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Mexican Law in Texas Courts and The Role of Judicial Interaction

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Mexican Law in Texas Courts and the Role of Judicial Interaction

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This thesis explores issue of whether Texas courts are currently capable of applying and willing to apply Mexican law. Texas courts and legal practitioners have historically been unwilling to trust or to apply Mexican law. This thesis explores the doctrines and legal rules that Texas courts have used to avoid Mexican law in the past and into the present. It then examines the few cases in which Texas courts have applied Mexican law to determine that even when applying Mexican law, the courts express uncertainty or an unwillingness to rely entirely on Mexican law.

This thesis then describes recent reforms to the Mexican judiciary that should obviate some of Texas courts' major concerns. However, Texas courts still do not willingly or comfortably apply Mexican law. This thesis concludes by suggesting that the comparative law doctrine of judicial dialogue, or communication among judges, offers the best chance for Texas judges to trust Mexican law enough to apply it. The paper ends with some proposals to implement this exchange.

TABLE OF CONTENTS

Chapter 1: Introduction.....	1
Chapter 2: The Legal Framework for Application of Mexican Law in Texas Courts before 1979.....	5
A. The Traditional Approach to Choice of Law in the United States.....	6
B. The Traditional Approach to Choice of Law in Texas	8
C. The Dissimilarity Doctrine	9
D. Summary and Conclusions.....	11
Chapter 3: The Legal Framework for Application of Mexican Law in Texas Courts Since 1979	12
A. Development of a new approach to Choice of Law in the United States.....	12
B. Adoption of the new approach in Texas	15
C. Rejection of the Dissimilarity Doctrine	20
D. Applying the New Approach to Torts That Occur in Mexico.....	23
E. Summary	28
Chapter 4: The Ability of Texas Courts to Apply Mexican Law	30
A. Determining the Content of Mexican Law in Federal Courts.....	30
B. Determining the Content of Mexican Law in State Courts in Texas.....	32
C. Summary	41
Chapter 5: The Mexican Legal System as a Possible Explanation for Judicial Reluctance to Apply Mexican Law.....	43
A. Perceived Inadequacies of the Mexican Legal System prior to 1994.....	44
B. Judicial Power and Independence in Mexico Since 1994.....	48
C. Accessibility of Mexican Legal Materials Since 1994.....	55
D. Summary	58
Chapter 6: The Need for Judicial Interaction.....	59
A. The Examples of Louisiana and Puerto Rico.....	60
B. Lessons from Louisiana and Puerto Rico—Judicial Interaction	66
C. Judicial Dialogue in Comparative Law	67
D. Efforts at Judicial Interaction Between Texas and Mexico.....	69
E. Summary	73
Chapter 7: Conclusion.....	75
BIBLIOGRAPHY	77
VITA	84

CHAPTER 1: INTRODUCTION

In recent years, courts in Latin America have shown an increased willingness to look at the decisions of courts in other countries as a tool for interpreting Latin American law.¹ Advocates of this approach both in Latin America and more generally have argued that this kind of “judicial dialogue” can significantly contribute to the development of national law. Sir Basil Markesinis has written that judicial dialogue may improve domestic law “as a source of inspiration, especially when the national law is dated, unclear, or contradictory.”² Anne-Marie Slaughter writes of a future “[n]ot of U.S. courts, French courts, German courts, Japanese courts, and associated international tribunals, but simply adjudicative entities engaging in resolving disputes, interpreting and applying the law as best they can,”³ a vision not of global courts but of national courts around the globe working together. Judicial interaction is the key to these visions.

However, despite these authors’ arguments and visions, U.S. courts have generally been reluctant to engage in a similar international dialogue. Although the U.S. Supreme Court has cited foreign judicial decisions in a few recent cases,⁴ a number of U.S. judges and scholars have warned that this trend is inappropriate because the

¹ See, e.g., Corte Suprema de Justicia [CJSN], 7/7/1992, “Ekmekdján v. Sofovich,” 315 F.C.S. 1792 (Arg.) (looking to U.S. law reviews and U.S. Television Code regulations to determine how Argentina should decide a case regarding the right of reply); see generally ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 237-261 (2006) (discussing Latin American courts’ willingness to apply both international and other nations’ laws).

² Sir Basil Markesinis and Jörg Fedtke, *The Judge as Comparatist*, 80 *TUL. L. REV.* 11, 17 (2005).

³ Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT’L L.* 1103, 1114 (2000).

⁴ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 577-79 (2005) (deciding that the death penalty for juveniles is “cruel and unusual” relying on the “overwhelming weight of international opinion” and the United Kingdom’s law in particular); *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing a European Court of Human Rights case as support for invalidating a Texas statute making “certain intimate sexual conduct” between two persons of the same sex a crime).

Supreme Court should not “impose foreign moods, fads, or fashions on Americans.”⁵ Because foreign law does not bind U.S. courts, Justice Scalia warned that courts used foreign law only when it agreed with their thinking and ignored it otherwise, which he called “not reasoned decisionmaking, but sophistry.”⁶ Judge Richard Posner has also noted that using foreign law is costly and undemocratic: costly since judges would need to expend extra time and effort to use unfamiliar foreign law and undemocratic because the foreign judges do not answer in any way to the American people.⁷

This thesis does not directly address the debate on whether U.S. courts should more actively engage in judicial dialogue with foreign courts to help determine the content of U.S. law. Instead, it seeks to contribute to that debate by exploring the largely neglected but essential issue of whether U.S. courts are currently capable of engaging in this type of dialogue.⁸ I do so by looking at the way in which U.S. courts have dealt with foreign law in disputes involving contracts and torts⁹ that are filed in Texas courts but have important connections with Mexico. In this type of case, U.S. law may in fact *require* both state and federal courts to apply Mexican law. Because of the Texas’s proximity to Mexico, courts in Texas have dealt with this type of cases more often, and for a longer period of time, than courts in most other states. Analysis of these cases is therefore likely to offer important lessons regarding the ability of U.S. courts to

⁵ *Lawrence*, 539 U.S. at 598 (Scalia, J., *dissenting*).

⁶ *Roper*, 543 U.S. at 627.

⁷ Richard Posner, *No Thanks, We Already Have Our Own Laws*, LEGAL AFFAIRS (July-August 2004), available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp (last visited July 31, 2010).

⁸ See, e.g., Markesinis, *supra* note 2, at 17-18 (explicitly noting that he is not considering foreign law as applicable law when the rules of choice of law require it).

⁹ A tort is “a wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction.” *Merriam Webster*, <http://www.merriam-webster.com/dictionary/tort>.

understand and apply Latin American law and steps that courts may need to take to improve their capacity to do so.

In Chapter 2 of this paper, I will lay out the legal framework that operated in Texas courts prior to 1979. As I explain in this chapter, traditional rules on “choice of law” required courts in Texas to apply Mexican law in cases where either a tort (i.e. a legal wrong) or a contract took place in Mexico. However, Texas courts adopted a legal doctrine that permitted them to dismiss any case that satisfied these requirements, based on the view that Mexican law was too “dissimilar” to Texas law, and that its justice was too uncertain.

In Chapter 3, I will explain the legal framework that has applied in the state of Texas since 1979. In that year, Texas abandoned the Dissimilarity Doctrine and adopted a new approach requiring courts to apply the law of a foreign country whenever that country has the “most significant relationship” with a specific case. I show that these rules give courts a great deal of discretion, and that Texas courts often use this discretion to apply Texas law if this benefits Texas parties.

In Chapter 4, I examine the difficulties that Texas courts have experienced in determining the content of Mexican law as a result of Texas post-1979 choice of law framework. I conclude that some U.S. federal courts appear to be comfortable investigating and determining Mexican law on their own, while state courts in Texas have shown little interest in investigating Mexican law and in some cases incorrectly assume that Mexican law is the same as U.S. law. In Chapter 5, I will consider the reasons for the apparent discomfort that Texas state judges have demonstrated with respect to

Mexican law. I will examine specific concerns that have been raised regarding the state of the rule of law, and judicial independence, in the Mexican legal system. I will then discuss recent changes to the Mexican legal system, and argue that these changes have removed many of the concerns that have historically blocked application of Mexican law in Texas, and should make Texas courts more willing to apply Mexican law today than they were 30 years ago.

Finally, in Chapter 6, I will draw conclusions regarding the lessons to be learned from cases where Texas courts have been required *directly* to apply Mexican law, and the way in which these lessons should be used to inform the debate over the *indirect* use of foreign law as a tool for interpreting U.S. law. I argue that the judicial interaction and communication espoused in the scholarly literature on comparative law is the most likely method to improve the willingness of Texas judges to apply Mexican law and should move beyond its scholarly, comparative context. I will discuss current efforts to improve judicial interaction between Texas and Mexico and conclude with suggestions to further this interaction.

CHAPTER 2: THE LEGAL FRAMEWORK FOR APPLICATION OF MEXICAN LAW IN TEXAS COURTS BEFORE 1979

United States courts see many cases that have connections with different countries. In these cases, the court must determine which law to apply, its own or the law from one of the other jurisdictions associated with the case.¹ The process of determining which law governs in such a case is called “choice of law analysis.”² To give a simple definition, “choice of law is the branch of conflict-of-laws doctrine that seeks to identify the appropriate law to apply in disputes with connections to more than one state.”³

While it may seem unusual that a court would be required to apply a law foreign to its own, in a federal system such as the United States, questions of choice of law are fairly common since each state in the U.S. has its own set of laws.⁴ Therefore, state and federal courts have long been required to consider which state’s substantive laws should apply to cases that may involve constituent elements from one or more different states. Given that legal disputes frequently involve elements from more than one state, U.S. courts must often apply the law of another state.⁵

Although choice of law questions in the United States mostly concern conflicts between the laws of different states, the same choice of law rules may lead a court to

¹ SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE AND ARTHUR T. VON MEHREN, CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL 1 (1998).

² *Id.*

³ Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 724 (2009).

⁴ SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 5 (2006).

⁵ *Id.* at 8.

apply not just the law of another state but the law of another country.⁶ Disputes requiring a U.S. court to apply another nation's law have become increasingly common because of the increasing globalization of commerce and disputes.⁷

Despite the common nature of the problem of deciding which law to apply, in the United States it is difficult to talk about one set of “choice of law rules” since every state has its own body of law.⁸ Nevertheless, it is possible to identify the historical development of choice of law doctrine in the United States and to establish categories of approaches to choice of law. In this Chapter, I will first trace briefly the development of “traditional” choice of law rules that were first developed in the U.S. I will then discuss the way in which these rules were applied in Texas prior to 1979.

A. The Traditional Approach to Choice of Law in the United States

According to most western legal scholars, the history of choice of law began as early as twelfth-century Italy.⁹ The legal scholar Bartolus developed a method of solving conflicts between laws based on classification of laws into two categories—real or personal.¹⁰ Real statutes operated only within the borders of the enacting state but not beyond; personal statutes bound all persons who owed allegiance to the state even beyond the state's boundaries.¹¹ Bartolus re-introduced the “conflictual method” of determining the law of multistate disputes, under which the arbiter chooses the law of one

⁶ *Id.* at 5.

⁷ Jorge A. Vargas, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L.J. 475, 478 (2006).

⁸ SYMEONIDES, *supra* note 4, at 5.

⁹ SYMEONIDES ET AL., *supra* note 1, at 6. According to these authors, choice of law may have also arisen among the ancient Greeks and the Romans.

¹⁰ *Id.* at 8.

¹¹ *Id.*

of the states instead of blending the laws to create a new substantive rule;¹² and this conflictual method is the method still used today.

In the United States, the first treatise regarding choice of law appeared in 1828, and future Supreme Court Justice Joseph Story published his important *Commentaries on the Conflict of Laws* in 1834.¹³ Story synthesized choice of law principles current in Europe at the time into three main rules: (1) every nation has “exclusive sovereignty and jurisdiction within its own territory,” (2) “no state or nation can, by its laws, directly affect, or bind property out of its own territory, or bind persons not resident therein,”¹⁴ and (3) the force that the laws of one country might have in another “depend[s] solely upon the laws . . . of the latter, . . . and upon its own express or tacit consent.”¹⁵ Choice of law doctrine continued to develop in the various states, resulting in the formulation of the approach set out in the influential *Restatement of the Law, Conflict of Laws* in 1934.¹⁶ This approach, called the “traditional approach,” reigned in the United States for several decades, and it still is the approach used in several states.

The “traditional” U.S. approach to choice of law is embodied in two rules known as *lex loci delicti* and *lex loci contractus*,¹⁷ which mean “law of the place of the wrong” and “law of the place of contract” respectively.¹⁸ In tort cases, the place where the tort

¹² *Id.*

¹³ *Id.* at 12.

¹⁴ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21 (1834).

¹⁵ *Id.* at 24-25.

¹⁶ SYMEONIDES ET AL., *supra* note 1, at 13.

¹⁷ SYMEONIDES, *supra* note 4, at 37.

¹⁸ SYMEONIDES ET AL., *supra* note 1, at 22, 34.

occurred determined the applicable law.¹⁹ In contract cases, the place where the contract was formed determined the applicable law. On the surface, these rules appear easy to apply and ostensibly neutral to the parties. The assumed clarity of these traditional rules made them the default rules for choice of law analysis for several decades.²⁰

B. The Traditional Approach to Choice of Law in Texas

The Texas Supreme Court generally followed the traditional approach described above—applying the *lex loci* rules—from the 1800s to 1979.²¹ In the case of torts, although the court did not specifically name its doctrine “lex loci” until the 1920s, cases such as *Texas P. and Railway v. Richards*,²² decided in 1887, show that the “law of the place of the wrong” already dominated the court’s thinking regarding choice of law in tort cases. In that case, a minor, through her next friend, brought suit against a Texas railway company in Texas courts to recover damages for the death of her father, who died as a result of injuries he sustained in Louisiana.²³ The court immediately determined that the law of Louisiana—the place of the tort—governed the action.²⁴ In contract cases, the court stated as early as 1846 that “[i]t is a well established principle of the law, that the *lex loci*, or law of the place where the contract is made, is to govern as to its construction and validity.”²⁵

¹⁹ See, e.g., *Texas P. & Ry. Co. v. Jackson*, 4 S.W. 627, 627-28 (Tex. 1887) (determining that Louisiana law applied because the accident giving rise to the suit occurred there).

²⁰ SYMEONIDES, *supra* note 4, at 38.

²¹ *Gutierrez v. Collins*, 583 S.W.2d 312, 313 (Tex. 1979)..

²² This case will be discussed further *infra* at 17.

²³ *Texas P. & Ry. Co. v. Richards*, 4 S.W. 627, 627-28 (Tex. 1887). The opinion does not specify the citizenship of the plaintiff or the circumstances of the injuries causing her father’s death.

²⁴ *Id.*

²⁵ *Chevallier v. Buford*, 1846 WL 3646 at *2 (Tex. 1846).

C. The Dissimilarity Doctrine

In cases involving torts and contracts that took place in Mexico, however, the courts adopted a special rule, known as the Dissimilarity Doctrine.²⁶ The Dissimilarity Doctrine was originally developed in 1887 to avoid applying the laws of Louisiana in Texas courts in *Texas & P. Ry. Co. v. Richards*.²⁷ In this case, a minor child brought suit against the Texas and P. Railway for injuries suffered by her father as a result of an accident that occurred in Louisiana. The plaintiff brought the suit pursuant to a Louisiana statute, which permitted plaintiff to bring the action on behalf of her father for up to one year after his death. However, Texas common law did not permit this type of claim to be brought after the father's death.²⁸ The Court refused to apply Louisiana law because Texas law specifically denied such a cause of action.²⁹

Less than ten years later, in 1896, the Texas Supreme Court expanded the scope of the Doctrine to avoid applying the laws of Mexico.³⁰ The Texas Supreme Court held that it would dismiss the case of an American worker injured in Mexico because choice of law rules dictated the application of Mexican law, which was essentially dissimilar to Texas law.³¹ Restating its earlier decision in *Richards*, the court said “that courts of [Texas would] not undertake to adjudicate rights which originated in another state or country, under statutes materially different from the law of [Texas] in relation to the same

²⁶ Carlos R. Soltero and Amy Clark-Meachum, *The Common Law of Mexican Law in Texas Courts*, 26 HOUS. J. INT'L L. 119, 125 (2003).

²⁷ *Texas & P. Ry. Co. v. Richards*, 4 S.W. 627 (Tex. 1887). The Texas Supreme Court, in *Gutierrez v. Collins*, 583 S.W.2d 312, 320 (Tex. 1979), identified *Richards* as the first example of the Dissimilarity Doctrine.

²⁸ *Texas & P. Ry Co.*, 4 S.W. at 629.

²⁹ *Id.* It is worth noting that Louisiana is the only U.S. state under civil law instead of common law.

³⁰ *Mexican Nat'l Ry. Co. v. Jackson*, 33 S.W. 857, 860 (Tex. 1896).

³¹ *Id.*

subject.”³² Specifically, the court stated that Mexican courts were not governed by precedent and, although Texas courts had access to Mexican statutes, they had no access to decisions from Mexican courts to interpret vague laws. Therefore, there was no guarantee that the parties would be treated in a Texas court as they would be in Mexico, which was the right of the parties.³³

The court then compared several aspects of Mexican and Texas law, such as the conflation of tort and criminal law in Mexico, to emphasize the differences.³⁴ At that time, according to the Court, a plaintiff could not recover for a defendant’s negligence unless the judge also found that the negligence was so great that it constituted a crime; and the court was unwilling to apply laws that “practically require[d] the defendant to be tried for a crime, in a civil action.”³⁵ The court also mentioned the requirement under Mexican law that parties first try to settle their differences before commencing suit.³⁶ In essence, the Court expressed what it considered to be fundamental differences in the two legal systems and found that it was incapable and unwilling to apply such a different law.

Texas courts used this doctrine to dismiss cases in which they would be required to apply Mexican law for over eight decades.³⁷ For example, in *El Paso & Juarez Traction Co. v. Carruth*, the court dismissed a case brought by a Texas resident working

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The Mexican laws requiring the conflation of civil and criminal liability in tort cases had been changed by the 1930s. Hugh Scott Hunsaker, “The Texas Dissimilarity Doctrine as Applied to the Tort Law of Mexico—A Modern Evaluation,” 55 TEX. L. REV. 1281, 1296-97 (1977).

³⁶ *Mexican Nat’l Ry. Co. v. Jackson*, 33 S.W. 857, 860-61 (Tex. 1896).

³⁷ *Gutierrez v. Collins*, 583 S.W.2d 312, 320 (Tex. 1979). The court’s full listing of these cases included fifteen cases involving Mexican law. *Id.*

for a U.S. company who was injured in Mexico.³⁸ It found that Mexican laws governing recovery in this case were simply too different in Mexico and Texas for Texas courts to undertake to apply them.³⁹ As the Texas Supreme Court later put it, “once the fact of dissimilarity was proven, the courts of this state, for the most part, unrelentingly followed the *Jackson* case and dismissed causes of action as, indeed, that opinion required them to do.”⁴⁰ The barriers to ascertaining law from across the border seemed too formidable to Texas courts, and they did not wish to apply such an alien law in any case.

D. Summary and Conclusions

This chapter has summarized the traditional choice of law rules in the United States, and Texas in particular. The traditional rules, called the *lex loci delicti* and the *lex loci contractus*, focuses on the place where the injury giving rise to the suit or where the contract that was the basis of the suit was formed. These rules had the advantage of simplicity, but they often led to unjust results. Texas, like most states, adhered to these rules. At the same times, Texas courts developed the Dissimilarity Doctrine to avoid applying Mexican law when a mechanical application of the *lex loci* rules would require it. Therefore, for over eight decades, Texas courts uniformly refused to analyze or even consider Mexican law. In the late 1970s, however, Texas courts would abandon both the mechanical *lex loci* rules and the Dissimilarity Doctrine, a process that will be the subject of the next chapter.

³⁸ 255 S.W. 159, 159-160 (Tex. Comm. App. 1923).

³⁹ *Id.* at 160.

⁴⁰ *Id.*

CHAPTER 3: THE LEGAL FRAMEWORK FOR APPLICATION OF MEXICAN LAW IN TEXAS COURTS SINCE 1979

In the previous chapter, I showed that Texas courts have been required to apply foreign law in cases involving torts and contracts that took place in a foreign country for many years. However, pursuant to the Dissimilarity Doctrine, Texas courts dismissed cases in which they would be required to apply Mexican law. In this section, I will discuss the development of a new approach to choice of law in the United States in the 1960s and the adoption of this approach by the Texas Supreme Court in 1979. I will then discuss the Supreme Court's simultaneous rejection of the Dissimilarity Doctrine in that year. Finally, I will discuss the most common type of case in which Texas courts have applied this new legal framework—cases arising from car accidents in Mexico.

A. Development of a new approach to Choice of Law in the United States

Dissatisfaction with the way in which courts were applying the traditional rules led U.S. courts to move away from the *lex loci* rules beginning in the mid-1960s.¹ Although ten states still adhere to the *lex loci delicti* rule and eleven states to the *lex loci contractus* rule, many other choice of law approaches have become prevalent in the United States, and these traditional rules are no longer dominant.² However, the traditional rules have not been replaced by a single common approach. In fact, Symeon Symeonides, a choice of law scholar, has categorized six “modern” choice of law

¹ Peter J. Riley, *Abandonment of Lex Loci Delicti in Texas: The Adoption of the Most Significant Relationship Test*, 33 SW. L.J. 1221, 1225 (1979-1980).

² SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 5 (2006). The ten states that maintain the *lex loci delicti* rule are Alabama, Georgia, Kansas, Maryland, New Mexico, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. The eleven states that adhere to the *lex loci contractus* rule are Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, Rhode Island, South Carolina, Tennessee, Virginia, and Wyoming.

approaches.³ However, the approach set out in the Second Restatement on Conflicts of Law—generally known as the “most significant relationship” approach—is by far the most common in the United States today.⁴ In the present day, twenty-two states follow the Second Restatement in tort cases, and twenty-four states adhere to it in contract cases.⁵

In tort cases, the guiding principle of the Second Restatement is to determine which state has the “most significant relationship” to the occurrence and to the parties in the case.⁶ To make this determination, courts should consider four factors: “the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered.”⁷ There is no firm rule to determine how much weight a court should give to each factor: these contacts are to be evaluated according to their relative importance with respect to the particular issue.⁸ Then courts should evaluate the importance of each of these contacts in light of several policy concerns, such as the needs of the interstate and

³ The six approaches are: 1) Restatement Second, 2) Significant Contacts, 3) Lex Fori, 4) Better Law, 5) Interest Analysis, and 6) Combined Modern. *Id.* at 99. The “Significant Contacts” method requires courts to consider contacts such as the place where the wrong occurred, the residence of the parties involved, and other connections to the tort without considering policy concerns. The “lex fori” method requires courts to apply a state’s own law, even if another state has a significant interest, so long as the forum state’s interests mandate that the forum law be applied. The “Better Law” approach explicitly permits judges to apply what they consider to be the “better” law, which often leads to a pro-forum bias. The “Interest Analysis” approach requires courts to resolve conflicts of law based mainly on a consideration of state interests. “Combined modern” is a term used to encompass approaches that a mix of the categories above. *Id.* at 77-82, 99.

⁴ *Id.* at 82.

⁵ *Id.*

⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).

⁷ *Id.*

⁸ *Id.*

international systems, policies of the forum state, policies of other interested states, protection of expectations, certainty and predictability, and ease of determination and application of the law.⁹

For contract claims, the Second Restatement directs courts to apply the law chosen by the parties to the contract in most cases, as long as the chosen state has a substantial relationship to the parties and the application of the chosen law would not be contrary to the fundamental policy of another state with a “material greater interest than the chosen state in the determination of the particular issue.”¹⁰ Absent a choice of law provision in the contract, the Restatement lists several factors that courts should consider to determine the applicable law. As in the case of torts, courts should consider the domicile, residence, or place of business of the parties and the place where key events giving rise to the claim occurred—in the context of contracts, these locations include the place of contracting, the place of negotiation, the place of performance, and the location of the subject matter of the contract.¹¹ Also as with torts, courts should evaluate these factors “according to their relative importance with respect to the particular issue.”¹²

Advocates of the Second Restatement approach praise the wide latitude that it allows judges in determining the applicable law, the lack of a “better law” or pro-forum bias, the combination of flexibility and real rules for guidance, and the prestige of a Restatement formulation.¹³ For example, the Texas Supreme Court, upon adopting the Second Restatement Approach, stated that its “methodology offers a rational yet flexible

⁹ *Id.* at § 6 (1971).

¹⁰ *Id.* § 187.

¹¹ *Id.* at § 188.

¹² *Id.*

¹³ SYMEONIDES, *supra* note 4, at 93-95.

approach to conflicts problems. It offers the courts some guidelines without being too vague or too restrictive.”¹⁴

However, critics of the Second Restatement approach argue that, particularly in the international context, the flexibility of this approach leads to contradictory and uncertain results. Christopher Whytock, a frequent writer on choice of law issues, notes that courts’ choice of law analyses are often considered “a mess” because the rules are very convoluted and easily manipulated by judges wishing to choose which set of laws to apply.¹⁵ The problem is exacerbated in the context of international choice of law because judges will have even more incentive to choose their own law over the law of other states because of the unfamiliarity of international law.¹⁶ Many critics of U.S. choice of law rules have suggested that these rules in fact allow judges arbitrarily to determine the applicable law based on inappropriate considerations such as which law will benefit the local party or which law will require less effort on the judge’s part.¹⁷ While Whytock’s studies suggest that these criticisms may be unduly harsh, the choice of law rules are certainly sufficiently complex to leave room for judicial interpretation. As shown below, this broad discretion is also reflected in Texas choice of law rules.

B. Adoption of the new approach in Texas

By the 1960s, Texas courts had begun to criticize the *lex loci* rules. For example, in *Marmon v. Mustang Aviation, Inc.*, the Court of Appeals in Austin considered a case filed on behalf of three Texas residents who were killed when a plane owned by Texas

¹⁴ Gutierrez v. Collins, 583 S.W.2d 312, 318 (Tex. 1979).

¹⁵ Whytock, *supra* note 3, at 732.

¹⁶ *Id.* at 738.

¹⁷ *Id.*

plaintiffs crashed in Colorado.¹⁸ Every passenger on the plane was from Texas, except for one Illinois resident; the defendant companies were both Texas companies; the plane was making a return trip from Montana to Texas; and the plane had been maintained and repaired only in Texas.¹⁹ The only contact to Colorado was the fact that the crash had occurred there.²⁰ Because of the unusual result that Colorado law applied to a case that had almost nothing to do with Colorado, the court was urged to abandon the *lex loci delicti* rule in favor of the “most significant relationship” test.

The court clearly wished to do so.²¹ It referred to the change in the Restatement rule from *lex loci delicti* in the First Restatement to the “most significant relationship” model in the Second Restatement, commentaries by conflicts of laws experts that supported the doctrine, and the number of states who had adopted the new formulation.²² The Austin court stated that it found much merit in the Second Restatement test and would consider it if it were not bound by Texas precedent in favor of the *lex loci delicti* approach.²³ Although the Texas Supreme Court did not adopt the “most significant relationships” test in its review of this case,²⁴ Texas courts had clearly begun to question the *lex loci* doctrine.

¹⁸ 416 S.W.2d 58 (Tex. App.—Austin 1967).

¹⁹ *Id.* at 59.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 62.

²³ *Id.*

²⁴ The Supreme Court did not adopt the Second Restatement test in this case because the cause of action arose from a wrongful death statute, and the court did not want to give effect to that statute outside of Texas’s borders. *Marmon v. Mustang Aviation*, 430 S.W.2d 182, 194 (Tex. 1968).

In 1979, the Texas Supreme Court finally overruled the *lex loci delicti* approach in *Gutierrez v. Collins*.²⁵ In this case, Gutierrez, a Texas citizen, brought suit against Collins, another Texas citizen, for an auto accident suffered in Zaragosa [sic], Chihuahua, Mexico.²⁶ Gutierrez claimed that Collins's negligence was responsible for the accident. The trial court, having applied the old *lex loci delicti* rule, found that Mexican law should govern the case; it therefore dismissed the case because it would require the application of Mexican law.²⁷ The Texas Supreme Court, however, took the opportunity to reconsider the choice of law rule in torts and to adopt the Second Restatement test. First of all, the court stated that the choice of law rules were essentially court-made rules, so the court had the freedom to select the choice of law methods concerning common law causes of action.²⁸ It argued that the *lex loci delicti* rule, far from actually providing certainty and stability as it was lauded as doing, in fact often "ignored the very substantial interests of the forum state" in favor of a mechanical application of the law of the place of the wrong.²⁹ This tendency led to unjust and arbitrary results, which often caused courts to avoid applying the *lex loci delicti* through exceptions that in fact undermined certainty and uniformity.³⁰

Therefore, the court, after briefly mentioning several choice of law methods such as the "better law theory" and the "states interests" test, decided to adopt the Second Restatement "most significant relationships" test, finding that it was the "best thinking"

²⁵ *Gutierrez v. Collins*, 583 S.W.2d 312, 313 (Tex. 1979).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 315.

²⁹ *Id.* at 317.

³⁰ *Id.*

available on the subject and contained ““most of the substance”” of all the modern theories.³¹ The court then offered an opinion on which law might govern, saying that most courts would probably find that Texas law applied in this case.³² It would make little sense to use Mexico’s laws of damages since both parties lived in Texas, and Mexico’s only contact appeared to be that the accident occurred there.³³ However, the court held that it was not a foregone conclusion and remanded the case to the lower court to determine the applicable law, emphasizing that the “most significant relationship” test should not turn on number of contacts but quality of contacts.³⁴ The language of the court emphasizes that the seemingly obvious law may not result from the choice of law analysis; a court must carefully consider not just the number but also the nature of the contacts.³⁵

In 1984, the Texas Supreme Court also adopted the Second Restatement test for contract cases. In *Duncan v. Cessna Aircraft Co.*, the plaintiff filed suit against Cessna after her husband, a Texas resident, died in a plane crash in New Mexico.³⁶ Cessna claimed that a release signed by the decedent released Cessna from liability. The court had to determine which state law governed the release.³⁷ The court found that the case had contacts with Kansas because Cessna was a Kansas corporation and the defective plane parts were manufactured there. But it also had contacts with Texas (the plane was sold in Texas; the decedent lived in Texas; the release was executed in Texas to settle a

³¹ *Id.* at 318.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 418 (Tex. 1984).

³⁷ *Id.*

lawsuit filed in Texas) and New Mexico (the decedent worked in New Mexico; the instructor, who also died, was a resident of New Mexico and the company that owned the Cessna was a New Mexico corporation).³⁸

Under the traditional *lex loci contractus* rule, Texas law would apply to this case.³⁹ However, the court explicitly overruled the use of *lex loci contractus* in Texas contract cases, adopting instead the Second Restatement’s “most significant relationship test.”⁴⁰ It found that Texas had the most significant relationship to the case.⁴¹ New Mexico did not have a legitimate governmental interest in the application of its own law on releases, since this law was designed to protect the interests of the parties to the release, and neither party to the release was a New Mexico resident.⁴² Texas, on the other hand, had a clear interest in application of its own law in order to protect its residents (plaintiff and decedent) and because its law of releases was designed to protect Texas residents from just the sort of categorical release at issue in the case.⁴³ The court’s analysis in this case makes clear that the number of contacts to a state does not determine the applicable law; it is a combined analysis of the contacts present and the governmental interests at stake.

³⁸ *Id.* at 421.

³⁹ *Id.* at 420.

⁴⁰ *Id.* at 421.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* The court did not consider Kansas law because Cessna, the Kansas corporation, had not objected to the application of New Mexico law or that Kansas had any interest in the case. *Id.*

C. Rejection of the Dissimilarity Doctrine

Despite the long history of the Dissimilarity Doctrine, the Texas Supreme Court overruled this over eighty-year-old practice in 1979 in *Gutierrez v. Collins*.⁴⁴ This case, which was discussed above has been mainly noted for announcing a major change in Texas's choice of law rules (changing the old *lex loci delicti* rule to an analysis of "most significant relationship").⁴⁵ However, it is equally important for doing away with the Dissimilarity Doctrine.

As discussed above, the case was brought by one Texas resident (Gutierrez) against another Texas resident (Collins) for negligence related to car accident that had occurred in Chihuahua, Mexico.⁴⁶ The trial court dismissed the case originally because of the Dissimilarity Doctrine, which it applied after receiving evidence of the relevant laws of Mexico.⁴⁷ However, the Texas Supreme Court held that this rationale no longer applied in Texas courts. The court emphasized how much the situation of Texas and Mexican law had changed since 1896. It said that the prior Court's ruling had been based on prevailing notions of practicality, fairness, and policy *of the time* that were no longer applicable.⁴⁸ In 1979, access to translations of Mexican legal materials was no longer a problem; and attorneys had regularly been able to plead Mexican law in Texas courts.⁴⁹ Because adequate translations had become widely available, the fear of judges' inaccurately interpreting Mexican law also was no longer a major concern; courts in other

⁴⁴ *Gutierrez*, 583 S.W.2d at 320.

⁴⁵ *Id.*

⁴⁶ *Id.* at 313.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

jurisdictions had competently applied Mexican law; and Texas judges were assumed to be equally as capable.⁵⁰

Although the court did not explicitly mention an increase in commentaries on Mexican law accessible to Texas judges, its citations regarding the Federal-State division of Mexican law, referring to books in English and several law journal articles, suggest a growing availability of secondary sources about Mexican law written for an American audience.⁵¹ Finally, the court emphasized that the fact that the laws of Mexico differed from the laws of Texas did not mean that the Mexican laws violated Texas public policy: while Texas courts would not enforce a foreign law that “violate[d] good morals, natural justice or is prejudicial to the general interests of [its] own citizens,” the mere fact of a difference in law did not make Mexican laws invalid in Texas.⁵² After *Gutierrez v. Collins*, Texas courts could no longer use the Dissimilarity Doctrine to avoid applying Mexican law.

Although Texas state courts could no longer avail themselves of the Dissimilarity Doctrine to dismiss cases, another doctrine soon became available. In 1993, the Texas Legislature adopted a new law, Section 71.051, that expressly permits dismissal based on *forum non conveniens*—a doctrine that permits dismissal of cases that could be brought in a foreign court based on considerations of convenience and ease of

⁵⁰ *Id.* at 321. See, e.g., *Victor v. Sperry*, 329 P.2d 728 (1958) (applying Mexican law to a tort case arising from a car accident between two California citizens that occurred in Mexico, a similar situation as in *Gutierrez v. Collins*).

⁵¹ *Gutierrez*, 583 S.W.2d at 321.

⁵² *Id.*

administration (including difficulties in determining the content of foreign law).⁵³ The federal doctrine is well-established and often used by federal courts to dismiss cases that could and should be brought in foreign courts.⁵⁴ In Texas, however, application of the doctrine was less in favor.⁵⁵ The Legislature passed the law in 1993 in response to a Texas Supreme Court decision which held that *forum non conveniens* did not exist in Texas,⁵⁶ in large part because they feared that Texas would become the “court of last resort” for the world otherwise and that businesses would avoid Texas if *forum non conveniens* were not available to dismiss suits.⁵⁷ Section 71.051(b) states that if the court “finds that in the interest of justice and for the convenience of the parties a claim or action to which this section applies would be more properly heard in a forum outside this state, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens*.”⁵⁸

The doctrine has been applied in only a few appellate cases in Texas. For example, in *In re Pirelli Tire*,⁵⁹ the Texas Supreme Court held that the lower court in

⁵³ See generally *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (setting out the factors and application of *forum non conveniens*).

⁵⁴ See generally *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (setting out the federal standards for *forum non conveniens* involving foreign countries).

⁵⁵ A 1913 Texas statute had precluded applying *forum non conveniens* in suits for personal injuries that occurred in foreign countries so long as the country has “equal treaty rights” with the United States. TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986). See also *Dow Chemical Company v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990) (analyzing section 71.031 for the first time).

⁵⁶ *Dow Chemical*, 786 S.W.2d at 675.

⁵⁷ Carl Christopher Scherz, *Section 71.051 of the Texas Civil Practice and Remedies Code—the Texas Legislature’s Answer to Alfaro: Forum non Conveniens in Personal Injury and Wrongful Death Litigation*, 46 BAYLOR L. REV. 99, 108-09 (1994).

⁵⁸ TEX. CIV. PRAC. & REM. § 71.051(b). In making this determination, the statute requires the court to consider whether an alternative forum exists that provides an adequate remedy, the alternate forum can exercise jurisdiction over all the defendants, and dismissal would result in unreasonable proliferation of litigation. *Id.* Furthermore, a court may not dismiss a claim if any plaintiff is a legal resident of Texas. *Id.* § 71.051(e).

⁵⁹ *In re Pirelli Tire, L.L.C.*, 247 S.W.3d 670, 684 (Tex. 2007).

Cameron County should have considered dismissing a case brought by Mexican citizens seeking damages from an Iowa corporation for the wrongful death of their son. Plaintiffs alleged that their son had died as a result of an auto accident that occurred in Mexico because of the defendant's allegedly defective tires.⁶⁰ The court determined that the lower court had erred in not granting the defendant's motion to dismiss the case on *forum non conveniens* grounds.⁶¹ The court emphasized that Texas courts should not be burdened with cases that have no significant connection to the forum.⁶² Moreover, the court concluded that an alternative forum existed in Mexico, the private interest factors (such as location of witnesses and evidence in Mexico) favored Mexico, and the public interest factors favored Mexico (since the plaintiffs were Mexican citizens and the safety of Mexican highways was a Mexican interest).⁶³ This opinion is unusual in Texas state case law; the courts have not dismissed many cases involving application of Mexican law for *forum non conveniens*.

D. Applying the New Approach to Torts That Occur in Mexico

Since 1979, courts in Texas have been required to apply the Second Restatement Approach to cases involving torts and contracts that occurred in Mexico.⁶⁴ One particularly common fact pattern in these cases involves automobile accidents that occur

⁶⁰ *Id.*

⁶¹ *Id.* at 673.

⁶² *Id.* at 676.

⁶³ *Id.* at 678-79.

⁶⁴ Cases involving Mexican contracts have all involved marriage contracts. *See, e.g.,* Ramirez v. Lagunes, 794 S.W.2d 501 (Tex. App.—Corpus Christi 1990) (holding that a Texas court did not have jurisdiction over a personal bank account in Texas, which was considered the personal property of Mexican citizens in a divorce proceeding); Ossorio v. Leon, 705 S.W.2d 219 (Tex. App.—San Antonio 1985) (holding that Mexican law governed the validity of an interspousal gift between two Mexican citizens and thus the disposition of funds in a Texas bank account).

in Mexico but involve citizens of the United States as either plaintiffs or defendants. Because of the high number of such cases, this section will focus exclusively on choice of law decisions issues in this type of case.

The choice of Texas or Mexican law in this type of case has important consequences because the amount of damages available under Texas law far exceeds that under Mexican law.⁶⁵ Under Mexican law, courts may award only compensatory damages, not punitive damages.⁶⁶ Furthermore, damages for lost wages in Mexico are based on the local legal minimum wage, not the victim's actual earning potential.⁶⁷ Although courts may award "moral damages" for intangible damages suffered, Mexican law tends to limit such recovery very severely.⁶⁸ Therefore, plaintiffs suing in Texas courts have a strong interest in applying Texas law; and Texas courts might conceivably have a strong interest in dismissing cases not involving Texas plaintiffs.

Texas courts have had to apply the Second Restatement approach in four cases involving car accidents that occurred in Mexico. As discussed below, two of the cases were brought by Mexican plaintiffs, while two of the cases were brought by Texas plaintiffs. These different types of cases produced different results depending on whether they involved Texas defendants.

1. Cases brought by Mexican plaintiffs against non-Texas defendants

Sanchez ex rel. Estate of Galvan v. Brownsville Sports Center, Inc., 51 S.W.3d 643 (Tex. App.—Corpus Christi 2001), involved a suit by the Mexican parents of a

⁶⁵ See generally STEPHEN ZAMORA ET AL., MEXICAN LAW 525-530 (2004) (discussing the several limitations of damages under Mexican law for tort recovery).

⁶⁶ *Id.* at 525.

⁶⁷ *Id.* at 526.

⁶⁸ *Id.* at 527.

Mexican child who died in Mexico as a result of an accident involving an all-terrain vehicle (ATV) that the parents had purchased in Mexico. The suit was brought against the Japanese company (Honda) that manufactured the ATV and the Texas distributors of the ATV. However, the Texas defendant was later dropped from the case, leaving only a Japanese defendant.⁶⁹ The ATV had been made in Japan, shipped to California, transferred to Louisiana, and finally to the Brownsville Sports Center (“BSI”), which sold it to the university in Brownsville.⁷⁰ The parents of the child who died had purchased the ATV from a friend in Mexico, who may or may not have purchased it from the university.⁷¹

To determine what law to apply to the case, the court of appeals applied the Second Restatement test, finding that Texas and Mexico both had significant contacts with the case.⁷² It noted that Honda’s negligent conduct (the design flaw) occurred in Japan and in Texas, where the ATV was placed into the stream of commerce.⁷³ However, the plaintiffs’ negligent conduct (allowing the child to drive the ATV alone and without protective gear) occurred in Mexico, and clearly any relationship between Honda and the plaintiffs was centered in Mexico.⁷⁴ Nevertheless, it concluded that Texas had the most significant relationship with the case because Texas had a strong interest in protecting its

⁶⁹ Sanchez ex rel. Estate of Galvan v. Brownsville Sports Center, Inc., 51 S.W.3d 643, 652-53 (Tex. App.—Corpus Christi 2001).

⁷⁰ *Id.* at 653.

⁷¹ *Id.*

⁷² *Id.* at 668.

⁷³ *Id.* at 668-69. The court did not explain why it found that the ATV had been placed in the stream of commerce in Texas, not California, where American Honda had first accepted the ATV. Presumably, the court was referring to the first place that the ATV was available for sale to the general public. However, placing an object in the “stream of commerce” usually means that a party has sold the object so that it can travel to distant states, even if the party does not actually sell the object where it ends up. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 306 (1980).

⁷⁴ *Id.*

citizens from defective products, and since the ATV was placed into the stream of commerce in Texas the state had a strong interest in applying its own law.⁷⁵ Mexico, while it had an interest in protecting its citizens from torts within its borders, did not have such a strong interest as Texas.⁷⁶

A second case, *Vizcarra v. Roldan*, 925 S.W.2d 89 (Tex. App.—El Paso 1996), was brought by Roldan, a Mexican citizen who lived in Juarez, who sued Vizcarra—a Texas citizen employed by a Texas corporation (Rock Shop)—and his employer for injuries arising when Vizcarra hit Roldan with the company’s truck in Roldan’s yard.⁷⁷ Vizcarra had been driving the truck from Rock Shop’s showroom in El Paso to its warehouse in Juarez when the accident occurred.⁷⁸ The Rock Shop and Vizcarra filed for Mexican law to govern the case, but the trial court applied Texas law.⁷⁹

In reviewing the trial court’s decision to apply Texas law, the court of appeals applied the “most significant relationship” test of the Second Restatement. It found that the Restatement factors favored Mexican law, given that the accident and the alleged negligence occurred in Mexico, Roldan was a citizen of Mexico, and the entire relationship between the parties was centered in Mexico.⁸⁰ Rock Shop’s status as a Texas corporation was not enough to point to application of Texas law.⁸¹ Furthermore, the court found that policy concerns did not mandate application of Texas law.⁸² While the court

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Vizcarra v. Roldan*, 925 S.W.2d 89, 89 (Tex. App.—El Paso 1996).

⁷⁸ *Id.*

⁷⁹ *Id.* at 90.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

admitted that Texas had a strong interest in regulating the conduct of its corporations, this policy was inapplicable in this case because the act in question, negligent driving, was not one that Texas had an interest in controlling.⁸³

2. Cases brought by Texas Plaintiffs

In *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252 (Tex. App.—San Antonio 1999), the San Antonio Court of Appeals also found that a cause of action arising from a vehicle accident in Mexico required the application of Texas law. In this case, the injured parties were all Texas residents.⁸⁴ Although the accident occurred in Mexico, the vehicle had been purchased in the United States (and it was inspected and primarily operated in Texas), the vehicle manufacturer was a U.S. corporation doing business in Texas (although not a local Texas entity), and the negligence that allegedly caused the accident (a mechanical problem) was committed in the United States.⁸⁵ The court applied the Second Restatement to find that Texas law governed this action because of these contacts and that Mexico had no interest in the case since none of the defendants was a Mexican citizen.⁸⁶

In *Trailways, Inc. v. Clark*, 794 S.W. 479 (Tex. App.—Corpus Christi 1990), the Court of Appeals in Corpus Christi determined that Texas's law of damages applied to a claim against a Mexican bus company and Texas bus company for the wrongful deaths of two Texas residents in a bus accident in Mexico.⁸⁷ On appeal, the Mexican bus company

⁸³ *Id.* at 91.

⁸⁴ *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 255 (Tex. App.—San Antonio 1999).

⁸⁵ *Id.* at 260.

⁸⁶ *Id.* Since no defendant was a Mexican citizen, Mexico had no interest in applying its own less punitive damage laws to protect its own citizen-defendants. *Id.*

⁸⁷ *Trailways, Inc. v. Clark*, 794 S.W. 479, 485 (Tex. App.—Corpus Christi 1990).

appealed the lower court's application of Texas law on damages.⁸⁸ However, the appeals court applied the "most significant relationship" test and found that Texas law applied to the issue of damages.⁸⁹

The court identified several factors in favor of Mexican law, including the location of the accident (Mexico), the nationality of the negligent bus company (Mexican), and Mexico's interest in protecting its citizens from excessive liability to foreigners from accidents on Mexican soil.⁹⁰ On the other hand, the court noted that the victims were Texas residents, the victims had purchased their tickets from the Texas bus company in Texas, the negotiations that led to the passengers' entrusting their safety to the bus company occurred in Texas, and that Texas has an interest in protecting the rights of its citizens to recover adequate compensation.⁹¹ Weighing all these factors, the court decided that Texas law should apply to the issue of damages in the case.⁹² Once again, as in the previous two cases, the court applied the harsher Texas rules of damages to a defendant who was not a Texas resident, since the case before the Court of Appeals concerned only the Mexican bus company's appeal.

E. Summary

Choice of law remains an important but complex aspect of the American legal system, especially when it comes to the rules for applying the law of another nation. As mentioned above, the Second Restatement's "most significant relationship" test, which

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 486.

⁹¹ *Id.*

⁹² *Id.*

permits a court to consider the contacts to a certain jurisdiction present in a case along with public policy concerns, has become the most important Choice of Law doctrine in the United States; and Texas has adopted the rule. At the same time that Texas courts adopted the “most significant relationship” test, it abolished the Dissimilarity Doctrine, which for over eighty years had allowed Texas courts to dismiss cases that would require application of Mexican law.

However, a prejudice against applying Mexican law is still obvious among Texas courts. The choice of law decisions in the cases discussed above suggest that choice of law rules provide a way for Texas courts to avoid Mexican law. In only one case did the court direct a Texas court to apply Mexican law. In the three cases in which the courts call for application of Texas law, the plaintiffs are both Texan and Mexican—so Texas courts are not obviously protecting their own resident plaintiffs. However, the defendants in all three cases were not Texas residents. Therefore, it appears that Texas courts may apply Texas law, with its more generous damage awards, mainly when Texas residents do not suffer from the greater potential for damage awards. The flexibility of the “most significant relationship” test possibly allows the courts to choose the law that benefits Texas parties the most.

CHAPTER 4: THE ABILITY OF TEXAS COURTS TO APPLY MEXICAN LAW

This Chapter will discuss how federal courts and Texas state courts have gone about determining the context of Mexican law in cases where choice of law rules require application of Mexican law. I will first discuss the rules in federal court, and the way in which federal courts have applied these rules have been applied in cases requiring determination of Mexican law. I will then discuss the rules in state court and specific cases in which courts in Texas have applied these rules to determine a contested issue of Mexican law.

A. Determining the Content of Mexican Law in Federal Courts

The Federal Rules of Civil Procedure state that, in order to determine the content of foreign law, a judge may consider “any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”¹ While a judge is not required to conduct research outside of the materials presented to him by the parties, especially if there is no reason to believe such research would be fruitful,² the comments to the Rule strongly suggest that the court should consider doing its own research because it might have “at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail.”³

Federal courts have clearly affirmed such a practice and conducted their own research into foreign law beyond what was presented by the parties.⁴ One such example

¹ *Id.*

² *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 155 fn. 3 (2d Cir. 1968).

³ FED. R. CIV. P. 44.1, Advisory Committee Notes

⁴ *See, e.g., Ackermann v. Levinne*, 788 F.2d 830, 838 fn 7 (2d Cir. 1986) (approving a court’s finding, upon its own research in addition to the evidence of foreign law presented by the parties, that service in the case was proper under German law); *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) (criticizing the lower

is the Second Circuit’s opinion in *Curley v. AMR Corp.* In this case, the plaintiff, an American citizen, had been detained, searched, and interrogated in Mexico upon suspicion that he had been using marijuana on an American Airlines flight.⁵ He alleged that American’s actions constituted negligence and gross negligence, by which he was harmed.⁶ The Defendant American Airlines moved for the application of Mexican law to the case, but the District Court denied the motion because neither party supplied it with information about the applicable Mexican law.⁷

In its opinion reversing the District Court, the Second Circuit chastised the lower court for not doing its own investigation into Mexican law.⁸ It stated that under New York’s “interests analysis” used to determine the applicable law in tort actions, Mexico had the prevailing interest, given that it was the locus of the tort and had the greatest interest in regulating the conduct of the parties.⁹ The court then investigated Mexican law for itself, using the Mexican Civil Code and several U.S. law review articles written about Mexican law.¹⁰ It ruled that American’s employees had not acted negligently under Mexican law, because Mexican law—unlike New York law—required that the defendants have acted “illicitly or against good customs and habits” to be held liable.¹¹ On the contrary, the court held, the American Airlines employees had adhered to the letter several Mexican regulatory requirements governing the operation of aircraft in

court for avoiding analysis of Mexican law simply because the parties had not presented Mexican law sufficiently for it to make a decision).

⁵ *Curley*, 153 F.3d at 13.

⁶ *Id.*

⁷ *Id.* at 10.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 15.

Mexican airspace.¹² The court reached this conclusion from its own active research into Mexican law.

B. Determining the Content of Mexican Law in State Courts in Texas

The Texas Rules of Evidence concerning presentation of foreign law are based on the Federal Rules, but in practice Texas state judges do less investigation of their own into the content of foreign law. The rules require that a party intending to raise an issue of foreign law give reasonable written notice that the party intends to use to prove the foreign law and, at least 30 days prior to trial, provide to all parties copies of any written materials and a translated copy if originally in a foreign language.¹³ The court may refer to any materials or sources in determining foreign law, not only the materials provided by the parties,¹⁴ just as federal courts are permitted to do.¹⁵ However, in contrast to the federal courts, if no party adequately supplies the content of foreign law, the Texas courts may assume that Mexican law is identical to the law of Texas or the same as federal law.¹⁶ Moreover, where the parties present conflicting expert testimony regarding the content of Mexican law, the courts tend to choose one expert over the other without conducting any independent investigation into Mexican law or explaining the reasons favoring one expert's view over the other's.

1. Cases Assuming Mexican Law is the same as U.S. Law

¹² *Id.*

¹³ TEX. R. EV. 203 (2010). The Federal Rules of Evidence do not require notice a specific amount of time before trial, nor do they require the parties to provide copies of the foreign law to the other parties or to provide translations. FED. R. CIV. P. 44.1 (2010).

¹⁴ *Id.* If the court uses materials other than those provided by the parties, it must give the parties adequate notice and provide them an opportunity to comment on the sources and submit further materials.

¹⁵ R. Doak Bishop, *International Litigation in Texas: Texas Rules of Evidence and Recent Changes in the Texas Rules of Civil Procedure*, 36 BAYLOR L. REV. 131, 146-47 (1984).

¹⁶ *In re Estates of Garcia-Chapa*, 33 S.W.3d 859, 863 (Tex. App.—Corpus Christi, 2000).

In *In re Estates of Garcia-Chapa*, 33 S.W.3d 859 (Tex. App.—Corpus Christi, 2000), the appellants urged the court to apply Mexican law differently from Texas law in the administration of two estates in Mexico because Mexican law and Texas estate law, although similar on their face, were in fact applied quite differently.¹⁷ The court readily stated that Mexican law should govern the estate administration of two Mexican nationals, with property entirely in Mexico, who had died in Mexico.¹⁸ However, the court applied Texas law because the appellants had not proven that the laws were actually applied differently. The court assumed that Mexican and Texas laws were the same absent proof to the contrary.¹⁹ Therefore, although Texas judges are permitted to consult almost unlimited resources to assist in their determination of the law, if the parties fail to provide sufficient proof to show that the foreign law is different from the law of Texas, Texas courts are permitted simply to apply their own law in the absence of proof otherwise.²⁰

In *Long Distance International, Inc. v. Telefonos de Mexico, S.A. de C.V.*, 49 S.W.3d 347 (Tex. 2001), the court had to determine if the plaintiffs, Long Distance International and Star Marketing Services (LDI/SMS), had violated Mexican telecommunications laws that granted Telefonos de Mexico (Telmex) a monopoly on providing service within Mexico.²¹ In 1992, Telmex and MCI had entered into agreements to provide international 1-800 services (“I800”) between the U.S. and Mexico.²² MCI then entered into agreements providing I800 numbers to LDI/SMS, who

¹⁷ *Id.*

¹⁸ *Id.* at 862.

¹⁹ *Id.* at 862-63.

²⁰ Bishop, *supra* note 15, at 146-47.

²¹ *Long Distance Int’l, Inc. v. Telefonos de Mexico, S.A. de C.V.* 49 S.W.3d 347 (Tex. 2001).

²² International I800 calls necessarily involve more than one carrier and split billing, so MCI and Telmex had reached an agreement under which MCI billed the (U.S.-based) end user for the entire call initiated by

contracted directly with Mexican customers to provide them with an I800 number linked to a Texas switching station.²³ As a result of these agreements, Telmex was able to set only the rate for the Mexico leg of the call, whereas if the Mexican customer called a U.S. destination directly, Telmex would have set the rate of the entire call.²⁴ In 1993, Telmex began disconnecting 1800 numbers that it claimed violated Mexican laws forbidding resale of telephone services, including some numbers acquired by LDI/SMS.²⁵ The court had to determine whether (1) LDI's services constituted "resale" of telephone services under Mexican law;²⁶ and (2) if so, whether such resale violated Mexican law.

In this case, even though the parties presented evidence of Mexican law (as they had not in *Garcia-Chapa*), the court abandoned any pretense at using Mexican law, instead turning to U.S. case law to help choose between the two legal arguments presented by the Mexican law experts. LDI's expert argued that no Mexican law expressly forbade LDI's activities, so they were legal. Telmex's expert, in contrast, said that since Telmex held an exclusive concession to "build, install, maintain, operate and exploit" Mexico's public telephone network, LDI's activities could not be legal under Mexican law.²⁷

The two parties in this case clearly provided the court with ample Mexican legal materials and opinions to make a decision regarding Mexican law. Nevertheless, to determine the major issue in the case—whether LDI's services were provision or resale of telephone services—the court relied mainly on U.S. case law, U.S. administrative

a Mexican caller and reimbursed Telmex for the Mexican portion. James P. George and Anna K. Teller, "Conflict of Laws," 56 SMU L. REV. 1283, 1342 (2003).

²³ *Long Distance Int'l*, 49 S.W.3d at 349-50.

²⁴ *Id.* at 350.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

decisions, and general policy considerations rather than on any source recognized as having legal authority in Mexican law.²⁸ The Texas Supreme Court placed great weight on a decision issued by the Fifth Circuit in *Access Telecom, Inc. v. MCI Telecomm. Corp.*,²⁹ a case involving another U.S. phone company that provided Mexican customers with I800 numbers that split the call into two legs and reduced the overall price of the call.³⁰ The Fifth Circuit found that the U.S. company was a “reseller” of phone services for purposes of Mexican law based on the following distinction:

A reseller cannot compete with a monopoly provider because the provider is the reseller's only supplier. The reseller can only undersell the provider if the provider sells its services to the reseller for less than they are worth. That is not the same kind of competition a provider faces against another provider. Competition between the provider and the reseller is at the mercy of the provider and the provider's knowledge or ignorance of the market.³¹

The Texas Supreme Court, in *Long Distance International*, lifted that standard directly from the Fifth Circuit case and applied it to its case, finding that “LDI/SMS acted as a middleman, delivering and billing Telmex's service to Mexican customers.”³² It was not a “provider” of services because it had not built its own infrastructure or provided its own equipment.³³ Even though the court was trying to decide if the company was violating Mexican law, it used U.S. law to define the essential categories and terms of the Mexican statutes.

After concluding that LDI's services were resale, the court still had to address Telmex's claim that LDI's activities nonetheless violated Mexican law. Once again, to determine this point of Mexican law, the Texas Supreme Court looked to U.S. cases and

²⁸ *Id.* at 350.

²⁹ 197 F.3d 694 (5th Cir. 1999).

³⁰ *Id.* at 702.

³¹ *Id.*

³² *Long Distance Int'l*, 49 S.W.3d at 354.

³³ *Id.*

policy, giving significant weight to the U.S. policy in favor of international resale.³⁴ It quoted extensively from a Federal Communications Commission (“F.C.C.”) decision that held that resale services were to be considered beneficial.³⁵ Because resale services were also legal in the U.S., and the F.C.C. had said that international resale is permitted under U.S. law unless it was *expressly prohibited* by another country involved in the sale, the court applied this rule to determine that resale is permitted under Mexican law, because it was not expressly prohibited under Mexican law.³⁶ Throughout its decision, the Texas Supreme Court relied on U.S. case law to interpret Mexican law even though it said that it was applying the law of Mexico.

2. Cases Relying on the Parties’ Experts

In *Gardner v. Best Western Int’l Inc.*, 929 S.W.2d 474 (Tex. App.—Texarkana 1996), the court had to determine whether Mexican law permitted a Scottish tourist, Hilary Gardner, to bring a claim against Best Western International (BWI) for injuries she incurred when she dove into a shallow pool at a privately owned, independently managed Mexican hotel that BWI had licensed to use its name.³⁷ The plaintiff alleged that the pool had been mislabeled as deeper than it actually was and argued that Mexican law permitted her to sue BWI as a third-party beneficiary of the license agreement between the hotel and BWI.³⁸ The trial court ruled that the substantive law of Quintana Roo (the Mexican state in which the hotel was located and in which the accident

³⁴ *Id.* at 355.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Gardner v. Best Western Int’l Inc.*, 929 S.W.2d 474, 474 (Tex. App.—Texarkana 1996).

³⁸ *Id.* at 476.

occurred) governed but dismissed the case on BWI's motion for summary judgment.³⁹ The Texarkana Court of Appeals reversed, finding that Mexican law did permit this type of claim. The court explained that it had found the expert testimony supporting this view to be more persuasive than the opposing expert testimony. However, it did not clearly explain why this was the case.

In fact, the court's opinion appeared to be mainly a summary of Mexican law as provided by the experts with very little independent analysis. Throughout the entire opinion, the court made clear that the statutes of Mexican law, the background information, and the interpretation all come from the parties' experts, not its own independent analysis. For example, when discussing Mexican legal reasoning in general, the court described one expert's analysis of the importance of Mexican case precedent and Mexico's "unitary" legal system, clearly attributing this information to the expert.⁴⁰

The court was persuaded by the plaintiff's expert, Professor Stephen Zamora of the University of Houston, who argued for corporate liability based on a Mexican statute providing that "corporate bodies are liable for damages that their legal representatives may cause in carrying out their duties," and that "employers or owners of industrial and commercial establishments, or of any means of transport, are obligated to pay for the damages and losses caused by their workers or employees in the exercise of their work,"⁴¹ Zamora supported these textual arguments by reference to the French Civil Code, which also permits the imputation to corporate entities of the "negligent acts

³⁹ *Id.* at 477. Although the opinion does not state on what grounds the trial court granted summary judgment, BWI had moved for summary judgment on the grounds that (1) BWI did not own the Hotel, (2) BWI was not an individual capable of committing an "act of man" under the law of Quintana Roo, (3) BWI was not an individual "exercising a profession" under the law of Quintana Roo, and (4) the affiliation agreement provided no stipulation that would give rise to liability. *Id.*

⁴⁰ *Id.* at 479-80.

⁴¹ *Id.* at 480-81.

carried out by corporate organs, officers, employees, or agents.”⁴² As Zamora had explained earlier in the opinion, since Mexico’s civil codes are based on France’s civil code, Mexican scholars often look to its example to interpret their own law.⁴³ Finally, the expert quoted the opinion of a Mexican civil law scholar for the proposition that corporations, since they can act only through their agents, are liable just like individuals for the negligent acts of their employees.⁴⁴

The court was less persuaded by the defendants’ expert, who relied on a decision issued by the Mexican Supreme Court that described civil liability as “based on the personal act attributed to an identified person.”⁴⁵ According to BWI’s expert, the requirement that the act be “personal” and attributed to an identified person would make Article 87 inapplicable to Gardner’s suit because BWI, a corporation, could not possibly commit a “personal” act.⁴⁶ The expert also relied on a statute that expressly limits the definition of corporate “legal representative” to administrators, attorneys, and managers, and on a Spanish legal dictionary, which defined “manager” as a company’s “supreme boss.”⁴⁷ Thus, the actions of an ordinary employee, which caused Gardner’s accident, would not be considered those of a “legal representative” of the company for which it would be liable under Quintana Roo law.

Although the court did not explain the reasons for its preference, it appears to have chosen the correct interpretation of Mexican law. As Zamora stated, under Mexican law arguments based on civil codes and legal commentary carry greater weight than those

⁴² *Id.* at 481.

⁴³ *Id.* at 479-80.

⁴⁴ *Id.* at 482. *See also* JOHN HENRY MERRYMAN AND ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 94-95 (3rd Ed. 2007).

⁴⁵ *Id.* The citation came from a source of *jurisprudencia* and *tesis aisladas* from the Mexican Supreme Court.

⁴⁶ *Id.*

⁴⁷ *Id.*

that rely on non-binding *tesis aisladas* and legal dictionaries. The main problem confronting U.S. judges seeking to determine and apply the substantive law of Mexico, however, is that the U.S. and Mexican legal systems rely on very different sources of legal authority. While both systems consider constitutions and statutes to be authoritative sources of law,⁴⁸ in civil law countries such as Mexico, judicial opinions theoretically do not provide any binding authority, at least in most circumstances. There is no formal concept of *stare decisis*. Each decision applies only to the parties to the suit, and future courts, in theory, are free to rule however they want, despite the previous judges' rulings.⁴⁹

In fact, the absolute dismissal of precedent in civil law systems is overstated.⁵⁰ However, civil law judges often turn to legal scholarship in order to interpret difficult questions of law instead of case law,⁵¹ whereas U.S. courts look to case law before legal commentaries to determine the law. Therefore, the civil law courts, when deciding cases, pay less heed to previous court decisions, focusing instead on the language of the statutes, government regulations and legal doctrine before turning to case law to make their decisions.⁵² As such, the court in *Gardner* most likely correctly followed Gardner's code-based analysis of Mexican law over BWI's case law-based reading, even if it did not explicitly assert which method was the correct way to interpret Mexican law. In contrast to the Second Circuit in *Curley*, where the court stated based on its own research that Mexican law relied more on codes and administrative regulations than case law,⁵³ the

⁴⁸ MERRYMAN, *supra* note 44, at 94-95.

⁴⁹ *Id.* at 83.

⁵⁰ *Id.*

⁵¹ *Id.* at 88.

⁵² STEPHEN ZAMORA ET AL., MEXICAN LAW 99 (2004).

⁵³ *Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998).

Gardner court merely accepted one expert's entire explanation of Mexican law. Although the court most likely made the correct ruling, it demonstrated no ownership or comfort with Mexico's law.

The court adopted a similar approach to Mexican law in *Hoffman-Dolunt v. Holiday Inn, Inc.*, 1997 WL 33760924 (Tex. App.—Corpus Christi, 1997). In that case, the court had to decide if a U.S. corporation (Holiday Inn) could be held liable under Mexican law for the actions of an affiliated (but independently owned and operated) Mexican hotel. The hotel in *Hoffman* recommended a doctor to one of its guests (Dolunt), who allegedly died of a heart attack as a result of the doctor's incompetence. Like BWI, Holiday Inn had signed a licensing agreement permitting the Mexican hotel to use its name.⁵⁴ The main issues under Mexican law in the case were whether Holiday Inn, as a franchiser, could be held liable for the death of a guest on its franchisee's (Posadas) premises and whether Posadas was legally responsible for Dolunt's death because it had recommended his treating physician to him.⁵⁵ The court accepted the view of a Mexican lawyer who had practiced for 14 years, who stated that under Mexican law who testified that Holiday Inns did not have a direct duty to provide guests with medical care and accommodations, and that its principal-agent relationship with the hotel was not sufficient to make it vicariously liable for the hotel's actions.⁵⁶ It also accepted the view of a second expert, a Mexican lawyer and law professor, that Mexican law does not permit a hotel to be held liable for recommending a negligent or incompetent physician to a guest, unless the physician is not officially authorized to practice medicine in Mexico.⁵⁷

⁵⁴ *Hoffman-Dolunt v. Holiday Inn, Inc.*, 1997 WL 33760924 (Tex. App.—Corpus Christi, 1997).

⁵⁵ *Id.* at *6.

⁵⁶ *Id.* at *6.

⁵⁷ *Id.*

The court did no independent research on Mexican law, as in the *Gardner* case, accepting the testimony of experts.

C. Summary

What is the upshot, then, of how Texas courts apply Mexican law in the few instances in which they do so? Federal courts such as the *Curley* court have taken the initiative to do their own research into foreign law when choice of law rules dictate its application. They have found the sources of foreign law on their own and interpreted it as well. In contrast, Texas state courts have simply, and often incorrectly, assumed that Mexican law is the same as Texas law when the parties' fail to provide sufficient evidence regarding the content of Mexican law. And, where the parties present conflicting expert testimony regarding the content of Mexican law, the courts have failed to venture far beyond the reasoning presented by the experts; they did not even do much application of law to facts or explain why they choose one expert's view over another's.

In another case, the Texas state resolved the conflict in expert testimony by considering U.S. case law, U.S. administrative decisions, and concerns of U.S. policy, even though none of these holds significant weight under Mexican law. Although U.S. (and Texas) courts are certainly supposed to consider important national policies in making their decisions, using a U.S. economic good to "define" terms of Mexican statutes is certainly not applying Mexican law as it would be applied in Mexico. In this case, the court protected an important U.S. policy not by refusing to apply foreign law on policy grounds but by fashioning the foreign law to bring about the desired result.

The paucity of Texas cases in which courts actually apply Mexican law, combined with the tendencies of the courts in the few cases in which Mexican law is

applied, tend to support the theory that Texas courts are not yet comfortable applying Mexican law. While much of that reluctance may be a general preference for its own, familiar law, it is possible that some of the hesitancy toward Mexican law in particular, evidenced by the Dissimilarity Doctrine, has not gone away. In the next chapter, however, I will argue that this hesitancy is misplaced as a result of recent changes to the Mexican legal system.

CHAPTER 5: THE MEXICAN LEGAL SYSTEM AS A POSSIBLE EXPLANATION FOR JUDICIAL RELUCTANCE TO APPLY MEXICAN LAW

As shown in the previous two chapters, prior to 1979, Texas courts were required to dismiss any case requiring the application of Mexican law, under the Dissimilarity Doctrine. This doctrine was overruled in *Gutierrez v. Collins*, which also adopted a new “significant relationship” test for resolving choice of law problems.

The *Gutierrez* decision should have led to a spate of cases in which Texas courts applied Mexican law and to a growing expertise in Mexican law in Texas courts. Especially considering the increasing connections between the United States and Mexico in multiple areas, one might expect suits involving facts concerning both the U.S. and Mexico to proliferate.¹ However, this situation has not come to pass. Courts in Texas, despite growing connections between Mexico and Texas, still seem rarely to apply Mexican law.² When they do, they often seem reluctant to do so and unfamiliar with the Mexican system. After the Texas Supreme Court’s bold pronouncement over thirty years ago promoting the application of Mexican law, what explains this situation?

In this Chapter, I will argue that reluctance to use Mexican law in the Texas court system is largely explained by an outdated assessment of the inadequacies of the Mexican legal system. I will begin by discussing the main features of the Mexican legal system that subjected it to criticism both within and outside Mexico prior to 1994: a weak and

¹ Jorge A. Vargas, *Mexican Law and Personal Injury Cases: an Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT’L L.J. 475, 478 (2007).

² See, e.g., Jorge A. Vargas, *Mexican Law in California and Texas Courts and the (Lack of) Application of Foreign Law in Mexican Courts*, 2 MEX. L. REV. 46, 62 (2009) (discussing how infrequently U.S. courts, including Texas courts, apply Mexican law despite increases in globalization and contacts between Texas and Mexico).

dependent judiciary and significant problems in accessing Mexican legal materials. I will then discuss legal reforms adopted since 1994 to increase the power and independence of the Mexican judiciary, and to increase the accessibility of Mexican legal materials.

A. Perceived Inadequacies of the Mexican Legal System prior to 1994

Legal culture in Latin America as a whole, and Mexico in particular, is often summed up by the phrase “*obedezco pero no cumplo*” (“I obey but I do not comply”).³ This phrase originated in the colonial period in Latin America when colonials paid lip service to royal laws but did not carry them out.⁴ This disconnect, or “dualism between legal formalism and actual implementation,”⁵ has continued to be part of Latin American legal culture and is sometimes considered an actual cultural trait.⁶ Even after independence from Spain, this dualism did not cease; decades of indiscriminate adoptions of European models exacerbated the divide between the law on the books and social reality.⁷ Mexico does not suffer from a *lack* of law, both Constitutional and statutory. Like most of Latin America, Mexico is part of a long tradition of civil law; the nation is steeped in laws on the books, with dozens of different codes and a Civil Code based on the French Napoleonic Code.⁸ It also has a long and detailed constitution, but this document is noted for being more “aspirational” than practical and for differing greatly in

³ JORDI DíEZ, POLITICAL CHANGE AND ENVIRONMENTAL POLICYMAKING IN MEXICO 112 (2006).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Rogelio Pérez Perdomo, *Notes for a Social History of Latin American Law: the Relationship Between Legal Practices and Principles*, 52 REV. COLEGIO DE ABOGADOS P.R. 1 (1991), in ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 73 (2006).

⁸ STEPHEN ZAMORA ET AL., MEXICAN LAW 450 (2004).

what it requires from the actual implementation.⁹ The legal system in Mexico is fully-fledged and comprehensive. However, the actual enforcement of this system is viewed as very weak.

One major factor explaining the weak enforcement of Mexican law has been the historic weakness and lack of independence of the Mexican judiciary. The Constitution of 1917 attempted to establish the Judiciary as an independent branch by giving each state legislature the power to nominate candidates to the Mexican Supreme Court, who would then be approved by a two-thirds vote by the national Congress.¹⁰ The members were also given life tenure, which implied that they would only be removed for bad conduct.¹¹ In 1928, however, Plutarco Elías Calles ended life tenure for Supreme Court judges, returned the power to nominate justices to the President, and summarily dismissed all current Supreme Court members.¹² When Lázaro Cárdenas became President in 1934, he again dismissed all Supreme Court members, despite their guarantees of lifetime tenure, and reduced lifetime terms to six-year terms to run concurrently with the President's.¹³ This change ensured that the Supreme Court was always at the beck and call of the powerful Mexican executive branch, which held almost total power over appointing and removing judges.¹⁴

Concerns about the impartiality of Mexican judicial decisions deepened as a result of the dominance of a single political dynasty in Mexico, the Partido Revolucionario

⁹ DÍEZ, *supra* note 3, at 112.

¹⁰ Michael C. Taylor, *Why do Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141, 145-46 (1997).

¹¹ *Id.* at 146.

¹² *Id.* at 146-47.

¹³ *Id.*

¹⁴ ZAMORA, *supra* note 8, at 205.

Institucional (“PRI”), from 1917 to 2000.¹⁵ As mentioned above, from 1928 to 1994, the President appointed the nominees to the Mexican Supreme Court, subject to approval by the Senate.¹⁶ While this procedure does not differ greatly from U.S. practice, the total dominance of the PRI in the Senate meant that the Senate did not do much more than endorse the President’s choice.¹⁷ The Supreme Court, populated by judges approved by the PRI, then selected lower federal judges, a practice which both contributed to the Court’s inefficiency by drawing time away from decision making and ensured that lower judges would be beholden to their superiors.¹⁸ Furthermore, since judicial appointments were not for life, the Executive often appointed political allies or friends who viewed tenure on the Supreme Court as a springboard to future political positions (even though the term length, by 1994, had been extended from 6 to 15 years).¹⁹ In such a context, it is hardly surprising that judicial nominees were viewed as subservient to the reigning political party.²⁰

State courts, prior to 1994, followed a similar procedure to the Federal system—the PRI-dominated governors’ offices appointed the state Supreme Court justices, subject to the legislatures’ approval, and the justices then appointed lower state court judges.²¹ As a result, the Mexican system depended entirely on executive appointment of the highest judges, who then selected judges all the way down the ranks. Because the PRI

¹⁵ *Id.*

¹⁶ *Id.* at 206.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 190.

²¹ *Id.* at 211.

entirely controlled the Executive and the Legislature in both the federal and state governments for over 70 years, judges were also beholden to the PRI, to the ruling party..

A second factor behind the weak enforcement of Mexican law has been the historic difficulty involved in accessing Mexican legal materials.²² A dearth of case law material is common in civil law countries, since case law historically does not play such a vital role in the formation of law as in the United States.²³ Because easy access to case precedent was not crucial in the legal system, Mexican judicial decisions were neither meticulously preserved nor scrupulously indexed as they are in the U.S.²⁴ Therefore, even if a thorough, clearly-reasoned opinion existed on a point of law, finding it could be quite difficult. Although Mexican Supreme Court decisions have been published in an official reporter, the *Semanario Judicial de la Federación*, since 1871, publication of the decisions historically has been delayed by months or even years, and owning volumes of the reporter very expensive.²⁵ Decisions of lower courts were essentially unavailable.²⁶ English-language treatises and law review articles were also rarely available to help U.S. jurists navigate what case law existed.²⁷

The next two sections will look at changes that have taken place in both of these areas since 1994.

²² ZAMORA, *supra* note 8, at 96.

²³ *Id.*

²⁴ *Id.* at 97.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

B. Judicial Power and Independence in Mexico Since 1994

At the end of 1994, when the last PRI President, Ernesto Zedillo, was newly in office, Mexico enacted major judicial reforms in an attempt to increase the power and independence of the Mexican judiciary.²⁸ The 1994 reforms took the form of Constitutional amendments. President Zedillo proposed the reforms on December 5, 1994, and they entered into law on December 31, 1994, through publication in the *Diario Oficial de la Federación de los Estados Unidos Mexicanos*.²⁹

The 1994 reforms increased the Supreme Court's authority to decide federal and state constitutional controversies, challenges to the constitutionality of federal and state laws, and *amparo* judgments.³⁰ *Amparo*, which means protection or shelter and is also known as a “writ of protection,” is a judicial action established in the Mexican Constitution by which individual persons may challenge state action that encroaches on their rights.³¹ A person who feels that the government has infringed upon his rights does not file a traditional complaint but instead requests a writ of protection against that infringement.³² *Amparo* also protects the state from federal laws that infringe on its

²⁸ On the face of it, this sort of reform may seem unusual—why would a powerful Executive, which has had the judicial branch in its back pocket for decades, wish to reduce judicial dependence on the executive branch? Scholars have advanced explanations for the reform ranging from Zedillo's general anti-corruption stance to an attempt by a party clearly about to lose power (the PRI) to reduce opportunities for the incoming party to become too powerful. See, e.g., Jodi Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 46 LAT. AM. POL. & SOC. 87 (2005); Caroline C. Beer, *Judicial Performance and the Rule of Law in the Mexican States*, 48 LAT. AMER. POL. & SOC. 33, 36 (2006).

²⁹ ZAMORA, *supra* note 8, at 188; Taylor, *supra* note 10, at 149.

³⁰ Alexis James Gilman, *Making Amends with the Mexican Constitution: Reassessing the 1995 Judicial Reforms and Considering Prospects for Further Reform*, 35 GEO. WASH. INT'L L. REV. 947, 958-960 (2003); CONSTITUCIÓN DE MÉXICO, arts. 105, 107.

³¹ ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* 263 (2006).

³² *Id.* at 264.

sovereignty and the federal government from state laws that do so.³³ This action commences a special procedure under which, if the individual prevails, the court orders the state to stop the violation.³⁴ Reforms to Article 107, which regulated *amparo* suits, permitted the full Supreme Court to take up direct *amparo* suits or appeals on *amparo* suits either upon its own initiative or upon the petition of a circuit court or the Attorney General if the suits implicated a significant interest.³⁵

The reforms of 1994 also addressed the historical lack of independence in the Mexican judiciary, from the Supreme Court level down to lower federal judges. Specifically, although the President retains the power to nominate Mexican Supreme Court justices, his choice is restricted by the Senate's approval—a much more significant restraint in the post-one-party era.³⁶ In addition, Supreme Court justices, no longer at the whim of the executive branch, may now only be removed from office in accordance with Title IV of the Mexican Constitution, which regulates generally the removal of federal officials. They may be impeached when, in the exercise of their duties, they commit acts or omissions that harm the public interest—they may not be impeached merely for expressing ideas.³⁷

Even more important was the establishment of an entirely new administrative body *within* the judicial branch to oversee administrative decisions, discipline, and

³³ *Id.*, CONSTITUCIÓN DE MÉXICO art. 103 (2010).

³⁴ OQUENDO, *supra* note 31, at 264.

³⁵ *Id.* at 960.

³⁶ ZAMORA, *supra* note 8, at 207. The specific procedure is as follows: The president nominates three candidates, who must appear before the Senate within 30 days of nomination, and the Senate should designate one candidate to fill the vacancy by a two-thirds vote. If the Senate does not act within the thirty days, the President shall appoint one of the nominees; but if the Senate rejects all the nominees, the President selects another three nominees. If the Senate rejects the entire group a second time, the President selects a nominee to fill the vacancy. *Id.*

³⁷ *Id.*

appointments in the judiciary.³⁸ This body, known as the *Consejo de la Judicatura Federal* (“Federal Judicial Council”), was founded to increase the autonomy of the judicial branch and to reduce the Supreme Court’s duties.³⁹ The *Consejo* is comprised of seven members: three judges chosen by lottery from lower courts, three appointees (one by the executive branch and two by the Senate), and the President of the Supreme Court, a configuration designed to reduce the power of the executive branch.

The *Consejo* has many functions. Most importantly from the perspective of increasing judicial independence, the *Consejo* now has the power to select federal judges and to discipline the judiciary. Prior to the 1994 reforms, members of the federal judiciary below the Supreme Court were chosen by the Supreme Court nominees (who were widely believed to be dependent on the President for their positions and influence); after the reforms of 1994, federal judges are selected by a system of exams established by the *Consejo de la Judicatura*.⁴⁰ This system, called the *Carrera Judicial* (“Judicial Career”), is designed according to principles of “excellence, professionalism, objectivity, impartiality, independence, and seniority.”⁴¹ Those seeking a position in the federal judiciary must take a competitive examination, which may be open to anyone or only to judicial employees, at the discretion of the *Consejo*.⁴² The five applicants to a judicial post with the highest scores on the initial written test may take practical and written examinations graded by a jury comprised of a member of the Federal Judicial Council, a

³⁸ HÉCTOR FIX-ZAMUDIO AND HÉCTOR FIX-FIERRO, CUADERNOS PARA LA REFORMA DE LA JUSTICIA: EL CONSEJO DE LA JUDICATURA 67-68 (1996).

³⁹ *Id.*

⁴⁰ LEY ORGÁNICA DEL PODER JUDICIAL DE LA NACIÓN, Art. 105; ZAMORA, *supra* note 8, at 208.

⁴¹ ZAMORA, *supra* note 8, at 208.

⁴² *Id.*

federal judge, and a law professor.⁴³ The jury chooses the successful candidate based on the applicant's performance on the examinations, courses completed at the Judicial Institute, seniority, and academic degrees and advanced studies.⁴⁴ Then the *Consejo de la Judicatura* makes the appointment by a majority vote.⁴⁵ This system makes appointment to the federal judiciary mainly dependent on a candidate's ability and seniority, in clear contrast to the previous method based substantially on the executive's selections.

In addition to gaining control over the appointment of federal judges, the *Consejo de la Judicatura* also now governs discipline and sanctions of the federal courts.⁴⁶ This responsibility had belonged to the Supreme Court, which was so overburdened with its many administrative duties that it had little time to supervise the judiciary.⁴⁷ Therefore, prior to the 1994 reforms, no truly reliable method of enforcing judicial discipline existed.⁴⁸ Furthermore, because the entire judiciary was tainted by strong influence by the executive, disciplinary actions were not viewed as in any way impartial.⁴⁹ One Mexican official said that prior to the 1994 reforms, each Supreme Court member was said to have a "stable" of lower court judges for whom he or she was responsible, in the sense of a patron-client relationship.⁵⁰ Disciplining the federal judges amounted to little more than ensuring sufficient political loyalty.⁵¹

⁴³ *Id.* at 209.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ LEY ORGÁNICA DEL PODER JUDICIAL DE LA NACIÓN Art. 68; *Id.*

⁴⁷ ZAMORA, *supra* note 8, at 198.

⁴⁸ *Id.*

⁴⁹ *Id.* at 197.

⁵⁰ Taylor, *supra* note 10, at 162.

⁵¹ *Id.*

The new system sets up a more neutral disciplinary scheme under the auspices of the seven members of the *Consejo*. The *Consejo*'s rulings in this regard are final and unappealable, except decisions concerning the appointment, assignment, and removal of federal judges, which may be reviewed by the Supreme Court.⁵² This system removes the pressure to supervise the judiciary from the already overburdened Supreme Court, which permits the Supreme Court more time to consider cases and places the responsibility for judicial discipline with a body that has time to perform proper supervision; in addition, because the supervision comes from within the judicial branch, undue executive influence is removed from the process.

The 1994 reform are widely viewed as having had a significant positive effect on the power and independence of federal judges in Mexico. Stephen Zamora writes that the early experience under the new system has been positive, with judges generally acting independently, in both the Supreme Court and the lower federal courts.⁵³ Jodi Finkel, upon investigating the Mexican Supreme Court's decision regarding electoral issues after the 1994 reforms, found that the justices acted with considerable independence.⁵⁴ According to Finkel's estimation, the Supreme Court's independence in such cases especially demonstrates its increasing empowerment in relation to the executive branch since electoral issues particularly concern the executive. José Antonio Caballero Juárez, a member of the *Instituto de Investigaciones Jurídicas* of the *Universidad Nacional Autónoma de México* ("UNAM"), wrote that the judicial reforms, ten years after they

⁵² FIX-ZAMUDIO AND FIX-FIERRO, *supra* note 38, at 66.

⁵³ *Id.* at 209.

⁵⁴ Jodi Finkel, *Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court*, 35 J. LAT. AM. STUD. 777, 798-99 (2003).

were passed, had wrought clear improvements in judges' independence vis-à-vis the other branches of government, allowing them to make decisions according to the law against external pressure.⁵⁵

However, these positive assessments are far from uncontradicted. Many scholars have criticized the reforms for not actually changing the status quo and for being mere attempts to quiet public opinion.⁵⁶ These critics have commented that the reforms are little more than window dressing and that judicial independence and prominence have not in fact increased relative to the executive branch. They have noted several lingering problems with the judicial reform, starting from the initial implementation of the program. The reforms were enacted only on a macro level, and therefore they did little to improve the actual administration of justice or separation of powers.⁵⁷ Furthermore, in order to kick-start the independence of the new judiciary and to remove the taint of past PRI influence, President Zedillo took a page from previous presidents' books and dismissed the entire Supreme Court.⁵⁸ When he replaced them with new members, he did not follow the prescribed procedures to the letter—instead of submitting three candidates per position for a total of thirty-three names, he submitted only eighteen proposed names.⁵⁹ Although such a defect might not be serious, Mexican legal scholars claimed that the nominations were fixed by the executive branch and that the Senate's

⁵⁵ José Antonio Caballero Juárez, *The Independence of the Judicial Powers Ten Years after the Reform in Mexico*, MEX. L. REV. (2006), available at <http://info8.juridicas.unam.mx/cont/mlawr/6/arc/arc2.htm>. Caballero Juárez cautioned that what he called “internal independence,” or independence in the face of their superiors, Mexican judges still need much improvement.

⁵⁶ Alberto Székely, *Democracy, Judicial Reform, the Rule of Law and Environmental Justice in Mexico*, 21 HOUS. J. INT'L L. 385, 400 (1999).

⁵⁷ *Id.*

⁵⁸ Taylor, *supra* note 10, at 159-60.

⁵⁹ *Id.*

examination of the candidates had no effect on the final appointments—the Senate reportedly asked only one question to each of the candidates.⁶⁰

Assessments of the *Consejo de la Judicatura* are similarly mixed. For example, after the *Consejo de Judicatura* took over the disciplinary responsibilities for the judicial branch, in what might seem a vote of confidence in the new system the number of complaints against individual judges rose sharply.⁶¹ However, most of these complaints were seeking reviews of judicial decisions and were not proper administrative complaints; as of 2001, the *Consejo* had resolved over 250 complaints, of which 45 had merit.⁶² Critics also point out that the *Consejo* includes members of the legislative and executive branches, a design that they say undermines the supposed delegation of authority to the judiciary.⁶³ In particular, when the *Consejo* acts by committee, each committee is to consist of three members, two of whom must be from the legislative and executive branches.⁶⁴ In effect, this requirement removes control of the judiciary from members of the judiciary, even though the *Consejo* is ostensibly formed for that purpose.

Another hindrance to an effective reform of the judicial system is the incomplete reform of the state courts. The 1994 reforms explicitly affected only the federal judiciary. Although the federal judiciary plays a dominant role in making Mexican law, the majority of suits first arise in Mexican state courts.⁶⁵ Since each state is responsible for reforming its own court system, the state-level reforms have been inconsistent. While

⁶⁰ *Id.*

⁶¹ *Id.* at 199.

⁶² *Id.*

⁶³ Manuel Gonzalez Oropeza, *Recent Problems and Developments on the Rule of Law in Mexico*, 40 TEX. INT'L L.J. 577, 580 (2005).

⁶⁴ Taylor, *supra* note 10, at 161.

⁶⁵ ZAMORA, *supra* note 8, at 211.

twenty-six state judiciaries adopted judicial councils modeled after the federal *Consejo de la Judicatura* discussed above (and Coahuila and Sinaloa had adopted judicial councils prior to the 1994 reforms),⁶⁶ reform at the state level has been fitful and incomplete.⁶⁷ One Mexican legal scholar noted that it is difficult even to generalize about judicial reform at the state level because of the variety of approaches.⁶⁸ However, these scholars also note that reforms in judicial independence and accountability at the state level have been hindered by interference from the executive branches, perhaps to a greater extent than at the federal level.⁶⁹ Therefore, the lack of uniform changes at the state level means that at the major entry point to the judiciary no systematic improvement has occurred.⁷⁰

C. Accessibility of Mexican Legal Materials Since 1994

Improved access to Mexican judicial materials in the past twenty years is another reason that Texas courts should become more willing to apply Mexican law. Beginning in 1991, the Mexican Supreme Court began to put all federal jurisprudence and *tesis aisladas* on CD-ROM.⁷¹ Today, the Court's *tesis* and jurisprudence are available through the Court's website and on the Universidad Autónoma de México's *Instituto de Investigaciones Jurídicas* website.⁷² These sites do not offer access in English, which might discourage a Texas judge wishing to investigate Mexican law personally.

⁶⁶ FIX-ZAMUDIO AND FIX-FIERRO, *supra* note 38, at 63-65.

⁶⁷ ZAMORA, *supra* note 8, at 211-12.

⁶⁸ José Antonio Caballero Juárez and Hugo A. Concha Cantú, *The Elements of Judicial Reform: A Multidisciplinary Proposal for Studying Mexican State Courts*, MEX. L. REV. (2004).

⁶⁹ *Id.*

⁷⁰ ZAMORA, *supra* note 8, at 207.

⁷¹ *Id.*

⁷² Instituto de Investigaciones Jurídicas, *InfoJus*, available at <http://info.juridicas.unam.mx/infjur/leg/jrs/> (last visited July 19, 2010); Suprema Corte de Justicia de la Nación, *Ius 2007*, available at <http://www.scjn.gob.mx/> (last visited July 19, 2010).

Moreover, the searching methods are not exactly like the legal research system in the United States: instead of an intricate and comprehensive key word system, these search engines allow one to search by general field of law, type of judicial opinion, date, and court.⁷³ Nevertheless, the opinions are available, online no less, whereas historically they might have been awaiting publication for years after they were first handed down. Mexican statutes and legal codes are also available through official government websites, such as that of the *Cámara de Diputados* or the Senate.⁷⁴ Although Texas judges may justifiably still be reluctant to rely entirely on these websites to determine Mexican law given the unfamiliar search system and the lack of English versions, the materials are accessible now through the internet; they are not sequestered in legal institutes in Mexico.

Besides case decisions and legislation available online, legal professionals and scholars in Mexico and in the United States have been making efforts to facilitate access to concepts in Mexican law to an English-speaking audience. One example is a website sponsored by Jorge Vargas, the author of several recent articles on the interaction of U.S. and Mexican law, called *Mexican Law*.⁷⁵ This website includes a thorough basic guide to Mexican law, written in English for a U.S. legal audience.⁷⁶ The website clearly conveys which materials are available in English and which are only available in Spanish, and it provides links to access them in both languages (when available).

⁷³ Instituto de Investigaciones Jurídicas, *InfoJus*, available at <http://info.juridicas.unam.mx/infjur/leg/jrs/> (last visited July 19, 2010).

⁷⁴ Cámara de Diputados, *Leyes Federales Vigentes*, available at <http://www.diputados.gob.mx/LeyesBiblio/index.htm> (last visited July 19, 2010).

⁷⁵ Jorge A. Vargas, *Mexican Law*, <http://www.mexlaw.com/> (last visited August 7, 2010).

⁷⁶ *Id.*

A second important example is the *Mexican Law Review*, an UNAM publication begun in 2004 “as a way for the professors at the Institute to share their research with English-speaking scholars and practitioners around the globe.”⁷⁷ Now run by John M. Ackerman, a long-time member of the *Instituto de Investigaciones Jurídicas* and expert in Mexican law, the journal has increased its accessibility to an English-speaking audience in recent years by accepting only articles written originally in English (because articles written originally in Spanish were often too local for an international audience to understand) and by beginning a print version to increase its presence in the international scholarly community.⁷⁸ Recent articles have addressed points of great importance to jurists attempting to understand Mexican law, such as *The Concept of Jurisprudence in Mexican Law* (José María Serna de la Garza) and *Legisprudence: the Role and Rationality of Legislator—vis-à-vis Judges—Toward the Realization of Justice* (Imer B. Flores) (both published in the 2009 online version of the *Mexican Law Review*).⁷⁹ These articles help to explain, in terms familiar to the U.S. legal community, pertinent issues of Mexican law. Although these articles may not be authoritative statements of the law in themselves, their availability, along with other commentaries on Mexican law that are

⁷⁷ John H. Ackerman and Héctor Fix-Fierro, *Introduction*, available at <http://info8.juridicas.unam.mx/introduction.htm> (last visted 19 July 2010)

⁷⁸ *Id.*

⁷⁹ John H. Ackerman and Héctor Fix-Fierro, *Instructions for Contributors*, available at <http://info8.juridicas.unam.mx/cont.htm> (last visted 19 July 2010). It is true that some of the articles in this series may serve to confirm the differences between the U.S. and Mexican legal approaches. *See, e.g.*, José Antonio Caballero Juárez and Hugo A. Concha Cantú, *The Elements of Judicial Reform: A Multidisciplinary Proposal for Studying Mexican State Courts*, MEX. L. REV. (2004) This article is an investigation of judicial reform at the state level that begins with a theoretical model, full of generalities, for assessing judicial reform and finishes with a relatively brief “application” of the model to the states. The focus of the article is the theoretical model, not the actual application of facts. This approach is widely considered to be a “civil law” approach.” ZAMORA, *supra* note 8, at 456-57. Nevertheless, these articles may also serve as useful foundations for common law judges seeking to understand Mexican civil law to apply it more accurately.

appearing with greater frequency in U.S. publications, would allow Texas judges to understand the basic principles of Mexican law and to be more comfortable in navigating it.

D. Summary

While there remain several aspects of the Mexican legal system that might give pause to Texas judges considering whether and how to apply Mexican law, the situation has improved dramatically from 1979, when the Texas Supreme Court first advocated applying Mexican law. The Mexican judiciary has gained an independence and authority that it did not have in 1979 because of the 1994 reforms to the Mexican Constitution and the judiciary itself. Moreover, while Mexican legal materials in English, especially lower court case reports, are still difficult to access, internet accessibility and a greater emphasis on Mexican Supreme Court precedent have dramatically improved availability of key portions of Mexican law. If the *Gutierrez* court determined that Texas courts could and should apply Mexican law in 1979, today's courts should find it both easier and less troubling to apply Mexican law. That they still experience problems doing so goes against predictions made by many experts on Mexican and U.S. law.⁸⁰ In the next chapter, I will discuss further reasons for this reluctance and possible avenues for improving Texas judges' ability and willingness to ascertain and apply Mexican law.

⁸⁰ See, e.g., *Gutierrez v. Collins*, 583 S.W.2d 312 (1979); ⁸⁰ JORGE A. VARGAS, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L.J. 475, 501 (2006-2007).

CHAPTER 6: THE NEED FOR JUDICIAL INTERACTION

In the previous chapter, I discussed recent improvements in the Mexican legal system that should increase the ability and willingness of Texas courts to apply Mexican law. Yet as shown in Chapters 3 and 4, Texas courts continue to apply Mexican law extremely rarely, and to experience serious difficulties in the few cases where they attempted to apply Mexican law. The question is how Texas courts might become more willing and able to apply Mexican law.

In this chapter, I will argue that the key to improving Texas judges' application of Mexican law is to ensure that Texas judges have greater personal exposure to Mexican law and to Mexican legal practitioners. I will first discuss examples within the U.S. legal framework that show judges are capable of applying and willing to apply civil law in cases involving the law of Louisiana and Puerto Rico. I will briefly summarize some illustrative cases from these jurisdictions and discuss how their examples might apply to the Texas-Mexico situation in terms of judicial interaction. I will then discuss the theories of judicial dialogue in the comparative law realm as described by Sir Basil Markesinis, and argue that these arguments are relevant in the choice of law domain also., I will look at current efforts to increase interaction between Texas and Mexican legal practitioners and discuss the needed improvements in the area of judicial interaction, considering the suggestions of Jorge A. Vargas, a frequent commentator on the use of Mexican law in U.S. courts.

A. The Examples of Louisiana and Puerto Rico

Although the U.S. is primarily a common law country, there are two examples of civil law jurisdictions within the United States—Louisiana and Puerto Rico. In this section, I will compare the way in which courts in the U.S. have dealt with choice of law problems involving Louisiana and Puerto Rico law with the way in which they have dealt with similar problems involving Mexico.

1. Louisiana

As discussed in Chapter 2, the Texas Dissimilarity Doctrine was originally developed to avoid applying Louisiana law.¹ However, according to a Texas court of appeals, Texas courts were “not infrequently” applying Louisiana law² as early as 1974—five years before the *Gutierrez* court overruled the Dissimilarity Doctrine.

Since Texas abandoned the Dissimilarity Doctrine in 1979, Texas courts have issued at least 15 cases in which they have found that Louisiana law applied. These cases have involved tortious interference with contracts,³ as well as accidents that

¹ *Texas & P. Ry. Co. v. Richards*, 4 S.W. 627 (Tex. 1887).

² *Continental Oil Co. v. P.P.G. Industries*, 504 S.W.2d 616, 621 (Tex. App.—Houston [1st Dist.] 1974).

³ *See, e.g., Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 626, 630 (Tex. App.—Dallas 2007) (finding that Louisiana law governed a claim of tortious interference with contract when the hotel that was the subject of the contract was in Louisiana and the tortious acts occurred there, and turning immediately to a Louisiana Supreme Court case to determine the elements); *Union Natural Gas Co. v. Enron Gas Marketing, Inc.*, 2000 WL 350546 at *7 (Tex. App.—Hous. [14th Dist.]) (deciding, after ruling that Louisiana law applied to a claim for tortious interference with contract when the injury occurred in Louisiana and the parties’ relationship was centered there, that under Louisiana law the claim was limited to interference by a corporate officer with his employer’s corporate contract with a third person and that Louisiana did not recognize an independent cause of action for civil conspiracy by reference to the Louisiana Civil Code and court cases interpreting it).

involved Texas citizens but took place in Louisiana,⁴ products liability cases,⁵ contract provisions,⁶ and other legal issues.

In each case, the court determined Louisiana law on its own, by consulting Louisiana statutes and case law, without any assistance from legal experts. The court's decision in *Union Pacific R. Co. v. Cezar*⁷ illustrates the approach courts have taken in cases involving Louisiana law. Louisiana citizens who were injured in a car-train accident in Louisiana brought suit against Union Pacific and a Union Pacific employee who lived in Jefferson County, Texas, for negligently causing the accident.⁸ The court determined that Louisiana law governed the action because Louisiana had the "most significant relationship" to the case—the injury and the conduct causing the injury occurred in Louisiana, the plaintiffs were domiciled there, and the relationship between the parties, which consisted only of the accident, existed only in Louisiana.⁹ There were no important contacts with Texas.¹⁰

The court had to determine the duty that Union Pacific owed to the traveling public at a Louisiana railroad crossing under Louisiana law, and it resolved this issue on its own, with no reference to experts.¹¹ It found the relevant provisions in Louisiana's Civil Code and Louisiana's Revised Statutes¹² and consulted Louisiana court decisions interpreting these statutes. It relied heavily on the Louisiana Supreme Court's

⁴ See, e.g., *Union Pac. R. Co. v. Cezar*, 293 S.W.3d 800 (Tex. App—Beaumont 2009); *Brown v. Pennzoil-Quaker State Co.*, 175 S.W.3d 431 (Tex. App—Houston [14th Dist.] 2005),

⁵ *Verret v. Amerian Biltrite, Inc.*, 2006 WL 2507318

⁶ *In Re Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600 (Tex. App—Houston [14th Dist.] 2003).

⁷ 293 S.W.3d 800 (Tex. App—Beaumont 2009).

⁸ *Id.* at 804.

⁹ *Id.* at 807.

¹⁰ *Id.*

¹¹ *Id.* at 807-08.

¹² *Id.* at 808.

interpretation of the relevant statutes to make its own determination of Louisiana law, concluding that Union Pacific in fact had a legal duty to motorists to install extra warning devices at crossings.¹³

Although these cases show that Texas courts are more comfortable applying Louisiana law than Mexican law, some Louisiana legal practitioners and jurists have complained that U.S. common-law courts fail to interpret Louisiana law with civilian methodology.¹⁴ This failure can be partially explained by the overwhelming influence of common-law training in the United States—according to one former Louisiana Supreme Court Justice, briefs on Civil Code cases even in Louisiana’s highest court often rely mainly on common law methodology.¹⁵ Federal judges in the Fifth Circuit face even greater difficulties because many of them are called to apply Louisiana law without ever having been trained in civilian methodology.¹⁶ According to this Justice, federal Fifth Circuit judges sometimes rely too greatly on case law to the exclusion of Louisiana legislative pronouncements, which sometimes leads the Fifth Circuit to reach different conclusions when predicting Louisiana law than the Louisiana Supreme Court would likely reach.¹⁷

Nevertheless, the Justice notes that Fifth Circuit panels have often been faithful to Louisiana’s Civil Law system, viewing the Code as supreme and referring to treatises and only well-settled Louisiana Supreme Court decisions to interpret Louisiana law.

¹³ *Id.* at 808-809.

¹⁴ *See, e.g.*, James L. Dennis, *Capitant Lecture*, 63 LA. L. REV. 1003, 1009 (2003) (noting that federal judges often have difficulty in applying the Louisiana Civil Code).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1012-13.

Although Louisiana civilian lawyers may note that Texas courts do not necessarily interpret Louisiana law exactly as it would be interpreted in Louisiana, Texas judges clearly feel more comfortable doing so than they do with Mexican law.

2. Puerto Rico

U.S. courts are called upon to apply Latin American civil law when they consider the law of Puerto Rico. Puerto Rico, because of its civil law history, operates under a combination of the civil law and the common law, with determined efforts in recent decades to re-emphasize the traditional civil law.¹⁸ Puerto Rican commonwealth courts are staffed by attorneys and judges trained in the civil law¹⁹

Over the past 30 years, courts in the First Circuit have issued more than 15 cases requiring them to apply Puerto Rican law. These cases involve diverse issues, including wrongful prosecution,²⁰ claims against Puerto Rican insurance companies,²¹ products liability claims,²² issue preclusion,²³ and wrongful prosecution.²⁴ The courts in these cases determined Puerto Rican law by several methods—by doing their own research, by certifying questions to the Puerto Rican Supreme Court,²⁵ and even occasionally by

¹⁸ *Reyes-Cardona v. J.C. Penney Co., Inc.*, 694 F.2d 894, 895-96 (1982).

¹⁹ *Id.*

²⁰ *Id.*, discussed in more detail below.

²¹ *MRCO, Inc. v. Juarbe-Jimenez*, 521 F.3d 88 (1st Cir. 2008) (delving into the Spanish text of the Puerto Rican law, supported by other provisions of the Puerto Rican Code, to determine that no judicial action could be brought against an insolvent insurance company under Puerto Rican law).

²² *Guevara v. Dorsey Laboratories, Div. of Sandoz, Inc.*, 845 F.2d 364 (1st Cir. 1988).

²³ *See Coors Brewing Co. v. Mendez-Torres*, 562 F.3d 3 (1st Cir. 2009), *abrogated by* *Levin v. Commerce Energy, Inc.*, 130 S.Ct. 2323 (2010); *Baez-Cruz v. Municipality of Comercio*, 140 F.3d 24 (1st Cir. 1998).

²⁴ *Reyes-Cardona*, 694 F.2d at 895.

²⁵ *See, e.g., Medina & Medina v. Country Pride Foods, Ltd.*, 858 F.2d 817 (1st Cir. 1988). In this case, the First Circuit asked the Puerto Rican Supreme Court to analyze a Puerto Rican law, the Puerto Rico Dealer's Act, to determine whether a supplier could withdraw from the Puerto Rican market under certain contract requirements. *Id.* at 819. The Supreme Court of Puerto Rico noted in that opinion that the "certification process is a valuable tool used by the federal forum to seek a direct interpretation of Puerto Rican law . . . [s]ince both forums are aware of the historical and legal peculiarities that distinguish [them]." *Id.* at 820.

reference to U.S. common law²⁶—but they have generally undertaken the task of applying Puerto Rican law without protesting their inability to do so.

The judicial approach in these cases is illustrated by the First Circuit’s opinion in *Reyes-Cardona v. J.C. Penney Co., Inc.*,²⁷ written by future Supreme Court Justice Breyer in 1982. The issue in the case was the type of negligence required under Puerto Rican law for a suit for wrongful prosecution—whether simple negligence was sufficient or if more than simple negligence were required (such as malice, bad faith, gross mistake, and lack of probable cause).²⁸ In commentary that mirrors the Texas Supreme Court’s words in *Gutierrez v. Collins*, Justice Breyer found it “appropriate” for federal courts to consider civil law sources in diversity cases arising from Puerto Rico since the Commonwealth’s law is based on civil law.²⁹ Although he recognized that such sources were often not readily available in English and relatively unfamiliar to federal courts, he believed that any problems caused by these barriers were not insurmountable.³⁰ Breyer listed 3 ways to overcome these barriers: certifying the question to the Puerto Rican

²⁶ *Guevara*, 845 F.2d at 366. In contrast to the Texas cases employing Texas law to interpret Mexican law, the court in this case stated that it was resorting to U.S. common law only because the parties had presented no controlling civil law and the court had not found any controlling law in its own research. *Id.*

²⁷ *Reyes-Cardona*, 694 F.2d at 895.

²⁸ *Id.* The underlying facts of the case concerned J.C. Penney’s initial suit against two Puerto Rican citizens, Hector L. Reyes-Díaz and Isabel Díaz de Reyes, and against what J.C. Penney thought was their “conjugal partnership.” *Id.* In fact, Hector L. Reyes-Díaz was Isabel’s son, not her husband. J.C. Penney’s error was based on Hector L. Reyes-Díaz’s credit application, on which he had listed Isabel Díaz de Reyes but had not specified her relationship. J.C. Penney wrongly assumed that Isabel and Hector L. Reyes-Díaz were married, when in fact Isabel was married to Hector E. Reyes-Cardona, the plaintiff in the suit. Although J.C. Penney withdrew the complaint when it learned of its error, Reyes-Cardona had already learned of the suit and had suffered anxiety that required emergency psychiatric help. The court had to determine whether Puerto Rican law permitted recovery for allow recovery of damages from a wrongful prosecution based on simple negligence. *Id.*

²⁹ *Id.* at 896-97.

³⁰ *Id.* at 897.

Supreme Court for an answer;³¹ asking for advice from the federal district judges in Puerto Rico;³² or researching civil law questions independently using civil law materials.³³ Although Breyer noted that a common law judge's analysis of the civil law might not be so sophisticated as an expert's, he followed the the third approach by independently researching the case at hand.

After summarizing the contradictory holdings of previous Puerto Rican decisions regarding the negligence standard in wrongful prosecution cases, the court investigated wrongful prosecution in both the civil law and common law systems, using sources such as the *Revista de Derecho, Jurisprudencia y Administracion* (a respected Uruguayan law journal) and *Leçons de droit civil* (a treatise published by French law professors concerning the basics of Civil Law), in addition to Prosser's *Handbook of the Law of Torts* (a staple U.S. legal treatise on the topic of tort law).³⁴ In addition, the court attached an appendix of over twenty civil law sources from ten civil law countries and Louisiana.³⁵ After examining these sources, the court concluded that the civil law approach to wrongful prosecution claims was similar to the common law, and that the negligence required for wrongful prosecution is beyond simple negligence.³⁶ Although

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* As is accepted in the civil law system, the court looked to authoritative treatises on the topics even outside of the country in question, relying on statements from more authoritative interpretations from Uruguay and France. JOHN HENRY MERRYMAN AND ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION* 50 (3rd Ed. 2007).

³⁵ *Reyes-Cardona*, 694 F.2d at 897.

³⁶ *Id.* at 897-98. Interestingly, in the First Circuit cases I have found decided prior to Breyer's pronouncement of the need and ability to apply Puerto Rican civil law, the court directed the federal district court to *abstain* from deciding a tricky point of Puerto Rican law (in *Diaz Gonzales v. Colon Gonzalez*, 536 F.2d 453, 457 (1st Cir. 1976); and relied mainly on U.S. common law to determine the meaning of Puerto Rican law (in *McPhail v. Municipality of Culebra*, 598 F.2d 603, 606-08 (1st Cir. 1979).

the First Circuit occasionally relies mainly on its own precedent or Puerto Rican case law to interpret Puerto Rican law (instead of the more traditional code interpretation and use of treatises), the First Circuit is willing and able to apply Puerto Rican law; and the Supreme Court of Puerto Rico has praised the First Circuit becoming “more sensible, respectful, and prudent in the construction and adjudication of Puerto Rican law.”³⁷

B. Lessons from Louisiana and Puerto Rico—Judicial Interaction

There are several reasons why Texas courts might be more comfortable applying Louisiana and Puerto Rican law than they are applying Mexican law. First, the legal materials for Louisiana and Puerto Rican law are much more likely to be available in English (certain to be available in the case of Louisiana) and in a research format that U.S. judges are likely to recognize. Second, the Louisiana and Puerto Rican systems are not “pure” civil law systems, but include common law elements. Third, federal courts may not dismiss cases on the grounds that they can be more conveniently brought in Louisiana or Puerto Rico, since both of these jurisdictions (unlike Mexico) are part of the U.S. federal system. (On the other hand, Texas courts can still dismiss cases on this ground, since neither jurisdiction is part of the Texas legal system).

None of these three circumstances apply in cases involving application of Mexican law. However, the cases suggest that the relatively easy access and communication that exists between judges in these civil law jurisdictions and judges outside those jurisdictions. As Breyer noted in his opinion, it would be a fairly simple thing for the First Circuit judges to ask the opinion of their district court colleagues

³⁷ *Medina*, 858 F.2d at 819.

regarding Puerto Rico law.³⁸ Mexico does not have these connections to Texas judges, and there is significantly less interaction between judges in Mexico and Texas. Increasing the level of interaction between judges in Mexico and the U.S. may be the key to increasing Texas judges' willingness to apply Mexican law.

C. Judicial Dialogue in Comparative Law

The notion of increased judicial interaction and judicial dialogue is certainly not new. In fact, although it appears not to have had great impact yet in courts required to apply a foreign law by choice of law principles, it has been promoted in the comparative law context for years, chiefly through the efforts of Sir Basil Markesinis. Markesinis and other comparative law scholars have made impassioned calls for U.S. judges to accept foreign law, to learn from it, and to apply it in the U.S. context.³⁹ Markesinis discusses judicial dialogue mostly in the context of inspiration for interpreting and changing our own domestic laws—Markesinis, for example, explicitly notes that he is “not talking about foreign law as applicable law where the rules of conflict of laws so require.”⁴⁰ Rather, he makes a case for U.S. judges to consider foreign law when U.S. law is unclear or there is a gap,⁴¹ when U.S. judges must discover common principles of law,⁴² or when foreign experience can prove that another method has “worked,”⁴³ to name a few contexts. Markesinis’s “judicial dialogue” is designed to allow U.S. judges to consider foreign principles of law in order to improve their own law.

³⁸ *Id.*

³⁹ *See, e.g.*, Sir Basil Markesinis and Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11 (2005).

⁴⁰ *Id.* at 17.

⁴¹ *Id.* at 17, 90.

⁴² *Id.* at 76.

⁴³ *Id.* at 106.

Nevertheless, although Markesinis has developed his concept of “judicial dialogue” to enhance judges’ willingness to consider a foreign law in interpreting their own, the dialogue he promotes might also improve Texas judges’ willingness to apply Mexican law in Texas courts. Markesinis mentions several objections to using foreign law that sound remarkably like Texas judges’ reasons for not applying Mexican law. Foreign law material is difficult to access or to comprehend.⁴⁴ Foreign legal materials are often simply translated into another language, not into legal concepts that members of a different legal culture can understand.⁴⁵ Certain cultural distinctions might make the law of one nation entirely incompatible with another’s.⁴⁶ Courts may not have enough time to deal with other legal systems, and they might get the legal principles wrong by focusing on only one case or statute and missing the bigger picture.⁴⁷

To counter the first argument, he notes the growing availability of legal sources through electronic access, which the *Gutierrez* court noted in the Mexico context in 1979;⁴⁸ in response to the second, he says that one need only have a background sketch of the foreign legal system to understand how the example might fit in his own legal culture.⁴⁹ As to the third argument, he says that cultural barriers may disappear if one tries to understand a foreign legal principle in its own context.⁵⁰ Finally, courts like South Africa’s often engage in comparative analyses with little difficulty, and misinterpreting a

⁴⁴ *Id.* at 112-13.

⁴⁵ *Id.* at 116-117.

⁴⁶ *Id.* at 120-121.

⁴⁷ *Id.* at 127-129.

⁴⁸ *Id.* at 113.

⁴⁹ *Id.* at 117.

⁵⁰ *Id.* at 126-27.

foreign law can be avoided by taking care to understand the legal situation fully.⁵¹ In other words, using foreign law in the comparative exercise is challenging and requires care, but judges are up to the task.

In many ways, Markesinis's defense of comparative law sounds like the Texas Supreme Court's opinion in *Gutierrez*. Judges are capable of understanding an unfamiliar law if they will research the materials (which are ever more readily available) and consider the foreign law in its appropriate context, with due care and effort. Markesinis's discussion of judicial dialogue in the comparative context also highlights the vehement opposition to using foreign law that many U.S. judges express,⁵² an attitude that likely seeps into Texas judges' minds when they face a question of Mexican law. The calls he makes for greater judicial interaction in order to make U.S. judges comfortable with using foreign legal principles to change and interpret their own law could just as easily apply to Texas judges required to apply Mexican law. It is time to apply the theories of judicial dialogue and interaction outside the comparative law realm.

D. Efforts at Judicial Interaction Between Texas and Mexico

The legal community in both Mexico and Texas has expressed increasing interest in establishing a healthy dialogue between the two legal systems.⁵³ The *Mexican Law Review* mentioned in Chapter 4 represents a concrete effort on the part of Mexican lawyers and law scholars to communicate Mexico's law with a United States audience and thus to "further . . . a lively dialogue between the professors at the Institute and the

⁵¹ *Id.* at 130-131.

⁵² *Id.* at 19.

⁵³ JORGE A. VARGAS, *Mexican Law and Personal Injury Cases: An Increasingly Prominent Area for U.S. Legal Practitioners and Judges*, 8 SAN DIEGO INT'L L.J. 475, 501 (2006-2007).

international legal community.”⁵⁴ This increased interest is also evident among Texas lawyers and legal practitioners. Several law review articles published in recent years address what the authors consider to be the growing importance of Mexican law for the Texas legal community.⁵⁵

In 1994, a group of U.S. and Mexican lawyers from established the U.S.-Mexico Bar Association “to develop and promote understanding of the legal systems and practices and cultural differences of the two nations.”⁵⁶ The organization (which was originally called the Texas-Mexico Bar Association) was originally limited to lawyers and students from Texas and the four Mexican states that bordered Texas; however, as interest in the organization grew, membership was opened to attorneys and law students throughout the U.S. and Mexico.⁵⁷ The organization holds annual meetings for members, hosts over twenty committees on various areas of law, and promotes networking opportunities for lawyers on either side of the border.⁵⁸ By promoting interaction among U.S. and Mexican lawyers, the Association hopes to promote understanding and acceptance of legal culture in both countries.

⁵⁴ John H. Ackerman and Héctor Fix-Fierro, *Introduction, Mexican Law Review*, available at <http://info8.juridicas.unam.mx/introduction.htm> (last visited July 19, 2010).

⁵⁵ See, e.g., VARGAS, *supra* note 53, at 501.

⁵⁶ U.S.-Mexico Bar Association, *History and Purpose*, available at <http://usmexicobar.org/page.asp?p=History,%20Purpose%20and%20Benefits>. (last visited July 19, 2010). The entire purpose statement of the Association is: “the purpose of the Association is to develop and promote understanding of the legal systems and practices and cultural differences of the two nations; to exchange professional information among its members, concerning issues of law that affect common interest, such as commerce, investment, and immigration, among others, to enable lawyers in the two countries, those in private practice as well as those serving in the judicial system, to better serve their communities and clients; to promote development of infrastructure for the provision of legal services and the solution of controversies; to share experiences in dealing with matters of common interest, and avoid unnecessary conflicts, without adopting or favoring any particular political standing.” *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

There are numerous other institutions that permit networking between U.S. and Mexican lawyers and law professors. The American Bar Association has a committee devoted specifically to Mexico within their International group, which seeks “to grow its members [sic] involvement in dialog on current and potential developments of Mexican, United States and other law”⁵⁹ The International Association of Law Schools (“IALS”), founded in 2005, is committed to “the continuous improvement of legal education and research through learning from diverse societies and cultures” by means of fostering contact between law students and law professors all over the world.⁶⁰ IALS sponsors meetings approximately twice a year in diverse countries on various topics of international law to facilitate such contact.⁶¹

Efforts to promote interaction between judges in the US and Mexico have been somewhat slower. The U.S.-Mexico Bar Association organized a conference called “Strengthening Our Ties: A Study in Current and Developing Law and Policy in US-Mexico Relations” in October 2007 which specifically invited U.S. and Mexican judges to discuss “the Role of the Judge in Instilling Public Confidence in a Country’s Judicial System.”⁶² The conference also featured a “Judicial Breakout Session” for the judges to interact, and a U.S. Circuit Judge, a Texas Supreme Court Judge, a Mexican Suprema Corte judge, and a judge from Spain all attended. However, the U.S.-Mexico Bar

⁵⁹ International Association of Law Schools, Charter for the International Association of Law Schools, <http://www.ialsnet.org/charter/index.html> (last visited November 6, 2010).

⁶⁰ *Id.*

⁶¹ International Association of Law Schools, Meetings, <http://www.ialsnet.org/meetings/index.html> (last visited November 6, 2010).

⁶² U.S.-Mexico Bar Association, Strengthening Our Ties: A Study in Current and Developing Law and Policy in US-Mexico Relations: 2007 Annual Meeting and Conference, *available at* <http://www.asil.org/pdfs/USMBA.pdf> (last visited November 6, 2010).

Association does not currently organize interaction among judges, nor were they aware of any standing programs to increase interaction.⁶³

The American Bar Association's Latin American Legal Initiatives Council also is deeply involved with the Latin American legal systems; but it appears largely to focus on programs to improve Latin American law rather than increase interaction to allow U.S. judges to understand Latin American law better.⁶⁴ Nevertheless, the Initiative has just this year instituted programs to facilitate judicial interaction between U.S. and Mexican judges. For example, to improve communication between Mexican and U.S. federal judges in the border cities of San Diego and Tijuana, the ABA Rule of Law Initiative ("ROLI") organized a visit in October 2010 for Mexican judges to their "sister courthouse" in San Diego.⁶⁵ The program's goals included "raising awareness of how justice is administered in both countries, helping to dispel long-standing misconceptions and fostering open dialogue about best practices."⁶⁶

Jorge Vargas, a Mexican and American legal scholar who first predicted a rise in cases applying Mexican law in U.S. courts (particularly in California and Texas), similarly suggests that greater judicial interaction is the best method to make U.S. judges comfortable in applying Mexican law. He recommended publishing handbooks of Mexican and U.S. law for judges and an annual compendium of cases, measures that

⁶³ Email from Barbara Williams, Executive Director U.S.-Mexico Bar Association, to author (July 24, 2010 11:05 AM CST) (on file with author); Email from José Zozayacorrea, Mexican Chair U.S.-Mexico Bar Association, to author (July 27, 2010 1:58 PM CST) (on file with author).

⁶⁴ See American Bar Association, Rule of Law Initiative: Latin America, *available at* http://www.abanet.org/rol/latin_america/ (last visited November 6, 2010) ("support[ing] legal reform efforts in Ecuador, Panama, Mexico, Guatemala, Belize and Nicaragua.")

⁶⁵ American Bar Association, Sister Courthouse Relationship Established between Tijuana and San Diego, *available at* http://www.abanet.org/rol/news/news_mexico_sister_courthouse_relationship_1010.shtml (last visited November 6, 2010).

⁶⁶ *Id.*

would help resolve lingering problems of accessing Mexican law.⁶⁷ In addition, he recommended instituting a series of classes for judges, regular annual meetings or conferences among judges, and periodic legal lectures from judges at law schools across the border.⁶⁸ The measures that he mentions mirror the efforts that other institutions have made to encourage interaction among U.S. and Mexican lawyers; these methods should also be effective in fostering communication between judges on either side of the border.

E. Summary

The idea that greater dialogue and interaction among judges will increase their comfort and familiarity with a foreign legal system, and thus lead to a better application of that foreign law, is of course not new. In the context of comparative law, scholars have long espoused greater judicial dialogue. The same benefits from judicial interaction in the comparative law context apply in the cases in which Texas judges must apply Mexican law because of choice of law principles. Greater interaction with judges who apply Mexican law could give Texas judges the familiarity with the actual law and methodology, increase Texas judges' comfort with the Mexican legal system, and provide them with contacts to assist in interpreting the unfamiliar law.

In contrast to the judicial dialogue of comparative lawyers, the judicial interaction necessary to increase Texas judges' comfort with Mexican law would likely require face-to-face interaction. As Vargas mentions in his article, conferences and classes, along with publishes guidebooks and annual reviews of law, are likely needed to increase Texas

⁶⁷ *Id.* at 63.

⁶⁸ *Id.*

judges' willingness to apply Mexican law. Personal contact is most likely necessary to counteract the history of distrust of the Mexican legal system.⁶⁹ However, increasing judicial interaction remains the most promising avenue of increasing Texas judges' comfort with Mexican law and therefore their willingness to apply it.

⁶⁹ See, e.g., John P. Tuman and Grant W. Neeley, *Explaining Attitudes toward Binational Cooperation among Texas Municipal Managers in the U.S.-Mexico Border Area*, 27 PUB. PERFORMANCE & MANAGEMENT REV. 88, 94 (2003) (finding that face-to-face interaction between city managers in Brownsville and Matamoros made the managers view cooperation more positively and more willing to cooperate).

CHAPTER 7: CONCLUSION

This thesis has attempted to assess the ability and willingness of courts in Texas to apply foreign law, by looking at the way in which those courts have handled cases raising issues of Mexican law. It turns out that, despite the increasing connectedness between Texas and Mexico and the predictions made by prominent legal scholars, Texas courts very rarely apply Mexican law. Courts apply choice of law rules to avoid the application of Mexican law if this law would be less favorable to Texas citizens. In the very few cases in which Texas courts *do* apply Mexican law, the courts demonstrate very little confidence in their ability to apply the law themselves. While federal courts have actively undertaken their own research into Mexican law and have conducted their own interpretations of Mexican law, state courts in Texas rely on experts in Mexican law to research the law and to interpret it. In at least one case, a federal court in Texas openly turned to U.S. case law and U.S. public policy to interpret the meaning of *Mexican* law.

The Dissimilarity Doctrine, in effect in Texas from the 1800s to 1979, suggests several of the reasons that Texas courts might distrust Mexican law. The Mexican legal system is very different from Texas's. Mexican legal materials were difficult to access, and Texas courts might have a hard time applying the law as it was applied in Mexico because of the lack of contact with Mexican judges and of explanatory material. Underlying all these concerns was also the sense that the Mexican legal system was fundamentally flawed.

Although recent reforms in Mexico should allay some of these concerns, both in terms of the reliability of Mexican law and the ease of accessing Mexican law, Texas courts still do not show comfort in applying Mexican law. This thesis has argued that the

best way to improve this situation is to “import” the notion of judicial interaction from the scholarly field of comparative law to the actual application of law under choice of law principles. The steps taken by legal scholars such as the IJ and legal practitioners such as the leaders of the U.S.-Mexico Bar Association are a first step. However, they do not explicitly allow judges to interact and become comfortable with each other. As Jorge Vargas suggests, only by specifically organizing opportunities for judges from Texas and Mexico to meet, exchange thoughts about their legal systems, and discuss common problems will Texas judges be likely to gain the confidence in Mexican law, and the basic understanding of it, necessary for them to be comfortable in applying it.

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