

THE COMMON LAW OF MEXICAN LAW IN TEXAS COURTS

Carlos R. Soltero & Amy Clark-Meachum***

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I. INTRODUCTION/SCOPE OF ARTICLE.

A quarter of a century ago in 1979, the Texas Supreme Court abolished the “Dissimilarity Doctrine” in Texas and the *lex loci delicti* rule in choice of law determinations in its

landmark watershed opinion, *Gutierrez v. Collins*.¹ Since that time, Texas courts have applied Mexican law to disputes filed in Texas.²

Texas adopted the English common law and repealed certain Mexican laws in 1840.³ As a common law jurisdiction, Texas courts follow precedent under the doctrine of *stare decisis*.⁴ According to the United States Supreme Court, “*stare decisis* . . . is a doctrine that demands respect in a society governed by the

1. *Gutierrez v. Collins*, 583 S.W.2d 312, 318, 322 (Tex. 1979). *Gutierrez* involved an automobile accident in Zaragosa, Chihuahua, Mexico between two cars operated by Texans from El Paso. *Id.* at 313. Plaintiff sought to apply Mexican law to the claim from the accident which occurred in Mexico. *Id.* The Texas Supreme Court rejected the lower court’s rejection of the applicability of Mexican law under the Dissimilarity Doctrine and remanded so the trial court could determine which jurisdiction had the most significant relation to the litigation. *Id.* at 318, 322.

2. *Long Distance Int’l, Inc. v. Telefonos de Mexico, S.A.*, 49 S.W.3d 347, 351 (Tex. 2001); *Gardner v. Best W. Int’l, Inc.*, 929 S.W.2d 474, 479 (Tex. App.—Texarkana 1996, writ denied); *c.f. Robertson v. Estate of McKnight*, 609 S.W.2d 534, 536–37 (Tex. 1980) (supporting the proposition that Texas courts apply the law of other forums to disputes filed in Texas). In fact, Texas courts had been applying Mexican law long before 1979. *Gutierrez*, 583 S.W.2d at 313. See Andrew Walker, *Mexican Law and Texas Courts*, 55 *Baylor L. Rev.* 225 (2003) (providing a historical account). See also *In re Estates of Garcia-Chapa*, 33 S.W.3d 859, 862 (Tex. App.—Corpus Christi 2000, no pet.). According to one court, Texans’ “familiarity with Spanish law and procedure” led to Texas adopting a “second constitutional provision insuring the right to a jury trial in all causes.” *Casa El Sol-Acapulco, S.A. v. Fontenot*, 919 S.W.2d 709, 715 (Tex. App.—Houston [14th Dist.] 1996, writ dismissed) (citing TEX. CONST. art. V, § 10).

3. *Cravens/Pocock Ins. Agency v. Beasley Constr. Co.*, 766 S.W.2d 309, 310 & n.2 (Tex. App.—Dallas 1989, no writ) (citing An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws, and Regulate the Marital Rights of Parties, 1840 Tex. Gen. Laws 1, 2 H. Gammel, *Laws of Texas* 177 (1898)). The Republic of Texas used the general laws until 1840. *Schwarz v. State*, 703 S.W.2d 187, 189 (Tex. 1986). The 1840 Act expressly excepted laws relating to “the reservation of islands, and also of salt lakes, licks and salt springs, mines and minerals of every description” which may have been modified by subsequent laws. *Id.* at 189–90 (discussing history of mineral reservations in public land grants in Texas and citing An Act to Adopt the Common Law of England, to Repeal Certain Mexican Laws, and Regulate the Marital Rights of Parties § 2, 1840 Tex. Gen. Laws 1, 2 H. Gammel, *Laws of Texas* 177 (1898)).

4. See *Weiner v. Wasson*, 900 S.W.2d 316, 320 (Tex. 1995) (stating that “generally, we adhere to our precedents for reasons of efficiency, fairness and legitimacy”). According to *Black’s Law Dictionary*, *stare decisis* is “the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).

rule of law.”⁵ This article catalogues and summarizes prior cases, primarily—although not exclusively—Texas state law cases and federal cases from Texas, in which courts have determined Mexican law with regards to particular areas. This article does not attempt to judge whether any particular interpretation or application of Mexican law was correct, but only reports what the courts have written and the conclusions they have reached. In addition, this article, designed for use by practitioners, cites many law review articles, books, and other sources generated in the United States but interpreting or related to Mexican law.⁶ This paper focuses primarily on Mexican civil, not criminal, laws. However, at least a handful of Texas cases have referenced Mexican criminal laws, and we have included a brief section on cases referencing criminal laws in Mexico.⁷

As courts and many commentators have noted, the evolution of the global economy and the economic integration of North America make Mexican legal issues increasingly more likely to arise in U.S. courts, especially in the Southwest where states share a border with Mexico.⁸ As one article notes, with an

5. *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 420 (1983).

6. Apart from the law review articles and other sources cited in this paper, some thorough sources or references on Mexican law include: 1–4 ANDRES ACEDO M. ET AL., *MEXICAN LAW: A TREATISE FOR LEGAL PRACTITIONERS AND INTERNATIONAL INVESTORS* (Jorge A. Vargas ed., 1998 & vols. 3–4 2001) [hereinafter *MEXICAN LAW: A TREATISE*]; *DOING BUSINESS IN MEXICO* (Leon E. Trakman et al. eds., 2002 & Supp. 2003); RALPH H. FOLSOM ET AL., *NAFTA: A PROBLEM-ORIENTED COURSEBOOK* (2000); ROLANDO BALLESTEROS ET AL., *MEXICAN & U.S. LABOR LAW & PRACTICE* (Anna L. Torriente Ed. 1997); JAMES E. HERGERT & JORGE CAMIL, *AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM* (1978); *MEXICAN CIVIL CODE* (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996) (translating *CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] (Mex.)*); *MEXICAN COMMERCIAL CODE* (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996) (translating *CÓDIGO DE COMERCIO [CÓD.COM.] (Mex.)*).

7. *See, e.g., Lizama v. United States Parole Comm'n*, 245 F.3d 503, 505 (5th Cir. 2001) (discussing homicide under article 123 of Baja California's Penal Code); *In re Balfour Maclaine Int'l Ltd.*, 85 F.3d 68, 72 (2d Cir. 1996) (discussing jailing of principals in Mexico for fraud in connection with obtaining franchising from foreign exchange transactions); *Tubular Inspectors, Inc. v. Petroleos Mexicano*, 977 F.2d 180, 182 n.4 (5th Cir. 1992) (discussing check cashing contrary to Mexican law); *Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301 (Tex. 1981) (discussing recognition of documents executed in Mexico in a manner contrary to public policy in Texas).

8. *See, e.g., Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998); *Perez v. Alcoa*

estimated 12 million U.S. citizens traveling to Mexico, if one in 10,000 suffers a tort, approximately 1,200 claims may be made in the United States.⁹ The United States shares 2,000 miles of border with Mexico, of which 1,254 miles are along the Texas border.¹⁰ Texas' geographic location makes Texas a jurisdiction with recurring Mexican law issues.¹¹

Practically, and contrary to the recent suggestion that litigation of Mexican law issues will proliferate in Texas courts,¹² in our judgment, many more disputes filed in Texas and governed by Mexican law will not be ultimately resolved in Texas courts because prior to the resolution of disputes on the merits, defendants will cite the applicability of Mexican law as a factor favoring dismissal under the *forum non conveniens* doctrine.¹³ *Gonzalez v. Chrysler Corp.*'s discussion makes it a significant case, although certainly not the first case, to hold

Fujikura, Ltd., 969 F. Supp. 991, 997 (W.D. Tex. 1997); M.E. Occhialino, *Representing Mexican Clients in U.S. Courts in Claims of Liability in Industrial Accidents*, 4 U.S.-MEX. L.J. 147, 168 (1996); Hale E. Sheppard, *The New Mexican Insolvency Law: Policy Justifications for U.S. Assistance*, 6 UCLA J. INT'L L. & FOREIGN AFF. 45, 79-80 (2001); Walker, *supra* note 2, at 230.

9. Michael Wallace Gordon, Book Review, 32 U. MIAMI INTER-AM. L. REV. 361, 364 (2001) (reviewing MEXICAN LAW: A TREATISE, *supra* note 6). This article does a good job of highlighting practical problems with trying to figure out and apply Mexican law.

10. Special Report from Carole Keeton Rylander, Texas Comptroller of Public Accounts, *State Functions at the Texas-Mexico Border and Cross-Border Transportation* 3 (January 2001).

11. See Walker, *supra* note 2, at 263-64. In 2001, Mexico was the third largest country in Latin America and fourteenth in the world with a population of over 92 million. Andrea B. Sluchan, Note, *Cross-Border Insolvencies, Section 304 and Reforming Mexican Insolvency Law*, 9 CARDOZO J. INT'L & COMP. L. 363, 375 (2001).

12. Trek C. Doyle & Roberto Calvo Ponton, *The Renaissance of the Foreign Action and a Practical Response*, 33 TEX. TECH L. REV. 293, 294-95 (2002) (suggesting that suits filed in Texas and governed by Mexican Law will dramatically increase).

13. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 379-82 (5th Cir. 2002) (affirming dismissal based on a finding that Mexico was an adequate forum for the matter at issue). Texas abolished the common law doctrine of *forum non conveniens*, *Dow Chemical Co. v. Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990), but the Legislature enacted the doctrine as a matter of statute. TEX. CIV. PRAC. & REM. CODE ANN. § 71.051 (Vernon 2003). For a criticism of how some Texas state courts have applied *forum non conveniens*, see Doyle & Ponton, *supra* note 12, at 302 (claiming that some courts follow the "any relationship to Texas test"); but see *Juarez v. United Parcel Serv. de Mexico, S.A.*, 933 S.W.2d 281, 285 (Tex. App.—Corpus Christi 1996, no writ) (using proof of Mexican law to affirm dismissal under *forum non conveniens*).

that Mexico is an adequate forum for *forum non conveniens* purposes.¹⁴ In 2003, the Fifth Circuit followed and reaffirmed *Gonzalez* by affirming another *forum non conveniens* dismissal to Mexico.¹⁵ The Fifth Circuit also stated that a “choice of law determination is a necessary part of [a *forum non conveniens*] dismissal.”¹⁶

Courts are understandably reluctant to engage in analyses of Mexican law that are likely to be complex and time-consuming, as opposed to a more straightforward *forum non conveniens* inquiry involving “well-established principles and a well-established body of American case law.”¹⁷ Even after the abolition of the Dissimilarity Doctrine¹⁸ and notwithstanding the availability of treatises and other translated materials of Mexican law,¹⁹ courts may still be reluctant to apply Mexican law because of the absence of readily available Mexican statutory and case law, problems inherent in a court applying laws the court is unfamiliar with, and the increased costs and length of trials due to the translation requirements.²⁰ Some opinions have also noted that Mexican courts are likely to understand Mexican law better than courts in the United

14. *Gonzalez*, 301 F.3d at 383. *See, e.g.*, *De Aguilar v. Boeing Co.*, 11 F.3d 55, 59 (5th Cir. 1993); *Industria Fotografica Interamericana S.A. v. M/V Jalisco*, 903 F. Supp. 18, 21 (S.D. Tex. 1995); *Seguros Comercial Americas S.A. v. Am. President Lines, Ltd.*, 910 F. Supp. 1235, 1245–46, 1250 (S.D. Tex. 1995); *Mora v. McDonald’s Corp.*, No. 96-C-5957, 1997 WL 102546, at *3 (N.D. Ill. Mar. 6, 1997) (not designated for publication); *Diaz v. Mexicana de Avion, S.A.*, No. SA-86-CA-1065, 1987 WL 275695, at *3 (W.D. Tex. Jan. 23, 1987) (not designated for publication).

15. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 (5th Cir. 2003).

16. *Id.* at 680.

17. *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp. 2d 646, 656 (S.D. Tex. 2003); *Juarez*, 933 S.W.2d at 285 (describing difficulty in applying Mexican law in Texas courts).

18. *Gutierrez v. Collins*, 583 S.W.2d 312, 317 (Tex. 1979).

19. *See supra* note 6 (listing alternative sources interpreting and translating Mexican Law).

20. *Taylor v. Daimler Chrysler Corp.*, 196 F. Supp. 2d 428, 434 (E.D. Tex. 2001) (describing difficulties of translation requirements); *Seguros Comerciales Americas, S.A. v. Am. President Lines, Ltd.*, 933 F. Supp. 1301, 1313 (S.D. Tex. 1996); *Seguros Comercial Americas S.A. v. Am. President Lines, Ltd.*, 910 F. Supp. 1235, 1248 (S.D. Tex. 1995); *Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at *1 (9th Cir. 1994) (not designated for publication) (describing difficulties of U.S. courts in familiarizing themselves with Mexican Law).

States.²¹ A *forum non conveniens* dismissal to Mexico (particularly in personal injury cases) may be outcome determinative because the lawsuit may not be economically viable in Mexico.²²

II. TEXAS ABOLISHED THE DISSIMILARITY DOCTRINE IN 1979, ALLOWING TEXAS COURTS TO APPLY MEXICAN LAW WHEN MEXICO HAS THE “MOST SIGNIFICANT” RELATIONSHIP TO THE LITIGATION

A. Gutierrez Abolished the Dissimilarity Doctrine

For many years, Texas courts refused to apply Mexican laws based on the Dissimilarity Doctrine. The Dissimilarity Doctrine was a defense against the application of Mexican law based on notions of practicality, fairness, and public policy prevalent [at the time because a] paucity of translated material [Mexican statutes and judicial opinions] might lead to incorrect interpretations of Mexican law by Texas courts, which would be unfair to the parties. Finally, several features of the laws of Mexico were considered to be so dissimilar to the laws of this state that they should not be enforced.²³

In 1979, the Texas Supreme Court abolished the Dissimilarity Doctrine, and recognized the *potential* applicability of Mexican law in Texas state courts for torts occurring in Mexico and elsewhere.²⁴

21. See, e.g., *Taylor*, 196 F. Supp. 2d at 434; *Diaz v. Mexicana de Avion, S.A.*, No. SA-86-CA-1065, 1987 WL 275695, at *5 (W.D. Tex. Jan. 23, 1987) (not designated for publication).

22. *Gonzalez v. Chrysler Corp.*, 301 F.3d 377, 382–83 (5th Cir. 2002); see also David W. Robertson & Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 938 (1990); Jacqueline Duval-Major, Note, *One Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 671 (1992). For the other side of this situation, see *In re Western Aircraft, Inc.*, 2 S.W.3d 382, 384–85 (Tex. App.—San Antonio 1999, no pet.) (Green, J., concurring).

23. *Gutierrez*, 583 S.W.2d at 320; see e.g., *Mexican Nat'l R.R. Co. v. Jackson*, 33 S.W. 857, 860–61 (1896) (refusing to enforce “dissimilar” Mexican laws). On the history of the Dissimilarity Doctrine, see Walker, *supra* note 2, at 255–57.

24. *Gutierrez*, 583 S.W.2d at 321-22.

The Texas Supreme Court in *Gutierrez* noted three dissimilarities which “were proven in the record before us and have been noted in most recent cases.”²⁵ The three distinctions between Mexican law and Texas law the Texas Supreme Court cited, all involving damages issues, were: (1) limitation of damages statutes indexing a plaintiff’s recovery to the prevailing wage rates set by Mexican labor law;²⁶ (2) that “Mexican law does not recognize pain and suffering as an element of damages, contrary to the laws of Texas and other jurisdictions in this country;”²⁷ and (3) that “Mexican law authorizes recovery for moral reparations which include injuries to a plaintiff’s reputation, dignity, or honor.”²⁸

This article analyzes how Texas courts and some other courts have interpreted Mexican law issues since *Gutierrez*.

B. Gutierrez Abolished the Lex Loci Delicti Rule and Adopted the “Most Significant Relationship” Test

Prior to *Gutierrez*, Texas followed the rule of *lex loci delicti*: “The law of the place where the cause of action arose, the *lex loci delictus*, must determine the nature of the cause of action, and the defenses, if any, available. The case asserted must stand or fall upon that law.”²⁹ This approach was rejected in *Gutierrez*.³⁰ Instead, the Texas Supreme Court adopted an interest balancing approach to choice of law issues requiring a judicial determination as to which jurisdiction has the “most significant relationship” to the litigation.³¹ This approach followed the national trend, and the methodology for determining the applicable substantive law is based on the Second Restatement of Conflict of Laws.³² Subsequent cases confirm that, absent

25. *Id.* at 321 (emphasis added).

26. *Id.*

27. *Id.*; accord *Fraga v. Villasana & Co., Inc.*, No. L-82-76, 1983 U.S. Dist. LEXIS 10932, at *2, *8 (S.D. Tex. Dec. 12, 1983) (not designated for publication).

28. *Gutierrez*, 583 S.W.2d at 321.

29. *Id.* at 314 (citing *Jones v. Louisiana W. Ry. Co.*, 243 S.W. 976, 978 (Tex. Comm’n App. 1922) (judgment adopted)).

30. *Gutierrez*, 583 S.W.2d at 318.

31. *Id.*

32. *Id.*

contractual agreement by a choice of law clause to the contrary, the Most Significant Relationship test applies in choice of law cases.³³

The general choice of law considerations under § 6 of the Restatement include:

- (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability, uniformity of result, and
- (g) ease in determination and application of the law to be applied.³⁴

The Second Restatement thus creates a rebuttable presumption that *lex loci delicti* applies, absent a more significant relationship by another (usually the forum) state. In cases involving two or more Texas residents in Mexico, Texas courts have found both Texas law and Mexican law controlling.³⁵

It is the quality, not the quantity of contacts, which is determinative.³⁶ Additionally, the directives of other Restatement provisions are particularly relevant.³⁷ The threshold point of inquiry in evaluating the contacts is the identification of the policies and governmental interests involved.³⁸ According to at least one commentator, there is a

33. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984) (rejecting traditional *lex loci contractus*).

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

35. *See Trailways, Inc. v. Clark*, 794 S.W.2d 479, 484 (Tex. App.—Corpus Christi 1990, writ denied) (applying Texas law); *but see Gutierrez*, 583 S.W.2d at 319, 321–22 (applying Mexican Law).

36. *Gutierrez*, 583 S.W.2d at 319.

37. *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 146, 175 (1971).

38. *See Duncan*, 665 S.W.2d at 420–22 (applying most significant relationship methodology to release of liability in airplane crash wrongful death suit involving Texas

recent trend where Texas courts interpret the Most Significant Relationship test in ways that result in the application of Texas, not Mexican, law.³⁹

C. Federal Courts with Diversity Jurisdiction Apply Texas Law

A federal court in Texas with diversity jurisdiction would apply Mexican law in the same manner as a Texas state court.⁴⁰

D. Some Choice of Law Problems for Texas Courts Applying Mexican Laws

Mexican corporations may argue that imposing Texas tort law is an unfair surprise.⁴¹ According to the Fifth Circuit: "Were we to apply Texas law as a means of righting any perceived inequities of Mexican law, we would be undercutting Mexico's right to create a hospitable climate for investment."⁴² Two Texas courts, the Corpus Christi and El Paso Courts of Appeals have similarly stated that "Mexico has a competing interest in protecting its residents from what it may consider to be excessive liability to foreigners for actions occurring on Mexican soil."⁴³

"Comity" may also be invoked as a ground for applying Mexican law or abstaining from adjudication or both.⁴⁴ Among

plaintiff, Kansas defendant, and an accident in New Mexico).

39. Doyle & Ponton, *supra* note 12, at 301-02.

40. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941); *Vasquez v. Bridgestone/Firestone*, 325 F.3d 665, 674 (5th Cir. 2003); *Southwest Livestock and Trucking Co., v. Ramon*, 169 F.3d 317, 320 (5th Cir. 1999); *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1413 (5th Cir. 1995).

41. See *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191-92 (3rd Cir. 1994); see also *In re Estates of Garcia-Chapa*, 33 S.W.3d 859, 862-63 (Tex. App.—Corpus Christi 2000, no pet.).

42. *Vasquez*, 325 F.3d at 675.

43. *Vizcarra v. Roldan*, 925 S.W.2d 89, 92 (Tex. App.—El Paso 1996, no writ); *Trailways, Inc. v. Clark*, 794 S.W.2d 479, 486 (Tex. App.—Corpus Christi 1990, writ denied). *Accord Danner v. Staggs*, 680 F.2d 427, 431 (5th Cir. 1982); *Hurtado v. Superior Court*, 522 P.2d 666, 670 (Cal. 1974); *Hernandez v. Burger*, 162 Cal. Rptr. 564, 566 (Cal. Ct. App. 1980) (noting that in a suit by a Mexican resident injured in Mexico by a California driver, Mexico's cap on damages advanced Mexico's "legitimate interest" in fostering local tourism). See also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 297 (3d ed. 1986).

44. See, e.g., *In re Xacur*, 219 B.R. 956, 969 (Bankr. S.D. Tex. 1998); *Wong v.*

the factors under a comity analysis is respect for the sovereignty of other countries.⁴⁵ The doctrine of comity is based on respect for the sovereignty of other states, like Mexico, and under that doctrine, the forum state will defer to the substantive law of the foreign sovereign to causes of action arising there.⁴⁶ However, the comity doctrine is not limitless.⁴⁷

Texas courts traditionally assert their jurisdiction and law vigorously in cases involving Texas residents. In wrongful death cases, "Texas has an interest in protecting the rights of its citizens to recover adequate compensation for the wrongful death of their relatives in foreign lands."⁴⁸ As a forum, Texas also has interests in applying its own law.⁴⁹ However, a Texas court may apply Mexican law to some issues and Texas law to others under the doctrine of *dépeçage*.⁵⁰

Choice of law clauses, wherein parties have chosen the applicability of Mexican law, may also result in the application

Tenneco, Inc., 702 P.2d 570, 575 (Cal. 1985) (applying Mexican Law under doctrine of comity with the result of denying recovery).

45. See *In re Xacur*, 219 B.R. at 969.

46. *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995) (quoting *Wong*, 702 P.2d at 575); see *Philadelphia Gear Corp.*, 44 F.3d at 191.

47. See *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 707 (5th Cir. 1999).

48. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1414 (5th Cir. 1995) (applying Texas law to Mexican airplane crash in Mexico and stating that "the important fact is that plaintiffs chose to sue in Texas under Texas law"); *Clark*, 794 S.W.2d at 486. *But see* *Fraga v. Villasana & Co., Inc.*, No. L-82-76, 1983 U.S. Dist. LEXIS 10932, at *8-*9 (S.D. Tex. Dec. 12, 1983) (not designated for publication) (holding that where defendant is from Texas and plaintiff is from Mexico, the factor is evenly divided). Texas has recognized

the full right of sovereignty of Mexico over the lands that lie south of the Rio Grande River boundary, and fully agree with the friend of the court that not only is that sovereignty supreme in that territory, but also that neither this State nor Nation has any right to exercise any sovereignty nor powers below the boundary.

Benavidez v. State, 154 S.W.2d 260, 266 (Tex. Crim. App. 1941).

49. WEINTRAUB, *supra* note 43, at 304; *but see* *Ossorio v. Leon*, 705 S.W.2d 219, 222 (Tex. App.—San Antonio 1985, no writ) (applying Mexican Law in a will contest to suits involving personal property between two Mexican citizens).

50. See WEINTRAUB, *supra* note 43, at 71; *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1153 (N.D. Tex. 1980) (applying Texas Law on liability and Canadian law on damages).

of Mexican law to a dispute filed in Texas courts.⁵¹

E. Arbitration and Alternative Dispute Resolution

Some disputes involving the potential application of Mexican law in Texas courts may also end up in arbitration by agreement of the parties.⁵² NAFTA-related disputes are also likely to be resolved by arbitration.⁵³ Forum selection clauses and prorogation clause are *prima facie* valid and, like other choices made by the parties, are enforced unless the opposing party shows that enforcement is unreasonable under the circumstances.⁵⁴ However, forum selection clauses must apply to the particular document at issue and be clear.⁵⁵

51. *Seguros Comercial Americas S.A. v. Am. President Lines, Ltd.*, 933 F. Supp. 1301, 1314 (S.D. Tex. 1996); *Seguros Comercial Americas S.A. v. Am. President Lines, Ltd.*, 910 F. Supp. 1235, 1244 n.20 (S.D. Tex. 1995). According to the Fifth Circuit, choice of law clauses are narrowly construed. *Access Telecom*, 197 F.3d at 705. *But see*, *MTIS Ltd. v. Corp. Interamericana de Entretenimiento S.A.*, 64 S.W.3d 62, 65 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding that parties contracted to be bound by Mexican law and Mexican courts have exclusive jurisdiction over any dispute). For a case where the parties agreed to apply Texas law rather than Mexican law, *see Beta Group, Inc. v. Larrinaga*, No. Civ. A. L-84-43, 1987 WL 13819, at *2 (S.D. Tex. Jan. 9, 1987) (not designated for publication).

52. *See Access Telecom*, 197 F.3d at 703. For other sources supporting the proposition that two parties may agree to arbitrate, *see Marathon Int'l. Petroleum Supply Co. v. I.T.I. Shipping, S.A.*, 728 F. Supp. 1027, 1032 (S.D.N.Y. 1990); *Unis Group, Inc. v. Compagnie Financiere de CiC et De L'Union Europeene*, No. 00 Civ. 1563(VM), 2001 WL 487427, at *1-2 (S.D.N.Y. May 7, 2001) (not designated for publication); 2 MEXICAN LAW: A TREATISE, *supra* note 6, at 7-8, 13-14.

53. *See* Stephen Zamora, *Nafta at Seven Years*, in 1 DOING BUSINESS IN MEXICO, *supra* note 6, Pt.I, § 1A.01; Leon E. Trakman, *Arbitrating Under Chapter 11 of the NAFTA: A Mexican Investor v. The U.S.*, in 1 DOING BUSINESS IN MEXICO, *supra*, at Pt.VI, Ch. 9, p. 1; Ian A. Lairs, *The Nuts and Bolts of Nafta Chapter 11 Arbitrations*, in 1 DOING BUSINESS IN MEXICO, *supra*, at Pt.VI, Ch. 9, p. 41.

54. *Industria Fotografica Interamericana S.A. v. M/V Jalisco*, 903 F. Supp. 18, 20 (S.D. Tex. 1995). *See also Albany Ins. Co. v. Banco Mexicano, S.A.*, No. 96-Civ.-9473-DAB, 1998 WL 730337, at *4 (S.D.N.Y. Oct. 19, 1998) (not designated for publication).

55. *See Summers v. Guss*, 7 F. Supp. 2d 237, 240 (W.D.N.Y. 1998). One federal district court in New York found that a forum selection clause also governed tort claims. *Albany Ins. Co.*, 1998 WL 730337, at *5.

III. PROCEDURAL RULES IN APPLYING MEXICAN LAW IN TEXAS COURTS

Failure to follow the proper procedural and evidentiary rules may be fatal to a party's request that a Texas court apply Mexican law, at least in state court.⁵⁶ In the absence of proper proof of the laws of Mexico (or any other country), Texas courts presume that the foreign country's laws are identical to the laws of Texas.⁵⁷ Texas courts have subject matter jurisdiction to consider choice of law and choice of forum determinations.⁵⁸

The court, not a jury, determines the laws of foreign countries like Mexico.⁵⁹ Choice of law is a mixed question of law and fact for the trial court requiring identification of relevant contacts and a determination of which law applies.⁶⁰ "The application of the law to the facts is a question of law."⁶¹ Accordingly, appellate courts defer to a trial court's determinations on questions of fact, and review *de novo* its determinations of whether Mexican law applies.⁶² A trial court's

56. See, e.g., *In re Estates of Garcia-Chapa*, 33 S.W.3d 859, 862 (Tex. App.—Corpus Christi 2000, no pet.) (holding that Mexican law could not apply despite the likelihood of its applicability, because party failed to follow procedures required under Texas law); *J. Parra e Hijos, S.A. v. Barroso*, 960 S.W.2d 161, 167 n.6 (Tex. App.—Corpus Christi 1997, no pet.) (holding that Mexican law could not apply because neither party urged its application); *Benitez v. Melendez*, No. 03-01-00126-CV, 2001 WL 1627656, at *3 (Tex. App.—Austin Dec. 20, 2001, pet. denied) (not designated for publication). *But see* *Curley v. AMR Corp.*, 153 F.3d 5, 12–13 (2d Cir. 1998) (recognizing Mexican law's applicability and content for the first time on appeal despite inadequate submission by parties).

57. *In re Estates of Garcia-Chapa*, 33 S.W.3d at 863. See *Tallant v. State*, 658 S.W.2d 828, 830–31 (Tex. App.—Fort Worth 1983, writ ref'd). Apparently, California also follows Texas' presumption rule as well. See *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1006 (9th Cir. 2001). By contrast, other common law jurisdictions like New York do not follow this presumption as it relates to civil-law jurisdictions. *Curley*, 153 F.3d at 14.

58. *Steele v. Diamond Corp. Servs., Inc.*, No. 14-96-469-CV, 1997 WL 528984, at *2 (Tex. App.—Houston [14th Dist.] Aug. 28, 1997) (not designated for publication).

59. *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A.*, 49 S.W.3d 347, 351 (Tex. 2001). See *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999).

60. See *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); *Gardner v. Best W. Int'l, Inc.*, 929 S.W.2d 474, 483 (Tex. App.—Texarkana 1996, writ denied).

61. *Gardner*, 929 S.W.2d at 483.

62. *Access Telecom*, 197 F.3d at 713; *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir.

refusal to apply Mexican law is not generally reviewable by mandamus.⁶³

A defendant moving for a “traditional” summary judgment under Tex. R. Civ. P. 166a(c) has the burden of proving that a plaintiff has no cause of action under Mexican law.⁶⁴

A. *The Primary Rules*

Texas Rules of Evidence 203 provides that:

A party who intends to raise an issue concerning the law of a foreign country shall give notice in the pleadings or other reasonable written notice, and at least 30 days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that the party intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court’s determination shall be subject to review as a ruling on a question of law.⁶⁵

Rule 203 is “a hybrid rule by which the presentation of the foreign law to the court resembles the presentment of evidence

1995); *Perez & Compania, S.A. v. M/V Mexico*, 826 F.2d 1449, 1450 (5th Cir. 1987); *Minn. Mining & Mfg., Co. v. Nishika, Ltd.*, 955 S.W.2d 853, 856 (Tex. 1996); *Ford Motor Co. v. Aguiniga*, 9 S.W.3d 252, 259 (Tex. App.—San Antonio 1999, pet. denied);

63. See *In re W. Aircraft, Inc.*, 2 S.W.3d 382, 384 (Tex. App.—San Antonio 1999, no pet.); *Transporters Aero Nacionales, S.A. v. Downey*, 817 S.W.2d 393, 395 (Tex. App.—Houston [1st Dist.] 1991, writ dism’d).

64. See *Gardner*, 929 S.W. 2d at 477 n.2.

65. TEX. R. EVID. 203.

but which ultimately is decided as a question of law.”⁶⁶ A party seeking to apply Mexican law must request that the court take judicial notice pursuant to Texas Rules of Evidence 203 at least 30 days prior to trial.⁶⁷ The motion requesting judicial notice and application of Mexican law must be verified.⁶⁸

The San Antonio Court of Appeals has found that a party fully complies with the requirements of Rule 203 when the party advocating judicial notice of Mexican law provides the court with:

- (1) an attorney’s affidavit concerning the grounds for applying Mexican law;
- (2) a Spanish version of the Mexican Civil Code;
- (3) a translated English version of the Mexican Civil Code; and
- (4) sworn legal opinions of Mexico’s law by lawyers.⁶⁹

Texas Rules of Evidence 1009 requires that if a translation of a foreign law is necessary, the translation must be served on all parties at least 45 days before trial.⁷⁰

In federal court, the primary rule is Federal Rules of Civil Procedure 44.1 (Determination of Foreign Law), which states:

A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal

66. Long Distance Int’l, Inc. v. Telefonos de Mexico, S.A., 49 S.W. 3d 347, 351 (Tex. 2001).

67. TEX. R. EVID. 203.

68. *Id. See, e.g.,* Trailways, Inc. v. Clark, 794 S.W.2d 479, 484 (Tex. App.—Corpus Christi 1990, writ denied) (requiring support for a party’s interpretation of Mexican law).

69. *See* Ossorio v. Leon, 705 S.W.2d 219, 221–22 (Tex. App.—San Antonio 1985, no writ); *but see* Cal Growers, Inc., v. Palmer Warehouse & Transfer Co., 687 S.W.2d 384, 386 (Tex. App.—Houston [14th Dist] 1985, no writ) (recognizing under Texas law, an actual copy of a foreign statute is not required to give judges sufficient information to take judicial notice of the laws of California).

70. TEX. R. EVID. 1009. *See also In re* Estates of Garcia-Chapa, 33 S.W.3d 859, 862 (Tex. App.—Corpus Christi 2000, no pet.)

Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.⁷¹

Unlike Texas state court rules which clearly state that failing to timely raise the applicability of a foreign country's law, such as Mexico, to the trial court waives its alleged applicability, federal courts have split authority on whether federal courts can consider the applicability of Mexican law for the first time on appeal.⁷²

B. *The Types of Pleading and Proof*

A motion for the court to take judicial notice of Mexican law is an appropriate pleading.⁷³ Parties may produce copies of the applicable statute, regulation, or other law, duly translated by a certified translator.⁷⁴

Parties also may present proposed expert testimony of Mexican lawyers or other experts in Mexican law including affidavit testimony, declarations, or deposition testimony.⁷⁵ "When the only evidence before the court is uncontroverted opinions of a foreign-law expert, a court generally will accept those opinions as true so long as they are reasonable and consistent with the text of the law."⁷⁶

The Corpus Christi Court of Appeals has found "a letter to

71. FED. R. CIV. PROC. 44.1.

72. Compare *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998) (allowing consideration of Mexican law applicability on appeal), with *Am. Int'l Trading Corp. v. Petroleos Mexicanos*, 835 F.2d 536, 540 (5th Cir. 1987) (precluding PEMEX from arguing choice of law question for the first time on appeal), and *Refrigeracion y Restaurante, S.A. v. Wal-Mart Stores, Inc.*, No. Civ.-A.-SA-97CA354EP, 1998 WL 1782541, at *2 n.1 (W.D. Tex. July 21, 1998) (not designated for publication).

73. See Linda L. Addison, *Civil Evidence*, 48 SMU L. REV. 943, 945 (1995); see also TEX. R. EVID. 203.

74. See, e.g., *Curley*, 153 F.3d at 16; *Nunez v. Hunter Fan Co.*, 920 F. Supp. 716, 718 (S.D. Tex. 1996); *Sanchez v. Brownsville Sports Ctr., Inc.*, 51 S.W.3d 643, 667-68 (Tex. App.—Corpus Christi 2001, pet. granted, judgment vacated w.r.m.).

75. *Curley*, 153 F.3d at 16; *Victor Equip. Co. v. Armco Steel Corp.*, 208 U.S.P.Q. 434, 440 (N.D. Tex. 1980); *Sanchez*, 51 S.W.3d at 667-68; Laretta Drake, *Stop the Madness! Procedural & Practical Defenses to Avoid Inconsistent Cross-Border Judgments Between Texas and Mexico*, 9 FLA. ST. U. J. TRANSNAT'L L. & POL'Y 209, 254, n.301 (1999).

76. *Gardner v. Best W. Int'l, Inc.*, 929 S.W.2d 474, 483 (Tex. App.—Texarkana 1996, writ denied).

the court from a Mexican attorney explaining the provisions of Mexican law relating to wrongful death damages, together with copies of the Mexican law and certified translations,” as sufficient to put the court on notice to apply Mexican law, thereby complying with Texas Rules of Evidence 203.⁷⁷

Parties should ensure that both the English translation and the original documents are properly authenticated, or the court may strike the proffered evidence.⁷⁸ A federal court, in determining Mexican law, may consider any relevant material or source, including testimony, whether or not submitted by a party in admissible form under Federal Rules of Civil Procedure 44.1.⁷⁹ Courts may also take judicial notice of treatises or other authority, including other cases that are part of the common law of Mexican law.⁸⁰

C. *Experts Are Subject to Daubert/Robinson and Other Challenges*

Expert opinion on Mexican law is generally required.⁸¹ “Expert testimony accompanied by extracts from foreign legal material is the basic method by which foreign law is determined.”⁸² All proposed expert testimony is subject to *Daubert/Robinson* challenges and scrutiny.⁸³ Specifically, *Daubert/Robinson’s* criteria applies to witnesses testifying as to legal issues,⁸⁴ and applies to witnesses hired by defendants.⁸⁵

77. *Clark*, 794 S.W.2d at 484; TEX. R. EVID. 203.

78. *See Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 997 (W.D. Tex. 1997) (stating this rule generally).

79. FED. R. EVID. 44.1. *See Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999).

80. TEX. R. EVID. 203.

81. *Compare Seth v. Seth*, 694 S.W.2d 459, 462–63 (Tex. App.—Fort Worth 1985, no writ) (considering expert testimony on Islamic law in bigamy and divorce cases), with *Access Telecom, Inc.*, 197 F.3d at 713 (noting that expert testimony is acceptable, but not necessary).

82. *Access Telecom, Inc.*, 197 F.3d at 713.

83. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 725–26 (Tex. 1998).

84. *Kumho Tire Co.*, 526 U.S. at 147 (holding that the *Daubert* factors apply to all experts, including those testifying to legal issues).

85. *Brownsville Pediatric Ass’n v. Reyes*, 68 S.W.3d 184, 195 (Tex. App.—

“For an expert’s testimony to be admissible, the expert must be qualified, and the expert’s opinion must be relevant to the issues in the case and based on a reliable foundation.”⁸⁶ Therefore, once challenged, the proponent of the Mexican law expert has the burden of proving to the trial court that the expert is qualified and that each proffered opinion is admissible because it is relevant to the suit and based on reliable methods, research, reasoning, and underlying data.⁸⁷

According to one pre-Rule 203 case, an expert opinion by itself may provide the court adequate grounds upon which to apply Mexican law.⁸⁸ Moreover, the mere fact that conflicting evidence of Mexican law is presented does not preclude the applicability of Mexican law.⁸⁹ Some courts have sustained predicate objections on the application of Mexican law.⁹⁰ Expert testimony without other pleading and proof of the laws themselves has previously not sufficed to prove Mexican law.⁹¹ Another court struck a non-lawyer, foreign law librarian who a party proffered to testify about Mexican law issues.⁹² Federal judges may reject even uncontroverted conclusions of an expert witness and reach their own decisions on the basis of an independent examination of foreign legal authorities.⁹³ Similarly, courts may weigh contradicting expert testimony on Mexican law.⁹⁴ Experts may be struck if they are totally

Corpus Christi 2002, no pet. h.).

86. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002).

87. *Kumho Tire Co.*, 526 U.S. at 149; *Gammill*, 972 S.W.2d at 718.

88. *Apodaca v. Banco Longoria, S.A.*, 451 S.W.2d 945, 947 (Tex. Civ. App.—El Paso 1970, writ ref’d).

89. *See Ochoa v. Evans*, 498 S.W.2d 380, 387 (Tex. Civ. App.—El Paso 1973, no writ).

90. *Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 998 (W.D. Tex. 1997); *Bostrom v. Seguros Tepeyac, S.A.*, 225 F. Supp. 222, 230–31 (N.D. Tex. 1963).

91. *Franklin v. Smalldridge*, 616 S.W.2d 655, 657 (Tex. Civ. App.—Corpus Christi 1981, no writ) (refusing to apply Mexican law that a religious marriage in Mexico is not legally binding thereby precluding second marriage).

92. *Bostrom*, 225 F. Supp. at 230–31.

93. *See Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 713 (5th Cir. 1999); *United States v. McLain*, 545 F.2d 988, 996 (5th Cir. 1977).

94. *See In re Balfour Maclaine Int’l Ltd.*, 873 F. Supp. 862, 867 (S.D.N.Y. 1995); *British Int’l Ins. Co. v. Seguros La Republica, S.A.*, No. 90-Civ.-2370-JFK-FM, 2000 WL 713057, at *7 (S.D.N.Y. June 2, 2000) (not designated for publication).

conclusory or if the substance is unpersuasive or cites dated authority or both.⁹⁵

IV. SUBSTANTIVE MEXICAN LAW AS PART OF THE COMMON LAW OF TEXAS

Unlike the common law system, in the Mexican Civil Code system, the language of the code itself is the “law” and prior judicial opinions have little, if any precedential value.⁹⁶ In Mexico, case law has precedential value only if it is *jurisprudencia obligatoria* or *jurisprudencia definida*, which means that the Mexican Supreme Court has considered and decided the same issue five consecutive times in the same way.⁹⁷ Mexico’s civil code concentrates on the code, statutes, regulations, customs, and scholarly writings as authoritative and accepted sources of law.⁹⁸

One Second Circuit case summarizes some of the differences between Mexican law and the laws of Texas (and most other U.S. jurisdictions as well):

Mexican law is much different, and its sources do not lie in precedent cases. As a civil law jurisdiction, Mexican courts consider the text of the constitution, civil code and statutory provisions as the primary source of law and give them preponderant consideration Likewise, Mexican courts give substantial weight to administrative regulations ‘Civil law codes tend to

95. See *Seguros Comercial Americas S.A. v. Am. President Lines, Ltd.*, 933 F. Supp. 1301, 1309 (S.D. Tex. 1996).

96. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA*, 36 (2d ed. 1985); Ryan G. Anderson, *Transnational Litigation Involving Mexican Parties*, 25 ST. MARY’S L.J. 1059, 1060–61 (1994); JAMES G. APPLE & ROBERT P. DEYLING, *A PRIMER ON THE CIVIL-LAW SYSTEM* 34–37 (1995).

97. *Gardner v. Best W. Int’l, Inc.*, 929 S.W.2d 474, 479 (Tex. App.—Texarkana 1996, writ denied). Mexican law does not rely merely on case law and Mexico does not follow the *stare decisis* rule, except when the Mexican Supreme Court creates binding rules called *jurisprudencia obligatoria* when it makes the same decision on similar facts in five consecutive cases. *Id.* See also Boris Kozolchyk, *Mexican Law of Damages for Automobile Accidents: Damages or Restitution?*, 1 ARIZ. J. INT’L & COMP. L. 189, 194 (1982).

98. MERRYMAN, *supra* note 96, at 23.

be much more general and encompass a broader range of circumstances than do common law statutes A civil code is not a list of special rules for particular situations; it is rather a body of general principles carefully arranged and closely integrated.⁹⁹

Like the United States, Mexico is a federal republic, with “sovereign” states in the federal system, each with its own body of law.¹⁰⁰ Federalism in Mexico is quite different, however, because federal law pervades Mexican life.¹⁰¹ Nevertheless, many private disputes within one state are issues of state law.¹⁰² Accordingly, both the Civil Code of the various states and the Civil Code of Mexico City or the Federal District (C.C.D.F.) may be relevant in a case where Mexican law applies. Because of Mexican federalism, the issue of *which* Mexican law to apply remains.

Mexico’s “rather unitary legal system” means “that the laws of the various states track closely and are interpreted similarly to the *Codigo Civil para el Distrito Federal* (Civil Code of the Federal District), that is, the national code.”¹⁰³ Moreover, the Civil Code for the Federal District has been the model used by the majority of the states.¹⁰⁴ In practice, there may be a false or spurious conflict between the law of the Federal District of Mexico and many Mexican states.¹⁰⁵

A. *Personal Injury Cases*

Personal injury actions involving accidents in Mexico are prevalent among cases seeking to apply Mexican law in Texas or

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

100. *Anderson*, *supra* note 96, at 1094. Mexico is a Republic of thirty-one states including the Federal District. *Sluchan*, *supra* note 11, at 375.

101. *See Anderson*, *supra* note 96, at 1094–95.

102. *See id.* at 1094.

103. *Gardner v. Best W. Int’l, Inc.*, 929 S.W.2d 474, 479 (Tex. App.—Texarkana 1996, writ denied).

104. *See id.*

105. *WEINTRAUB*, *supra* note 43, at 281. *See also Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 422 (Tex. 1984) (declaring the law of the interested state controls in cases involving “false conflicts”). For a case involving a false conflict between New York and Mexican law, see *D’Alessandro v. Am. Airlines, Inc.*, 139 F. Supp. 2d 305, 310–11 (E.D.N.Y. 2001).

other U.S. courts. In fact, *Gutierrez* is a typical example of this phenomenon.¹⁰⁶

1. *Mexican Tort Law Is More General Than Texas Law*

Unlike the law of American jurisdictions like Texas that have particular types of “torts” (e.g., negligence, strict liability, false imprisonment), Mexico tends to have one law of “wrongs” or torts which is codified in one general article in the Mexican Civil Code, Chapter V, “Liability from Illicit Acts” of Book Four (“Obligations”).¹⁰⁷ The *Curley* case cites a translation of one of the general tort statutes as follows:

Whoever, by acting illicitly or against the good customs and habits, causes damage to another shall be obligated to compensate him unless he can prove that the damage was caused as a result of the fault or inexcusable negligence of the victim.¹⁰⁸

Commentators generally support the *Curley* analysis.¹⁰⁹ Mexico’s laws limit liability in negligence cases to an amount based on a statutory framework.¹¹⁰ “Mexican law does not provide for derivative claims, such as the bystander or loss of

106. *Gutierrez v. Collins*, 583 S.W.2d 312, 313 (Tex. 1979). *Accord De Aguilar v. Boeing Co.*, 11 F.3d 55, 58–59 (5th Cir. 1993) (affirming denial of remand motion and dismissal of case based on *forum non conveniens* for plane crash that occurred in Mexico); *In re W. Aircraft, Inc.*, 2 S.W.3d 382, 385 (Tex. App.—San Antonio 1999, pet. filed) (Green, J., concurring) (finding defendant in airplane crash case that occurred near Piedras Negras, Mexico had adequate remedy on appeal from denial of *forum non conveniens* motion); *Juarez v. United Parcel Serv. de Mexico S.A.*, 933 S.W.2d 281, 285–86 (Tex. App.—Corpus Christi 1996, no writ) (finding no personal jurisdiction over Mexican corporation for auto-pedestrian accident in Matamoros, Mexico); *Diaz v. Mexicana de Avion, S.A.*, No. SA-86-CA-1065, 1987 WL 275695 (W.D. Tex. Jan. 23, 1987) (dismissing case based on *forum non conveniens* for plane crash that occurred in mountains west of Mexico City); *Fraga v. Villasana & Co., Inc.*, No. L-82-76, 1983 U.S. Dist. LEXIS 10932, at *7, *12 (S.D. Tex. Dec. 12, 1983) (not designated for publication) (applying Texas law to case involving auto-pedestrian accident on international bridge between Laredo and Nuevo Laredo, Mexico).

107. *Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998). Mexican law (at least under the state of Quintana Roo) regulates three types of liability: (1) contracted liability, (2) extra-contractual liability (similar to tort), and (3) objective liability (similar to strict liability). *Gardner*, 929 S.W.2d at 479.

108. *Curley*, 153 F.3d at 14. C.C.D.F. art. 1910.

109. See, e.g., *Anderson*, *supra* note 96, at 1097.

110. *Vizcarra v. Roldan*, 925 S.W.2d 89, 92 (Tex. App.—El Paso 1996, no writ).

consortium claims” filed by spouses or relatives.¹¹¹ One Michigan federal district court found that common-law negligence claims are similar to Article 1843 of the Civil Code of Veracruz.¹¹²

Under Mexican law, as interpreted by the Second Circuit, whether a wrongful act was intentional or negligent has no bearing on liability, although it may impact the damages award.¹¹³ According to the Second Circuit, the potential for liability is somewhat open-ended, because an illicit act may be a violation of “good customs” as well as a violation of a statute or administrative regulation.¹¹⁴

In *Sanchez v. Brownsville Sports Ctr., Inc.*, a products liability case involving an all-terrain vehicle (“ATV”) accident, the Corpus Christi Court of Appeals affirmed the jury’s finding

111. *Id.*

112. *Buettgen v. Volkswagenwerk, A.G.*, 505 F. Supp. 84, 86 (W.D. Mich. 1980).

113. *See infra* section IV.A.5.c. *Curley*, 153 F.3d at 14–15. There are two basic theories of tort liability in Mexican law: “subjective” and “objective.” The subjective theory is basically a *culpa*, or fault, driven theory based on article 1910, which provides that: “Whoever, acting illegally or against the good customs and habits causes damage to another is obligated to compensate him, unless he can prove that the damage was caused as a result of the fault or inexcusable negligence of the victim.” C.C.D.F. art. 1910 (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996) (Mex). The objective theory is based on Article 1913, which introduced for the first time to Mexican law in 1932 an additional theory of tort liability based not on fault, but on notions of strict liability—in particular, strict liability for ultrahazardous activities. *Id.* at art. 1913. Article 1913 provides that:

If a person employs mechanisms, instruments, equipment or substances which by themselves are dangerous or because of the speed they develop, their explosive nature and inflammable characteristics or by the intensity of the electric current, or similar causes, he is liable for the damages or injuries they cause, even though he is using them licitly, unless he can prove that the damage was caused by the fault or inexcusable negligence of the victim.

Id. If harm is caused by something other than negligence, an intentional tortious act, or strict liability under Article 1913, then no civil liability arises from that act. *Id.* at art. 1914; C.C.TAMAU. Art. 1395. Harm or damage, according to the code, is defined as “the loss or diminution of assets suffered as a result of the failure to comply with an obligation.” *Id.* at art. 2108. Likewise, loss, or prejudice, is defined as “the deprivation of legal gains that would have resulted had there been compliance with an obligation.” *Id.* at art. 2109.

114. *Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998); *Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 997 (W.D. Tex. 1997) (referencing Boris Kozolchyk & Martin L. Ziontz, *A Negligence Action in Mexico: An Introduction to the Application of Mexican Law in the United States*, 7 ARIZ. J. INT’L & COM. L. 1, at 11(1989)).

of contributory negligence because the driver violated Mexican laws requiring ATV drivers to be licensed and wear safety equipment.¹¹⁵ *Sanchez* suggests that even when Texas courts apply substantive Mexican law, Texas' proportionate responsibility scheme applies.¹¹⁶ Complying with Mexico's specific regulatory requirements may, as a matter of Mexican law, preclude a finding of acting illicitly or against good customs and habits as defined by Mexican law.¹¹⁷ In a claim arising from a car accident, a Michigan federal district court found that under the laws of Veracruz, the Mexican Federal Commercial Code, and Mexican Federal Consumer law, claims generally exist for "hidden defects, lack of quality and breach of warranty . . ."¹¹⁸

Contributory negligence under Mexican law is an affirmative defense.¹¹⁹ The general defense in Mexican Federal Law is contributory negligence under Article 1910, which provides that a tortfeasor is liable unless he proves that the injury occurred as a consequence of the victim's fault or inexcusable negligence.¹²⁰

2. Causation Issues

Under Texas law, causation, also proximate cause, has two elements: cause in fact and foreseeability.¹²¹ Causation has equivalent elements in Mexican tort law. Mexican law requires that the conduct of the defendant cause the injury suffered by the plaintiff and that the resulting harm must have been foreseeable.¹²² Other causation defenses, according to *Gutierrez y*

115. *Sanchez v. Brownsville Sports Ctr., Inc.*, 51 S.W.3d 643, 654 (Tex. App.—Corpus Christi 2001, pet. granted, judgment vacated w.r.m.)

116. *Id.* at 655–56. See TEX. CIV. PRAC. & REM. CODE ANN. §§ 33.001–.012 (Vernon 1997) (codifying the Texas proportionate responsibility scheme).

117. *Curley*, 153 F.3d at 15.

118. *Buettgen v. Volkswagenwerk, A.G.*, 505 F. Supp. 84, 86 (W.D. Mich. 1980).

119. *Anderson*, *supra* note 96, at 1099.

120. C.C.D.F. art. 1910 (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996) (Mex).

121. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1982).

122. See, e.g., *Anderson*, *supra* note 96, at 1098; see also *Gardner*, 929 S.W.2d at 480 (noting that all acts executed by fault or negligence—whether unintentional or intentional—which cause damage to another, oblige the actor to repair the damage and

Gonzales, an unforeseeable or fortuitous event, known as a *fuera mayor* for causation purposes is an event “that impedes the carrying out of an obligation or legal duty (and whose presence) cannot be determined or conjectured by signals or indications that foreshadow its proximity or arrival.”¹²³ The language of the *fuera mayor* definition is very similar to notions of foreseeability in the realm of proximate cause.¹²⁴

3. Particular Non-Negligence Tort Claims

In Mexican law, there is no distinction between intentional and negligent conduct.¹²⁵ To put it another way, there is a general duty owed to everyone to act in such a way as to not injure others. The Second Circuit found that a commercial airline’s pilot’s reporting of suspected in-flight drug use or possession in compliance with Mexican regulations and several Mexican laws that led to the incarceration of plaintiff did not, as a matter of law, constitute “illicit” conduct or actions that are “against good customs and habits.”¹²⁶ The Austin Court of

to indemnify the injuries in accordance with the Code.)

123. Kozolchik & Zientz, *supra* note 114, at 28 (citing ERNESTO GUTIERREZ Y GONZALES, *DERECHO DE LAS OBLIGACIONES* 489 (5th ed. 1976)).

124. *Id.* For examples of U.S. notions of proximate cause, see *Hines v. Morrow*, 236 S.W. 183, 185 (Tex. Civ. App. 1921) and *Palsgraf v Long Island R.R.*, 162 N.E. 99, 99–100 (N.Y. 1928). Article 2110 reads: “Damages and losses must be a direct and immediate consequence of the failure to comply with the obligation, whether they have already occurred or will necessarily occur.” C.C.D.F. art. 2110 (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996). Article 2111 reads in relevant part: “No one shall be held liable for a fortuitous event, unless caused or contributed to by him, or expressly assumed or imposed by law.” *Id.* at art. 2111. “*Fuerza mayor*” and unforeseeability or unavoidable accident are also defenses under Mexican law. Anderson, *supra* note 96, at 1098. Under Tamaulipas law, *fuera mayor* or “fortuity” may be only partial rather than absolute setoffs. *Id.*; C.C. TAMAU. Art. 1167.

125. *Curley v. AMR Corp.*, 153 F.3d 5, 14–15 (2d Cir. 1998); Edith Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. L.A. INT’L & COMP. L.J. 235, 243 (1986) (noting the lack of distinction between intentional and negligent torts in determining liability under Mexican law).

126. *Curley*, 153 F.3d at 15, 16. The court found that Article 322 of the Communications Law of Mexico requires the pilot in command to log and make known to Mexican federal authorities upon landing in Mexico “all incidents which might have legal consequences and which take place during the flight,” as does Article 556 of the Communications Law of Mexico, which provides that a pilot may be subject to fines for “acts or omissions which, actively or passively, contribute to the act of smuggling.” *Id.* at

Appeals has found that the Mexican Insurance Commission lacks jurisdiction over tort claims.¹²⁷

4. *Strict Liability Tort Claims*

Mexican law does not have the doctrine of strict products liability absent privity.¹²⁸ Furthermore, Mexico has not adopted strict products liability for defective products.¹²⁹

5. *Damages Issues*

The greatest difference between the tort laws of Texas and Mexico as written appears to be the calculation of damages.¹³⁰ Mexico's "underlying policy interest in adopting laws restricting tort recovery is to protect Mexican businesses and citizens from excessive liability claims . . ." ¹³¹ According to one source, Mexico does not recognize the collateral source rule.¹³²

a. *Damage Caps Including Wrongful Death Cases*

Mexico has limitation-of-damages statutes that index a plaintiff's recovery to the prevailing minimum wage rates set by Mexican labor law.¹³³ These provisions have the effect of substantially reducing a plaintiff's recovery compared to what he might expect to receive in a U.S. court.¹³⁴

For instance, according to one expert testifying in a Texas court proceeding, the law of the Mexican state of Nuevo Leon

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127. Summit Mach. Tool Mfg. Corp. v. Great N. Ins. Co., 997 S.W.2d 840, 843 (Tex. App.—Austin 1999, no pet.).

128. Gonzalez v. Chrysler Corp., 301 F.3d 377, 381 n.4 (5th Cir. 2002); Urena Taylor v. Daimler Chrysler Corp., 196 F. Supp. 2d 428, 432 (E.D. Tex. 2001) (finding Mexican law adequate despite its lack of a strict liability cause of action); Sanchez v. Brownsville Sports Ctr., Inc., 51 S.W.3d 643, 667–68 (Tex. App.—Corpus Christi 2001, pet. granted, judgm't vacated w.r.m.); Anderson, *supra* note 96, at 1099–1100.

129. Sanchez, 51 S.W.3d at 670.

130. Gutierrez v. Collins, 583 S.W.2d 312, 318, 322 (Tex. 1979); Anderson, *supra* note 96, at 1100–02.

131. Vizcarra v. Roldan, 925 S.W.2d 89, 92 (Tex. App.—El Paso 1996, no writ).

132. Anderson, *supra* note 96, at 1102–03.

133. Gutierrez, 583 S.W.2d at 321.

134. See Fraga v. Villasana & Co., Inc., No. L-82-76, 1983 U.S. Dist. LEXIS 10932, at *2, *8 (S.D. Tex. Dec. 12, 1983) (not designated for publication).

limits wrongful death liability to approximately \$5,700 plus unspecified moral damages.¹³⁵ And the Fifth Circuit found that Mexico limits damages in a case for the wrongful death of a child at \$2,500.¹³⁶

According to a Washington state court of appeals, “under “Mexican law, recovery for the death of another is calculated by ‘tak[ing] as the base four times the minimum daily salary which is the highest in force in the region and . . . multipl[ying] [it] by the number of days indicated in the Federal Labor Law for each of the incapacities mentioned.’”¹³⁷ In *Wolf*, the plaintiffs took the position that this calculation would lead to a limit of approximately \$10,000.00 for the life of each person who died on the airplane crash in question, although the court disputed the accuracy of that calculation.¹³⁸

Unlike laws in “the United States which establish an inflexible minimum, the Mexican minimum is geared to the type of work and the area of the country where the work is done. Thus, there is a sliding scale of minimum wages depending upon whether the work is carpentry or truck driving or whether it is done in rural Durango or industrial Monterrey.”¹³⁹ Several courts in the United States have found Mexico’s damage caps unreasonable.¹⁴⁰

b. Pain and Suffering

Unlike the laws of Texas, Mexican law does not recognize pain and suffering as an independent element of damages.¹⁴¹

135. *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 n.4 (5th Cir. 2003).

136. *Gonzalez v. Chrysler*, 301 F.3d 377, 381–83 (5th Cir. 2002).

137. *Wolf v. Boeing Co.*, 810 P.2d 943, 948 (Wash. App., Div. 1 1991) (citing Cód.COM. art. 1915 (Mex.)).

138. *See Wolf*, 810 P.2d at 948–49 nn.6–7.

139. *HERGERT & CAMIL*, *supra* note 6, at 31; *see also* Doyle & Ponton, *supra* note 12, at 297 n.28 (discussing Mexican recovery limitations).

140. *See, e.g., Gutierrez v. Collins*, 583 S.W.2d 312, 318, 321–22 (Tex. 1979); *but see Alvarez-Machain v. United States*, 331 F.3d 604, 635 (9th Cir. 2003) (rejecting damage award limitations of Mexican law because they conflict with the public policy of the United States in an Alien Tort Claims Act case).

141. *Gutierrez*, 583 S.W.2d at 321; *Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at *8 (9th Cir. 1994) (not designated for publication); *see also* Fraga v.

c. Moral Reparation Damages

Mexican law allows the recovery of damages for “moral reparations which include injuries to a plaintiff’s reputation, dignity, or honor.”¹⁴² These damages, which are awarded in the judge’s discretion may not, according to one court, exceed 1/3 of other damages awarded.¹⁴³

Among the factors courts looking at Mexican law consider in determining the appropriate amount of moral reparations damages is whether the wrongful act was intentional or merely negligent.¹⁴⁴ Apparently the Mexican Supreme Court has limited recovery of moral damages to “actions in which there is definite evidence of the defendant’s willful, wanton, or negligent acts which caused the victim’s damages.”¹⁴⁵ They, therefore, appear to be unavailable in strict liability cases.

According to one Mexican law scholar, moral damage is the “loss to the ‘rights of personality’ or moral rights, which involve an affront to one’s honor, reputation, feelings, emotions or peace of mind.”¹⁴⁶ Citing one of the codes, Friedler states that moral damages are recoverable.

Independently of the damages and losses, the judge may grant in favor of the victim of an illegal act, or of his family if the victim dies, an equitable indemnity as a moral reparation to be paid by the person responsible for the act. Such an indemnity cannot exceed one-third (1/3) the amount of such civil liability¹⁴⁷

Villasana & Co., Inc., No. L-82-76, 1983 U.S. Dist. LEXIS 10932, at *2, *8 (S.D. Tex. Dec. 12, 1983) (not designated for publication) (recognizing the differences in amount of recovery available in wrongful death actions in Texas and Mexico); *but see*, *Curley v. AMR Corp.*, 153 F.3d 5, 15 (2d Cir. 1998) (defining moral reparation damages as damages compensating for non-physical injuries such as emotional harm).

142. *Gutierrez*, 583 S.W.2d at 321. *See also Fraga*, 1983 U.S. Dist. LEXIS 10932, at *14 (recognizing the differences in amount of recovery available in wrongful death actions in Texas and Mexico).

143. *Gutierrez*, 583 S.W.2d at 321 (relying on C.C.D.F. art. 1916 and C.C.Chihuahua art. 1801). C.C.D.F. art. 1916 (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996) (Mex).

144. *Curley*, 153 F.3d at 14–15.

145. *Anderson*, *supra* note 96, at 1102.

146. *See Friedler*, *supra* note 125, at 248.

147. *Id.* at 254.

According to another Mexican law scholar, the code provisions related to moral damages in Mexican law have been used almost exclusively in the context of libel and slander actions.¹⁴⁸ Also significant is that the award is discretionary with the *judge*; Mexican law, of course, has no provision for jury awards.¹⁴⁹

d. Lack of Punitive Damages

Punitive damages are not recognized under Mexican law.¹⁵⁰ While moral damages do have similar moral and punitive dimensions, they are not tacked on as additional damages to teach defendants a lesson, but rather are considered an integral part of the patrimony from where the defendant wrongfully took and must restore.¹⁵¹ Thus, moral damages are more akin to pain and suffering in Texas law than to punitive damages.

e. Limitations

Some Mexican jurisdictions have a two-year-limitation statute; others have a one-year-limitation statute.¹⁵² After reviewing various Mexican laws on limitations, a Michigan federal district court found that Article 1867 of the Civil Code of Veracruz provides for a two year limitations period:

Article 2082 of the Civil Code of Veracruz limits actions for hidden defects to six months from the date of delivery of the thing sold. Article 383 of the Federal Commercial Code limits actions for lack of quality to five days from receipt of the merchandise and for hidden

148. Kozolchyk & Ziontz, *supra* note 114, at 34.

149. *See id.* at 14 (discussing Mexican requirement that civil cases be tried before a judge who has broad discretion to decide matters of fact and law).

150. Villaman v. Schee, Nos. 92-15490, 92-15562, 1994 WL 6661, at *3 (9th Cir. 1994) (not designated for publication); *see* Tubos de Acero de Mexico, S.A. v. Am Int'l Investment Corp., 292 F.3d 471, 489 (5th Cir. 2002). *See* Friedler, *supra* note 125, at 253 (stating that punitive damages for tort liability are not permitted and that only a criminal law judge can award punitive damages); *see also* Doyle & Ponton, *supra* note 12, at 297 n.28.

151. Friedler, *supra* note 125, at 262-63.

152. Zermeno v. McDonnell Douglas Corp., 246 F. Supp.2d 646, 658 (S.D. Tex. 2003); Doyle & Ponton, *supra* note 12, at 309-10, n.140.

defects to 30 days from receipt. Article 34 of the Federal Law protecting consumers limits actions for breach of warranty to two months from the date of the receipt of the product, or longer if the product was sold with a guarantee.¹⁵³

This Michigan federal district court also found that “Mexico has no tolling provision analogous to the notice rule” which resembles the discovery rule under Texas law.¹⁵⁴

B. Commercial Disputes

Recently, and certainly consistent with greater U.S.-Mexican integration and the passage of NAFTA,¹⁵⁵ cross-border transactions or transactions in Mexico that have gone wrong have been litigated in Texas and other U.S. courts.¹⁵⁶ At least one Mexican governmental agency has taken the position that the computation of damages in breach of contract or fraud claims under Mexican law are “radically different,” although the differences were not specified in that case.¹⁵⁷ Even years before the passage of NAFTA, historically, business disputes involving Mexican law have been litigated in Texas courts.¹⁵⁸

1. Contract Law Generally

One court in a case involving a contract governed by Mexican law, because the court was not provided proof to the contrary, presumed that Mexican law, like American contract law, recognizes implied contractual terms.¹⁵⁹ At least in the case

153. Buettgen v. Volkswagenwerk, A.G., 505 F. Supp. 84, 86 (W.D. Mich. 1980).

154. *Id.*

155. The North American Free Trade Agreement (“NAFTA”) was signed on December 17, 1992 and enacted by Congress on January 1, 1994. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1-9); 32 I.L.M. 605 (chs. 10-22). For the legislation implementing NAFTA, see the NAFTA Implementation Act of 1993, 19 U.S.C. § 3301 (2000) (referring to 19 U.S.C. § 1311(a)).

156. See, e.g., *In re Jackson Nat'l Life Ins. Co.*, 156 F. Supp. 2d 846 (W.D. Mich. 2001) (denying motion for application of Mexican law for an action in which insured residents of Mexico brought Texas state court action against a life insurer).

157. *Amer. Int'l Trading v. Petroleos Mexicanos*, 835 F.2d 536, 540 (5th Cir. 1987).

158. Walker, *supra* note 2, at 258-61.

159. *Victor Equip. Co. v. Armco Steel Corp.*, 208 U.S.P.Q. 434, 439-40 (N.D.

of agency contracts under Mexican law, a plaintiff may seek to recover for services which it has provided but for which it has not been paid; and it would be entitled to remuneration at the rate agreed to by the parties, or absent such agreement, to remuneration based upon the 'customary fee at the place' where [the plaintiff] provided these services.¹⁶⁰

In one case, certificates of deposits and warehouse receipts were offered as *prima facie* evidence under Mexican law of the existence of goods referenced in the certificates.¹⁶¹

At least one court has found, based on the testimony of Mexican law experts, that a person's signature over the name of a company means, under Mexican law that the intention of the signator was to sign on behalf of the company, which may be relevant to the signer's ultimate liability.¹⁶²

2. Collections, Debts, Notes

Promissory notes under Mexican law are called *pagarés*, "an *aval* is a form of financial obligation similar to a co-maker under U.S. law," and the maker of the note is an *avalista*.¹⁶³ Money undisputedly loaned and not repaid is compensable under Mexican law.¹⁶⁴ Unlike Texas law, under Mexican law, a promissory note (*pagaré*) can be 48 or 52 percent and not be usurious.¹⁶⁵ Article 358 of the Mexican Commercial Code provides the following: "A loan transaction shall be deemed mercantile if it is identified as one wherein the borrowed and loaned effects shall be dedicated only for commercial purposes. If entered into between merchants they shall be presumed to be

Tex. 1980).

160. *Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 1006 (W.D. Tex. 1997) (interpreting CÓD.COM. arts. 764–65 (Mex.)).

161. *In re Balfour Maclaine Int'l Ltd.*, 85 F.3d 68, 76 (2d Cir. 1996).

162. *In re Xacur*, 219 B.R. 956, 963 (Bankr. S.D. Tex. 1998).

163. *Id.* at 956, 962; *see also*, *Summers v. Guss*, 7 F. Supp. 2d 237, 238 n.3 (W.D.N.Y. 1998).

164. *Perez*, 969 F. Supp. at 1013.

165. *Southwest Livestock and Trucking Co., v. Ramon*, 169 F.3d 317, 319–21 (5th Cir. 1999)

mercantile.”¹⁶⁶

According to Article 359, in a mercantile loan the debtor is liable for repayment in an amount “pursuant to the monetary law in effect in the Republic at the time of payment, and this shall be an [sic] non-waivable restriction.”¹⁶⁷ Additionally, if the loan parties did not agree on an interest rate, the debtor is liable for interest at the rate of six percent per annum, from the day following the due date.¹⁶⁸

Parties who are co-signers or co-makers of notes may be jointly and severally liable for debts under Mexican law.¹⁶⁹ However, Mexican law experts on adverse sides in a bankruptcy proceeding in Houston concurred that “the same debt cannot be collected twice, and that a plaintiff may not sue to collect the same debt based on two different instruments.”¹⁷⁰ Finally, Mexican law “permits a paying *avalista* to become subrogated to the note holder’s claim against the corporate maker.”¹⁷¹

One party argued, in trying to prevent a *forum non conveniens* dismissal, that Mexican law would limit its damages for stolen shipping cargo in Mexico from possibly \$500/package under U.S. law to \$2.38/ton under Mexican law.¹⁷² Plaintiff’s expert in that case testified that under Mexican law (without citation to controlling provisions from Mexican civil code or judicial precedent) that “all actions resulting from a bill of lading are time-barred twelve months from the date goods are delivered” and that no restitution of rights (similar to a discovery rule concept) is permitted under Mexican law.¹⁷³ By contrast, another expert testified that the limitations period was six months.¹⁷⁴ The court concluded that under Mexican law, the

166. Cód.COM. art. 358 (Abraham Eckstein & Enrique Zepeda Trujillo trans., 1996) (Mex.).

167. *Id.* at art. 359.

168. *Perez*, 969 F. Supp. at 1013 n.14 (interpreting Cód.COM. art. 362 (Mex.)).

169. *In re Xacur*, 219 B.R. 956, 963 (Bankr. S.D. Tex. 1998).

170. *Id.* at 964.

171. *Id.*

172. *Seguros Comerciales Americas, S.A. v. Am. President Lines, Ltd.*, 933 F. Supp. 1301, 1308 (S.D. Tex. 1996).

173. *Id.*

174. *Id.*

defense of limitations appears to be waivable.¹⁷⁵

3. *Contracts Violating Mexican Law*

Texas law recognizes that contracts established to violate Mexican law are generally not enforceable.¹⁷⁶

C. *Estate, Trust, and Family Law Issues*

Land and intestacy Mexican law issues have long been applied by Texas courts.¹⁷⁷ Even pre-*Gutierrez* cases applied Mexican heirship law.¹⁷⁸ A more recent case granted judgment as a matter of law under what it found to be the applicable Mexican law to the wife of a decedent in a dispute over proceeds of liquidation of properties held during marriage against a challenge by children of the deceased from a prior marriage.¹⁷⁹

Like Texas, Mexico follows the Spanish civil code tradition of community property in marriage.¹⁸⁰ “The framework for the Spanish community property system of marital property builds upon a distinction between spouses’ community and separate estates.”¹⁸¹

Due to the flow of people across the Mexican-Texas border, family law issues frequently arise, and are likely to continue to arise. There are several articles in American law reviews and journals that discuss family law issues in far greater detail.¹⁸²

175. *Id.*

176. *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 638–39 (Tex. App.—San Antonio 1993, writ denied); *but see In Re Jackson Nat. Life Ins. Co.*, 156 F. Supp. 2d 846, 855 n.5 (W.D. Mich. 2001) (ruling that contracts made in violation of Mexican law will not be enforced “only if (1) Mexican law is relevant to the contracts in question, and (2) at least one of the parties intended to violate Mexican law.”).

177. Walker, *supra* note 2, at 257–61.

178. *Nevarez v. Bailon*, 287 S.W.2d 521, 523 (Tex. Civ. App.—El Paso 1956, writ ref’d).

179. *Ossorio v. Leon*, 705 S.W.2d 219, 222 (Tex. App.—San Antonio 1985, no writ).

180. *Id.*

181. *Cameron v. Cameron*, 641 S.W.2d 210, 223 (Tex. 1982).

182. See, e.g., Margarita Trevino Balli & David S. Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN. J. INT’L L. 29, 42–43 (1995); Antoinette Sedillo López, *International Law-U.S./Mexico Cross-Border Child Abduction—The Need for Cooperation*, 29 N.M. L. REV. 289, 297–98 (1999).

Some Texas courts have addressed these issues since 1979. In some instances, Texas courts have refused to apply Mexican law or to exercise jurisdiction over a dispute already existing or ongoing in Mexico.¹⁸³ With regard to community property, Texas courts do not have jurisdiction to grant the use of Texas discovery methods in order to obtain information located in Texas for use in a legal proceeding in a Mexican court.¹⁸⁴

One Texas case discusses the requirements of the Mexican Civil Code for spouses who seek a voluntary divorce.¹⁸⁵ One requirement is an agreement providing for child support both during the pendency of the divorce and after the divorce is finalized.¹⁸⁶ In this case, the custodial parent sought and was awarded child support arrears based on the divorce decree of a Mexican domestic relations court that was recognized in a Texas Suit Affecting the Parent-Child Relationship (SAPCR) filed in Bexar County.¹⁸⁷ Under Mexican law, custody rights apply by operation of law.¹⁸⁸ A Tennessee federal district court concluded that under Mexican law, natural parents can properly exercise their custody rights in removing children from Mexico.¹⁸⁹

Mexican law recognizes the validity of premarital agreements that control “not only the marriage *relationship* but also the *property* acquired by either of the parties during the marriage.”¹⁹⁰ Mexican law does not recognize common-law

183. Ramirez v. Lagunes, 794 S.W.2d 501, 507 (Tex. App.—Corpus Christi 1990, no writ).

184. *Id.* at 506–07 (noting that any division and apportionment of community property would have to be done in the Mexican divorce court and using Mexican law because it has sole jurisdiction over the community property regime and the parties).

185. *In re* E.I.R.H., No. 34-97-00667-CV, 1999 WL 623479, at *1 (Tex. App.—San Antonio Aug. 18, 1999) (not designated for publication) (interpreting Article 273 of the Mexican Civil Code to require divorcing spouses to present to the Mexican court an agreement establishing the following general points: custody designations, how the children’s needs will be taken care of, residences of each spouse, alimony, and method of administering jointly owned property).

186. *Id.*

187. *Id.* at *2–*4 (relying on the child support requirements of Article 273 of the Mexican Civil Code).

188. March v. Levine, 136 F. Supp. 2d 831, 842 (M.D. Tenn. 2000).

189. *Id.*

190. Carrillo v. Garzon, No. 14-94-00630-CV, 1995 WL 628156, at *3 (Tex. App.—Houston [14th Dist.] Oct. 26, 1995) (not designated for publication) (emphasis

marriages.¹⁹¹ In another case, an expert testified that Mexican law “requires all marriage ceremonies to be performed by the civil registry judge and that all such ceremonies be recorded in the civil registry of the district.”¹⁹² Finally, in a case from the El Paso Court of Appeals, the court found that Texas, not Mexican, courts had jurisdiction over the paternity dispute.¹⁹³

D. Regulatory Laws, Tax Law, and Issues Including Investments and Property, and Intellectual Property

Many legal publications in the United States understandably focus on corporate law issues under Mexican law, which include investment, taxes, and similar issues.¹⁹⁴ Issues of Mexican corporate, regulatory, tax and similar laws have not been discussed frequently in published cases in Texas.

However, some cases discuss various aspects applicable to investment issues in Mexico.¹⁹⁵ In 1973, Mexico passed the Law to Promote Mexican Investment and to Regulate Foreign Investment that was nationalist, anti-foreigner, and restrictive in terms of investment and ownership issues.¹⁹⁶ Mexican law has had banking restrictions, including some restrictions on depositing currency other than pesos in Mexican banks.¹⁹⁷ Other restrictions lead to situations where Mexican investors sought

original).

191. See *Nevarez v. Bailon*, 287 S.W.2d 521, 523 (Tex. Civ. App.—El Paso 1956, writ ref'd) (holding that a woman who cohabited with a man in the relationship of concubinage in the state of Chihuahua, Mexico for several years until his death could not claim any interest as his common-law wife in his property situated in Texas, because the relationship of common-law marriage was not recognized in Chihuahua). *But see* *Flores Gonzalez v. Viuda de Gonzalez*, 466 S.W.2d 839, 840–41 (Tex. Civ. App.—Dallas 1971, writ ref'd n.r.e.) (noting that concubinage could become common-law marriage following a couple's move to Texas).

192. *Reed v. Campbell*, 682 S.W.2d 697, 700 (Tex. App.—El Paso 1984, writ ref'd n.r.e.).

193. *In re Calderon-Garza*, 81 S.W.3d 899, 901–03 (Tex. App.—El Paso 2002, no pet.).

194. See, e.g., *Jorge Jimenez et al.*, *Mexican Law*, 36 INT'L LAW. 879, 892, 895–96 (2002).

195. See *Brady v. Brown*, 51 F.3d 810, 816–17 (9th Cir. 1995).

196. *Id.* at 816–17 & n.8.

197. *Primera Vista S.P.R. v. Banca Serfin, S.A.*, 974 S.W.2d 918, 924 (Tex. App.—El Paso 1998, no pet.).

investment opportunities that provided them access to non-Mexican financial markets.¹⁹⁸ Non-Mexican financial institutions are restricted by Mexican law in the manner by which they could advise clients in Mexico.¹⁹⁹

Mexican law—specifically Article 27, Section I of the Mexican Constitution—does not allow foreign ownership of coastal properties in Mexico within a zone of 50 kilometers along the Mexican shores.²⁰⁰ Similarly, in 1972 the Mexican government published regulations and controls “forbidding the use of ‘straw men’ . . . who would hold title to Forbidden Zone property” on behalf of foreigners.²⁰¹ Some U.S. courts have likewise refused to honor attempts to circumvent Mexican property laws.²⁰² Permits are sometimes required to engage in various businesses, such as telecommunications.²⁰³

In one case in 1980, the Northern District of Texas found that Mexico had a “strong public policy in favor of free usage by Mexican companies of imported technology.”²⁰⁴ Based on that premise, the court found that a Mexican court might imply a contractual term permitting the free and unfettered use of technology that would be a defense to a claim of a wrongful use of trade secrets.²⁰⁵

The Fifth Circuit recently applied Mexican law in a case in which Mexican film production companies sued American distributors for copyright infringement concerning 81 Mexican films.²⁰⁶ The Fifth Circuit made the following observations and

198. See, e.g., *Interworld, Inc. v. Comm’r of Internal Revenue*, 71 T.C.M. (CCH) 3231 (1996).

199. *Id.*

200. MEX. CONST., ch. 1, art. 27, § 1

201. *Brady*, 51 F.3d at 814.

202. *Id.* at 817–18 (citing *Stockton v. Ortiz*, 120 Cal. Rptr. 456, 462–63 (Ca. Ct. App. 1975)); *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629, 638–39 (Tex. App.—San Antonio 1993, writ denied).

203. See *infra* Section IV.G. See *Schwartz v. Autobuses Internacionales Sociada de Responsabilidad Limitada*, 483 F. Supp. 397, 398–400 (E.D. Mo. 1979), for an interesting case on obtaining permits in Mexico.

204. *Victor Equip. Co. v. Armco Steel Corp.*, 208 U.S.P.Q. 434, 440 (N.D. Tex. 1980).

205. *Id.*

206. *Alameda Films S.A. v. Authors Rights Restoration Corp.*, 331 F.3d 472,

interpretations of Mexican law before affirming most of the trial court's ruling:

(1) Film production companies—not just individuals—can hold copyrights under Mexican law and qualify as “authors” under the Mexican Civil Code;²⁰⁷

(2) Because Mexico amended its copyright laws to eliminate the registration requirement in 1947, for any works originally published in Mexico after the effective date of that country's registration requirement, authors received automatic copyright protection;²⁰⁸

(3) However, the 1947 amendment did not apply retroactively;²⁰⁹ and

(4) Therefore, never-registered Mexican films—such as the ones in this case—produced before 1947 were not protected by Mexican copyright law, even though time for registering films under previous Mexican law had not expired at the time the new law went into effect.²¹⁰

Because the foreign companies' works had fallen into the public domain, their copyrights were automatically restored under the Uruguay Round Agreement Act, which had been adopted by the United States in 1994.²¹¹

One Texas court found no evidence of tax fraud under Mexican law (the other side alleged fraud in income tax and ownership of third-party funds pledged as collateral for loans) although the court did not identify the underlying Mexican

474 (5th Cir. 2003).

207. *Id.* at 478. Interestingly, the Government of Mexico filed an *amicus* brief in this case, urging the court that the Collaboration Doctrine covers corporations. *Id.* at 477.

208. *Id.* at 479. “The 1947 amendment . . . also contained a safe harbor for any previously published works that had fallen into the public domain under the 1928 Code prior to the new law's effective date of January 14, 1948.” *Id.*

209. *Id.* at 480.

210. *Id.* at 480–81. “Works produced between January 1945 and January 1948 remained within the three-year grace period specified under the 1928 Code during which their authors could register them.” *Id.* Because authors of works created in this time period still had time to register their works as required under the 1928 Code, the authors were not in need of a safe harbor. *Id.* at 481.

211. *Id.* at 475; 17 U.S.C. §§ 104A(a)(1)(A), (h) (2000).

law.²¹² A Pennsylvania federal court entered a consent judgment on alleged antitrust violations by Mexican parties in the United States.²¹³ One commentator claims that piercing the corporate veil is not available under Mexican law for a properly incorporated Mexican entity.²¹⁴

Furthermore, Mexican law, at least as of 1997, had prohibitions against American citizens having businesses in their own names.²¹⁵ Subsidized needs to employees from on-site vendors were taxable under Mexican law as of July of 1993.²¹⁶ Some Mexican laws had, at least in 1992, purchasing requirements that Mexican entities purchase from “local” Mexican concerns, requiring the creation of Mexican subsidiaries.²¹⁷

Historically, Mexican property law issues were applied in Texas courts for many years prior to 1979, notwithstanding the Dissimilarity Doctrine.²¹⁸ Texas law still honors the shorelines of Spanish and Mexican civil-law grants.²¹⁹ Regarding coastal lands, particularly important for Gulf of Mexico and Rio Grande disputes, Mexico’s civil-law system determines shoreline boundaries in land grants with reference to the measured mean daily water levels.²²⁰ Under Mexican civil law, like Texas law, “a

212. *In re NationsBank, N.A.*, No. 01-99-00278-CV, 2000 WL 799807, at *7-*8 (Tex. App.—Houston [1st Dist.] June 19, 2000) (not designated for publication).

213. *United States v. Ixtlera de Santa Catarina*, No. CIV.A.96CV-6515, 1996 WL 925857, at *6 (E.D. Pa. Dec. 10, 1996) (not designated for publication).

214. *Doyle & Ponton*, *supra* note 12, at 309.

215. *See Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 999–1000 (W.D. Tex. 1997) (suggesting that the choice of a married couple to register their partnership only under the name of the spouse with Mexican citizenship shows that it was not possible under Mexican law for American citizens to have businesses in their names).

216. *Id.* at 1001.

217. *Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180, 186 (5th Cir. 1992).

218. *See Walker*, *supra* note 2, at 257 (suggesting that because the Dissimilarity Doctrine was not applied to suits involving natural resources, the same was true for all property law issues).

219. *John G. & Marie Stella Kenedy Mem’l Found. v. Dewhurst*, 90 S.W.3d 268, 282 (Tex. 2002).

220. *Id.* at 281. For an extensive discussion of water rights in Texas under Mexican and Spanish law, see *In re Adjudication of Water Rights*, 670 S.W.2d 250, 252–54 (Tex. 1984) and *In re Contests of City of Laredo*, 675 S.W.2d 257, 259–67, 270 (Tex.

grantee from the sovereign who takes to the shoreline does not have title to submerged lands.”²²¹ At least one party has claimed that Mexican law allows oral agreements to vest a tenant with a life estate and other tenancy rights, although the court rejected the argument that any such legal right prevented the entry or turnover of property located in Mexico.²²²

E. Bankruptcy Issues

Mexico’s Bankruptcy and Suspension of Payments Laws (MBSPL) have suspension of payment proceedings analogous to Chapter 11 of the U.S. Bankruptcy Code.²²³ In May of 2000, Mexico enacted a new bankruptcy law, the *Ley De Concursos Mercantiles*, which has been the subject of numerous articles in the United States and which commentators believe will “substantially improve the Mexican insolvency system.”²²⁴ The new law places bankruptcy courts under Mexican federal courts

App.—Austin 1984, writ ref’d n.r.e.). Cf. *New Mexico v. Aamodt*, 618 F. Supp. 993, 999–1000, 1009–10 (D.N.M. 1985) (discussing water rights of Pueblos under Mexican law).

221. *City of Port Isabel v. Mo. Pac. R.R.*, 729 S.W.2d 939, 942 (Tex. App.—Corpus Christi 1987, writ ref’d n.r.e.); see *Campbell v. State*, 626 S.W.2d 91, 92 (Tex. App.—Corpus Christi 1981, no writ) (explaining that submerged lands are part of the public domain as determined by the line of mean high tide which is a higher, more landward line than the mean higher high tide of Mexican law).

222. *Lozano v. Lozano*, 975 S.W.2d 63, 68–69 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). However, the court did modify the turnover order to prevent bypassing a receiver. *Id.*

223. *Philadelphia Gear Corp. v. Philadelphia Gear De Mex., S.A.*, 44 F.3d 187, 190 (3d Cir. 1994).

224. Sheppard, *supra* note 8, at 68. See Eduardo Martinez, *The New Environment of Insolvency in Mexico*, 17 CONN. J. INT’L L. 75, 75 (2001) (observing that Mexico’s new bankruptcy law safeguards the public interest and attracts new investors); Luis Manuel C. Mejan, *Global Development: The Genesis, Structure and Projection of the New Mexican Insolvency Law*, 17 CONN. J. INT’L L. 79, 82, 88 (2001) (commenting that the new legislation promotes the exchange of information and may lead to better resolutions of insolvency issues); Michael L. Owen, *Overview of the New Bankruptcy Law of Mexico*, 10 U.S.-MEX. L.J. 43, 43 (2002) (recognizing that the adoption of the new bankruptcy law of Mexico was the result of many years of effort in getting the attention of the people that counted as to the importance of reforming the law); Josefina Fernandez McEvoy, *Mexico’s New Insolvency Act*, 19-Sep. AM. BANKR. INST. J. 12, 23 (2000) (commenting that Mexico’s adoption of the UNCITRAL Model Law will likely lead to greater investment in Mexico); Sluchan, *supra* note 11, at 380–381 (observing that the new bankruptcy laws will speed up the bankruptcy process and lead to a lending revival).

rather than local courts, which according to at least one source, should minimize corruption in Mexico.²²⁵ The new law follows United Nations Commission on International Trade Law (UNCITRAL) guidelines.²²⁶ According to one commentator, by being the first country to adopt UNCITRAL's model law, Mexico has "set a remarkable example for both civil law countries and common law countries in making it possible to facilitate effective cross-border coordination and cooperation in the administration of insolvency cases."²²⁷

The new bankruptcy law also establishes the creation of three specialists: auditors, conciliators, and trustees—each of whom have separate functions.²²⁸ According to one source, Article 224 of Mexico's Act of Commercial Insolvency states that the creditors of the estate shall be paid before the claims of the creditors of the debtor in the following order: (1) wages, salaries, and other labor or employee benefits guaranteed under the Mexican Constitution and other laws; (2) administrative expenses incurred by the debtor and approved by the conciliator; (3) actual and necessary expenses of preserving the estate; (4) court fees; and (5) pre-petition fees and the actual and necessary costs incurred by the examiner and the post-petition fees incurred by the conciliator and trustee related to services provided to the estate.²²⁹

The old law was apparently similar to the provisions of Chapter 7 of the U.S. Bankruptcy Code.²³⁰ Under the old bankruptcy law, one Mexican attorney opined in a case in the Third Circuit that under the MBSPL,

[t]he obligation to present all claims against the common debtor is based on the principle to preserve the company and its possessions which should not be distributed in prejudice of all creditors, and in other

225. Eduardo Martinez, *The New Environment of Insolvency in Mexico*, 17 CONN. J. INT'L L. 75, 76 (2001).

226. Sheppard, *supra* note 8, at 70; Fernandez McEvoy, *supra* note 224, at 23.

227. Fernandez McEvoy, *supra* note 224, at 23.

228. Mejan, *supra* note 224, at 84.

229. Josefina Fernandez McEvoy, *Mexico's Quest for Legislative Transparency*, 10 AM. BANKR. INST. L. REV. 249, 250, 263-64 (2002).

230. Sheppard, *supra* note 8, at 54-55.

principle based on the universality and territoriality of the suspension of payments and the equitable treatment of all creditors.²³¹

The Third Circuit interpreted this to mean that under the MBSPL, all creditors are treated equally, and therefore the MBSPL shares the U.S. policy of equal distribution of assets.²³² The old law, now probably only of historical interest, also had automatic stay provisions.²³³

F. *Labor and Employment Law Issues*

Unlike Texas, which is generally an at-will jurisdiction,²³⁴ Mexico has a detailed federal labor code as well as constitutional provisions which govern labor relations, including separation from employment.²³⁵ Labor law decisions have recognized a number of different aspects to Mexican law. Certain employee benefits in the form of subsidies are taxable under Mexican law.²³⁶ Forming a Mexican entity may be necessary to comply with Mexico's labor laws.²³⁷ Even if an American corporation has set up a Mexican subsidiary, failing to follow formalities may result in disregarding the corporate form by a Texas court.²³⁸

A *maquiladora* is "a unique business on the Mexican-American border whereby the American business maintains a Mexican subsidiary, or *Maquiladora*, usually to conform to Mexican labor and tax laws."²³⁹ *Maquiladoras* or "*maquilas*" are

231. *Philadelphia Gear Corp. v. Philadelphia Gear De Mex., S.A.*, 44 F.3d 187, 193 (3d Cir. 1994) (quoting expert opinion relied upon in the case).

232. *Id.*

233. *See id.* (suggesting that the opinion of a Mexican attorney with regards to the MBSPL mandating a stay in district court proceedings shows that the old law had automatic stay provisions).

234. *In re Halliburton Co.*, 80 S.W.3d 566, 572 (Tex. 2002).

235. *See Luis Ruiz Gutierrez & William E. Mooz, Jr., Labor Relations in Mexico, in 1 DOING BUSINESS IN MEXICO, supra note 6, at Pt. VIII, Ch. 1, p. 1-2.*

236. *Perez v. Alcoa Fujikura, Ltd.*, 969 F. Supp. 991, 1001 (W.D. Tex. 1997).

237. *Nunez v. Hunter Fan Co.*, 920 F. Supp. 716, 719 (S.D. Tex. 1996).

238. *Id.* at 719-20.

239. *Perez*, 969 F. Supp. at 999 n.3. *See Sharrell Ables, Note, The Integrated Environmental Plan for the Mexican-U.S. Border: A Plan to Clean Up the Border or a Public Relations Ploy to Promote a Free Trade Agreement*, 9 ARIZ. J. INT'L. & COMP. L. 486 n.17 (1992) (defining *maquiladora* and *maquila*).

plants in Mexico to whom materials are sent from the United States for processing and manufacturing and then returned to the United States for sale.²⁴⁰

G. Telecommunications Law Issues

In 1996-97, Mexico deregulated the telecommunications industry, which previously was a state monopoly by Tel-Mex.²⁴¹ Since competition began, U.S. investors and Mexican investors in the telecommunications industries have had several cases litigated in Texas courts, including opinions published by the Fifth Circuit and the Texas Supreme Court.²⁴² In one case, an investor estimated that his company's future economic value, even consisting solely of a small percentage of Mexico's long distance traffic, could have ranged from three to four million dollars on the "low-end" to an amount in the order of \$300,000,000.²⁴³ Another court determined that the Mexican telecommunications laws required, in part, a concession to install, establish, operate, and exploit telecommunications networks.²⁴⁴

"Mexican law required a permit to be a provider of telecommunication services in Mexico."²⁴⁵ A reseller cannot compete with a monopoly practice because the provider is the reseller's only supplier.²⁴⁶ A provider, by contrast, requires a concession and entails constructing, establishing, and exploiting the telecommunications systems.²⁴⁷ The Texas Supreme Court

240. See *Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301, 302 (Tex. 1981).

241. See *Access Telecom, Inc. v. MCI Telecomm. Corp.*, 197 F.3d 694, 701 (5th Cir. 1999).

242. See *Long Distance Int'l, Inc. v. Telefonos de Mexico, S.A.*, 49 S.W.3d 347, 351 (Tex. 2001) (containing discussion of the Mexican laws and regulations applicable to the telecommunications).

243. *Geocomm Int'l, Ltd. v. Arroyo*, No. 04-95-00727-CV, 1996 WL 81918, at *2 (Tex. App.—San Antonio Feb. 28, 1996, no writ) (not designated for publication).

244. *Long Distance Int'l, Inc.*, 49 S.W.3d at 352 (interpreting Mexican laws as applied to Network Communication).

245. *Access Telecom, Inc.*, 197 F.3d at 702.

246. *Id.* at 704.

247. See, e.g., *Long Distance Int'l, Inc.*, 49 S.W.3d at 354, 359 (holding that LDI/Star was providing telecommunication services in Mexico and citing LEY FEDERAL DE TELECOMUNICACIONES, Ch. III, § 1, arts. 6a, 11).

concluded that under the narrow facts and based only upon the record before it, that reselling long-distance telecommunication series with a concession is not illegal under Mexican law.²⁴⁸

H. Criminal Law Issues

“Under Mexican law, an automobile collision can result in civil and/or criminal charges being filed against the driver ‘Presumption of innocence’ has no application in Mexico.”²⁴⁹ According to one court, “[d]ifferences in law enforcement methods in the United States and in Mexico appear almost weekly in local papers.”²⁵⁰

In Mexico, civil suits may be dependent on the findings in a simultaneous criminal suit.²⁵¹ Conversely, the existence of parallel criminal proceedings in Mexico is not an uncommon part of civil litigation in Mexico, or even of civil litigation in the United States.²⁵² According to one court, parties under Mexican law have a right, if not an obligation, to report criminal activity to Mexican authorities.²⁵³ The El Paso Court of Appeals also stated that a party under Mexican law may agree on restitution and request that the Mexican government pardon the defendant, if the defendant confesses guilt in open court for certain offenses such as abuse of confidence or embezzlement.²⁵⁴ The El Paso Court of Appeals further found that under Mexican law, restitution is very important and may be “the difference between three or four days and fourteen or fifteen years in

248. *Long Distance Int'l, Inc.*, 49 S.W.3d at 355.

249. *State Farm Mut. Auto. Ins. Co. v. Zubriate*, 808 S.W.2d 590, 594 (Tex. App.—El Paso 1991, writ denied).

250. *Id.* at 598.

251. *Id.* at 600.

252. *See, e.g., Andrews v. Am. Nat'l Red Cross, Inc.*, 176 F. Supp. 2d 673, 678–79 (W.D. Tex. 2001) (stating that when plaintiff returned to Texas from Mexican jail sentence, he filed the instant suit); *Lewkowicz v. El Paso Apparel Corp.*, 614 S.W.2d 198, 199 (Tex. Civ. App.—El Paso 1981, writ granted) (stating that within an hour of the commencement of criminal process in Mexico, a civil action was brought in Texas), *rev'd*, *Lewkowicz v. El Paso Apparel Corp.*, 625 S.W.2d 301 (Tex. 1981); *Mora v. McDonald's Corp.*, 1997 WL 102546, at *2 (describing parallel proceedings in Mexico and in the United States).

253. *Lewkowicz*, 614 S.W.2d at 200.

254. *Id.* at 199.

jail.”²⁵⁵

According to one court, Mexican law requires an accused to furnish a statement regarding the crime charged, even if the statement is incriminating; a person who fails to make such a statement can be charged with a separate offense.²⁵⁶ The Texas Court of Criminal Appeals has held that *Miranda* warning requirements do not apply to activities of Mexican law enforcement personnel in Texas proceedings.²⁵⁷ In that case, the Court found that “[f]ollowing the Mexican Code of Criminal Procedure, the Mexican State Police obtained a written statement from appellant in which he confessed to his crimes in the United States.”²⁵⁸ The court further stated that the record reflected that in the Mexican criminal system, “an accused has the right to appoint any person, not necessarily an attorney, to assist or defend himself, but there is no right to appointed counsel during the interrogation process.”²⁵⁹ The court found that the appellant in this case did not complain of anything “unusual or shocking about the manner in which his statement was obtained.”²⁶⁰

Among some of the Mexican criminal laws identified in cases in Texas and other jurisdictions are: aggravated homicide,²⁶¹ introduction of ammunition into the Republic of Mexico,²⁶² and breach-of-trust or embezzlement.²⁶³

255. *Id.* at 200.

256. *Bean v. United States*, 89 F.Supp. 2d 828, 837 (E.D. Tex. 2000) (explaining that defendant who did not speak, write, or understand Spanish had confessed to the Mexican crime).

257. *Alvarado v. State*, 853 S.W.2d 17, 24 (Tex. Crim. App. 1993). *See Zani v. State*, 679 S.W.2d 144, 151 (Tex. App.—Texarkana 1984, pet. granted) (setting out the rule for when state and federal search and seizure laws become applicable in foreign searches), *vacated*, 758 S.W.2d 233 (Tex. Crim. App. 1988), *remanded*, 767 S.W.2d 825 (Tex. App.—Texarkana 1989, pet. refd).

258. *Alvarado*, 853 S.W.2d at 19.

259. *Id.* at 20.

260. *Id.* at 22. *But see In re Extradition of Contreras*, 800 F. Supp. 1462, 1469–70 (S.D. Tex. 1992); *United States v. Fernandez-Caro*, 677 F. Supp. 893, 894 (S.D. Tex. 1987).

261. *In re Extradition of Diaz Medina*, 210 F.Supp. 2d 813, 817 (N.D. Tex. 2002) (making relevant findings under Jalisco’s criminal law).

262. *Bean v. United States*, 89 F.Supp. 2d 828, 837 (E.D. Tex. 2000)

263. *In re Extradition of Morales*, 906 F. Supp. 1368, 1369 (S.D. Cal. 1995).

V. CONCLUSION

Parties will likely continue to assert that Mexican law governs disputes in Texas and other U.S. courts. This article strives to assist litigants and courts in simplifying and resolving those disputes. While this article does not purport to be an exhaustive review of cases interpreting Mexican law, it should be an efficient and useful starting point for litigants and courts who confront and decide these questions and issues.