



## MEXICAN LAW IN CALIFORNIA AND TEXAS COURTS AND THE (LACK OF) APPLICATION OF FOREIGN LAW IN MEXICAN COURTS

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*ABSTRACT. This article discusses two areas of Mexican law seldom addressed by either American or Mexican scholars, namely: first, court decisions rendered by U.S. courts based on Mexican law; and, second, the application of foreign law (including U.S. law) by Mexican courts. Since the entering into force of NAFTA on January 1, 1994, Mexican law has been slowly but steadily making its presence felt in the decisions of U.S. courts. Evidently, this incipient phenomenon is found only in a selected number of States, notably Texas, California, Illinois, Florida, New Mexico and Arizona, where a large concentration of Mexican-Americans and Mexicans are found. Regarding the second area, notwithstanding that Article 14 of Mexico's Federal Civil Code (as amended in 1988) recognized the application of foreign law in that country (including U.S. law), Mexican courts have somewhat disregarded the tenor of said Article. There is not sufficient data to explain this result.*

**KEY WORDS:** *Mexican law, foreign law, Mexican courts, cases.*

*RESUMEN. Este artículo discute dos áreas del derecho de México que son poco tratadas tanto por estudiosos de México como de Estados Unidos, a saber: primera, las decisiones de tribunales de Estados Unidos que se rinden*

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*con base en el derecho de México; y, segunda, la aplicación del derecho extranjero (incluido el de Estados Unidos) por tribunales mexicanos. Desde la entrada en vigor del TLCAN en enero de 1994, el derecho de México ha hecho sentir su presencia de manera gradual aunque segura en las decisiones rendidas por los tribunales de Estados Unidos. Evidentemente, este fenómeno se da en un número selecto de Estados, en especial en Texas, California, Illinois, Florida, Nuevo México y Arizona, donde hay importantes grupos demográficos de mexicanos-americanos y de mexicanos. Por lo que se refiere a la segunda área, no obstante que el artículo 14 del Código Civil Federal (por enmienda de 1988) reconoció la aplicación del derecho extranjero (incluyendo el de Estados Unidos) en ese país, los tribunales mexicanos en cierto modo han desatendido el tenor de dicho artículo. No se cuenta con datos suficientes que expliquen este resultado.*

PALABRAS CLAVE: *Derecho mexicano, derecho extranjero, tribunales mexicanos, casos.*

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## I. INTRODUCTION

It is only logical to expect that, in principle, American courts should impart justice to American citizens by applying American law. This is the fundamental reason the judicial power of the United States, and that of the 52 states, was established pursuant to the U.S. Constitution.<sup>1</sup> However, since the early days of the country, American courts also have been empowered by U.S. law at the state and federal levels to decide cases based on foreign law.<sup>2</sup> Moreover, legal scholars have recently suggested that around the time of the founding of the United States, the Supreme Court used international law to inform some of its constitutional interpretations, possibly because the distinction between domestic law and international law “was much less crisp at the time Bentham was writing than it was in the middle of the twentieth century.”<sup>3</sup>

A recent article asserts that the Supreme Court and federal and state courts throughout the country “have been using *foreign* and international law in their decisions since the eighteenth century.”<sup>4</sup> Most of these decisions citing or invoking foreign and international law have been used, in some way, “to interpret constitutional provisions that facially have no international implications.” Whereas many of the early decisions using international law referred to the laws of war,<sup>5</sup> state court decisions have relied on foreign law (and international opinions) for a comparative law perspective.<sup>6</sup>

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<sup>1</sup> U.S. CONST. art. III § I.

<sup>2</sup> The use of the term “foreign law” applies to the law which is in force in a foreign country such as Mexico, Canada, France, Japan, etc. Therefore, this term does not include international law or the law of nations (modern *Ius Gentium*).

<sup>3</sup> See, for example, Jeremy Waldron, *Modern Law and the Modern Ius Gentium* (Comment), 119 HARV. L. REV. 129, 135 (2005); David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. OF EMPIRICAL LEGAL STUDIES 297-331 (July 2006); and Vicki Jackson, *Yes, Please, I'd Love to Talk with You*, LEGAL AFF. 44 (Aug. 2004).

<sup>4</sup> Mark Wendell DeLaquil, *Foreign Law and Opinions in State Courts*, 69 ALB. L. REV. 697 (2005-2006).

<sup>5</sup> *Griswold v. Waddington*, 16 Johns. 438 (N.Y. 1819). For a discussion on this matter, see Steven G. Calabresi and Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

<sup>6</sup> See, for example, David S. Clark, *The Use of Comparative Law by American Courts (I)*, 42

Justice Sandra Day O'Connor, in her acceptance speech when she was presented with the "World Justice Award" in 2003, alluded to the inescapable importance that *foreign law* exercises upon American courts when she said:

American courts need to pay more attention to international legal decisions to help create a more favorable impression abroad... The impressions we create in this world are important. Although it is true that the U.S. judicial system generally gives a favorable impression worldwide, *when it comes to the impression created by the treatment of foreign and international law by a United States court, the jury is still out.*<sup>7</sup>

In the past, the application of foreign law in the United States was generally represented by the domestic laws of Canada and Western European countries (in particular Great Britain, Germany, Switzerland, France, Italy and Spain), as reflected in the decisions by New York City courts.<sup>8</sup> More recently, under the influence of the phenomenon of "globalization,"<sup>9</sup> an increasing number of Free Trade Agreements (including NAFTA), as well as the considerable flow of immigrants, business transactions and U.S. investment abroad, the domestic law of Mexico and other Latin American countries is beginning to gradually make its entrance into American courts.

The emerging presence of Mexican law is of particular importance given its proximity.<sup>10</sup> The present article includes a survey of cases in California and Texas that were resolved based on Mexican law between 2000 and 2007. Unfortunately, the results were disappointing since a total of only nine cases were found (two in California, two in Texas and five in other states).<sup>11</sup> Nevertheless, there is clearly an important increase in interest in Mexican law throughout the U.S. scholarly and judicial community and most likely the number of cases will multiply in the years to come. It is therefore very important to take stock of the present situation.

Viewed from the perspective of Mexico, under Mexican law each of Mexico's individual states (32 if the Federal District is included) handle and

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AM. J. COMP. L. SUPP. 23 (1994), and Alain A. Levasseur & Madeline Herbert, *The Use of Comparative Law by Courts II*, 42 AM. J. COMP. L. SUPP. 41 (1994).

<sup>7</sup> O'Connor, *U.S. Must Rely on Foreign Law*, WORLDNETDAILY, Oct. 23, 2003.

<sup>8</sup> Zaring, *supra* note 3 at 299.

<sup>9</sup> See Sandra Day O'Connor, *International Law, Globalization and U.S. Law*, Address at the dedication of the Eric E. Hotung International Law Building, Georgetown University Law Center (October 27, 2004).

<sup>10</sup> Jorge A. Vargas, *The Emerging Presence of Mexican Law in California Courts*, 7 SAN DIEGO INT'L L.J., 215 (2005-2006); Carlos Soltero & Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUS. J. INT'L L., 119 (2003-2004); Andrew Walker, *Mexican Law and the Texas Courts*, 55 BAYLOR L. REV., 225 (2003).

<sup>11</sup> The list of cases is found in Section B. of this article, *see infra* notes 41 and 42.

resolve U.S. requests to recognize and enforce a U.S. judgment in Mexico according to the provisions of the Code of Civil Procedure (*Código de Procedimientos Civiles*) of the state in question. Each of these codes includes a section devoted specifically to this subject, usually under the title of “*Cartas rogatorias*.” In most cases, the applicable provisions of each local code follow the language of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*)<sup>12</sup> which has inspired most of the provisions on this matter in state codes dating back to 1988.

In Mexico, questions pertaining to “*Cartas Rogatorias*” and the recognition and enforcement of foreign judgments were the consequence of a major substantive overhaul of the Mexican legal system which took place in 1988. Until then, there was a lack of the proper codified legal bases for handling these questions due to the extreme policy of “Absolute Territorialism,” introduced in the 1928 Mexico City Civil Codes that entered into force in 1932.<sup>13</sup> The drastic change of 1988 was soon emulated in some of the codes at the state level throughout Mexico by reproducing the same amendments with minor variations.<sup>14</sup>

Unlike the United States, Mexico does not adhere to the *stare decisis* principle.<sup>15</sup> In other words, court judgments in Mexico are decided and based on applicable statutes, codes, and regulations (including international treaties and conventions to which Mexico is a party) and not on precedent.<sup>16</sup> It

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<sup>12</sup> The 1988 amendments to this Federal Code are now included in its Book Four: *International Procedural Cooperation*, composed of Articles 543-577. For an analysis of these Articles, see Jorge A. Vargas, *Conflict of Laws in Mexico as governed by the Rules of the Federal Code of Civil Procedure*, in MEXICAN LAW FOR THE AMERICAN LAWYER (Jorge A. Vargas ed., Carolina Academic Press, 2009).

<sup>13</sup> See Jorge A. Vargas, *Conflict of Laws*, §22.4 *Background and Purpose of the 1988 Amendments*, in MEXICAN LAW A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS, Vol. 1, Chapter 22, 247-252 (West Group, 1998) (*hereinafter* MEXICAN LAW TREATISE).

<sup>14</sup> At that time (1988), the Civil Code for the Federal District served a double function: as a Mexico City Code for local matters and as a Federal Civil Code for federal matters throughout the Republic of Mexico. Since 2000, there have been two codes: one for the Federal District and the Federal Civil Code (both based on the original 1932 version). From a substantive viewpoint, both codes share identical language although their functions are different. For a discussion on how the original 1932 Civil Code for the Federal District was divided into the current two codes, see J.A. Vargas, *The Federal Civil Code of Mexico*, 2005 INTER-AM. L. REV. 229 (Winter/Spring 2005).

<sup>15</sup> See J.A. Vargas, *Contrasting Legal Differences between Mexico and the United States*, in MEXICAN LAW TREATISE, *supra* note 12, Chapter 1, §1.11 at 6-9.

<sup>16</sup> The only exceptions to this rule are the so-called *Jurisprudencias* [court precedents] which are those federal judicial resolutions rendered by Mexico’s Supreme Court and Circuit Collegiate Courts pursuant to Articles 192 and 193 of the *Amparo Act* (*Ley de Amparo*) that are legally binding to all lower courts. See José María Serna de la Garza, *The Concept of Jurisprudencia in Mexican Law*, Vol. I, No. 2, MEXICAN L. REV., 131 (2009).

should be clarified, however, that the “Jurisprudencias” [court precedents] rendered by Mexico’s Supreme Court and by the Federal Circuit Courts are legally binding and must be complied with by all lower courts in that country. The basic difference between the U.S. legal system (as a part of the common law tradition) is that in the United States all judicial cases must be decided based on applicable precedents in accordance with the *stare decisis* principle. This principle predicates that “when the court has laid down a principle of law as applicable to a certain state of facts, *it will adhere to that principle*, and apply it to all future cases, where facts are substantially the same, regardless of whether the parties and property are the same.”<sup>17</sup> In contrast, in Mexico there are only a very few number of precedents, *i.e.*, only those ruled the same way in five consecutive cases by Mexico’s Supreme Court or its Federal Circuit courts. In other words, the difference is not only numerical but also qualitative.

In recent years other countries belonging to the civil legal tradition, such as Germany, Austria, France and Spain, have adhered to the practice of recognizing that under certain special circumstances, judicial precedents become legally binding to lower courts.<sup>18</sup> Continuity and predictability of the law are important attributes, long recognized by the countries belonging to the *common law* tradition. As a result, in Mexico the judicial resolutions rendered by state courts—including final judgments by first instance courts (*Juzgados de Primera Instancia*) and those of appellate courts (usually resolved by the *Tribunal Superior de Justicia*) within same state—are *not* published and, consequently, not made available to the general public. The reason for this is simple: since judicial precedents in Mexico have no legally binding effect, and court judgments are strictly based on the language of the law as it is written in codes, statutes and regulations, and in the text of international treaties and conventions when approved by Mexico’s Senate and promulgated by the Executive, there is no apparent need for publishing any judicial precedents (except for *Jurisprudencias*).

This Mexican state level judicial practice of not publishing judicial judgments has created serious problems for gathering and collecting statistical data and information from judicial sources. These have to be supplemented through personal interviews with judges, legal practitioners and academics. Unquestionably, the results of this survey constitute the most valuable, unprecedented and original empirical legal contribution of the joint transborder project on *International Civil Litigation between the United States and Mexico*.<sup>19</sup>

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<sup>17</sup> BLACK’S LAW DICTIONARY 1261 (9th edition, 2004).

<sup>18</sup> M.A. GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 132-149, 276 (3rd ed. 2009).

<sup>19</sup> All the data resulting from interviews and questionnaires with Mexican judges, court secretaries and Mexican legal practitioners from the six Mexican States bordering the United States (*i.e.*, Baja California, Sonora, Chihuahua, Coahuila, Nuevo León y Tamaulipas) on international judicial cooperation and conflict of laws between both countries

## II. MEXICAN LAW IN CALIFORNIA, TEXAS AND OTHER COURTS

### 1. *Mexican Law in the United States*

Mexican law is turning into a nascent field of law in the United States, particularly in California and Texas, but also in other states such as Arizona, New Mexico, Florida, Illinois, Washington, New York, and Washington, D.C. The fundamental reasons for the growth of Mexican law can be summed up in three words: *a)* geography; *b)* people; and *c)* wealth.

#### A. *Geography*

For Mexico, its geographical proximity to the United States is, no doubt, its most precious strategic asset. The old adage attributed to Porfirio Díaz, dictator of Mexico at the beginning of the 20th century, “Oh, poor Mexico! So close to the United States and so far away from God!” has now lost its original meaning. When this adage was formulated (prior to 1910 when Díaz was forced to leave Mexico to be exiled in France), the image of the United States as an enemy was still fresh in many Mexicans’ memories: a country that militarily defeated Mexico in the 1846-1848 war, forcing Mexico to “cede” almost half of its territory to the United States, as established in the language of Article V of the Treaty of Guadalupe Hidalgo of 1848.

In contrast, today (161 years after the signing of that Treaty), the volume of Mexican exports to the United States amounts to about \$216 billion per year.<sup>20</sup> Furthermore, since the end of World War II, the United States has been Mexico’s largest foreign investor.<sup>21</sup> The largest companies in the United States, such as Coca Cola, Pepsi Cola, Lucent Technologies, Ford Motor Company, Chrysler, IBM, Hewlett-Packard, and WalMart, among others, operate in Mexico providing millions of jobs to Mexicans.<sup>22</sup> Every

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were gathered by Prof. Jorge Alberto Silva, Facultad de Derecho, Universidad de Ciudad Juárez, Chih.

<sup>20</sup> Official Trade and Industry Information available at: <http://ita.doc.gov/td/industry/otea/OTII/OTII-index.html> (last visited October 1, 2009). According to the Secretariat of Economy (Secretaría de Economía) the value of exports from Mexico to the United States in 2008 was \$234.557 billion. See: [http://www.economia-snci.gob.mx/sphp\\_pages/estadisticas/cuad\\_resumen/expmx\\_e.htm](http://www.economia-snci.gob.mx/sphp_pages/estadisticas/cuad_resumen/expmx_e.htm) (last visited: October 1, 2009).

<sup>21</sup> U.S. Department of State available at: <http://www.state.gov/r/pa/ei/bgn/35749.htm> (last visited: October 1, 2009).

<sup>22</sup> According to “*Expansion*” magazine, in 2008 Wal-Mart provided 157,432 employments and Coca Cola provided 58,126. See: <http://www.cmexpansion.com/las-500-de-expansion/2009/06/25/las-500-en-resumen>. For a complete list of the largest employment providers in Mexico visit <http://www.cmexpansion.com/XPA5002009/?uid=9> (last visited: October 1, 2009).

year, close to 20 million Americans visit Mexico as tourists and the U.S. Department of Commerce reported that in 2002 Mexico had a trade surplus with the United States totaling some \$35 billion dollars.<sup>23</sup> In sum, to a large extent, all of these major benefits for Mexico, its economy and its people, may be attributed to Mexico's geographical contiguity to the United States. This geographical proximity is perceived today not as a curse, but a clear advantage.

The 1,952 mile-long border that runs between the two countries—formed by natural and artificial segments—does not divide the two nations. Rather, they unite a major global power with a developing democracy rich in history, culture and natural resources.

### B. People

Mexican people are Mexico's best resource, and the United States receives thousands of them every day. Whereas the U.S. population is growing older every day, with increasing numbers of people who are no longer able to work and drain considerable resources in terms of social security payments, medical treatment and rehabilitation,<sup>24</sup> the Mexican population is young, healthy and physically apt to work and contribute to the economy. Consider, for example, that over the last five years, the remittances of Mexican nationals who work in the United States totaled over \$20 billion dollars, representing the third source of revenue for Mexico after oil and trade.<sup>25</sup> With nearly 107 million people, Mexico continues to strengthen its position as a mid-size power in Latin America and the Caribbean.<sup>26</sup> In 2006, the U.S. Census Bureau reported that the Hispanic population had become the largest ethnic minority in the United States.<sup>27</sup> About 67% of

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<sup>23</sup> See: [http://www.unameseca.com/ejercicios/Negocios/Otono\\_2003/Superavit.pdf](http://www.unameseca.com/ejercicios/Negocios/Otono_2003/Superavit.pdf) (last visited: October 1, 2009).

<sup>24</sup> U.S. Census Bureau, Age Data of the United States, <http://www.census.gov/population/www/socdemo/age/agebyage.html> (last visited October 1, 2009).

<sup>25</sup> Federal Reserve Bank of Dallas, [http://www.dallasfed.org/research/swe/2007/swe0704\\_b.cfm](http://www.dallasfed.org/research/swe/2007/swe0704_b.cfm) (last visited: October 1, 2009). See related articles from Mexican sources: <http://www.elsiglodetorreon.com.mx/noticia/20999.superavit-comercial-historico-para-mexico.html>; <http://www.banxico.org.mx/documents/%7BB7CBCFAF-AB7D-BE65-F78F-6827D524C418%7D.pdf> (last visited: October 1, 2009).

<sup>26</sup> The estimated population of Mexico as of mid-2008 is 106,682,500 people. See: <http://www.inegi.gob.mx/est/contenidos/espanol/proyectos/integracion/inegi324.asp?s=est&c=11722#tres>.

<sup>27</sup> In 2002, there were 37.4 million "Latinos" in the non-institutional civilian population of the United States, representing 13.3% of the total. Among the Hispanic population, two-thirds (66.9%) were of Mexican origin, followed by Central and South American (14.3%), Puerto Rican (8.6%), Cuban (3.7%), and the remaining 6.5% from other Hispanic origins. The regional distribution of the Hispanic population ranged from 44.2% in the western part of the United States to 7.7% in the Midwest. "Latinos" of Mexican origin



this group is made up of Mexicans and Mexican-Americans, a large number of which live in California.<sup>28</sup>

From the perspective of U.S. travel and emigration to Mexico, nearly 20 million American tourists visit Mexico every year.<sup>29</sup> About 350,000 Americans live on a permanent or semi-permanent basis in Mexico,<sup>30</sup> including some 25,000 who consider Baja California to be their “home.”

The constant flow of people between both countries allows them to engage in a variety of activities: business and trade, tourism and excursions, shopping, movie- and theater-going, and school enrollments. Over the last two decades, bi-national marriages between American and Mexican people have become increasingly common, as well as adoptions and divorces, with the resulting exponential growth —of course— of international civil litigation between both countries.<sup>31</sup>

### C. *Wealth*

Speaking in terms of wealth, Mexico is the United States’ second most important trading partner (after Canada), having displaced recently Japan. To give an idea of the volume of wealth that moves across both countries, the United States sells more goods and services to Mexico than it does to Germany, the United Kingdom, Italy and France combined, or to the People’s Republic of China, Singapore and Hong Kong combined, or to the rest of Latin America.<sup>32</sup> Some readers may be surprised to know that California exports more to Mexico than it does to Japan.<sup>33</sup> Furthermore, as a result of NAFTA, the volume of exports from Texas to Mexico between

are more likely to live in the West (54%) and the South (34.3%), particularly in metropolitan areas. See Roberto R. Ramírez and G. Patricia de la Cruz, U.S. DEPT. OF COMM., BUREAU OF THE CENSUS. THE HISPANIC POPULATION OF THE UNITED STATES: MARCH 2002 (June 2003), available at: <http://www.census.gov/prod/2003pubs/p20-545.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> See Jorge.A. Vargas, *Rights and Obligations of Americans in Mexico under Immigration Law and Other Areas of Mexican Law*, in MEXICAN LAW FOR THE AMERICAN LAWYER 451-492 (Jorge A. Vargas ed., Carolina Academic Press, 2009).

<sup>30</sup> According to INEGI (*Instituto Nacional de Estadística, Geografía e Informática* or National Institute of Statistics, Geography and Information) out of 492,617 foreigners living in Mexico today, 69.7 percent (or 343,391) are Americans. Taken from *Los Extranjeros en México* [Foreigners in Mexico], INEGI (2005), available at: [http://www.inegi.gob.mx/prod\\_serv/contenidos/espanol/bvinegi/productos/estudios/sociodemografico/ext\\_en\\_mex/extraen\\_mex.pdf](http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/estudios/sociodemografico/ext_en_mex/extraen_mex.pdf).

<sup>31</sup> Thirty cases between 1995-2002 compared with 45 between 2003 and present, as seen in MEXICAN LEGAL DICTIONARY AND DESK REFERENCE (West/Thomson, 2009 ed.).

<sup>32</sup> U.S. Department of State, available at <http://www.state.gov/r/pa/ei/bgn/35749.htm> (last visited: October 1, 2009).

<sup>33</sup> Trade Statistics - California Chamber of Commerce, available at: <http://www.calchamber.com/International/Trade/Pages/TradeStatistics.aspx> (last visited: October 1, 2009).

1997 and 2000 was equal to \$48 billion dollars or 46% percent of the total amount of Texas exports.<sup>34</sup>

These impressive figures become meaningful when placed within the context of American investment in Mexico. Since the end of World War II, the United States has been an important foreign investor in Mexico, with investments totaling \$85 billion dollars, which represents 70% of Mexico's total direct foreign investment (DFI).<sup>35</sup> Other investors include the U.K. (6%), Germany (4%), France, Spain and Switzerland combined (3.5%), and the Netherlands and Japan combined (2%).<sup>36</sup>

After the People's Republic of China, Mexico today is one of the top destinations of DFI on a global scale.<sup>37</sup> Before NAFTA, U.S.-Mexico trade amounted to \$86 billion dollars annually.<sup>38</sup> Today, this trade exceeds \$225 billions dollars every year.<sup>39</sup> In 2002, the U.S. Department of Commerce reported that Mexico had a \$35 billion dollars surplus over the United States.<sup>40</sup>

## 2. *Summary of Cases Involving Mexican Law in California, Texas and Other States*

### *California Cases*

#### 1) *Coufal Abogados v AT&T, Inc.*

223 F.3d 932 (9th Cir. 2000)

Tort Law/Contract Law/Rendering of Professional Services

Plaintiff, Coufal, sued the defendant, AT&T, based on the tort of interference with a contract. Under Mexican law, contract interference does not constitute illicit behavior allowing for recovery of damages. The defendant had hired Coufal to represent a claim the defendant had in Jalisco, Mexico. The contract entered into by Coufal and AT&T allowed Coufal to retain a

<sup>34</sup> See [http://texaspolitics.laits.utexas.edu/9\\_3\\_3.html](http://texaspolitics.laits.utexas.edu/9_3_3.html) (last visited: October 7, 2009).

<sup>35</sup> See [http://www.economia.gob.mx/pics/pages/1175\\_base/JunW09.pdf](http://www.economia.gob.mx/pics/pages/1175_base/JunW09.pdf) (last visited: October 1, 2009).

<sup>36</sup> See *supra* note 32.

<sup>37</sup> See [http://www.promexico.gob.mx/wb/Promexico/razones\\_para\\_invertir\\_en\\_mexico](http://www.promexico.gob.mx/wb/Promexico/razones_para_invertir_en_mexico) (last visited: October 1, 2009).

<sup>38</sup> Pre-NAFTA Trade: a. The NAFTA Preference and U.S.-Mexico Trade, Figure 2 b. Laurie-Ann Agama, Christine A. McDaniel, October 2002 c. Office of Economics Working Paper, U.S. International Trade Commission.

<sup>39</sup> Post NAFTA Trade: About \$216 billion b. Official Trade and Industry Information, <http://ita.doc.gov/td/industry/otea/OTII/OTII-index.html> (last visited: October 1, 2009).

<sup>40</sup> See <http://usasearch.gov/search?affiliate=commerce.gov&v%3Aproject=firstgov&query=mexican+surplus+2002> (last visited: October 1, 2009).

portion of the collections from the arbitration claim in Jalisco. AT&T eventually removed Coufal as their lead counsel due to a perceived conflict of interests. Eventually, AT&T decided that collecting the arbitration award would hinder their ability to do business in Mexico and dropped the collection efforts. The trial court granted summary judgment in favor of AT&T holding that the law of Jalisco, Mexico, would apply to this case. Jalisco does not recognize the tort of contract interference and illicit behavior has a statute of limitations of two years, which had already run out. The Circuit Court applied the California test for choice of law questions, which is a governmental interest analysis. The analysis led the court to hold that Mexican law was correctly applied since Mexico has the greatest interest in seeing its laws upheld. The court said: “The parties agree that the laws of New York and Mexico differ. Specifically, New York recognizes a claim for tortious interference, *whereas Mexico does not*” (*Coufal* case, page 936).

2) *Laparade v. Ivanova*

387 F.3d 1099 (2004)

Intellectual Property Law/Copyright

Plaintiff, Laparade, sued defendant, Ivanova, alleging copyright infringement involving thirty-four Spanish language films. Defendant argued that the plaintiff could not hold a copyright under Mexican law. In order to rule on the issue, the Ninth Circuit Court referred to a Fifth Circuit case, *Alameda Films SA de CV v. Authors Rights Restoration Corp.*, 331 F. 3d 472. The court simply stated that it agreed with the reasoning in the *Alameda* case (see below).

*Texas Cases*

3) *Southwest Livestock v. Ramon*

169 F.3d 317 (5th Cir. 1999)

Contract Law

Plaintiff, Southwest, sued defendant, Ramon, for damages based on a debt that Southwest defaulted on. The trial court granted summary judgment in favor of Southwest. Southwest had entered into a loan arrangement with Ramon, a Mexican citizen, in which Southwest borrowed money and signed a new promissory note every month while paying interest on the previous month's note. Southwest defaulted on the loan and Ramon received a judgment in Mexico to collect the debt. After the action was taken in Mexico, but before the judgment was rendered, Southwest sued in Texas federal court to recover based on the fact that the interest rate was too high and against Texas usury laws and, therefore, was contrary to public policy. The

Circuit Court used the Texas Recognition Act to determine whether the court was required to recognize the judgment from Mexico, which would bar the current litigation if upheld. In Texas, there are ten specific grounds for non-recognition, none of which Southwest was able to prove. The court reversed the summary judgment, stating that Southwest failed to prove that the judgment should not be recognized. The court further determined that under the language of the Recognition Act the judgment was not contrary to public policy and therefore the collection of the debt did not violate public policy.

4) *Alameda Films S A de C V v. Authors Rights Restoration Corp.*  
331 F.3d 472 (5th Cir 2003)  
Intellectual Property Law/Copyright Law

Plaintiff, Alameda, sued defendant, Authors Rights, claiming copyright infringement. At the trial level, a jury ruled in favor of the plaintiff. The defendant appealed alleging that a production company is not considered “an author” under Mexican law and cannot hold a copyright. The issue arises out of the Uruguay Round Agreement Act (“URAA”), which changed the way copyrights are given for foreign work. This Act requires that the law of the country where the work was produced determine the copyright. The films at issue were created in Mexico and under said Act Mexican law would be the applicable law. The court cites the Collaboration Doctrine of the Mexican Civil Code to explain that corporations can hold copyrights. The court also received Amicus briefs from the Mexican Government further stating that in Mexico companies can hold permits. This was based upon Art. 59 (1963) of the Ley Federal de Derecho de Autor [Federal Copyright Act], which states that legal entities can hold copyrights. The court held that Alameda did have the rights to the films and the trial court was correct in its findings.

#### *Cases from Other States*

5) *Spinozzi v. ITT Sheraton Corp.*  
174 F.3d 842 (5th Cir. 1999)  
Tort Law

Plaintiffs, Dr. Spinozzi and Linda, were residents of Illinois who vacationed in Acapulco. While on vacation, the plaintiffs’ hotel had a power outage that lasted into the night. While waiting for the outage to end, Dr. Spinozzi walked past the planters and gate guarding a maintenance pit and fell into the pit. This accident led to the court action. The trial court granted summary judgment for Sheraton because under Mexican law any con-

tributory negligence constitutes a total bar on tort claims. It is from this judgment that the Spinozzis appealed. The Circuit Court decided to use the *Restatement (Second) of Conflict of Laws*, which deals with the proper choice of law when there is a conflict of laws. An important factor is the place where the tort occurred. The appellant tried to argue that contributory negligence is repugnant to the public policy of Illinois and should not be applied to this case. The court determined that Illinois still uses a form of contributory negligence to bar some tort claims and the policy would not be against the public policy of Illinois. The Circuit court affirmed the decision of summary judgment for Sheraton. The Circuit did not cite any Mexican codes or cases because the concepts of contributory negligence are the same in Mexico and the United States.

6) *Silverman v. Rosewood Hotels*

2004 US Dist Lexis 16110, 2004 WL 1823634 (New York 2004)

Tort Law

The plaintiff, Silverman, a resident of New York, was vacationing in Cabo San Lucas, Mexico, at the defendant's hotel. Silverman suffered an injury when a sauna jet burned her ankle requiring surgery upon her return to the U.S. The defendant asked the court to grant partial summary judgment in order to ban the collection of moral damages. The court had to decide which law to apply. Concerning tort law, New York utilizes an interest analysis to determine which jurisdiction should have its laws applied. The location of the tort serves as the tiebreaker when the interests of the parties are both compelling. The court determined that Mexico had the greatest interest in seeing its law applied because of the nature of regulating employees, managers and guests within its territory. The court used Article 1821 of the Civil Code of Baja California Sur, Mexico, to help decide whether the injuries received by the plaintiff ascended to the level of moral damages under said Civil Code. The court granted the defendant's motion for partial summary judgment as to the application of Mexican law and denied the motion as to a determination of the extent of the guest's recovery.

7) *March v. Levine*

136 F.Supp.2d 831 (Tennessee 2000)

Family Law/ Custody Rights/ Child Abduction

Petitioner, March, sought the return of his two children to Mexico who were in the custody of their grandparents, the Levines. The Levines brought the children out of Mexico pursuant to a visitation order issued by a court in Illinois but failed to return them to Mexico as they were required to do at the end of the visitation period. March brought the action under the In-

ternational Child Abduction Remedies Act (ICRARA), which was designed to implement The Hague Convention on the Civil Aspects of International Child Abduction (“Convention”). The Convention states that the removal of a child from one country to another is wrong when the parent can show that it breaches their right to custody under the laws where the child habitually resides. The court determined that the children were habitual residents of Jalisco, Mexico, because they had lived there over a year and attended school there as well. The court next determined that March had the rights of custody over the children at the time of their removal from Mexico. The court cites Articles 412 and 418 of the Civil Code for the Federal District of Mexico City to show how custody rights are determined in Mexico. The court held that March was exercising his right of custody over the children based upon the law of Jalisco, Mexico, and ordered the return of his children to him.

8) *Whallon v. Lynn*

230 F.3d 450 (1st Cir 2000)

Family Law/Custody Rights/ Child Abduction

Whallon petitioned the district court in Massachusetts for the return of his daughter under The Hague Convention on the Civil Aspects of International Child Abductions (“Convention”). The district court granted the petition in Whallon’s favor and from that decision came the appeal. Whallon and Lynn lived together in Cabo San Lucas, Baja California Sur, Mexico, but were never formally married. Under the Convention, the court must determine whether the petitioning parent has the right of custody over the child in the jurisdiction where the child habitually resides. The parties agreed to the fact that Baja California Sur is the place of habitual residence and thus the law of that state would apply to the case. The court cited Article 474 of the Civil Code of Baja California Sur to determine the custody rights over the children and which parent exercises those rights. Article 478 of the Civil Code of Baja California Sur explicitly states that both parents exercise the parental authority. The court held that Whallon was exercising his parental authority and thus his custody rights as they were determined under the Civil Code of Baja California Sur, Mexico, where the child was a habitual resident.

9) *Curley v. AMR Corp.*

153 F.3d 5 (2nd NY 1998)

Tort Law

Plaintiff, Curley, sued the defendant, AMR Corporation, under various tort actions in order to recover from an incident that occurred on AMR’s airline in Mexico. The trial court granted summary judgment in favor of

AMR, basing their decision on New York law. Curley appealed the decision to the Circuit Court. The Circuit Court did an interest analysis to see if the district court applied the correct law in order to reach their decision. The court determined that Mexican law was the correct law to apply to the case, citing Article 1910 of the Mexican Federal Civil Code, which prescribes economic indemnification for the victim of a tort. The court also included in its analysis a reference to Article 308 of Mexico's General Communications Act to support the idea that what happens in Mexican airspace is considered to have happened on Mexican soil. The court held that the summary judgment was correctly granted, but that the law that should have been applied was Mexican law and not New York state law. The court reasoned that Mexico had the greatest interest in seeing its laws applied since the claim originated from actions that took place in Mexican airspace and, as a consequence, on Mexican soil.

### 3. Discussion of Cases

In the listed tort law cases, we can see that the application of Mexican law to a given case is not difficult for an American judge when this application can be done simply and without complications.<sup>41</sup> For example, in the Spinozzi case, the Circuit Court had no problem in applying what probably constitute the two most fundamental and well-recognized Mexican tort law principles: that the law of the place where the act occurred governs the case (*Lex loci delicti*) and that contributory negligence constitutes a total bar to any recovery.

The Civil Code of the State of Guerrero (where Acapulco is located), as well as the Civil Codes of the other "federal entities" that compose the Republic of Mexico (*i.e.*, total of 31 States and one Federal District), virtually reproduce the language of Mexico's Federal Civil Code which today reads: "*Article 1910. Whoever, by acting illicitly, or against good customs, causes damage to another shall be obligated to compensate him/her, unless he/she can prove that the damage was caused as a result of fault or inexcusable negligence of the victim.*"<sup>42</sup>

Based on the "Principle of Limited Territorialism," each Civil Code in Mexico mandates that "the laws of the State shall apply to all inhabitants of the State of [Guerrero, or any other State], with no distinction as to persons and regardless of sex or nationality, whether domiciled in the State or tran-

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<sup>41</sup> For a detailed review of this subject, See Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L. JOURNAL 475 (Spring 2007).

<sup>42</sup> Taken from JORGE A. VARGAS, MEXICAN CIVIL CODE ANNOTATED BILINGUAL EDITION 653 (Thomson/West, 2009 ed.).

sient.”<sup>43</sup> Therefore, when a tortious act takes place in, say, Guerrero, the law of the State of Guerrero shall govern that act. It should be noted that the Civil Code of that state regulates the commission of tortious acts, known in Guerrero (and in Mexico at large) as “Extra-contractual liability” for acts arising out of illicit civil acts.<sup>44</sup>

The second fundamental tort-law principle under Mexican law, also established throughout Mexico, prescribes that contributory negligence constitutes a total bar to any recovery. In this regard, the Civil Code of the State of Guerrero reads: “*Article 1735.* Any person’s act, whether committed through deception or fault, that causes damage to another, shall obligate its author to repair the damage and to indemnify the losses, *unless it is proven that the damage was caused as a consequence of the inexcusable fault of the victim.*”<sup>45</sup>

In other words, once the American court has already determined that the case is to be governed by Mexican law, after having denied the motion for *Forum Non Conveniens*, the application of the Civil Code provisions of the Mexican State in question may be smooth and incontrovertible.

However, it may not be so simple for an American judge to determine, for example, whether a “tortious interference with a contract” should be judged by Mexican law. In principle, this cause of action may be considered a true legal construct of U.S. law. This type of case is expected to generate serious arguments and counter-arguments between the litigants, especially if the economic stakes of the case are high.

Although under Mexican law there is no explicit cause of action for tortious interference with a contract (with that specific name), there may be—at the discretion of the American court—certain acts significantly valid to persuade the court that, under Mexican law, said acts are similar or equivalent to the U.S. cause of action. This possibility may be realistic considering, first, that the law is always dynamic and fluid and second, American law has exercised a profound influence on Mexican law in contractual relations, business, commerce, tax, intellectual property, etc.

Sometimes, the determination of an American court regarding a specific legal question or issue under Mexican law may simply require the consultation of the pertinent Mexican code or statute. Since Mexico—unlike the United States—is a country under the Romano-Germanic tradition that

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<sup>43</sup> The corresponding Article in the Civil Code of the State of Guerrero is Article 1: “The provisions of this Code shall apply, in the State of Guerrero, to situations and civil relations of ordinary law not subject to federal laws, and shall supplement, when appropriate, the other laws of the State, except for any provision to the contrary” (translation by author).

<sup>44</sup> Extra-contractual liability is governed by Article 1735, *et seq.*, of the Civil Code of the State of Guerrero. Evidently, this Article was highly influenced by Article 1910 of the Federal Civil Code (Código Civil Federal).

<sup>45</sup> *Id.* Article 1735 (translation by author).



does not adhere to the *stare decisis* principle, the explicit language of the law as reflected in its statutes, codes and regulations (including international treaties and conventions to which Mexico is a party), is of the utmost importance to Mexican judges in rendering their resolutions and judgments. Rather than giving their judicial reflection to precedents,<sup>46</sup> Mexican judges give their careful and full attention to the letter of the law since they have been trained to be “applicers of the law,” rather than “interpreters,” and never “creators of the law.”<sup>47</sup>

This strategy may apply, for example, when an American court has to determine whether, under Mexican law, a Mexican company (known in Mexico as a “legal person”) can be the legal holder of a copyright. Basically, to resolve this question, it would suffice for the judge to ascertain whether Mexico’s Federal Copyright Act (*Ley Federal del Derecho de Autor*, which regulates copyright issues) expressly authorizes Mexican legal entities to hold a given copyright.

This federal statute protects the rights of authors, artists, interpreters, etc., regarding their literary or artistic works in all their manifestations, including films, videotapes, interpretations, performances, editions, etc., and including their intellectual property rights.<sup>48</sup> This Act prescribes that the author “may authorize others (whether individuals or companies) for its exploitation, in any form, within the limits established by said Act without detriment to the author’s moral rights referred to in Article 21 of said Act.”<sup>49</sup> In addition, the statute provides that “The holder of patrimonial rights may freely, pursuant to what is established by the latter Act, transfer his/her patrimonial rights or grant licenses for its exclusive or non-exclusive use.”<sup>50</sup> Finally, under this Act, “the producer of an audiovisual work (including films) is the individual or company [literally: “persona física o moral”] who has the initiative, coordination and responsibility for the realization of the work, or that sponsors such work.”<sup>51</sup> Once the determination has incontrovertibly been made that in Mexico a company may be the legal holder of a copyright license pursuant to that country’s Copyright Act, the case is resolved.

In general, Mexican law finds its way to U.S. courts via (i) American judges taking judicial notice; and (ii) through the legal opinion or declaration of an expert witness. Occasionally, the U.S. court may be assisted by a “Master to the Court,” or by a detailed enunciation of the applicable Mexican law to the case at bar through a detailed legal report either prepared by

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<sup>46</sup> Vargas, *supra* note 15.

<sup>47</sup> Vargas, *supra* note 15, at 34, 1-35.

<sup>48</sup> Article 1, Federal Copyright Act, published in the *Diario Oficial* [Federal Official Gazette] of December 24, 1996 (as amended on July 23, 2003).

<sup>49</sup> Article 24, Federal Copyright Act.

<sup>50</sup> *Id.*, Article 30.

<sup>51</sup> *Id.*, Article 98.

a Mexican legal specialist or by a member of Mexico's Foreign Service, delivered to the American judge through consular or diplomatic channels.

The limited amount of cases we have been able to find of the full application of Mexican law in U.S. courts limits the reach of the analysis in this section. However, a few general observations may be tentatively advanced:

- A. The search of cases decided by American courts both in California and Texas (as well as in many other states) produced more than one hundred cases in each state. However, over 90% of these cases consisted of discussions relative to a *Forum non conveniens* motion and not to the application of Mexican law;
- B. Once the American court decided that the case was to be governed by Mexican law, judges made a genuine effort to apply what they considered to be the valid and accurate Mexican law governing the case, principally relying on (a) Mexican law expert witnesses' affidavits or depositions or (b) on the skill of their judicial clerks to find, assimilate and apply the needed Mexican law to the case at bar;
- C. Like Mexican judges, American judges are allowed to apply foreign law (*i.e.*, Mexican law) to a portion of the case, and American law to the other portion(s) of the case;
- D. The limited data did not provide any cases in which the American judge produced a "legal hybrid" formed by a combination of Mexican law and American law (what may be described as a "Calimex" or "Texican" resolution);
- E. No evidence was found that the decisions were influenced by parochial "ethnocentric" preferences on the part of the American judges to favor American plaintiffs.
- F. Trans-border judicial relations or personal contacts between American judges and Mexican judges, and the possibility of learning about the other country's legal system can be greatly enhanced through:
  - (a) a "Practical Handbook on Mexican law for U.S. Judges" (and a similar handbook for Mexican judges on U.S. law);<sup>52</sup>
  - (b) the publication of an "Annual Compendium on U.S. Cases Involving Mexican Law;"
  - (c) special courses on practical legal issues between the United States and Mexico;
  - (d) regular annual meetings (or legal conferences) between U.S. judges and Mexican judges;
  - (e) periodic legal lectures of U.S. judges to Mexican judges and Mexican law schools (and similar lectures of Mexican judges in the United States); and

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<sup>52</sup> See Jorge A. Vargas, *The Emerging Presence of Mexican Law in California Courts*, 7 SAN DIEGO INT'L L. JOURNAL 215-221 (Fall 2005).

- (f) the annual publication in English of Mexican judicial decisions and other Mexican legal materials of interest to U.S. judges.

### III. APPLICATION OF FOREIGN LAW BY MEXICAN COURTS

#### 1. *Absence of Foreign Law Prior to 1988*

In theory, the application of foreign law by Mexican courts is a rather recent development, formally introduced in 1988 by way of a series of legal reforms at the initiative of Miguel de la Madrid, then President of Mexico. These amendments took place thanks to the efforts made by the Mexican Academy of Private International Law (*Academia Mexicana de Derecho Internacional Privado*) through its participation in the Advisory Commission on Private International Law of the Secretariat of Foreign Affairs (*Secretaría de Relaciones Exteriores* or SRE).<sup>53</sup> However, despite these legislative amendments, the application of foreign law in Mexico today is still something to be desired.

It should be made clear that the major objective of the 1988 amendments—as asserted by Fernando Vázquez Pando<sup>54</sup>—was simply to incorporate into Mexico’s domestic legislation the basic rules and principles already contained in a number of Inter-American Conventions on private international law to which Mexico had already become a party prior to 1988.

The amendments the Executive proposed to Congress resulted in the modernization of the language in four particularly relevant areas, namely:

- 1) Application and proof of foreign law;
- 2) Letters rogatory “*Cartas Rogatorias*”;
- 3) International judicial cooperation on gathering evidence; and,
- 4) Enforcement of foreign judgments and arbitral awards.

The Mexican codes amended in 1988 were: *a*) the Civil Code for the Federal District, applicable to the entire Republic on federal matters;<sup>55</sup> *b*) the Code of Civil Procedure for the Federal District;<sup>56</sup> *c*) the Federal Code of Civil Procedure;<sup>57</sup> and *d*) the Code of Commerce.<sup>58</sup>

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<sup>53</sup> Vargas, *supra* note 13, Vol. 2 at 241-273.

<sup>54</sup> FERNANDO VÁZQUEZ PANDO, *NUEVO DERECHO INTERNACIONAL PRIVADO* 45 (Themis, 1990).

<sup>55</sup> Decree published in the *Diario Oficial* of January 7, 1988.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Decree published in the *Diario Oficial* of January 4, 1989.

*The Notion of Absolute Territorialism*

Prior to 1988, none of these codes were legally equipped with the language or the sufficient provisions to overcome the traditional isolationist attitude that had prevailed in Mexico until then—known as the Doctrine of Absolute Territorialism—adopted in 1932, when the Civil Code for the Federal District entered into force.<sup>59</sup> The original notion of “Absolute Territorialism” (which was attenuated as a result of the 1988 amendments) was included in Article 12 of the respective Civil Code of 1928 which read: “*Article 12.* Mexican laws, including those relative to the status and capacity of persons, shall apply to all the inhabitants of the Republic, whether national or foreigners, domiciled therein or transient.”<sup>60</sup>

Since its inception, this provision posed two serious problems: first, it elevated civil matters to a federal level which until then had been traditionally governed by state legislation; and second, it applied Mexican law to foreigners on matters of the civil status and legal capacity of individuals. Therefore, it adopted an absolute or extreme position with respect to the applicability of Mexican law. From 1932 to 1988, strong adherence to this “Absolute Territorialism” led Mexican courts to resolve cases based solely on Mexican law. The judicial philosophy shared by judges and magistrates in Mexico during those five decades was to maximize the importance of Mexican law and virtually disregard foreign law, including the law of the United States.

Historically, during those years the diplomatic relations between Mexico and the United States were not very cordial or even amicable.<sup>61</sup> Mexico was undergoing a period of drastic political changes somewhat connected to the violent and national revolutionary movement of 1910. In addition, the nationalization and expropriation of the foreign oil companies—including U.S. companies—by the administration of President Lázaro Cárdenas in 1938, resulted in a political distancing between the two countries. Accordingly, in those years the application of American law by Mexican courts was clearly out of the question.

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<sup>59</sup> Although this Code was published in the *Diario Oficial* of March 26, 1928, it entered into force on October 1, 1932, by Presidential decree published in the *Diario Oficial* of September 1, 1932. For additional information about this code, see Jorge A. Vargas, *The Federal Civil Code of Mexico*, 36 INTER-AMER. L. REV. (Winter/Spring 2005) at 229-247. Since May 29, 2000, Mexico has a Federal Civil Code that regulates federal matters throughout the Mexican Republic, and a Civil Code for the Federal District that governs civil matters at the local level (*i.e.*, in Mexico City).

<sup>60</sup> Vázquez Pando, *supra* note 54, at 22.

<sup>61</sup> LUIS G. ZORRILLA, *HISTORIA DE LAS RELACIONES ENTRE MÉXICO Y LOS ESTADOS UNIDOS DE AMÉRICA, 1800-1958*, 467-482 (Porrúa, 1977).

As a result of the 1988 amendments, the “absolutist” language of Article 12 was somewhat attenuated. Today, Article 12 of the Federal Civil Code reads:

*Article 12.* Mexican laws apply to all persons within the Republic, as well as to acts and events which take place within its territory or under its jurisdiction, including those persons who submit themselves thereto, *unless the law provides for the application of foreign law, or is otherwise prescribed by treaties or conventions to which Mexico is a signatory party.*<sup>62</sup>

In principle, Mexican law applies within the boundaries of the Republic of Mexico, including legal acts and events. However, this prescription recognizes that under certain circumstances, “the law” may provide for the application of foreign law<sup>63</sup> or the application of foreign law is mandated by those international treaties and conventions to which Mexico is a party. In Mexico, this new approach is known as the notion of “Limited Territoriality.”

## 2. *The “Opening” of Mexico to Private International Law Conventions*

During the first three decades that followed Mexico’s adoption of its “Absolute Territorialism” in 1932, there was no perceivable dissent or critique by academics or by judges and legal practitioners. It seems that during those years Mexico had become shrouded in an “isolationist cocoon.” In other words, the attention of the country regarding judicial and legal matters was only centered on domestic matters, in clear disregard of the important developments that were taking place at that time at the regional and international levels in the area of private international law.

However, this ethnocentric attitude was slowly but effectively changed by the ideas and the work of a distinguished group of academics and legal practitioners who were members of the Mexican Academy of Private International Law (*Academia Mexicana de Derecho Internacional Privado*), among them José Luis Siqueiros, Leonel Pereznieto Castro, Fernando Vázquez Pando, Laura Trigueros and Ricardo Abarca Landero.<sup>64</sup>

Interested in putting Mexico up to date with the progressive developments and codification of conflict of laws matters (*i.e.*, opening the country to the latest legal trends formulated by the international legal community),

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<sup>62</sup> VARGAS, *supra* note 42, at 5.

<sup>63</sup> VÍCTOR CARLOS GARCÍA MORENO, *DERECHO CONFLICTUAL* 25 (UNAM, México, 1991).

<sup>64</sup> Vázquez Pando, *supra* note 54, at 17. *See also* LEONEL PEREZNIETO CASTRO, *DERECHO INTERNACIONAL PRIVADO* 84-187 (Harla, México, 1995).

members of the Academy approached the Secretariat of Foreign Affairs (SRE) in 1985 with the proposal of forming an Advisory Commission to SRE on Private International Commercial Law.<sup>65</sup> The proposal was accepted and this led to a complete change of policy in this important legal area. Later that same year, members of the Academy prepared a number of legislative bills to add the necessary language to Mexican codes—taken or adapted from selected international conventions to which Mexico was already a party—<sup>66</sup> to modernize Mexican law in the major substantive areas where there were conflicts between laws.

Mexican academics specializing in conflict of laws questions—including Vázquez Pando,<sup>67</sup> García Moreno,<sup>68</sup> and Perezniето Castro—<sup>69</sup> are of the opinion that Mexico's becoming a party to numerous international conventions on conflicts of laws, especially at the Latin American regional level, was the most decisive factor in accomplishing the updating and modernization of the Mexican codes in the area of private international law, including the application of foreign law by Mexican courts.

By the time the Mexican Executive Branch sent the legislative bills to Congress in 1988 to add provisions to the four major codes that regulate matters pertaining to private international law (*i.e.*, conflict of laws), Mexico had become a party to a total of thirty-three international conventions.<sup>70</sup> Pursuant to Mexico's Political Constitution of 1917, "all the treaties in accordance with the Constitution, made or which shall be made by the President of the Republic, with the approval of the Senate, shall be the Supreme

<sup>65</sup> Vázquez Pando, *supra* note 54, at 17-18.

<sup>66</sup> By December of 1985, Mexico was a party to these six conventions: 1) Inter-American Convention on Letters Rogatory (*D.O.* of April 25, 1978); 2) Inter-American Convention on Conflict of Laws regarding Bills of Exchange, Promissory Notes and Invoices (*D.O.* of April 25, 1978); 3) Inter-American Convention on Conflict of Laws regarding Commercial Companies (*D.O.* of May 8, 1979); 4) Additional Protocol to the Inter-American Convention on Letters Rogatory (*D.O.* of April 28, 1983); 5) Inter-American Convention on Proof of Information regarding Foreign Law (*D.O.* of April 29, 1983); and 6) Inter-American Convention on General Rules of Private International Law (*D.O.* of May 8, 1984; Erratum: *D.O.* of October 8, 1984). List taken from Vargas, *supra* note 14, Vol. 2 at 247-248.

<sup>67</sup> Vázquez Pando pointed out that the incorporation of the private international law principles found in the international conventions into Mexican law was a formal obligation for Mexico as a party to said conventions, *See supra* note 55, Chapter 4 at 46. At that time, Mexico had become a party to 33 of this kind of conventions. The complete list appears at *Id.* 30-32 and 36-37.

<sup>68</sup> García Moreno, *supra* note 63, at 20-24.

<sup>69</sup> *See* Perezniето Castro, *supra* note 64 at 183-187.

<sup>70</sup> At the recommendation of the Advisory Commission to SRE, in 1987 and 1988, Mexico became a party to eleven additional conventions on powers of attorney, domicile of physical persons, personality and capacity of legal entities, extraterritorial effects of foreign judgments and arbitral awards, adoption of minors, reception of evidence abroad, international sales, etc. For the complete list, *see* Vargas, *supra* note 13 at 247-248.

Law of the entire Union.”<sup>71</sup> As a result of this constitutional text, the language of all the international conventions “approved” by the Senate became fully incorporated into Mexican law, legally binding on Mexico as a party to those international instruments.<sup>72</sup> Accordingly, all Mexican courts must abide by the provisions in these international conventions giving them priority over federal statutes and local laws.

A. *When is Foreign Law to be Applied in Mexico?*

The new language of Article 12 of the Federal Civil Code, as amended in 1988, introduced a new and limited territorialism. Under this novel approach, Mexico now allows the application of foreign law as an exception to the fundamental principle that Mexican law applies within the Republic of Mexico. Accordingly, foreign law applies in these two cases:

- A. When Mexican law explicitly prescribes the application of foreign law; and
- B. When pertinent treaties and international conventions to which Mexico is a party clearly provide for the application of foreign law.

Specialists in this legal field characterized this innovation as cautious since it did not abandon Mexico’s traditional territorialism. In general, the change has been perceived as necessary and positive.<sup>73</sup>

Vázquez Pando, in commenting on a proposal prepared by the Federal Chamber of Deputies (*Cámara de Diputados*) on the application of foreign law in that country in 1979, suggested that “if foreign law is to be applied, it has to be done in conformity with the provisions of Mexico’s Civil Code, taking into consideration sources, methods of interpretation, court precedents, etc., as these elements are considered to form part of the applicable foreign law.”<sup>74</sup> In other words, he advocated a true and comprehensive application of foreign law by Mexican judges rather than the mere mechanical process

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<sup>71</sup> Article 133. Evidently, this Article was inspired by Article VI, Section II of the Constitution of the United States.

<sup>72</sup> It may be of interest to point out that from a hierarchical viewpoint, unlike the United States, when approved by the Senate in conformance with Article 133 of Mexico’s Political Constitution, international treaties and conventions in Mexico are only inferior to the Constitution but superior to federal statutes and local laws by decision of the Plenary of the Supreme Court of the Nation. This decision reads: “*The Supreme Court of Justice considers that international treaties are placed on a second tier below the Fundamental Law and above the federal and local law.*” P. LXXVII/99, *Amparo en revisión* 1475/98. SEMANARIO JUDICIAL DE LA FEDERACIÓN (*Federal Judicial Weekly*), Ninth epoch, Vol. X, November 1999 (*emphasis added*).

<sup>73</sup> Vázquez Pando, *supra* note 54 at 54.

<sup>74</sup> *Id.* at 54-55.

of simply citing the foreign law provision considered to govern the case devoid of any historical background, sources, interpretation, precedents, opinions, etc.

### B. Rules Governing the Application of Foreign Law in Mexico

Article 14 of the Federal Civil Code enunciates the “rules” to be observed in the application of foreign law. The first paragraph reads:

*I. It shall be applied in a manner that the corresponding foreign judge would apply it, for which the local judge shall take legal notice of all necessary information regarding the text, applicability, meaning and scope of the foreign law.*<sup>75</sup>

This paragraph simplifies the language of Article 2 of the Inter-American Convention on General Rules of Private International Law,<sup>76</sup> adhered to by Mexico in 1984. Although it is believed that this language closely follows the most advanced opinions on the matter, Miguel Acosta Romero,<sup>77</sup> a leading commentator of the Civil Code, questions the possibility of whether a Mexican judge may be able to truly comply with this prescription. Acosta Romero raises a pragmatic question: How viable is it for a Mexican judge to apply foreign law if he or she is not fluent in the foreign language of the law or has never studied the legal system of that country?

Scholars in Mexico have pointed out that, given the language of this new Article 14 (1) of the Federal Civil Code, it is unnecessary in that country to prove the existence of foreign law, meaning that the interested party does not have to provide evidence that the foreign law exists in its country. It simply suffices for the interested party to invoke the application of foreign law, and the judge would have to comply with this request.<sup>78</sup>

Perezniето Castro indicates that a Mexican judge must apply foreign law *motu proprio (ex officio)* “whether through the parties or using the means he or she considers the most convenient for that purpose (consulting an expert witness, through the Secretariat of Foreign Affairs) whether in relation with the language of foreign law to prove that it is in force and, especially, its legal meaning and scope.”<sup>79</sup> Perezniето Castro concludes that by means of

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<sup>75</sup> Translation by author

<sup>76</sup> Signed at Montevideo, Uruguay, on May 8, 1979.

<sup>77</sup> MIGUEL ACOSTA ROMERO, *CÓDIGO CIVIL PARA EL DISTRITO FEDERAL. COMMENTARIOS, LEGISLACIÓN, DOCTRINA Y JURISPRUDENCIA* 27-29, Vol. I (Porrúa, México, 1998) (At that time, the language of the Federal Civil Code and that of the Civil Code for the Federal District were identical).

<sup>78</sup> Vázquez Pando, *supra* note 54 at 88-90.

<sup>79</sup> *Id.*



this provision of the Federal Civil Code “the most complete assimilation of foreign law to Mexican law is established and it gives ample possibilities of interpretation to the judge.”<sup>80</sup>

The new text of the Civil Code was inspired by the language of Article 86-Bis of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*) which reads:

*Article 86-Bis.* The [Mexican] court shall apply foreign law in a manner that the foreign judge would apply it.

To gain more information on the text, the temporal validity of the law (*vigencia*), meaning and scope of foreign law, the court may use the official reports on this matter, which may be requested from the Mexican Foreign Service, as well as order and admit the evidentiary proceedings (*diligencias probatorias*) that may be deemed necessary or offered by the parties.<sup>81</sup>

Although Mexican judges are legally empowered to apply foreign law in Mexican proceedings, and no formal or informal survey has been conducted since 1988 to determine the number of substantive cases that have been resolved on the basis of foreign law, empirical data suggests that the number of these cases is close to zero. In an informal and preliminary survey conducted with judges and court secretaries in the six Mexican states bordering the United States (in addition to Mexico City), no cases of any Mexican court resolving a given case based on American law or any other foreign law were reported.<sup>82</sup>

In the United States, when the application of foreign law is requested by a defendant, that request may be challenged by filing a *forum non conveniens* motion. Mexico lacks this type of motion and preliminary proceedings. However, a procedural challenge may take place attacking the substantive application of foreign law based on these considerations, as formulated in the Federal Civil Code:

- a) When fundamental principles of Mexican law are evaded; and,
- b) When the provisions of foreign law, or the result of its application, is contrary to Mexico’s public order (*orden público*)<sup>83</sup> (Such is the case in the United States).

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<sup>80</sup> Perezniето Castro, *supra* note 65 at 194.

<sup>81</sup> Article 86-Bis, Federal Code of Civil Procedure taken from AGENDA DE AMPARO 2008, ISEF, México (2008) at 16 (Translation by author).

<sup>82</sup> Prof. Jorge A. Silva, from the University of Ciudad Juárez, Chih., School of Law, distributed a questionnaire and interviewed judges, court secretaries and legal practitioners in civil court of the six Mexican states bordering the United States. *See supra* note 20.

<sup>83</sup> Article 15, Federal Civil Code.

In addition, said applicability may be contested through the *Amparo* lawsuit,<sup>84</sup> when one of the parties to the controversy is of the opinion that the application of foreign law may have been done in violation of his or her constitutional rights (known in Mexico as *garantías individuales*).

Whether in Mexico, the United States or elsewhere, the application of foreign law warrants a certain degree of concern in a judge's mind. Clearly, applying foreign law places the judge in an exceptional situation. The judge's role has always been that of applying domestic law and for that task he or she has been trained. Judicial experience has provided the judge with a certain degree of experience in the study, interpretation, research, analysis and application of the law. However, applying foreign law may have little or nothing to do with the techniques and methods required for applying the law of the land.

Based on the above considerations, it may not be surprising to learn that there is some degree of reluctance, hesitation, and maybe even doubt, when a judge anywhere in the world needs to resolve a case based on foreign law. Indeed, this may be an unprecedented and alien experience. This kind of idea is present not only among judges in Mexico but also those in the United States, and elsewhere in the world. No one knows to what degree, if any, this inherent reluctance in applying foreign law is responsible for the relatively low number of cases decided based on foreign law by any judge in a domestic arena.

*II. Foreign substantive law shall be applied except when, by reason of the special circumstances of the case, the conflict of laws rules of said foreign law must be taken into account, as an exception, thus requiring the application of Mexican substantive law or that of a foreign state.*<sup>85</sup>

This provision establishes, according to Perezniето Castro, two clear rules: first, Mexican judges are legislatively mandated to apply substantive foreign law, without taking into account the conflict of law rules of said foreign law, always doing their best to avoid *renvoi* when possible; and, second, only when there are "special circumstances of the case," do Mexican judges have the powers of discretion to apply the rules of conflict of laws predicated by foreign law limited to two situations: (i) when the rules of said for-

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<sup>84</sup> Amparo is a federal lawsuit filed by any Mexican individual or foreign when a constitutional right (also known in Mexico as "Garantías individuales" (or *Individual guarantees*) is considered to have been breached by a Mexican authority. The "Amparo" lawsuit is based on Articles 103 and 107 of Mexico's Political Constitution of 1917 and both its substance and procedure are governed by the Federal "Amparo" Act (*Ley de Amparo*). For additional information, see Jorge A. Vargas, *Introduction to Mexico's Legal System*, MEXICAN LAW FOR THE AMERICAN LAWYER 40-42 (CAP, 2009).

<sup>85</sup> Article 14, Para. II, Federal Civil Code (*hereinafter* FCC).

foreign law remit to Mexican law, and (ii) when said remission (*renvoi*) is made to the law of a third state, which substantially limits the applicability of the foreign law of another state.<sup>86</sup>

Most scholars agree that the objective of the Mexican Congress was to elude the use of *renvoi*, given the doubts and controversy associated with this concept. The solution given by the Federal Civil Code is to reach a compromise. In principle, the message to the Mexican judge is: “Do your best not to use the notion of *renvoi*. However, if you have to, do it only in exceptional cases when the specific circumstances of the case justify it.”<sup>87</sup> Other scholars, among them Dr. Carlos Arellano García, have characterized this position as “moderate.”<sup>88</sup>

However, Arellano García and Alberto G. Arce have been critical about the use of *renvoi* under Mexican law. The first author goes to the extreme of characterizing the allusion to *renvoi* in Article 14, paragraph II, of the Federal Civil Code, as amended in 1988, as incorrect. In general terms, Dr. Arellano García alleges that paragraph II would be perfect “if it had only limited itself to establishing that ‘when the conflictual norm remits to foreign law the foreign legal norm of a material character (*Norma jurídica extranjera de carácter material*) would be applied in an obligatory manner.”<sup>89</sup>

The rationale that accompanied the 1988 amendment is silent on this matter and does not provide any guidance to determine what those rules are.<sup>90</sup>

In closing this section, it may be said that it has always been somewhat of a challenge for judges to have to apply foreign law to a given case. At least from a U.S. perspective, American judges do their best to apply Mexican law when they do so as a Mexican judge would: objectively, impartially and in perfect symmetry with the letter and the spirit of the Mexican legislature.

However, on very rare occasions, American judges may believe that they are applying Mexican law, but the tenor of the judicial resolution may appear to be more of a hybrid, resembling Mexican law with U.S. law components. This could lead a Texas judge to strongly rely on the opinion of a Mexican law expert to advise him in drafting the respective judicial resolution in order not to produce a “Texican” resolution.

The Third Federal Collegiate Court on Civil Matters of the First Circuit declared in 2001 that it corresponds to the parties to prove the relevance of the application of foreign law. The relevant part of this judicial resolution reads:

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<sup>86</sup> Pereznieto Castro, *supra* note 64 at 194.

<sup>87</sup> Vázquez Pando, *supra* note 54 at 57-58.

<sup>88</sup> *Id.* at 58.

<sup>89</sup> CARLOS ARELLANO GARCÍA, DERECHO INTERNACIONAL PRIVADO 874 (Porrúa, México, 1999).

<sup>90</sup> *Id.* at 874-875.

*Foreign law. Its proof at the trial corresponds to the Parties, and to the Mexican court, the power to verify its language, temporal application, meaning and scope, giving special attention to the international conventions to which Mexico has become a party.*

...[I]t corresponds to the parties to provide the judge with evidence of the foreign law invoked, as well as the elements from which its language, temporal application, meaning and scope [may be determined], granting powers to the court to utilize, when necessary, the official reports prepared by Mexican Foreign Service officials or the conventions to which Mexico has become a party to accurately ascertain the required information and data, in order to give legal accuracy to the [court's] determinations.

The [Mexican] legislature has incorporated general rules of an international nature into the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*) to form a part of the Mexican legal system, pursuant to Article 133 of the Federal Constitution, in order to facilitate the application of foreign law in this country, by considering the provisions in said code insufficient to adequately regulate issues regarding private international law. This allows [this court] to conclude that to obtain the exact solution to these issues, and in particular to prove foreign law, special attention is to be given to the international conventions that Mexico has already signed, since these [conventions] form a part of the national law.<sup>91</sup>

*III. The application of foreign law shall not be prevented because of the non-existence of institutions or essential procedures under Mexican law similar to the applicable foreign institution, if there are analogous institutions or procedures available.*<sup>92</sup>

In principle, scholars are of the opinion that this paragraph tries to avoid the situation in which a judge may dismiss a case based on the fact that the Mexican domestic law does not have a similar institution equivalent or identical to that of a given foreign legal institution. In this regard, a Mexican judge keeps in mind the mandates of the Federal Civil Code that prescribes: "Silence, obscurity or insufficiency of the law shall not deter judges or courts from resolving any controversy that comes before them,"<sup>93</sup> and that: "Civil juridical controversies shall be decided in strict adherence to the letter of the law or its judicial interpretation. *In the absence of law, controversies shall be decided in accordance with the general principles of the law.*"<sup>94</sup>

This provision assumes a certain degree of legal erudition and judicial experience on the part of Mexican judges that is sometimes difficult to find,

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<sup>91</sup> Direct *Amparo* 10623/2001. Juan Cortina del Valle. October 18, 2001. Unanimous decision. *Instance:* Tribunales Colegiados de Circuito [Collegiate Circuit Courts]. *Source:* SEMANARIO JUDICIAL DE LA FEDERACIÓN Y SU GACETA [Weekly Federal Court Report], Ninth Epoch, Vol. XV, March 2002, p. 1326. *Tesis Aislada.*

<sup>92</sup> Article 14, paragraph III, FCC.

<sup>93</sup> Article 21, Federal Civil Code.

<sup>94</sup> Articles 18 and 19, FCC (*Emphasis added*).

especially when certain empirical factors suggest that Mexican judges' application of foreign law seems to be virtually absent today. This question may be further complicated by the fact that the study of foreign law or, more directly, U.S. law in the academic curriculum of Mexican law schools is lacking. Moreover, unlike the United States, the institution of "judicial clerks" does not exist in Mexico. In the United States, judicial clerks are selected among the brightest and most capable law students or graduates to assist judges in doing research on specific legal issues, drafting legal memoranda on legal topics, searching for precedents, writing drafts of judgments, etc., including doing research to provide the judge with objective and current legal information about a specific area of foreign law that may or may not be applied by the judge.

Introducing in Mexico the institution of "judicial clerks" as it operates in the United States (and in other countries) may be a valuable aid that would eventually assist Mexican judges, *inter alia*, in obtaining the appropriate legal information on foreign legal rules or institutions, including those of the United States, that may be required by a judge when resolving a given case. On the American side, for example, these kinds of cases usually require the U.S. judge to make determinations as to whether, for instance, a Mexican "concubine" may be legally equivalent to a "common law spouse" under U.S. state law;<sup>95</sup> or what the legal effects attributed under Mexican law to a religious marriage conducted by a priest, a pastor or a religious minister in a remote village where there is no Civil Registry are, for example. Other examples may include issues such as whether the Mexican civil concept of "moral damages"<sup>96</sup> is legally akin to equitable damages or exemplary damages; or whether there is a legal institution in Mexican civil law similar or equivalent to the U.S. cause of action of "tortious interference to a contract."<sup>97</sup>

The language of paragraph III of Article 14 of the Federal Civil Code was taken, *mutatis mutandis*, from Article 3 of the Inter-American Convention on the General Rules of Private International Law,<sup>98</sup> which reads: "Ar-

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<sup>95</sup> See Jorge A. Vargas, *Concubines under Mexican Law: With a Comparative Overview of Canada, France, Germany, England, and Spain*, XII SOUTHWESTERN J. OF LAW & TRADE IN THE AMERICAS 45 (2005).

<sup>96</sup> See also Vargas, *Moral Damages under the Civil Law of Mexico. Are These Damages Equivalent to U.S. Punitive Damages?*, 35 INTER-AMER. L. REV. 183 (Spring 2004).

<sup>97</sup> In the *Coufal* case (see section II, 2 in this article *supra*), the U.S. Court determined that "Mexico does not recognize... a claim for tortious interference with a contract."

<sup>98</sup> Mexico is a party to the Inter-American Convention on General Rules of Private International Law, signed on May 8, 1979; approved by the Mexican Senate on January 13, 1983; and promulgated in the Federal Official Gazette of October 10, 1984. Other parties to this Convention include: Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru, Uruguay and Venezuela. Information taken from L. PEREZNIETO CASTRO & J.A. SILVA, *DERECHO INTERNACIONAL PRIVADO. PARTE ESPECIAL* 490-491 (Oxford, 2000).

*title 3.* Whenever the law of a State Party has institutions or procedures essential for their proper application that are not provided for in the law of another State Party, this State Party may refuse to apply such a law if it does not have like institutions or procedures”.

It is unquestionable that judges from both the United States and Mexico would benefit greatly if they could attend bi-national annual meetings to exchange information about their respective legal systems in areas of their judicial interest. A prospective format could call for the conference to be held on one side of the border one year and on the other side the following year. Topics of discussion could include questions relating to “letters rogatory” and the enforcement of judgments, as well as the application of foreign law, and other matters, under the umbrella of U.S.-Mexico bi-national judicial cooperation.

*IV. Prior, preliminary or incidental questions that may arise in connection with the principal questions shall not necessarily be resolved in accordance with the applicable law to the latter.*<sup>99</sup>

In this regard, the Federal Civil Code adheres to the “principle of independence of both questions” which predicates that “previous, preliminary or incidental questions” are recognized as legally different from the “principal issues” in a given case. Therefore, the law governing these principal issues may not necessarily apply to previous or incidental matters. However, the judges in question are under the obligation to provide valid legal reasons supporting their decisions; otherwise, the affected party is likely to allege that his or her constitutional rights may have been violated by the judge’s decision via the use of “*Amparo*” proceedings.

With respect to this kind of cases, or situations, the Inter-American Convention on the General Rules of Private International Law states: “*Article 8.* Previous, preliminary or incidental issues that may arise from a principal issue need not necessarily be resolved in accordance with the law that governs the principal issue.”<sup>100</sup>

This would be the case, for example, for a Colombian judge who applied Mexican law to resolve an interstate succession (*principal issue*) of a person of Colombian descent (*de cuius*) who died in Mexico, but whose assets were located in Colombia. A problem arises when the legitimacy of the adoption of one of the heirs is challenged (*preliminary issue*). Regarding said adoption, is the Colombian judge to apply Mexican law (including its rules of conflicts) or, based on the legal differences between both issues, is the Colombian judge to apply the law that controls adoption?<sup>101</sup>

<sup>99</sup> Article 14, paragraph IV, Federal Civil Code.

<sup>100</sup> Article 8, Inter-American Convention, *supra* note 98.

<sup>101</sup> This example is provided by Perezniето Castro, *supra* note 64 at 195.

Another example is when a judge in Mexico City (*i.e.*, Federal District) confronts a lawsuit for breach of contract executed in El Salvador and containing a *Choice of law* clause designating Salvadoran law to govern the contract (*principal issue*). However, one of the parties domiciled in Costa Rica does not have the legal capacity to execute that contract (*preliminary issue*). Therefore, the Mexico City judge may apply Salvadoran law, designated by the parties as the governing law for the contract, including the issue of capacity of the contracting parties; or apply the law of Costa Rica as a personal right based on the parties' residence, to resolve the capacity issue. In either case, the judge is to resolve the principal issue by applying Salvadoran law because it was expressly chosen by the parties to govern the contract, and then it will resolve the capacity issue based on Costa Rican law.<sup>102</sup>

*V. When different aspects of the same legal relationship are governed by different laws, they shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case.*<sup>103</sup>

This paragraph is almost a *verbatim* copy of Article 9 of the Inter-American Convention on General Rules. Vázquez Pando has said that this provision constituted “the principal novelty of the 1988 reform.”<sup>104</sup> Two principles are embedded in this text: first, that different aspects in a legal relationship may be governed by different laws (*decoupage*); and, second, the adherence to a policy that discards the application of mechanical criteria and adopts a position that brings the notion of equity to resolve the central elements of a case.<sup>105</sup>

Pereznieto Castro recognizes the value of this equitable solution, although he bases his opinion on the ideas advanced by the classical French specialist on *Droit International Privé*, Henri Batiffol.<sup>106</sup> Pereznieto Castro illustrates the case with the following example: an 18-year old individual signs a promissory note in Panama, where the legal capacity for contracting these commercial obligations is a minimum age of 21. The note indicates that it should be paid in Guatemala, where the age for such a transaction is 18. Since the person who signed the promissory note (*obligado o girador*) owns real estate in Mexico, the holder of the title files a lawsuit in Mexico. The Mexican judge would be faced with this situation: the law of the place of emission which invalidates the note, and the law of the place of payment

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<sup>102</sup> *Id.* at 195-196.

<sup>103</sup> Article 14, paragraph V, Federal Civil Code.

<sup>104</sup> Vázquez Pando, *supra* note 54 at 60.

<sup>105</sup> *Id.*

<sup>106</sup> Pereznieto Castro, *supra* note 64 at 196.

under which the credit instrument is valid. Clearly, it is a relationship governed by different laws, and the judge aims “to attain the purposes pursued by each of such laws.” Accordingly, the judge shall apply the law of Guatemala, validating the title, and shall take jurisdiction over the lawsuit to attach the assets of the person in Mexico.<sup>107</sup>

### 3. *Exceptions to the Application of Foreign Law in Mexico*

The Federal Civil Code mandates that foreign law “shall not be applied” in these two situations: *a)* When foreign law is used to evade the application of fundamental principles of Mexican law; or, *b)* When the substance of foreign law, or its application, runs contrary to “the principles or fundamental institutions of Mexico’s public order.”

#### A. *When Fundamental Principles of Mexican Law are Evaded*

This exception refers to the old and well-known notion of *fraud au loi* (*fraude a la ley*), dating back to the time of Justinian, as explained by Paulus and Ulpian, when they declared that: “Acting against the law is doing what the law forbids; fraud of the law is when someone, respecting the language of the law, eludes its meaning;” and “When someone does something that the law did not want to be done but did not prohibit it,” respectively.<sup>108</sup> The Spanish jurist Adolfo Miaja de la Muela defines fraud of the law “as the commission of one or several licit acts in order to reach an anti-legal outcome. It constitutes a means to breach imperative laws.”<sup>109</sup>

From the viewpoint of private international law, fraud of the law is characterized as “a remedy that impedes the application of a foreign legal norm, to which the interested parties have subjected themselves voluntarily, because it is more convenient to their interests, thus deceptively evading the imperative nature of the domestic legal norm.”<sup>110</sup> From this perspective, fraud of the law is composed of the following elements:

- a) A rule of conflict of laws that recognizes the valid application of the material foreign legal norm;
- b) The placement of the individual case in a substantially close relationship with the foreign legal norm;

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<sup>107</sup> *Id.*

<sup>108</sup> Cited in the entry “Fraude a la Ley,” NUEVO DICCIONARIO JURÍDICO MEXICANO (*New Mexican Legal Dictionary*), Vol. 2, 1736 (Porrúa/UNAM, México, 2000).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*



- c) The advantages or benefits that the application of the foreign legal norm provides to the interested parties;
- d) The less advantageous or less beneficial aspects of the domestic material legal norm from the viewpoint of the other involved parties in the controversy;
- e) The intentional evasion of the domestic material legal norm that originally was to be applied to the individual case in question, prior to the occurrence of element b), *supra*;
- f) The presence of deception, lack of sincerity, or anomaly on behalf of the parties involved; and
- g) The evasion of the imperative nature of the national legal norm which is not applied given the change introduced in the individual case by the parties.<sup>111</sup>

Article 6 of a “Conflict of Laws Draft” formulated by Carlos Arellano García and José Luis Siqueiros added: “It shall correspond to the authority or judge of the receiving State of the foreign juridical norm (*norma jurídica extranjera*) to determine the scope and modalities of this exception.”<sup>112</sup> Article 7 of the same draft proscribed the application of foreign law, “when it has deceptively evaded the law of the receiving States, it shall be left to the discretion of the competent authorities of this State to determine the fraudulent intention of the interested parties.”<sup>113</sup>

#### B. *When Contrary to Mexico’s Public Order*

Fraud of the law should not be confused with the other “public order” exception even though both lead to the end result of the non-application of the valid foreign law norm. The non-application of foreign law as a result of a *fraud of the law* is the direct consequence of a deceitful act on the part of one of the interested parties. This action clearly intends to evade the application of the foreign norm. In contrast, in a *public order* exception, the non-applicability of foreign law is the result of the fact that said foreign law runs contrary to public order. Since the foreign law norm offends or breaches the public order it is not applied.<sup>114</sup>

In a draft of this provision, formulated by Carlos Arellano García and José Luis Siqueiros, these specialists not only referred to “foreign law,” but also expanded this notion by including “judicial judgments, arbitral awards,

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<sup>111</sup> *Id.*

<sup>112</sup> Article 7, Arellano-Siqueiros Draft on “Conflict of Laws,” reproduced in Vázquez Pando, *supra* note 54 at 61.

<sup>113</sup> *Id.*

<sup>114</sup> NUEVO DICCIONARIO, *supra* note 108 at 1737.

legal acts and declarations from abroad to be applied in Mexico in accordance with the international or domestic rules of conflict of laws, shall cease to have legal effect (*dejarán de tener eficacia*) when they run contrary to the public order of the receiving country.”<sup>115</sup> The draft produced by Dr. Perez-nieto Castro in 1977 on this same issue, states that: “Foreign law may not be applied in Mexico when it is manifestly incompatible to the public order as understood by the international law and custom. No one may benefit in Mexico out of a legal situation created by virtue of the application of foreign law committed in fraud of Mexican law.”<sup>116</sup>

Both of the exceptions in Mexican Law are in close symmetry with Articles five and six of the Inter-American Convention on General Rules of Private International Law:

*Article 5.* The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (public order).

*Article 6.* The law of a State Party [to this convention] shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded. The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties.<sup>117</sup>

### *Mexico's Concept of Public Order*

Today, there is no legal norm —whether statute or code— which provides a legal definition of “public order” (*orden público*) as part of Mexican law. However, the Federal Civil Code mandates: “*Article 8.* Any act that runs contrary to the tenor of prohibitive or public order laws (*Leyes prohibitivas o de interés público*) shall be null and void, unless otherwise provided by law.”<sup>118</sup>

Public order may have different legal meanings. Generally speaking, “public order” refers to the existence of peaceful coexistence among members of a given community, generally identified with public peace in a community.<sup>119</sup>

From a legal perspective, *public order* is defined as the body of legal institutions that identify the law governing the community, when this law is

<sup>115</sup> Article 6, Arellano-Siqueiros Draft on “Conflict of Laws,” *supra* note 112.

<sup>116</sup> The Perez-nieto Castro draft is also reproduced by Vázquez Pando, *supra* note 54 at 62.

<sup>117</sup> See Inter-American Convention on General Rules of Private International Law, *supra* note 98.

<sup>118</sup> Vargas, *supra* note 42 at 3.

<sup>119</sup> NUEVO DICCIONARIO, *supra* note 108 at 2701.

formed by principles, rules and institutions that cannot be altered by either the will of individuals (*i.e.*, the autonomy of the will of the parties) or the application of foreign law. It should be noted that these principles, rules and institutions are not only formed by legislative enactments, since public order also consists of traditions, customs and judicial practices, including those pertaining to the legal and judicial professions.<sup>120</sup>

In civil law matters, public order is defined as a mechanism through which the State (whether the legislature or the judiciary) impedes certain acts of individuals that may affect the fundamental interests of the community. It acts as a limit or boundary to any activity that takes place within the legal realm. It corresponds to the institutions that apply the law to define which acts affect the public interest. Sometimes, specific legislative enactments explicitly declare those activities that affect the public order. It may also correspond to the tribunals to make a determination as to which acts or activities run contrary to public interest.<sup>121</sup>

Regarding public order as a legal concept, the Fourth Federal Collegiate Court on Administrative Matters rendered the following opinion in August 2005:

PUBLIC ORDER. IT IS A VAGUE LEGAL CONCEPT THAT IS UPDATED EVERY TIME IT IS APPLIED TO A SPECIFIC CASE, TAKING INTO CONSIDERATION THE MINIMAL RULES OF SOCIAL COEXISTENCE. Public order does not constitute a notion that may be defined on the basis of a formal declaration contained in a given law. To the contrary, a constant criterion of the Supreme Court of Justice of the Nation has been to assert that it corresponds to the judge to determine its presence in each individual case. Accordingly, this legal concept may only be delineated by the circumstances of form (*modo*), time and place prevailing at the moment of making the determination. In any event, the judge must take into account the essential conditions for the harmonious development of the community; that is to say, the nominal rules of social coexistence, in the intelligence that the decision to be rendered in a specific case cannot rest on mere subjective appreciations but on objective elements that are translated into the fundamental concerns of the society, always striving not to obstruct the legitimate rights (*eficacia*) of a third party.<sup>122</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 2702-2703.

<sup>122</sup> *Cuarto Tribunal Colegiado en Materia Administrativa [Fourth Collegiate Court for Administrative Matters]*. Direct *Amparo* 312/2004. Alberto Salmerón Pineda. 12 January 2005. Unanimity of votes and Direct *Amparo* 453/2004. Hospital Ángeles del Pedregal, S.A. de C.V. 23 February 2005. Unanimity of votes. *Instance*: Tribunales Colegiados de Circuito [Circuit Collegiate Courts]. *Source*: Semanario Judicial de la Federación [*Weekly Federal Court Report*] and its Gazette, Ninth Epoch. Volume XXII, August 2005, p. 1956. *Tesis Aislada [isolated thesis]*.

#### 4. *Choice of Applicable Law*

Article 15 of the Federal Civil Code establishes five rules that govern the choice of law in Mexico. These rules are:

*I. Situations and determinations validly emanating from any entity of the Republic, or in a foreign country, in accordance with its laws, shall be recognized as valid.*<sup>123</sup>

Inspired by the Constitution of the United States,<sup>124</sup> Mexico's Political Constitution prescribes:

*Article 121.* Full faith and credit shall be given in each state of the Federation to the public acts, records, and judicial proceedings of every other state. The Congress of the Union, by general laws, shall prescribe the manner of proving such acts, records, and proceedings, and their effect, by subjecting them to the following principles:

I. The laws of a state shall have effect only within its own territory and are consequently not binding outside that state;

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

III. Judgments pronounced by the courts of one state regarding property rights or real estate located in another state, shall only have executory effect in the latter when its own laws so provide;

Judgments regarding personal rights shall be executed in another state only when the convicted defendant (*condenado*) has expressly, or by reason of place of residence, deferred to the court that pronounced the judgment, and provided that he/she has been personally summoned (*citada personalmente*) to appear at a judicial hearing;

IV. Acts regarding the civil status of individuals done in conformance with the laws of a given state shall have validity in the others; and

V. Professional degrees (*títulos profesionales*) issued by the authorities of one state, in conformance with its laws, shall be respected in other states.<sup>125</sup>

This article has drawn virtually no attention or commentaries from constitutional and conflict of law experts in Mexico, despite the legal importance of its language. The article focuses on the express mandate of the

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<sup>123</sup> Vargas, *supra* note 42 at 5.

<sup>124</sup> See U.S. CONST. Article IV § 2, which reads: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

<sup>125</sup> The original language of Article 121 of the Political Constitution of Mexico was taken from AGENDA DE AMPARO (ISEF, México, 2008) at 89.

Constitution directed at each of Mexico's political entities (31 states and one Federal District, that administratively functions as a state), to give full faith and credit to the public acts, records and judicial proceedings of the other states. As pointed out by leading constitutional law expert Felipe Tena Ramírez, whereas this obligation does not exist between countries, unless based on pertinent bilateral agreements or international treaties or conventions, the federal entities in Mexico have this obligation directly imposed upon them by the Federal Constitution of 1917.<sup>126</sup>

Laura Trigueros has emphatically pointed out the powerful influence the U.S. Constitution exercises regarding paragraph I of this article. She has also been critical of the fact that this paragraph has been incorrectly translated into Spanish from the original English version.<sup>127</sup> In the Mexican translation, the English expression "public acts," which refers to formal legislative enactments passed by Congress, has been incorrectly translated as "*actos públicos*," which means "public acts" in the sense of actions on the part of a public authority like when the police close a street. This paragraph also reiterates Mexico's concept of "limited territorialism," as formulated in Article 12 of the Federal Civil Code.<sup>128</sup>

On the subject of the valid application of foreign law in Mexico, the Third Federal Collegiate Court on Civil Matters of the First Circuit rendered the following opinion in 2000:

FOREIGN LAW. VALID APPLICATION IN THE MEXICAN TERRITORY. When a legal act executed abroad produces effects in national territory, the validity of said act is to be previously ascertained as a prerequisite to determine the applicability of the legislation or place of its implementation and, if this is the case, which law is to define the validity of said act..... To resolve an individual case, the state court taking cognizance of the controversy that may result in the application of foreign substantive law (*derecho sustantivo extranjero*) must adapt its actions to the law of the land. In other words, on procedural matters, as a general rule, the court cannot be obligated to apply a procedural rule that has not been formulated by its own legislative branch, including that which has been prescribed by international treaties as part of its domestic law, when these have been incorporated into the positive law system, provided no one challenges their having entered into force or their inapplicability has been decided by a *res judicata* decision.

The court should consider the substantive aspects of international law norms which have been incorporated into its domestic legal system and the specific rules for resolving a given case. What is the applicable norm governing the legal act in a given controversy? It cannot be generally and fully decided that the foreign substantive law cannot be applied by the Mexican

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<sup>126</sup> See CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Vol. IV, 304 (Porrúa/UNAM, México, 2003).

<sup>127</sup> *Id.* at 308.

<sup>128</sup> See Article 12, Federal Civil Code.

court since there are federal norms, such as Articles 14 and 133 of the Political Constitution and Articles 12 and 13 of the Federal Civil Code, that establish specific rules that should be followed to resolve a controversy of this nature duly grounded in law and fact (*para resolver en forma fundada y motivada*). In this case, the Mexican court is to resolve the controversy presented to it in the manner a foreign court would.<sup>129</sup>

*II. The status and legal capacity of individuals (personas físicas) shall be governed by the laws of their place of residence.*<sup>130</sup>

Accordingly, an individual's civil status, *i.e.*, birth, marriage, divorce, or their legal capacity, *i.e.*, legal capacity to execute or to enter into certain acts, incapacities, etc., are governed by the law of said individual's place of residence.<sup>131</sup> For example, if an individual's address is in La Jolla, California, U.S.A., and is planning to execute a testament with a Notary Public in Mexico City, the Notary has to confirm that, under California law, the individual in question is legally capable of formulating and executing said testament.

*III. The creation, term and termination of real property, as well as leasing agreements and temporary rental contracts of real or personal property, shall be governed by the laws of the place where they are situated, regardless of the foreign nationality of their holders or owners.*<sup>132</sup>

This paragraph simply reiterates the ancient Roman law principle of *Lex rei sitae* (*i.e.*, the law of the place where the thing is located), applicable to both real and personal property. Evidently, this paragraph is in complete symmetry with Article 121, paragraph II, of the Political Constitution of Mexico.<sup>133</sup>

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<sup>129</sup> Direct *Amparo* 10523/2000. Victor Vasarherely, alias Vasarely, now his heirs (*herederos*) André and Jean Pierre. 12 June 2001. Unanimous decision. *Instance*: Tribunales Colegiados de Circuito [*Collegiate Circuit Courts*]. *Source*: Semanario Judicial de la Federación [*Weekly Federal Court Report*] and its Gazette, Ninth Epoch. Volume XIV, September 2001, p. 1311. *Tesis Aislada* [isolated ruling].

<sup>130</sup> Article 13(II), Federal Civil Code (2009 Ed.) at 5.

<sup>131</sup> In Mexico there are different kinds of "addresses," such as an individual's place of residence, legal domicile, etc. Article 29 of the Federal Civil Code defines an individual's place of residence as "the place where the person habitually resides; if none, then where the person has his or her principal place of business; if none, then where the person actually resides and, if none, then where the person is located." An individual's legal domicile (Article 30, FCC) is "where the law determines the person's place of residence to be for the exercise of his or her rights and where the person must comply with his or her obligations, even if in fact not physically present." Legal entities (Article 33) "are domiciled at the place where their administrative offices are located."

<sup>132</sup> Article 13 (III), Federal Civil Code (2009 Ed.) at 5.

<sup>133</sup> *See supra* note 125 and the accompanying text.

*IV. The formalities required of legal acts shall be determined by the laws of the place where they are executed. In the event such acts produce effects within the Federal District, or in the Republic regarding federal matters, they may follow the formalities prescribed in this Code.*<sup>134</sup>

Recognized Roman law principles assert that the form of legal acts is to be governed by the law of the place where they are executed (*Locus regit actum*). When the act produces an effect in, say, Mexico City (*i.e.*, Federal District), such act should conform to the law of Mexico City (*i.e.*, Civil Code for the Federal District).

*V. Except as provided in the preceding paragraphs, the legal effects of acts and contracts shall be governed by the laws of the place of their performance, unless the parties have validly designated the applicability of a different law.*<sup>135</sup>

This final paragraph of Article 15 of the Federal Civil Code begins by reiterating the fundamental principle that the effects of acts and contracts shall be governed by the laws of the place of their performance, subject to the *lex loci executionis* principle, applicable to both formalities and legal substance. Alternatively, this same paragraph recognizes that the principle of the autonomy of the parties should prevail when said parties “have validly designated the applicability of a different law.” This would be the case when a given contract, for example, was executed by the parties in the city of Monterrey, Nuevo León, Mexico, but the contract included a choice of law clause validly stating that the contract should be governed by the laws of Mexico City, *i.e.*, pursuant to the Civil Code for the Federal District.

The use of the adverb “validly,” found in the language in paragraph V leaves the determination as to whether the choice of law clause is legally sound and valid in accordance with the law where the contract was executed to the judge’s discretion. Consider the example of a Mexican national selling an American citizen a piece of ocean-front real estate on fee for the construction of a private villa. Article 27, paragraph I, of Mexico’s Constitution imposes an outright prohibition on foreigners to acquire direct ownership of a piece of real estate located in the so-called “restricted zone,” which comprises a strip of 100 kilometers along Mexico’s borders and 50 km. along its coastlines. Such a purchase-sale contract would run contrary to Mexico’s public order as established by its Federal Constitution and, as such, would be null and void.<sup>136</sup>

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<sup>134</sup> *Id.*

<sup>135</sup> Article 13 (V), Federal Civil Code (2009 Ed.) at 5.

<sup>136</sup> See Jorge A. Vargas, *Acquisition of Real Estate in Mexico by U.S. Citizens and American Companies*, in MEXICAN LAW FOR THE AMERICAN LAWYER 155-187 (Carolina Academic Press, 2009).

Therefore, the judge has to ascertain whether the selection of a different law goes against Mexico's public order, or whether the chosen law was made use of only to thwart the application of Mexican law. In this regard, it may be pertinent to recall that the Inter-American Convention on the Law Applicable to International Contracts,<sup>137</sup> to which Mexico is a party since May 1998, prescribes: "The contract shall be governed by the law chosen by the parties. The parties' agreement on this selection must be explicit or, in the event that there is no explicit agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole."<sup>138</sup> It adds that: "If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties."<sup>139</sup>

#### IV. RECENT COURT DECISIONS IN MEXICO

Recently, Mexico's Circuit Collegiate Courts have rendered a couple of important rulings (*Tesis aisladas*) regarding foreign law in Mexico. These brief resolutions have established the following:

1. In 2001, the Third Collegiate Court of the First Circuit on Civil Matters prescribed that in order to prove the existence of foreign law in Mexico due consideration is to be given to the pertinent provisions of an international treaty or convention to which Mexico is a party, such as the Inter-American Convention on Proof of and Information on Foreign Law (published in the Federal Official Gazette on April 29, 1983). Articles 1 and 3 of this convention establish that the proper proof and information should consist of: a) certified copies of legal texts of the applicable foreign domestic legislation together with an indication of their validity, or judicial precedents (if any); b) Expert testimony rendered by experts on the matters; and c) official reports of the State of destination on the text, validity, meaning and scope.<sup>140</sup>

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<sup>137</sup> This convention was signed by Mexico in Mexico City on November 27, 1995, and adopted in the same place on March 17, 1994, during the Inter-American Specialized Conference on Private International Law (CIDIP V). The Instrument of Ratification was signed on August 20, 1996 and deposited with the Secretary General of the Organization of American States (OAS). The publication decree was published in the *Diario Oficial* [Federal Official Gazette] on May 25, 1998.

<sup>138</sup> Article 7, paragraph I, Inter-American Convention on International Contracts. The final paragraph of Article 7 reads: "Selection of a certain forum by the parties does not necessarily entail selection of the applicable law."

<sup>139</sup> *Id.*, Article 9.

<sup>140</sup> Direct *Amparo* 10623/2001. Juan Cortina del Valle. 18 October 2001. Unanimous



2. In 2001, the Third Collegiate Court of the First Circuit on Civil Matters dictated a resolution sentencing that in regard to Article 14, paragraph I, of the Federal Civil Code and Article 86 Bis of the Federal Code of Civil Procedure, it corresponds to the parties to provide the Mexican judge with the foreign law that has been invoked, along with the necessary elements of the text, validity, legal meaning and scope of said law. The parties in question should also authorize the judge to request, if deemed necessary, official reports produced by the Mexican Foreign Service or international conventions to which Mexico is a party to verify the accuracy of this information for the purpose of giving legal certainty to its determinations. The court reiterated the importance that should be given to those international conventions to which Mexico is a party in cases involving the proof of foreign law.<sup>141</sup>

## V. CONCLUSIONS

The number of cases that require some kind of judicial trans-border cooperation between the United States and Mexico today remains relatively small. Since the enactment of the Civil Code for the Federal District of 1928 (local and federal at that time), Mexico has strongly embraced a legal concept of “absolute territorialism.” This notion maximized the importance of Mexican law *vis-à-vis* foreign law, especially with that of the United States. As a consequence of this extreme domestic policy, foreign law became virtually banned from Mexican courts. Fueled by the intense wave of nationalistic sentiments that engulfed the country during the expropriation of the oil industry by President Lázaro Cárdenas in 1938, Mexico encapsulated itself in an “isolationist cocoon.” This was a sterile policy that hindered any contact with foreign law but, more importantly, deprived Mexico from participating in and assimilating the progressive developments in important areas in private international law that flourished in Latin America in the 1970s and 1980s. Fortunately, the enactment of the 1988 amendments by President Miguel de la Madrid put an end to this ethnocentric policy.

The 1988 amendments on conflict of laws and enforcement of judgments were expressly targeted to amend the most important codes in Mexico: those in force in Mexico City at a local level, such as the (i) Civil Code for the Federal District and (ii) the Code of Civil Procedure for the Federal District; as well as the (iii) Federal Civil Code, (iv) the Federal Code of Civil Procedure and (v) the Federal Code of Commerce.

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decision. SEMANARIO JUDICIAL DE LA FEDERACIÓN (SJF) [Federal Weekly Court Report], Ninth Epoch, Volume XV, April 2002, p. 1248.

<sup>141</sup> *Id.*, SJF, Ninth Epoch, Volume XV, March 2002, p. 1326.

It is well known that since the enactment of the very first codes at the end of the 19th century (all of which were published in Mexico City), each of those five codes was formulated by a group composed of eminent Mexican jurists in Mexico City. Highly influenced by similar codes in Spain and France (as well as those of other countries), the substance and format of these Mexican codes have exercised the most profound and permanent influence in the formulation of similar codes at state level since the time of their publication in the *Diario Oficial de la Federación* [Federal Official Gazette] in Mexico City. In other words, those five codes have served in the past—and continue to serve in the present—as the “legal models” that each and every state in the Republic of Mexico strives to emulate.

The area of private international law is a case in point. The 1988 amendments to the Federal Civil Code regarding the application of foreign law and the questions pertaining to *Cartas Rogatorias*, *exequatur*, *homologación* and the enforcement of judgments in the Federal Code of Civil Procedure, for example, are four perfect examples. The language of the federal codes and those of the Federal District has been followed so closely by the state legislatures that, with minor exceptions, the provisions of all of the states’ codes are but a copy of the federal codes and of the local codes for the Federal District.

In general, Mexico has utilized as “legal models” the principles and rules formulated by the various Inter-American Conventions on a number of areas of private international law to which Mexico is a party. The influence of these “legal models” is evident in the language of the Federal Civil Code and, especially, in the new relatively “Book four” of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Cíviles*), relative to “International Procedural Cooperation” (*Cooperación Procesal Internacional*), Articles 543-577, added in January of 1988.

It should be noted, however, that leading Mexican jurists and private international law experts actively participated in formulating and drafting the language of many of these Inter-American Conventions, dating back to the 2nd Specialized Inter-American Conference on Private International Law (Montevideo, CIDIP-II, 1979 and subsequent conferences). Furthermore, Mexican experts who were members of the Mexican Academy of Private International Law at the time, became directly involved in the formulation and revision of the draft provisions of the 1988 amendments (Advisory Commission to SRE and then to the Interior Ministry).<sup>142</sup>

In closing, special reference should be made to the work of the current Mexican Academy of Private International and Comparative Law (Ame-

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<sup>142</sup> For a detailed description of the work of these jurists and specialists, and the articulate and dynamic work of the Mexican Academy of Private International Law, see Vázquez Pando, *supra* 54 at 7-32; Perezniето Castro, *supra* note 64 at 213-214; and García Moreno, *supra* note 65 at 18-32.

dip).<sup>143</sup> Composed of law professors and legal practitioners interested in this field of the law, the Academy organizes congresses and seminars on current legal areas of interest to Mexico, and posts the most recent papers submitted to these academic events on its website. Jointly with the Legal Research Institute (*Instituto de Investigaciones Jurídicas, UNAM*), the Academy is a leader in the advancement of private international law in Mexico.

Despite the fact that the international border between the United States and Mexico is one of the longest and oldest in the world (1,952 miles in length, and dating back to 1848, and slightly modified in 1853), empirical legal research projects between these two countries is virtually non-existent. Sociologically, the “border” between these countries is frequently characterized as a fascinating laboratory that fuels the conduct of numerous research projects addressing issues such as legal and undocumented immigration, bi-national and bilingual education, trans-border pollution problems, increasing flows of trade and investment, *maquiladoras*, technology transfer, tourism, acquisition of real estate on both sides of the border, demographic acculturation, as well as other aspects that include national security and terrorism, human trafficking, local and trans-border kidnappings, drug smuggling, and organized crime activities, to mention only the most salient areas.

However, empirical projects of a legal or judicial nature are sorely lacking between Mexico and the United States. As of today, the results of possible research projects addressing, for example, the differences and similarities in legal education in the United States and Mexico; the number and type of lawsuits filed by Mexican nationals in American courts; the number of Mexican inmates in American prisons, or the number of Americans in Mexican prisons; the adoption of Mexican children by American citizens; the number of cases in the United States and Mexico involving the application of The Hague Convention for the Protection of Abducted Children, etc., are projects waiting to be undertaken by scholars and academics, legal practitioners and government officials.

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<sup>143</sup> Academia Mexicana de Derecho Internacional Privado y Comparado, A. C. (Amedip) at: [www.amedip.com](http://www.amedip.com).