THE TERMINATION OF REPRESENTATION AGREEMENTS: THE APPLICATION OF FOREIGN LAW AND THE CONCEPT OF *ABUSO DE DERECHO*

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Several interesting legal questions in the area of comparative law were left unanswered in July of 1977 due to the extrajudicial settlement of a lawsuit initiated by a foreign sales representative against an American manufacturer. The suit was based on damages allegedly incurred by the sales representative when the manufacturer terminated the parties' representation agreement. In particular, two issues are significant to the practicing lawyer who is called upon to resolve transnational or comparative law problems in the United States. They are, (1) the application of foreign law in a lawsuit commenced in the Federal Courts of the United States, and (2) the use of the concept of *abuso de derecho*[1] in the termination of representation agreements. For purposes of our discussion, the chosen forum shall be the United States District Court for the Middle District of the Commonwealth of Pennsylvania and the applicable foreign law shall be the law of the Republic of Argentina.

The principal objective of this article is to raise the aforecited legal issues and to present the legal arguments in favor of the position that (i) Argentine law should be applied to the facts of the case; and (ii) the concept of *abuso de derecho* should protect the sales representative and require the manufacturer to pay all damages proximately caused by its termination of the representation agreement, including punitive damages. We hope that our rather summarized adversarial presentation of this complicated material will engender further scholarly research and a brisk debate of the merits of the case and our conclusions.

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1. *Abuso de derecho* is translated to mean an abusive exercise of rights.

Facts

The Representative is a *sociedad anonima*[2] duly constituted under the laws of the Republic of Argentina having its principal place of business in Buenos Aires, Argentina. It has no offices or other establishments located in the United States or outside of Argentina. The Representative's primary business is the marketing of the products of foreign manufacturers in Argentina.

The Manufacturer has its principal place of business in the state of Pennsylvania, engaging primarily in the business of manufacturing and marketing industrial machinery.

The Manufacturer had begun to manufacture and market industrial machinery in the mid-1960's and had concentrated its efforts toward the domestic United States sales market. In early 1968, the Representative initiated discussions with the Manufacturer regarding the marketing and sale of its machinery in Argentina. At the time of the discussions with the Representative, the Manufacturer was neither active nor successful in marketing its products in Argentina or anywhere else internationally. This was largely due to the Manufacturer's inability to service its machinery outside of the United States. Nevertheless, the Manufacturer conveyed to the Representative its interest in expanding its exports and in developing a marketing network in all of South America, particularly in Argentina.

In April, 1968, the Representative was informed that Mr. Fulano, the Manufacturer's executive responsible for export development and the appointment of foreign sales representatives would be travelling to Argentina. His express purpose for the trip was to appoint the Manufacturer's exclusive sales representative in that country.

During the trip Mr. Fulano spoke to three Argentine firms, including the Representative, regarding the appointment of his company's Argentine representative. At the end of his stay in Argentina Mr. Fulano orally agreed with the Representative's President to their appointment as the authorized representative of the Manufacturer in Argentina. Before returning to the United States, Mr. Fulano notified the other two candidates of his decision.

The Representative began its duties as the Manufacturer's authorized representative in Argentina immediately following the ap-

2. *Sociedad anonima* is the title given by Spanish speaking nations to business enterprises incorporated under their laws.

pointment by Mr. Fulano. Thereafter all correspondence and "Field Personnel and Distributor Lists" issued by the Manufacturer referred to the Representative as the Manufacturer's distributor and sales representative in Argentina. In September, 1968, at the Representative's request, the Manufacturer's Assistant Export Manager issued the first of a series of letters confirming the Representative's appointment as the exclusive distributor and sales representative for the Manufacturer in Argentina. These letters were received, accepted and relied upon by the Representative in Argentina.

The Manufacturer promised to reduce the terms and conditions of the representation agreement to writing, but failed to do so even after being prodded by the Representative. The Manufacturer's executives justified the lack of written terms and conditions on the fact that their policy towards international representation agreements was not yet settled. They attributed this lack of policy to the inexperience of management in the exporting and marketing of their products on the worldwide market. Additionally, the Manufacturer justified the lack of written terms and conditions on the basis that any such Agreement would be too difficult to draft and would be too general for the numerous countries which are or would be product markets.

Notwithstanding the absence of written terms and conditions, it was orally agreed to, clearly understood by both parties, and firmly established in practice during the succeeding years, that the Representative would be the exclusive sales representative for the Manufacturer's products in Argentina. While maintaining this capacity, the Representative would assist the Manufacturer in the promotion, advertising and selling of its products in Argentina in accordance with the applicable provisions of Argentine law. In addition, it was agreed that the Representative would be responsible for the service and repair of the Manufacturer's equipment following its shipment to Argentina. These activities would be carried out pursuant to the corresponding warranties issued by the Manufacturer and in accordance with the applicable provisions of Argentine law.

As compensation for the services rendered by the Representative as the exclusive Agent in Argentina, the Manufacturer agreed to grant the Representative a twenty percent discount on the list price for all machinery sold by it in Argentina, plus an extra two percent discount for any cash payment made in connection with

such sales. It was also agreed that the Representative would be reimbursed for certain promotional expenses incurred pursuant to the applicable Advertising-Promotion Program of the Manufacturer. Payment of the aforesaid compensation and reimbursements was normally made by the Manufacturer through credit memoranda and bank transfers expedited by institutions located in New York state and Argentina.

The Representative communicated with the Manufacturer through correspondence originating from its offices in Buenos Aires, Argentina. Periodically the responsible executives of the Manufacturer, particularly the Area Managers located in Brazil and Chile, travelled to Argentina for extended business conferences.

The Representative's representation agreement with the Manufacturer related exclusively to sales consummated and services performed within the territory encompassing the Republic of Argentina. Except for a special assignment in Bolivia, which fell outside the regular scope of its representation agreement with the Manufacturer and for which it was issued a Special Power of Attorney, the Representative rendered its services exclusively in Argentina.

Until August 29, 1976, Argentine law[3] required local companies representing foreign entities in Argentina to register as such in a special registry.[4] The Representative duly registered as the sales representative for the Manufacturer in Argentina, thereby subjecting itself to all the consequences created thereunder.

The Representative rendered performance under the representation agreement continuously from 1968 to 1976. Without any prior notice whatsoever, by telex communication and letter dated June 22, 1976, the Manufacturer terminated the representation agreement as of the date of the correspondence. These communications, which were sent to and received by the Representative in Argentina, also stated that the Manufacturer would process all purchase orders submitted by the Representative within the next thirty days. Notwithstanding the foregoing, the Manufacturer refused to accept twenty purchase orders submitted by the Representative on July 13, 1976. In addition, the Manufacturer appointed a new sales representative for Argentina, who proceeded to contact

3. Anales de Legislación Argentina [1974] [hereinafter cited as Legislación Argentina].
4. *Id.* at Registro de Inversiones Extranjeras,, Law No. 20,575.

many of the prospective customers referred to in the purchase orders submitted by the Representative.

The Representative commenced a civil action against the Manufacturer in September, 1976, in the United States District Court for the Middle District of Pennsylvania for breach of contract and "abusive exercise of rights."

I. THE APPLICATION OF FOREIGN LAW

A. Question

The sole question presented to the Court was whether the law of the Republic of Argentina should govern the rights and duties of the respective parties with respect to the issues of breach of contract and abusive exercise of rights.

B. Statement of Law and Argument

1. *Choice of Law Rule*. In a diversity action the Federal District Court is bound to apply the choice of law rule of the jurisdiction in which it sits.[5]

In 1964, the Supreme Court of Pennsylvania, after extensive analysis, adopted as its choice of law rule the "most significant contacts theory" now embodied in the Restatement (Second) of Conflict of Laws.[6] Since that time Pennsylvania courts and the Federal Courts sitting in Pennsylvania have consistently recognized and followed this modern Restatement Second approach in actions based on both tort and contract. Both judicial levels look to the local law of the place with the most significant relationship to the parties and the transaction.[7]

This Restatement Second approach to choice of law problems has been variously referred to in cases and literature as "grouping of contacts," "most significant relationship," "most significant contacts," "center of gravity" and "interest analysis." In practice this means that the court will analyze the policies and interests underlying the issues before it and then apply the local law of the state having the greatest interest and the most direct contacts with the matter in dispute.

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5. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

6. Griffith v. United Airlines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 379 (1971) [hereinafter cited as RESTATEMENT (SECOND)].

7. Gillan v. Gillan, 345 A.2d 742 (Pa. Super. 1975); Neville Chemical Co. v. Union Carbide Corp., 422 F.2d 1205 (3d Cir. 1970).

In the case of *McSwain v. McSwain*,[8] the Supreme Court of Pennsylvania, while applying the Restatement Second approach, stated:

> Whether the policies of one state rather than another should be furthered in the event of conflict can only be determined within the matrix of specific litigation. What should be sought is an analysis of the extent to which one state rather than another has demonstrated, by reason of its policies and their connection and relevance to the matter in dispute, a priority of interest in the application of its rule of law.[9]

The court went on in the case of *DeAngelis v. Scott*[10] and stated that

> [u]nder the modern dispensation now applied in Pennsylvania, it appears that we are neither controlled by the law of the place where the contract right arose (Pennsylvania) nor by the law of the place where the assignment was made (Mass.). The courts of Pennsylvania now say that in determining the applicable law we give to the place having the most interest in the problem paramount control over the legal issues arising out of a particular factual context.[11]

In determining the validity of a release, the Pennsylvania court in *Weddington v. Jackson*[12] relied on German law and stated:

> In adopting this [most significant relationship] rule, the Pennsylvania Supreme Court quoted with approval from a decision of the New York Court of Appeals, holding that "[j]ustice, fairness, and the 'best practical result' . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation."[13]
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> . . . .
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> To select the jurisdiction whose law should govern determination of the validity of the release in question, *Griffith* and its progeny require the identification of the jurisdiction with the most significant contacts with the parties and occurrences in question. By this standard, it is clear that Germany has the most significant contacts with the parties and occurrences in question; therefore, the validity of the release before me should be mea-

8. McSwain v. McSwain, 420 Pa. 86, 215 A.2d 677 (1966).
9. *Id.* at 682.
10. DeAngelis v. Scott, 337 F. Supp. 1021 (W.D. Pa. 1972).
11. *Id.* at 1022.
12. Weddington v. Jackson, 331 F. Supp. 1271 (E.D. Pa. 1971).
13. *Id.* at 1273.

sured by the law of Germany.[14]

There are several sections of the Restatement (Second) of Conflict of Laws[15] which are particularly relevant to the considerations in this case. The Restatement Second provides that subject to constitutional restrictions, a court will follow the choice of law statutory directive of its own state.[16] However, should there be no directive, the Restatement Second lists the factors which are relevant in determining the applicable law.[17] These include the needs of the interstate and international systems,[18] the relevant policies of the forum and other interested states,[19] the protection of justified expectations[20] and the basic policies underlying the particular field of law.[21]

The Restatement Second provides that the parties are free to choose and designate the state whose law will determine issues in contract.[22] However, where no choice is made by the parties, the law of the state which has the "most significant relationship" to the parties and the transaction will apply.[23]

Application of the "most significant relationship" doctrine requires an examination of the contacts between the parties. These include, the place of negotiation, contracting and performance of the contract;[24] the location of the subject matter of the contract;[25] and the domicile, residence, nationality, place of incorporation and place of business of the parties.[26] The contacts' relative importance to the particular issue should govern their evaluation.[27] Additionally, if the place of performance is in the same state that the contract was negotiated, the local law of this state will usually be

14. *Id.* at 1275.

15. RESTATEMENT (SECOND), *supra* note 6.

16. *Id.* at § 6(1).

17. *Id.* at § 6(2).

18. *Id.* at § 6(2)(a).

19. *Id.* at § 6(2)(b), (c). Section (6)(2)(c) continues on to state that the relative interests of those other interested states in the determination of the particular issue is also a factor to be considered.

20. *Id.* at § 6(2)(d).

21. *Id.* at § 6(2)(e). Section (6)(2)(f) includes the factors of certainty, predictability and uniformity of result in the consideration process. Subsection (2)(g) lists the ease in the determination and application of the law to be applied as the final factor to be examined.

22. *Id.* at § 186.

23. *Id.* at § 188(1).

24. *Id.* at § 188(2)(a), (b) & (c).

25. *Id.* at § 188(2)(d).

26. *Id.* at § 188(2)(e).

27. *Id.* at § 188(2).

applied.[28]

There are exceptions in the Restatement Second which specify the use of certain law in various situations in the absence of an effective choice of law by the parties. In the case of a service contract, the local law of the state in which the services or a major portion thereof will be rendered governs.[29] However, the application of the rules of Sections 187 and 188 of the Restatement Second, as discussed above, govern the determination of the rights and duties of a principal and agent towards each other, as well as determining the measure of recovery for a breach of contract action.[30]

In the case of *Neville Chemical Company v. Union Carbide Corporation*[31] the Court applied the principles stated above and determined specifically that "[t]he Pennsylvania Supreme Court follows the modern approach and looks to the law of the place with the most significant relationship to the parties and the transaction, on each issue, or the center of gravity of the contract."[32] Accordingly, the most significant relationship rule should now be applied in this case to determine the law governing the issues relating to breach of contract and abusive exercise of rights.

II. THE REPUBLIC OF ARGENTINA IS THE STATE WITH THE MOST SIGNIFICANT RELATIONSHIP TO THE MATTER IN DISPUTE AND ITS LOCAL LAW SHOULD BE APPLIED TO THE ISSUES PRESENTED

A. Application of the Most Significant Relationship Principle

Since the parties in the case at hand did not expressly agree on an effective choice of law in their representation contract, the following contacts should be taken into account in applying the "most significant relationship" principle to determine the applicable law in the present action:

(1) The place of contracting;

(2) The place of negotiation of the contract;

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28. *Id.* at § 188(3).

29. *Id.* at § 196. However, if another state has a more significant relationship to the parties and the transaction with respect to the particular issue, its local law will be applied. The more significant relationship will be determined under the principles stated in Section 6. *Id.* The Restatement Second also states that the local law of the place of performance determines issues related to the details of that performance. *Id.* at § 206.

30. *Id.* at §§ 207 & 291.

31. Neville Chemical Company v. Union Carbide Corporation, 422 F.2d 1205 (3d Cir. 1970).

32. *Id.* at 1210-11.

(3) The place of performance;
(4) The domicile, residence, nationality, place of incorporation and place of business of the parties; and,
(5) The law relied upon by the parties in their performance under the contract.[33]

1. *Place of Contracting*. In April, 1968, the Manufacturer sent Mr. Fulano, its international sales and marketing executive to Argentina for the express purpose of appointing its exclusive representative for machinery sales in Argentina. During his visit Mr. Fulano selected and appointed the Representative to serve as his company's exclusive sales representative in Argentina and the Representative agreed to and accepted this appointment. Argentina was clearly the place of contracting.

2. *Place of Negotiation of the Contract*. The material terms and conditions of the sales representation agreement by and between the Manufacturer and the Representative were discussed and negotiated by Mr. Fulano and the President of the Representative in Argentina during April, 1968. Consequently, Argentina was the place of negotiation of the contract.

3. *Place of Performance*. The subject matter and principal objective of the sales representation agreement was the pursuance and obtaining of machinery sales in Argentina. All sales activities under the representation agreement were undertaken and consummated within the Republic of Argentina. The machinery sales obtained by the Representative were made exclusively to entities operating within the Republic of Argentina and all equipment related thereto was delivered to them in the Republic of Argentina. All equipment sold under the sales representation agreement was assembled and operated in Argentina. The Representative maintained and serviced the machinery in Argentina under the Manufacturer's applicable warranty and all spare parts were delivered and installed in Argentina. The Representative rendered all of its services and performance under the representation agreement in the Republic of Argentina. Consequently, Argentina was clearly the place of performance.

4. *Domicile, Residence, Nationality, Place of Incorporation and Place of Business of the Parties*. The Representative, the party

33. RESTATEMENT (SECOND), *supra* note 6, at § 188.

seeking damages under the representation agreement, is an Argentine corporation with offices in Buenos Aires, Argentina. Argentina is the place of incorporation and the principal place of business of the Representative. The Representative does business exclusively in the Republic of Argentina. The Manufacturer is a Pennsylvania corporation and does business throughout the United States and in numerous foreign countries.

5. *Law Relied Upon by the Parties in Their Performance Under the Contract*. Argentina is the State whose law was relied upon and adhered to by the Representative and the Manufacturer in their performances under the sales representation agreement. Compliance with Argentine law by both the Representative and the Manufacturer was absolutely necessary and essential to effect machinery sales in Argentina. The manner in which sales were obtained, documented, consummated, financed and imported under the sales representation agreement were controlled and dictated primarily by the laws of the Republic of Argentina. The Representative's responsibilities and liability to its Argentine customers, the Republic of Argentina and the Manufacturer were circumscribed by Argentine law. The Representative and the Manufacturer molded their conduct under the representation agreement to conform to the legal and commercial requirements of Argentina. The parties relied upon no other law as heavily as they relied upon the law of the Republic of Argentina.

6. *Additional Considerations*. The protection of justified expectations is another of the relevant factors set forth in the Restatement Second.[34] The sales of the Manufacturer's equipment in Argentina had to be obtained, consummated and serviced in accordance with the law of Argentina. Both the Representative and the Manufacturer relied on the pertinent provisions of Argentine law in their performances under the representation agreement. It follows that the parties contemplated, from the very commencement of their relationship in 1968, the application of Argentine law. It was their probable intention, expectation and desire that such law would be applied to any and all controversies arising during

34. *Id.* at § 6. Additionally, Comment d to § 6 states that

> [p]robably the most important function of choice-of-law rules is to make the interstate and international systems work well. Choice-of-law rules, among other things, should seek to further harmonious relations between states and to facilitate commercial intercourse between them. In formulating rules of choice of law, a state should have regard for the needs and policies of other states and the community of states.

the course of performance. Consequently, the application of Argentine law herein would clearly protect the justified expectations of the parties.

The Restatement Second specifically provides in pertinent part that "[i]f the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied. . . ." The Supreme Court of Pennsylvania followed this approach in the case of *In re Danz Estate*[35] and applied German law in determining the validity of a gift contract "because that is the place where the contract was made and was to be performed."[36]

A comment following section 291 of the Restatement Second asserts that

> [T]he state where performance by the agent is to take place will usually be given the greatest weight in the absence of an effective choice of law by the parties . . . , in determining what law governs the rights and duties owed by the principal and agent to each other.[37]

In the case of contracts specifically for the rendition of services, the Restatement Second refers directly to the "local law of the state where the contract requires that the services, or a major portion of the services, be rendered."[38] The commentary following this section further illuminates this point and states that:

> [s]everal factors serve to explain the importance attributed by the rule to the place where the contract requires that the services, or a major portion of the services, be rendered. The rendition of the services is the principal objective of the contract, and the place where the services, or a major portion of the services, are to be rendered will naturally loom large in the minds of parties. Indeed, it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the services, or a major portion of the services, are to be rendered would be applied to determine many of the issues arising under the contract. The state where the services are to be rendered will also have a natural interest in them and indeed may have an overriding interest in the application to them of certain of its regulatory rules. The rule of this Section also furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the place where the contract

35. In Re Danz Estate, 441 Pa. 411, 283 A.2d 282 (1971).
36. *Id.* at 284.
37. RESTATEMENT (SECOND), *supra* note 6, at § 291, Comment f.
38. *Id.* at § 196.

requires that the services, or a major portion of the services, are to be rendered will be readily ascertainable, of ease in the determination of the applicable law.[39]

The foregoing authorities establish that the place of performance is a highly significant, if not the most significant, "contact" for purposes of applying Pennsylvania's choice of law rule in cases such as the one now at hand. The representation agreement between the Representative and the Manufacturer concerned the sale of heavy equipment in Argentina. It was negotiated, made and performable in Argentina. Argentina was clearly its place of performance. This "significant contact" dictates, in accordance with the choice of law rule presently prevailing in Pennsylvania, that the local law of Argentina should be applied to determine the rights and duties of the parties under such agreement.

It is clear from the facts that the "most significant relationship and contacts" with respect to the representation agreement, both qualitative and quantitative, occurred in, and are closely identified with, the Republic of Argentina. Parties entering into such a representation agreement in Argentina should be able to do so with confidence in the validity and stability of the agreement as measured by Argentine law. Conversely, no other jurisdiction has anywhere near the significant relationship or contacts to the transaction or the parties as the Republic of Argentina. Accordingly, for the foregoing reasons, the law of Argentina should be applied to the issues presented.

III. THE CONCEPT OF *ABUSO DE DERECHO*

A. History of "Abuso de Derecho" in Civil Law

The concept of *abuso de derecho* (or *abuse of rights* or the *abusive exercise of rights*) was originally developed in France in the cases of *Affaire Doerr*[40] and *Eaux Minerales Saint Galmier*.[41] In these cases the eminent jurists did not consider it acceptable to give legal protection to actions taken by owners and creditors, regardless of their motives, if such actions exercised rights with the sole intent to harm another.[42] This school of thought includes actions without a legitimate interest on the part of the owner or holder of the right

39. *Id.* at Comment c.

40. Affaire Doerr, Colmar, May 2, 1855, D.P. 1856.2.9.

41. Eaux Minerales Sait Galmier, Lyon, April 18, 1856, D.P. 1856.2.199.

42. Cueto Rua, *Abuse of Rights*, 35 LOUISIANA L. REV. 956, 996 (1975) [hereinafter cited as Cueto Rua].

worthy of legal protection, actions against some acknowledged general or accepted principles of good faith or positive morality and actions against a widely recognized criterion of elementary fairness.[43]

The principle of abuse of rights has been accepted, developed and incorporated into the positive law of many civil law countries.[44] For example, the German *Land Recht Prusiano* of 1974, and the German Civil Code of 1900 prohibit the abusive exercise of rights and contain express provisions governing the duty to indemnify for damages caused in connection therewith. Article 826 of the German Civil Code (BGB) provides that "[a] person who wilfully causes damage to another in a manner *contra bonos mores* is bound to compensate the other for the damages." Similarly, Article II(2) of the Swiss Civil Code states that ". . . [t]he law does not protect the manifest abuse of a right."

B. "Abuso de Derecho" in the Law of Argentina

In Argentina, the concept of abuse of rights was first developed in doctrine and case law before being expressly incorporated into the positive law. The text of Civil Code Article 1071 originally read, "The exercise of one's right or the performance of a legal obligation cannot make unlawful any act." In 1968, Article 1071 of the Civil Code was amended to read:

> The regular exercise of one's right or the performance of a legal obligation cannot make unlawful any act.
>
> The law does not protect the abusive exercise of rights. That which is contrary to the purpose that the law intended when the rights were recognized, or that which exceeds the limits imposed by good faith, morality and good customs shall be deemed an abusive exercise of rights.[45]

The difference between the amended text of Civil Code Article 1071 and its former text is illustrative of the legislative intent in this regard. As can be seen, the amendment, in addition to incorporating the wholly new second paragraph specifically regarding abuse of rights, added the qualifying element of "regular" to the first paragraph thereof. This addition significantly limited the exercise of rights protected.

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43. *Id.*

44. *Id.* at 972.

45. Legislación Argentina, *supra* note 3, Cod. Civ. Art. 1071, as amended by Law 17,711 of 1968.

The principle of good faith was also expressly adopted in Argentine law in the first paragraph of Article 1198 of the Civil Code by the 1968 amendment.

> Contracts must be executed, construed and performed in good faith and in accordance with what the parties most likely understood or were able to understand, acting with care or foresight.[46]

This principle of good faith has been applied and construed by Argentine courts in many case decisions.[47]

Argentine law also embraces the concept of good customs and the effect of any breach thereof is set forth in Article 953 of the Civil Code.

> The object of legal acts must be things which are commercial, or which have not been prohibited for any special reason from being the object of any legal act, or events which are not impossible, unlawful, contrary to good customs or prohibited by law, or do not oppose the freedom of action or conscience, or do not prejudice the rights of a third party. Legal acts which do not conform to this provision are null and void as if they had no object.[48]

C. Analysis of Article 1071 of the Argentine Civil Code

Guillermo Borda, one of the principal drafters of the 1968 amendment, after reviewing the modification of Civil Code Article 1071 by the amendment stated that "[the addition of the word 'regular' to the first paragraph] modifies substantially the meaning of the principle: the exercise of a right is not always protected by law; it must be a 'regular' exercise, that is, just, legitimate, normal."[49]

Borda goes on to explain the criterion used in establishing the concept of abuse of rights:

> . . . It is deemed that there is abuse when the exercise [of the right] is contrary to the ends taken into account by the law when recognizing such right, or when such exercise is contrary to good faith, morality and good customs.[50]

He then clarifies the factors that the judge should take into consideration when determining whether there has been an abusive exercise of rights.

In his decision, the judge should consider if the following exist:

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46. *Id.* at art. 1198.

47. *Cf.* Diario La Ley, June 17, 1974, case no. 70465 and Diario La Ley, October 10, 1974, case no. 70989, *as cited in* Cueto Rua, *supra* note 43, at 1000.

48. Legislación Argentina, *supra* note 3, Cod. Civ. Art. 953.

49. 1 G. BORDA, TRATADO DE DERECHO CIVIL 51 (6th ed. 1976).

50. *Id.*

> 1) intent to harm; 2) absence of interest; 3) if, among the various ways of exercising the right, the way which is harmful to others has been chosen; 4) if the resulting loss is abnormal or excessive; 5) if the conduct or performance is contrary to "good customs" (*buenas costumbres*); 6) if [the defendant] has acted in an unreasonable manner, repugnant to loyalty and to mutual trust.[51]

The letter and spirit of Article 1071 of the Argentine Civil Code, in establishing the legal principle of abuse of rights within the positive law of Argentina, is captured precisely by Borda.

> If the theory of abuse of rights has made headway, it is due to moral reasons. All the teachings of prestigious jurists against its admission have become ineffectual against the feeling of justice which each man lodges in his heart and which cannot tolerate any attempt to justify under the guise of the law that which is arbitrary, immoral or harmful.[52]

It is important to emphasize in this regard that the concept of abuse of rights in Argentine law has been based principally on the "functional" (*finalista* or *funcional*) and "moral" criteria. That is to say, there is an "abusive exercise of a right" when the right has been exercised either contrary to the economic and social purpose of the law that created such right, in other words the "functional" criterion, or contrary to morality and good faith, the "moral" criterion. Borda specifically states that the traditional French and English criteria regarding abuse of rights, which focus primarily on the defendant's gross negligence, lack of interest and intention to cause damage to third parties, are inadequate, and were not adopted by the 1968 modification to Article 1071 of the Civil Code. Consequently, the Argentine concept of abuse of rights should, *arguendo*, be construed by judges (both Argentine judges and American judges applying Argentine law) much more in line with the subjective moral criterion, "good customs" and good faith, than with the objective criterion based on fault, interest and intent.

D. Precedent: Dillon S.A. v. Ford Motor Argentina S.A.

The rather recent decision of *Dillon S.A. v. Ford Motor-*

51. *Id.* at 52, *citing* Markovitch, *La Théorie de l'abus des droits en droit comparé*, Paris 1936, No. 358; Repetto Mario I, et al v. Blanco, Carlos, (C. Civil Cap.), Sala A, October 18, 1957, 91 La Ley 531.

52. BORDA, *supra* note 49, at 46.

Argentina S.A.,[53] rendered by the highest commercial court of Argentina, involved a plaintiff who entered into an automobile franchise business with the defendant. Pursuant to a standard form or adhesion contract issued by the defendant, the plaintiff would receive a commission on all automobiles sold by it. Under the terms of said contract, the defendant had no obligation to deliver to the plaintiff a specific number of vehicles and had the right to cancel the franchise at any time by mere prior notice. Based on the representations and projected sales and production schedule of the defendant, the plaintiff expanded its operations rapidly and became heavily indebted. The defendant was consistently errant and tardy in its delivery of vehicles to the plaintiff and abruptly cancelled the plaintiff's franchise by telegram a few hours after the plaintiff had read about such cancellation in several newspapers. At the time of cancellation, the plaintiff was the sixth largest Ford dealer in terms of sales (out of 236) and had pending orders for eighty-nine vehicles. In an effort to receive delivery of sufficient vehicles to complete its pending sales, the plaintiff agreed to waive irrevocably all its rights to commence legal proceedings against the defendant. The plaintiff, however, subsequently commenced an action against the defendant for breach of contract and abusive cancellation of its franchise.

The trial court dismissed the action based on its finding that the waiver was entered into willingly by the plaintiff and thus it had no right to bring suit against the defendant. The appellate court reversed the lower court and found for the plaintiff, awarding it $40,000,000.00 in damages; $15,000,000.00 for loss of goodwill, and $25,000,000.00 in general damages.[54]

The *Dillon* case is the latest major pronouncement by an Argentine appellate court construing the principle of abuse of rights. It established several major points:

a) The invocation by the defendant of the clause of the franchise agreement that authorized cancellation may not be discretionary or arbitrary, and its exercise must be subject to the principles of good faith, equity, loyalty and reasonableness.

b) The principle of good faith is based on law and of a legal nature.

c) The arbitrary cancellation of a contract that causes unnec-

53. Dillon S.A. v. Ford Motor Argentina S.A., (C.N. Com.), Sala A, September 11, 1973, 152 La Ley 250.

54. Damages were awarded in pesos the monetary denomination of Argentina.

essary harm to the cancelled party is not admissible because it constitutes an abuse of rights.

d) The conduct of those who abusively exercise a right constitutes an unlawful act pursuant to Civil Code Article 1071 and, accordingly, all the consequences of an unlawful act are attributable thereto.

That part of the *Dillon* decision which is most pertinent to the concept of abuse of rights is transcribed below:

> What consequence does the abusive exercise of a right have? After the enactment of Law 17,771, with the resulting amendment of Article 1071, the answer is simple: Since the abusive exercise of rights is not permitted, such conduct is unlawful. And, therefore, it will produce all the consequences of an unlawful act, to wit: a) In the first place, the judge shall deny protection to anyone who tried to abusively exercise a right and shall dismiss his complaint. b) Secondly, if the abusive conduct has extra-judicial effects, the judge shall demand that the guilty party stop such conduct. c) Lastly, the guilty party shall be liable for damages in the same manner as the perpetrator of any unlawful act: He is liable for all damages, including punitive damages (Art. 1078, Civil Code) and if there are several guilty parties, the liability is jointly held (Art. 1109) . . . [E.D., Book 29, 726].[55]

E. Damages

There are four articles in the Argentine Civil Code which govern the issue of damages. They provide that damages will be available when the loss caused is susceptible to pecuniary evaluation;[56] when there is a loss which is directly related to things in a person's control or possession; or when the loss is an indirect result of a wrong committed to the person's body, rights or powers.[57]

General damages include the loss incurred as well as the loss of anticipated profits.[58] The financial situation of the party suffering the loss can also be taken into account during the judges deliberation process.[59]

Additionally, Argentina's codified duty to indemnify for damages includes not only indemnification of losses and general dam-

55. *Id.* at 264.
56. Legislación Argentina, *supra* note 3, Cod. Civ. Art. 1068.
57. *Id.*
58. *Id.* at art. 1069.
59. *Id.*

ages, but compensation for the punitive damages as well.[60] This liability to indemnify applies to damages intentionally and negligently inflicted.[61]

The court in the *Dillon* case applied the appropriate Civil Code sections and came to the following conclusion on the issue of damages and the scope of the liable party's duty to indemnify the injured party.[62] The court stated that:

> . . . the responsible party shall be liable for damages in the same manner as the perpetrator of an unlawful act: He is liable for all damages, *including punitive damages* [pursuant to Article 1078 of the Civil Code], and if there are several liable parties, the liability is jointly held . . . .[63]

Dr. Borda states in another of his treatises that:

> all *damages* mean the direct consequences; the forseen and forseeable indirect consequences; and the accidental consequences of the unlawful act which resulted as intended by the liable party at the time of performing such unlawful act, excluding therefrom the remote consequences that do not have an adequate causal connection with the unlawful act.[64]

In the leading case in Argentina regarding abuse of rights, *Dillon v. Ford*,[65] the judge awarded the plaintiff $40,000,000.00 in damages. In making this award the court made the following observations.

> The argument in this case that there is no right to indemnification for the goodwill lost through the cancellation of the automobile dealership, because this risk was forseen, is groundless since forseen risk is normal in a cancellation lawfully carried out, but not in an unlawful rescission, such as the present case, which is the result of an abusive attitude.
>
> . . .
>
> In each lawsuit, the judges determine the amount of goodwill; they cannot choose a fixed system, but should analyze the elements of the lawsuit that constitute the claim therein.[66]

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60. *Id.* at art. 1078.

61. *Id.* at art. 1109.

62. Dillon S.A. v. Ford Motor Argentina S.A., *supra* note 53, at 264; *citing* BORDA, *supra* note 49, at 24.

63. *Id.* (emphasis added).

64. G. BORDA, TRATADO DE DERECHO CIVIL ARGENTINO, OBLIGACIONES II — (6th ed. 1976); *citing* Legislación Argentina, *supra* note 3, Cod. Civ., at arts. 901, 902, 904, 905 and 906.

65. Dillion S.A. v. Ford Motor Argentina S.A., *supra* note 53.

66. *Id.* at 253.

In awarding general damages the Argentine court cited the following as the basis for their award.

> Discharge of personnel; losses sustained in the sale of fixed assets; lost profits — not subject to dispute — and losses sustained in the sale of rights and in the forced cancellation of intangible assets; losses not shown in the books of account; legal fees; exchange losses; interest charges; losses from bad debts; loss of a down payment on the purchase of land; non-amortized expenses of forming the business; advertising expenses; obligations assumed by members of the Board of Directors; unpaid balance of mortgage; and penalties or additional taxes — subject to dispute.[67]

The appellate court awarded the plaintiff damages for loss of goodwill, citing various factors taken into consideration. These included: the type and quality of the business; the experience of the aggrieved party in the business; the location of the business; the rate of sales or the growth of the business; the type and nature of the clientele of the aggrieved party; the commercial results of the business; and, the circumstances surrounding the contract negotiation and origin of the business.[68]

IV. CONCLUSION

In light of the factual situation described and the legal provisions and authorities cited herein, it is reasonable to conclude that the Representative had a valid legal claim against the Manufacturer. This claim is based on the concept of abuse of rights and includes all damages caused to the Representative as the result of the Manufacturer's cancellation of its representation agreement, including general, consequential and punitive damages.

This conclusion is based on the following rationale:

Point 1: The Manufacturer's cancellation of its representation agreement with the Representative was capricious and arbitrary and contrary to the principle of good faith set forth in Article 1198 of the Civil Code of Argentina.

Point 2: The Manufacturer's cancellation of the representation agreement contrary to the principle of good faith constituted an abusive exercise of its right to cancel such agreement under Article 1071 of the Civil Code.

Point 3: The Manufacturer's abusive exercise of its right to

67. *Id.* at 263.
68. *Id.* at 270.

cancel the representation agreement was an unlawful act and, as such, rendered the Manufacturer liable for all general, consequential and punitive damages, including loss of goodwill, caused to the Representative, in accordance with the provisions of Articles 1069 and 1078 of the Civil Code.