are allowed, unless there has been a change in circumstances and you want to bring such circumstances to the attention of the court. Typically, once you file your answer, all of your defenses have to be incorporated in it. You must have all the exhibits you want the court to consider included in that answer. And, by the way, you have only ten days to do this, from the time you have been served.

Luiz Migliora:

Yes, this is something you have to be very careful about, and I will now talk more about Brazil. If you look at a local state judge, for instance in Rio de Janeiro, you are looking at a judge who has about five thousand active cases going on his docket. You are looking at a judge who is extremely busy and has an enormous backlog of work he or she cannot handle. If you start putting together a very nice, but long motion you, are going to start to lose the judge. The judge will move your case to the back of the line because he or she has too much work to do. The judges will try to understand your motion by reading the first five or ten pages and will not read through the rest of the fifty pages that you wrote. It is a very delicate way of litigating. The entire process has to be done in writing; everything has to be there, but you must not be excessive. If you are, you will lose the judge's attention. It is sometimes very difficult to find the optimum amount of information to put in each motion. As Luis [Pérez] says, you have to put it all together in the complaint and in the answer. These documents are going to define what the litigation is about, and you will not be able to amend what you are asking for if you are the plaintiff. You are not going to be able to amend your defenses if you are the defendant. Even new documents cannot be attached after the answer is filed, although they can be brought in through expert examinations. With an expert witness, it is possible to put additional documents into the record.

F. The Use of Experts

Luis Pérez:

The use of experts in Latin America is completely different from the way we use experts in the United States. In Latin American jurisdictions, the court appoints an expert who will investigate the case and report back to the judge. The parties have an opportunity to interact with this expert through designated technical advisors. Each side will have a technical advisor who will meet with the court-appointed expert. The court appointed expert issues a report and delivers it to the court. He also delivers the report to the parties in the case and the parties have an opportunity to comment or to reply. This is contrary to what happens in most cases in the United States, where expert witnesses are usually selected by the parties to testify as to their conflicting views and where the court or jury must resolve the contradictions.

Luiz Migliora:

What we have to understand is that whenever you have a technical issue, which is not a legal issue, the judge appoints an expert and allows the parties to do

the same. These panels of three experts provide the judge with technical solutions. The judge-appointed expert has the final word in the form of a written report. This written report may also be signed by experts chosen by the parties; however, usually the report will only be signed by one of these experts, with the other disagreeing, because it is very difficult for the expert to make everyone happy. Usually, the determination by the court-appointed expert decides a technical issue and predominantly influences the decision of the court. Thus, some cases involving a highly technical issue are actually won or lost by the expert.

G. Discovery and “Confessional Evidence”

Luis Pérez:

I want to shift to discovery in Latin America. Obviously, discovery is much more limited in Latin American than it is here. There is typically *no* exchange of documents or information between the parties. Parties introduce the documents they believe are beneficial to their case. The other side responds by objecting to the documents or by indicating that there is other relevant evidence that has not been presented to the court and will try to present such evidence to the court. Depositions are also extremely limited.

I would like to address one specific novelty of Argentine law, which may not exist in other countries in Latin America. It is called “confessional” evidence. This involves parties being called into court to admit or deny certain asserted facts or conclusions. The questions are usually posed by the judge and asked in a very conclusionary manner. The parties can only answer “yes” or “no,” without further explanation. They can try to give further explanations, but it is in the purview of the court to exclude such an additional statement. This sometimes presents a dilemma when you are trying to present a certain corporate theme and are confronted with a “confessional.” You typically have to designate a corporate representative to go to court to answer the confessional and to answer the questions posed by the judge. In litigation, it is seldom a “yes” or a “no” matter, because the truth will usually lie somewhere in between; however, that is not acceptable during an Argentine “confessional” proceeding. You have to be very careful in responding to general questions. If you answer a general question in the affirmative, it can be used as an admission in another case that is before the court. It is difficult to deal with this situation, because you need to reconcile various positions in different jurisdictions.

Luiz Migliora:

As Luis [Pérez] mentioned, discovery is much more limited in Latin American practice than in the United States. You do not have the ability to force the opposing party to present something the party does not want to produce. This is a *big* difference. A Latin American party has the choice not to produce a document or a piece of evidence that is damaging to its position. If it is in your file, you can keep it there, and no one can force its production, unless your opponent can identify it as evidence. Only then can the court order you to present that specific document or material. However, you do not have to allow the other party to access to your files.

H. Media Coverage

Luis Pérez:

Press coverage of a case can make a difference in Latin American litigation. Another aspect of litigating in Latin America is the fact that the local press is interested in any case that deals with a U.S. company, which is being sued in their jurisdiction. Unfortunately, sometimes these companies will want to say: “No comment,” and/or “We will respond in a court of law and will otherwise refrain from making any extra-judicial comments about this matter.” That is typically not a particularly wise thing to do in Latin America. When you are representing a U.S. multinational company in Latin America, you need to start presenting your client’s defense on various fronts. One of those fronts is, of course, the judicial one, but you also need to defend the company before the local press and the court of public opinion.

You need to develop a public relations strategy, namely the positions that the company is to take in answering question with respect to the litigation. Do not think your case will remain hidden in the judge’s desk. If a plaintiff counsel is astute, one of the things he or she will try to do is to make a big splash in the news that a U.S. company has been sued, trying to sway public opinion. Of course, the judges will hear and read what is being published about the case.

Luiz Migliora:

We cannot forget that we are dealing with a single judge who usually is also a consumer of the products that result in product liability cases. This means that the judge is often in a better position to understand the plaintiff’s perspective than the defendant’s. That makes your life as defense counsel a little more difficult when defending a product liability case.

I. The Expansion of “Moral” Damages

Luis Pérez:

Latin America may be lagging behind the United States a few years, but what we have seen in the United States is re-occurring in Latin America. The same trends that have hit the United States are developing in Latin America. Class actions and punitive damages, or “moral damages,” are emerging. “Moral damages” are being expanded to include the punitive damages in the United States. You see some countries like Venezuela and Brazil drafting legislative proposals to implement class actions and punitive damages. Such trends, of course, make a U.S. company very nervous since punitive damages have skyrocketed and are running rampant in the United States. Punitive damages are the big monster that most U.S. companies now fear. These companies are looking at the same demon in Latin America. Furthermore, the idea of consumer protection is developing. There are administrative agencies being formed in different countries that have focused on dealing with and protecting consumers. Everything that has happened in the past in the United States is happening in Latin America. Of course, this development occurred because there is more interaction, more contact, and more communication. You have Latin American attorneys coming to the United States or Europe for their legal education. There are U.S. attorneys, plaintiffs’ counsel, going to Latin America trying to develop and stimulate their business over there.

Luiz Migliora:

Some of the concepts being copied from the United States create a situation worse than the original. In Brazil, for example, there is a procedure similar to a class action that, from a defendant’s standpoint, is much more dangerous than what you have in the United States. We are talking about the “collective lawsuit.” People tend to believe that they are doing something similar to the class actions in the United States, but its results are sometimes totally different, similar to the reversal of the burden of proof in favor of the “hyposufficient” claimant that Professor Mossett Iturraspe referred to in his presentation. We are still seeing the law pertaining to products liability develop, and in the process, litigation will become quite difficult for the defendants.

J. Asset Protection

Luis Pérez:

One last topic is a key issue if you are representing U.S. interests in Latin America-asset protection. Most U.S. companies have intellectual property rights and real property as their main assets. How do you isolate those assets from potential exposure when one is doing business in other jurisdictions? You have to sit down with local counsel in each of these foreign countries and devise a strategy that will tend to insulate the principal assets of the U.S. company from exposure by establishing subsidiaries or by first creating offshore companies and then subsidiaries. We can spend a whole day talking about asset protection strategies because it is something we need to keep in mind when we are assisting a U.S. company in establishing a business operation abroad.

Luiz Migliora:

Yes, I do agree with you on that, and this is specifically true when you talk about consumer law. In consumer law, what we see happening in Latin America is the same as in the area of labor law, namely that the consumer deserves pervasive protection by legislation and sometimes also by the courts. The concept is prevalent that consumers, like employees, deserve protection. Their claims have to be satisfied no matter what you do for them.

We are now talking about how to deal in Latin America with external influences on the judge, including corruption, and everything that is usually considered within the scope of the work of the lawyer. This is a very difficult issue. I can talk about Brazil because it represents the main part of my practice.

Yes, you do have political influence, and you *can have* some corruption in the court system. Corruption, at least in Brazil, is something minor if you look at the overall picture. It is not something that you see on a daily basis; *i.e.*, that judges are being corrupted to decide a certain way. On the other hand, since we have these informal conferences with judges that we have mentioned earlier, it is possible to talk with the judges about a case that is currently before them. I would like to point out that developing a good relationship with the judges makes a difference, and *that is* the type of influence that some people consider as being undesirable. I agree with such criticism to a certain extent. If you are a good lawyer, but you cannot get along with judges, then you may lose your cases. Sometimes you can be a less qualified lawyer, but if you are good at talking with judges, you know them and you will go to have cups of coffee with them. If they like you, then you can win cases. It sounds a little unfair, but you have to deal with the way it is.

We should, of course, move in Brazil and other countries in Latin America, to have laws and regulations that would define and formalize

conferences with judges. It makes sense to be able to talk to judges but it may be better if you are required to talk to the judges with the other party present or in predetermined hearings. The main reason why this is not possible today is that judges simply do not have the time. We are talking about judges who are extremely busy, and they will never have the time to talk to all the parties for all the cases. So, it is difficult. I would say my experience shows that what really defines a case is your ability to communicate your legal arguments to the judge. I still believe that this ability determines whether you are going to win or lose a case.

K. Corruption

Luis Pérez:

My experience is that every country in Latin America varies in this area of potential corruption. If you are litigating in Argentina, I think you are pretty safe as far as corruption is concerned. I am not so sure about other countries, but I think that in Argentina, it does not vary too much from the United States. I am not arguing that there is a lot of corruption in the United States. We all know there is some; I think it is minimal. However, as I learned on the first day I walked into my first law firm, you need to be very aware of who your judge is and to conduct research to know your judge, know his/her background, and know where he/she is coming from. It is the same when practicing in Latin America.

VI. INSURANCE COVERING PRODUCTS LIABILITY CLAIMS ARISING IN OR FROM LATIN AMERICA

Tim Moerschel:

My role is to develop global insurance for multinational companies. We look at companies of all sizes – from small companies with one or two people to those operating throughout the world. One of the things I would like to talk about is the perception most U.S. companies have toward the legal systems of Latin America. Specifically, I will focus on Florida. A great many of Florida's firms do business in Latin America. When we sell an insurance program, people here, large and small, are very reluctant to spend any money on foreign insurance. They say: "I only have a million dollars in sales. I do not have any assets over there. Let them sue me there; I could care less. What is the difference? What are they going to take from me?"

A typical U.S. general liability policy has a limitation on the territory covered. The territory covered is vitally important. A typical U.S. policy states that the insurer will defend against a suit that results from a loss inside the

jurisdictions of the United States, Puerto Rico, and Canada. If the loss itself occurs outside of the United States, the suit [to be covered] has to be brought in the United States. Ninety-nine percent of companies in operation are limiting their coverage in such ways. If one is exporting a product and the product causes loss in Latin America, this policy will not respond unless the suit is brought back into the United States, hence, the need for the development of an international insurance. There are a couple of ways to do it.

There is an exporters' package covering foreign suits (litigation taking place outside the United States) that binds the insurance company to defend the client anywhere in the world. Another way of doing this is, if you have facilities at overseas bases in Latin America, you can get a local policy issued in the respective country in which you are doing business. Some key words in this matter are "admitted" and "non-admitted" coverage. "Admitted" means that the insurance company issuing the policy has been admitted to do such business in the particular country under the licensing procedure of that country. This is a requirement in most countries in Latin America, as with most countries in the world. One of the few countries that does not require "admitted" coverage is Chile.

Mexico, Brazil, and Argentina all require "admitted" coverage with a locally licensed insurance company or with a locally licensed insurance broker in order for you to procure an insurance policy. You have to deal with such a company in order to get coverage. In the countries that do not require "admitted coverage," the insurer can "get by" with a foreign exporter's package. This can be issued here in the United States. The difference with a "non-admitted" package is that the insurer cannot go to court. Under such a policy, if you are a U.S. company, you have only an exporter package for your sales overseas. If there is a loss and a claim made overseas, you cannot be defended by your insurance company, even though you may be indemnified by it if the policy so specifies. So the key in doing business overseas is to get a local policy from an "admitted" company, which can defend you in the foreign court.

If you have a local policy, let's say in Brazil, and you accommodate the requirements of Brazil in getting local coverage, you will have coverage to a local limit that Brazilian law establishes. The Brazil Reinsurance Institute (IRB) (Brazil's local monopoly insurer) may, for instance, establish a maximum of twenty-five thousand dollars as a limit of such coverage. Thus, your local policy is limited to that amount. A U.S. issued "Difference in Conditions Policy" (DIC), usually combined with a "Difference in Limits Policy" (DIL), is added to the local placement. You have two policies, the legally required (by local law) policy and the "non-admitted" DIC/DIL policy, which differ in conditions and losses covered; these policies are in addition to the local policy. The DIC/DIL is determined by U.S. terms and conditions, standards, and limits, and will protect you from loss that exceeds the local policy. Consequently, there are two ways of obtaining coverage overseas. You usually have to have the local policy and should have the DIC/DIL in order to be covered up to a U.S. standard. In a very

abbreviated way, that is the structure of a foreign insurance program for the most part. Questions?

(Audience member):

If you have a large company with facilities in Latin America, for insurance purposes should it have a local, “admitted” policy with a limited amount of coverage and then a DIC/DIL policy to cover the rest? Would that be the optimal insurance situation for a company?

Tim Moerschel:

It is, and again it depends on what country you are referring to. Each country in Latin America has different laws and different standards, but generally speaking the answer is “Yes.” If you have a facility or other physical location in Latin America, you need to purchase a local general liability policy. That policy will have the limits that are standards to the respective country you are in. It will have its own terms and conditions. Since a U.S. company is used to a much broader coverage and much higher limits, you purchase a DIC/DIL policy from a U.S. company, which goes over and atop the local policy.

Boris Kozolchyk:

Do you have an exporters’ policy as well that covers some of the product liability as well as some of the commercial risk aspects of it?

Tim Moerschel:

Yes, a standard exporters’ policy will have product liability, premises operation, personal injury, advertising, medical expenses, fire, and legal [coverages]. That is an excellent point because a *local* general liability policy may only provide relief that brings somebody back to the way they were; it indemnifies them for their pure physical loss. The DIC, the exporters’ package policy, consists of U.S. documents with a U.S. monetary limit; it is an English document. It is a standard form in the United States. Your client is used to that broad coverage that is much broader than a Latin American policy, and has limits that are up to U.S. standards.

Boris Kozolchyk:

Does it cover, as part of the policy, the commercial risk, as well as the risk of lack of payment by the buyer?

Tim Moerschel:

No. “Trade credit insurance” is kind of an exotic accounts receivable coverage. Let us assume that you are a U.S. company distributing aircraft products to Latin American governments. We see this, for example, in Colombia. U.S. companies may distribute used aircraft products to Colombia. “Trade credit insurance” will protect your U.S. firm from this foreign client defaulting on what they owe you. But that is *not* included in a standard form. That is separate coverage.

William D. Wood:

I was struck by what you said – that some of your clients that have “only” a million dollars in Latin American sales are not too concerned about having a judgment entered against them there. Is it because they do not think liabilities incurred there can be levied against their assets in the United States? Or, just that they are not worried about the amount that can be thus occasioned?

Tim Moerschel:

Well, there are two reasons. Number one, they may feel that they do not have any assets there, and hence they do not care. It sounds simplistic, but that is a perception in some quarters: “We do not have any assets there. How can they get to me?” What I try to do is educate them as to how that actually works, the petitioning of a U.S. court to hear a suit from a foreign country. Of the many claims that we see, only a handful actually are heard in the United States. If you petition a court in the United States, perhaps a federal court with a full docket, it may very well be dismissed. We do not see a lot of that and that is the perception of people, which we have to overcome [in order to sell insurance coverage]. When the company has physical facilities in Latin America, it is an easy sell. They *have* to have coverage to do business there. Most people nowadays just export. Only the largest clients have full-fledged facilities in Latin America.

(Audience member):

How does directors' liability coverage factor into the package?

Tim Moerschel:

Again, it is not a standard coverage. I will quickly mention the standard lines again. You have the local [foreign] coverage, the exporters' package, such as you usually see, the general liability, property, workers' compensation, travel, accident, sickness, kidnapping, ransom, etc. Directors' and officers' liability, and executive risk type coverages are written separately. Some of them have worldwide forms. Directors' and Officers' Liability (D&O) and Employment Practices Liability (EPLI), for example, are very prominent coverages right now and are growing in relevance. They are written on a separate, stand-alone basis; they may have worldwide coverage, depending on what insurance company you are using. They can perhaps issue local coverage for Brazil, Argentina, etc. for subsidiaries located there.

Philip Robbins:

Can you comment on the comparative cost of coverage for the manufacturing risk in the United States as opposed to Latin America?

Tim Moerschel:

A good point. In Latin America, we are used to it being less litigious, and that is the buzzword of insurance. It is going to be cheaper down south. The limits, however, are smaller. The coverage forms are less broad. Usually, when you acquire coverage in Latin America, there are going to be two charges. You are going to acquire a DIC/DIL, usually from a U.S. carrier, for which there will be a charge. Then you will have a low-limit, "admitted" policy to accommodate the requirements of doing business in the country. It depends on which company is handling your insurance program. At AIG, we have facilities in all these countries. In some countries, they are tariff-rated, just like in the United States, and the carrier files its rates with the local administrator. That means you have to file for "per exposure" and a rate for general liability. You are bound by those rates. Mexico is like that; companies operating there are tariff-rated. Brazil is tariff-rated, but some countries are not. In other words, in such countries, any person who is pricing insurance can apply any charge to the local policy. Actually, we have evidence as to what we should charge. Certainly, if you are an

insurance carrier, you want to get adequate premium for whatever risk you are assuming. For these reasons, it is usually cheaper in Latin America.

VII. USE OF ARBITRATION OR MEDIATION IN PRODUCT LIABILITY CLAIMS IN LATIN AMERICA

Diana Droulers:

First, I would like to thank the National Law Center for having invited me, and for having included arbitration and mediation into the topic of product liability. When we spoke about having this conference, one of the objectives was to give you an overview of arbitration and mediation in Latin America, and then, at the end, to see the possibilities of bringing such product liability claims into mediation or arbitration.

Most constitutions in Latin America have been reformed in the last twenty years. The oldest constitution is that of Bolivia, but it was reformed in 1995. However, arbitration has not been included in most Latin American countries through their constitutions, and that has led to a development of special laws. I would like to say first that when we speak of “mediation,” we will see a lot of special legislation on what is known as “conciliation.” This can cause confusion. Some Latin American countries use the word “mediation” while others use the word “conciliation.” There are different theories as to what “mediation” and “conciliation” mean. There is not one theory that is adopted by all the countries. Some countries believe that conciliation is mediation that takes place before a public figure or a public authority, be that person a judge within a court procedure or a public servant in a federal agency.

International arbitration law that most countries have comes from international conventions. Generally domestic law in these [Latin American] countries is based on the UNCITRAL Model Law for Arbitration. That provides uniformity, but each country adds its own nuances. Several countries, such as Panama, have only one statutory provision that deals with mediation and arbitration. Others have adopted arbitration in their codes of civil procedure, in which case, when you talk about arbitration and mediation, you are referring to more than one statute. The international conventions on arbitration that have been adopted are the New York Convention of 1958 (which is the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards), the Panama Convention of 1975 (which is the Inter-American Convention on International Commercial Arbitration), and the Montevideo Convention of 1979 (which is called the Inter-American Convention on Extra Territorial Validity of Foreign Judgments and Awards).

Almost all Latin American countries have adopted the New York Convention; only Brazil has not. The same is true for the Panama Convention, but not the Montevideo Convention. The New York Convention is dated 1958, but

the first country to sign it was Ecuador four years later. It took other countries, like Venezuela, Argentina, and Bolivia, much longer.

In several countries, it is complicated to have all relevant statutes in a single code. I will give you an example. Colombia had different decrees [statutes] for mediation and for arbitration. After ten years of working with these separate laws, Columbia had such a mix-up that its lawmakers had to draft new legislation, the so-called Law 446, in which they collected all relevant provisions, Decree 1923 and Decree 226. The UNCITRAL Model Law requires that for arbitration there must be a written and signed agreement. What happens when you do *not* have such a contract? That is indeed a big problem. Without an agreement, you simply cannot have your dispute arbitrated.

What balances this, in the minds of the producers, is that arbitration has a significant advantage over litigation, namely confidentiality. Often, you have companies that are protecting the image of their product. Consumers, on the other hand, are more apt to think that the publicity of trial is more attractive than arbitration. Another element that might influence the decision of whether to arbitrate is the cost, and how fast you can get your damages awarded. If you are a person going against a big company, you would sometimes rather sit down, talk it over, and settle as fast as you can.

This brings us from arbitration to mediation. There is a saying that the best battle fought is the one you do not have to fight. It is because court cases naturally take longer than mediation or even arbitration. Therefore, parties sometimes prefer mediation, because it is quicker and they get their potential awards faster. Furthermore, mediation is never mandatory. You can call a party to mediation, and if they want to come, fine. If not, then nothing happened and the case will proceed to trial.

The consumer protection laws of most Latin American countries are outdated and are premised upon the need to defend the less strong: "We have to defend the people against big companies." This is a view that has been pounded into the governments of our countries, because of the political situations that we have. These consumer protection laws will, in most instances, be enforced by administrative agencies, and these agencies have the power to conduct mediation within the agency, with a public servant serving as a mediator. What happens to these claims? To find out, I sent an inquiry to directors of arbitration and mediation centers throughout the continent. I asked them: "What kind of mediation or arbitration cases have you had with product liability?" Most of the answers I got were: "No arbitration cases at all, and the mediation cases were only very small cases." The "small cases" refer to cases where people have bought something, and somehow the product that they bought, be it an electrical appliance, etc., did not work.

The only case of this kind that my firm had for mediation arose from individuals in Venezuela—persons who bought electrical appliances manufactured in Europe. The instructions on the product were in French and German. This particular retailer had his daughter, who had studied outside the country and spoke

French, type the instructions out in Spanish. What these instructions failed to state was that the electrical current in Europe is different from ours. When these appliances were plugged-in, every single one of them burst.

A couple of these people got together and came to my firm. They said they wanted to do a mediation: “We want to get our money back,” and one of them had some burns on his hands. Accordingly, a multi-party mediation commenced. The case was settled in the mediation center.

There is another procedure available in Latin America, which is neither mediation nor arbitration, the so-called “judges-of-peace” system. Judges are elected who use mediation techniques to solve problems within their communities.

We have many rural communities with people of less economic power, and in such areas, the judge-of-peace system has worked well. This way, small cases, which would be called product liability cases in the United States, are settled. These judges-of-peace are not lawyers, but are in most cases community leaders, before whom the problems of the community are brought so that neighbors can live peacefully side-by-side.

VIII. LITIGATION IN U.S. COURTS OF PRODUCT LIABILITY CASES ARISING IN LATIN AMERICA

Panelists: José Astigarraga, Douglas Seitz, and Victor Diaz

José Astigarraga:

This session will address litigating in U.S. courts and litigation in U.S. courts of product liability cases that arise in Latin America. Victor Diaz will provide us with the plaintiff’s perspective. Doug Seitz will provide the defendant’s point of view. I will attempt to set the framework for discussion, particularly for Latin American colleagues who might not be familiar with U.S. litigation and its rules of procedure. Yesterday, we had Sara Schotland and William Wood, who touched on a number of issues. My hope is that I can recap those issues and set the stage for Victor and Doug to give us their thoughts from their very different perspectives.

Just to recap: What are the threshold issues of U.S. litigation? Well, essentially, a court, in order for it to exercise its power, must satisfy a minimum of three requirements. First, it has to have jurisdiction over the subject matter – that is, it has to be competent to deal with the particular type of dispute. Second, the defendant must have been properly served with process, meaning there must have been an official notification by which the defendant has been formally notified of the court’s intention to exercise power over him. Then, finally, the defendant has to be subject to the court’s jurisdiction. In other words, the court must have power over that individual defendant by reason of his residence, intentional activity within the jurisdiction, consent, or in some other way.

And even after satisfying these three, you still have, in the United States, the doctrine of *forum non conveniens*. Unlike many courts in Latin America, a U.S. court has the discretion to abstain from exercising the jurisdictional power that it possesses. In other words, even if the court has subject matter jurisdiction, and even if it has personal jurisdiction over a defendant after proper service of process, the court may, as to litigation with foreign attributes, say: “No, I will not decide this case,” effectively forcing the plaintiff to go to another forum. Coming back then to these threshold elements, you can see how they present a framework for a number of decisions that Victor and Doug would take in the course of representing their clients.

The plaintiff’s first consideration, of course, is determining the court in which to file. In the U.S., you often have the option of filing either in the federal or in the state courts. There are fifty states, and each has a court of general jurisdiction. The federal courts are those of limited jurisdiction. Federal courts are confined to cases in which there is “diversity jurisdiction,” when all of the plaintiffs to the action are citizens of a different state than all of the defendants, and there is a minimum amount in controversy of \$75,000, or in which there is “federal question jurisdiction” involved, meaning the litigation involves a substantial question of federal law. One of the things Victor Diaz, the plaintiffs’ attorney, will share with us are his considerations in deciding whether to sue in state versus federal court. In Doug Seitz’s case, the issue is whether, when a case has been filed in a state court, he should attempt to remove the case to a federal court.

Essentially, defendants have a right to remove a case from state to federal court only under certain limited circumstances. The key circumstance is that the federal court must have subject matter jurisdiction. Recall that federal courts are courts of limited jurisdiction and have jurisdiction only when there is either diversity jurisdiction or federal question jurisdiction. Therefore, one of the things that Victor will do in setting up his lawsuits, assuming he wants to remain in state court, is to structure a lawsuit that will defeat a defendant’s ability to move the case into a federal court. For example, if Victor has the option, he would sue at least one defendant that has similar citizenship as one of the plaintiffs, thereby defeating the existence of diversity jurisdiction. Furthermore, if Victor joins a defendant resident of the same state as of one of the plaintiffs, perhaps a local Ford dealer in a products liability case involving a Ford automobile, then this might very well prevent the removal of such case to the federal court.

In U.S. practice, in order for a court to have jurisdiction, there must be an official notification to the defendant, the so-called “service of process.” When you are serving a foreign defendant, you can invoke provisions of several applicable international conventions, or you can serve process in the manner provided for under the local law of the jurisdiction where the service is made. But then, we still get to the third issue: whether or not there is personal jurisdiction over the defendant. Essentially, the U.S. Constitution guarantees defendants the right to due process of law. That, interestingly, applies both to U.S. citizens, as

well as foreign citizens, and has been interpreted to mean that the defendant cannot be subjected to a state's judicial power unless that defendant has certain contacts with the particular state, so that, under commonly held American notions, it is fair to make the defendant litigate a particular lawsuit in the particular judicial forum. The judicial lingo is: "Do they have the minimum contacts?" This has been a very litigated area in the United States, and it continues to evolve as we speak.

Another interesting twist is that states are not required to exercise their jurisdictional power as far as the Constitution will permit. This issue was a matter of heated litigation twenty or thirty years ago. The states, for the most part, have currently amended their rules so as to exercise their reach as far as the Constitution will permit, and there is usually a concurrence between a state's "long-arm statute," which permits service of process on out-of-state defendants, and the constitutional limits on personal jurisdiction.

But the analysis, nevertheless, is: first, whether the state's long-arm statute reaches the defendant by its terms, in the way it is written; and second, assuming that is the case, whether the Federal Constitution permits a state to subject a particular defendant to its jurisdiction. There are cases in which the first threshold question, simply a matter of state statutory law, gets decided in favor of the defendant if the defendant convinces the judge that the exercise of jurisdiction is not within the scope of the state's long-arm statute. In such a case, you never reach the constitutional question.

Assuming the defendant has been served in the manner provided by the state statute, the typical issue in these "long-arm" service cases is whether the defendant's conduct is such that it gives the court personal jurisdiction over the defendant. The first possibility, for example, is that the defendant is "doing business" in the state. Another is did the defendant commit a tort in the state? And, there are a series of other categories and a myriad of decisions, determining circumstances that will bring a defendant within the scope of the "long-arm" statute of a jurisdiction.

There is a difference between "specific" and "general" jurisdiction. General jurisdiction arises from the notion that if a defendant is doing enough activities in the forum, it should be subject to personal jurisdiction for any cause of action, regardless of whether the cause of action arises out of the activities that are being conducted in that state. We could use the example of a Detroit car maker being sued in Detroit for a cause of action arising out of something that occurred, say, in Europe. In such a case, it would not matter that the particular case has nothing to do with the car maker's activities in Detroit. In such cases, the defendant has sufficient activity in the state that it is fair to have it litigate there, and it would be subject to the general jurisdiction of the courts in Michigan.

However, even then, several courts, overburdened with causes of action arising from events occurring in foreign countries, have rejected jurisdiction, insisting upon the "specific" type of jurisdiction that requires the cause of action to arise out of the activities in which the defendant engaged in that particular

jurisdiction. Such a dismissal, of course, would be the *forum non conveniens* doctrine at work. We are now talking about the states' power to abstain from exercising their jurisdiction. This notion is somewhat "arrogant," or difficult, for our Latin American colleagues to understand, particularly that a judge has jurisdiction to render a decision on a specific subject matter, and nevertheless has the right to tell a citizen of his country, who is applying for relief, "I am not going to exercise this power."

The easy way to explain the doctrine is that the court can view another forum as "more convenient." There are many considerations that became part of the determination of whether a forum is "convenient" or not. Judges generally go through a series of elements in answering the *forum non conveniens* question. For example: "Is there an adequate alternative forum?" There are a number of variations of this question, including: "Which court would have jurisdiction over the entire controversy?"

One of the interesting developments in Latin America, and we are pleased that we have the Attorney General from Ecuador here for comment, is that a number of the Latin American countries have enacted statutes that in effect foreclose the operation of *forum non conveniens* when the plaintiff has brought the suit in a foreign country and jurisdiction had been denied under the *forum non conveniens* doctrine. Judges have dealt with this in a number of ways.

Typically, what we have done [in seeking to stop the U.S. case] is to file affidavits to the effect that the dismissal in the foreign jurisdiction is unconstitutional and would not bar the plaintiff from suing there again. In one case, a U.S. court judge said: "Look, if the Supreme Court of another country ultimately determines that its statute bars litigation, then you are permitted to come back to the American venue and I will hear your lawsuit; however, you have to go to the appropriate foreign court first." Thus, U.S. judges, for the most part, do recognize that these statutes are aimed at trying to block the doctrine of *forum non conveniens*.

In applying the *forum non conveniens* doctrine, there are a number of questions that a judge should consider. First: "Is there an adequate alternative forum?" Second: "What are the private interest factors?" For example: "Where are the witnesses?" If there are twenty witnesses in the case, and eighteen of them reside in Ecuador and two of them in the United States, then that first factor weighs in Ecuador's favor. "Where is the evidence? Physically, is it necessary for the fact-finder to visit the site?" Or is this a case that you are dealing with hundreds of thousands of documents that are located in Ecuador, or wherever they might be? Further, there are other practical factors that we will not take the time this morning to go through, but this is the kind of information the judge must consider.

Assuming there is an adequate alternative forum, the judge is then required to weigh these private interest factors. If these factors weigh in favor of a *forum non conveniens* decision, then the judge should abstain from exercising jurisdiction and, in such event, the plaintiff is forced to go to the alternative forum.

The judge does have the right to impose conditions for this abstention, for instance, to require the defendant to commit not to assert a statute of limitations defense that might arise between the time the American suit was filed and the time a new lawsuit is filed in another jurisdiction.

If these private interest factors are *in equipoise*, then the judge should consider public interest factors. Public interest factors are the respective interests of the governments providing the courts. Let us take the example of a case involving extensive injuries to Ecuadorian citizens. An American judge handling a suit for such injuries might say that the Ecuadorian government has a greater interest in vindicating the rights of its citizens than Florida courts. Another factor to be considered is whether there will be a need to apply foreign law; this becomes a very important issue in the public interest factors test, because, again, you wind up in a situation where you have an American judge trying to sort through Latin American codes and the concepts of civil law and having to work through translators. Reasonably, one can say that it makes much more sense for an Ecuadorian judge to be the one interpreting the Ecuadorian Code, rather than an American judge.

Finally, there are issues regarding the burden on the courts. We talked about the interest in Ecuador of vindicating the rights of its citizens. If you litigate this case in the United States, taxpayers here will have to pay for the cost of litigation. I have one case right now where the judge has literally bought a computer in order to handle the case, and we have a *forum non conveniens* argument. In a respectful, and hopefully, humorous way, I said: "I am sure the taxpayers of Florida will appreciate having to buy a computer to litigate this foreign case." I was trying to get the court to understand the burden that is being imposed on the citizens of Florida in providing a forum for what was essentially a foreign cause of action.

Let us take just a moment to look at the issue of foreign law and conflicts of laws. Again, these are the type of considerations that Victor Diaz will look at in deciding whether he should file his case in the United States or in a foreign country. In Doug Seitz's case, he may be invoking the doctrine of *forum non conveniens* because he knows that the law selected by the court to apply to the case can be outcome-determinative.

In the United States, you have two principal rules to determine what law will apply to a controversy. One is the rule of *lex loci delicti*, the law where the tort occurred. The more modern and evolving, if not the evolved, view is the significant relationship test. The significant relationship test is articulated in the Restatement (Third) of Conflicts of Laws, which is essentially a summary of the view of the country's leading legal scholars as to what the common law of this country is, or some would say their view of what the law should be. As articulated in the Restatement, the relationship to the occurrence is determined by answers to the following questions: what is the accident that occurred; where did it occur; and who are the parties? The way the rule is articulated, the law of the place that has the most significant relationship to the occurrence and to the parties, should be the

governing law. The Restatement specifies that you should consider the needs of the interstate court systems, the relevant policies of the forum, and the relevant policies of the other fora that are involved.

The need for certainty, predictability, and ease of application are all factors that should determine what jurisdiction has the most significant relationship. In order to measure and apply these factors, the Restatement specifies that the court should consider: where the injury occurred; and where the injury-causing conduct occurred. Obviously, the injury can take place in one jurisdiction and the injury-causing conduct can take place in another. The simple example of this scenario would be where a missile is launched from one jurisdiction, and it winds up causing injury in another. The place of the parties' domiciles, their nationalities, their places of business, and the place where the parties entered into their contractual relationship, all should be considered in determining the jurisdiction with the most significant relationship.

As a recap, the preliminary questions are: (1) where to sue; (2) in which country and jurisdiction; (3) what are the advantages of the U.S. forum versus the foreign forum. In the United States, we have the jury system, discovery, punitive damages, which are all lacking in Latin American courts. It would be interesting if Victor, our plaintiffs' attorney, would share with us whether he has ever found another forum that is better than the United States' jury and punitive damage system.

Then there is the issue of federal versus state courts and the issue of which defendants to sue. For example, can you subject them to the jurisdiction of the particular court? If you cannot directly bring a defendant to jurisdiction, can you somehow get it through a parent, subsidiary, or an agent? Finally, the question that remains is: "What can a plaintiff's lawyer do to prevent removal of the case from the state to the federal court?" More specifically, "What can he do to mitigate forum non conveniens factors, *i.e.*, the structure of his claims?"

Douglas Seitz:

The topic that I have been asked to take a look at is: What are the practical factors in litigating product cases in the United States that arrive out of actions in Latin America? There is not one correct defense strategy that is going to work for all cases. The best strategy for a particular case is going to depend on the particular facts and circumstances of that case. Therefore, rather than trying to tell you what I think generally the strategy is, I thought it would make much more sense to have a discussion on what are some of the factors that I take into account in deciding how to handle this type of case. The plaintiff has the initial option of whether to file in state or federal court. The first thing you would look at in most of these cases is whether you want to be in state or federal court. As a practical matter, most of the time, if the plaintiff has an option, the plaintiff is going to file the suit in a state court.

Once you are in state court, the defendant has its first decision to make: “Should I try to remove the case to federal court?” There are statutes that govern when a case can be removed to federal court. The one most likely to come into play is the diversity jurisdiction statute that requires complete diversity between the parties, meaning that [all] plaintiffs and [all] defendants are residents of different states. Most of the time, the defendant will decide [in such a case] to remove the case to federal court.

There are a number of factors that I look at in order to make a decision regarding removal. First, you have different types of judges. Federal court judges are appointed for life. State court judges in many states are appointed, but in many states they are still elected. The corporate defendants that I represent usually do not have too many votes to elect those judges; thus, [they] prefer federal court judges on a philosophical basis alone. Most people think that federal court judges tend to be more conservative. Another consideration is the difference in the jury pool. Often, there are some differences in the area from which the jurors will be drawn. State courts are county courts and jurors will be selected from the county in which the court sits. The federal courts are district courts, and often the federal court district will encompass more than one county; consequently, you may have a broader jury pool, which probably is more favorable to the defense than to the plaintiff. Another factor you want to look at is the differences in procedure. Although civil rules of the various states are often patterned in accordance with the Federal Rules of Procedure, there are differences in many states. The federal rules tend to be more rigorous in terms of timing requirements and in terms of report requirements.

Then you have to decide if you have any basis for trying to get into federal court. The plaintiffs will have tried to structure their lawsuit so that they can stay in state court. The most common way to do that is to defeat diversity jurisdiction by adding a local defendant. For example, if you have sued Ford Motor Company, which is probably *not* a citizen of the same state as the plaintiff, then plaintiff’s counsel will probably add [as a defendant] the local Ford dealer who sold the vehicle. If the dealer is an appropriate defendant, [and modern products liability doctrine provides a claim against him if he sold a defective vehicle], then from a defense perspective, there is really nothing you can do [to remove the case to federal court]. You are going to be in state court, and you might as well learn to live with it.

However, there are some aspects that you may want to look at. There is a doctrine of fraudulent joinder [of a defendant]. We have had a case where the product liability statute of limitation was two years, and it had run before the case was filed. The claim against the manufacturer of the product, in this case an automobile, was not really a products liability case but a fraudulent concealment case, alleging that the defendant manufacturer had fraudulently concealed the defect in the vehicle. In the particular jurisdiction, the statute [of limitations] on that kind of a claim was four years instead of two. [After being sued, the defendant manufacturer] made a fraudulent concealment claim against the dealer.

The argument we made was that there was no colorable claim against the dealer for fraudulent concealment. The dealer had simply sold the vehicle and was now being fraudulently joined because any claims against the dealer would have expired with the two-year products liability statute of limitations. The case settled before we got a decision. The point is that you need to take a hard look and see whether a party attempting to defeat jurisdiction really has a valid claim. You may have a claim based on fraudulent joinder.

Let me move on to whether you want to be litigating in a U.S. court or in Latin America. We are assuming a situation where the accident happened in Latin America. One of the things important to look at is publicity. Has there been publicity in either forum about the product or the accident or any events, which would sway a jury or a judge one way or another in the case? You will probably have a good idea as to what the publicity in the United States has been. You may have no knowledge as to the extent of publicity in the Latin American country, unless you retain a lawyer in that country and rely on him to tell you what is going on down there.

A second issue is regulatory action. Have there been recalls of the product, either in the United States or in the Latin American country? Again, this is something as to which you will want to get help from an attorney in the Latin American country. Furthermore, the reputation of the defendant company is important. How is the company viewed, both in the United States and in the Latin American country? I have tried a couple of cases for the Mayo Clinic [in Phoenix, Arizona] during the last two years. Mayo built a facility in Phoenix several years ago and, after talking to the jurors following those cases, I was very impressed by the weight they assigned to the company's reputation in their decision-making process.

These are areas where you would want to get advice and counsel in the Latin American country. I was thinking of the example where a motorcycle manufacturer retains your services for an accident that happened in a Latin American country, and there is a claim that the accident happened because of defects of the motorcycle. The rider fell and hit his head, and you have a defense based on the failure to wear a helmet. The person would not have been injured had he been wearing a helmet. I would think that before you decide that you do not want to be in the United States, where most people view motorcycle riding as a risk-taking activity and people are used to seeing motorcycle riders wearing helmets, you want to know whether, in the particular Latin American country, motorcycle riding is considered a very common activity, and no one wears helmets.

Let me quickly discuss jurisdiction. Jurisdiction really is the first issue that an attorney needs to address. If you decide that you do *not* want to be in the U.S. court, then one of the first things you look at is whether there is jurisdiction over your client in the U.S. court. The next issue is forum non conveniens. It can be a venue defense where the court, although it has jurisdiction over the case, can decide that the convenience of the parties and the ends of justice would best be

served elsewhere and it simply will not exercise that jurisdiction and the plaintiff to go to another more convenient forum.

The analysis is often a *forum non conveniens* one. First, “Is there jurisdiction in the chosen forum?” Second, “Is there an adequate alternative forum?” Third, Is the venue proper to decide the dispute between the parties and whether justice would be better served in an alternate forum. As a defendant, you have the burden of going forward and showing that there is an adequate available forum with jurisdiction that would be a more convenient forum.

Let us take a look at the factors regarding the availability of an alternative forum. All parties must be subject to the alternative forum’s jurisdiction. How do you establish that the parties are subject to jurisdiction in the alternative forum? One way, if you are in a U.S. court, is to simply ask the court to take judicial notice of the statutes of the Latin American country concerned. This process is rather complicated because attorneys will have to work with translations. The more common way is to simply retain an expert in the law of the proposed alternative forum and obtain an affidavit from that expert. With respect to your own client, there should be no issue because you simply consent to the jurisdiction of the foreign court.

With regard to the adequacy of the alternative forum, it has to provide some avenue of redress for the U.S. cause of action. The operative word there is “some.” It is not necessary that the same range of remedies be available in the alternative forum as would be available in the United States. Similarly, the procedural differences between the U.S. and the alternative forum do not bar dismissal on *forum non conveniens* grounds unless they amount to a complete denial of due process.

The convenience factors will be weighed qualitatively, not quantitatively. Private convenience factors are factors that affect the parties’ access to accident-specific sources. If the accident happened in the Latin American country, the decision will often be heavily weighed toward that Latin American country. But, if it is a product design case, and the product was designed in the United States, then the proof in terms of the product design may well have nothing to do with the Latin American country. We will look at the availability of court process to force the attendance of unwilling witnesses and the cost of obtaining attendance of witnesses. If you have witnesses from South America and you try the case in the United States, there can be obviously significant costs in bringing those witnesses to the trial. Another practical problem that courts will look at is the importance of a view of the scene of the accident by the fact finder. The fact that the accident scene is in Latin America, or the defective product cannot be moved to the United States would be factors in favor of moving the case to the Latin American country.

These are, basically, the factors that will weigh in terms of public policy. The main consideration here is: “What law will apply?” That entails an analysis of choice-of-law rules. In the United States, there is a developed body of law determining the applicable law in cases that are brought into our courts. It is certainly not automatic that if you sue in Florida, Florida law will apply. There

are a number of rules to determine the choice of law, such as the *lex loci delecti* and the most significant contacts doctrine. You really need to take a close look at these rules to determine what your best argument is. If you are, in defending, trying to move a case from the United States to Latin America, your best argument is that a local controversy should be decided in the country where it happened. The argument is that the impact of the law is there and that the country really has an interest in resolving the case. If a foreign law will apply, then you have the argument that there will be the problem of having experts in foreign law come in to tell you what the foreign law is, whereas this would not be necessary in Latin America.

We also look at what law will apply to the various issues in the case. For example, if you split the case between liability issues and damage issues, including punitive damage issues, there is an argument that the United States has the prime interest in governing its own manufacturers by the imposition of punitive damages, whereas compensatory damages may very well be a local issue. You can argue that even if the court is going to apply the law of the forum state to the liability issues, then it ought to apply the law of the Latin American country to the damages issues. There is a 1996 decision rendered by the District Court for the Eastern District of Pennsylvania, *Kelley vs. Ford Motor Co.*, [933 F. Supp. 465 (E.D. Pa 1996)]. In this case, Ford was sued in federal court in Pennsylvania and the argument was that, with respect to punitive damages, Michigan law should apply because the vehicle was designed in Michigan and that state has the greater interest in controlling the conduct of its manufacturers. It may not surprise you to know that Michigan does not have punitive damages, which was obviously a driving factor in Ford's efforts to apply Michigan law. Incidentally, the *Kelley* case *did* apply Michigan law to the punitive damage issue.

One of the choice-of-law factors that I take into account in considering whether it would be better to litigate in the United States versus in the Latin American country is the part that discovery will play in the case. Inspection by the defendant of the allegedly offending product is usually very easy in the United States and sometimes not as easy in Latin America. On several occasions, our firm experienced the situation where the product was in the custody of local authorities, and it was difficult to get our people down there to inspect. Again, this is an area where you really need the help of good counsel in the country where the accident occurred.

It is very easy in the United States to take the depositions of police officers and other witnesses. It has been my experience that it is not as easy to arrange depositions of public officials, such as police officers, in Latin American countries. Again, this is where you need the help of good counsel in that country.

When depositions are taken in the foreign country, it is wise to anticipate the need for court rulings during the deposition. If you can make arrangements to have the court or magistrate available to give you rulings, since taking depositions involves a lot of travel, and it is not a situation where you will want to go down there and do it again if the court decides that questions should be answered that were not

answered during the deposition. If you have, as a defendant, a facility in a Latin American country, you may have to get down there and review the documents, sometimes in a foreign language. Things that are easy in the United States are sometimes much more difficult in the Latin American country.

Victor Manual Diaz, Jr.:

Well, I think that José and Doug have really given you the framework for this discussion. Today, I am just going to make some general observations about the practice that I think will be helpful.

The first observation I want to make is in the matrix of how to analyze these cases. There are four sub-matrixes. First, you have to separate situations in which you are dealing with an alien plaintiff from those when you are representing a U.S. plaintiff, because the analysis changes depending on whether you are talking about representing a foreign national who is suing in the United States, or representing a U.S. citizen or a U.S. resident-alien, who is suing in this country. Concerning the latter, you have to distinguish between a U.S. manufacturer, a foreign manufacturer, or a U.S. defendant or a foreign defendant. In the case of a U.S. citizen versus a U.S. manufacturer, even if the accident occurs abroad, you have a simple situation. The case stays in this country. The most difficult case, of course, for staying in this country, is the case of a foreign national suing a foreign corporation for a foreign-designed product.

We essentially have four scenarios regarding jurisdiction, and the analysis changes depending on whether you are dealing with U.S. plaintiffs or foreign plaintiffs. You can defeat diversity jurisdiction and keep the case in state courts if you can bring in as a defendant a resident of the same state as any of the plaintiffs. However, the situation is completely different when you are dealing with foreign nationals. When you are dealing with foreign national plaintiffs, the joinder of a resident defendant is not a solution to the diversity problem. There are actually sixteen combinations under the jurisdictional statutes of the U.S. You have jurisdiction in state courts only when you are dealing with an alien plaintiff suing an alien defendant.

In the case where an alien plaintiff is suing only a U.S. corporation, the alien-versus-U.S. situation, there is diversity jurisdiction. This is the situation in a case I am currently litigating, where I am representing Venezuelan nationals who were injured as a result of defective Ford Motor Company Explorers and defective Firestone tires. We made the decision to file the case initially in federal court rather than filing in state court and then waiting for the defendants to remove it. Under 28 U.S.C. §1332(a)(2), diversity does exist. Similarly, we had this come up in a number of the Ford/Firestone cases, in which a combination of U.S. and alien plaintiffs are suing U.S. and alien defendants, you also have jurisdiction under 1332(a)(3). Again, it is the converse of what normally happens when you are

dealing with U.S. plaintiffs. Many lawyers do not realize that there is diversity jurisdiction when you have American citizens and aliens on both sides.

The determination whether to sue in federal or state court, when you are dealing with foreign plaintiffs, is largely made in accordance with the federal statutes. Defense lawyers usually want cases to be litigated in federal court. The key here is to understand the sixteen different scenarios that the federal jurisdictional statutes create; to understand the matrix and then see if you can fit your case into a scenario whereby you, as a plaintiffs' attorney, can maintain jurisdiction in state court. A great deal of planning must occur on the part of the plaintiffs in order to understand these considerations.

One very interesting aspect is how important the choice of forum is for an issue that you would think is unrelated to the forum non conveniens analysis. Our firm is litigating what we think is going to be one of the landmark cases in this area right now in the Eleventh Circuit Court of Appeals. State court rules on forum non conveniens dismissals are different from the federal court rules. When you are looking at contacts with the jurisdiction for purposes of making the forum non conveniens analysis in state court, you are limited to looking at jurisdictional contacts within the state. In other words, if I had filed my Ford/Firestone cases in a Florida state court, the analysis there would be: "What contacts are there to the underlying design of the Ford Explorer with the State of Florida? In federal court, the rule is different because you are dealing with national jurisdiction and therefore the rule is that you look at *national* contacts. The court must look at the jurisdictional contacts within the entire United States, not just with the State of Florida. Because those jurisdictional rules are different, the outcome in any particular case can be different.

We are currently litigating this issue in a case in which we represent a U.S. citizen who was injured aboard a Costa Cruise Line vessel. We initially filed the case in the state court. There, we had the ability to defeat diversity and the defendants moved to dismiss on the basis of forum non conveniens. We defended on the basis of federal decisions on the subject and the defendant argued that the state rule was different. The trial court denied the motion, and we temporarily remained in state court. However, in a decision published in Southern Reporter [678 So.2d 372], the Florida Court of Appeals accepted their argument, reversed, and dismissed our action. At that point, we turned around and said, "okay, if you say that the state court rule is different, we are going to federal court." We refiled the suit in the Federal District Court here in Florida. The federal court reasoned defendant Costa Cruise Line argued in state court that the rule is different, and so the court ruled accordingly. The court denied the forum non conveniens motion, notwithstanding that there was a *res judicata* argument made by the defendants: "Judge, we just litigated this issue and the state court held that this case should be sent to Italy, where the defendant Costa Cruise Line has its principal place of business." However, the federal court stated: "But, you argued before the state court that the state court rule was limited, and now I am going to hold you to that." This decision is currently before the Federal Circuit Court of Appeals. So you

have the situation that if the state court rule applies, the case goes to Italy. If the federal court rule applies, the case stays in the United States, where we want it.

Another very important aspect of product liability litigation is the availability of multi-district proceedings. Product liability litigation from a plaintiff's perspective can sometimes be very difficult. Doug Seitz and his clients are experienced and familiar with this situation, but if you are an individual plaintiff's lawyer litigating a case against Ford Motor Company, you are facing a Goliath. You have a huge corporation that is defending its product with millions of technicians ready to parade into court to tell you that there is nothing wrong with this product, a defendant that has litigated the case in probably sixty seven forums across the country and has learned from their prior mistakes or their prior successes, how to litigate the case successfully. If you are a sole plaintiff representing an injured young girl, you are facing a daunting challenge to prove liability. When there are multiple suits pending around the country, the availability of multi-district litigation is a benefit to such a plaintiff's lawyer.

In the case of the Ford/Firestone litigation, consideration of [the availability of multi-district litigation procedure] weighed heavily in our decision of whether to file these cases in state or federal court. The fact that there was a federal multi-district litigation procedure might have long-term considerations concerning the court dismissing a case for forum non conveniens reasons. For example (and I cannot comment too much about this case because the forum non conveniens motion now pending is litigating six hundred cases arising out of the Ford/Firestone rollovers), there is a less compelling argument for dismissing the 115 cases that arise outside of the United States, because they involve the same witnesses, the same discovery, and the same evidentiary rulings. Thus, it becomes a stretch for a defendant to say: "Well, these cases should be dismissed out of the United States."

For the Latin American lawyers present, what we in this country call "subject matter jurisdiction," and the issues of whether a federal court has jurisdiction either through the existence of a "federal question" or "diversity of citizenship" is what I think Latin American countries refer to as going to *la competencia* of the court, as opposed to *jurisdiccion*. In this country, we call it all "jurisdiction," subject matter jurisdiction or personal jurisdiction, but in Latin American countries we are talking about *la competencia*, which describes the ability of the court to hear the case.

Turning now to what jurisdiction really means, both here and in Latin America, is the issue of personal jurisdiction. A very important challenge, from the plaintiffs' perspective, is the ability to get personal jurisdiction and/or service of process, which are distinct issues, over a foreign defendant when you are dealing with either a principal defendant that is a foreign corporation, or an ancillary defendant that is a foreign corporation.

There are three approaches that have been successfully used by plaintiffs' lawyers to get jurisdiction in the United States over foreign manufacturers or product designers. We have already mentioned the issue of general versus subject

specific jurisdiction, particularly the contacts of the foreign defendant with the U.S. jurisdiction. For general jurisdiction, we will determine answers to questions such as: "Do they come here to source their merchandise? Do they have agents here? Do they conduct their transactions here? Have they entered into leasing agreements here?" General jurisdiction is the one that most people refer to when they are speaking of "personal jurisdiction." However, there have been great successes by creative plaintiffs' lawyers using two other approaches.

In many instances, U.S. manufacturers set up foreign subsidiaries in order to insulate themselves from suits in the U.S. arising from products distributed by these subsidiaries in Latin America. Sometimes, you can hold the parent company liable in a suit on an alter ego theory, maintaining that in fact the subsidiary was set up solely for the purpose of insulating the parent from liability, and that the requisite formalities of maintaining the distinction between parent and subsidiary have not been respected.

We have used the alter ego theory successfully on several occasions against, for example, Club Med. Club Med operates through different operating companies in almost every country where they have a resort, with all of the centralized marketing advantages and centralized sales functions. We all know "Club Med," and we all think, "Oh, we bought a Club Med vacation—of course, I bought it in Fort Lauderdale. Surely you do not mean that I will not be able to sue in the United States?" Well, lo and behold, when you went to Cancun, it was a Mexican company and the Mexican company says: "Oh, we have absolutely nothing to do with the United States." The alter ego theory has been successfully used in such cases as Club Med to establish jurisdiction over the foreign defendant by saying: "Well, look, the sales company you have in the United States has been treated as part of one and the same company; thus, for purposes of liability, we [the courts] are going to do the same."

In another case that I am currently litigating, arising from the Swiss Air crash in Canada off Peggy's Cove, the Swiss Air group had undergone a corporate restructuring on the advice of its lawyers, to structure the company on a worldwide basis to insulate its products division from its sales division and carrier division. Here, we filed a multi-district proceeding. Again, the Plaintiff's Steering Committee has successfully argued jurisdiction in the United States over the non-U.S. carrier. The carrier is operating in the United States under FAA regulations and has to consent to jurisdiction under the Warsaw Convention. However, we also argued a joint-venture theory against the foreign defendant and were able to keep, at least for the purposes of the motion to dismiss stage, the foreign defendants in the U.S. litigation. Once you have subject matter jurisdiction and personal jurisdiction over the defendant, of course, the battleground shifts to venue, and venue in the context of foreign product liability litigation is *forum non conveniens*, again.

The fact is that the litigation of foreign product liability cases in the United States has been on the rise, significantly, since 1985. I have a long list of decisions where courts have denied *forum non conveniens* motions involving

product liability where the court is dealing with a U.S. manufactured and designed product that caused injury to a foreign national in a foreign country. Courts have denied forum non conveniens motions consistently in those cases and allowed the foreign national to sue in the United States. However, there are exceptions. Sometimes the plaintiffs' attorneys lose, but there is a growing body of law allowing litigation of cases in the United States. In this growing body of law, Florida is, not surprisingly, a hotbed, because we are a center for inter-American commerce. Hence, we are also a center for inter-American litigation.

Kevin Malone was telling me that Dupont, the principal defendant in the Ecuadorian Shrimp litigation, elected not to make a forum non conveniens motion, because it had a large judgment pending against it in Ecuador. An undecided issue in this area is whether a defendant can consent in such a forum non conveniens motion to the jurisdiction of the foreign court *only* for one case, and only for that specific plaintiff, thus taking the position that: "I do not want to be subject to the laws of Ecuador for any other possible dispute that anyone could bring against me." It is not clear that such consent is proper, either under U.S. law or under the laws of the Latin American countries. It is an area of particular interest to me, because I believe that when you look at the laws of these civil code countries, you will find you cannot consent in such a limited fashion, even if a U.S. court would accept it. Latin American courts will rule that, if you consent, you must consent in an unlimited fashion.

It may come as a surprise to some foreign manufacturers that, because of the inter-relationship in Latin American countries between civil and criminal codes, what we regard as civil torts are regarded as *quasi delitos*, and the litigation arising out of the same is criminal in nature. You get civil retribution via the criminal case. When you consent to jurisdiction, you are, in our opinion, consenting not only to civil jurisdiction, but necessarily also to criminal jurisdiction. As a matter of law, if a Latin American court finds there is a *delito* (a crime that has resulted in the injury to the plaintiff) they are required to make a referral to a criminal court. The civil process must stop, and until there is an adjudication of the criminal matter, the civil process cannot go forward. Therefore, you may find by consenting to litigate the case of an injured person outside the United States, you have subjected yourself and your executives to criminal liability in Latin America. We do not have decisions on this subject yet, but I can assure you that it is an area that plaintiffs' lawyers are looking into intensely, and it is an area that is unique to the interrelationship of the civil and criminal codes in Latin American countries.

We have about fifteen decisions, in state and federal courts, involving product liability cases arising in foreign nations in which forum non conveniens motions have been denied. This is a very timely topic and the volume of this type of litigation, particularly with the globalization of the world market, is necessarily going to increase. As you have U.S. corporations becoming increasingly successful in introducing their products to Latin America as the result of inter-American free trade agreements, you are going to have people injured by defective

products, and you are going to have plaintiffs' lawyers trying to bring suits in the United States.

The forum non conveniens analysis has been covered. I just want to make a few more observations that have not been touched upon. First, the law in the United States is to the effect that the plaintiff's choice of forum is to be given a presumption of being justified. That is something you start off with in this country, namely the presumption that the forum selected by the plaintiff is a proper forum and the burden is on the defendant to change that election. That law is not the same in the case of plaintiffs who are aliens or foreign nationals. A Venezuelan national is not, per se, entitled to the same presumption in favor of his choice of forum as a U.S. citizen. However, there are now six decisions that have found this is not the case where the U.S. and the foreign country involved have entered into multilateral treaties guaranteeing to their citizens mutual access to the courts of their respective countries. Most Latin American countries have those treaties.

One of the forum non conveniens criteria is the basic presumption in almost all of Latin America that the proper forum is the principal place of business of the defendant. That concept is codified in almost every civil code in Latin America and in the Bustamonte Code, which is the Latin American equivalent of the Restatement of the Law in the United States. From there flows the difference between U.S. and foreign product cases, because when you are dealing with a U.S. defendant which has distributed a product into a foreign country causing injury to a foreign citizen, the basic precept of international law is that the proper place to sue a Ford Motor Company is in the principal place of business of Ford Motor company in the United States. Absent the development of private international law statutes in most Latin American countries, the general principle found in the Bustamonte Code, and in most of the jurisdictional provisions of the civil codes of these countries, is that a foreign defendant should be sued in that foreign country, and a U.S. defendant should be sued in the United States. Within the last fifteen years, in many, if not all, Latin American jurisdictions, private international law statutes have been developed, which have created limited situations where extraterritorial application of the *competencia* of Latin American courts will be accepted.

Our firm is litigating this issue now intensely because Venezuela is one of the countries that is developing two strains of protection that may limit the scope of forum non conveniens dismissals in the United States. Further, we have a number of decisions in Latin America, wherein Latin American courts themselves have adopted the concept of forum non conveniens. This was unheard of previously. Generally, it is very difficult for a civil code lawyer to accept the concept of a judge having *competencia*, subject matter jurisdiction, over a case and still be able to refuse to hear the case. We also have what I would call a results-based jurisprudence in some Latin American courts. A number of countries have adopted protective statutes, Ecuador being one of them that address

the principle of not denying access to foreign courts to its citizens who have been injured by defective products manufactured in another country.

I think these cases are not won or lost dependent on where the witnesses are or where the evidence is. The fact is that defendants' counsel can develop an argument that: "Well, the accident occurred in Venezuela, so I need to talk to the tow truck driver that towed away the Ford Explorer, and I need to go view the scene of the accident, and I need to talk to every nurse and every technician and every person who touched the patient at the hospital. They are all material witnesses in the case." Similarly, plaintiffs' lawyers can say: "Wait a minute, the Ford Explorer was designed by this technician, and five million different people in sixty different parts of the United States had something to do with the design of this product." All of this does not really get you very far because, when you are talking about product liability cases involving U.S. design, most of the liability witnesses are going to be in the United States. However, most of the material witnesses are going to be abroad. These arguments will not get you as far as looking into the foreign law, the proof of the foreign law. The limitations of the foreign law; these structural issues and strategic issues affect how to position your lawsuit and how to position the forum non conveniens motion. This is where the real lawyering comes in.

I will close by saying that I think that when you look at this area of the law, the most important thing to remember is that not all cases are the same. If you want to come up with a model analytical framework for these cases, you have to talk about separate rules that govern the U.S. plaintiff versus foreign corporation case, where the accident occurs abroad, the rules that govern the alien plaintiff versus U.S. corporation case, where the accident occurs abroad, and the rules that govern cases involving disputes between alien corporations.

As I have said, and will say again, I do not believe that there is a compelling argument why a U.S. manufacturer of a product that is distributed worldwide, which causes injury to some people in the State of Tennessee and to others in the State of Florida, and again to others in the Republic of Ecuador, should not be subject to suit in its own forum. I think as much as U.S. corporations would like to insulate themselves from liability exposure, the fact is that if you were going to avail yourself of the benefit of a world market and if you are going to reap the economic benefit of selling your U.S. designed product abroad, you should have the burden of being subject to liability in your home court. Therefore, I hope as you move forward in your discussions that you will come up with a set of rules that might be instructive for Latin American legislators that will not only protect legitimate interests of corporations, but also the legitimate interests of individuals that have been injured in these accidents.

The only comprehensive study that has been done on this subject was by an Italian law professor. What he found was that ninety-nine percent of cases dismissed on forum non conveniens grounds in the United States, are, for one reason or another, never refiled. Thus, the fact is that the forum non conveniens dismissal is, in most instances, a dispositive dismissal of the litigation. The other

aspect that this exchange illustrates to me is that we can have an analytical perspective and discuss it in a broad context, from the perspective of someone thinking: "How do you want to develop a model code to replace the respective judicial systems?" The rules should be set in a clear and definable fashion, because the way the law has currently been structured, you have a playing field that leads to unpredictable, uncontrollable, and at times irrational results. It is in everybody's best interests, as the Warsaw Convention did for international aviation litigation, to define a series of rules that, in order to be acceptable, must be fair. It cannot be a set of rules that arbitrarily denies access to the judicial system in the United States for all foreign litigants. Although we certainly have congestion in our court system, it pales in comparison to the congestion that is prevalent in Latin America. Here we have an average period of about eighteen months from filing to the resolution of the matter.

Because of the taxation problem, we have to make the distinction between U.S. and foreign-manufactured products, and between U.S. and foreign defendants. With the globalization of the world market, when U.S. corporations sell their products to Latin America, they are generating tax revenues for the states, meaning that they are generating profits. They are generating corporate taxes that go to pay for our courts. We are reaping the economic benefits of a globalized world market, but only when you look at the cost of globalization of liability exposure do people talk about economic considerations. If it did not make economic sense for corporations to sell their products abroad, they would not do it.

José Astigarraga:

This is exactly what the National Law Center for Inter-American Free Trade wanted to see, exactly this kind of debate. We need to see people with experience in this field, such as the participants in this seminar, develop a model code.

IX. THE ROLE OF GOVERNMENT AND LEGISLATION IN LATIN AMERICAN PRODUCT LIABILITY CLAIMS

Panelists: José Ramón Jiménez-Carbo, the Attorney General of Ecuador; Maria Augusta Cueva, Counsel to the Attorney General of Ecuador; and Alfredo Bullard Gonzáles, of the law firm of Bullard & Rivarola, Lima, Peru

Attorney General Jiménez-Carbo:

Ecuador's first Consumer Defense Law, was adopted in 1990 to provide for consumers' rights and redress from injuries caused by defective products; however, the law failed because it was so blatantly "against private enterprise" and "communistic." The revised Consumer Defense Law, adopted in July of 2000, is working better. It consists of sixty-three Articles, which are broken up in seven sections addressing the following areas: Section A, the Consumer Defense Law addresses the duties of suppliers; Section B, the obligations of consumers; Section C, the regulation of advertising, requiring, among other things, that the country of origin of the product be included; Section D, the required commercial information that should accompany advertising, such as prices, weights and measures, and the currency used (presently, the U.S. dollar is the official currency of the country); Section E, the joint and several responsibility of manufacturers, importers, distributors, and retailers; Section F, the control of the charges for public utilities, requiring suppliers to justify all increases in rates and to give users certain rights to refuse paying the bills; and Section G, the Consumer Defense Law, ostracizes attempts by manufacturers or retailers to limit liability by using certain provisions in invoices, strictly prohibiting such methods. In the procedural field, the Attorney General stated that while Argentina has 20,000 separate statutes in place concerning products liability, Ecuador has only 5,000. The burden of proof in civil actions is the same as in Argentina, but on appeal, an Ecuadorian appellate court on its own initiative can accept new evidence, which is contrary to the practice in Argentina. Ecuador has a 1955 statute, which permits litigants to choose U.S. courts over courts in Ecuador.

Maria Augusta Cueva, Assistant Attorney General of Ecuador:

The product liability principle is found in the Ecuadorian Constitution, specifically in the provision that states, "The law will establish quality control processes, consumers defense procedures, indemnities and damages for deficient quality of goods and services." In compliance with this constitutional mandate, laws have been adopted which provide that those who render services and/or sell products will be civilly and criminally liable if such products and/or services do not comply with their advertising and/or labels. The adoption of the U.S. dollar as currency was the result of rampant deflation in the value of the Ecuadoran sucre,

which declined in a period of three years from a value of 7,000 sucres to the dollar to the exchange rate of 25,000 sucres to the dollar. Ecuador's new Consumer Defense Law, with its strong enforcement provisions, has forced compliance with sanitary registration requirements that had previously been avoided by Ecuadorian businesses.

Alfredo Bullard Gonzáles:

Product liability law in Peru has experienced a remarkable evolution, beginning with the adoption of the first Consumer Protection law in 1991. There are two avenues of redress for consumers of defective products in Peru: (a) the Ordinary Courts, and (b) the National Institute for the Defense of Competition and Consumer Protection, with the acronym of INDECOPI, established in 1991. Unfortunately, judicial decisions in Peru are not reported in such a way as to provide an in-depth discussion of legal conclusions or important legal principles. Relief for product defects has been largely administered by INDECOPI, and there are many reported decisions by that administrative body. In these proceedings, relief in the form of fines imposed upon the violating manufacturer or merchant can occur. There can be the ordering to pay for the cost of repairs, and/or replacement, and the like, but no compensatory damages. Fines imposed by INDECOPI have been as high as US \$85,000, but the average is US \$1,300. Most consumers choose to go to INDECOPI because it provides for a conciliation process during which the parties reach an agreement in seventy percent of the cases, and INDECOPI's resolutions are reached quicker than in ordinary courts.

The product liability law as administered by ordinary courts is governed by statutory law, which, in Article 32 of Legislative Decree 716, provides that the supplier is held liable for any damage caused to the personal safety of consumers or to their property due to any defect in its product. All those in the chain of distribution are held jointly liable, and the supplier paying compensation to a consumer is entitled to indemnify the entity that provided the defective product or that caused the defect. However, punitive damages are not recognized in Peru.

Only "reasonable consumers" are protected under Peruvian law. Negligence of the user may reduce recovery. As far as determining what is defective, the "idoneity" principle applies. The product must meet the reasonable expectations of the consumer. A product that does not comply with this "idoneity" model is defective. Defects may fall into three categories, that of (a) defective design, (b) defective manufacturing, and (c) defective information in connection with the marketing of the product. Class actions are recognized in Peru, but only when brought by INDECOPI or by a public or private entity empowered by INDECOPI. As of now, INDECOPI has never directly or indirectly exercised its faculty in the area of class actions.

X. PRODUCT LIABILITY—A VIEW FROM THE BOARDROOM

Jay Fox:

The first speaker cautioned manufacturers/suppliers who avidly condemn the innovations in product liability law, but who do not adjust to those innovations. He labeled them “Horses with Blinders.” These “horses” condemn the “bad law,” asserting that: “plaintiffs attorneys are Demons,” and that “dopey consumers” are being given large sums of money, that the “wheel” is being “reinvented,” and that they want to “hang the nuisance filers.” The answer is to quit fighting the system and to adjust to its idiosyncrasies. The desire of civil lawyers, and of some manufacturers, to codify the law is not yet here, and many questions of liability remain unanswered. Are medicines entitled to a different standard of liability than beverages? Is a product that is designed for one use, for instance a rivet, defective when placed to another use?

Those in the sales departments should be concerned with contracts between exporters and distributors concerning the allocation of liability for product defect, the insuring of goods in transit, and the responsibility between exporter and distributor regarding the placing of warnings on products. The possibility of the personal liability of directors for the distribution of a defective product was also pointed out by the speaker.

XI. COMMENTS ON CURRENT AND FUTURE TRENDS IN PRODUCTS LIABILITY AND PROSPECTS FOR A MODEL LAW FOR THE AMERICAS

Victor Schwartz:

Our products liability law is for the most part judge-created, keeping with the English tradition of the common law. The role of state legislatures has often been to restrict rather than extend liability. Some have accused judges of “unrestrained judicial lawmaking” and of “judicial imperialism” in this area. A “snapshot” of the present American products liability law is found in the Restatement (Third) of Torts: Products Liability. This Restatement particularizes considerably on the singular definition of a “defect” which had been adopted in the early 1960s in the Restatement (Second), § 402(A). The new Restatement is based on later judicial decisions and divides liability into: (1) manufacturing defects, in §2(a); (2) failure to warn defects, in §2(c); (3) design defects, in §2(c); and (4) innocent misrepresentation, in §9.

The most remarkable departure from the prior Restatement is that in the third Restatement, fault-based concepts are brought back into the criteria for liability regarding the failure to warn and defective design situations. The only “strict liability” imposed by the current Restatement concerns manufacturing

defects, *i.e.*, when injury is caused by the failure of the product to be manufactured in compliance with the standards of its own design. As to “design defects,” the new Restatement requires that in order to recover, there must be an evidentiary showing that a Reasonable Alternative Design (RAD) exists. However, this provision has a “bypass” avenue for plaintiffs’ recoveries in Comment *e*, the so-called “manifestly unreasonable design.” The example given here is that of a toy gun that shoots hard rubber pellets with sufficient velocity to cause injury to children.

Though there are some of these liability-limiting modifications in the new Restatement, it also includes some new ammunition for plaintiffs: (1) a post-sale duty to warn of after-manufacture-discovered defects is inserted in §10; (2) even adequate warnings may not shield against a design defect claim (Comment 2(1)); (3) non-compliance with a safety statute is spelled out as a strict liability situation; (4) there is the possibility for design claims against manufacturers of prescription drugs and medical devices; and (5) there is a “caveat” expressed as to the Learned Intermediary Doctrine, which has been regarded in some courts as a defense to manufacturers. Recent cases have applied the principles of the Third Restatement. One hopes that the pronouncements of the new Restatement will be treated fairly by the courts in the future.