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# Conciliation of Laws in the NAFTA Countries

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# Conciliation of Laws in the NAFTA Countries

H. Patrick Glenn\*

Symeon Symeonides has brought to his work on the codification and reporting of private international law a vast knowledge of the efforts of many states, and of many authors, in bringing about international legal harmony. His work on the codification of Louisiana conflicts rules reflects this background, in its insistence that interest analysis be conducted in an even-handed manner through the process of comparative impairment.<sup>1</sup> This essay is also an effort towards international legal equilibrium, and it is a pleasure to dedicate it to Professor Symeonides and to his ongoing work. Its thesis is that the North American Free Trade Agreement (NAFTA)<sup>2</sup> should require us to think of North American private law in terms of conflict avoidance rather than in terms of conflict. How can we help to bring about a conciliation of the private laws of the NAFTA countries?

## I. NAFTA AND THE EUROPEAN UNION

NAFTA came into force on January 1, 1994 and immediately brought about comparison with the integrating mechanisms of the European Union.<sup>3</sup> As a free trade arrangement, NAFTA removes tariff and non-tariff barriers to trade in goods between the member countries, without creating a common, external tariff wall. The European Union, as an integrating customs union, creates such a common, external tariff wall and, as well, creates a complex set of institutions to insure uniformity or harmony of national European laws. These include the European Council and Commission (having extensive legislative authority through enactment of pan-European, private law Directives) and the European Court of Justice, charged with overseeing the application of the basic norms of the Union. The next stage of European legal integration would be the creation of a European "judicial space," in which the judgments of the courts of each country would be automatically

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1. See Symeon C. Symeonides, *Private International Law Codification in a Mixed Jurisdiction: The Louisiana Experience*, 57 *RebelsZ* 460 (1993); Symeon C. Symeonides, *Les grands problèmes de droit international privé et la nouvelle codification de Louisiane*, 81 *Rev. critique de droit international privé* 223 (1992); Symeon C. Symeonides, *Problems and Dilemmas in Codifying Choice of Law for Torts: The Louisiana Experience in Comparative Perspective*, 38 *Am. J. Comp. L.* 431 (1990). See also La. Civ. Code art. 3515 which provides: "Except as otherwise provided in this Book, an issue in a case having contacts with other states is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue."

2. See the North American Free Trade Agreement, 32 *I.L.M.* 289 (ch's. 1-9), 605 (ch's. 10-22), (1993).

3. See, e.g., Frederick M. Abbott, *Integration Without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 *Am. J. Comp. L.* 917 (1992); Frederick M. Abbott, *The North American Free Trade Agreement and Its Implications for the European Union*, 4 *Transnat'l L. & Contemp. Probs.* 119 (1994).

recognized and executable in the other countries.<sup>4</sup> In contrast, it has been said that NAFTA is characterized by an "institutional meagerness," which eventually leaves the playing field to the discretion of the national legal institutions and processes of each of the Member States.<sup>5</sup>

To what extent, however, does a common market require a common law? It may depend on the common market. The European market is composed of sovereign, unitary states in which judicial review at the national level has been the exception rather than the rule. There has often been no internal recourse against legislative over-reach. The law of the European continental States, those of the original Common Market, is also in principle codified law, such that differences in national codification can be easily seen as conflicts of laws. The conflicts are clearly visible in the opposition of bright line, codified rules. Conflict is less apparent, however, in the casuistic case law of common law jurisdictions. Thus, the European common market is one in which a need for pan-European institutions could be seen as evident, given the absence of any other means of reconciling national legislative wills.

The North American situation is different. All three states are federal or confederal,<sup>6</sup> in character, such that in each state there are judicial institutions which have long arbitrated between competing jurisdictions. The territorial reach of the legislation of the states and provinces of North America is thus, necessarily, limited by the national constitutions. Much of North America also adheres to the common law tradition and this inevitably reduces conflicts of laws, either through the commonality of shared rules or through the submerging of conflicts in the mass of decisional law. All three North American jurisdictions, moreover, constitute internal common markets which have functioned with a diversity of internal laws.

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4. See *L'espace judiciaire européen va voir progressivement le jour*, *Le Monde*, selection hebdomadaire (Paris), Oct. 23, 1999, at 4. This measure would essentially eliminate the significance of national boundaries for the recognition of judgments, a step beyond "Full Faith and Credit" as it is known in the national laws of North America. There is no pan-North-American equivalent, however, to either "Full Faith and Credit" or a transnational judicial space.

5. Noemi Gal-Or, *Private Party Direct Access: A Comparison of the NAFTA and the EU Disciplines*, 21 *B. C. Int'l. & Comp. L. Rev.* 1, 6-7 (1998). NAFTA does provide for dispute resolution techniques arising under the Agreement itself, notably in relation to disputes over anti-dumping or countervailing duty measures, investment, and general interpretation of the Agreement. See also James R. Cannon, Jr., *Resolving Disputes Under NAFTA Chapter 19* (Shepard's/McGraw-Hill, 1994); J.C. Thomas & Sergio López Ayllón, *NAFTA Dispute Settlement and Mexico: Interpreting Treaties and Reconciling Common and Civil Law Systems in a Free Trade Area*, *Can. Y.B. Int'l. L.* 75 (1995); Michael S. Valihora, *NAFTA Chapter 19 or the WTO's Dispute Settlement Body: A Hobson's Choice for Canada?*, 30 *Case W. Res. J. Int'l. L.* 447 (1998); David López, *Dispute Resolution Under NAFTA: Lessons from the Early Experience*, 32 *Tex. Int'l. L.J.* 163 (1997).

6. The United States of America and Mexico are both federations; Canada at its inception was considered a Confederation and is still often designated as one. In recent years, the language of federation has, however, become more frequent in Canada. For the consequences of the original Confederal model on the Canadian court structure, see H. Patrick Glenn, *Divided Justice? Judicial Structures in Federal and Confederal States*, 46 *S.C. L. Rev.* 819 (1995); and for the relations between U.S. state and Canadian provincial structures, see H. Patrick Glenn, *Reconciling Regimes: Legal Relations of States and Provinces in North America*, 15 *Ariz. J. Int'l & Comp. L.* 255 (1998).

The "institutional meagerness" of NAFTA may therefore be seen as an indication of continuing faith in the adaptability of federal structures and in informal processes of harmonization, and not simply as hostility or indifference to NAFTA objectives.

The range of conflicts in North America will be exacerbated, however, by the operation of NAFTA. Under NAFTA, there is an increase in trans-border activity, which will have the effect of raising conflicts which have thus far remained latent. The weight of the civil law has also been increased in North America, since now Mexico, Louisiana and Quebec find themselves important participating units in a larger structure, as opposed to separate or isolated civil law jurisdictions. NAFTA also presents a challenge in bringing together three different economies, those of the world's largest economic power (the United States of America), a developing country (Mexico) and a middle power in transition from a resource-based economy to a technology-based economy (Canada). There is, therefore, ample room for private law conflicts, if we think in terms of conflicts, and no NAFTA institutions for their resolution. In these circumstances, what are the means of conflict avoidance? They can be found at the level of legal structures and at the level of legal techniques. Taken together, they may provide an efficient process of continental conflict avoidance.

## II. STRUCTURES OF CONFLICT AVOIDANCE

Since the nationalization of western law in the nineteenth and twentieth centuries, western lawyers have been trained to think in terms of conflict of laws rather than in terms of their conciliation. Hence, we have an entire discipline of conflicts of laws, which accepts the existence of conflict as a given, and resolves each conflict by declaring a winner. There has been great debate, and rightly so, as to how this process can best be justified. Professor Batiffol thus traced the philosophical foundations of private international law, or conflicts of laws, to the allegedly systemic character of national laws, and conflict is necessarily found in the competing, national claims to exclusivity.<sup>7</sup>

This nineteenth century attitude towards sources of law, however, is changing. There appear to be two primary reasons for this. One is found in the process of regionalization, two examples of which are now provided by Europe and North America. The European process of regionalization has resulted in the creation of pan-European law, such that conflicts are necessarily reduced through the creation of pan-national sources of law. There has been less of this in North America, but the process of regionalization in North America has shifted the emphasis of legal thought, in some measure at least, away from national sovereignty towards efficiency, harmony and prosperity in regional trade.

The second reason for a shift away from nineteenth century ideas is the large process of informal harmonization of laws which has been taking place in the world. There are many features of this. Most significantly, for North American purposes, is the increasingly visible commensurability between civil and common law

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7. Henri Batiffol, *Aspects philosophiques du droit international privé* 16, 24 (1956).

traditions.<sup>8</sup> In the nineteenth century, in France, the *Société de législation comparée* was created because it was not thought possible to compare the codified law of Europe with the case law of the common law world. Realistic comparison was possible only between comparable sources of law and, given the civilian tradition, only legislation provided these comparable sources. Today, jurisprudence or case law has grown in importance in civil law jurisdictions while common law jurisdictions are filled with legislation. In structural terms, the common law has abandoned what was for centuries its most characteristic institution, the writ system, and now expresses itself in terms of substantive law (whether legislative or jurisprudential in origin) which can be applied by a judge.<sup>9</sup> There are no longer major differences in sources of law; there are only more minor differences in the specific content of rules.

Regionalization and harmonization have been accompanied, moreover, by corresponding changes in professional structures and legal education. The trans-border law firm is a new phenomenon in legal history and places legal practitioners, in a sense, above national sources of law.<sup>10</sup> The intellectual resources of these firms are rooted in the laws of many jurisdictions, allowing assessment and comparison of national laws within a single professional unit. Formal or superficial differences in law may thus be identified as such, given deeper knowledge of the entire normative base of each jurisdiction and its actual application. In the context of NAFTA, these larger professional structures are now accompanied by an increased measure of individual mobility, given NAFTA's endorsement of the concept of the Foreign Legal Consultant, authorized to practice the law of their home jurisdiction in another, host jurisdiction.<sup>11</sup> Legal education is less ambulatory or comparative in North America than in Europe, where the ERASMUS program has led to great mobility of law students, in formal programs of exchange over national borders. In North America there is now, however, a North American Consortium for Legal Education;<sup>12</sup> a program of student mobility funded by the NAFTA governments for

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8. This extends to private international law itself. See Mathias Reimann, *Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century*, 39 Va. J. Int'l. L. 571, 572 (1999) ("quiet harmonisation," "it just happens"); and for international convergence beyond western jurisdictions, see K. Pistor & P. A. Welooos, *The Role of Law and Legal Institutions in Asian Economic Development 1960-95* at 1, 7 (1999) (overall convergence of six Asian economies, and with West, notably in reduction of the role of State, greater emphasis on "rule-based procedures").

9. H. Patrick Glenn, *La civilisation de la common law*, Rev. int'l. droit comp. 559 (1993).

10. See generally H. Patrick Glenn, *Private International Law and the New International Legal Professions, in Conflicts and Harmonization*[:] *Mélanges en l'honneur d'Alfred von Overbeck* at 31 (1990); Roger J. Goebel, *Professional Qualification and Educational Requirements for Law Practice in a Foreign Country: Bridging the Cultural Gap*, 63 Tul. L. Rev. 443 (1989).

11. Annex 1210.5 (Professional Services, Section B - Foreign Legal Consultants), NAFTA, *supra* note 2; and see Sydney M. Cone, III, *International Trade in Legal Services*[:] *Regulation of Lawyers and Firms in Global Practice*, ch. 2 (1999); H. Patrick Glenn, *The Regulation of Transboundary Legal Practice*, in *Contemporary Law 1998 Droit contemporain*[:] *Canadian Reports to the 1998 International Congress of Comparative Law*, Bristol, 1998, 247 (1999); Julie Barker, *The North American Free Trade Agreement and the Complete Integration of the Legal Profession: Dismantling the Barriers to Providing Cross-Border Legal Services*, 19 Hous. J. Int'l. L. 95 (1996).

12. The Consortium, created at the initiative of Dean Stephen Zamora of the Houston Law

which law students are eligible;<sup>13</sup> as well as a wider phenomenon of "Global Law Schools."<sup>14</sup>

The structures within which lawyers work and are trained will, therefore, be more open and fluid in the next century than in the immediately preceding ones. The systemic and exclusive character of national law will be less evident. It will be more possible to overlook and avoid conflicts whose resolution is not necessary for efficient resolution of a case. Whether this will be done, however, is dependent on more precise legal techniques, notably those of the pleading and proof of foreign law.

### III. TECHNIQUES OF CONFLICT AVOIDANCE: PLEADING AND PROOF OF FOREIGN LAW

Private international law became very important in the nineteenth century, when law came to be thought of, in many jurisdictions, exclusively as state law. International cases did not obviously belong to a given state, yet the fundamental equality of all states meant that a neutral method had to be found to allocate international cases to a single national law. This basic philosophy favored the development of bilateral choice-of-law rules, whose function was the allocation of cases according to neutral connecting factors, and which constituted the principal choice-of-law technique for most of the nineteenth and twentieth centuries in Europe and in North America. If this view is taken to its logical conclusion, which has inevitably occurred, it follows that private international law must intervene in every international case, which must necessarily be allocated to a national law before examination of the merits may begin. Different language and arguments are used to justify this conclusion: the judge must apply choice of law rules *d'office*, or *von Amts wegen*; foreign law must be respected as law, not fact; straightforward application of the law of the forum in an international case represents unacceptable bias against foreign law. These are praiseworthy sentiments, and have resulted in a number of civil law jurisdictions, including Switzerland and Germany, accepting the principle that private international

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Center, is composed of law schools of nine North American Universities: Houston, the University of Arizona and George Washington in the U.S.A.; McGill, Dalhousie and Ottawa in Canada; and the Instituto de Investigaciones Juridicas, Panamericana and the Instituto Tecnologico de Monterrey in Mexico. See North American Consortium on Legal Education (visited Aug. 17, 2000) <<http://www.law.uh.edu/nacle>>.

13. In the United States, see The Fund For Improvement of Post Secondary Education (visited Aug. 17, 2000) <<http://www.ed.gov/offices/OPE/FIPSE/NAFTA/inst.html>>.

14. See David S. Clark, *Transnational Legal Practice: The Need for Global Law Schools*, 46 Am. J. Comp. L. 261 (Supp. 1998); and on further North American initiatives in particular law schools, see Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 Ariz. J. Int'l. & Comp. L. 401, 420-23 (1995).

law rules must be obligatorily applied by the judge in all cases.<sup>15</sup> Jurisdictions accepting this principle have also developed sophisticated techniques for ascertaining the content of foreign law, notably resort by judges to opinion-writing by researchers of national or university foreign law institutes.

Such insistence on the equal character of national laws results, however, in a presumption of conflict of laws. Allocation must precede any determination of whether the national laws in presence are even different. Allocation is undertaken because it is presumed in private law matters that states are interested in the application of their law to international cases, regardless of the law in question and regardless of whether it actually differs from any other law in presence. So an expensive and time-consuming second-order process of choice of law must take place in all international cases. This is the logic of nineteenth century thinking which concentrates on notions of national sovereignty. It is not the logic of regionalization or free trade areas, it is suggested, in which an emphasis is placed on reducing the importance of national boundaries and other impediments to cross-border circulation of goods and products. In the context of regionalization and free trade, conflicts of laws must be dealt with, but it is contrary to the objectives of free trade to presume that conflict exists in all cases. This is particularly the case when structures exist, as presently in North America, which both limit the reach of national laws and allow assessment, notably in trans-border law firms, of the extent of actual conflict. What further justification can be offered for refusing, in an obligatory manner, to allocate cases to a single national law in all instances?

The traditional common law response to this question is to treat foreign law as fact, which does not exist unless it is pleaded and proved.<sup>16</sup> From the perspective of private international law, this position may be seen as an historical accident, since it flowed from a time in which English courts in principle applied only the *lex fori* and entrusted its application to the jury, such that any deviation from this process had to result from a different plea and different proof.<sup>17</sup> In the result, however, the common law was able to avoid a presumption of conflict of laws. It allowed parties to implicitly agree on application of the law of the forum, through failing to plead and prove foreign law whenever they saw no significant difference

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15. For Swiss law see art. 16 of the Federal Law on Private International Law of Dec. 18, 1987 ("The contents of the foreign law shall be established by the authority on its own motion"); and for general acceptance of the principle in Germany, see Jan Kropholler, *Internationales Privatrecht* 504 (1990). For further references see the comparative colloquium of the Institut de droit comparé, Université de Strasbourg, *Les problèmes actuels posés par l'application des lois étrangères*, 23 *Annales de la Faculté de droit de Strasbourg* (1998).

16. In English law, see *Fremoult v. Dedire*, 1 P. Wms 429, 24 Eng. Rep. 458 (1718); *Mostyn v. Fabrigas*, 1 Cowp. 161, 98 Eng. Rep. 1021 (1774), and for reception into U.S. law by Chief Justice Marshall see *Church v. Hubbard* 6 U.S. (2 Cranch) 187, 236 (1804); Eugene F. Scoles & Peter Hay, *Conflict of Laws* 418 (2d ed. 1992).

17. On the historical development of choice of law in England, see Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, in 3 *Law: A Century of Progress* 342 (1937); and on the relation of this historical development to pleading and proof of foreign law, see H. Patrick Glenn, *Harmonization of law, foreign law and private international law*, 1 *Eur. Rev. Private L.* 47, at 61-62 (1993).

between the national laws in presence. This conclusion continued to be based on historical reasons, however, and these reasons did not address nineteenth century concerns about equal treatment of states. They also resulted in procedural anomalies, such as the determination of foreign law being left to the jury and being the object only of limited appellate review.<sup>18</sup> How have these traditional civil and common law positions been received in North American jurisdictions?

U.S. law appears faithful to the original common law model, while having removed some of the procedural anomalies. Foreign law is widely described as fact, required to be pleaded and proved by the parties, though its determination is now described by Federal Rule 44.1 "as a ruling on a question of law."<sup>19</sup> This extends appellate review and removes the determination of foreign law from the jury. The U.S. common law position has, however, been vigorously criticized on grounds similar to those raised in civil law jurisdictions. Judge Roger Miner thus argued in 1995 that "[i]t is strange indeed for a court to consciously apply the wrong law, based on the position taken by the parties, while acknowledging a discretionary authority to apply the right law."<sup>20</sup> Judge Miner would apparently impose a duty on the court not only to determine the content of foreign law pleaded but not proven by the parties, but also to insist on application of foreign law. This duty would arise "as soon as it becomes apparent to the court that foreign law governs" and notice by a party would not be essential "to bring the issue into the case."<sup>21</sup> Judge Miner's position is an eloquent plea for the reception of foreign law in U.S. federal courts but, with respect, the price paid for such reception is unacceptably high. Foreign law can be received into federal courts in all cases where it is necessary to do so, i.e., where a genuine conflict exists which has been identified and insisted upon by one of the parties. In other cases, within the NAFTA area, insistence on a presumption of conflict, accompanied by obligatory determination and application of foreign law, is neither required nor justified. U.S. case law appears to continue to support this view.<sup>22</sup> There would, therefore, be no interest on the part of states in having their law applied to an international private law case, where such law is not invoked by one of the parties. This is most evident where the law in question is suppletive in character, as for most of the law of contracts, for example. It would also be the case, however, for private law rules which in a domestic cadre are considered imperative.

The U.S. position is replicated in Canadian common law provinces, which have always adhered to the classic English position. Given the virtual absence of juries in Canadian private law practice, the Canadian position also parallels the reformed

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18. Scoles & Hay, *supra*, note 16, at 418-19.

19. 28 U.S.C. Rule 44.1 (1992); and *see* Scoles & Hay, *supra*, note 16, at 418 (indicating that judicial notice of foreign law is now permitted in some states); Lawrence W. Newman & David Zaslowky, *Litigating International Commercial Disputes* 153-55 (1996) (indicating court may undertake its own investigation of the content of foreign law, once it is pleaded).

20. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 *Am. J. Comp. L.* 581, 583 (1995).

21. *Id.* at 584.

22. Miner, *supra* note 20.



U.S. law in terms of determination of foreign law by the judge and the extent of appellate review.<sup>23</sup>

The civil law jurisdictions in North America are those which are most sympathetic, in structural terms, to the treatment of foreign law as law and not fact. These jurisdictions have not been through the common law history of having to displace the jury's use of local law by pleading and proof of foreign law. Historically, however, the civil law jurisdictions of North America have not followed the model of those continental jurisdictions which have insisted on obligatory application of private international law rules. The clearest example of this appears to be Louisiana, which has never deviated from practice elsewhere in North America and whose present codification of conflicts of laws contains no provision which would oblige a judge, on the judge's own initiative, to apply choice of law rules not invoked by the parties.<sup>24</sup>

Quebec has also declined the obligatory character of private international law rules, following in this both the common law and the historic French position on the question.<sup>25</sup> Quebec's new Civil Code, which came into force on January 1, 1994, codifies both the law of proof and private international law. During the preparation of the new Quebec Civil Code, however, the French Court of Cassation in a series of decisions gave some support to the obligatory character of private international law rules, though eventually refusing to take such a categorical position.<sup>26</sup> Whether these developments have influenced Quebec law can best be seen in reproducing the relevant articles of the new Quebec Civil Code:

2807. Judicial notice shall be taken of the law in force in Quebec.

2809. Judicial notice may be taken of the law of other provinces or territories of Canada and that of a foreign state, provided it has been pleaded. The court may also require that proof be made of such law; this may be done, among other means, by expert testimony or by the production of a certificate drawn up by a jurisconsult.

Where such law has not been pleaded or its content cannot be established, the court applies the law in force in Québec.

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23. See generally J.-G. Castel, *Canadian Conflict of Laws* 147 (3d ed. 1994).

24. For discussion of the general provisions on judicial notice of the Louisiana Evidence Code, which also do not deviate from the historical North American position, see Frank L. Maraist, *Evidence and Proof*, 19 *Louisiana Civil Law Treatise Series* 45-48 (1999).

25. The French position was crystallized in the *Bisbal* decision of the French Court of Cassation; Cass. Ie. civ., May 12, 1959, D. Jur. 1960, 610, note Philippe Malaurie; J.C.P. 1960, II, 11733, note Henri Motulsky, which allowed Italian nationals to divorce in France by invoking French law at a time when divorce was prohibited in Italian law.

26. See, for deviation from the *Bisbal* jurisprudence, Cass. Oct. 11, 1988 and Oct. 18, 1988, *Clunet* 1989, 349, note D. Alexandre; cf. Cass. Dec. 4, 1990, *Clunet* 1991, 371, note Dominique Bureau; Cass. Nov. 5, 1991 and Dec. 10, 1991, 81 *Revue Critique de Droit International Privé* 1992.314, note Horatia Muir Watt; and for the ongoing debate Jan. 27, 1998, J.C.P. 1998, II, 10098; May 26, 1999, J.C.P. 1999, II, 10192.

Article 2807 may be read as consistent with the obligatory character of private international law rules, of which judicial notice shall (not may) be taken. However, article 2809 clearly indicates that application of foreign law is subject to the condition of its having been pleaded; absent pleading of foreign law, the law of the forum is applied. Article 2807 thus obviates pleading and proof by the parties of Quebec rules of private international law. These rules are not, however, of obligatory application. Their application is reserved for the case in which application of foreign law has been pleaded by a party. A presumption of conflict of laws thus remains absent from Quebec law; conflict avoidance remains possible.

Mexican private international law underwent significant reform in 1988 prior to Mexican adherence to NAFTA. Most pertinent are amendments to the Federal Code of Civil Procedure and the Code of Civil Procedure for the Federal District of Mexico, both of which adopt similar texts in relation to the application of foreign law in Mexico. Article 86 of the Federal Code of Civil Procedure provided in the past that: "Only facts shall be subject to proof: law shall be subject to proof only when based on foreign law, practices, customs or binding precedents."<sup>27</sup> Following the 1988 amendments the reference to foreign law was deleted from article 86 and a new article 86 bis was added, which provides:

The court shall apply foreign law in the same way as it would be applied by the judges of the State the law of which is applicable, without prejudice to the parties being able to plead the existence and content of the foreign law.<sup>28</sup>

For information on the text, validity, meaning and scope of foreign law, the court may make use of official reports, notably those it may solicit from the Mexican Foreign Service Ministry, as well as preparing and admitting the proof which it considers necessary or which are offered by the parties.<sup>29</sup>

The precise effect of these articles is not clear and Mexican doctrinal authority appears divided. Professor Perezniето considers that they require Mexican rules of private international law to be applied in an obligatory manner by the Mexican judge; he cites continental models to similar effect and gives examples of how the Mexican judge can obtain information on the content of foreign law.<sup>30</sup> Professor Arellano insists on the ongoing necessity of proof by lawyers, which would represent the dominant position on this question in the world.<sup>31</sup> Professor Ovalle concludes that proof of foreign law is no longer the exclusive preserve of the parties, though they retain the possibility of offering such proof.<sup>32</sup> Given the

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27. The translation is that of Fernando Alejandro Vazquez Pando in *New Trends in Mexican Private International Law*, 23 Int'l Law 995, 1003 (1989).

28. Translation of Vazquez Pando, *supra* note 27, at 1004. Article 14 of the Federal Civil Code was also amended in a similar manner in 1988.

29. Author's translation.

30. Leonel Perezniето Castro, *Derecho internacional privado* 277-81 (5th ed. 1991).

31. C. Arellano Garcia, *Derecho internacional privado* 910-15 (11th ed. 1995).

32. J. Ovalle Favela, *Derecho procesal civil* 133 (6th ed. 1994).

apparent ambiguity of the texts, and the NAFTA context, it would seem appropriate to limit the amendments to the question of proof of foreign law, opening the possibility for the court to take judicial notice of foreign law or to request a formal opinion on its content, without requiring obligatory application of Mexican rules of private international law in all cases.

#### IV. CONCLUSION

North American jurisdictions have historically resisted the conclusion that rules of private international law are of obligatory application by the court. This view was taken in the nineteenth century by some continental jurisdictions as a means of ensuring equal respect for foreign law. The consequence of this view is the creation of a presumption of conflict of laws, such that the choice of law process is obligatorily imposed on the parties in all cases which have a significant international element. Such a presumption, it is suggested, is not justifiable in the cadre of NAFTA in twentieth or twenty-first century North America, in which a presumption of harmony of laws is more appropriate. Such a presumption of harmony justifies invocation of private international law rules only when they are invoked by one or both of the parties to the dispute. Old law is sometimes most appropriate for new circumstances.