

Northwestern Journal of International Law & Business

Volume 14
Issue 2 *Winter*

Winter 1993

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Recommended Citation

Jorge A. Vargas, Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure, 14 Nw. J. Int'l L. & Bus. 376 (1993-1994)

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Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure

Jorge A. Vargas*

INTRODUCTION

For over half a century, Mexico's absolute territorialism¹ led to the virtual exclusion of foreign law from that country's court system. From 1932 until 1988, Mexican judges applied only Mexican law to cases before Mexican courts, in conformity with a selected number of substantive provisions contained in Mexico's domestic legislation. At the center of Mexico's extreme territorialism was Article 12 of its Civil Code for the Federal District and Territories of 1932.² This article provided that 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.³

The adoption of this rigid territorialist doctrine led to the following consequences: first, the virtual absence of enacted procedural rules as part of Mexico's domestic legislation in the area of conflict of laws,

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¹ For a lucid analysis of Mexico's origin, content and application of its territorialist doctrine, see Lionel Perezniето Castro, *La Tradition Territorialiste en Droit International Privé dans les Pays d'Amérique Latine*, 190 RECUEIL DES COURS 271, 330-35 (1986).

² Diario Oficial de la Federación [D.O.], March 26, 1926. The Code entered into force on October 1, 1932, by a presidential decree published in the D.O., September 1, 1932.

³ Código Civil para el Distrito y Territorios Federales en Materia Común y para toda la República en Materia Federal [Civil Code for the Federal District and Territories in Ordinary Matters and for the entire Republic in Federal Matters] at 43 (52a. ed. Editorial Porrúa 1984) (Mex.). Arts. 13-15 of this Code should also be considered as essential components of this absolute territorialist doctrine. For an English translation of this code, see *The Mexican Civil Code* (M. W. Gordon trans., 1980).

both at the domestic and international levels. Mexican specialists agree that for almost sixty years Mexico did not have a set of comprehensive and systematic provisions to regulate these questions.⁴ For instance, both the Federal Code of Civil Procedure of 1942⁵ and the Code of Civil Procedure for the Federal District of 1932⁶ simply alluded to these questions in a few provisions, without establishing a procedural mechanism to address these matters in depth. The rationale for this was very simple: since Mexico needed to apply Mexican law only, any substantive or procedural provisions regulating in detail foreign law questions were clearly unnecessary.

Secondly, for almost a century Mexico adopted a rather isolationist policy, maintaining itself apart from the most important codificatory developments in the area of private international law which were taking place at that time at the global and regional levels. For example, Mexico did not sign the Montevideo Convention of 1889⁷ or the Bustamante Code of 1928,⁸ nor any of The Hague conventions⁹ concluded during the first decades of this century. It was not until the early 70's when Mexico decided to come out of its "isolationist co-

⁴ See, in particular, the comments advanced by Lic. Jose' Luis Siqueiros, *La Cooperacion Procesal Internacional [International Cooperation in Procedural Matters]*, in *Jurídica* No. 19, at 14 (1988-89) (Mex.).

⁵ Only three provisions of this Code addressed conflict of laws questions at the international level, namely: Arts. 131, 302 and 428. See *Código de Procedimientos Civiles [Federal Code of Civil Procedure]*, D.O., February 24, 1942, included in *Nueva Legislacion De Amparo Reformada Doctrina Textos y Jurisprudencia* at 269, 295 and 316 (*Editorial Porrúa* 1983) (Mex.) [hereinafter C.F.P.C.].

⁶ Arts. 108, 605, 606 and 608 of the *Código de Procedimientos Civiles para el Distrito Federal [Code of Civil Procedure for the Federal District]*, D.O., September 1-21, 1932. It entered into force on October 1, 1932. *Editorial Porrúa* 19.

⁷ Montevideo was chosen as the venue for the First South American Congress on Private International Law, i.e. *Primer Congreso Sudamericano de Derecho Internacional Privado*, held in 1888-89. This congress produced eight international conventions, one on the rules applicable to conflict of laws. See T. Esquivel Obregon, *Conflict of Laws in Latin American Countries*, 27 *YALE L.J.* 1030, 1042 (1918).

⁸ As it is known, the Bustamante Code or Code of Private International law (i.e.: *Código de Derecho Internacional Privado*) devoted 124 articles to rules on private international law questions (Book IV).

⁹ Mexican authors showed little interest on the codification efforts undertaken at The Hague Conferences on Civil Procedure (1905) and on Recognition and Enforcement of Foreign Judgements (1925), nor on the Geneva Protocol on Arbitration (1923) or the Geneva Convention on the Enforcement of Arbitral Awards (1927).

coon,"¹⁰ adopting a more constructive role, particularly at the regional level.¹¹

A drastic change occurred in the period between 1978 and 1988 when in a relatively short period of time Mexico became a party to a significant number of important Inter-American conventions in private international law matters; thus, from 1978 to 1985 that country adhered to six Inter-American conventions,¹² including those on Letters Rogatory¹³ (and its Protocol¹⁴), Proof of Information regarding Foreign Law¹⁵ and the Convention on General Norms of Private International Law.¹⁶ Then, in 1987 and 1988, Mexico became a party to twelve additional conventions,¹⁷ among them: the Inter-American Convention on the Legal Regime of Powers to be Utilized Abroad,¹⁸ Domicile of Physical Persons,¹⁹ Personality and Capacity of Juridical

¹⁰ Mexico's adhesion in 1971 to the *United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards*, (published in the D.O. of June 22, 1971), signals the initiation of a more active role on private international law matters on the part of this country.

¹¹ Mexico became an active participant at the first three of the Inter-American Specialized Conferences on Private International Law, commonly known in Latin America as CIDIP (i.e.: Conferencia Especializada Interamericana sobre Derecho Privado Internacional). CIDIP-I, held in Panama City, September 14-30, 1975. This conference produced six conventions and Mexico "ratified" five of them; CIDIP-II, held in Montevideo, Uruguay, in April and May of 1979, concluding eight conventions out of which Mexico "ratified" six; and CIDIP-III, held in La Paz, Bolivia, in May of 1984. This conference approved four conventions, all of them "ratified" by Mexico. See also Lionel Perezniето Castro, *Derecho Internacional Privado*, 5th ed., in *Mexico En Derecho Convencional Internacional* 345, 347-487 (1991) (Hereinafter *Perezniето*).

¹² Those conventions included: (1) The Inter-American Convention on Conflict of Laws concerning Bills of Exchange, Promissory Notes and Invoices (D.O. of April 25, 1928), and (2) Inter-American Convention concerning Commercial Companies (D.O. of May 8, 1979).

¹³ The *Inter-American Convention on Letters Rogatory* was signed in Panama City on January 30, 1975 (D.O. of April 25, 1978).

¹⁴ The *Additional Protocol to the Inter-American Convention on Letters Rogatory* was signed in Montevideo, Uruguay on May 8, 1979 (D.O. of December 3, 1982).

¹⁵ The *Inter-American Convention on Proof of Information regarding Foreign Law* was signed at Montevideo, Uruguay on May 8, 1979 (D.O. of April 29, 1983).

¹⁶ The *Inter-American Convention on General Norms of Private International Law* was signed at Montevideo, Uruguay on May 8, 1979 (D.O. of January 13, 1983).

¹⁷ These instruments included: 1) the *Inter-American Convention on Conflict of Laws regarding Adoption of Minors* signed at La Paz, Bolivia, on 24 May, 1984 (D.O. of August 21, 1987); 2) *United Nations Convention on Representation of International Sale of Goods*, done at Geneva on February 16, 1983 (D.O. of November 10, 1987); 3) *United Nations Convention on Contracts about International Sales of Goods*, done at Vienna on April 11, 1980 (D.O. of November 12, 1987); 4) *United Nations Convention on Prescription regarding the International Sales of Goods*, signed on April 14, 1974 (D.O. of December 8, 1987); and 5) *Protocol amending the convention in number 4*, signed on April 11, 1980 (D.O. of May 6, 1988).

¹⁸ The *Inter-American Convention on the Legal Regime of Powers to be Utilized Abroad* was signed in Panama City on January 30, 1975 (D.O. of February 6, 1987).

¹⁹ The *Inter-American Convention on the Domicile of Physical Persons in Private International Law* was signed at Montevideo, Uruguay on May 8, 1979 (D.O. of August 19, 1987).

Persons,²⁰ Extraterritorial Validity of Foreign Judgements and Arbitral Awards,²¹ Competence on the International Sphere for the Extraterritorial Validity of Foreign Judgements²² and the Additional Protocol on the Reception of Evidence Abroad.²³

To a large extent, this dramatic change in Mexico's policy towards embracing the major codificatory instruments at the international level on private international law was the product of the vigorous efforts of a small but eminent group of Mexican experts in the field, who joined their talents to create first, and then work through, the Mexican Academy of Private International Law.²⁴ The Academy was the intellectual force that propelled Mexico's modernization in this important legal area, including the consequent amendments in that country's domestic legislation.²⁵

Mexico's adherence to these numerous international conventions in such an unprecedented short period of time created a dual problem at its internal level: pursuant to Article 133 of the Mexican Constitution,²⁶ these conventions formally became the "Supreme law throughout the Union." This meant that the provisions in those conventions became an integral part of that country's domestic legislation, as soon as the proceedings mandated by the Constitution regarding the approval of treaties had been completed.²⁷ However, Mexican judges and legal practitioners were unfamiliar not only with the provisions in

²⁰ The *Inter-American Convention on the Personality and Capacity of Juridical Persons in Private International Law* was signed at La Paz, Bolivia on May 24, 1984 (D.O. of August 19, 1987).

²¹ The *Inter-American Convention on the Extraterritorial Validity of Foreign Judgements and Arbitral Awards* done at Montevideo, Uruguay on May 8, 1979 (D.O. of August 20, 1987).

²² The *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgements* was signed at La Paz, Bolivia, on May 24, 1984 (D.O. of August 28, 1987).

²³ The *Additional Protocol to the Inter-American Convention on the Reception of Evidence Abroad* was signed at La Paz, Bolivia, on May 24, 1984 (D.O. of September 7, 1987).

²⁴ See generally Vázquez Pando, Fernando Alejandro, *Nuevo Derecho Internacional Privado. Introducción y Selección de Fuentes*, 1 *Editorial Temis* 13-22 (for the history, evolution and accomplishments of the "Academia de Derecho Internacional Privado, A.C.").

²⁵ Mexican authors are of the unanimous opinion that the initial impetus, as well as the format and substance of the legal régime Mexico applies today in matters of conflict of laws was a direct consequence of the Mexican Academy of Private International Law. See *id.* at 17-22. See also Pereznieta, *supra* note 11, at 296-299 and Siqueiros, *supra* note 4, at 11-13.

²⁶ *Constitución Política de los Estados Unidos Mexicanos* [Const.] (translation by author), reprinted in 97 *Editorial Porrúa* 121 (1993).

²⁷ Mexico's constitutional system for approving treaties is patterned after the U.S. system: the Mexican Senate has the "exclusive faculty" to approve those "international treaties and diplomatic conventions entered into by the Executive." See *id.* at art. 76, para. 1.

those conventions but especially with the idea of applying foreign law in Mexico.

The second problem stemmed from the existence of a dual legal régime controlling international conflict of laws matters. To those countries which were parties to the same conventions that Mexico adhered to, this country had to apply the provisions contained in those conventions, in compliance with Article 133 of Mexico's Federal Constitution.²⁸ However, in cases involving other foreign nations, those who were not parties to the pertinent conventions, Mexico had to apply the very limited provisions found in its domestic legislation.

This situation led to the enactment of legislation in Mexico designed to regulate conflict of laws questions. This was accomplished by three presidential decrees which amended (1) the Civil Code of the Federal District,²⁹ (2) the Code of Civil Procedure for the Federal District,³⁰ and (3) the Federal Code of Civil Procedure.³¹ In sum, this legislation attenuated Mexico's absolute territorialism, allowing for the application of foreign law in that country. At the same time, it established a more systematic and complete régime designed to regulate questions on conflict of laws at the international and internal levels by incorporating into its domestic legal system key provisions taken from the major codificatory instruments in the area of private international law. These changes have no precedent in the legislative history of Mexico.

This article describes and analyzes the reforms to the Federal Code of Civil Procedure in the following four areas: (1) application and proof of foreign law; (2) processing of letters rogatory; (3) international cooperation for the taking of evidence, and (4) enforcement of foreign judgments. The first part offers an overview and commentary on the very few provisions Mexico had enacted in the area of international procedural cooperation prior to the 1988 reform. Part two explores the legislative history of the 1988 amendments, emphasizing the objective and purpose of the legislative bills submitted to Congress by the President of Mexico. The third part proceeds to ana-

²⁸ Article 133 of the Constitution provides: "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, 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." See *supra* note 26, at art. 133.

²⁹ D.O. of Jan. 7, 1988.

³⁰ D.O. of Jan. 12, 1988.

³¹ D.O. of Jan. 7, 1988.

lyze the content of these unprecedented but important legislative changes. The article concludes with a series of final observations.

MEXICO'S DOMESTIC LEGISLATION PRIOR TO THE
1988 AMENDMENTS

In Mexico, procedural questions pertaining to conflict of laws questions at the international level, prior to the amendments of 1988, were regulated by the following two codes: 1) the Federal Code of Civil Procedure,³² on federal matters, and 2) the Code of Civil Procedure for the Federal District,³³ on local matters pertaining to Mexico City.

The Federal Code of Civil Procedure, with a total of 577 articles, devoted only three to questions on conflict of laws at the international level. Article 131 simply provided that foreign public documents had to be "duly legalized" by the proper diplomatic or consular authorities, as stipulated by the pertinent laws, in order to produce legal effects in Mexico.³⁴

Article 302 of the same Code provided that letters rogatory sent to, or received from, abroad "shall be subject to the provisions contained in treaties or international conventions." In the absence of these instruments, the article established five rules applicable to these questions: (1) letters rogatory should be sent by diplomatic channels; (2) "legalization" shall be unnecessary when the "laws or practices" of the recipient country do not establish such a requirement; (3) when the laws of the recipient country so authorize, the letter rogatory shall be sent directly by the Mexican court or judge, with no "legalization" except as provided by the laws of the recipient country; (4) letters rogatory addressed to Mexican courts may be sent directly by the foreign court or judge, once they are "legalized" by the Mexican consul or minister residing at that foreign country; (5) judicial proceedings abroad may be performed by members of Mexico's foreign service, when requested by the interested party. In this case, the letter rogatory, "legalized" by the Secretariat of the Interior (i.e.: Secretaría de Gobernación) shall be sent to its destination by the Secretariat of Foreign Affairs³⁵ (i.e.: Secretaría de Relaciones Exteriores).

Finally, Article 428 of the Federal Code addressed the question of enforcement of foreign judgments. It empowered the Mexican court,

³² D.O. of Feb. 24, 1942; D.O. of Mar. 13, 1943.

³³ D.O. of Sept. 1, 1932.

³⁴ *Nueva Legislación*, *supra* note 5, at 269.

³⁵ *See generally Nueva Legislación*, *supra* note 5, at 265.

prior to enforcing the judgment, to determine "whether or not said judgment is contrary to the laws of the Republic, treaties or principles of international law." In the affirmative, the judgment in question should be sent back with a letter rogatory articulating the reasons that impeded the enforcement.³⁶

Turning now to the Code of Civil Procedure for the Federal District, Article 108 provided that the formalities and procedural questions concerning letters rogatory, as well as the requirements applicable in the Federal District to foreign public documents, should be controlled by the Federal Code of Civil Procedure.³⁷ Article 605 of this Code enumerated the conditions that foreign judgments should comply with in order to be enforced in Mexico.³⁸ Article 606 established the competence of the Mexican judge to enforce a foreign judgment, whereas Article 606 detailed the judicial proceedings before a Mexican court—known as "Homologación"—to provide a foreign judgment with executive force when it had to be applied coactively.³⁹

Finally, Article 608 established the principle that the Mexican judge should not inquire into the substance of the foreign judgment, nor into its legal or factual aspects, but only to examine its authenticity and to determine whether or not it should be enforced in conformity with the applicable Mexican laws.⁴⁰

Commenting on the fact that by the early 70's Mexico had not yet come out of its isolationist attitude, Lic. Siqueiros refers to the problems that Mexican judges had to confront in those days when they had to apply these scarce and rather concise provisions on their own, not having the guidance provided by treaties or international conventions, nor the jurisprudence created by the Mexican courts, including its Supreme Court.⁴¹

THE LEGISLATIVE BILLS OF PRESIDENT MIGUEL DE LA MADRID

Pursuant to Article 71, paragraph I of the Mexican Constitution,⁴² on October 26, 1987, the then President of Mexico, Lic. Miguel de la Madrid Hurtado, sent to the Federal Congress three legislative

³⁶ *Nueva Legislación*, *supra* note 5, at 316.

³⁷ Code of Civil Procedure for the Federal District, *supra* note 6, art. 108.

³⁸ Code of Civil Procedure for the Federal District, *supra* note 6, art. 605.

³⁹ Code of Civil Procedure for the Federal District, *supra* note 6.

⁴⁰ Code of Civil Procedure for the Federal District, *supra* note 6.

⁴¹ See Siqueiros, *supra* note 4.

⁴² This constitutional provision empowers the President of Mexico, the deputies and senators of the Congress, and the legislatures of the States to submit legislative bills to the Federal Congress. See *Mex. Const.*, *supra* note 26, at art. 71.

bills⁴³ with the purpose of accomplishing three major objectives. First, to incorporate into that country's domestic legal system a selected number of key provisions extracted from the international conventions on private international law to which Mexico had become a party.⁴⁴ It should be recalled that in a relatively short period of time, Mexico became a party to some eighteen international conventions.⁴⁵

Second, to establish a more detailed and systematic legal régime in matters concerning conflict of laws, with particular emphasis in the area of international procedural cooperation. Third, to educate Mexico's legal community—in particular judges and legal practitioners—so it would become more familiar with the substantive principles and procedural rules contained in the numerous international conventions in the area of private international law that now applied to Mexico, including those pertaining to foreign law. It was expected that this exercise would contribute to dilute the ethnocentricity displayed by Mexican judges, thus expanding their international perspectives.

Although the legislative bills were formally submitted to the Federal Congress by the Executive, it deserves to be noted the crucial role that the Mexican Academy of Private International Law played in the drafting, revision and preparation of the final text of what later turned out to be the amendments to the Federal Code of Civil Procedure and to the Code of Civil Procedure for the Federal District.

The idea to propose amendments to these Codes emerged at the Tenth Seminar of the Academy,⁴⁶ held in Mexico City in 1986. Interested in formalizing the proposals submitted at the seminar, the Academy formed two Working Groups to produce the final drafts: one on substantive civil matters and the other on international procedural questions,⁴⁷ which were concluded in 1987. These drafts were then discussed and finally approved by an Advisory Commission on Private International Law composed by members of the Academy and representatives from the Secretariats of Foreign Affairs (i.e., Secretaría de Relaciones Exteriores) and of the Interior (i.e., Secretaría de

⁴³ D.O. of Jan. 7, 1988; D.O. of Jan. 12, 1988; D.O. of Jan. 7, 1988. See also D.O. of Mar. 4 1989 (President De la Madrid's amendment of Mexico's Code of Commerce, which formed a part of the policy behind these bills. The presidential bill was dated Oct. 21, 1988. An analysis of these amendments is beyond the scope of this article.).

⁴⁴ See Vázquez Pando, *supra* note 24, at 87-88.

⁴⁵ See Jorge A. Vargas, *Conflict of Laws in Mexico: The New Rules introduced by the 1988 Amendments* for a list of these conventions (on file with Northwestern Journal of International Law and Business).

⁴⁶ See Vázquez Pando, *supra* note 24.

⁴⁷ The members of this working group were Ricardo Abarca Landero, José Luis Siqueiros and Fernando Alejandro Vázquez Pando. See Vázquez Pando, *supra* note 24, at 21.

Gobernación). The final drafts were then sent to President De la Madrid who in turn sent them to Congress, who finally passed them on November 24, 1987.⁴⁸ The presidential decrees promulgating the amendments to the Federal Code of Civil Procedure and to the Code of Civil Procedure for the Federal District were published in the *Diario Oficial* of January 7 and 12, 1988, respectively.⁴⁹

The legislative technique utilized by the Federal Congress to introduce the amendments was the following: since the text of the Federal Code of Civil Procedure lacked virtually any provisions on this matter, the legislature decided that it was simpler and more practical to create a special chapter exclusively devoted to addressing international procedural questions in a more detailed and systematic manner.⁵⁰ Some minor adjustments were made to the Code of Civil Procedure for the Federal District,⁵¹ making pertinent references to the Federal Code, when appropriate.⁵²

In the bill that President De la Madrid sent to Congress, the following assertions were advanced:

1. Special recognition was given to these six international instruments:

(1) *the Inter-American Convention on Letters Rogatory*,⁵³ signed at Panama City on January 30, 1975 at CIDIP-I;⁵⁴

⁴⁸ See Vázquez Pando, *supra* note 24, at 21.

⁴⁹ D.O. of Jan. 12, 1988; D.O. of Jan. 7, 1988.

⁵⁰ A new "Fourth Book", entitled "International Procedural Cooperation", comprised of six chapters and 35 articles (Articles 543 through 577), was added to this Code. The titles of each of the six chapters are: I. General Provisions; II. International letters rogatory; III. Competence on procedural questions; IV. Reception of evidence; V. Competence regarding enforcement of judgements; and, VI. Enforcement of judgments. See *Código Federal de Procedimientos Civiles, Nueva Legislación de Amparo Reformada. Doctrina, Textos y Jurisprudencia. Editorial Porrúa*, 58a. ed., México, D.F., 1993, pp. 371-77.

⁵¹ According to the decree published in the D.O., January 7, 1988, the following articles were amended or added to the Code of Civil Procedure for the Federal District: a) art. 40, paras. II and III; 108, 198 and 284 were amended; b) arts. 604-08 were amended, although the new ch. VI on *International Procedural Cooperation* was added; and, c) para. IX to art. 193, art 284 Bis, art. 337 Bis and a second paragraph to art. 893, were added. See *Código de Procedimientos Civiles para el Distrito Federal [C.P.C.D.F.]* (44a. ed. *Editorial Porrúa* 1993) (Mex.).

⁵² Since the amendments to the Federal Code of Civil Procedure are more systematic and complete, these amendments will be analyzed in this article.

⁵³ 1 F.V. Garcia Amador, *THE INTER-AMERICAN SYSTEM. TREATIES, CONVENTIONS AND OTHER DOCUMENTS* 450-454 (1983).

⁵⁴ The First Inter-American Specialized Conference on Private International Law (i.e., Conferencia Interamericana de Derecho Internacional Privado, known in Latin America by its acronym CIDIP-I) concluded six conventions in 1975. Mexico "ratified" five of them, including this convention, published in the D.O. of Apr. 25, 1978.

(2) *the Inter-American Convention on the Taking of Evidence Abroad*,⁵⁵ signed on the same date and place,

(3) and its *Additional Protocol*⁵⁶ signed at La Paz, Bolivia, on May 24, 1984 at CIDIP-III;⁵⁷

(4) *the Inter-American Convention on General Rules of Private International Law*,⁵⁸ signed in Montevideo on 8 May 1979 at CIDIP-II;⁵⁹

(5) *the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards*,⁶⁰ signed at Montevideo in 1979, and

(6) *the Inter-American Convention on Competence in the International Sphere for the Extraterritorial Validity of Foreign Judgments*.⁶¹

2. Although these conventions actually form a part of Mexico's domestic legislation, if it is considered that they have become the "Supreme law throughout the Union" in conformity with Article 133 of the Constitution, it was expressly recognized by the Executive that "it has become evident that our domestic law continues to be behind the progress made by the already promulgated [international] conventional law, since said domestic law has not had the legislative evolution to be updated to put it in conformity with the latter".⁶²

3. The Federal Code of Civil Procedure "is insufficient to regulate in an adequate manner the controversial questions of private international law, as they arise today."⁶³

4. In drafting the bill, special attention was given to the "Principle of Flexibility" in matters of international procedural cooperation, as established in Article 302 of the Code. This principle was considered to be "at the base of the existence and functioning of said cooperation since the procedural systems of other countries. . . have their own identity and characteristics; therefore, the widest flexibility and the best facilities should be granted to the requesting foreign nation, but always within the framework of the nature of the national procedural institutions."⁶⁴

5. The "Principle of Negative Reciprocity" is considered "as a more practical and efficient criterion" than the Principle of Positive Reciprocity which, as it is known, requires the necessity of proving that the country of origin actually allows the enforcement of foreign judgments. Instead, the denial to enforce foreign judgments, used as a defense, is

⁵⁵ Mexico "ratified" this convention and the decree of promulgation appeared in the D.O. of Feb. 9, 1978.

⁵⁶ D.O. of September 7, 1987.

⁵⁷ CIDIP-III approved four conventions, all of them "ratified" by Mexico, Diario Oficial, May 24, 1984.

⁵⁸ D.O. of Jan. 13, 1983.

⁵⁹ CIDIP-II finalized eight conventions; Mexico "ratified" six of them, Diario Oficial, May 8, 1979.

⁶⁰ D.O. of Aug. 20, 1987.

⁶¹ D.O. of Aug. 28, 1987.

⁶² The text of the presidential bill, dated October 26, 1987, is reproduced in its entirety, jointly with the approving opinions of the legislative commissions, in Vázquez Pando, *supra* note 24, at 552-79.

⁶³ See Vázquez Pando, *supra* note 24, at 554.

⁶⁴ Vázquez Pando, *supra* note 24, at 555.

within the interest of the party against whom the judgment is to be enforced, requiring only to prove the similarity of the matter or the reason to obtain a negative response;⁶⁵ and

6. Emphasis is given to the special judicial proceedings that must be met by a requesting party to confer upon a foreign judgment the necessary formalities under Mexican law to be able to enforce it in a co-active manner.⁶⁶ Internationally known as "Exequatur" this proceeding is known in Mexico as "Homologación."⁶⁷

INTERNATIONAL PROCEDURAL LAW AND INTERNATIONAL PROCEDURAL COOPERATION

International procedural cooperation is an essential component of today's modern world in the areas of business, trade, investment, travelling, diplomacy and, of course, law.

The frequent conduct of transactions at the international level and the increasing number of contacts between people across boundaries, combined with the unprecedented development of science and technology and the gradual globalization of the world economy, have already created a highly interactive civilization on this planet. Our civilization as it exists today could no longer continue and prosper in the near future without the application of fair and flexible principles of international cooperation; that invisible but indispensable ingredient that oils interactions among nation-states in all types of business, legal and official arenas. The existence of all these complex factors contribute to explain the growing presence of foreign law before the *judex fori* in any given country.

The simple usage of the term "international procedural cooperation" recently included in Mexico's Federal Code of Civil Procedure, suggests that that nation—contrary to almost one century of ethnocentricity and international isolationism—has clearly decided to embrace the most progressive trends in the area of private international law. For that neighboring nation, it is evident that a number of procedural questions that take place practically on a daily basis—such as the enforcement of a foreign judgment, the service of summons or the taking of evidence abroad—form a part of that emerging legal field known as "International Procedural Law."⁶⁸

⁶⁵ Vázquez Pando, *supra* note 24, at 558.

⁶⁶ Vázquez Pando, *supra* note 24, at 558.

⁶⁷ See C.P.C.D.F., *supra* note 6, art. 571.

⁶⁸ MIGUEL ARJONA COLOMO, DERECHO INTERNACIONAL PRIVADO. (*Parte especial*) 465-66 (1954).

The content of this new discipline consists of rules of jurisdiction and competence, as well as notions of solidarity and assistance that countries apply, on a reciprocal basis, through their respective court system in the process of administering justice.⁶⁹ However, other authors are of the opinion that the so-called "International civil procedural law" constitutes only a branch of the domestic legislation of each nation-State, composed of the norms and rules dictated to regulate a given process involving foreign law notions.⁷⁰

An enumeration of some of the major questions embraced under the new field of *International Procedural Law* might offer an idea, albeit limited, of its conceptual richness: application and determination of foreign law; international civil litigation involving federal, state or municipal government agencies; court jurisdiction; choice of law; taking of evidence abroad, including witnesses, public and private documents, expert witnesses and discovery; forum selection and *forum non conveniens*; formal requirements to validate foreign public documents, known in Mexico as "legalization"; service of summons abroad; the conduct of judicial proceedings abroad to produce effects in a different domestic court; format and content of letters rogatory, and procedures to be used; role and functions of consular and diplomatic officials in this area; procedures for ensuring the validity of foreign judgments, arbitral awards and decisions; privileges and immunities of foreign governments; international due process considerations, including questions regarding constitutional and human rights, appointment of legal counsel, denial of justice, *res judicata*, etc.⁷¹

It is beginning to become clear that relations between nation-states in matters concerning procedural questions tend now to be regulated by principles and rules contained in international conventional law, rather than abiding by the traditional and somewhat unpredictable notions of comity, reciprocity or *politesse internationale*,⁷² so much in vogue a few decades ago.

Since the establishment of the United Nations, for example, over thirty international conventions have been concluded under the aegis of this international organization, the European Economic Community, or the Organization of American States, in a variety of private international law areas. Most of these instruments refer to persons,

⁶⁹ Siqueiros, *supra* note 4, at 1.

⁷⁰ See A. MORELLI, *IL DIRITTO PROCESSUALE CIVILE INTERNAZIONALE* 1-9 (1954).

⁷¹ For an excellent recent treatise on some of these questions, see GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (1992).

⁷² *Id.*

powers of attorney, commercial law, procedural questions, fiscal matters, etc. In general, these international conventions attest to the valuable codificatory work which has been accomplished in this field of international conventional law in recent years.

Furthermore, in other legal disciplines, international procedural cooperation is being progressively developed and strengthened by means of a different mechanism: the negotiation and signing of a growing number of bilateral agreements. Nation-states are more comfortable becoming parties to multilateral instruments on private international law, or entering into bilateral agreements on specific international procedural questions, because these conventions clearly spell out legally binding rights and duties. Following this strategy, nation-states who become parties to a specific formal legal agreements dispel the uncertainties associated with non-legal notions encapsulated in the traditional terms of "comity" or *politesse*.

With the passage of the North American Free Trade Agreement (NAFTA) and the expected increase in the trade relations between the United States, Canada and Mexico, there is no question that International Procedural Law is bound to become the most prolific, dynamic and important area of private international law.

DESCRIPTION AND ANALYSIS OF THE 1988 AMENDMENTS TO THE FEDERAL CODE OF CIVIL PROCEDURE

As enacted in 1943, the Federal Code of Civil Procedure contained only three articles regulating matters pertaining to international procedural cooperation questions.⁷³ To correct this *lacuna* the Mexican legislator decided to create a new section in the Code—Book Fourth ("Libro Cuarto") formed by one Title, six chapters and 35 articles—, devoted entirely to these questions.⁷⁴ A description and analysis of each of the articles follows:

5.1 General provisions

ARTICLE 543 establishes this fundamental premise:

In matters of a federal nature, the international judicial cooperation shall be regulated by the provisions of this Book and other applicable laws, *save what is provided by the treaties and conventions to which Mexico is a party.*⁷⁵

⁷³ See *supra* note 5. The amending decree of 1988 repealed Articles 131, 302 and 428.

⁷⁴ International Procedural Cooperation, *supra* note 50.

⁷⁵ International Procedural Cooperation, *supra* note 50.

On this matter, Lic. Vázquez Pando is of the opinion that probably the latter part of this article was redundant, in light of the content of Article 133 of the Mexican Constitution;⁷⁶ however, he suggests that probably it was included “to underline the obligation of the [Mexican] judge to act in accordance with international law.”⁷⁷

For purposes of this article it should be understood that under Mexican law, questions of a federal nature comprise civil or criminal controversies involving “the enforcement and application of federal laws or of international treaties entered into by the Mexican State”, as provided by Article 104-A of the Mexican Constitution.⁷⁸ However, when those controversies “affect only particular interests” then, at the election of the plaintiff, ordinary courts in the States or in the Federal District may take cognizance of these cases.⁷⁹ So, it should be clear that in cases involving a private international law convention or a judicial cooperation treaty to which Mexico is a party, there will be a case of concurrent jurisdiction and the plaintiff may be able to choose between federal or ordinary courts.

ARTICLE 544 reads:

On international litigation matters, the Federal and state agencies shall be subject to the *special rules* provided in this Book.⁸⁰

In his message accompanying the bill, President De la Madrid underlined that the provisions in this chapter contain rules that regulate “the procedural situation of the federal and state governmental agencies, as well as its officials and employees” when they are sued in foreign courts, adding that those rules are in symmetry with “widely recognized international law principles.”⁸¹ In the years prior to the drafting of this bill, different entities of the government of Mexico had been sued before U.S. courts. This explains the rules contained in Articles 559 through 563 regarding the taking of evidence in possession of Mexican officials, but in particular ARTICLE 563 which provides:

In relation with Article 543, public officials of federal or state agencies shall be impeded to rendering statements in judicial proceedings and to give testimonial proof with respect to their functions as said officials. Such declarations should be made in writing when they involve private matters and when the competent national judge se orders.⁸²

⁷⁶ *Mex. Const.*, *supra* note 26, arts. 76, 133.

⁷⁷ See Vázquez Pando, *supra* note 24, at 91.

⁷⁸ *Mex. Const.*, *supra* note 26, art. 104-A.

⁷⁹ *Mex. Const.*, *supra* note 26, art. 104-A.

⁸⁰ International Procedural Cooperation, *supra* note 50, at 371.

⁸¹ See the text of the message (“Exposición de Motivos”) accompanying the presidential bill, reproduced in Vázquez Pando, *supra* note 24, at 556.

⁸² Vázquez Pando, *supra* note 24, at 374.

According to Lic. Siqueiros, this provision was included considering the litigiousness in the United States and the high number of suits filed against Mexican governmental agencies both at the federal and state levels in U.S. courts, in order to emphasize that "the public sector [in Mexico] is subject to the new procedural norms which incorporate the agreed principles at the international sphere."⁸³

ARTICLE 545 of this Chapter establishes that:

The processing by Mexican courts of service of process, taking of evidence or any other procedural acts of a merely formal nature, requested to produce effects abroad, shall not imply the definite recognition of the jurisdiction assumed by the foreign court, nor the obligation to enforce the judgment to be rendered in the corresponding proceeding.⁸⁴

This article was clearly inspired by Articles 2 and 9 of the Inter-American Convention on Letters Rogatory,⁸⁵ as pointed out by Prof. García Moreno.⁸⁶ Dr. Pereznieto adds that this provision was included to "facilitate the processing of said acts, avoiding commitments [on the part of the Mexican courts] which may limit them at a later stage. . . including the future enforcement of judgments rendered by a foreign court."⁸⁷

ARTICLE 546 basically eliminates the "legalization" requirement for foreign public documents to produce legal effects in Mexico when they are sent internationally by the official channels.⁸⁸ Any other documents—as it is customary in these cases—will have to be "legalized" by the competent Mexican authorities in conformity with the applicable laws.⁸⁹ Whereas in Mexico "the official conduct" is its *Secretaría de Relaciones Exteriores* (i.e.: Secretariat of Foreign Affairs, also

⁸³ See Siqueiros, *supra* note 4, at 18.

⁸⁴ International Procedural Cooperation, *supra* note 50, at 371.

⁸⁵ Art. 9 of this Inter-American Convention on Letters Rogatory provides: "Execution of letters rogatory shall not imply ultimate recognition of the jurisdiction of the authority issuing the letter rogatory or a commitment to recognize the validity of the judgement it may render or to execute it." *Documentos Oficiales*, Serie sobre Tratados No. 43, at 7, OEA/ser. A./21 SEPP (1975) (Organización de los Estados Americanos).

⁸⁶ See Victor Carlos García Moreno, *Derecho Confictual*, INSTITUTO DE INVESTIGACIONES JURÍDICAS, at 35 (1991) (Mex.).

⁸⁷ See Pereznieto Castro, *supra* note 11, at 341.

⁸⁸ International Procedural Cooperation, *supra* note 50, at 371.

⁸⁹ Article 546 of the Federal Code of Civil Procedure reads:

Foreign public documents, to produce legal effects in the Republic [of Mexico] should be presented duly "legalized" by the competent Mexican authorities in conformity with the applicable laws. No "legalization" shall be required for those documents sent internationally through the official channels.

International Procedural Cooperation, *supra* note 50, at 371. This article is in accord with Arts. 5 and 6 of the Inter-American Convention of Letters Rogatory, and Arts. 10 and 13 of the Inter-American Convention on the Taking of Evidence Abroad, according to García Moreno, *supra* note 86, at 35.

known by its acronym SRE), in other Central and South American countries this entity (referred to in the Inter-American conventions as “the central authority”) is generally identified with the Ministry of Justice.⁹⁰

ARTICLE 547 allows the service of summons (i.e., “Notificaciones”) and the taking of evidence in Mexico’s national territory, to produce legal effects abroad, at the request of the interested party, without having to obtain a letter rogatory from the foreign court.⁹¹

The last article in Chapter I, ARTICLE 548, introduced a procedural innovation when it provided:

The conduct of procedural acts in a foreign country to produce legal effects in suits before national courts may be entrusted to members of the Mexican Foreign Service by the competent courts; in these cases, the conduct of said acts shall be carried out in conformity with the provisions of this Code, within the limits allowed by international law.

In cases when it is allowed, said members may request the cooperation of the competent foreign authorities in the carrying out of the entrusted acts.⁹²

The cooperation on the part of the competent authorities of the foreign country should take place when the procedural acts to be carried out (i.e., “Práctica de diligencias”) by Mexico’s consular officials involve the enforcement of coercive actions, in the opinion of Dr. Perezniето.⁹³

5.2 Jurisdiction of the Mexican judge over procedural questions

According to the 1988 Federal Code of Civil Procedure, Mexican judges may be competent to exercise jurisdiction over three different types of procedural acts in matters involving international judicial cooperation, namely: the “performance of procedural acts of a merely formal nature,”⁹⁴ such as service of process, summonses or subpoenas abroad, and the taking of evidence (i.e., Arts. 556 and 557); the enforcement of foreign judgments (Art. 573); and, the recognition of the jurisdiction of the Mexican judge to enforce a foreign judgment in that country (Arts. 564-568).

ARTICLE 556 provides:

⁹⁰ See Perezniето Castro, *supra* note 11, at 341-42.

⁹¹ See Vázquez Pando, *supra* note 24, at 92.

⁹² International Procedural Cooperation, *supra* note 50, at 372.

⁹³ See Perezniето Castro, *supra* note 11, at 342.

⁹⁴ In Spanish, this expression reads, “. . . asuntos de mero trámite.” C.C.D.F. 2(a).

Mexican courts sending to a foreign country or receiving from abroad "international letters rogatory,"⁹⁵ shall transmit them in duplicate, keeping a copy as proof of what was sent, received and done.⁹⁶

ARTICLE 557 reads:

Service of process, summonses and subpoenas served from abroad to Federal or state agencies, shall be done through the competent federal authorities by reason of the domicile of said agencies.⁹⁷

ARTICLE 558 stipulates that the performance of these procedural acts, and those referred to in Article 545 (i.e.: Service of process and taking of evidence), shall follow the same principle, granting jurisdiction to the court of the domicile of the person to be served, of whom evidence is to be received or of the location of the asset,⁹⁸ as the case may be.

This principle also controls the jurisdiction of a judge regarding the enforcement of a foreign judgment, an arbitral award or a judicial resolution (Art. 573).

The recognition of jurisdiction by the Mexican judge to enforce in Mexico a foreign judgment is regulated by Chapter V of this Code.⁹⁹

On this matter, ARTICLE 564 provides:

The jurisdiction assumed by a foreign court regarding the enforcement of judgments shall be recognized in Mexico when said jurisdiction has been assumed based upon reasons compatible or similar to those in Mexico's domestic legislation, save when the case involves matters of the exclusive jurisdiction of Mexican courts.¹⁰⁰

ARTICLE 565 establishes that notwithstanding the content of Article 564, a Mexican court shall recognize the jurisdiction of a foreign court if, in its discretion, said foreign court took cognizance of the case only "to avoid a denial of justice due to the lack of a [foreign] competent court." In similar cases a Mexican court may also take cognizance of a given case.¹⁰¹ ARTICLE 566 provides that a Mexican court may recognize the jurisdiction of a foreign court chosen by agreement between the parties if, "given the circumstances and relations between them," said selection "does not *de facto* imply an impediment or denial of access of justice."¹⁰² However, ARTICLE 567 establishes that a forum selection clause "shall not be valid" when the selection in ques-

⁹⁵ International Procedural Cooperation, *supra* note 50, at 375.

⁹⁶ International Procedural Cooperation, *supra* note 50, at 373.

⁹⁷ International Procedural Cooperation, *supra* note 50, at 373.

⁹⁸ International Procedural Cooperation, *supra* note 50, at 373.

⁹⁹ Ch. V. comprises arts. 564-68.

¹⁰⁰ International Procedural Cooperation, *supra* note 50, at 374.

¹⁰¹ International Procedural Cooperation, *supra* note 50, at 374.

¹⁰² International Procedural Cooperation, *supra* note 50, at 374-75.

tion results “in the exclusive benefit of some but not of all the parties involved.”¹⁰³

The limit to the jurisdiction of a foreign court is found when the foreign judge encounters an area reserved exclusively to the jurisdiction of Mexican courts, in the following instances, according to ARTICLE 568: (1) in cases involving lands and waters located in Mexico’s national territory, including its subsoil, air space, the territorial sea and the continental shelf, whether with respect to realty or concession rights, or the leasing of said assets;¹⁰⁴ (2) marine resources in Mexico’s 200-nautical mile exclusive economic zone;¹⁰⁵ (3) acts of authority or pertaining to the internal régime of the Nation, including federal and state agencies; (4) the régime applicable to the Mexican embassies and consulates abroad, and their official functions; and (5) in the cases provided for other laws.¹⁰⁶

5.3 Letters rogatory

Traditionally, the word in Spanish “exhorto” has been utilized to refer to the official communication a judge in Mexico sends to another in the same country requesting the performance of some act within the ambit of the latter’s territorial jurisdiction. The term “carta rogatoria” refers to the same kind of communication when used at the international level. However, following the practice of the pertinent Inter-American conventions, the Federal Code of Civil Procedure uses both terms indistinctly.¹⁰⁷

ARTICLE 550 provides a general definition of letter rogatory:

Letters rogatory to be sent abroad shall be the official written communications containing a petition to carry out those procedural acts which are necessary in a given case. Said communications shall contain the necessary information, as well as the certified copies, notifications, copies of the complaint and any other pertinent annexes, as may be necessary. No other additional formal requirements shall be necessary regarding letters rogatory received from abroad.¹⁰⁸

¹⁰³ International Procedural Cooperation, *supra* note 50, at 375.

¹⁰⁴ Art. 42 of the Mexican Constitution enumerates the parts that comprise Mexico’s “national territory,” such as the thirty-one states; islands; the continental shelf, cays and reefs; the waters of the territorial seas and internal waters, and the air space, in accordance with international law.

¹⁰⁵ By a presidential decree published in the D.O. of February 6, 1976, President Luis Echeverría Alvarez amended art. 27 of the Mexican Constitution to establish a 200-nautical mile exclusive economic zone. See Jorge A. Vargas, *La Zona Económica Exclusiva de México*, EDRO-RIAL V. SIGLOS (1980).

¹⁰⁶ International Procedural Cooperation, *supra* note 50, at 375.

¹⁰⁷ See generally Federal Code of Civil Procedure, *supra* note 5.

¹⁰⁸ See generally Federal Code of Civil Procedure, *supra* note 5.

In symmetry with Article 4 of the Inter-American Convention on Letters Rogatory, and Article 11 of the Inter-American Convention on the Taking of Evidence Abroad, ARTICLE 551 establishes that letters rogatory may be transmitted by any of the four following manners: (1) by the interested parties, (2) through judicial channels, (3) by consular or diplomatic agents, or (4) by the competent authority of the State of origin or of the State of destination, as the case may be.¹⁰⁹ ARTICLE 552 reiterates that letters rogatory received from abroad through “official channels” need not be “legalized” and those sent to a foreign nation “shall only require the ‘legalization’ demanded by said country in its domestic legislation.”¹¹⁰ ARTICLE 553 simply states that any letter rogatory received from abroad written in a foreign language should be translated into Spanish.¹¹¹

Article 554 merits a special comment. It addresses the question of “Homologación” which is the formal procedure that must be initiated before a competent Mexican court when an international letter rogatory received from a foreign nation does not involve the performance of “procedural acts of a merely formal nature” but, rather, the coercive enforcement of specific acts, such as the repossession of an asset, the access to certain documents or files, the compliance of specific conditions, etc. Known at the international level as “Exequatur,” this procedure consists in the formal compliance in a court of law of those specific requirements established by the applicable Mexican domestic legislation to provide a foreign judgment, arbitral award or judicial resolution “with executive force” (i.e.: *para dotarlo de fuerza ejecutiva*) to be enforced coercively, if need be.

ARTICLE 554 reads:

*The international letters rogatory received from abroad shall require “homologación” when it needs to be coercively enforced against persons, assets or rights, in which case the provisions of the Sixth Chapter of this Book shall control. Letters rogatory regarding service of summons, taking of evidence and other procedural acts of a merely formal nature, shall be performed without “homologación.”*¹¹²

¹⁰⁹ See generally Federal Code of Civil Procedure, *supra* note 5, at 551.

¹¹⁰ See generally Federal Code of Civil Procedure, *supra* note 5, at 552.

¹¹¹ See generally Federal Code of Civil Procedure, *supra* note 5, at 553.

¹¹² *Supra* note 50, at 372-73 (translation and emphasis by the author). The expression: “. . . se diligenciarán sin formar incidente,” which appears in the original in Spanish at the end of this article, was simplified by the use of the word *homologación*. See Vázquez Pando, *supra* note 24, at 93; Siqueiros, *supra* note 4, at 27; Pereznieto Castro, *supra* note 11, at 341; and García Moreno, *supra* note 86, at 37.

Regarding this specific type of “*executive* letter rogatory,” in his statement accompanying the corresponding bill,¹¹³ President De la Madrid explained that since this international procedural documents “affect the assets and the rights” of the person targeted by this document, under Mexican law it is indispensable to initiate special judicial proceedings before a competent court, known as “Incidente de Homologación.” These proceedings require the serving of summons to the affected party in a personal manner, as well as the intervention of the competent District Attorney (i.e., Agente del Ministerio Público, either federal or local). The “Homologación” proceedings are regulated by Article 608 of the Code of Civil Procedure for the Federal District.¹¹⁴

Article 555 gives discretion to the court at the State of destination (i.e. Tribunal exhortado) to allow for the exceptional simplification of formalities or those different than the national ones, at the request of the judge of the State of origin or of the interested party, “provided this shall not result in prejudice to the public order and especially to the constitutional rights” [of a Mexican national]. The request in question should contain “the description of the formalities whose application is demanded for the enforcement of the letter rogatory.”¹¹⁵

This article follows rather closely the content of Article 10 of the Inter-American Convention on Letters Rogatory.¹¹⁶ Mexican authors agree that Article 555 is going to force judges in that country to distinguish between mandatory and discretionary rules; a distinction with which Mexican judges “are not too familiar with.”¹¹⁷ Dr. Vázquez Pando is of the opinion that, to favor international cooperation, “it is preferable for Mexican judges to adopt formalities different than the national ones” when this does not result in the violation of any constitutional rights.¹¹⁸

5.4 Taking of Evidence

In general Chapter IV of the new Fourth Book of this Federal Code contains two different sets of “special rules:”¹¹⁹ (a) those designed to facilitate the taking of evidence (Arts. 560 and 562); and

¹¹³ See Vázquez Pando, *supra* note 24, at 556; see also Federal Code of Civil Procedure, *supra* note 5, art. 608 (for additional information on the “Incidente de Homologación”).

¹¹⁴ C.P.C.D.F. art. 608, *supra* note 51, at 144-45.

¹¹⁵ C.P.C.D.F. art. 608, *supra* note 51, at 373.

¹¹⁶ See Inter-American Convention on Letters Rogatory, *supra* note 85, at 7-8.

¹¹⁷ See Vázquez Pando, *supra* note 24, at 94.

¹¹⁸ See Vázquez Pando, *supra* note 24, at 94.

¹¹⁹ See Vázquez Pando, *supra* note 24, at 94-96.

(b) those included to limit it (Arts. 561, 559 and 563). Other questions on this matter are subject to the applicable rules contained in other chapters of this Book.

According to Prof. García Moreno,¹²⁰ prior to the enactment of these amendments, both the Mexican government or some of its "parastatal entities" were subject to frequent and excessive requests on discovery proceedings ordered by U.S. courts which were deemed to be "absurd and impossible to be complied with." ARTICLE 559 was designed by the Mexican legislator to avoid these excesses. This article provides:

Federal and state agencies, and their public officials, are enjoined from exhibiting documents or copies of documents contained in official archives in Mexico under their control; cases involving personal matters, [access to] personal documents or archives when permitted by the law, and when this is so ordered by a Mexican court while enforcing a letter rogatory, are excepted.¹²¹

Consequently, Mexican courts cannot order the inspection of archives which are not "public archives", except as authorized by the applicable Mexican domestic legislation.¹²²

These limitations are inspired by the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad¹²³ of 1984, and The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters¹²⁴ of 1970.

So, ARTICLE 560 establishes that in cases of taking of evidence in suits filed abroad, "the embassies, consulates and members of the Mexican Foreign Service shall act in conformity with the treaties and conventions to which Mexico is a party, as well as what is provided by the Mexican Foreign Service Organic Act, its Regulations and other applicable provisions."¹²⁵ In cases of the taking of a testimony or a declaration to be given legal effects in a suit filed abroad, ARTICLE 562 provides that persons in these situations "may be interrogated orally and directly in accordance with Article 173" of the same Federal Code of Civil Procedure.¹²⁶ In these cases, it must be proven

¹²⁰ See García Moreno, *supra* note 86, at 37; see also Siqueiros, *supra* note 4, at 21.

¹²¹ International Procedural Cooperation, *supra* note 50, at 373.

¹²² See C.F.P.C. art. 561, para. 2.

¹²³ See Diario Oficial, *supra* note 56 and corresponding text.

¹²⁴ Signed at The Hague on 18 March 1970; published in the D.O. of Feb. 12, 1990.

¹²⁵ International Procedural Cooperation, *supra* note 50, at 373-74.

¹²⁶ International Procedural Cooperation at 374. Article 173 of this Code provides:

To examine witnesses, written questionnaires shall not be necessary. Questions shall be formulated verbally and directly to the witness by each party and their attorneys. The first one to start the interrogatory will be the party who requested this type of proof and, thereafter, all the other parties. In cases in which a delay may interfere with the result of the investiga-

before the competent court (i.e., Tribunal del desahogo) that the facts alluded to in the interrogatory are related to the case and that there is a specific request by the interested party or by the competent authority of the State of origin (i.e., Autoridad exhortante).

The rules imposing limitations may be divided into two categories: general (Art. 561) and special (Arts. 559 and 563).¹²⁷

ARTICLE 561 provides:

The obligation to exhibit documents and things in relation with suits filed abroad does not include exhibiting documents or copies of documents identified by their generic characteristics.¹²⁸

The second general limitation is found in the final paragraph of the same article. It provides that Mexican judges "cannot order, nor conduct an inspection of archives to which the public has no access, save in the cases permitted by the [Mexican] national laws."¹²⁹

Article 559 contains a specific limitation imposed upon government officials, at the federal and state level, as discussed above. ARTICLE 563 adds the following: "those government officials shall also be enjoined from rendering declarations in judicial proceedings and in the taking of evidence regarding their functions as said officials." However, "in cases involving private matters, and when this is so ordered by the national competent judge, said declarations shall be done in writing."¹³⁰

5.5 Enforcement of foreign judgments

In the opinion of Dr. García Moreno, among the *lacunae* presented by the Mexican procedural legislation was the omission that in order for a Mexican judge to enforce a foreign judgment, valid jurisdiction on the part of the foreign judge was a *sine qua non* condition.¹³¹ On this point, Lic. Siqueiros adds that Article 605 of the Code of Civil Procedure for the Federal District, in force until early 1988, did not provide anything on this matter.¹³² ARTICLE 564 was created by the Mexican legislator in 1988 to take care of this matter, thusly:

tion, the court, at its discretion, may allow that once the answer is given, the other parties may formulate pertinent questions, or the court itself may proceed to formulate them.

Chapter VI, Title IV of the First Book of the Federal Code of Civil Procedure, comprised of Articles 165-87, addresses "Witnesses' Declarations" (Prueba Testimonial); International Procedural Cooperation, *supra* note 50, at 308-11.

¹²⁷ See Vázquez Pando, *supra* note 24, at 95.

¹²⁸ *Supra* note 50, at 374 (Translation by the author).

¹²⁹ *Supra* note 50, at 374.

¹³⁰ *Supra* note 50, at 374.

¹³¹ See García Moreno, *supra* note 86, at 38.

¹³² See Siqueiros, *supra* note 4, at 22.

The jurisdiction assumed by the foreign court shall be recognized in Mexico regarding the enforcement of a judgment, when said jurisdiction has been assumed by reasons resulting compatible or analogous with the national law, save in those cases which are of the exclusive jurisdiction of the Mexican courts.¹³³

It should be evident that this article was clearly inspired by Article 2, (d), of the Inter-American Convention on Jurisdiction on the International Sphere for the Extraterritorial Validity of Foreign Judgments.¹³⁴ Pursuant to ARTICLE 565, the Mexican court is to recognize the jurisdiction of the foreign judge when s/he "assumed said jurisdiction to avoid a denial of justice, for the lack of a competent jurisdictional organ."¹³⁵

ARTICLE 566 recognizes the validity of a forum selection clause when the court mutually chosen by the parties "does not imply a *de facto* impediment or denial of justice."¹³⁶ This provision should be read in conjunction with ARTICLE 567 which declares said selection "not valid" when it results "in the exclusive benefit of a party but not of all the parties involved."¹³⁷

In relation with this article, it needs to be pointed out that its content has provoked "an extensive debate" in Mexico's legal community. The limitation imposed by its text has been interpreted "as a restriction to the autonomy of the contractual will of the parties to designate competent courts."¹³⁸ Basically, two different interpretations have been advanced in relation with this provision. First, that its text follows "at least the *animus* of Article 1, paragraph (d)"¹³⁹ of the Inter-American Convention on Competence in the International Sphere for the Extraterritorial Validity of Foreign Judgments.¹⁴⁰ This article provides:

¹³³ International Procedural Cooperation, *supra* note 50, at 374. Chapter V of the Federal Code, entitled *Competence regarding enforcement of judgments* is formed by Articles 564-568.

¹³⁴ See *supra* note 22 and corresponding text. At the time of ratification of this convention, Mexico declared that: ". . . [T]his instrument shall be applied to determine the validity of jurisdiction in the international sphere referred to in Article 2d) of the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards, without prejudice to Mexico's prerogative to apply this Convention independently" (Information provided by the OAS, Secretariat for Legal Affairs, Washington, D.C.).

¹³⁵ *Ibid.* See also *supra* note 102 and corresponding text.

¹³⁶ International Procedural Cooperation, *supra* note 50 at 374-75; see also *supra* note 104. In civil law countries, a forum selection clause is generally referred to as "the territorial enlargement of the competence of a judge" (i.e.: *Prórroga territorial de la competencia del juez*).

¹³⁷ *Supra* note 104.

¹³⁸ See Siqueiros, *supra* note 4, at 23-24.

¹³⁹ See García Moreno, *supra* note 86, at 39.

¹⁴⁰ See *supra* note 22 and corresponding text.

...the requirement of jurisdiction at the international sphere is considered to be satisfied when the jurisdictional organ of a State Party which has rendered a judgment has had jurisdiction in accordance with the following provisions: d) With respect to actions derived from commercial contracts at the international sphere in which the parties have agreed in writing to submit to the jurisdiction of a State Party where the judgment was rendered, unless and until said jurisdiction had not been established in an abusive manner and there had been a reasonable connection with the object of the controversy.¹⁴¹

In this regard, Lic. Siqueiros advances the idea that “[P]erhaps the Mexican legislator wanted to enunciate the same principle when it was provided that the right to select should operate to the benefit of all the parties involved and not in the exclusive benefit of only one of them.”¹⁴² For Vázquez Pando, a forum selection clause is therefore considered “abusive” in the following two cases: (1) when it leads to a denial of justice; and, (2) when it benefits only one of the parties but not all of them.¹⁴³

The second interpretation is predicated upon the idea that with the text of Article 567 the Mexican legislator “wanted to *limit* the negotiating position of the stronger economic party, such as it happens in contracts of adhesion in which the weaker party has to agree with all the conditions imposed to it, including the submission to foreign laws and courts.”¹⁴⁴

This interpretation merits a special comment. In recent years, with the proliferation of “time-share” condominiums in certain coastal areas of Mexico—in particular, Acapulco, Can Cún, Huatulco, Puerto Vallarta and San José del Cabo—the Mexican corporations who own or manage these condominiums have shown a special preference for the inclusion of these forum selection clauses in their time-share contracts. In general, these clauses establish not the application of the laws of Mexico, where the condominium facilities are located but, instead, “the application of the laws and courts of Cayman Islands,”¹⁴⁵ for instance, in the event any judicial controversy arises from the interpretation or fulfillment of the pertinent Membership Agreement.

This abusive practice has been so widespread over the past few years, and the complaints of U.S. tourists so intense and frequent, that

¹⁴¹ International Procedural Cooperation, *supra* note 50.

¹⁴² See Siqueiros, *supra* note 4, at 24.

¹⁴³ See Vázquez Pando, *supra* note 24, at 97.

¹⁴⁴ See Siqueiros, *supra* note 4, at 24.

¹⁴⁵ See, e.g., *Villas Del Mar/Villas Del Palmar, Contract of Membership*, [n.d.] (On file with Northwestern Journal of International Law & Business).

its solution required the official intervention of Mexico's Secretariat of Tourism (Sectur), who continues to struggle with this problem.

Therefore, the final determination of whether the forum selection clause is to be considered to the exclusive benefit of only one of the parties, shall be a matter for the judge's discretion.

The final article in this chapter, Article 568, as discussed earlier, establishes the cases in which the Mexican courts have "exclusive jurisdiction."¹⁴⁶ Private international law clearly recognizes the validity of the judge's decision to refuse the enforcement of a foreign judgment in violation of the exclusive jurisdiction of the State of destination; this is the tenor of Article 4 of the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments.¹⁴⁷

The legal régime established by the Federal Code of Civil Procedure for the enforcement of judgments is the one which received the greatest attention from the Mexican legislator, as contained in Articles 564-568 and 569-577. The following two initial statements should be made in relation with this important section: first, that most of the new provisions in the Code appear to have been inspired by (a) the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards,¹⁴⁸ and (b) by the few and concise provisions contained in the Code of Civil Procedure for the Federal District prior to the 1988 amendment, in particular Articles¹⁴⁹ 604-608. And second, that the Federal legislator finally rescued an area which was left for years, in a *de facto* manner, in the hands of the local code.¹⁵⁰

ARTICLE 569 provides:

Judgments, private arbitral awards and other foreign jurisdictional resolutions shall have validity and be recognized in the Republic [of Mexico] in everything which is not contrary to the internal public order in the terms established by this code and other applicable laws, save what is provided by the treaties and conventions to which Mexico is a party.¹⁵¹

Pursuant to this provision, when a Mexican judge is to enforce a foreign judgment, private arbitral award or any "other foreign jurisdictional resolution" rendered by a foreign judge in the State of origin

¹⁴⁶ See *supra* notes 105-07 and corresponding text.

¹⁴⁷ Article 4 of this Convention provides: The extraterritorial effect of a judgement may be refused when said judgement has been rendered invading the exclusive jurisdiction of the State Party in which it is invoked.

¹⁴⁸ See *supra* note 21.

¹⁴⁹ Code of Civil Procedure for the Federal District, *supra* note 6.

¹⁵⁰ See Siqueiros, *supra* note 4, at 25.

¹⁵¹ See International Procedural Cooperation, *supra* note 50, at 375.

which is a party to a treaty or convention that is in force in Mexico,¹⁵² said judge shall act in strict compliance of the pertinent international instrument. Mexican judges should refer to the provisions of the Federal Code only when said international instruments are inadequate because of omissions or *lacunae*.¹⁵³

The second paragraph of the same article reads:

Regarding judgments, awards or jurisdictional resolutions *to be utilized only as proof before Mexican courts*, it shall suffice for those documents to comply with the necessary requirements to be considered as authentic.¹⁵⁴

This paragraph alludes to the distinction between foreign documents of an “executive nature” and those involving “the performance of procedural acts of a merely formal nature.”¹⁵⁵

As this article provides, foreign documents “to be utilized only as proof” in Mexico simply require to prove their authenticity. Therefore, they should be duly legalized by the diplomatic or consular authorities and be translated into Spanish, when written in a foreign language different than Spanish.¹⁵⁶

A. Requirements to Enforce a Foreign Judgment

In general, these requirements fall within two large categories: procedural and substantive.

Substantive requirements have to do, for example, with the exercise of proper and valid jurisdiction by the foreign judge (known in Mexico as “Competencia de origen”). In this respect, it is of the essence to carefully review the criteria established by those provisions included in Chapter V of the Federal Code of Civil Procedure (Arts. 564-568), discussed above.

Article 571 adds the conditions that must be complied with to be provided with “executive force” when foreign judgments are to be en-

¹⁵² Regarding foreign judgments, as of this writing, Mexico is a party to: (1) the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979 in *Diario Oficial*, *supra* note 60; (2) the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments of 1984 in *Diario Oficial*, *see supra* note 61. On *private arbitral awards*, Mexico is a party to: (1) the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on June 10, 1958 (D.O. of June 22, 1971); (2) the Inter-American Convention on International Commercial Arbitration signed in Panama on Jan. 30, 1975 (D.O. of Feb. 9, 1979); and, (3) the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards in *supra* note 61.

¹⁵³ *See Siqueiros, supra* 4, at 26.

¹⁵⁴ *See International Procedural Cooperation, supra* note 50, at 375 (emphasis added).

¹⁵⁵ *See C.C.D.F.* 2(a).

¹⁵⁶ *See C.C.D.F.* 131-32.

forced in Mexico coactively, in the proceedings known as "Exequatur" or "Homologación." ARTICLE 571 provides:

The judgments, private arbitral awards and jurisdictional resolutions rendered abroad, may have "executive effect"¹⁵⁷ if they comply with the following conditions:

I. That the formalities provided for in this code regarding letters rogatory from abroad, have been satisfied;

II. That they have not been rendered as a consequence of the exercise of a realty action;

III. That the judge or sentencing court had jurisdiction to take cognizance and decide the matter in accordance with the recognized rules in the international sphere compatible with those adopted by this code;

IV. That the defendant had been summoned or serviced¹⁵⁸ in a personal manner in order to assure him/her "a fair trial,"¹⁵⁹ and the exercise of his/her defenses;

V. To be *res judicata* in the country that rendered them, or that there is no ordinary recourse against them;

VI. That the action generating them is not the subject of another suit still pending between the same parties in Mexican courts, and in which suit the Mexican court has prevailed, or at least the letter rogatory had been transmitted and delivered to the Secretariat of Foreign Affairs or to the authorities of the State where the service of summons is to take place. This same rule is to be applied when a definite judgment is rendered;

VII. That the obligation requested to be carried out is not contrary to the public order in Mexico; and

VIII. That the requirements to be considered as authentic are complied with.¹⁶⁰

Notwithstanding the fulfillment of the enumerated conditions, the [Mexican] court may deny the enforcement if it is proven that in the country of origin foreign judgments or awards are not enforced in similar cases.¹⁶¹

It is important to underline this last paragraph. Even when each of these conditions are fully complied with, this does not automatically guarantee the enforcement of the foreign judgment. The Mexican judge is empowered to deny the requested enforcement when it is proven, at his/her discretion, that similar foreign judgments are not enforced in the country of origin. The basis for this outcome is the application of the so-called "Principle of Negative Reciprocity." Un-

¹⁵⁷ The original expression in Spanish reads: ". . .podrán tener fuerza de ejecución si cumplen con las siguientes condiciones:" (emphasis added).

¹⁵⁸ In Spanish, it reads: "Que el demandado haya sido notificado o emplazado en forma personal. . ." (emphasis added).

¹⁵⁹ "Garantía de audiencia" in Spanish.

¹⁶⁰ See C.C.D.F. 131-32.

¹⁶¹ See International Procedural Cooperation, *supra* note 50, at 376 (emphasis added).

like “positive reciprocity” which requires valid proof that the country of origin does permit the enforcement of similar kind of judgments in an exercise generally involving costly legal research and time, the principle of negative reciprocity is considered to be less cumbersome and more practical.

However, the inclusion of the last paragraph in Article 571 has produced some commentaries among Mexican specialists. Although the notion of reciprocity continues to attract some criticisms, Vázquez Pando clarifies that this notion was attenuated in said article by three factors: (i) it is not necessary to prove the existence of reciprocity before a Mexican judge to obtain the enforcement, but to prove the lack of it to enjoin such enforcement; (ii) the absence of reciprocity is only relevant when applied to similar cases; and (iii) the Mexican judge is not obligated, but rather “empowered” (i.e.: facultado), to deny the enforcement.¹⁶²

ARTICLE 572 establishes:

The letter rogatory of the judge or court of the country of origin should be accompanied of the following documentation:

- I. [An] authentic copy of the judgment, award or jurisdictional resolution;
- II. [An] authentic copy of the records (i.e.: constancias) proving that the conditions in paragraphs IV and V of the previous article were complied with;
- III. The translations to the Spanish language which are necessary; and
- IV. That the party enforcing the judgment (i.e.: el ejecutante) has given a domicile to receive judicial notices in the same location as the court (i.e.: tribunal de la homologación).¹⁶³

It should be understood that, pursuant to ARTICLE 572, the Mexican court having jurisdiction to enforce a foreign judgment is the court of the domicile of the defendant or, in the absence of it, the court of the place where his/her assets are located in the [Mexican] Republic.¹⁶⁴

ARTICLE 574 enumerates the requirement to be complied with in conducting the proceedings to provide a foreign judgment with “executive force,” known in Mexico as “*Incidente de Homologación*.” Both the plaintiff and the defendant should be personally served with the summons, giving each of them nine working days to advance their defenses or exercise their corresponding rights. If there is evidence, a special hearing shall be scheduled to admit only that evidence authorized by the court. A public prosecutor (i.e., Agente del Ministerio

¹⁶² See Vázquez Pando, *supra* note 24, at 98; Siqueiros, *supra* note 4, at 27; García Moreno, *supra* note 87, at 42-43.

¹⁶³ See International Procedural Cooperation, *supra* note 50, at 376-77.

¹⁶⁴ International Procedural Cooperation, *supra* note 50, at 377.

Público) is to take part in the proceedings, to exercise any pertinent rights. The decision rendered by the judge in these proceedings is appealable both is the enforcement is denied or granted.¹⁶⁵

It deserves to be underlined that, in accordance with ARTICLE 575, neither the trial court (i.e., tribunal de primera instancia), nor the court of appeals are allowed to examine or decide over the justice or injustice of the [foreign] judgement, its rationale or the factual or legal grounds, but only limit their role to examining the authenticity of said judgement and determining whether it should be enforced in conformity with the applicable Mexican domestic legislation.¹⁶⁶ The court where the "Homologación" proceedings take place retains jurisdiction to decide on any questions associated with the coercive enforcement of the foreign judgement, such as repossession, deposit, sale at a public auction, etc. in the intelligence that the monies resulting from that auction should be made available to the foreign judge.¹⁶⁷

The Mexican legislator introduced an interesting innovation: when the foreign judgement or award cannot be enforced in its entirety, the Mexican court "may admit its partial validity, at the request of the interested party."¹⁶⁸

OTHER AMENDMENTS TO THE FEDERAL CODE

First, it should be pointed out that the amending decree of 1988 repealed Articles 131, 302 and 428 of the Federal Code of Civil Procedure.¹⁶⁹ These articles referred to public and private documents, rules applicable to letters rogatory and enforcement of foreign judgements, respectively, as discussed earlier.¹⁷⁰

A. Accumulation of Suits

ARTICLE 72 of the Federal Code establishes the rules that control the accumulation of two or more suits. However, the final paragraph of this provision stipulates that regarding suits taking place outside Mexico "accumulation shall not proceed."¹⁷¹ This paragraph reflects the respect given to "the reciprocal independence of the judicial powers of each country."¹⁷²

¹⁶⁵ International Procedural Cooperation, *supra* note 50, at 377.

¹⁶⁶ International Procedural Cooperation, *supra* note 50, at 377.

¹⁶⁷ See Article 576, International Procedural Cooperation, *supra* note 50, at 377.

¹⁶⁸ See Article 577, International Procedural Cooperation, *supra* note 50, at 377.

¹⁶⁹ See D.O. of Jan. 7, 1988.

¹⁷⁰ See *Nueva Legislación*, *supra* note 5, at 295, 316, 269.

¹⁷¹ See International Procedural Cooperation, *supra* note 50, at 295.

¹⁷² See Siqueiros, *supra* note 4, at 14.

B. Proof of Foreign Law

In its original version (prior to the 1988 amendment), Article 86 provided that "Only the facts are subject to proof, as well as the uses and customs upon which the law is established."¹⁷³ The decree of 1988 added a new provision, ARTICLE 86 BIS, which basically stipulates that:

The court shall apply foreign law in the same way as it would be applied by the judges or courts of the State whose law is applicable, without prejudice that the parties may allege the existence and content of foreign law. To inform itself about the text, validity, meaning and scope of foreign law, the [Mexican] court may utilize pertinent official reports that may be requested from the Mexican Foreign Service, as well as to schedule and receive that evidence it considers necessary or that it has been offered by the parties.¹⁷⁴

It is clear that this provision was inspired by Article 2 of the Inter-American Convention on General Rules of Private International Law¹⁷⁵ and Article 2 of the Inter-American Convention on Proof and Information on Foreign Law.¹⁷⁶

Mexico made a reservation with respect to the first of the above-mentioned conventions, in the following terms:

Mexico interprets Article 2 to mean that it creates an obligation *only when the existence of the foreign law has been proved before the judge or authority or its provisions are made known to them in some other way.*¹⁷⁷

Mexican authors appear to be in disagreement on the implications to be derived from this reservation. Lic. Siqueiros,¹⁷⁸ for example, is of the opinion that the application of the principle contained in Article 2 was limited by this reservation, in the sense that the Mexican judges "shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable" but only when the existence of said foreign law "has been proved before the judge," as

¹⁷³ See *Nueva Legislación*, *supra* note 5, at 297.

¹⁷⁴ See *International Procedural Cooperation*, *supra* note 50, at 297. This same principle is reproduced literally in the new text of Article 284-Bis of the Code of Civil Procedure for the Federal District, as amended in 1988. For a comment on this provision, see Vargas, *supra* note 45.

¹⁷⁵ See *supra* note 58 and corresponding text (Translation and emphasis by the author). Article 2 of this convention reads: "Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the State whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked," taken from *THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS AND OTHER DOCUMENTS*, *supra* note 53, at 486.

¹⁷⁶ Signed at Montevideo on May 8, 1979 (D.O. of Apr. 29, 1983).

¹⁷⁷ Organization of American States, Secretariat for Legal Affairs: General Information on the Treaty, B-45 (Fax in the possession of the author).

¹⁷⁸ See Siqueiros, *supra* note 4, at 16.

provided in the new Article 86 Bis. Lic. Vázquez Pando, however, indicates that the Mexican judge "is now under the obligation to do research on foreign law and to apply it in a correct manner." Furthermore, this author adds that "the inadequate application of foreign law may be invoked as a violation at the appellate level and even in an "Amparo" suit."¹⁷⁹

SUMMARY OF THE MAJOR AMENDMENTS TO MEXICO'S FEDERAL CODE OF CIVIL PROCEDURE

These amendments are expected to generate increased attention among business persons, government officials, judges and, in particular, private practitioners, because of the profound impact they are expected to produce in international civil litigation between the United States and Canada, on the one hand, and Mexico, on the other. This is particularly significant considering that due to Mexico's absolute territorialism¹⁸⁰—which lasted since 1932 until 1988—there were virtually no cases involving the application of foreign law decided by Mexican courts during this period. Needless to say that the entering into force of the North American Free Trade Agreement (NAFTA),¹⁸¹ coupled with the unprecedented and drastic changes that President Salinas de Gortari's administration has made to the legal system of that country,¹⁸² including the gradual but steady recovery of its economy,¹⁸³ shall no doubt trigger an increase in international litigation, especially between the United States and Mexico. Therefore, a summary of these amendments may be a valid exercise for practical purposes:

1. In Mexico, international civil litigation on federal matters is regulated by the Federal Code of Civil Procedure (FCCP, Arts. 543-577), save what is provided in treaties and international conventions to which Mexico is a party;

¹⁷⁹ See Vázquez Pando, *supra* note 24, at 90.

¹⁸⁰ See *infra* the beginning of this article.

¹⁸¹ NAFTA was approved by the Canadian Parliament, and was thereafter passed by the U.S. Congress on November 17, 1993 by a vote of 236 to 200. The Mexican Senate gave its approval on November 24, in compliance with Article 76, paragraph I, of Mexico's 1917 Federal Constitution. The trilateral agreement entered into force on January 1, 1994.

¹⁸² Since he took office on December 1st, 1988, Mexican President Carlos Salinas de Gortari has sent to Congress some 100 legislative bills, resulting in major amendments to federal statutes, federal codes, regulations and the Constitution itself, which has been amended six times until now. These changes have dramatically altered Mexico's legal system, putting it in closer symmetry to the U.S. legal system.

¹⁸³ From 1989 to 1992 Mexico's economy grew at an annual rate of 3.4%. See BANK OF MEXICO, ANNUAL REPORT 37 (1993).

2. Mexican governmental agencies at the federal and state levels are subject to the provisions of said code in cases involving international litigation (Art. 544);
3. The performance by Mexican courts of procedural acts of a merely formal nature requested by a foreign court does not imply recognition of the jurisdiction assumed by said foreign court, nor the obligation to enforce the judgment to be rendered in the corresponding proceedings (Art. 545);
4. To produce legal effects in Mexico, foreign public documents should be duly legalized (and translated into Spanish, when necessary), except when transmitted through official channels (Art. 546);
5. The performance of procedural acts to take place outside Mexico may be carried out by the members of the Mexican Foreign Service, who may request the assistance of the competent foreign authorities when performing "procedural acts of an executive nature" (Art. 548);
6. International letters rogatory should be regulated by the provisions of the FCCP, save what is provided in international conventions to which Mexico is a party (Art. 549);
7. An international letter rogatory may be transmitted to the competent court by (a) the interested parties, (b) the court, (c) the proper official channels and (d) the "competent authority" of the State of origin or the requesting State. In Mexico, the competent authority is the Secretariat of Foreign Affairs (SRE) (Art.551);
8. International letters rogatory requesting the performance in Mexico of procedural acts of an "executive nature" must strictly comply with the procedural requirements of Mexico's domestic legislation, known as "Incidente de homologación." Procedural acts of an executive nature (i.e.: actos dotados de fuerza ejecutiva que impliquen ejecución coactiva sobre personas, bienes o derechos) are those to be enforced coactively upon persons, assets or rights located in Mexico (Arts. 554 and 571);
9. A Mexican court who receives an international letter rogatory from abroad may decide to simplify the formalities in exceptional cases, provided this does not injure the public order or any constitutional rights (Art.555);
10. Service of process, summonses and subpoenas to federal or state governmental agencies, received from outside Mexico, shall be served by the competent federal authorities by reason of the domicile of said agencies (Art. 557);
11. Mexican federal and state governmental agencies, and their officials, are enjoined from giving access to official documents or

archives, under their control; save personal cases involving private documents (Art. 559);

12. The obligation to exhibit documents or things in suits taking place outside Mexico, shall not be honored by the Mexican courts when said documents are identified only by their “generic characteristics” (Art. 561);

13. No private archives may be inspected in Mexico save when Mexico’s domestic legislation so provides (Art. 561);

14. The taking of testimonial evidence or declarations to take effect outside Mexico, may be conducted orally and directly by the interested parties (Arts. 562 and 171);

15. Public officials of federal and state agencies of the government of Mexico are enjoined from giving declarations or rendering testimony regarding their official functions (Art. 563);

16. The jurisdiction of a foreign court is recognized in Mexico for purposes of enforcing a judgment when said jurisdiction is assumed by reasons compatible or similar to those in Mexico’s domestic legislation, save in cases subject to the exclusive jurisdiction of Mexican courts (Arts. 564 and 566); however, a Mexican court does recognize the jurisdiction of a foreign court when, in its discretion, the foreign court took cognizance of the case (i) to avoid a denial of justice or (ii) because there was no competent jurisdictional organ (Art. 563);

17. The jurisdiction assumed by a foreign court who has been designated by the interested parties is recognized by a Mexican court when said forum selection does not imply an impediment or denial of justice (Art. 566);

18. Foreign judgments, private arbitral awards and other judicial resolutions shall be recognized as valid in Mexico pursuant to the FCCP and other applicable laws, save what is provided in international conventions to which Mexico is a party (Art. 569);

19. In cases regarding the enforcement of a foreign judgment, the Mexican competent court shall be the court of the domicile of the defendant (i.e.: domicilio del ejecutado) or, in its defect, the court of the location of the assets in the Republic of Mexico (Art. 573);

20. The “Incidente de homologación” must be initiated with the serving of a personal summons to both the plaintiff and the defendant, and the intervention of a public prosecutor (i.e.: Agente del Ministerio Público), among other procedural formalities (Arts. 574 and 571);

21. A Mexican court may neither examine or decide anything about the substance of the foreign judgment, nor about its rationale or factual or juridical bases; said court should simply limit itself to examine

the authenticity of the foreign judgment and whether it should be enforced, in conformity with Mexican law (Art. 575);

22. Matters regarding re-possession, deposit, appraisal, sale at a public auction, or any other pertaining to the coercive enforcement of a foreign judgment, shall be resolved by the same Mexican court competent in the "Incidente de homologación"; any monies resulting from the public auction shall be made available to the foreign judge (Art. 576);

23. When a foreign judgment may not be enforceable in its entirety, the competent Mexican court may determine to enforce it only in part, at the request of an interested party (Art. 577);

24. The joinder of suits shall not proceed in Mexico in relation with suits taking place outside that country (Art. 72); and,

25. Mexican judges are expected to "apply foreign law in the same way as it would be applied by the judges or courts of the State whose law is applicable, without prejudice that the parties may allege the existence and content of foreign law". In this regard, the Mexican court, to inform itself about "the text, validity, meaning and scope of foreign law" may utilize any pertinent evidence as well as special reports especially prepared by the members of the Mexican Foreign Service (Art. 86 Bis).

SUMMARY AND CONCLUSIONS

It may be too early to draw up any conclusions regarding the manner in which these unprecedented legislative changes are being interpreted and applied by Mexican courts to specific cases involving international litigation. There is no doubt that the passage of time will contribute to a cautious but gradual development of jurisprudence and doctrine in this field.

The entering into force of the North American Free Trade Agreement on January 1st, 1994 constitutes the single major act which is expected to accelerate the development of jurisprudence and doctrine in this area not only between the contracting parties, but among a number of European and Asian nations. However, purely from the viewpoint of the substance of the provisions which are now included in Mexico's Federal Code of Civil Procedure, as a result of the 1988 amendments, the following conclusions may be advanced.

First, the 1988 amendments to the Federal Code of Civil Procedure put an end to almost six decades of the most extreme application of a territorialist doctrine in Mexico. This unprecedented change in the legislative history of that country was brought about when Mexico

realized the inadequacy of continuing with its policy of absolute territorialism. This policy forced Mexico into adopting an isolationist attitude, away from the codifying developments which were taking place in the field of private international law at the global and regional levels. It was not until the 1980s that Mexico finally decided to change this sterile isolationism, rapidly becoming a party to some 18 international conventions in the area of conflict of laws.

Since these conventions became legally binding on Mexico, pursuant to Article 133 of its 1917 Constitution, the country proceeded to facilitate the application of these norms and rules of international conventional law by means of incorporating them directly into Mexico's domestic legislation. This was accomplished by the Mexican federal legislature through the 1988 amendments. These legislative changes modernized not only the Federal Code of Civil Procedure but also three other important codes: (a) the Civil Code for the Federal District, on substantive matters affecting conflict of laws rules; (b) the Code of Civil Procedure for the Federal District, on procedural questions involving international cooperation at the local level in Mexico City; and (c) the Code of Commerce, on questions dealing with international commercial arbitration.

Second, the recent amendments to the Federal Code of Civil Procedure—and in particular the addition of the new “Libro Cuarto” (Fourth Book), composed of 35 articles—establishes the most systematic and detailed legal régime in the history of Mexico in the area of international procedural cooperation. This régime is formed by two components: (i) Mexico's domestic legislation, as contained in the pertinent provisions of the above-mentioned four codes and other applicable statutes; and (ii) the applicable international conventional law in this field. Under Mexican constitutional law, international conventional law occupies a higher level than the domestic legislation of the country. This legal régime not only contributes to modernizing Mexico's domestic legislation but also helps to fill out the considerable *lacunae* which remained untouched in this area for a number of decades. It should be recalled that, prior to the 1988 amendments, the Federal Code of Civil Procedure contained only three concise provisions on conflict of laws questions.

Third, from a substantive viewpoint, most of the provisions included in the Federal Code of Civil Procedure were literally copied from the corresponding regional conventions, in particular the Inter-American Conventions (1) on Letters Rogatory, (2) on the Taking of Evidence Abroad, (3) on General Rules of Private International Law

and (4) on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards. The preference in favor of these hemispheric instruments *vis à vis* global conventions may be explained based upon historic, political, socio-economic and legal considerations. Furthermore, Mexico has been an active participant in the formulation of several of these conventions. Although some of the norms and rules extracted from these regional conventions have been in existence for almost two decades, their recent inclusion in Mexico's Federal Code may be justified because of the generalized perception among the contracting parties that they continue to represent validly codified principles (at least at the regional level).

Fourth, recently, Mexican legal experts have been of the opinion that their country has been exposed, as a defendant, to some of the extremes that discovery may lead to in a civil litigation case before a U.S. court. It is their impression that in these suits, Mexico has been subjected to the performance of acts—such as the inspection of documents or archives—which under Mexican law standards are considered to be somewhat unfair or abusive. These unpleasant experiences no doubt convinced the Mexican federal legislature to utilize the domestic legislation of their country as a “protective shield” against this kind of evidentiary or procedural acts, otherwise legal under U.S. civil procedural law.

This explains the inclusion in the Federal Code of Civil Procedure of a number of procedural measures clearly designed to “shelter” or “protect” Mexican governmental agencies at the federal and state levels, including their officials, from performing certain procedural acts requested by foreign courts. Such measures are generally designed to produce legal effects in judicial proceedings taking place outside of Mexico, such as a suit before a federal court in the United States. Unquestionably, no Mexican judge would authorize the performance of this kind of evidentiary act (i.e.: access to or inspection of official documents or archives not open to the general public, the taking of a deposition from a Mexican governmental official, etc.) since they would appear to be contrary to Mexican law or injurious to the public order of Mexico.

Fifth, another innovation contained in this code involves the members of the Mexican Foreign Service. These individuals are allowed to prepare special reports to inform Mexican judges about the content and meaning of foreign law. They are additionally permitted to carry out certain procedural acts in the country of their destination,

at the request of a competent Mexican judge, when said acts are to produce their legal effects in Mexico.

Sixth, rather than relying upon the traditional but ambiguous notions of international *politesse* and reciprocity, Mexico's legal régime regulating matters of international procedural cooperation is openly based upon legal principles and norms derived from international conventional law at the bilateral, regional or global scope. This approach appears to be modern, pragmatic and legally reliable, in symmetry with the latest trends in this field.