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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,931

JUAN VICENTE PEREZ SANDOVAL, et al.,

Petitioners,

vs.

BANCO DE COMERCIO, S.A., C.A.,

Respondents.

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE FACTS AND OF THE CASE

Sociedad Financiera de Comercio, C.A., ("Financiera") and Inversiones Credival, C.A., ("Inversiones Credival") sued Juan Vicente Perez Sandoval ("Perez"), Sandy Bay Investments Company, S.A. ("Sandy Bay")and others. [1] (R, 154) The amended complaint contains 75 pages, 141 paragraphs and twelve counts. (R, 162-247) It addresses a series of transactions and events occurring primarily in Venezuela during the years 1982, 1983, and 1984. The counts characterize the events as fraud (Count I), Civil theft (Count II), conversion (Count III), negligence, (Count IV), breach of fiduciary duty (Counts V and IX), conspiracy (Count VI), unjust enrichment (Count VII), and Rico (Count VIII). Remaining counts sought the imposition of a constructive trust and an injunction. The Complaint does not refer or quote Venezuelan law insofar as it pertains to attorney's fees and costs, nor does it pray for fees and costs on the basis of Venezuelan law. Extensive discovery and a number of hearings were held. The file of the case contains 45 volumes.

The pre trial stipulation reduced the claims to one transaction. The claim was called the "Sandy Bay" transaction. (R. 456) The pre-trial stipulation also provided:

> As to rules of law, the parties agree that Venezuelan law controls the substance of the issues of liability and obligations with respect to the so-called Sandy Bay transaction. (R, 459),

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[1] The usual descriptions "R" for the record, "T" for the transcript of the trial held on liability, and "Ex" for the exhibits will be used unless noted otherwise, all emphasis is ours. Two evidentiary hearings were held on the issue of attorney's fees and references to these which are contained in an appendix will be designated by use of the symbol "A".

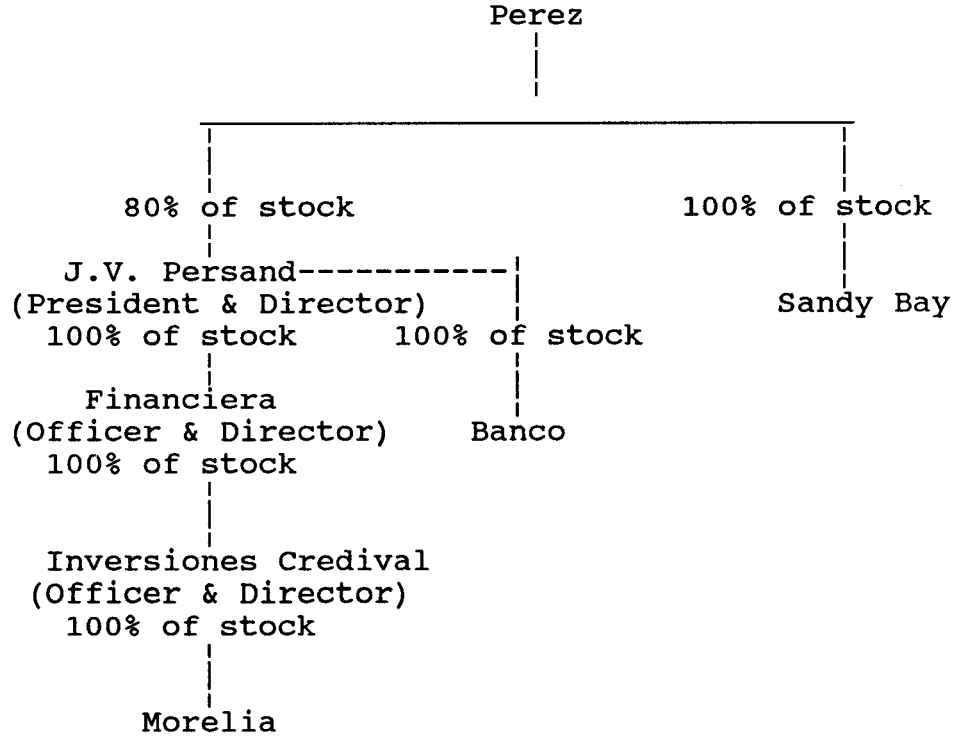
and

(a) which codes of Venezuelan law are applicable to the "Sandy Bay" transaction.

(d) Whether Venezuelan law provides that the prevailing party in this action is entitled to recover its fees and costs,

(e) Whether prejudgment interest is available under Venezuelan law and, if so, the rate that would apply. (R, 459)

The "Sandy Bay" transaction involved the purchase in March, 1982, of stock in a drilling company. In 1982, Perez owned 80 percent of a Venezuelan company call J.V. Persand y Compañia, C.A. ("Persand") (R, 455). Persand in turn owned Financiera, a Venezuelan finance company, which owned all of the stock of Inversiones Credival, an investment company, (R, 2-3, 253) Inversiones Credival in turn eventually came to own the stock in Morelia, a company created to acquire the stock in the drilling company. (R, 457) Persand also owned Banco. (R, 456) Perez's status with these companies is noted on the following diagram:



The "Sandy Bay" investment involves the sale by Delmar and Dora Wright of their stock in a Panamanian company named Anson Perforaciones, S.A. In late 1981, Perez, then a Venezuelan resident, decided to increase his empire's interest in the oil drilling business. At the time Inversiones Credival already owned a subsidiary in the oil drilling business which operated on the eastern boundary of Venezuela. (T, 33, R, 457-458)) Perez contacted Wright to negotiate the purchase of the Anson shares which owned 98.5% of a company which owned land and an oil rig on the western coast of Venezuela. (R, 456, T, 35) Perez negotiated a handshake deal with Wright to purchase the shares for 3.5 million dollars, although the value was 10 or 20 times that. (T, 42, 61) The drilling contract owned by the company was in jeopardy because the Wrights were not Venezuelan nationals and were not associated with one; however, ownership by a Venezuelan national would allow the company to obtain new drilling contracts. (T, 79)

During 1981 and 1982 Perez presented the opportunity to purchase the shares to the directors of Inversiones Credival and Financiera but the board turned it down. (T, 35, 48-49, 61, 65) Perez then decided to acquire the shares himself. (T, 62) Perez, thereupon, contacted a drilling company which advised him that it would give him additional drilling contracts. Perez also obtained seven drilling contracts. (T, 79)

In the interim, Perez hired an outstanding management group for the drilling company already owned by Inversiones Credival.

(T, 68) The comfort and confidence provided by this management spurred Perez's associates interest in acquiring an additional drilling company. (T, 68-69) Additionally, Perez discovered that Wright had a company owned which carried out drilling in Colombia, Peru and Ecuador. (T, 69) Perez found out that Mr. Wright's partners were willing to sell their interest in this multinational company and offered it to Inversiones Credival's directors. (T, 70) This would permit a multi-national expansion of Inversiones Credival's holdings. The members rejected the acquisition but requested that Perez sell his rights in the proposed Anson acquisition. (T, 70-71) Perez eventually acceded but requested that the price be negotiated by one or more of the members of the board. (T, 72) The price was eventually negotiated and approved by the directors of Inversiones Credival and Financiera. (T, 73) Morelia, a Panamanian subsidiary of Inversiones Credival was then created to acquire the Anson shares.

On December 11, 1981, Wright and Perez signed a letter agreement stating that Inversiones Credival would purchase the Anson shares for an unstated price with a closing within sixty days. (R, 457, Ex. 11)

Perez then formed Sandy Bay, a Panamanian Company to acquire the Anson shares and sell them to Inversiones Credival. (T, 33) Venezuelan law permitted sales by Panamanian companies to be tax free. (T, 42, 48) Sandy Bay eventually purchased the Anson shares on March 9, 1982. Sandy Bay agreed to pay the Wrights $3,500,000

and to pay: (i) a $1.6 million down payment on March 9, 1982; (ii) $800,000 on March 9, 1983, and (iii) the balance on March 9, 1984.

On the same day, Sandy Bay sold the Anson shares to Morelia, Inversiones Credival's subsidiary, for $16 million. (T, 81) Perez's profit from the sale was $12.5 million. (T, 45, 47)

Opinion testimony regarding the applicability and effect of the Venezuelan Banking Code was received. The Banking Code is a general law which governs all credit institution which are the only entities authorized to receive deposits from the public. (T, 146) The code did not govern Inversiones Credival; it only governed Financiera. (T, 166) The code contains what were opined by the experts to include "public order norms", i.e., norms designed to protect the public trust. (T, 147, 183, 222) The particular section of the Banking Code upon which a great deal of emphasis was placed was section 153 which states:

> The following is prohibited to banks or other credit institutions that function under the present law:
>
> (1) to issue, directly, or indirectly loans, discounts...advances or credits of any type to its president, directors, managers, or other officers or employees except for mortgage loans on their own housing which has been granted in accordance to general plan established for its personal loans guaranteed by their social laws. The totality of these loans may not exceed 10 percent of the paid in capital and reserves of the bank or credit institution referenced. (T, 148)
>
> (4) to make loans, discounts or rediscounts or to extend credit or security to one and the same natural or legal person in an amount or amounts that exceed in the aggregate 10 percent of the paid in capital plus

> reserves of the bank or lending institutions...
>
> (13) are prohibited in selling or purchasing either directly or indirectly assets of any nature from its president, director, managers, secretaries or other officers in the executive level. (T, 148)

These particular sections also represent what are known as good practices. (T, 166)

A violation of Subsections 1, 4, and 13 renders the transaction void. (T, 152) This is known as the concept of absolute nullity. (T, 152) Thus, a venezuelan judge is empowered to declare a nullity, restore the parties to status quo before the transaction, and can set the degree of damages or restitution that is required. (T, 162, 165, 223) In decreeing a nullity a court can issue a judgment based on equivalence requiring the plaintiff to pay, an equivalent sum of the article which the Court adjudicates is a nullity. (T, 165)[2] Under this doctrine restitution can be ordered and the Plaintiff is required to restore to the defendant to the position that existed before the transaction took place; in this particular case it would require a return of the Anson stock. (T, 166, 185, 201, 202, 239) Venezuelan law, nonetheless, limits the doctrine because restitution is not required if the violation by the Defendant is considered done of "good practices" or "customs". (T, 166, 226) Hence, while restitution on both sides is ordinarily required, where the violation is deemed to be one of the "good practices or

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[2] The remedy of rescission, as we know it, is most akin to this.

customs", balancing or restitution is not required. A nullification also requires the presence of all parties to the transaction before the court. (T, 161, 162) The purchase and sale in this case was between Sandy Bay, a named party and Morelia, a non-party to the action. (T, 159)[3]

The trial court ruled for Inversiones Credival and Financiera. The pertinent provisions of the final judgment state:

> 5. The form of the "Sandy Bay transaction is not disputed. On December 11, 1981...Wright and...Perez executed a letter agreement stating that [Inversiones] Credival would purchase 80% of Anson's shares. Credival...did not purchase the Anson shares...Instead, on March 9, 1982, Sandy Bay...purchased the shares for $3.5 million.
>
> 6. On the same day, Sandy Bay sold the...stock for the sum of $16 million to Morelia...a 100% subsidiary of Inversiones Credival...By virtue of this transaction...Perez made a personal profit of U.S. $12.5 million.
>
> 7. All of the funds used in the purchase of the Anson shares---first by Sandy Bay, followed immediately by Morelia---came from SFC.
>
> 9. At the end of March of 1982, Sociedad Financiera's total paid in capital and reserves equaled approximately U.S. 26.6. million.
>
> 10. The expert accounting testimony...showed that the U.S. 14.6 million provided...for the Sandy Bay transaction was treated on the books Sociedad Financiera and Inversiones Credival as a series of loans from Sociedad Financiera to Credival.

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[3] It would appear that rescission was not available as at least on indispensable party was not present before the Court, Coast Cities Coaches, Inc. v. Whyte, 130 So. 2d 121 (Fla. 3d DCA, 1961)

> 12. ...Plaintiffs alleged that the Sandy Bay transaction violated Ordinal 1, 14 and 13 of Article 153 of the Venezuelan General law on Banks...as well as Article 266(4) of the Venezuelan Commercial Code.
>
> 13. ...the court determines that Perez violated, or caused violations of, Venezuelan law in a number of respects in connection with the Sandy Bay transaction. The court also finds that the appropriate remedy, under the circumstances of this case, is to order the return of the U.S. $12,500,000 in profit which Defendant Perez admittedly received from the "Sandy Bay" transaction.[4]
>
> It is therefore...ADJUDGED...
>
> a. The court finds that Plaintiffs recover the sum of U.S. $12,500,000 from Perez and Sandy Bay...

The judgment did not require upon delivery of the Anson shares to Perez or Sandy Bay.

The issues regarding fees and interest were determined in post-judgment hearings. Evidence was received at two sessions with memoranda submitted afterwards.[5] Perez and Sandy Bay argued in

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[4] It is important to note that presence of the term "remedy" under Florida Conflicts of Laws, the remedial aspects of a case are governed by Florida law. Brown v. Chase, 80 Fla. 703, 86 So. 684 (1920) ("remedies are to be governed by the 'lex fori"), repeated in Wingold v. Horowitz, 292 So. 2d 505, 506 (Fla. 1974) and Goodman v. Olsen, 305 So. 2d 733, 735, (Fla. 1974)

[5] No active stipulation of entitlement was made at trial. Plaintiffs' counsel did state:

> Your honor, there are just a couple of preliminary matters I would like to refer to.
>
> Consistently, with my understanding of Florida law, in the event this Court determines, upon the determination of the issues in the main case that either side is entitled to

their memorandum that the claim for fees could not be honored because it had not been specifically pleaded. (A, 108-109)

Nonetheless, the evidence developed at the two sessions showed that Venezuelan law is governed by a series of codes, each governing a different aspect of Venezuelan life. For example Venezuela has a Penal Code pertaining to crimes, and their punishment. (A, 27) Venezuela also has a Commerce Code which regulating merchants, maritime commerce, bankruptcies and business associations. (A, 26) The code under which Perez and Sandy Bay were held liable by the final judgment, the Banking Code is separate and distinct from the Code of Civil Procedure. (R, 496).

The evidence regarding the award of attorneys fees, nonetheless, focused on the Code of Civil Procedure. As the name suggests, the code is one of procedure. Its purpose is patently that which the name suggests: to govern procedure. (A, 28)[6] The

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> attorney's fees it is my understanding that would be separately visited at that time and it won't be necessary to try the issues in the main case. (T, 8-9)

Counsel would like to treat this totally self-serving statement as a waiver because it was not objected to. (A, 5-6) However, no response or active joinder was made by Perez or Sandy Bay's counsel. A procedural waiver or stipulation can not be implied by such silence. See Miami Herald Publishing Co. v. Payne, 358 So. 2d, 541, 542 (Fla. 1978) ("where the contention that a party's silence in response to the Court's suggestion could be construed as a stipulation was rejected") and see Fla. R. Jud. Admin., 2.060(g) ("no private agreement or consent between parties...concerning practice or procedure shall be of any force unless...in writing.")

[6] Financiera's expert characterized the commerce code as providing "substantive law" regarding merchants, maritime commerce and bankruptcies. (A, 2, 26)

code does not give rise to any vested rights. The code was amended in 1986. (A, 28) Article 9 of the present code specifically provides that acts and events that have not yet been adjudicated will be regulated by prior law. (A, 37) Indeed, it was conceded that Venezuelan constitutional law prohibits retroactive application of the code to events occurring before 1986 because. (A, 35). The events involved in this occurred in 1982.

The matter of attorney's fees is governed by §174[7], a section which was changed in 1986. Prior to 1986, the provision which was stated:

> 174. The party totally defeated in a proceeding either in trial or in a legal proceeding or in another incidence shall be obliged to pay costs. The court may exempt the party from same when it appears that the party has had reasonable motives to bring litigation (A-2, 32)

In 1986, the underlined provisions were eliminated. Nonetheless, both versions share the words "total defeat". This term does not have an equivalent in our law; its definition requires a view of Venezuelan law and its procedure. Under Venezuelan procedure, amendments to complaints do not exist once an answer is filed. (A, 40-41). This is important because the determination of whether a party has suffered a "total defeat" requires looking at the complaint and more particularly, the prayers for relief, referred to under Venezuelan law as petitioning prayers. (A, 39-40). A "total defeat" occurs where all of the

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[7] The section of the code was mentioned by Financiera's counsel for the first time four days before the first session on the matter of fees. (A, 7)

petitioning prayers of the complaint have been granted. (A, 40) Thus, a party obtaining only one form of relief in a multi-prayer complaint does not "totally defeat" the other. (A, 40-41, 66). Then again, even if all prayers are granted, if the prevailing party obtains less than what he prayed for, a total defeat has not occurred. (A, 39-40, 66) For example, if the prayer requests "x" amount and the court awards "y", a party has not totally prevailed. (A, 12-13)

THE LAW UNDER THE PRE-1986 CODE

The pre-1986 code stated that even if total defeat occurred:

> ...the court may exempt the party from same when it appears that the party has had reasonable motives...to bring litigation.

This left a Venezuelan trial judge with something akin to discretion. One expert summarized the concept thus:

> Consequently, what the code stated or mentioned was a reasonableness and this was subjective appreciation on the part of the judge. (A-2, 39)

Reasonable motives were equated with "rational motives". (A, 33) Perez and Sandy Bay's expert testified that the following reasons were sufficient to litigate: (1) that a case required an in depth analysis of particular sections of a code; (2) that the case required a hermeneutical analysis of an existing code section. (A, 64)

Both parties took the position that Venezuelan law determined the matter of prejudgment interest. The parties differ as to whether a particular section of the Venezuelan Commercial Code

applies. Inversiones Credival and Financiera asserted that Article 108 of the Commercial Code entitled them to prejudgment interest. Article 108 states:

> Mercantile debts of liquid and demandable sums of money rightfully accrue the current market interest, as long as the same does not expend twelve percent annually. [8]

However, Section 108 applies only to mercantile obligation. (A-2, 45) The final judgment of the Court was clear in that it ordered the return of a profit. The judgment stated:

> 4. ...by virtue of this transaction, defendant Perez, by his own admission, made a personal profit of U.S. 12.5 million.
>
> 13. The Court also finds that the appropriate remedy, under the circumstances of this case, is to order the return of the U.S. $12,500,000.00 in profit which Defendant Perez admitted he received from Sandy Bay transaction.

Inversiones Credival and Sociedad Financiera's expert, nonetheless, reached the confusing conclusion that the case involved a "mercantile debt" [9] in spite of his opinion that this case did not involve a commercial obligation, but which arose due to an

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[8] The judgment, on its face, shows that the theory of liability against Perez and Sandy Bay was restitutionary in nature. The liability did not arise from a "demandable" sum such as that in a note.

[9] Perez's expert treated the matter thus:

> ...the decision of the court was to give back a profit Perez-Sandoval made in this operation. so this is an obligation, and that obligation has a legal interest depending on whether it's commercial -- any obligation has a legal interest depending on whether it is commercial obligation or civil obligation. (A-3, 14)

infraction of the Banking Code. (A, 22) The trial court, nonetheless, ruled that (1) the plaintiffs were entitled to attorney's fees; (2) that Venezuelan law required Perez and Sandy Bay to pay such fees, (3) that Venezuelan law required the payment of interest.

POINTS ON APPEAL [10]

I

WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES WHERE THE BASIS FOR THE AWARD OF SUCH FEES WAS NOT PLED IN THE COMPLAINT

II

WHETHER THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES UNDER VENEZUELAN LAW WHERE ATTORNEY'S FEES WERE A REMEDIAL PART OF THE CASE AND THEREFORE PROCEDURAL IN NATURE TO BE DETERMINED IN ACCORDANCE WITH THE LAW OF FLORIDA.

III

WHETHER THE TRIAL COURT ERRED IN AWARDING INTEREST ON THE BASIS OF VENEZUELAN LAW WHERE THE THEORY OF LIABILITY AGAINST PEREZ AND SANDY BAY DID NOT ARISE AS A MERCANTILE OBLIGATION WHICH WAS DEMANDABLE IN NATURE.

IV

WHETHER THE TRIAL COURT ERRED IN GRANTING A REMEDY WHICH RESCINDED THE SALE OF STOCK BY PEREZ AND SANDY BAY BUT WHICH DID NOT CONDITION SUCH JUDGMENT UPON THE DELIVERY OF THE STOCK DELIVERED IN THE SALE TO PEREZ AND SANDY BAY AND THUS DID NOT RESTORE THE PARTIES TO STATUS QUO ANTE

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[10] Where review is granted, the court can review and decide all the issues present in the case, Bankers Multiple Life Ins. Co. v. Farish, 464 So. 2d 530, 531, (Fla. 1985) ("Once we take jurisdiction because of conflict on one issue, we may decide all issues.") The case decided other issues and we have addressed them in this brief.

SUMMARY OF ARGUMENT

The award of attorney's fees predicated upon Venezuelan law was not prayed for in the complaint. Accordingly, it was error to enter such an award. Additionally, the record does not justify a waiver of the lack of such pleading.

Moreover, the trial court erroneously applied Venezuelan law because the matter of fees was a substantive matter in which Florida law should have applied. Florida law would not permit the award of fees in the case at bar.

The taxing of interest based upon a provision of the Venezuelan pertaining to mercantile obligations was not applicable to the proceedings at bar where the liability arose as from a concept of restitution.

Finally, the remedy provided by the final judgment does not conform to Florida law which requires a plaintiff seeking rescission to restore the defendant to the position that was occupied before the transaction.

ARGUMENT

I
THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEES WHERE THE BASIS FOR THE AWARD OF SUCH FEES WAS NOT PLED IN THE COMPLAINT

In Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991), this Court unequivocally held that "a claim for attorney's fees, whether based on statute or contract, must be pled". We view the rule as applying with greater vigor where particular provisions of foreign law are relied upon as the basis for a particular

liability. That is to say, a party seeking attorney's fees based on foreign law should be required to plead the particular foreign law which is asserted to be controlling.

The pleadings in this case did not set forth any references to the Venezuelan code. The order awarding attorneys fees was, nonetheless, based on the Venezuelan Code of Civil Procedure. Accordingly, on the foundation of this case, it was error for the trial court to determine that the Inversiones Credival and Financiera are entitled to an award of attorneys fees.

Most assuredly, Inversiones Credival and Financiera will rely on that part of Stockman, which holds that where a party:

> "has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees"

Stockman, at 838. Inversiones Credival and Financiera will suggest that the pre-trial stipulation that:

> "...the parties agree that Venezuelan law controls the substance of the issues of liability and obligation with respect to the so-called Sandy Bay transaction."

necessarily covers the procedural and remedial aspects of the case. The award of fees is ancillary to the damage claim, Cheek v. McGowan Electric Supply, 511 So. 2d 977, 979 (Fla., 1987). ("...the payment of attorney's fees is not party of the substantive claim".) Accordingly, the stipulation did not address the matter of fees and is not a waiver of the issue. Second, the argument may be made that the stipulation that an issue to be resolved was "whether

Venezuelan law provides that the prevailing party in this action is entitled to recover its fees and costs impliedly waives the objection". First, all the stipulation indicates is that a factual inquiry is to be made regarding Venezuelan law. Second, there is no stipulation noting that "entitlement per se" is a stipulated issue; it could not be because the pleadings didn't raise the issue. Additionally, no express stipulation akin to that appearing in Mainlands of Tamarac v. Morris, 388 So. 2d 226 (Fla. 2d DCA, 1980) was entered into. We note that in Mainlands the parties stipulated during trial that the question of attorney's fees and costs to the prevailing party would be heard at a hearing subsequent to the final hearing. While the stipulation in this case may factually resemble such stipulation, substantively it is not; we repeat, the stipulation only deals with an inquiry into Venezuelan law and not whether fees would be taxed.

Nowhere is there a stipulation that Inversiones Credival or Financiera were entitled to fees, per se; the stipulation requires jumping that hurdle before the factual question is reached. Otherwise, Perez and Sandy Bay would have objected.

II

THE TRIAL COURT ERRED IN AWARDING ATTORNEY'S FEE UNDER VENEZUELAN LAW WHERE ATTORNEY'S FEES WERE A REMEDIAL PART OF A CASE AND THEREFORE PROCEDURAL IN NATURE AND THUS ARE TO BE DETERMINED BY THE LAW OF FLORIDA.

The trial court found that the right to attorney's fees was substantive, and thus Venezuelan law applied. This conclusion was error. Recovery of attorneys fees is not part of the plaintiffs'

damage claim, but is ancillary to the damage claim. Cheek, supra. Accordingly, the right to attorney's fees is a remedial, and thus a procedural, aspect of the case. Under Florida conflict of laws, the remedial aspects of a case are governed by Florida law. Brown, supra. See also, Farris & Co. v. William Schluderberg, etc., co., 183 So. 439 (Fla. 1940). There can be no doubt that entitlement to attorneys fees is a remedial aspect of a case. As the Florida Supreme Court observed, attorneys fees awards are not common law damage awards entitling the parties to a jury determination of reasonable fees. Rather, fee awards are ancillary to the damage claim with the purpose of making the prevailing party whole by reimbursing him for the expense of litigation. Cheek, supra, at 979. See also, B & H Construction & Supply Co., Inc. v. District Board of Trustees, 542 So. 2d 382, 389 (Fla. 1st DCA, 1989). Thus, awarding attorneys fees is analogous to the taxing of costs, a remedial and procedural aspect of a case governed by the lex fori.

Other courts have decided that the matter is remedial, determine by the law of the forum. Thus, in Security Co. of Hartford v. Eyer, 36 Neb. 507, 54 N.W. 838 (1893) the Plaintiff sued on a note executed in Iowa which provided that it was construed in accordance with Iowa law. The Nebraska Supreme Court refused to award attorneys fees although validly provided for in the note and allowable under Iowa law because "they were in the nature of costs and are taxed and treated as such." Id. 840. The court agreed that this was an extraneous agreement and quoted the

observation from Commercial National Bank v. Davidson, 18 Or. 57, 22 P. 517 (1889) decision that:

> ...the obligation of which does not arise until a remedy is sought upon the contract, to which it is only auxiliary.

Id. at 840.

Accordingly, it would appear that even prior to the Supreme Court's decision in Cheek, supra, under a traditional view the right to attorney's fees is a remedial aspect of the case and thus Florida law would apply. Under such circumstances, attorney's fees is a remedial aspect of the case and thus Florida law would apply. Under such circumstances, attorney's fees would not be available.

A final factor is that the very code upon which Inversiones Credival and Financiera base their claim states that it is "a code of procedure", meant to be used by Venezuelan judges in proceedings before them in their cases". Moreover, that the code is integrated and complete appears to suggest that it does not vest rights in any litigant for cases arising under other codes. That is to say, nothing in the Banking code states that a party violating a provision thereof is liable for fees of any type.

Under Section 122 of the Restatement (Second) of Conflict of Law (1971) ("Restatement") "[a] court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another [jurisdiction] to resolve other issues in the case". Thus, enormous burdens may be avoided. (Restatement Section 122, comment a) provides four factors which may be considered by courts in determining whether to apply forum

local law rather than the local law of another jurisdiction. First is whether the parties shape their action with reference to the local law of a certain jurisdiction. In the case at hand, when Perez-Sandoval and Sandy Bay engaged in the transaction no forethought was given to a particular Code of Civil Procedure. In fact, the closing occurred in Panama. Hence, the parties had no thoughts of vesting any rights based upon the Venezuelan Code of Civil Procedure. Therefore, the right to attorneys fees was not a substantive one that latched on the claim.

The second factor is whether the issue is one whose resolution would be likely to affect the ultimate result in the case. The application of Section 174 of the Code of Civil Procedure does not affect the ultimate outcome of the case assuming that the court applied the banking code properly in the first case. Because the Venezuelan codes are integrated and constitute a body whole of law, the fact that the Venezuelan Code of Civil Procedure would not apply has no bearing on the liability aspect of the final judgment. Hence, section 174 in this context again appears to be a procedural matter.

Third is whether the precedents tended consistently to classify the issue as "procedural" or "substantive". As we have noted before, the existing precedents have tended to explain the issue of attorney's fees as being procedural or remedial in nature and thus the law of the forum (Florida) should apply. Fourth is whether an effort to apply the rules of judicial administration of another jurisdiction would impose an undue burden upon the forum.

The pre-1986 version of the Code of Civil Procedure requires a Florida court to attempt to place itself in the position of a Venezuelan judge to determine whether there were reasonable motives to litigate. That the experts from Venezuela gave differing views on this exposes the guesswork imposed on Florida Court. Guesswork is quite a burden and justice is not served by engaging in such guesswork. Accordingly, engaging in such analysis is a burden on the courts of this forum. Thus, the matter should be determined to be procedural, and further Florida law should apply.

Additionally, under Venezuelan procedure, amendments to complaints do not exist once an answer is filed. In this particular case, Inversiones Credival and Financiera filed a multiple count complaint and did not prevail on all claims. Accordingly, the Plaintiffs did not obtain a "total defeat" and, thus, the Code had no applicability.

III

THE TRIAL COURT ERRED IN AWARDING INTEREST ON THE BASIS OF VENEZUELAN LAW WHERE THE LIABILITY AGAINST PEREZ AND SANDY BAY DID NOT ARISE AS A MERCANTILE OBLIGATION WHICH WAS DEMANDABLE IN NATURE.

There is no justification for characterizing the obligation in question as a "mercantile obligation" pursuant to Article 108 of the Commercial Code. It is quite apparent from the final judgment that the award in this case was not based upon a mercantile obligation such as a promissory note, draft, mortgage, or other usual instrument. Rather, it was based upon principles

of unjust enrichment requiring restitution or quasi contract. Under no approach to law can this be characterized as a mercantile or commercial obligation. Additionally, the evidence showed that the obligation that was created by the judgment was not a "demandable" one that would qualify under Section 108.

IV

THE TRIAL COURT ERRED IN GRANTING A REMEDY WHICH RESCINDED THE SALE OF STOCK BY PEREZ AND SANDY BAY BUT WHICH DID NOT CONDITION SUCH JUDGMENT A\UPON THE DELIVERY OF THE STOCK DELIVERED IN THE SALE TO PEREZ AND SANDY BAY AND THUS DID NOT RESTORE THE PARTIES TO STATUS QUO ANTE.

The judgment in question determined that the transaction was an absolute nullity and ordered "a return of the U.S. $12,500" that Perez and Sandy Bay had derived from the transaction. The judgment granted the remedy of rescission but did not condition such rescission upon a return to status quo ante. In this particular case, the plaintiffs were not required to deliver the Anson shares to Perez or Sandy Bay. In fact, Perez and Sandy Bay were obligated to pay a sum and were penalized by not receiving anything in return. Under the judgment in question Financiera and Inversiones Credival obtained the windfall of keeping the Anson Stock while at the same time receiving an entitlement to 12.5 million dollars (together with interest).

We return to the concept that the remedy in this case is governed by the laws of the State of Florida. Brown, supra at fn. 4. It is, thus, becomes appropriate to determine whether Florida law permits rescission without the Plaintiff being required

to restore the Defendant to status quo ante. On this point is quite uniform and axiomatic that the plaintiff must restore the defendant to the position that it occupied before the transaction. McDonald v. Sanders, 103 Fla. 93, 137 So. 123, 126 (1931) ("...the very idea of rescinding...implies that what has been parted with shall be restored on both sides..."); Lang v. Horne, 156 Fla. 605, 23 So. 2d 848, 853 (1945) ("a party who rescinds an agreement must place the opposite party in status quo..."); Steak House v. Barnett, 54 So. 2d 736, 738 (Fla. 1953) ("...equity will not order rescission unless the condition of the parties as it existed prior to the execution of the contract can be restored").

In this particular case, the judgment entered by the trial court does not violence to the aforementioned rules. The remedial aspects prescribed by the judgment do absolute violence to the law of Florida.

The judgment in question determined that the transaction was an absolute nullity and ordered "a return of the U.S. $12,500". The judgment granted the remedy of rescission, while not attempting to restore the parties to status quo ante. In this particular case, this would require that either Sandy Bay or Perez be given the Anson stock. Instead, Inversiones Credival obtained the windfall of keeping the Anson stock while at the same time an entitlement of 12.5 million dollars.

CONCLUSION

The award of attorney's fees and interest by the trial court was in error. Additionally, the remedy of rescission granted by the trial court did not comply with Florida law.

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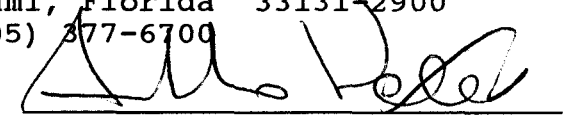
BY: 
ARNALDO VELEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was on this 16th day of April, 1991, served by mail upon Raquel Rodriguez, Greenberg, Traurig, et al., 1221 Brickell Avenue, Miami, Florida 33131.

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