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ARTICLES

JORGE A. VARGAS*

Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments

Familiarity with those principles and rules that control a controversy involving two different legal systems is a task usually requiring an advanced level of legal professional expertise, particularly in conflict of laws, comparative law, and international law. The degree of difficulty involved in determining the precise legal principles that regulate the dispute tends to increase disproportionately when the legal systems involved pertain to two contrasting legal traditions, such as the common law system¹ and the civil legal tradition.²

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1. OLIVER W. HOLMES, *THE COMMON LAW* (Mark D. Howe ed., Harv. U. Press 1963) (1909); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); CHARLES P. DALEY, *THE COMMON LAW: ITS ORIGIN, SOURCES, NATURE AND DEVELOPMENT, AND WHAT THE STATE OF NEW YORK HAS DONE TO IMPROVE UPON IT* (1894); OSCAR RABASA, *DERECHO ANGLOAMERICANO* (1944).

2. JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA*, (1987); RENE DAVID & JOHN E.C. BIERLY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (1978); K.W. RYAN, *AN INTRODUCTION TO THE CIVIL LAW* (1962); ARTHUR T. VON MEHREN & R. GORDLEY JAMES, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (1977); ALAN WATSON, *THE MAKING OF THE CIVIL LAW*, (1981).

The body of principles applicable to these international disputes is generally known in common law countries as conflict of laws³ and in nations belonging to the civil legal tradition as private international law.⁴ Recently, specialists from the Romano-Germanic tradition have coined the expression "international procedural law"⁵ to refer to an emerging body of law whose principles and institutions regulate procedural aspects in international civil litigation based upon agreed notions of international judicial cooperation. Some of the major questions relating to this new and rapidly expanding area include: extraterritorial validity and enforcement of a judgment, or an arbitral award; the service of process at the international level; the taking of evidence abroad; the format and content of letters rogatory; the legal capacity of the parties, the jurisdiction of the court; "legalizations"; and the role played by consular or diplomatic agents in handling these questions.

Currently, the presence of foreign concepts in domestic trials is a growing trend in the international legal arena. This trend appears to be nurtured by a multiplicity of factors. Some of these factors have little or no relationship with the legal realm, such as increased global trade, closer interdependency among nations, and higher mobility of persons and goods; others are eminently juristic. Legal concepts in this field generally gravitate around the gradual structuring of an international network of treaties and conventions, an enhanced sophistication of private practitioners and judges in handling international civil litigation cases, and a greater reliance on international adjudicatory mechanisms for the peaceful solution of international disputes. During this decade, and especially in the early years of the next century, legal questions relating to conflict of laws and international judicial cooperation are likely to multiply in international tribunals and domestic courts, especially in the conduct of legal interactions between the United States and Mexico.

Until very recently decisions involving conflict-of-law questions between the United States and Mexico were extremely rare. The reasons are several: (1) the absolute territorialist policy adopted by Mexico in its Civil Code for the District and Federal Territories of 1932;⁶ (2) for almost a century Mexico maintained itself in an isolationist cocoon, which kept it away from the codificatory developments taking place between 1889 and 1971 in private international law, particularly at the inter-American level; and (3) the Mexican Government's apparent

3. ERNEST G. LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* (1947); GEORGE MERRIL, *STUDIES IN COMPARATIVE JURISPRUDENCE AND THE CONFLICT OF LAWS* (1985); KURT LIPSTEN, *PRINCIPLES OF THE CONFLICT OF LAWS, NATIONAL AND INTERNATIONAL* (1981); ISTRAN SZASZY, *CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES* (1974).

4. HENRI BATIFFOL, *DRIT INTERNATIONAL PRIVÉ* (7th ed. 1981); P.M. NORTH, *PRIVATE INTERNATIONAL LAW PROBLEMS IN COMMON LAW JURISDICTIONS* (1993); ALBERT EHRENZWEIG, *PRIVATE INTERNATIONAL LAW: A COMPARATIVE TREATISE ON AMERICAN INTERNATIONAL CONFLICTS OF LAW* (1967); DAVID S. CLARK, *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* (1990).

5. MIGUEL ARJONA COLOMO, *DERECHO INTERNACIONAL PRIVADO* (1954); JOSÉ LUIS SIQUEIROS, *LA COOPERACIÓN PROCESAL INTERNACIONAL*, *REVISTA DE LA FACULTAD DE DERECHO* (1989); VÍCTOR CARLOS GARCÍA MORENO, *DERECHO CONFLICTUAL* (1991).

6. *Diario Oficial de la Federación* [D.O.] (1928). This Civil Code did not enter into force until October 1, 1932, pursuant to a Presidential decree published in the D.O. of September 1, 1932.

lack of interest in systematizing and simplifying its conflict-of-law rules to put it in symmetry with the developments accomplished at the international level.

In essence, Mexico's territorialist policy excluded the application of foreign law in that country.⁷ In explaining how this strict legal policy was adopted by Mexico in the early 1930s, Mexican authors are of the opinion that the policy was the product of a highly nationalistic attitude that prevailed at that time.⁸ This policy reached its climax in 1938 with the expropriation of the oil industry by President Lázaro Cardenas. The intense nationalism was fueled by the unjust military interventions suffered by Mexico in the nineteenth century⁹ and the socio-political and legal philosophy that triggered Mexico's revolution in 1910 and led to the adoption of the 1917 Federal Constitution. In sum, Mexico's absolute territorialism was the consequence of a series of dramatic political factors¹⁰ rather than of a progressive legal evolution. Indeed, the unexpected adoption of such a strict territorialism was a retrogression in Mexico's legal philosophy of that epoch.

From a procedural viewpoint, the adherence to the territorialist policy did not require Mexico to enact domestic legislation, such as a code of civil procedure or specific statutes, to address matters pertaining to private international law questions, because the territorialist approach made such legislation unnecessary. The territorialist approach explains why legal provisions on conflict of laws were absent from domestic legislation until very recently.

From an international law perspective, Mexico's isolationist attitude insulated the country from the global and regional trends that materialized in important conventions. Mexico finally decided to come out of its isolationist cocoon and become a signatory to several inter-American conventions beginning in the late 1970s and especially during the late 1980s.¹¹

In December 1988 Mexico changed its territorialist approach, adopting a new domestic legislative policy in symmetry with internationally recognized trends in private international law. This change was accomplished by means of three presidential decrees amending (1) the Civil Code of the Federal District,¹² (2) the Code of Civil Procedure for the Federal District,¹³ and (3)

7. Mexico's territorialist policy was contained in articles 12 through 15 of its Civil Code for the District and Federal Territories [Código Civil para el Distrito y Territorios Federales].

8. Leonel Pereznieto Castro, *La Tradition Territorialiste en Droit International Privé dans les Pays d'Amérique Latine*, 190 RECUEIL DES COURS 271, 330-35 (1985); see also LEONEL PEREZNIETO CASTRO, *DERECHO INTERNACIONAL PRIVADO* (5th ed. 1991) [hereinafter PEREZNIETO, *DERECHO INTERNACIONAL PRIVADO*].

9. Pereznieto, *supra* note 8, at 332-33.

10. *Id.* at 335.

11. For a list of these conventions, see *infra* notes 31-36, 38-49, and accompanying text.

12. Decreto por el que se Reforma y Adiciona el Código Civil para el Distrito Federal en Materia Común y para toda la República en Materia Federal [Decree by which the Civil Code for the Federal District on Ordinary Matters, and for the Republic on Federal Questions, is hereby amended and added], D.O. (Jan. 7, 1988) at 2-6. For an English translation of these amendments, see Appendix at the end of this article.

13. Decreto que reforma y adiciona el Código de Procedimientos Civiles para el Distrito Federal [Decree by which the Code of Civil Procedure for the Federal District is hereby amended and added], D.O. (Jan. 12, 1988).

the Federal Code of Civil Procedure.¹⁴ These legislative amendments created Mexico's most profound private international law reform during this century. The 1988 amendments covered four major legal areas: (1) application and proof of foreign law in Mexico, (2) letters rogatory, (3) international cooperation on evidentiary questions, and (4) enforcement of judgments.

The objective of this article is to describe and analyze the content and consequences of these belated amendments from a U.S.-Mexican comparative law perspective.¹⁵ The first part of this article details the historical background and purpose of the 1988 reform. Special attention is given to the role of the Mexican Academy of Private International Law in the enactment of these amendments and in the dramatic change of attitude that took place in Mexican private international law. The second part centers on an analysis of these Mexican legislative changes. The final part offers some conclusions and a prognosis on how these rules may affect international civil litigation between these two neighboring countries during the remaining part of this century.

I. Background and Purpose of the 1988 Amendments

Mexico's absolute territorialism was introduced by the Civil Code for the District and Federal Territories of 1932.¹⁶ The adoption of this absolute territorialism was rather unexpected since the 1932 Code clearly deviated not only from the more flexible legal philosophy contained in the previous codes of 1870¹⁷ and 1884,¹⁸ both inspired by the French-oriented Statutory Doctrine, but also from the draft code of 1928, which followed the same European model.¹⁹ It has been asserted that Mexico's national conflict system in the Americas belongs to the latest of four groups:²⁰ a legal trend that adopted the

14. Decreto que reforma, adiciona y deroga diversos artículos del Código Federal de Procedimientos Civiles [Decree by which several articles of the Federal Code of Civil Procedure are hereby amended, added and derogated], D.O. (Jan. 7, 1988).

15. Mexico's Code of Commerce [Código de Comercio] was also amended as a consequence of the 1988 amendments. See D.O. (Jan. 4, 1989). However, an analysis of these Code of Commerce amendments is outside the scope of this article.

16. D.O. (Mar. 26 1928). The Code entered into force on October 1, 1932, by presidential decree. D.O. (Sept. 1, 1932).

17. Civil Code of the Federal District and for the Territory of Baja California; in particular, see articles 13 through 15 and 17 through 19 that enshrined the so-called statutory doctrine based on the nationality of the person.

18. Civil Code for the Federal District and for the Territory of Baja California, *amended by* presidential authorization granted by decree published in D.O. (Dec. 14, 1883).

19. See FERNANDO A. VÁZQUEZ PANDO, *NUOVO DERECHO INTERNACIONAL PRIVADO MEXICANO* 7-10, 22-24 (1990); Pereznieta, *supra* note 8, at 232-36.

20. The first group was inspired by Story's ideas, as reflected in the Paraguayan Code of 1889; the second group followed the doctrine advanced by Andrés Bello, which influenced the codes of several countries in Central and South America, such as Ecuador (1860), Venezuela (1862), Nicaragua (1867), Uruguay (1868), Colombia (1873), El Salvador (1862), Honduras (1880), and Panama (1916); the third group is identified with the Brazilian Code (1860), and the codes of Argentina and Paraguay.

principles of the French statist school, basing personal status on nationality rather than domicile.²¹

Some of the pertinent articles of the 1870 Code provided:

Article 13: The laws concerning the status and capacity of persons are obligatory for the Mexicans in the Federal District and in California, even when they reside abroad, with respect to the acts which should be executed totally or in part in the above-mentioned demarcations.²²

Article 14: Immovable assets located in the Federal District and in California are to be regulated by Mexican laws, even if they are possessed by foreigners.²³

Article 15: Regarding the form and external solemnities of contracts, wills, and any public instrument, the laws of the country in which they were executed should control. However, Mexicans or foreigners residing outside the District or California are free to subject themselves to the forms and solemnities prescribed by the Mexican law, in the cases in which the act is to be executed in those demarcations.²⁴

Article 19: That one who exercises a right based upon foreign laws must prove the existence of these laws and that they are applicable to the case.²⁵

During the first three decades following the enactment of the 1932 Civil Code no record of criticisms against Mexico's doctrine of absolute territorialism has been found. Not until the 1960s and 1970s did some academicians, including Trinidad García,²⁶ Enrique Helguera Soiné,²⁷ José Luis Siqueiros,²⁸ and others, start to voice their criticisms against the doctrine. Probably the most complete

Unlike the others, the fourth group was not clearly influenced by any American publicists but, rather, by the Napoleonic Code. See Tatiana B. de Maekelt, *General Rules of Private International Law in the Americas, A New Approach*, 177 RECUEIL DES COURS 193, 239-43 (1982).

21. Mexico's Civil Code of 1870 adopted the principles contained in the draft proposed by the Spaniard García Goyena, inspired in the French statist school that based status upon the nationality of the person rather than domicile. See *id.* at 240; VÁZQUEZ PANDO, *supra* note 19, at 7, 22-23; Pereznielo, *supra* note 8, at 296.

22. See VÁZQUEZ PANDO, *supra* note 19, at 22-23 (translated by the author). For additional information, see Fernando A. Vázquez Pando, *Notas Para el Estudio del "Principio de Efectividad"* 126 (1970) (thesis, Escuela Libre de Derecho).

23. VÁZQUEZ PANDO, *supra* note 19, at 22-23 (translation by the author).

24. *Id.*

25. VÁZQUEZ PANDO, *supra* note 19, at 22-23.

26. See TRINIDAD GARCÍA, APUNTES DE INTRODUCCIÓN AL ESTUDIO DEL DERECHO 141-43 (1961). Commenting on the amendments to the Civil Code of 1928, which he qualified as a "backward movement," García refers to the system contained in article 12 of the 1932 Civil Code as a "feudal system of strict territoriality of the law, which is unanimously disapproved today." VÁZQUEZ PANDO, *supra* note 19, at 26 (discussing García's criticisms). García advocated the thesis that "the capacity of persons—as it is followed in countries of America and Europe—should be regulated by the law of the domicile which is, by the way, the system adopted by the 1988 reform." *Id.*

27. Enrique H. Soiné, *El Derecho Internacional Privado Mexicano y el Código Bustamante*, in COMUNICACIONES MEXICANAS AL VI CONGRESO INTERNACIONAL DE DERECHO COMPARADO (1962).

28. José L. Siqueiros, *Síntesis del Derecho Internacional Privado*, in PANORAMA DEL DERECHO MEXICANO (1965).

and systematic critical analysis of Mexico's absolute territorialism position was formulated by Leonel Pereznieto Castro in 1977.²⁹

Despite these criticisms, Mexico's territorialist policy remained unaltered until the early 1970s.³⁰ It was not until 1978 that Mexico finally initiated a gradual process of adherence to some of the major conventions in key areas of private international law, particularly those concluded at the regional inter-American level. This process took place in three stages: first, from 1978 to 1985 Mexico adhered to six inter-American conventions; second, from 1987 to 1988 Mexico became a party to twelve additional conventions; and third, Mexico enacted the 1988 amendments.

Thus, by the end of 1985 Mexico had become a party to the following six conventions:

- (1) Inter-American Convention on Letters Rogatory;³¹
- (2) Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices;³²
- (3) Inter-American Convention concerning Commercial Companies;³³
- (4) Additional Protocol to the Inter-American Convention on Letters Rogatory;³⁴
- (5) Inter-American Convention on Proof of Information regarding Foreign Law;³⁵ and
- (6) Inter-American Convention on General Norms of Private International Law.³⁶

In an unprecedented move, and largely due to the strong influence exercised by the Mexican Academy of Private International Law before the Secretariat of Foreign Relations through its Advisory Commission on Private International Law and International Trade Law,³⁷ Mexico became a party to the following additional eleven conventions in the field of private international law between 1987 and 1988, and is considering a twelfth one:

- (1) Inter-American Convention on the Legal Regime of Powers to be Utilized Abroad;³⁸

29. LEONEL PEREZNIETO CASTRO, *DERECHO INTERNACIONAL PRIVADO: NOTAS SOBRE EL PRINCIPIO TERRITORIALISTA Y EL SISTEMA DE CONFLICTOS EN EL DERECHO MEXICANO* (1977).

30. Mexico's adherence to the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards, D.O. (June 22, 1971), marks Mexico's first step towards embracing conventional international law principles, thus breaking an isolationist attitude that lasted for almost a century.

31. D.O. (Apr. 25, 1978).

32. *See id.*

33. D.O. (May 8, 1979).

34. D.O. (Apr. 28, 1983).

35. D.O. (Apr. 29, 1983).

36. D.O. (May 8, 1984); D.O. (Oct. 10, 1984).

37. *See VÁZQUEZ PANDO, supra* note 19, at 19-22 (describing the functions of this Commission).

38. D.O. (Aug. 19, 1987).

- (2) Inter-American Convention on the Domicile of Physical Persons in Private International Law;³⁹
- (3) Inter-American Convention on the Personality and Capacity of Juridical Persons in Private International Law;⁴⁰
- (4) Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards;⁴¹
- (5) Inter-American Convention on Conflict of Laws regarding Adoption of Minors;⁴²
- (6) Inter-American Convention on Competence in the International Sphere for the Extraterritorial Validity of Foreign Judgments;⁴³
- (7) Additional Protocol to the Inter-American Convention on the Reception of Evidence Abroad;⁴⁴
- (8) Convention on Representation on International Sale of Goods;⁴⁵
- (9) United Nations Convention on Contracts concerning International Sales of Goods;⁴⁶
- (10) Convention on Prescription regarding the International Sales of Goods;⁴⁷
- (11) Protocol Amending the Convention on Prescription regarding the International Sales of Goods;⁴⁸ and
- (12) The Hague Treaty on Procedural Questions.⁴⁹

These conventions became Mexico's "Supreme Law throughout the Union pursuant to article 133 of the Mexican constitution."⁵⁰ Under Mexican constitutional law, this article is interpreted in virtually the same terms as the Supremacy Clause provision contained in article 6, section 2 of the United States Constitution.⁵¹ Therefore, the eighteen international conventions were legally considered

39. *Id.*; D.O. (Nov. 30, 1987).

40. D.O. (Aug. 19, 1987).

41. D.O. (Aug. 20, 1987).

42. D.O. (Aug. 21, 1987).

43. D.O. (Aug. 28, 1987).

44. D.O. (Sept. 7, 1987).

45. D.O. (Feb. 22, 1988).

46. D.O. (Mar. 17, 1988).

47. D.O. (May 6, 1988).

48. D.O. (May 6, 1988).

49. The Mexican Government is currently contemplating whether to adhere to this convention; the prospects are not good.

50. Article 133 reads:

This Constitution, the laws of the Congress of the Union which emanate therefrom, and all treaties in accordance therewith, made or to be made by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of each State shall conform to the said Constitution, statutes and treaties, notwithstanding any provisions to the contrary that may exist in the Constitutions or statutes of the States.

CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS 121 (Editorial Porrúa, 1992) [hereinafter CONSTITUCIÓN POLÍTICA] (translation by the author).

51. It appears that this provision in the United States Constitution inspired the corresponding articles in Mexico's constitutions of 1824 and 1857, from which the text was reproduced in the current article 133. For an historical evolution of this article, see 8 DERECHOS DEL PUEBLO MEXICANO—MÉXICO A TRAVÉS DE SUS CONSTITUCIONES 935-47 (Gran Comisión de la Cámara de Diputados, 1967) [hereinafter DERECHOS DEL PUEBLO MEXICANO].

as Mexico's "[s]upreme law throughout the union" and the judges in every state were bound by the conventions "notwithstanding the provisions to the contrary that may exist in the constitutions or statutes of the States."⁵²

Although this interpretation is correct, the Mexican Congress did not enact the domestic legislation necessary to implement the conventions. As a result, as pointed out by Vázquez Pando,⁵³ a dual system existed in the area of judicial international cooperation. In the first system, the principles contained in these conventions created an international legal regime. This international legal regime applied, for instance, when Mexico handled an international request from a country that was a party to the same convention as Mexico. Consequently, the provisions contained in those international conventions controlled the case. The second system resulted from Mexico's own domestic law contained in the provisions of the Federal Code of Civil Procedure (enacted in 1942), the Code of Civil Procedure for the Federal District (enacted in 1932), and the state codes of civil procedure, if any. In addition to the technical complexities inherent in this dual system, the fact that neither the Federal Code of Civil Procedure nor the Civil Code for the Federal District regulated private international law questions in an adequate manner was a further complication.⁵⁴

This peculiar situation led to the 1988 amendments. First, it was convenient for Mexico to modernize its legal regime in the area of private international law. Such a domestic regime needed to be structured in close symmetry with the applicable contemporary principles of conventional international law. Second, it was imperative for Mexico to fill out the lacuna that had existed since 1932 in its domestic legislation. Third, the adoption of a system that addressed private international law questions in a modern, clear, and efficient way constituted the legal avenue Mexico needed in order to reunite itself with other members of the international legal community in the closing years of the twentieth century. How was the Mexican legislature going to accomplish these objectives in a legal area as complex and technical as that of private international law and in an area in which the Mexican court system had virtually no experience? Where were the Mexican experts capable of formulating the required 1988 amendments?

The answers to these questions would have been extremely difficult to articulate had it not been for the innovative and systematic work undertaken by the Mexican

52. MEX. CONST. art. 133, *supra* note 50.

53. See VÁZQUEZ PANDO, *supra* note 19, at 87.

54. Mexican experts in this field—including Fernando Vázquez Pando, Leonel Pereznieto, José Luis Siqueiros, Víctor Carlos García Moreno, and others—are of the unanimous opinion that the provisions addressing private international law questions contained in Mexico's applicable codes were scarce and insufficient since the absolute territoriality doctrine made it unnecessary to have detailed provisions in this matter. See generally VÁZQUEZ PANDO, *supra* note 19, at 45-50; PEREZ-NIETO, *supra* note 29, at 296-99; SIQUEIROS, *supra* note 5, at 3; GARCÍA-MORENO, *supra* note 5, at 34-35.

Academy of Private International Law.⁵⁵ In essence, the Academy inspired the creation of the Advisory Commission to the Secretariat of Foreign Relations on Private International Law and International Trade Law⁵⁶ in 1985, and later submitted to the Commission the legal drafts with amendments to the different codes that eventually resulted in the 1988 reform.⁵⁷ The unprecedented contribution produced by the Mexican Academy of Private International Law not only addressed the legal areas covered by the 1988 amendments, a singular accomplishment by itself, but also covered other legal areas, such as international adoption and the traffic of minors.⁵⁸

Eventually, the draft amendments generated by the Advisory Commission became the three official bills⁵⁹ submitted to Congress by the President of Mexico, which were approved by Congress virtually unchanged on November 24, 1987,⁶⁰ and were published in the *Diario Oficial* on January 7 and 12, 1988.⁶¹ These 1988 amendments probably constitute the most valuable contribution to date by the Mexican Academy of Private International Law to the progressive development of the legal discipline in Mexico.⁶²

II. The Presidential Bill of October 26, 1987

Based upon the President of Mexico's right, granted by the Constitution,⁶³ to submit legislative bills to the Federal Congress, then Mexican President Miguel de la Madrid Hurtado submitted a presidential bill to amend the Civil Code for

55. For information on the origin and functions of this Academy, see VÁZQUEZ PANDO, *supra* note 19, at 17-22.

56. Originally composed of seven jurists, including three members of the Academy, this Commission was expanded in 1987 to twelve jurists, including one from the Secretariat of the Interior (Secretaría de Gobernación). For a detailed description on the composition and work of this Commission, see VÁZQUEZ PANDO, *supra* note 19, at 17-22; see also Pereznieto, *supra* note 8, at 298-99.

57. VÁZQUEZ PANDO, *supra* note 19, at 21.

58. *Id.* The original work of the Academy in these areas was reviewed by the Advisory Commission to the Secretariat of Foreign Relations, which first produced a draft to amend the Civil Code and later on changed it to a federal statute draft; however, this draft died in the Senate. See *id.*

59. These three presidential bills, dated October 26, 1987, referred to (1) the Civil Code for the Federal District on ordinary matters and for the entire Republic of Mexico on federal matters; (2) the Code of Civil Procedure for the Federal District; and (3) the Federal Code of Civil Procedure. All were sent to the Senate. For the original wording in Spanish of these bills, see VÁZQUEZ PANDO, *supra* note 19, at 529, 579, 552.

60. On the origin and content of these amendments, see Victor Carlos García Moreno, *Reformas de 1988 a la Legislación Civil en materia de Derecho Internacional Privado* [Amendments of 1988 to the Civil Legislation on Private International Law] (unpublished paper presented to the 12th National Seminar on Private International Law, University of Tlaxcala, Mexico, Oct. 13-15, 1988).

61. See *supra* notes 12-14 and accompanying text.

62. Besides the fact that the members of this Academy may be reputed as the leading experts in this field, thus explaining the success of this major undertaking, special recognition should be given to Fernando Alejandro Vázquez Pando, then President of the Academy, whose initiative, diligent work, and diplomatic abilities transformed the valuable academic work of the Academy into a legislative reality.

63. MEX. CONST. art. 71, para. I, in CONSTITUCIÓN POLÍTICA, *supra* note 50, at 53.

the Federal District on October 26, 1987.⁶⁴ Among the objectives President de la Madrid announced at the beginning of his administration was the revision of "the principles, institutions and instruments that sustain and realize the administration and prosecution of justice."⁶⁵

The law, understood as a promotor of social change, cannot remain static *vis-à-vis* the transformations taking place in the social realm. The increasing economic, political, social, and cultural relations which are established on a daily basis between persons within our society and those who belong to other states which compose the international community, have demonstrated the necessity of seeking solutions in accord with current times.⁶⁶

The content of said conventions,⁶⁷ the product of the most accepted doctrine in private international [law], practically inspires in its entirety the [legislative] bill which I hereby submit to this Honorable Congress. . . . The Executive [Power, which I represent] has considered the convenience of amending the Civil Code to adjust it to the principles enshrined in the above-mentioned conventions. . . . [Those principles form a part] of the prevailing private international law doctrine [and contribute to] the solution of those conflicts and problems which are present between the nationals of a State and those from a foreign nation.⁶⁸

From the text of his legislative initiative it became clear that:

- (1) The amendments and additions to the Civil Code for the Federal District were inspired "practically in their entirety" by the content of the following four inter-American conventions to which Mexico had previously become a party:⁶⁹ (i) the Inter-American Convention on General Rules of Private International Law,⁷⁰ signed in Montevideo on May 8, 1979, at CIDIP-II;⁷¹ (ii) the Inter-American Convention on Domicile of Natural Persons in Private International Law,⁷² signed in Montevideo on May 8, 1979;⁷³ (iii) the Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law, subscribed in La Paz on May 24, 1984;⁷⁴ and (iv) the Inter-American Convention on

64. See *supra* note 12. The presidential bill in question is reproduced, along with the legislative history, in VÁZQUEZ PANDO, *supra* note 19, at 529-52.

65. VÁZQUEZ PANDO, *supra* note 19, at 530.

66. *Id.* at 530-31.

67. *Id.* at 529-52.

68. *Id.* at 530-31.

69. *Id.* at 531.

70. For the text of the convention, see I F.V. GARCÍA-AMADOR, *THE INTER-AMERICAN SYSTEM; TREATIES, CONVENTIONS AND OTHER DOCUMENTS* 86-88 (1988). The text of all the inter-American conventions and other international instruments to which Mexico has become a party also appear in VÁZQUEZ PANDO, *supra* note 19, at 348-490, and PEREZNIETO, *DERECHO INTERNACIONAL PRIVADO*, *supra* note 8, at 143-527.

71. This second Inter-American Specialized Conference on Private International Law (CIDIP-II) produced eight conventions in 1979; Mexico ratified six including this convention. D.O. (Jan. 13, 1983).

72. GARCÍA-AMADOR, *supra* note 70, at 495-97.

73. D.O. (Aug. 19, 1987).

74. VÁZQUEZ PANDO, *supra* note 19, at 262-67; Pereznieto, *supra* note 8, at 357-60.

Conflicts of Law concerning the Adoption of Minors,⁷⁵ subscribed in La Paz on May 24, 1984.⁷⁶

- (2) Proposed article 12 maintained the principle of territoriality of Mexican law (although in a slightly attenuated form), without excluding the possibility of applying foreign law provisions, in conformity with the applicable treaties and conventions.⁷⁷
- (3) Article 13 proposed rules to determine the law applicable to a given situation. It is acknowledged that these rules filled a lacuna that existed in Mexico's domestic legislation.⁷⁸
- (4) New article 14 established the rules for the application of foreign law, as articulated in the provisions contained in the inter-American conventions.⁷⁹ This article advocated the application of the same rules to solve conflict-of-law questions between sister states within Mexico.
- (5) Proposed article 15 detailed the cases in which foreign law cannot be applied, incorporating two well-recognized principles in private international law, that of *ordre public* and *fraud au loi*.⁸⁰

In his closing remarks, President de la Madrid insisted that the major objective of his bill was to harmonize two formal sources of Mexican law: its domestic legislation and the pertinent international conventions. By incorporating the basic principles of these conventions in its domestic legislation, Mexico thus "facilitates and propitiates the knowledge of the legal norms for the benefit of the safety of persons."⁸¹

Mexico's leading experts in this field are in unanimous agreement with this reasoning. Thus, Professor García Moreno asserts that the 1988 amendments "only attempt to implement, even though in a partial manner," nine [sic] private international law conventions and protocols.⁸² Siqueiros is of the opinion that notwithstanding that all these conventions were of a constitutional rank, "[t]heir

75. Perezniето, *supra* note 8, at 360-63; VÁZQUEZ PANDO, *supra* note 19, at 234-41.

76. D.O. (Aug. 21 1987).

77. VÁZQUEZ PANDO, *supra* note 19, at 531.

78. *Id.*

79. *Id.* at 532.

80. *Id.*

81. *Id.* at 534.

82. According to Garcia Moreno, these international instruments are: (A) On general matters and civil law: (1) The Inter-American Convention on General Norms in Private International Law (Montevideo, 1969); (2) The Inter-American Convention on the Personality and Capacity of Juridical Persons (La Paz, 1984); (3) The Inter-American Convention on Domicile of the Physical Persons; (B) On civil procedure: (4) The Inter-American Convention on Letters Rogatory (Panama, 1975); (5) The Inter-American Convention on the Taking of Evidence Abroad (Panama, 1975), and its Protocol (La Paz, 1984); (6) The Inter-American Convention on Proof of and Information on Foreign Law (Montevideo, 1979); (7) The Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; (8) The Inter-American Convention on the Legal Regime, of Powers of Attorney to be Used Abroad; and (9) The Inter-American Convention on Jurisdiction at the International Level regarding the Extraterritorial Validity of Foreign Judgments (La Paz, 1984). See GARCÍA-MORENO, *supra* note 5, at 23-24.

text and scope were not known by the majority of judges and private practitioners," and, in addition, "this subject matter continued to be quite distant from the advances of the already promulgated international conventional law [in Mexico], making it indispensable to incorporate it into [Mexican] positive law."⁸³ This author further comments that "it was necessary to update the Mexican procedural legislation in light of the numerous suits initiated by the United States of America against the government of Mexico."⁸⁴ Finally, Dr. Vázquez Pando adheres to these opinions, adding that the amendments sought two objectives: first, to simplify the application of private international law rules contained in the international instruments to which Mexico had adhered to and, second, to simplify the observance of certain inter-American conventions.⁸⁵

The formal draft to amend the Civil Code (jointly with the two other complementary legislative bills)⁸⁶ was elevated to the consideration of the President of Mexico by his Secretaries of Foreign Affairs and of the Interior.⁸⁷ The President sent the Civil Code bill to the Senate, which approved it on November 24, 1987.⁸⁸ The House of Representatives (the Cámara de Diputados) of the Mexican Federal Congress gave its approval in early December of the same year.⁸⁹ The final decree amending the Civil Code for the Federal District appeared in the *Diario Oficial* of January 7, 1988.⁹⁰

III. Amendments to the Civil Code for the Federal District

The 1988 decree⁹¹ of President de la Madrid introduced twelve amendments⁹² and two additions⁹³ to the Civil Code for the Federal District in Ordinary Matters, and for the entire Republic in Federal Matters,⁹⁴ originally enacted in 1932.⁹⁵

83. José Luis Siqueiros, *La Cooperación Procesal Internacional* 10-11 (Sept. 1988) (unpublished manuscript).

84. *Id.* at 12 (the author does not mention any specific cases).

85. VÁZQUEZ PANDO, *supra* note 19, at 46; see also Fernando A. Vázquez Pando, *New Trends in Mexican Private International Law*, 23 INT'L LAW. 995, 999 (1989).

86. The two other legislative bills proposed the amendment of the Federal Code of Civil Procedure and the Code of Civil Procedure for the Federal District.

87. See VÁZQUEZ PANDO, *supra* note 19, at 20-21; Pereznieta, *supra* note 8, at 297-99.

88. VÁZQUEZ PANDO, *supra* note 19, at 21; Pereznieta, *supra* note 8, at 299. The text of the official approval by the Mexican Senate is reproduced in VÁZQUEZ PANDO, *supra* note 19, at 538-46.

89. For the text of the official approval of the Cámara de Diputados, see VÁZQUEZ PANDO, *supra* note 19, at 546-52.

90. See *supra* note 12.

91. The amendments and additions introduced by this decree became effective the next day with its publication in the *Diario Oficial* on January 8, 1988.

92. The amendments affected articles 12, 13, 14, 15, 29, 30, 31, 32; the name of Chapter VI of Title XI of the second part of the Fourth Book of the Code; and articles 2736-38. This article analyzes the changes to articles 12-15 only.

93. The additions include paragraph VII to article 25 and article 28 *bis*.

94. Código Civil para el Distrito Federal en Materia Común, y para toda la República en Materia Federal, translated in THE MEXICAN CIVIL CODE (Michael W. Gordon trans., 1980).

95. See *Diario Oficial*, *supra* note 6; Appendix at the end of this article.

Basically, the 1988 reform simply incorporated into the Code a number of key provisions contained specifically in the inter-American conventions.

From a historical perspective, Mexico has had three progressive phases⁹⁶ on matters concerning private international law within the content of the Civil Code: The first phase was from the early times when Mexico initiated its independence in 1810 to the enactment of the Civil Codes of 1870⁹⁷ and 1884.⁹⁸ The 1884 Code and the legal system it established based on the notion of nationality was changed by the Civil Code of 1928, which entered into force on October 1, 1932. The second phase comprised the period from 1932 until the 1988 amendments. This intermediate phase is characterized by its recalcitrant territorialism. The third and current phase is the product of the 1988 amendments.

During the first phase, Mexico followed a legal regime applicable to both Mexican nationals and foreigners based on the concept of nationality. In his analytical study, Leon Pierre de Montluc indicates that Mexico's first Civil Code of 1870 borrowed from the codes of Portugal, France, Austria, Italy, and Spain.⁹⁹ Article 13 of the 1870 Code provided that "[t]he laws regarding the status and capacity of persons are obligatory to Mexicans in the Federal District and California, even when they reside abroad, with respect to those acts which are to be carried out, fully or in part, in the said demarcations."¹⁰⁰

Trinidad García suggested that article 13 implied that if the Mexican laws were to apply to Mexicans abroad regarding their status and capacity, foreigners in Mexico would have to be regulated by their respective laws on these same questions.¹⁰¹ The 1870 regime based on nationality was adopted by Mexico's Civil Code of 1884¹⁰² and continued in force until 1932.

The second phase started with the Civil Code of 1928.¹⁰³ Although this code has been amended several times including the 1988 reform, it continues to be in force today. As indicated earlier, this code was adopted at the request of the Secretariat of Foreign Relations¹⁰⁴ and advocated a position of absolute territorial-

96. This categorization is made by Dr. Pereznieto. See PEREZNIETO, *DERECHO INTERNACIONAL PRIVADO*, *supra* note 8, at 296.

97. Promulgated as law on December 8, 1869, under the official title Civil Code for the Federal District and Territory of Lower California, to become effective on March 1, 1871. For additional information, see HELEN L. CLAGETT & DAVID M. VALDERRAMA, *A REVISED GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO* 62-69 (1973).

98. The 1870 Code was amended by presidential decree of December 14, 1883. In matters concerning private international law, the Code of 1884 simply reproduced the pertinent articles of the 1870 Code. See VÁZQUEZ PANDO, *supra* note 19, at 22-23.

99. *Id.* at 66 n.12.

100. *Id.* at 22 n.2.

101. *Id.* at 25-26.

102. *Cf.* article 12 of the Civil Code of 1884, which is virtually identical to article 13 of the 1870 Code. The 1884 Code was promulgated as the second Civil Code of Mexico on March 31, 1884, entering into force on June 1, 1884.

103. See VÁZQUEZ PANDO, *supra* note 19, at 23 n.3.

104. See *id.* at 7. For more detailed information, see IGNACIO GARCÍA TELLEZ, *MOTIVOS, COLABORACIÓN Y CONCORDANCIAS DEL NUEVO CÓDIGO CIVIL MEXICANO* 77 (2d ed. 1965).

ism in matters of private international law, which has been explained by some authors as a consequence of the intense nationalism¹⁰⁵ generated in Mexico by the revolutionary movement of 1910. Given the well-known influence that the Civil Code of the Federal District exercises upon the format and content of the respective codes of every state in the Republic of Mexico, as soon as the 1928 Code entered into force, virtually all of the state codes adhered to the doctrine of absolute territorialism.¹⁰⁶

The third phase began with the 1988 amendments. Based on the substance of these amendments, changes to the Civil Code for the Federal District may be broadly divided into two basic categories: first, an enumeration of the general rules on conflict of laws,¹⁰⁷ and second, a systematic enunciation of some of the major principles of private international law.¹⁰⁸ However, before discussing these two categories, a brief commentary on the origin of the 1988 Civil Code amendments seems to be appropriate to clarify their genesis, evolution, and final enactment.

In his recent book, Leonel Pereznieto Castro provides a detailed genesis and evolution of the 1988 amendments to the Civil Code for the Federal District.¹⁰⁹ This important legislative reform was the result of the initiative and diligence of the Mexican Academy of Private International Law.

The efforts of the Academy began in 1977 when several of its members realized that Mexico should not be in an official position divorced from the private international law trend prevailing at that time, and promoted Mexico's participation at the First Inter-American Conference on Private International Law (CIDIP-I) of 1975. In 1977, Dr. Pereznieto formulated a Draft Statute on Private International Law for the Civil Code of the Federal District.¹¹⁰ This idea led to the creation of a special commission of jurists formed within the Chamber of Deputies of the Federal Congress, which in 1978 produced the first official legislative draft in this field.¹¹¹ Thanks to this impetus, Mexico participated actively at the subsequent CIDIP conferences.¹¹²

105. See Pereznieto, *supra* note 8, at 296.

106. For instance, see article 12 of the Civil Code of the State of Baja California, which is, even today, identical in substance to the text of article 12 of the Civil Code for the Federal District, as enacted in 1932. *CÓDIGO CIVIL REFORMADO BAJA CALIFORNIA 2* (1st ed. 1991).

107. See VÁZQUEZ PANDO, *supra* note 19, at 50-65.

108. *Id.* at 65-81.

109. See Pereznieto, *supra* note 8, at 296-99; see also VÁZQUEZ PANDO, *supra* note 19, at 7-32.

110. Pereznieto, *supra* note 8, at 297.

111. *Id.* Many of the ideas contained in Dr. Pereznieto's draft were included in the Commission's draft, entitled: "Working Document for the Study of Possible Amendments to the Civil Code for the Federal District in Ordinary Matters, and for the entire republic in Federal Matters." Members of this Commission included Ignacio Galindo Garfias and Jorge Sánchez Cordero. Dr. Pereznieto served as advisor.

112. Mexico was for the first time involved in the negotiation of several conventions in Panama in 1975. In 1978 Mexico participated at CIDIP-II in Montevideo, which produced eight conventions. Mexico ratified six of them. In 1984 Mexico participated at CIDIP-II in La Paz, Bolivia, which concluded four conventions; Mexico ratified three of these instruments.

In 1986, Dr. Vázquez Pando, then president of the Academy, proposed that the members of the Academy should prepare four drafts on private international law questions, including the area of civil law.¹¹³ All of these drafts were discussed within the Academy and then submitted to the 10th National Seminar on Private International Law held in Mexico City in 1986.¹¹⁴

As a result of the final recommendation made by this seminar, the Academy later created two ad hoc working groups,¹¹⁵ one of them devoted to preparing a more elaborate draft on the Civil Code questions.¹¹⁶ The new draft was circulated among the members of the Academy and received their approval on March 27, 1987.¹¹⁷

Eventually the Civil Code draft, as well as the drafts for the Federal Code of Civil Procedure Code and the Code of Civil Procedure for the Federal District, were submitted to the Secretariat of Foreign Relations.¹¹⁸ The Secretariat of Foreign Relations Commission considered the Academy's Civil Code draft "too ambitious" since it implied "a total reform in this area, adding a new Book to the Civil Code" and "the taking of a position on certain questions on conflict of laws in which the doctrine is still uncertain and judicial decisions lack uniformity."¹¹⁹ The Commission advised the Academy to prepare a new draft subject to the following two criteria: first, "to respect to the utmost the formal structure of the Civil Code" and second, "to limit its work to only those amendments considered to be indispensable to incorporate those international obligations acquired through the relevant inter-American conventions, as well as some well-established principles of Mexican doctrine and practice."¹²⁰ The new draft was

113. Pereznieto, *supra* note 8, at 298. The four areas were: (1) International Judicial Cooperation by Ricardo Abarca; (2) Enforcement of Judgments by José L. Siqueiros; (3) Labor Law by Laura Trigueros; and (4) Civil Law by Leonel Pereznieto Castro. In drafting his document, Dr. Pereznieto informs us that he took into account the following sources: (A) the general norms and rules contained in the pertinent Inter-American Conventions; (B) his personal draft of 1977; (C) the draft of the Brazilian Civil Code of 1984, known as the "Valladao Draft"; and (D) the Peruvian Civil Code. *Id.*

114. See VÁZQUEZ PANDO, *supra* note 19, at 18.

115. The second working group was created to address the legal questions in the area of international civil procedure. This group consisted of the following Academy members: Ricardo Abarca, José L. Siqueiros, and Fernando Vázquez Pando. *Id.*

116. The Working Group on Civil Law Matters was formed by Ricardo Abarca, Walter Frisch, Leonel Pereznieto Castro, José L. Siqueiros, Laura Trigueros, and Fernando Vázquez Pando. Dr. Pereznieto served as rapporteur of this group.

117. *Id.*

118. This Secretariat created an Advisory Commission on Private International Law and International Mercantile Law, composed of twelve members, including three from the Mexican Academy on Private International Law (Abarca, Siqueiros, and Vázquez Pando) and one from the Secretariat of the Interior (Lic. Salvador Rocha Díaz, Legal Advisor to the Secretariat).

119. See VÁZQUEZ PANDO, *supra* note 19, at 20. International adoption and the international trade of minors were among the topics excluded from the draft of the Academy. See also GARCÍA MORENO, *supra* note 65, at 24.

120. See VÁZQUEZ PANDO, *supra* note 19, at 20.

discussed at the 11th National Seminar on Private International Law¹²¹ and finally approved by the Secretariat of Foreign Relations Advisory Commission in 1987.¹²²

Both the Secretariats of Foreign Relations and Interior transmitted the approved drafts to President de la Madrid, who then sent the three legislative bills, dated October 26, 1988, to the Federal Congress through the Mexican Senate.¹²³ The Senate relayed the Civil Code bill to the Commissions of Justice and Legislative Studies, which approved it on November 24, 1987.¹²⁴ The corresponding amending decree to the Civil Code for the Federal District was published in 1988.¹²⁵

IV. General Rules on Conflict of Laws

A. A NEW LIMITED TERRITORIALISM

Article 12 of Mexico's Civil Code for the Federal District¹²⁶ introduces, for the first time in the contemporary legal history of Mexico, a rather "limited" type of territorialism. The amended text of this article reads:

The Mexican laws apply to all the persons located in the Republic, as well as to the acts and factual situations which have taken place within its territory or jurisdiction, and to those who have submitted to said laws, save when those laws provide for the application of a foreign law and save, also, what is provided by the treaties and conventions to which Mexico has become a party.¹²⁷

Although the notion of territorialism continues to be the basic legal premise that regulates the status and capacity of persons, and since Mexican courts and judges should decide their cases based upon Mexican law, this article allows for the application of foreign law in the following instances: (1) when Mexican laws explicitly require the application of foreign law, and (2) when pertinent treaties and conventions to which Mexico has become a party clearly provide for the application of foreign law.

As of today, only a very limited number of Mexican laws allow for the application of foreign law. All of these domestic statutes, particularly a few articles in the Civil Code, are the direct result of the 1988 reform. Therefore, when the applicable choice-of-law rule in a Mexican law mandates that the case should be decided by a foreign law, the application of this rule may have local or federal

121. The 11th National Seminar was held in Querétaro, Qro., in 1987.

122. VÁZQUEZ PANDO, *supra* note 19, at 20; Pereznieto, *supra* note 8, at 298-99.

123. *See supra* note 59 and accompanying text.

124. *Id.*

125. D.O. (Jan. 7, 1988); *see supra* note 13 and accompanying text.

126. The official title in Spanish of this code is Código Civil para el Distrito Federal en Materia Común, y para toda la República en Materia Federal [Civil Code for the Federal District in Ordinary Matters, and for the entire Republic in Federal Matters] [hereinafter Civil Code for the Federal District, or Civil Code]. *See supra* note 12 and accompanying text.

127. *Id.* (translation by the author). Text in Spanish taken from CÓDIGO CIVIL PARA EL DISTRITO FEDERAL 12 (59 ava. edición, Editorial Porrúa, 1991).

consequences. Thus, the pertinent Civil Code article may control a local situation taking place in the Federal District, such as Mexico City, or it may govern a given case elsewhere in Mexico when applied on a federal matter.¹²⁸ Currently, when treaties and conventions adhered to by Mexico provide for the application of foreign law to a Mexican case, all the Mexican courts must abide by the provisions contained in these international instruments according to the supremacy clause notion in article 133 of Mexico's Constitution.¹²⁹

Tracing back the origin of article 12, its text is an exact copy of the final draft prepared for the SRE Advisory Commission by the Mexican Academy of Private International Law.¹³⁰ The content of the current article clearly contrasts with article 12 of the 1928 Civil Code, which did not allow for the application of foreign law and simply provided that "[t]he Mexican laws . . . apply to all the inhabitants of the Republic, whether nationals or foreigners, and whether domiciled therein or transient."¹³¹

The combination of the two major legal regimes currently followed by Mexico, the extreme territorialistic approach adopted by the 1928 Code on the one hand and the permissive system followed by the 1870 Code on the other, has led Mexican jurists to refer to this system as mixed¹³² or limited.¹³³ Most Mexican authors are of the opinion that the change of policy contained in the amended article 12 constitutes the major innovation introduced by the 1988 reform.¹³⁴ The new policy may be characterized as timid, but it nonetheless represents a positive step in abandoning, albeit partially, the extreme territorialism of the 1928 Code.

B. DETERMINATION OF THE APPLICABLE FOREIGN LAW

Article 13 of the amended Civil Code establishes some basic rules on conflict of laws. The first paragraph of the article provides: "Article 13. The determination of the applicable [foreign] law will be done in conformity with the following rules: I. The juridical relationships validly created in the States of the Republic [of Mexico], or in a foreign nation in conformity to its law, should be given full credit."¹³⁵

This paragraph appears to be inspired in part by article 7 of the Inter-American Convention on General Rules of Private International Law.¹³⁶ It addresses the general obligation of a Mexican judge to give legal recognition and full credit to legal acts that have been validly entered into in sister states

128. See Pereznieto, *supra* note 8, at 299.

129. *Id.*

130. See VÁZQUEZ PANDO, *supra* note 19, at 53-54.

131. See THE MEXICAN CIVIL CODE, *supra* note 94, at 3.

132. See Pereznieto, *supra* note 8, at 299; see García Moreno, *supra* note 60, at 9-10.

133. See VÁZQUEZ PANDO, *supra* note 19, at 50-54.

134. See *supra* notes 132-33 and accompanying text.

135. Código Civil art. 13, para. I, *supra* note 94, at 42-43 (translation by the author).

136. *Supra* note 30, at 487.

of the Republic of Mexico, or in a foreign country, when the acts are in conformity with the applicable legal norm, both from the viewpoint of form and content. Therefore, the Mexican judge appears to be legally empowered to look into the form and the substance of the act in question in order to determine whether the act, in the judge's opinion, has been validly created. In other words, that the judge is asked to give legal recognition and full credit to certain legal acts should not be interpreted to constitute a mere mechanical procedure leading to an automatic recognition.

When copying the wording in article 7 of the Inter-American Convention on General Rules signed at Montevideo in 1979,¹³⁷ the Mexican legislature preferred to use the term "juridical relationships" instead of "legal acts" and the verb "to recognize" rather than the traditional expression "full faith and credit," which was originally taken from the U.S. Constitution¹³⁸ and has been used in article 121 of Mexico's Constitution since it was promulgated in 1917.¹³⁹ Mexican authors¹⁴⁰ are of the opinion that the tenor of this paragraph may be somewhat reminiscent of the vested rights theory.

C. STATUS AND CAPACITY OF NATURAL PERSONS

Paragraph II of amended article 13 of the Civil Code reads: "The status and capacity of physical persons is regulated by the law of the place of their domicile."¹⁴¹ This article simply provides that in regard to the civil status of physical persons (for example, birth, marriage, or divorce) or their legal capacity (such as legal age, or general or special incapacities) the law of the place of their domicile should control, regardless of the fact that such persons may be physically located in a place different from their domicile.¹⁴²

This paragraph clearly departs from the rigid territorialism that prevailed in article 12 of the 1928 Code. The new policy in article 13, paragraph II, is symmetrical with the "personal system" followed by Mexico's Civil Codes of 1871 and 1884.¹⁴³ The only difference is that these codes adhered to the concept of nationality to regulate the status and capacity of physical persons rather than the concept of domicile.¹⁴⁴

From a historical perspective, one should note that the draft of the Civil Code

137. *Id.*

138. U.S. CONST. art. I, § 4.

139. Taken from the U.S. Constitution, the expression "full faith and credit" appears for the first time in Mexico's constitutional history in article 20 of the 1824 Federal Constitution. Subsequent constitutions—in particular the 1857 Constitution—reproduced the content of that article. *See DE-RECHOS DEL PUEBLO MEXICANO*, *supra* note 51, at 589-95.

140. *See* Pereznieto, *supra* note 8, at 300; Vázquez Pando, *supra* note 85, at 1002; García Moreno, *supra* note 60, at 26.

141. Código Civil art. 13, para. II, *supra* note 95, at 42-43; Appendix at the end of this article.

142. *See* Pereznieto, *supra* note 8, at 300-01.

143. For article 13 of the 1871 Code and article 12 of the 1884 Code, *see supra* notes 72, 74.

144. *See* VÁZQUEZ PANDO, *supra* note 19, at 50.

of 1928 also proposed a system based upon the notion of domicile.¹⁴⁵ It took sixty years for the Mexican legislature to make the change.

D. LEGAL REGIME OF IMMOVABLE AND MOVABLE ASSETS (*LEX REI SITAE*)

Paragraph III of article 13 of Mexico's Civil Code, as amended, consecrates the old and well-known principle of *lex rei sitae*, which the Code applies to both movable and immovable assets. This paragraph provides that "[t]he creation, regime and extinction of realty rights over immovable assets, as well as leasing agreements and contracts for the temporary use of said assets, are to be regulated by the law of their place of location, even though their owners may be foreigners."¹⁴⁶

The 1988 amendment extends the application of this principle, first, to leasing agreements and contracts for the temporary use of immovable assets and, second, to movable assets. The extension of this principle to these agreements and contracts was proposed at the 11th National Seminar on Private International Law.¹⁴⁷ Dr. Pereznieto has suggested that the application of the *lex rei sitae* principle to leasing agreements may be traced back to article 31 of Mexico's Foreigners and Naturalization Act of 1886.¹⁴⁸

In regard to movable assets the provision contained in paragraph III of this article constitutes an exception to the traditional principle long ago recognized in Mexico that movable assets are governed by the law of the owner's domicile, as provided by article 156, paragraph IV of the Code of Civil Procedure for the Federal District.¹⁴⁹ Mexican authors believe that this exception operates in favor of the widest mercantile circulation of this type of assets, especially since securities and stocks are the most common and most valuable commercial examples of movables in today's world of finance.¹⁵⁰ In general, this paragraph is in close legal symmetry with article 121, paragraphs II and III, first part, of Mexico's 1917 Constitution.¹⁵¹

145. *Id.*

146. Código Civil art. 13, para. III, *supra* note 95, at 43; Appendix at the end of this article. Article 14 of the 1928 Civil Code provided that: "Real property situated in the Federal District, and personal property found therein, shall be governed by the provision of this Code, even though the owners be aliens." English version taken from Gordon, *supra* note 94, at 3.

147. See VÁZQUEZ PANDO, *supra* note 19, at 67. The Secretariat of Foreign Relations Advisory Commission originally intended not to change article 14 of the 1928 Code. For additional information on this question, see Proceedings [Memorial] of the 11th National Seminar Held in Querétaro, Qro. (October 15-17, 1987).

148. Ley de Extranjería y Naturalización de 1886. See Pereznieto, *supra* note 8, at 301.

149. Código de Procedimientos Civiles para el Distrito Federal. Article 156, para. IV of this Code reads: "The one of the domicile of the defendant, if it is a matter regarding the filing of an action over movable property, or over personal actions or pertaining to the civil status." (Translation by the author.)

150. See Pereznieto, *supra* note 8, at 301.

151. See MEX. CONST. art. 121, paras. II and III.

E. FORM OF THE LEGAL ACTS (*LOCUS REGIT ACTUM* AND *LEX LOCI EXECUTIONIS*)

Paragraph IV of article 13 reads:

The form of legal acts will be governed by the law of the place where they are executed. Nevertheless, when the act is to produce its effects in the Federal District or in the Republic in federal matters, such act may be then subject to the form prescribed by this Code.¹⁵²

The first part of this provision clearly adheres to the traditional principle of *locus regit actum*,¹⁵³ characterized as one of the oldest and most well-known principles in Mexico's legal history. However, the latter part of the paragraph introduces an exception in providing that if the act in question is going to produce its effects in the Federal District as an ordinary matter, or elsewhere in Mexico in a matter of a federal nature, then the parties involved may decide to adopt the form prescribed by the Civil Code. Thus, the rule of *locus regit actum* is displaced by the principle of *lex loci executionis*¹⁵⁴ for practical purposes. The current text of this paragraph was taken literally from a proposal submitted by Dr. Pereznieta to the 11th National Seminar on Private International Law, held in 1987 in Querétaro,¹⁵⁵ to improve on the wording and substance¹⁵⁶ of article 15 of the 1928 Civil Code.¹⁵⁷

F. EFFECTS OF LEGAL ACTS

Paragraph V of article 13 of the amended Civil Code provides: "The effects of legal acts and contracts, save for what is provided for in the previous paragraphs, are governed by the law of the place where they should be executed, unless the parties had validly designated the applicability of another law."¹⁵⁸ In the initial part of this paragraph, the Mexican legislature adheres to the well-accepted principle of *lex loci executionis*.¹⁵⁹ Thus, in the absence of the express intention of the contracting parties, the effects of legal acts and contracts are to be governed by "the law of the place where they should be executed,"¹⁶⁰ both from the

152. Código Civil art. 13, para. IV, *supra* note 95, at 43; Appendix at the end of this article.

153. See García Moreno, *supra* note 60, at 57-58; Pereznieta, *supra* note 8, at 301-02; VÁZQUEZ PANDO, *supra* note 19, at 68-69.

154. See PEREZNIETO, DERECHO INTERNACIONAL PRIVADO, *supra* note 8, at 302.

155. See VÁZQUEZ PANDO, *supra* note 147, at 68-69.

156. However, in the opinion of Prof. García Moreno, paragraph IV of the amended article 13 "did not introduce substantial changes, since the abrogated Article 15 of the Civil Code basically established the same principles." See García Moreno, *supra* note 60, at 13.

157. The original text of article 15 of the 1928 Civil Code reads:

Juridical acts in everything relating to their form shall be governed by the laws of the place where they are executed. Nevertheless, Mexicans or aliens residing outside of the Federal District are at liberty to subject themselves to the forms prescribed by this Code, when the act is to be carried out in the said demarcations.

THE MEXICAN CIVIL CODE, *supra* note 94, at 3.

158. Civil Code art. 13, para. V, *supra* note 126, at 42-43.

159. See Pereznieta, *supra* note 8, at 302; see also García Moreno, *supra* note 60, at 127.

160. Código Civil art. 13, para. V, *supra* note 95, at 42-43; Appendix at the end of the article.

viewpoint of their form and substance. Given that an act or contract may be executed in more than one place, the possibility that the effects of a single act or contract will be controlled by several laws depending upon the number of places of execution is implicitly recognized.¹⁶¹

The final part of this paragraph incorporates a subsidiary rule that recognizes the autonomy of the contracting parties' intention to freely designate the law by which the effects of a legal act or contract are to be governed, provided that the designation is validly entered into. Whereas Professor García Moreno has noted that this rule was already contained, to a certain extent, in the repealed article 13 of the Code,¹⁶² Dr. Pereznieto indicates that the recognition of the autonomy of the parties' intention constitutes "one of the most innovative aspects of the reform, which follows the current trend in this area."¹⁶³

Although this provision may appear to have been drafted in a rather general or imprecise manner, the passage of time and the creation and development of Mexican jurisprudence will undoubtedly contribute to a more precise interpretation of the Code's language with respect to its content and scope of application.¹⁶⁴ In any event, regarding the specific enumeration that appears to allow the contracting parties to make a valid designation of a given law to govern the effects of acts or contracts as a result of the exercise of the parties' autonomous intention, one must keep in mind two basic premises added to the Code by the 1988 reform: No foreign law may be validly designated by the contracting parties when the designation (i) is made artificially to avoid the application of "fundamental principles of Mexican law,"¹⁶⁵ and (ii) when it goes against "fundamental principles or institutions of the Mexican public order."¹⁶⁶

V. Application of Foreign Law

The new article 14 of the Civil Code, added in 1988, enunciates five rules that must be observed when applying foreign law in Mexico.¹⁶⁷ For the first time in Mexico's legal history a domestic statutory provision allows Mexican judges to apply the law of a different nation.

Prior to 1988 Mexican judges did not have to struggle with the subtleties of rare and complex matters inherent in the application of foreign law. Given Mexi-

161. See VÁZQUEZ PANDO, *supra* note 19, at 70.

162. The repealed article 13 of the Civil Code reads: "The juridical effect of acts and contracts made in a foreign country, which are to be carried out in the territory of the Republic, shall be governed by the provisions of this Code." See THE MEXICAN CIVIL CODE, *supra* note 94, at 3.

163. See Pereznieto, *supra* note 8, at 302. For a detailed discussion of the accomplishments of the first and second Inter-American Specialized Conference on Private International Law (CIDIP-I and II), see Gonzálo Parra-Aranguren, *Recent Developments of Conflict of Laws Conventions in Latin America*, 164 RECUEIL DES COURS 55 (1979).

164. *Id.*

165. Civil Code art. 15, para. I, as amended; see *supra* note 126, at 44.

166. *Id.* art. 15, paras. I & II, *supra* note 126, at 44.

167. *Id.* art. 14, *supra* note 126, at 43-44.

co's then extreme territorialist position, it sufficed for the Mexican courts to apply only domestic law. That Mexican judges are now required by law to apply pertinent provisions from foreign legal systems in cases before Mexican courts at the ordinary and federal levels poses an unprecedented challenge to those involved with Mexico's legal system today: judges, magistrates, Supreme Court justices, court interpreters and recorders, private practitioners, expert witnesses, government officials, members of legal institutions, and law professors.¹⁶⁸

The concept of allowing Mexican judges to apply foreign law is a very recent development. Such an idea was not even considered in any of the legal works by distinguished members of the Mexican legal community produced prior to 1979¹⁶⁹ to propose changes to modernize Mexico's Civil Code of 1928. Nor was this notion contemplated in the draft of that Code.¹⁷⁰

The idea of applying foreign law appears for the first time in a critical commentary formulated by Dr. Vázquez Pando in relation to the "Working Document"¹⁷¹ prepared by Mexico's Chamber of Deputies in 1979. In this innovative proposal, the author suggested that foreign law had to be applied in conformity with the provisions of Mexico's Civil Code, taking into consideration sources, methods of interpretation, and jurisprudence, as these elements are considered to form a part of the applicable foreign law.¹⁷²

Turning to the content of article 14, let us examine the language of its first paragraph: "The following is to be observed in the application of foreign law: I. It shall be applied as the corresponding foreign judge would do it; to that end, the judge may obtain the necessary information about the text, validity, meaning and legal scope of said law."¹⁷³ This paragraph is a simplified adaptation of article 2 of the Inter-American Convention on General Rules of Private Interna-

168. Eventually, the necessity to become familiar with foreign legal systems—in particular, the U.S. system—might require Mexico to organize special orientation and training programs on specific aspects of foreign legal institutions for the benefit of judges and legal practitioners, and to introduce academic courses on foreign law and comparative law in Mexican law schools in the short run. Mexico may also need to create Masters' programs on U.S. law in the long run.

169. The reader should take note that a number of informal proposals to amend the Civil Code of 1928 in several areas were made public in the late 1960s. See, e.g., Antonio Aguilar Alvarez, *Bases para un Anteproyecto de Código Civil Uniforme para toda la República* [Bases for a Draft Project of a Uniform Civil Code for the Entire Republic] (UNAM, 1967); Rafael Rojina Villegas, *Proyecto de Reformas al Código Civil del Distrito y Territorios Federales* [Draft Amendments to the Civil Code for the Federal District and Territories] (1967); Leonel Perezniño Castro, *Notas sobre el Principio Territorialista y el Sistema de Conflictos en el Derecho Mexicano* [Notes on the Territorialist Principle and the System of Conflicts in Mexican Law] (UNAM, Instituto de Investigaciones Jurídicas, 1977); *Proyecto Arellano-Siqueiros (Arellano-Siqueiros Draft)—Es posible la Codificación de Principios Generales del Derecho Internacional Privado? [Is It Possible to Codify the General Principles of Private International Law?]*, in *PRIMER SEMINARIO NACIONAL DE DERECHO INTERNACIONAL PRIVADO* [FIRST NATIONAL SEMINAR ON PRIVATE INTERNATIONAL LAW] (Perezniño & Belair eds., UNAM, 1979).

170. See VÁZQUEZ PANDO, *supra* note 19, at 54.

171. *Id.*

172. *Id.*

173. Civil Code art. 14, para. I, *supra* note 126, at 43-44 (translation by the author).

tional Law,¹⁷⁴ adopted by Mexico in 1984.¹⁷⁵ The language was taken from the proposal submitted at the 11th National Seminar on Private International Law in 1987.¹⁷⁶

Most Mexican authors agree that this provision embraces the latest doctrinal trend: In applying foreign law the judge of the forum should do it "as the corresponding judge would do it."¹⁷⁷ However, other areas of agreement regarding the content and scope of the language are still elusive. For instance, whereas Pereznieto considers that this provision empowers the Mexican judge to assume a *lege causae* qualification,¹⁷⁸ Vázquez Pando characterizes such an interpretation as incorrect.¹⁷⁹

Without question this recent provision gives the Mexican judge ample power and the necessary flexibility to engage in the delicate process of attaining a correct application of foreign law. Read in conjunction with article 285 *bis* of the Code of Civil Procedure for the Federal District,¹⁸⁰ which was also added as a result of the 1988 reform, the judge of the forum may follow several avenues in order to obtain information on pertinent aspects of the applicable foreign law: (a) directly, based on the judge's own research; (b) through the parties in the dispute; or (c) through any other valid means, in particular by relying on "official reports" produced by the competent foreign authorities on a given matter.¹⁸¹ These reports can be obtained through Mexico's Secretariat of Foreign Relations.¹⁸² The final part of paragraph I of article 14 is reproduced and expanded in some detail in article 284 *bis* of the Code of Civil Procedure.

However, other questions remain unclear because of the novelty of the Mexican courts' application of foreign law and the nature of Mexico's legal system. For instance, the answers to some procedural questions encountered in a case in which a Mexican court is to apply foreign law are hard to find within the brevity and conciseness of the language of article 284 *bis*.¹⁸³

174. Signed at Montevideo, Uruguay, on May 8, 1979; see GARCÍA-AMADOR, *supra* note 70, at 486.

175. See *supra* note 70 and accompanying text; see also D.O. (Jan. 13 1983); Pereznieto, *supra* note 8, at 349.

176. See VÁZQUEZ PANDO, *supra* note 19, at 55; see also 11th Seminar Proceedings in Memoria, Querétaro (1987).

177. Most Mexican specialists, including García Moreno, Pereznieto, and Vázquez Pando, are of this opinion. Prof. García Moreno asserts that "this is the only way for Mexican judges to apply foreign law." García Moreno, *supra* note 60, at 14.

178. See Pereznieto, *supra* note 8, at 303.

179. See VÁZQUEZ PANDO, *supra* note 19, at 65.

180. See *supra* note 13.

181. These official reports are a valid legal avenue recognized in article 37 of the Inter-American Convention on Letters Rogatory.

182. Código de Procedimientos Civiles para el Distrito Federal [Code of Civil Procedure for the Federal District] art. 284 *bi*.

183. Article 284 *bis* of the Code of Civil Procedure for the Federal District states:

The court shall apply the foreign law as it would be done by the judges of the State whose law becomes applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked. To acquire information about the text, validity, meaning and scope of the foreign law, the court may rely on the

Another difficult question is whether the new Civil Code rule obligates Mexican courts to take judicial notice¹⁸⁴ of foreign law, and what is the meaning of this Anglo-American legal concept under Mexican law.¹⁸⁵ This question was triggered by Pereznieto's comment that the first paragraph of article 14 of the Civil Code creates an obligation on the part of the Mexican judge to apply foreign law "automatically."¹⁸⁶

Finally, because this rule is so new to Mexico's domestic legislation, it may be too early to make a prognosis whether it will function effectively in Mexico's civil legal arena. It is safe to forecast that satisfactory results will largely depend upon the number of cases decided, the content of the decisions rendered, and the eventual, but gradual, creation of a national jurisprudence and doctrine. This result will undoubtedly happen in the years to come.

A. *RENOI* IN EXCEPTIONAL CASES ONLY

Renoi continues to be situated among the most controversial topics in private international law today. The discussion of *renoi* provoked such an intense debate among participants at the Second Specialized Inter-American Conference on Private International Law (CIDIP-II),¹⁸⁷ held in Montevideo in 1979, that the conference decided not to include this topic as part of the Inter-American Convention on General Rules.

From a historical perspective, neither the 1928 Code nor its draft mentions *renoi*.¹⁸⁸ However, members of the Mexican Academy of Private International Law with an interest in the topic made public proposals between 1977 and 1987 suggesting different ways in which *renoi* should have been treated in the Civil Code since it was absent from domestic legislation.¹⁸⁹

The current language of paragraph II of the new article 14 of the Civil Code was taken literally from a proposal submitted to the 11th National Seminar of Querétaro of 1987.¹⁹⁰ The paragraph reads: "The substantive foreign law shall

pertinent official reports, which it may request from the Mexican Foreign Service, or may order or admit those evidentiary hearings deemed to be necessary or requested by the parties.

See García Moreno, *supra* note 60 (translation by the author).

184. See FED. R. CIV. P. 44.1.

185. Consider, for instance, some of the procedural questions associated with the construction and application of Rule 44.1, Determination of Foreign Law. FED. R. CIV. P. 44.1.

186. The original expression that Dr. Pereznieto uses is: "Se trata de la aplicación *de oficio* del derecho extranjero por el juez mexicano." Pereznieto, *supra* note 8, at 303 (emphasis added).

187. On the origin and work of CIDIP-II, see J.L. Siqueiros, *La Codificación del Derecho Internacional Privado en el Continente Americano* [*The Codification of Private International Laws in the American Continent*], 14 JURÍDICA 235-51 (1982), and T. Maekelt, *Normas Generales de Derecho Internacional Privado en América* [*General Rules of Private International Law in America*], in FACULTAD DE CIENCIAS JURÍDICAS Y POLÍTICAS DE LA UNIVERSIDAD CENTRAL DE VENEZUELA 50-55 (1984).

188. See VÁZQUEZ PANDO, *supra* note 19, at 56.

189. For the language of the formal drafts prepared by Pereznieto in 1977, Arellano-Siqueiros in 1979, Vázquez Pando in 1979, and Pereznieto in 1987, see VÁZQUEZ PANDO, *supra* note 19, at 56-57.

190. *Id.* at 57.

be applied, save when given the special circumstances of the case the conflict of laws rules of said foreign law should be taken into account, as an exception, making applicable the Mexican substantive rules or those of a third country."¹⁹¹

Thus, the Mexican judge is given, in most explicit terms, the directive to apply "the substantive foreign law." However, in exceptional cases to be determined by the judge's discretion based upon "the special circumstances of the case," the Mexican judge may be required to apply not the substantive aspects of foreign law, but rather its conflict rules when these provide for the application of Mexican law or the law of a third country. Thus, the provision allows a limited form of *renvoi* in exceptional cases only.

Evidently, the Mexican legislature decided to avoid a policy on *renvoi* in an area paved with doubts and debate. Instead, it adopted a position that has been characterized as "very cautious or moderate."¹⁹² On a positive note, this provision can be seen as an attempt to avoid a mechanical application of the rules on conflict of laws by striving to persuade the judge of the forum to take into consideration the more flexible notion of equity.¹⁹³ It is interesting to note the willingness of a civil law legislature like Mexico's to consider using equity, which is traditionally associated with legal systems derived from an Anglo-Saxon tradition, like the United States.¹⁹⁴

B. SUFFICIENT TO HAVE SIMILAR LEGAL INSTITUTIONS IN MEXICO TO APPLY FOREIGN LAW

Paragraph III of Article 14 reads: "It will not be an impediment for the application of foreign law that Mexican law does not provide institutions or procedures essential to the applicable foreign institution, if analogous institutions do exist."¹⁹⁵ Based on the language of this new provision, a Mexican judge cannot refuse the application of foreign law by using the excuse that Mexican law does not have an identical institution, or precise legal equivalent, to the specific institution or procedure of the foreign law. Therefore, if the Mexican judge, at his or her discretion, determines that there is an institution or procedure in Mexican law analogous to the foreign legal institution or procedure in question it is sufficient to apply foreign law.

191. Civil Code art. 14, para. II, *supra* note 126, at 43 (translation by the author).

192. In his article, Vázquez Pando says: "On *renvoi*, the reform is very cautious, as it does not reject but neither does it accept *renvoi* as a general principle." See Vázquez Pando, *supra* note 85, at 1000.

193. *Id.* at 1001.

194. JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA (13th ed., Boston, Little Brown & Co., 1886); JOHN ADAMS, THE DOCTRINE OF EQUITY: A COMMENTARY ON THE LAW AS ADMINISTERED BY THE COURT OF CHANCERY (6th Am. ed. 1873); GEORGE L. CLARK, EQUITY: AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS (E.W. Stephens Publishing Co., 1924); RALPH A. NEWMAN, EQUITY AND LAW: A COMPARATIVE STUDY (Oceana 1961).

195. Civil Code art. 14, para. III, *supra* note 126, at 43-44 (translation by the author).

In Mexico, most authors agree that this provision simply attempts to prevent Mexican judges from refusing to apply foreign law by relying on the use of the "unknown institution."¹⁹⁶ According to this practice, a judge may try to escape the application of a pertinent institution or procedure of foreign law by claiming that the foreign entity has no exact legal counterpart in the law of the forum. Pereznieto advises that "Mexican judges should not have a closed mentality attitude . . . to evade the application of foreign law," but rather they should have "an open and receptive" attitude toward foreign law.¹⁹⁷ On the other hand, García Moreno points out that because "Mexican judges are rather unfamiliar with [this] institution," this provision has been included in the Code "to avoid, to the extent possible, a denial of justice."¹⁹⁸

Two additional comments may be in order. It is clear that this provision leaves Mexican judges with the discretion to determine whether Mexican law has a legal institution or procedure that is analogous to the applicable foreign law provision. The question that follows is what criteria does a Mexican judge take into account when making such a determination. Should not the major components of these criteria be expressly enunciated in substantive Mexican law to guarantee to the parties compliance with standards of legal objectivity? Or should this process be left entirely to the discretion of the Mexican judge who might be unfamiliar with and even ignorant about the applicable foreign law? In 1979 Vázquez Pando proposed that the so-called "unknown institution" shall not be considered as such "if there is a Mexican [institution] with clearly analogous goals or functions, save if that determination may lead to a contravention of public order . . . or to a fraudulent evasion of Mexican law."¹⁹⁹

Second, it is worth noting that paragraph III of article 14 refers not only to institutions, but also to "*procedures* essential to the applicable foreign institution."²⁰⁰ Determining the existence of procedures that are a part of Mexican law and are also analogous to an applicable foreign procedure may prove to be an even more difficult task, if not an elusive one, for a Mexican judge to perform. Mexican judges are not familiar with the application of foreign law, given Mexico's previous policy of an extreme territorialist position. Thus, judges in Mexico, unlike those in common law countries, might find themselves required to apply foreign law without substantive or procedural norms in Mexican law to guide their decisions. Time and practice, as well as specific inquiries regarding the operation of this system in other countries, including the United States, will serve to educate and enlighten judges who confront this new predicament in Mexico.

This provision reproduces the text of Pereznieto's proposal²⁰¹ to the 11th Na-

196. See Maekelt, *supra* note 20, at 314-16.

197. See Pereznieto, *supra* note 8, at 304.

198. See García Moreno, *supra* note 60, at 15.

199. See VÁZQUEZ PANDO, *supra* note 19, at 59.

200. *Id.* at 59.

201. *Id.*

tional Seminar at Querétaro. Pereznieta's proposal, in turn, is based on article 3 of the Inter-American Convention on General Rules of Private International Law.²⁰²

C. INDEPENDENCE OF PRELIMINARY OR INCIDENTAL QUESTIONS

Paragraph IV of article 14 of the Civil Code is taken directly from article 8 of the Convention on General Rules.²⁰³ The new paragraph of article 14 reads: "Previous, preliminary or incidental questions that may arise from a principal issue, should not necessarily be resolved with the law that governs said issue."²⁰⁴ This provision clearly recognizes the distinct separation between previous, preliminary, or incidental questions and the principal issue in the same case, since both may be subject to the application of different conflict-of-law rules. This provision acknowledges the principle of independence of both questions.²⁰⁵

D. HARMONIOUS APPLICATION OF VARIOUS FOREIGN LAWS AND THE NOTION OF EQUITY

Once again, the text of paragraph V of article 14 clearly shows the influence of article 9 of the Inter-American Convention on General Rules.²⁰⁶ The Mexican version reads:

When different aspects of the same juridical relationship are governed by different [foreign] laws, these shall be applied harmoniously endeavoring to attain the purposes pursued by each of said laws. The difficulties caused by the simultaneous application of such [foreign] laws shall be resolved taking into account the requirements of equity in the specific case.

What is provided for in this article shall be observed when the law of another entity of the Federation is applicable.²⁰⁷

According to some Mexican authors this paragraph constitutes "the principal novelty of the [1988] reform."²⁰⁸ Others consider that the opening part of the

202. Article 3 of this Convention reads: "Whenever the law of a State Party has institutions or procedures essential for its 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 any like institutions or procedures." GARCÍA-AMADOR, *supra* note 70, at 486 (emphasis added).

203. *Id.* Article 8 of this Convention reads: "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." *Id.* at 487.

204. Civil Code art. 14, para. IV, *supra* note 126, at 44 (translation by the author).

205. See VÁZQUEZ PANDO, *supra* note 19, at 57-58; see also GARCÍA MORENO, *supra* note 60, at 16.

206. See *supra* note 36, at 487.

207. Civil Code art. 14, para. V, *supra* note 126, at 44 (translation by the author). The latter part of the main paragraph poses some translation problems, as to the expression: "Las dificultades causadas por la aplicación simultánea de tales derechos se resolverán tomando en cuenta las exigencias de la equidad en el caso concreto" (emphasis added). To avoid problems, the English text follows the translation of article 9 of the Inter-American Convention. See GARCÍA-AMADOR, *supra* note 70, at 487.

208. See Vázquez Pando, *supra* note 85, at 1001.

provision embraces the legal thesis advanced by Henri Batiffol in 1956, in which he suggested the necessity of coordinating the simultaneous application of different foreign legal laws to harmoniously resolve the objectives of each of them.²⁰⁹

In essence, this provision advocates the harmonious application of various foreign laws in a simultaneous manner, endeavoring to attain the individual objectives of each foreign law. Whether this policy is viable or unattainable, especially in light of the complexities caused by the simultaneous application of different foreign laws, remains to be seen. In any event, in order to resolve the problems that any judge must confront in handling these demanding cases, the Mexican legislature decided to follow the proviso contained in the General Rules Convention of 1979. This proviso directs the judge to make use of the "requirements of equity in the specific case," which may lead to rather subjective decisions.

In theory, the policy behind this paragraph appears to be fair, albeit idealistic. However, its implementation by a Mexican judge may cause serious problems to the parties, especially considering that Mexican law has neither a substantive nor a procedural provision to guide the judge as to how to apply different, and most likely quite conflicting, foreign laws in a harmonious manner, or how to render a decision based on equity, a notion with which judges in Mexico, a civil law country, are unfamiliar.

E. INTERSTATE CONFLICTS IN MEXICO

The first sentence of article 14 of the Civil Code refers to interstate conflicts. Under Mexican law, like the applicable U.S. law,²¹⁰ the law of each of the thirty-one federal states in Mexico is assimilated under the category of foreign law. Therefore, for conflict-of-law purposes virtually no difference exists in Mexico between international and interstate conflicts.²¹¹

This final proviso should be read in conjunction with article 121 of the Mexican Constitution, which contains the Mexican version of the full-faith-and-credit clause.²¹² The Republic of Mexico is constitutionally divided into thirty-one federal entities,²¹³ each entity being autonomous internally,²¹⁴ with its own local constitution and state legislation.²¹⁵ The legislation enacted by the thirty-one states rarely differs substantively despite the large diversity in geographical areas, popu-

209. See Pereznieto, *supra* note 8, at 305.

210. See ROBERT C. CRAMTON ET AL., *CONFLICT OF LAWS: CASES, COMMENTS, QUESTIONS* (5th ed. 1993); DAVID H. VERNON, *CONFLICT OF LAWS: THEORY AND PRACTICE* (2d ed. 1982); GARY J. SIMSON, *ISSUES AND PERSPECTIVES IN CONFLICT OF LAWS: CASES AND MATERIALS* (2d ed. 1991).

211. See VÁZQUEZ PANDO, *supra* note 19, at 64; Vázquez Pando, *supra* note 85, at 1001.

212. Article 121 of Mexico's Constitution establishes the principles that regulate the "full faith and credit" that each state of the Mexican federal system should give to "the public acts, records and judicial proceedings" of the other sister states. MEX. CONST. art. 121, in *CONSTITUCIÓN POLÍTICA*, *supra* note 50, at 103.

213. MEX. CONST. art. 43, in *CONSTITUCIÓN POLÍTICA*, *supra* note 50, at 44.

214. MEX. CONST. art. 40, in *CONSTITUCIÓN POLÍTICA*, *supra* note 50, at 43.

215. *Id.*

lation, natural resources, and socio-economic indicators.²¹⁶ This relative uniformity in state-produced legislation may be attributable, to a large extent, to what may be informally described as the national uniformity effect.²¹⁷ This effect is caused by the powerful and prolonged centralization the Federal District has exercised upon the states, coupled with the fact the Partido Revolucionario Institucional (PRI), the official political party, has successfully elected its members to the most important public positions, including President of the Republic and governors of the states, for the last sixty years.²¹⁸

The language of this provision was also taken directly by the Mexican legislature from a proposal discussed and approved at the 11th National Seminar of the Mexican Academy of Private International Law in 1987.²¹⁹

F. EXCEPTIONS TO THE APPLICATION OF FOREIGN LAW IN MEXICO

Article 15 of the Civil Code was added during the 1988 reform.²²⁰ It provides:

Foreign law shall not be applied:

- I. When fundamental principles of Mexican law have been evaded artificially, having the judge to determine the fraudulent intention of such evasion; and,
- II. When the provisions of foreign law or the result of its application are contrary to fundamental principles or institutions of the Mexican public order.²²¹

In essence, this article establishes two exceptions to the application of foreign law by Mexican judges: first, the notion of public policy²²² (*orden público*), and second, the so-called fraud to the law²²³ (*fraud au loi*). These principles are universally recognized. The Mexican legislature took them from articles 5 and 6 of the Inter-American Convention on General Rules of Private International Law.²²⁴

216. For information on Mexico's 31 states, see G. NEWMAN & A. SZTERFELD, *BUSINESS INTERNATIONAL'S GUIDE TO DOING BUSINESS IN MEXICO* (1993).

217. This uniformity effect is clearly manifest with respect to the four major codes enacted by each state in Mexico: (1) the Civil Code, (2) the Code of Civil Procedure, (3) the Penal Code, and (4) the Code of Penal Procedure, as well as with certain legislation in which the states have little or no experience, such as environmental legislation. For example, the Civil Code of the State of Baja California is virtually a simple copy of the Civil Code of the Federal District. This pattern repeats itself throughout Mexico.

218. When this article was being written (November 1993), the Presidency and the thirty governorships in Mexico were in the hands of members of the PRI except for the governorship of Baja California.

219. See VÁZQUEZ PANDO, *supra* note 19, at 64.

220. See *supra* note 12 and accompanying text.

221. Civil Code art. 15, *supra* note 126, at 44.

222. *Id.*

223. *Id.*

224. The text of these articles reads: 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 (ordre public)." Article 6: "The law of a State Party shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded." GARCÍA-AMADOR, *supra* note 70, at 486 (emphasis added).

Prior to the 1988 amendment, several proposals formulated by Mexican jurists to amend the Civil Code included the same exceptions to the application of foreign law,²²⁵ including the provisions in the draft of the 1928 Code that did not prosper.²²⁶ The current language of this new article was adopted by the Mexican legislature from a proposal approved at the 11th National Seminar at Querétaro.²²⁷

Most authors agree that in the *fraud au loi* exception, the Mexican judge has the burden of proving the fraudulent intention behind the alleged evasion.²²⁸ According to García Moreno, this exception, like the *renvoi*, tends to be highly controversial in private international law because of its subjective elements such as fraudulent intention, fundamental principles, artificially, and the like. However, the use of this exception is a provision commonly found to avoid the application of foreign law in cases involving *dolus*.²²⁹

When dealing with public order, the contravention in question must be directed against fundamental principles and institutions of such *orden público*. In García Moreno's opinion, this contravention is manifest if it is "objectively evident to any judge or person . . . in conformity with the usual practice and good faith."²³⁰ It may be necessary to clarify that such contravention may occur, not only because of the direct application of foreign law to a given case but also, indirectly, as a result expressly stated in paragraph II of this article.²³¹

Vázquez Pando believes that these exceptions do not apply to interstate conflicts.²³² He argues that the two exceptions apply only to the law of other countries and not to the law of other states within Mexico. His rationale is that Mexican state law "is not susceptible of attacking . . . fundamental principles or institutions of Mexican law . . . since all the local regimes derive their legal validity from one and the same [Federal] Constitution."²³³ As indicated earlier, article 14 does not distinguish between foreign law *per se* and the law enacted by the different states of Mexico.²³⁴ For all legal purposes, the law of Mexican sister states is assimilated with foreign law. Second, the language of article 15 does not exclude Mexican

225. For example, see the proposals of (1) Arellano-Siqueiros, (2) Pereznieta in 1977, (3) the "Working Document," (4) Vázquez Pando, and (5) Pereznieta before the 10th National Seminar, all reproduced in VÁZQUEZ PANDO, *supra* note 19, at 61-63.

226. *Id.* at 61.

227. *Id.* at 63.

228. *Id.*

229. See García Moreno, *supra* note 60, at 17 (in the original: "[S]in embargo, es un remedio que nunca falta en leyes y convenciones conflictuales para evitar la aplicación de normas extranjeras cuando exista intención dolosa de por medio").

230. See García Moreno, *supra* note 60, at 18.

231. See Civil Code art. 15, para. II, *supra* note 126, at 44; VÁZQUEZ PANDO, *supra* note 19, at 63.

232. See VÁZQUEZ PANDO, *supra* note 19, at 64.

233. *Id.*

234. See *supra* note 211 and accompanying text.

state law from the two exceptions. If the language of the law does not distinguish, the judge should not either.

Finally, given the autonomy in the state's internal affairs, it is conceivable that the local legislation of a given state explicitly recognized by a constitutional mandate²³⁵ may infringe on certain fundamental principles of Mexican law, as construed and incorporated in the statutory language of another state, despite the existence of only one Federal Constitution. This would be unthinkable given the enunciated national uniformity effect.²³⁶ However, this possibility may prove more viable in the future when the role of political parties in Mexico is expected to become more effective in a truly democratic process and when the degree of socio-economic development in certain states increases. From a comparative law perspective, most countries have adopted a legal regime for interstate conflicts that assimilates the law of sister states in a federal system such as the United States,²³⁷ Germany,²³⁸ France,²³⁹ and Switzerland,²⁴⁰ with the larger notion of foreign law.

VI. Conclusion

Mexico's adoption of a strict territorialist policy, as contained in its Civil Code for the Federal District of 1932, produced two major consequences in its legal system. First, it virtually excluded the application of any foreign law for over half a century. From 1932 until 1988 only Mexican laws were applied by Mexican courts. Consequently Mexican judges became unaccustomed to using foreign legal notions and institutions. During these intellectually arid years, academicians, international law experts, and diplomats played an important role in attempting to inform and educate the Mexican legal community about recent developments taking place outside the nation. The fact that foreign law was not legally admissible before any Mexican court led to the absence of domestic legislation controlling legal questions within the area of private international law.

Second, Mexico became legally immersed in itself, uninterested in taking part in the legal and codificatory developments taking shape at different international fora, especially at the inter-American level. For almost a century, Mexico main-

235. MEX. CONST. art. 40, in *CONSTITUCIÓN POLÍTICA*, *supra* note 50, at 41.

236. *See supra* note 217 and accompanying text.

237. *See generally* CRAMTON, VERNON, and SIMSON, all *supra* note 210.

238. *See, e.g.*, WILHELM WENGLER, *DER SPYCATCHER—FALL UN DAS INTERNATIONALE PRIVATRECHT: DER VORBEHALTENE TATIGKITSBERICH DER STAATEN* (1989); PETER HEIDENBERGER, *DEUTSCHE PARTEIEN VOR AMERIKANISCHEN GERICHTEN: ERFAHRUNGEN AUS DER PRAXIS* (1988).

239. *See* HENRI BATIFFOL, *DRIT INTERNATIONAL PRIVÉ* (7th ed. 1981); CHRISTINE LECUYER-THIEFFRY, *LE RÉGLEMENT DES LITIGES CIVILS ET COMMERCIAUX* (1986); GEORGES R. DELAUME, *AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW* (2d ed. 1961).

240. *See* Switzerland's Private International Law Statute of December 18, 1987; *LE NOUVEAU DROIT INTERNATIONAL PRIVÉ SUISSE: TRAVAUX DES JOURNÉES D'ÉTUDE ORGANISÉES PAR LE CENTRE DU DROIT DE L'ENTREPRISE LES 9 ET 10 OCTOBRE 1987 À LA UNIVERSITÉ DE LAUSANNE* (1989); PIERRE A. KERNER, KARL W. ARNOLD, *THE SWISS CODE ON CONFLICT OF LAWS, AND RELATED LEGISLATION* (1989); ARTHUR NAUSSBAUM, *AMERICAN-SWISS PRIVATE INTERNATIONAL LAW* (1958).

tained an isolationist attitude relating to conflict of laws. It was not until the early 1970s that Mexico came out of its isolationist cocoon by adhering to the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards. Since then, Mexico has continued to follow a more vigorous and constructive attitude in relation with current global and hemispheric developments taking place in a variety of private international law areas.

The 1988 amendments to the Civil Code for the Federal District drastically changed Mexico's anachronistic policy of absolute territorialism. This long overdue change placed Mexico in a more adequate international setting by putting Mexico in clear symmetry, not only with the latest codificatory accomplishments, but also with the most recent trends in trade, business, and finance at the transnational level. This profound transformation in one of Mexico's most important areas of its legal system was largely due to the initiative and determination of the Mexican Academy of International Law, whose members deserve to be congratulated for their efforts.

From a substantive viewpoint, the 1988 amendments constitute the best adaptation of key principles extracted from various inter-American conventions on private international law matters to the Mexican legal environment. Special reference must be given to the following instruments: (1) The Inter-American Convention on General Rules of Private International Law; (2) The Inter-American Convention on the Domicile of Natural Persons in Private International Law; (3) The Inter-American Convention on the Personality and Capacity of Juridical Persons in Private International Law; and (4) The Inter-American Convention on Conflicts of Law concerning the Adoption of Minors.

The new amendments articulated a number of explicit rules on conflict of laws in Mexico. Article 12 of the Civil Code for the Federal District introduced a new and more subdued form of territorialism. In principle, Mexican laws continue to apply to all the persons located in that country; however, foreign law may be applied in two cases: (1) when Mexican laws so provide, or (2) when international instruments to which Mexico is a party so dictate.

Regarding the determination of the applicable foreign law, article 13, paragraph I of the Code recognized the validity of "juridical relationships" created in other states of the Republic of Mexico or in foreign nations. Basically, this article recognizes the old full-faith-and-credit clause, now couched in more modern language.

The status and capacity of natural persons are now to be controlled by the law of the place of their domicile, in clear opposition to the previous notion of rigid territorialism adopted by the Civil Code of 1932. Unquestionably, both movable and immovable assets are to be regulated by the ancient and universal rule of *lex rei sitae*. The form of legal acts is to be governed by the law of the place where they are executed, that is *lex loci executionis*, as are the effects of legal acts and contracts, unless the parties validly designated the application of another law.

The application of foreign law was a notion alien to Mexico's legal system from 1932 until the reform of 1988. The most recent trend in this area, article

14 of Mexico's Civil Code, provides that Mexican judges are to apply foreign law "as the corresponding foreign judge would do it," allowing judges to take judicial notice of foreign law. In general, this provision closely resembles rule 44.1 of the Federal Rules of Civil Procedure.

The 1988 amendments adopted a very cautious form of *renvoi*, attempting to avoid the mechanical application of the rules of conflict of laws. Mexican judges are not to refuse the application of foreign law under the pretense that Mexico's legal system does not have a legal institution identical to the foreign institution in question; the judge has discretion to apply foreign law if Mexico has a legal institution analogous to a foreign one. Preliminary or incidental questions may be treated and resolved independently from the principal cause.

Article 14, paragraph V deserves a special commentary because of its innovative nature. It provides that when the different aspects of the same juridical relationship are governed by different foreign laws, the Mexican judge should apply all of them harmoniously. However, in difficult cases, the judge may invoke the notion of equity, a rather unprecedented step for judges belonging to the civil legal tradition. Mexican scholars have said that this provision constitutes the principal novelty of the 1988 reform.

On the question of interstate conflicts in Mexico, article 13, paragraph I of the Civil Code for the Federal District establishes the basic conflict-of-law rules without distinguishing between the law of each of the thirty-one federal states in the Republic of Mexico and the law of a foreign nation. Furthermore, the final paragraph of article 14 stipulates that the conflict-of-law rules contained in article 13, devoted to addressing foreign law questions, shall be observed when the law of another Mexican state is to be applied. In essence, the 1988 reform established no difference between international and interstate conflicts.

Finally, the recent amendments to the Civil Code established two universally recognized exceptions to the application of foreign law: (1) when fundamental principles of Mexican law have been evaded artificially (*fraud au loi*) and (2) when foreign law interferes with Mexico's public interest (*orden público mexicano* or *ordre public*).

These important amendments undoubtedly are among the most constructive legal developments in Mexico's legislative history over the last seventy-five years. Initiated by the administration of President Miguel de la Madrid Hurtado, the 1988 reform may be characterized as an initial step toward the modernization of Mexico's legal system. A most challenging and valuable goal, its final objective has been continued and vastly expanded by the current administration of President Carlos Salinas de Gortari. All the changes that are now drastically transforming the content and format of Mexico's legal system and the conception of it abroad, principally in the United States and Canada, should be grouped under one unprecedented notion: the gradual but seemingly unavoidable process of the "Americanization" of Mexico's legal system.

Appendix

CIVIL CODE FOR THE FEDERAL DISTRICT AND TERRITORIES IN ORDINARY MATTERS AND FOR THE ENTIRE REPUBLIC IN FEDERAL MATTERS

(Published in the *Diario Oficial* of March 26, 1926;
entered into force on October 1, 1932 by
decree published in the *Diario Oficial* of September 1, 1932)*

Article 12

The Mexican laws, including those which refer to the status and capacity of persons, apply to all the inhabitants of the Republic, whether nationals or foreigners, and whether domiciled therein or transient.

Article 12

*Civil Code for the Federal District (as amended by decree
published in the Diario Oficial of January 7, 1988)*

The Mexican laws apply to all the persons located in the Republic [of Mexico], as well as to the acts and factual situations which have taken place within its territory or jurisdiction, and to those who have submitted to said laws, save when those laws provide for the application of a foreign law and save, also what is provided by the treaties and conventions to which Mexico has become a party.

Article 13

The juridical effect of acts and contracts made in a foreign country, which are to be carried out in the territory of the Republic, shall be governed by the provisions of this Code.

Article 13

(As amended in 1988)

The determination of the applicable [foreign] law will be done in conformity with the following rules:

*Translated by Prof. Jorge A. Vargas, University of San Diego School of Law

- I. The juridical relationships validly created in the states of the Republic [of Mexico], or in a foreign nation in conformity to its law, should be given full credit.**
- II. The status and capacity of natural persons are regulated by the law of the place of their domicile.**
- III. The creation, regime, and extinction of realty rights over immovable assets, as well as leasing agreements and contracts for the temporary use of said assets, are to be regulated by the law of their place of location, even though their owners may be foreigners.**
- IV. The effects of legal acts and contracts will be governed by the law of the place in which they are executed. Nevertheless, when the act is to produce its effects in the Federal District [i.e.: Mexico City] or in the Republic in federal matters, such act may be then subject to the form prescribed by this Code; and**
- V. The effects of legal acts and contracts, save for what is provided for in the previous paragraphs, are governed by the law of the place in which they should be executed, unless the parties had validly designated the applicability of another law.**

Article 14

Real property situated in the Federal District, and personal property found therein, shall be governed by the provisions of this Code, even though the owners be aliens.

Article 14 *(As amended 1988)*

The following is to be observed in the application of foreign law:

- I. It shall be applied as the corresponding foreign judge would do it; to that end, the judge may obtain the necessary information about the text, validity, meaning, and legal scope of said law.**
- II. The substantive foreign law should be applied, save when given the special circumstances of the case, the conflict-of-law rules of said foreign law should be taken into account, as an exception, making applicable the Mexican substantive rules of those of a third country.**
- III. It will not be an impediment for the application of foreign law that the Mexican law does not provide institutions or procedures essential to the applicable foreign institution, if analogous institutions do exist.**
- IV. Previous, preliminary, or incidental questions that may arise from a principal issue, should not necessarily be resolved with the law that governs said issue; and**

- V. When different aspects of the same juridical relationship are governed by different [foreign] laws, these shall be applied harmoniously endeavoring to attain the purposes pursued by each of said laws. The difficulties caused by the simultaneous application of said [foreign] laws shall be resolved taking into account the requirements of equity in the specific case.**

Article 15

Juridical acts in everything relating to their form shall be governed by the laws of the place where they are executed. Nevertheless, Mexicans or aliens residing outside of the Federal District are at liberty to subject themselves to the forms prescribed by this Code, when the act is to be carried out in the said demarcations.

Article 15

(As amended in 1988)

Foreign law shall not be applied:

- I. When fundamental principles of Mexican law have been evaded artificially, having the judge to determine the fraudulent intention of such evasion; and**
- II. When the provisions of foreign law or the result of its application is contrary to the fundamental principles or institutions of Mexican public order [i.e.: *orden público mexicano*].**