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Arizona Journal of International and Comparative Law

SPRING, 1995

12 Ariz. J. Int'l &amp; Comp. Law 225

**LENGTH:** 25120 words**ARTICLE:** **APPLICATION, PROOF, AND INTERPRETATION OF FOREIGN LAW:** A COMPARATIVE STUDY IN PRIVATE INTERNATIONAL LAW**NAME:** Jacob Dolinger\***BIO:**

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**LEXISNEXIS SUMMARY:**

... The fundamental question to answer is whether foreign law is considered as law, proven and interpreted as such, or whether the law of another jurisdiction is merely a matter of fact, to be applied only if and when parties to the case plead its application and prove its content and effectiveness. ... The prevalent rule in continental law is that the judge may call upon the parties to help him discover content and enforceability of the foreign applicable law. ... When, after all efforts, it is still impossible to discover the content of the applicable foreign law, the judge is allowed to apply the forum's law as a subsidiary rule. ... The French Judiciary traditionally applies French law as a subsidiary solution when the content of the applicable foreign law has not been discovered. ... Eduardo Espinola, a prolific legal writer and a justice of the Brazilian Supreme Court, came out very early in favor of the *ex officio* application of foreign law and, following Andre Weiss, formulated his theory based on three maxims: namely, that the judge applies foreign law, even when none of the parties plead it, if the private international law rule so determines; if the judge does not have sufficient knowledge of the foreign law, he may demand the proof from the party who will benefit from its application; and the party may -- without waiting for the judge's order -- invoke and prove the existence and content of the applicable foreign law. ...

**TEXT:**

## [\*225] I. INTRODUCTION

**Application, proof, and interpretation of foreign law** are interrelated subjects that sit at the core of international conflict of laws, or, as known in the civil law system, private international law. The fundamental question to answer is whether foreign law is considered as law, proven and interpreted as such, or whether the law of another jurisdiction is merely a matter of fact, to be applied only if and when parties to the case plead its application and prove its content and effectiveness. Matter of law or matter of fact -- this is the basic question this Article will address, with reflections on the ways and means to prove the foreign law and repercussions on the method of its interpretation.

We shall see in this Article that the controversy about how to classify foreign law, as law or as fact, does not necessarily follow the bifurcation between the common law and the civil law systems. Neither France nor Italy have reached a definitive position, and some of the Cassation Court's decisions have frankly been in favor of the fact theory.

The majority of the continental European countries do treat foreign-law-as-law, however, either by statutory rule or through consistent case law. Furthermore, in Brazil, statutes, conventional obligations, scholars' opinions, and the Supreme Court all favor the matter of law approach.

On the opposite side of the spectrum, the Anglo-American system consistently favors consideration of foreign law as a matter of fact. England has remained a foreign law as fact jurisdiction inflexibly. The United States, on the other hand, has changed moderately and is lately exhibiting a tendency to accept some of the legal aspects of foreign law.

Finally, this Article shall connect the two different approaches to foreign law with the very important debate in private international law between the unilateralists and the universalists; the former considering foreign law as fact, the latter as law. The universalists put the application of the most appropriate law above any other consideration, whereas the unilateralists are still influenced by a seventeenth century theory that saw everything through the lenses of one's own jurisdictional sovereignty.

## [\*226] II. EUROPEAN CONTINENTAL SYSTEMS

### A. Application of Foreign Law

Is foreign law applied the same way and under the same conditions as domestic law? This is a general question that evokes various particular questions: Does the judge have to apply foreign law even if the parties did not invoke it, i.e., is he obliged to apply it *ex officio*? And what ought the judge to do in case there is doubt about the contents of the foreign law -- should he order the party that invokes the foreign law to prove it? And, in the affirmative case, should this proof be produced in accordance with the way facts are to be proven? And finally, will there be an appeal to the highest court in case the foreign law has been violated or incorrectly applied?

Tobias Asser, <sup>n1</sup> one of the foremost European private internationalists and co-founder of the *Institut de Droit International*, wrote about these issues in 1879, and these questions have continued to be on the minds of French and other European scholars for over a century.

Asser answered the basic question of private international law in the affirmative: The judge should apply foreign law on his own initiative because his duty is to judge each case according to the law that he considers applicable, and if this should be the foreign law, so be it, even if none of the parties pled it. <sup>n2</sup> This theory amounts to equating foreign statutory law with domestic statutory law, both representing a command that courts must follow. Whenever a rule of private international law indicates the application of a foreign law to an international legal relation, a court is bound to follow this rule so that in effect, Spanish law will be forcibly applied to the personal status of a Spanish national, just as French law is to be applied to the personal status of a Frenchman. <sup>n3</sup>

#### 1. France

Asser's theory was not followed by French jurisprudence and many French writers on private international law have treated foreign law as a matter of fact and not of law.

[\*227] The leading modern French case is the famous 1959 *Bisbal* decision by the Cour de Cassation. <sup>n4</sup> In this case, a Spanish couple had their separation converted into a divorce without any reference by the parties or any judicial notice by the courts that as Spanish nationals, they were not entitled to be divorced by a French court. The wife appealed to the French Supreme Court and only then invoked the French conflict of law precept that family matters are to be ruled according to the parties' national law. She argued that this had to be considered by the judges even though none of the parties had raised the issue in the lower court nor in the court of appeals. The civil chamber of the Cour de Cassation disagreed with Mrs. Bisbal and stated that

the French rules on conflict of laws, at least those that prescribe the application of foreign law, do not have a public policy nature, so it is up to the parties to claim their application and one cannot blame a judge for not having applied a

foreign law on his own initiative. . . .<sup>n5</sup>

In his comments on *Bisbal*, Henri Batiffol asserts that the decision is in accordance with the general French approach of applying its own law in certain international situations where normally a foreign law should apply, such as the case of a stateless person without a fixed domicile, when it becomes impossible to obtain proof of the foreign applicable law. Batiffol concludes that it is just as natural to extend this same solution to cases where the parties do not claim the applicability of foreign law.<sup>n6</sup>

In *Compagnie Algerienne de Credit et de Banque v. Chemouny*,<sup>n7</sup> the Cour de Cassation held that a French judge may, if he so wishes, apply the foreign law indicated by the French rule of conflicts.<sup>n8</sup>

These two decisions established the principle that French courts are not obliged to apply foreign law in accordance with conflict rules if none of the parties asked for it, but they are allowed to apply foreign law if they so wish. This principle raises the critique that if judges in France are free to apply or to [\*228] not apply foreign law, parties are motivated to forum shop internally. Thus, a foreign party, whose national law does not allow divorce, will look for a French judge that does not apply foreign law on his own initiative and will request to be divorced by that judge.<sup>n9</sup>

The justification for considering that courts are free to not apply foreign law where none of the parties pled it has been the distinction construed between domestic and foreign law, the former being a matter of law, the latter a matter of fact.<sup>n10</sup> When applying foreign law, a judge does not search for what is logical, useful, or just, but rather for what is actually admitted in the other country; he does not look for what *has to be*, but for what *is*.

Batiffol and Paul Lagarde explain that the foreign law is a real law in the territory in which it rules and for the judges to whom it was addressed. Concerning the competent (French) judge, however, the foreign law does not constitute an imperative command from the authority to which this judge is submitted.<sup>n11</sup> It is not a question of the nature of the foreign law but of realizing that one cannot impose on the judge the law of another state: "*c'est une question d'inopposabilite, non de nature.*"<sup>n12</sup>

This argument is not very convincing because the authority that commands the judge to apply the foreign law is his own law, i.e., the private international law rule established by the state to which he owes obedience. Henri Motulsky<sup>n13</sup> has consistently raised this critique of the French Cour de Cassation; his argument is that there is no difference between rules of internal French law and rules of French private international law commanding the application of foreign law. M. Massip<sup>n14</sup> takes Motulsky's critique one step further and argues that conflict rules are precepts of domestic law and that not applying those rules amounts to a violation itself of French domestic law.

One modern French author, Pierre Mayer, has formulated a conciliatory theory: Foreign law is law as it derives from a state, *but the existence of a foreign law with a certain content is a fact.*<sup>n15</sup> He illustrates this dichotomy with the Spanish rule that used to forbid divorce: It is a rule of law but also a fact, which can be proven, that Spanish law forbids divorce. It is true, says Mayer, that you can say the same about French law, but here the factual aspect is overpowered by the obligatory knowledge of the judge of its contents, which suppresses the problems regarding proof.<sup>n16</sup>

[\*229] This rationale conditions the nature of foreign law to the question of proof of foreign law. Since the judge is supposed to know his own law, it is considered purely as law. But as the judge is not obliged to know the foreign law and can demand that the parties or interested party prove the existence and content of the foreign law, it is also considered as a fact. In other words, application of foreign law depends on proof of foreign law.

The English system is more radical than the French jurisprudence of *Bisbal-Compagnie Algerienne*,<sup>n17</sup> which admits that the judge may apply foreign law if he so wishes. In England, the foreign law must be pled and proved by the interested party in each case, and, in the absence of satisfactory evidence of foreign law, a court must apply English law.<sup>n18</sup>

In 1988, after almost thirty years of consistent case law, the Cour de Cassation changed its stand.<sup>n19</sup> In two cases

decided on the 11th and 18th of October, <sup>n20</sup> the Cour de Cassation stated clearly that French courts *must* apply foreign law in accordance with conflict rules and that said law may not be substituted by French domestic law. In other words, the rules of French private international law ordering the application of foreign law, which previously had been optional, became obligatory for the French courts.

The first case had applied French and not Algerian law to a paternity investigation action that an Algerian woman brought against a man of the same nationality -- a decision that the Supreme Court rejected because it did not abide by the conflicts rule of article 311-14 of the French Civil Code, which disposes [\*230] that filiation matters are ruled by the national law of the mother. <sup>n21</sup> The second case concerned the inheritance of a Swiss man who died domiciled in Switzerland and who had given his mistress a disguised donation; the Cassation Court decided that the court of appeals had erred in applying French law because the matter pertained to succession, which is ruled by the law of the last domicile of the deceased according to the rule of French private international law. Thus, Swiss law had to be applied. <sup>n22</sup>

Yves Lequette <sup>n23</sup> espouses various reasons why the Cassation changed its position: (1) the change in French private international law establishing domicile as a connecting rule, ending the so-called monopoly of the national law, eased the need for the *Bisbal* formula; (2) the difficulty in maintaining the coexistence of rules that are self executing -- treaty rules on conflicts are self applicable by the courts -- and others that are only applicable if and when the parties ask for them; <sup>n24</sup> and (3) the isolation of France's practice in comparison with its neighbors: German, Italian, Swiss, and Belgian case law and Austrian, Spanish, and Greek statutory law all determine the *ex officio* application of foreign law. <sup>n25</sup> Andre Ponsard stresses that the new jurisprudence is based on article 12, paragraph 1, of the new French Code of Civil Procedure which states that the judge has to decide the litigation in accordance with the rules of law that are applicable to the case. <sup>n26</sup> D. Alexandre adds that French jurisprudence was not consistent with another aspect of its private international law which equates fraud against foreign law with fraud against French law because in both cases there is fraud against the law designated as applicable by the French conflicts rule. If so, it was inconsistent to [\*231] not consider the application of foreign law as obligatory, and this has been corrected by the 1988 decisions of the highest court of France. <sup>n27</sup>

However, suddenly and surprisingly, the Court of Cassation again changed its position in December 1990, returning to its former policy in *Coveco v. Vesoul*. <sup>n28</sup> There, the court held that if the seller, Coveco, a Dutch company, did not invoke the application of Dutch law to losses that occurred in the transportation of meat from Holland to Spain due to the health control of the Spanish authorities, "one may not reproach a court of appeals for not having taken the initiative of searching if a foreign law was applicable to the case." <sup>n29</sup> A French commentator regrets the change of position by the French Supreme Court -- opposing its decisions of 1988 -- which carried "the simplicity of strong ideas in accordance with a wide doctrinary consensus: the obligatory character of any and all rules of law whether they are mandatory or not and whatever their source." <sup>n30</sup> The regrets should be universal. <sup>n31</sup>

In November 1992, France's highest tribunal took a new turn in *Maklouf v. Benali*, <sup>n32</sup> a paternity investigation case where, although the lower court and the court of appeals knew that the mother was of Algerian nationality, they applied French law and did not take the initiative to search out for the mother's national law. The Cour de Cassation reversed this decision as being contrary to article 311-14 of the Civil Code that orders the application of the personal, national law of the mother at the day of the child's birth and also contrary to article 12, I of the Code of Civil Procedure that states that a judge must settle disputes in accordance with the applicable legal rules. <sup>n33</sup>

As can be seen from this fluctuation, French case law is taking time to establish a decisive position on this most important matter. Whether foreign law should be applied in an obligatory manner as law or voluntary manner as fact is an issue that is especially important for France to settle due to the extensive [\*232] amount of international litigation within its domestic courts. I expect that the 1988 and 1992 decisions, which require application of applicable foreign law, will hold ground and will turn into the definitive policy of the Cour de Cassation.

## 2. Italy

Italian jurisprudence has also gone through a change of heart, though in a different sequence: in 1966 the Cassation Court decided that foreign law should be considered as law, not as fact, and that the judge has a duty to employ all available means to ascertain the foreign legal rule, inclusive with the collaboration of the parties. The Court concluded that a violation of the foreign applicable law allows for an appeal to the highest court. In this decision, the Italian Court of Cassation followed the opinion of the majority of Italian authors of private international law. <sup>n34</sup>

However, the Court did not maintain this position in various later judgments, <sup>n35</sup> holding that the knowledge of foreign law is not included in the official and mandatory science of the Italian judge, and thus the party who has interest in the application of foreign law must plead and prove it. Tulio Treves refers to decisions of the highest Italian court where foreign law was treated as fact and regrets that Italian scholars, with only two exceptions, have not criticized the new trend in their country's case law. <sup>n36</sup>

Italian literature brought to light an interesting theoretical observation concerning the nature of foreign law when it is applied by Italian courts: when an Italian court applies a foreign rule of law, this rule is considered as incorporated into the Italian legal system itself. Further speculation and analysis has brought [\*233] about two differing theories regarding the exact nature of this incorporation into Italian law: material reception and formal reception. <sup>n37</sup>

The material reception theory holds that when foreign law is applied, it loses its foreign character and is incorporated into the forum's legal system, as if it were nationalized, <sup>n38</sup> becoming an integral part of forum law. This means that the forum law adopts, for purposes of the specific case, an equivalent rule to the foreign legal disposition. Consequently, the foreign precept will be interpreted as if it were a local rule, according to the forum's principles of exegesis. Batiffol and Lagarde consider this theory artificial, <sup>n39</sup> and Loussouarn and Bourel add that by this *nationalization* and interpretation of the foreign rule according to the legal concepts of the forum, there is a risk that the foreign rule will be distorted. <sup>n40</sup>

The other Italian school <sup>n41</sup> advocates a formal reception, which also considers that the foreign law incorporates itself into the system of the forum, but without losing the meaning and sense which the foreign legal system has attached to its norm. <sup>n42</sup> French doctrine does not accept this theory because any reception of foreign legal rules would cause the forum to incorporate, piecemeal, different legal systems of the world. <sup>n43</sup> The essence of the French position was summarized by Paul Lerebours-Pigeonniere:

It is obvious that a foreign law can only be applied by our courts following the command of the French law, the only one that has the power on French territory to adjudicate and to enforce. Does it therefore lose its character of a foreign law? We answer that not, contrary to Italian authors. The foreign rule continues to be an order of the foreign legal system and is not transformed into French law. This is the principle established by French jurisprudence. . . . <sup>n44</sup> [\*234] Based on this rationale, French courts established that the parties must plead and prove the contents of the foreign law; it was only a short step from this requirement to qualifying foreign law as a fact. <sup>n45</sup>

As a result of this short analysis of the Italian and the French theories, we can conclude that there are three different ways of conceiving the application of foreign law by the forum judge: (1) Material reception of the foreign rule of law, which incorporates and nationalizes it, making it an integrated part of the forum legal system and therefore interpreted as if it were local law; (2) Formal reception, which consists of the incorporation of the foreign law into the forum's legal system without nationalizing the foreign rule, which is to be interpreted in accordance with the exegesis given to it by the legal system that enacted the rule; and (3) Straight application of the foreign legal rule without any incorporation or integration into the legal system of the forum -- the application is of pure foreign law. We shall come back to these theories when dealing with the **interpretation of foreign law**.

### 3. Other European Countries

Some European countries have express legislative precepts ordering *ex officio* application of foreign law by their courts. These include countries such as Greece, <sup>n46</sup> Austria, <sup>n47</sup> Spain, <sup>n48</sup> Portugal, <sup>n49</sup> Hungary, <sup>n50</sup> and the recent

Swiss law on private international law of 1987. <sup>n51</sup> Belgian courts have a tradition of applying foreign law on their own initiative, <sup>n52</sup> and the same has occurred in Germany. <sup>n53</sup>

### [\*235] B. Proof of Foreign Law

Who is supposed to prove the existence and content of an applicable foreign law and whether it is in force? How does one prove these aspects of a foreign law? What is to be done if the foreign law cannot be proven? These are the three basic questions regarding proof of an applicable foreign law. The answers to these questions are directly related to the nature of the application of foreign law. If this application is not obligatory for the judge, if he only has to apply foreign law when this is pled by the parties, foreign law is equivalent to a fact. In these cases, the proof must be produced by the interested party by the same means that facts are proven, and if the parties do not produce the proof, the judge will be free to decide in accordance with *lex fori*. If, however, the foreign law indicated by the conflicts rule must be obligatorily applied, then foreign law is law and the basic duty of discovering the foreign law is with the judge, <sup>n54</sup> who will ascertain the content of the foreign rule as a matter of law. And the judge is free to choose another solution *only* if it becomes completely impossible to prove the content of the foreign law.

Of course, even if the foreign law is law and not fact, it is still not the same as the as the forum's own law that the judge is supposed to know -- *iura novit curia* -- whereas he cannot be expected to know all the laws of the world. Therefore, different techniques follow when foreign law has to be applied.

#### 1. Who Proves the Foreign Law?

The prevalent rule in continental law is that the judge may call upon the parties to help him discover content and enforceability of the foreign applicable law. This has been established clearly by the legislatures in countries such as Portugal, <sup>n55</sup> Spain, <sup>n56</sup> Greece, <sup>n57</sup> and Switzerland. <sup>n58</sup> In other countries, where there [\*236] is no statutory provision, doctrine has firmly established the cooperation between courts and parties. <sup>n59</sup> However, it should remain clear that the judge has the final word and will be the one to determine individually the content of the foreign law. <sup>n60</sup>

#### 2. How Does One Prove the Foreign Law?

The attainment of knowledge of foreign law is sometimes a very difficult task and has occupied the attention of jurists for a long time. The *Institut de Droit International* approved various resolutions in the late nineteenth century concerning the need of the states to exchange information about their legislation. In 1880 and 1886, international agreements were signed in Brussels <sup>n61</sup> that established a system of exchange of official gazettes between all the signatory countries so that each one could stay up to date with the legislation of other states.

This initiative did not and could not prosper. In addition to the practical difficulties involved, law is not only what the legislature creates but also what courts interpret and innovate, as well as what scholars publish. Furthermore, the [\*237] knowledge of whether a law is still in force could never be perfectly controlled by following the official publication of the laws of a state. In 1968, the Council of Europe approved a Convention, known as the Brussels Convention, on information of foreign law under which the signatory parties agreed to exchange information concerning their laws in the areas of civil, commercial, and procedural law, as well as on the organization of their judiciary systems. <sup>n62</sup> In addition, the Inter-American Specialized Conference on Private International Law approved a Convention on Proof of and Information on Foreign Law in 1979. <sup>n63</sup>

These initiatives may be helpful for academic purposes, but when courts and lawyers need to find out the present legal status of a certain matter, other ways and means must be available. It is of absolute importance that the search succeed in obtaining the exact rule. For as Rodolfo de Nova wrote:

Otherwise, the choice of the applicable law -- an undertaking often far from easy -- will have been accomplished to no purpose, for the end result will be the application of a wrong rule. It is useless, in effect, to go to all the trouble of finding the correct solution of the problem of private international law when the further step, the final step, namely the

discovery and application of the apposite rule belonging to the competent foreign law, will be taken in the wrong direction, or will not be taken at all. <sup>n64</sup>

One option for a party, who has the burden of proving the content and enforceability of a foreign law, is to produce certificates awarded by jurists that are experts in the particular field of foreign law. The judge may choose to defer to such expertise. <sup>n65</sup>

### [\*238] 3. In the Impossibility of Discovering the Foreign Law

When, after all efforts, it is still impossible to discover the content of the applicable foreign law, the judge is allowed to apply the forum's law as a subsidiary rule. <sup>n66</sup> Some civil codes have express rules ordering the application of forum law if and when foreign law cannot be verified. <sup>n67</sup> Legal systems that have no express legal provision for this circumstance have also arrived at the same solution. The French Judiciary traditionally applies French law as a subsidiary solution when the content of the applicable foreign law has not been discovered. Italy's Court of Cassation has recently decided likewise. <sup>n68</sup>

[\*239] Some earlier French cases had interesting aspects. In *Budot v. Collet*, <sup>n69</sup> the *Tribunal de grande instance de Paris* had to decide a claim for damages concerning a car accident which occurred in Andorra -- a small autonomous principality in the Pyrenees mountains between France and Spain with an area of 175 square miles -- and discovered that Andorra lacked a specific rule of law for damages in general, or for damages resulting from accidents in particular. Additionally, the court discovered that Andorran law is inspired by in the principles of Roman law and Canon law which recognize personal liability and oblige the responsible party to pay damages. The Court decided that it was not well informed on the law of Andorra and instead applied French law, as supplementary applicable law. <sup>n70</sup>

In *Zikman v. Lopato*, <sup>n71</sup> the same court decided on a pecuniary obligation between an American citizen and a Polish refugee that originated in Manchuria at the time it was under Russian military occupation, in the period that followed the dissolution of the state of Manchuria after the Japanese had left it but before the Chinese took it over. Naturally, it was very difficult to discover what legal system was in effect at that place at the time the legal obligation was created; here again the Court decided to apply French law. <sup>n72</sup>

In Germany, the *Bundesgerichtshof* <sup>n73</sup> has applied German Law when it could not discover the contents of the foreign applicable law. It has also applied forum law when the foreign law is controversial among the foreign authors and where there is not yet a decision by the supreme judicial body of the foreign country. <sup>n73</sup>

Rodolfo de Nova suggests that when the provisions of the foreign law cannot be discovered, justice could be better served by empowering the courts to judge the case on its merits according to equitable considerations rather than by resort to local law. <sup>n74</sup>

To apply French law to an accident that occurred in neighboring Andorra seems to make good justice when Andorran law is unknown, but perhaps the same is not true regarding facts that occurred in Manchuria, where a different legal culture prevails, for which case, and similar ones, de Nova's advice could be very welcome.

### [\*240] C. **Interpretation of Foreign Law**

The debate that has been waged in Italy concerning the nature of the incorporation of foreign law by the Italian courts, material or formal reception, <sup>n75</sup> influences the manner in which the **interpretation of foreign law** should be approached. If the reception is a material one, through which the foreign law is incorporated and nationalized, it will consequently be interpreted in accordance with the legal principles of the Italian system. However, if the reception is a formal one, which incorporates but does not nationalize the foreign rule, it should be interpreted in accordance with the sense it is attributed in the foreign system.

The prevailing opinion among continental scholars is that the foreign law should be applied exactly as it is



interpreted in the legal system which created it. Batiffol states that if the applicable foreign law does not derive from a clear statutory rule but stems from more or less well-established case law, the judge will have to ascertain what decision the foreign court itself would reach. <sup>n76</sup> In addition, he stresses an important distinction between the judge's role when applying his own national law and when applying foreign law. In the former case he is free to create or change the interpretation that has been given to his law whenever it appears to him that his interpretation will make better justice; whereas in the latter case, the foreign law is the one which is effectively adjudicated abroad, and he has no competence to judge its value and take the initiative of a different interpretation. <sup>n77</sup>

The Permanent International Court of Justice held in 1929 that "there is no other interpretation to be given to a foreign law but the one that its own case law attributes to it." <sup>n78</sup>

The Belgian Cassation Court decided in 1980 that article 1645 of the French and Belgian Civil Codes -- the exact same rule in both codes regarding seller's liability when the equipment sold has inherent defects -- should be interpreted in accordance with French and not Belgian interpretation. <sup>n79</sup> The court reasoned that French law was applicable by force of the 1955 Hague Convention on International Sales of Movables, which states that the law of the state where the seller resides when he receives the order is applicable.

[\*241] Some codes have express rules about the **interpretation of foreign laws**; these include the laws of Austria, <sup>n80</sup> Portugal, <sup>n81</sup> and the former Yugoslavia. <sup>n82</sup>

As seen in the majority of the European continental systems, foreign law is considered as law, either by statutory provisions or by courts' policies; parties cooperate with courts in ascertaining the content of foreign law, although judges have the last word; and foreign law is to be interpreted in accordance with the practice of the courts of the country of its origin.

The situation is still uncertain in Italy and France. In Italy, scholarly opinion, divided on some aspects between formal or material reception, is in favor of considering foreign law as law. In France, the doctrinal view that considers foreign law as law is getting the upper hand, and the more recent jurisprudence of the Cassation Court indicates that the earlier orientation that saw foreign law as being of non-obligatory application is being abandoned.

### III. BRAZILIAN SYSTEM

In Brazil, as well as in many other civil law countries, case law has become an important source of law as scholars and courts interact in their work of interpreting (and sometimes re-interpreting) the meaning of statutory rules. <sup>n83</sup> However, this strength of jurisprudence has not yet occurred in the realm of choice of law because Brazilian courts have decided relatively few cases in this particular field.

The Brazilian Supreme Court acts frequently on international law matters such as extradition, <sup>n84</sup> confirmation of foreign judgments and foreign arbitral [\*242] awards, the execution of foreign rogatory letters, <sup>n85</sup> and international tax matters. <sup>n86</sup> But the Supreme Court and the other federal courts of Brazil, as well as the state courts, do not have many opportunities to decide on choice of law cases, much less **application, proof, and interpretation of foreign law**. Thus, in the particular field of private international law with which this article deals, one is left with some statutory rules, conventional precepts, opinions of scholars, and one decision of the Supreme Court with which to analyze this doctrine.

The rarity of cases that involve choice of law results from the basic Brazilian private international law rule set forth in the Law of Introduction to the Civil Code of 1942, which states that matters of status, capacity, family, and succession are governed by the person's domicile. <sup>n87</sup> Because the original rule of the civil code of 1916 had established the law of a person's nationality as ruling all these matters, <sup>n88</sup> there was much more case law on choice of law between 1916 and 1942 as the immigrants from different parts of the world (Italians, Germans, Japanese, Lebanese, Syrians, and others) had their personal affairs ruled by the law of their nationality. The 1942 domicile rule radically changed this trend and now leads to the almost exclusive application of forum law. <sup>n89</sup>

### A. Application of Foreign Law

In the nineteenth century there was a tendency to consider foreign law as a fact; this is what Teixeira de Freitas inserted in his draft for a Brazilian civil code.<sup>n90</sup> This doctrine, however, did not appear in the final version of the 1916 [\*243] Civil Code. Argentina's civil code, on the other hand, followed very closely Freitas' draft and has a clear rule about foreign law being considered as a fact.<sup>n91</sup>

Brazilian private internationalists of the early twentieth century<sup>n92</sup> did not accept Freitas' and Carvalho's rules and preferred to adhere to those European scholars<sup>n93</sup> who had advocated since the last century that foreign law is to be considered as law and not as fact, and that the judge is obliged to apply the foreign law as ordered by the domestic rules of private international law. Amílcar de Castro<sup>n94</sup> is probably the only Brazilian internationalist who does not accept that Brazilian courts should apply foreign law as such; for him, foreign law is merely to be imitated by the forum because a legal precept is only characterized as law in the state in which it was enacted, and this characteristic cannot be exported to another state.

Two international documents had substantial influence on Brazilian law, one of them with obligatory effects. The first is the Additional Protocol approved by [\*244] the Montevideo Conference in 1889,<sup>n95</sup> which states in its article 2 that the application of foreign law shall be made *ex officio* by the judge without prejudice to the parties' right to allege and prove the existence and content of the invoked law.<sup>n96</sup> Article 5 of the Protocol established a compromise of all the signatory states to exchange authentic copies of their existing statutes and of the ones that would be approved in the future.

The second source is the Bustamante Code,<sup>n97</sup> which is an official source for Brazilian private international law and is therefore of obligatory application. The Code has a chapter composed of four articles<sup>n98</sup> on the application of foreign law:

#### Special Rules on Evidence of Foreign Law

Article 408 - The judge and courts of each contracting State shall apply *ex officio*, in suitable cases, the laws of the others, without prejudice to the means of proof referred to in this chapter.

Article 409 - The party invoking the application of the law of any contracting State in one of the others, or dissenting from it, may show the text thereof, force and sense, by means of a certificate subscribed by two practicing lawyers of the country whose legislation is in question, which certificate shall be duly authenticated.

Article 410 - In the absence of proof, or if the judge or the court deems it insufficient for any reason, they may request *ex officio* before deciding, through the diplomatic channel, that the State whose legislation is in question furnish a report on the text, force and sense of the applicable law.

Article 411 - Each contracting State binds itself to furnish to the others, as soon as possible, the information referred to in the preceding article, which information should come from its Supreme Court, or [\*245] from some one of its divisions or sections, or from the State Attorney, or from the Department or Ministry of Justice.<sup>n99</sup>

Eduardo Espinola, a prolific legal writer and a justice of the Brazilian Supreme Court, came out very early in favor of the *ex officio* application of foreign law<sup>n100</sup> and, following Andre Weiss,<sup>n101</sup> formulated his theory based on three maxims: namely, that the judge applies foreign law, even when none of the parties plead it, if the private international law rule so determines; if the judge does not have sufficient knowledge of the foreign law, he may demand the proof from the party who will benefit from its application; and the party may -- without waiting for the judge's order -- invoke and prove the existence and content of the applicable foreign law. These maxims generally constitute Brazil's present statutory law, as will be seen further on.

The majority of Brazilian private internationalists have agreed with this orientation. Not to apply the foreign applicable law, which has been set by Brazilian private international law rules, would amount to discarding this domestic rule of law. Parties' silence about the application of foreign law may even be intentional, in order to avoid compliance with the applicable law, and their wish shall not supersede the wish of the legislator. Oscar Tenorio refers to an interesting comment by Calamandrei on the principle of *iura novit curia* in domestic law: it does not only mean that the judge must know and apply the law *ex officio*, but also that when he does not know it and the interested party did not take the initiative to invoke and prove it, the judge must search, find, and apply the law. <sup>n102</sup> This reading can very well extend to the application of foreign law by the court, with a different wording: the judge is not supposed to know all the laws of the world, but he is expected to search by all means -- including by ordering the help of the parties -- in order to discover the foreign law and apply it. Haroldo Valladao adds that foreign law should be equated to domestic law in the same way that foreigners are entitled to the same legal standing as nationals, and therefore foreign law cannot be considered as a fact. <sup>n103</sup>

On the equivalence of applicable foreign law to domestic law for purposes of appeals, the Inter-American Convention on General Rules of Private International Law states in article 4 that "all the appeals provided for in the procedural law of the place where the proceedings are held shall also be admissible for cases in which the law of any of the States Parties is applicable." <sup>n104</sup> The same rule had been established in article 3 of the Montevideo Additional Protocols of 1889 and 1940, and by the Bustamante Code, article 412, which states that "[i]n every [\*246] contracting State where the appeal for annulment or other similar institution exists, it may be interposed for the infraction, erroneous interpretation or improper application of a law of another contracting State, upon the same conditions and in the same cases as in respect to the national law." <sup>n105</sup>

An exception to the obligatoriness of the foreign law when the parties do not invoke it can occur in contractual matters, where the parties are free to choose the law they wish to be applied to their reciprocal obligations. This choice, which is presently accepted in practically all legal systems and has been inserted in important recent international conventions, <sup>n106</sup> is accepted by Brazilian doctrine and jurisprudence. <sup>n107</sup> Therefore, in a case concerning a pure contractual relation, does the judge have to apply foreign law -- if that is the applicable law according to rules of Brazilian private international law -- when the parties did not invoke the applicability of that law? Should their silence be interpreted as a choice of forum law or should a court consider their silence as ignorance of the private international law rule and apply the foreign law *ex officio*? Haroldo Valladao admits that the judge does not have to apply foreign law in such case. <sup>n108</sup> This author, however, has doubts because the principle that has been disposed in all conventions is that the free choice of the parties has to be established expressly, "clearly demonstrated," or "demonstrated with reasonable certainty," <sup>n109</sup> whereas the mere silence of parties during a litigation does not necessarily reflect that they (or the interested party) knew of the rule on application of foreign law and chose not to invoke it due to preference for the forum law.

## B. Proof of Foreign Law

Presently there are two statutory rules in Brazil on the discovery of foreign law, one in the Law of Introduction to the Civil Code and the other in the Code [\*247] of Civil Procedure. <sup>n110</sup> The Law of Introduction, article 14 disposes that "[n]ot knowing the foreign law, the court may require proof of its text and effectiveness from the party invoking it." <sup>n111</sup> The Code of Civil Procedure, article 337 states that "[t]he party that will allege city, state, foreign or customary law, will prove its content and effectiveness, if the judge will so demand." <sup>n112</sup>

There was originally some debate in the interpretation of these articles; it seemed that courts did not have a basic obligation to apply foreign law, as both rules refer to a prior allegation or invocation by one of the parties. One author, P. Balmaceda Cardoso, even argued that the Law of Introduction contained a contradiction because it set forth a series of rules on the mandatory application of foreign law <sup>n113</sup> and then made the application of foreign law depend on the pleading and proof by the party vis-a-vis article 14. <sup>n114</sup>

Cardoso's view remained an isolated opinion as the other writers on private international law accepted the rule of

article 14, explaining that the judge is supposed to apply the foreign law in accordance with the rules contained in the Law of Introduction and that basically a court is supposed to know the foreign applicable law. But if the court should have difficulties in discovering the law, it may order the party to prove the law; however, a court's obligation to apply the foreign law is unaffected by the success or failure of the party in producing the proof of the foreign applicable law.

[\*248] Some Brazilian authors <sup>n115</sup> invoked the example of article 293 of the German Code of Civil Procedure, <sup>n116</sup> which states that foreign law does not have to be proven unless it is unknown to the court. Under this article, the court is not restricted to the proofs produced by the parties. The court has the power to resort to other sources of information and to order the necessary measures for discovery of the content of foreign law.

The other Brazilian source for judicial notice, article 337 of the Code of Civil Procedure, basically repeats the rule of article 212 of the earlier procedural code. Both articles compared foreign law to state, municipal, and customary law, from the standpoint that the judge can demand proof from the parties about their content and effectiveness. And, as state, municipal, and customary laws are obligatorily applied, the same goes for foreign law. <sup>n117</sup>

The decisive argument in favor of the obligatory application of foreign law is the Bustamante Code rules transcribed above, which have been ratified by Brazil and prevail over domestic statutes. <sup>n118</sup> Article 408 thereof establishes in all clarity that the judge must apply *ex officio* the laws of the other contracting states. Naturally, it could be argued that the Code only applies in Brazil to the law of the other 14 signatory states that have ratified it. However, it is unacceptable for Brazil to treat the law of the member-states of the Bustamante Code as law and give a different treatment to the legal provisions of other states. Ratifying this international code without any reservation to article 408 revealed the domestic law's position that foreign law is law and that the judge is supposed to apply it.

A reading of the main articles of the Law of Introduction demonstrates the clear intention of the legislature was clearly that applicable foreign law is to be mandatorily applied, independently of any initiative by and/or cooperation from the parties: <sup>n119</sup>

[\*249] [Article 7:] The law of the country in which the person is domiciled *establishes* the legal rules concerning the beginning and end of legal personality, his name, capacity and family rights.

[Article 8:] To characterize property and govern the relations concerning it, the law of the country in which it is situated *shall* be applied.

[Article 9:] To characterize and regulate obligations, the law of the country in which they are constituted *shall* be applied.

[Article 10:] Succession by death or through absence *is governed* by the law of the country in which the deceased or absentee was domiciled, whatever may be the nature and location of the property involved.

[Article 16:] When in the terms of the preceding articles, a foreign law *is to be applied*, only its contents shall be considered, without considering any remission made by it to another law.

[Article 17:] Laws, acts, and judgments of another country, as well as any kind of declaration of private intention, shall not be effective in Brazil when they offend national sovereignty, public order or good customs.

These are mandatory terms which can hardly be shaken by the wording of article 14.

In the spirit of the Bustamante Code, the Inter-American Conference on Private International Law <sup>n120</sup> approved in CIDIP-II a Convention on Proof and Information on Foreign Law. Article 2 of this Convention, more realistically than the Brussels Convention of last century, <sup>n121</sup> sets forth the obligation of state-parties to provide to the authorities of the other state-parties *that so request*, the elements of proof and report on the text, validity, meaning, and legal scope of their law. <sup>n122</sup>

[\*250] 1. Unproven Foreign Law

What if after all efforts by the parties and judge, it remains impossible to discover the foreign law? Brazilian doctrine formulates four different solutions for this problem. One school advocates dismissal of the case. Balmaceda Cardoso <sup>n123</sup> refers to the opinions of Anzilotti in Italy and Machado Villela in Portugal <sup>n124</sup> and says that dismissal is the most defensible theory because it is a duty of the court to decide according to the competent law, which can only be established by the rules of private international law and the applicable foreign law may only be substituted by the local law in case the former one is manifestly offensive to the principles of the international *ordre public* of the forum.

Eduardo Espinola <sup>n125</sup> holds that if there is no proof regarding the foreign law, the judge should apply his own law as if it were the foreign law, basing himself on the presumption of equivalence. This coincides with the solution adopted by various European systems, such as the French, the Portuguese, the Polish, and the Swiss, as seen in the section on European law <sup>n126</sup> and was adopted by Brazilian courts in a few cases in which it was impossible to discover the content of the foreign applicable law. <sup>n127</sup>

The majority of Brazilian authors were not pleased with this solution and advocated other alternatives. Oscar Tenorio <sup>n128</sup> and Serpa Lopes <sup>n129</sup> followed Martin Wolff's suggestion <sup>n130</sup> that if the parties did not prove the foreign law and the judge cannot discover with certainty its content, the case should be decided in accordance with the *probable law in that foreign system*.

[\*251] Martin Wolff illustrates what he means by the *probable law* with the following example:

If the judge cannot obtain a new edition of the Bolivian civil code, he must suppose that the 1830 text is in force. If he cannot obtain any edition of the code, he will have to conform himself with the informations at his disposal about the content of the applicable law. In last resort he may declare that the Bolivian civil code is an imitation of the French civil code. It has been said that applying such hypothetical rules the decision will come out entirely wrong, and that therefore in such cases the judge should apply his own law. However there is no doubt that if he were to do so, the error would be even greater. For instance: if he has to decide on the will of an Equatorian that disinherited arbitrarily his wife and children and there is no way to discover the rule of Equatorian law on the subject of the legitime (inheritance), it would be an absolute mistake to assign to the widow and to the three children an eighth of the estate to each one in accordance with article 2303 of the German civil code, when we know that the prusso-austrian system of the right to a legitime inheritance in money is not found in any other part of the world. Much better would be to apply the law of Chile, as the judge finds out that the code of Equador is based on the one of Chile; and if he cannot get hold of the Chilean law, better than applying German law, would be to apply the French civil code which was the model of the former one. According to this criterion if the judge cannot obtain U.S. common law, he should apply the law from which it derives: English common law. <sup>n131</sup>

Haroldo Valladao prefers the subsidiary solution of the Portuguese civil code, article 23, paragraph 2, <sup>n132</sup> and explains the general solution. When a court cannot discover the law of the person's nationality (in a system that commands the application of a person's nationality to matters of status and capacity), it should pursue to discover the law of his domicile (a subsidiary connecting rule in the nationality system, when the person has no nationality). If it is not possible to determine the law of the country of the person's domicile, the judge should try to find out the law of the country where the person has his residence (a subsidiary to the domicile rule) and so on, keeping always to the private international law principle of applying the law that is most related to the case and therefore, concludes Valladao, that will do better justice. <sup>n133</sup>

[\*252] With the change of the basic Brazilian rule of private international law, which established domicile instead of nationality as the law that rules the person's capacity and family law, practically no case law has been decided on choice of law. Because personal and family cases arise between people that are domiciled in Brazil, Brazilian law generally applies, whereas with international contracts, when trouble arises between Brazilian and foreign parties, these cases have been settled through arbitration abroad. <sup>n134</sup>

This author believes that Martin Wolff's approach to decide in accordance with the *probable law in the foreign system* should only be followed when there are very clear indications that the probability is a very strong one; otherwise, the judge should apply his own law, the law of his state, provided that it leads to an equitable solution.

### C. Interpretation of Foreign Law

Brazilian doctrinal and jurisprudential approach indicates that when a Brazilian court applies a foreign law, it has to interpret it as the foreign judge would, following Zitelman, who said that "the judge has to apply the substantive foreign law as if he were judge in the foreign state." <sup>n135</sup>

Article 410 of the Bustamante Code has been understood as following this doctrine when it states that the foreign law is to be proven by means of a report on "the text, force and *sense* of the applicable law;" the term *sense* being understood as the interpretation which is given to the text in the country of its origin. <sup>n136</sup>

Article 2 of the 1979 Inter-American Convention on General Rules of Private International Law <sup>n137</sup> regarding **application, proof, and interpretation of foreign law**, states:

Judges and authorities of the States Parties shall enforce the foreign law in the same way as it would be enforced by the judges of the state whose law is applicable, without prejudice to the parties' being able to plead and prove the existence and content of the foreign law invoked. <sup>n138</sup>

[\*253] This establishes very clearly the principle that the judge does not merely apply foreign law, interpreting it as if it were domestic law -- incorporated, nationalized local law, as some Italian jurists are so fond of doing -- but that he has to apply foreign law as foreign law, exactly as his colleague abroad would do it. <sup>n139</sup> This forces the judge not only to discover the text and content of the foreign law, but to find out how the law is applied abroad, how it is interpreted by the doctrine, and the jurisprudence of the state that prescribed that particular rule of law.

Article 5 of the Law of Introduction to the Brazilian Civil Code states that "in the application of the law, the judge shall bear in mind the social goals to which it is directed and the requirements of the public welfare." <sup>n140</sup> When the Brazilian judge decides a case based on a foreign applicable law, he has to inquire into the *mens legis* of the foreign legislator -- why did he legislate such rule and for what purpose. <sup>n141</sup>

In the meager post-1942 Brazilian jurisprudence on application of foreign law there is one decision of the Supreme Federal Tribunal (*Supremo Tribunal Federal*) which illustrates very richly how a court follows the interpretation of a foreign law by abiding the lessons of its scholars. In *Recurso Extraordinario no. 93.131*, <sup>n142</sup> the Supreme Court handled two important questions. First, when a [\*254] foreign law has to be applied in accordance with the precepts of Brazilian private international law is it equivalent to Brazilian law for purposes of allowing the *recurso extraordinario* to the Supreme Court?

According to the Brazilian Constitution in force at the time of this case, the 1969 Constitution, <sup>n143</sup> the Supreme Court would decide a *recurso extraordinario* appealed from decisions that would be contrary to a constitutional rule, that would deny the effectiveness of a treaty or a federal law, or that would give to a federal law a divergent interpretation to one given by another court or by the proper Supreme Court. Subsequent doctrine has unanimously established that the same applies to a case based on a foreign law. Thus, if a lower court would not apply the foreign law that Brazilian private international law indicates as applicable or would apply it in accordance with an interpretation in conflict with the interpretation given to it by another of the Brazilian courts or by the Supreme Court, an extraordinary appeal to the Supreme Court would be acceptable. <sup>n144</sup> Hence, the Supreme Court, after quoting various Brazilian writers and citing a 1945 precedent, <sup>n145</sup> decided in *Recurso Extraordinario no. 93.131* that the denial to enforce the applicable Portuguese law ensues the extraordinary appeal to the Supreme Court <sup>n146</sup> and the judgment of the Minas Gerais state court was reversed because the Supreme Court understood that the lower court had denied effectiveness to certain articles of the Portuguese Civil Code. <sup>n147</sup>

The second question the Brazilian Supreme Court dealt with in this case was how the Brazilian Judiciary should interpret the applicable Portuguese law. This the Supreme Court answered by analyzing articles 592, 593, and 837 of the Portuguese Civil Code, all of which deal with the subject matter of the case -- [\*255] subrogation of credit -- in exact accordance with what Portuguese scholars had written and commented. <sup>n148</sup>

Whether the constitutionality of a foreign law can be decided upon in a Brazilian court is a polemic matter which has been treated by a few scholars in Brazil. <sup>n149</sup> Severo da Costa <sup>n150</sup> understands that the Brazilian judge has to consider the foreign law valid as long as it has not been decided otherwise by the Supreme Court of the other state (which would be better stated if it did not restrict the condition to the foreign Supreme Court, as some constitutional systems allow lower courts to equally reach this decision). Haroldo Valladao <sup>n151</sup> does admit the possibility of such initiative by the Brazilian judge, arguing that sometimes the problem of constitutionality is a very simple one, such as when a new Constitution comes into force containing rules that are incompatible with prior laws. But, he goes farther than that and writes that the judge has the power to declare the unconstitutionality of a foreign law in any event, even when it is a matter of high social and political relevance. Of course, if we admit, as referred to above, that the judge of the forum when applying foreign law has to consider himself as a foreign judge and act as he understands the foreign judge would act, it is comprehensible that he should be allowed to deny the application of a foreign law which he considers to be in conflict with the basic law of that country.

The Brazilian Supreme Court judged an extradition request, <sup>n152</sup> in which a debate arose whether it could declare the unconstitutionality of an Argentinian law. The case was a request from Argentina for the extradition of Eduardo Firmenich, one of the leaders of the revolutionary movement which convulsed that country in the 1970s. Argentina had enacted an amnesty with certain restrictions; namely, it would not apply to those who were not living in Argentinian territory, to those that through their behavior demonstrated that they continued attached to their subversive organizations, and to those that had been condemned by judgments that were already enforceable (*res judicata*). Firmenich requested that the extradition should not be granted based on the amnesty, whereas Argentina considered him within one of the exceptional categories to which the amnesty did not apply.

Because the Supreme Court did grant the extradition, Firmenich appealed back to the Court by means of *Embargos de Declaracao*, which allows a party to come back to the court alleging that it did not decide on a certain point of its [\*256] original request. He claimed that the Supreme Court did not discuss one of his original claims, namely that the exclusions to the amnesty contained in the Argentinian law were unconstitutional. <sup>n153</sup> By an eight-to-two majority (one Justice was not present), the Supreme Court held that it was not up to it to decide on the unconstitutionality of a foreign law. <sup>n154</sup>

Justice Francisco Rezek <sup>n155</sup> was, frankly, in favor of the Brazilian Supreme Court analyzing the constitutional aspect of the Argentinian law because he argued that an amnesty law cannot make the differentiations contained in the Argentinian law. He recalled that the appellant had referred to Argentinian case law which had criticized the amnesty law for its unconstitutionality. Justice Soarez Munoz <sup>n156</sup> said that since the Argentinian Constitution disposes that an amnesty must be general, the law disobeyed the Constitution and therefore the extradition should not be granted. He stressed that he was not declaring the Argentinian law unconstitutional but merely deciding not to apply the law (he would not apply article 2 containing the restrictions to the amnesty).

The other eight Justices were adamantly against judging the constitutionality of the Argentinian law. Justice Djacy Falcao <sup>n157</sup> stated that the Brazilian Supreme Court had no competence to declare the unconstitutionality of the law of the requesting state; otherwise the Brazilian Supreme Court's decision could conflict with a decision of the Argentinian Supreme Court. Justice Moreira Alves <sup>n158</sup> said that "in an extradition case the Supreme Court cannot examine the compatibility of the legislation of the requesting state with its Constitution."

This case does not indicate how the Court would decide a civil or commercial case where a party claims that the foreign law is unconstitutional according to Brazilian standards. In that instance, the rules of Brazilian private international law order the application of a foreign law, and the Court could deny the application of the foreign law

based upon the public policy exception. <sup>n159</sup> But if the claim of unconstitutionality is based on the foreign country's basic law, we only know so far that there is doctrinal divergence.

Brazil has followed the general tendency of Latin American private international law as expressed in the Montevideo Treaties' Additional Protocols of 1889 and 1939, in the Bustamente Code of 1928, and in the Inter-American Convention on General Rules of Private International Law of 1979, in that [\*257] foreign law is law and must be applied as such. The proof of foreign law's content is up to the judge, who may call upon the parties to cooperate. If the foreign law remains unproven, the best solution is to apply the forum's law, unless it is possible to assess the probable foreign law. And the **interpretation of the foreign law** follows that which is prevalent in the country from which the applicable legal rule originated.

#### IV. ANGLO-AMERICAN SYSTEM

##### A. Application of Foreign Law

The Anglo-American system established in its origins a clear position that foreign law is a fact and as such has to be pled and proved by the party or parties. According to Dicey and Morris in Rule 18:

(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case. <sup>n160</sup>

According to the same authority, this principle has been established since 1718. <sup>n161</sup> Joseph Story, the classical author on U.S. conflict of laws, established the same principle in the various editions of his treatise. <sup>n162</sup> An English author <sup>n163</sup> explains:

[T]he only law applied by the judge is the *lex fori*, the only rights enforced by him are those created by the *lex fori*. But owing to the foreign element in the case, the foreign law is a fact that must be taken in consideration. What the judge attempts to do is to create and to [\*258] enforce a right as nearly as possible similar to that which would have been created by the foreign court had it been seised of a similar case purely domestic in character. <sup>n164</sup>

The relevant consequences of considering foreign law as a matter of fact are that it is pleadable and provable as such, by evidence supplied by experts to a jury, <sup>n165</sup> and that the appellate court review of the lower court's decisions is limited or excluded. <sup>n166</sup>

In the United States, various statutes <sup>n167</sup> introduced considerable changes in the common law by establishing that for certain purposes foreign law is a matter of law and not of fact. These provisions did not rule that the judge must apply foreign law when it is not pled by a party, but rather left that decision to the discretionary power of the judge. These provisions do, however, provide that if a judge does decide to apply foreign law or when parties plead for the application of foreign law -- which automatically obliges the judge to apply it -- the foreign law is to be treated as law and not as fact. This requirement has important implications on the manner of proving the content of the foreign law, as will be [\*259] seen further on. <sup>n168</sup> Foreign law will only be treated as fact where there was no pleading for it and the judge decides not to apply it on his own initiative. <sup>n169</sup>

One commentator explains that the rule refrains from imposing an obligation on the court to take "judicial notice" of foreign law because this would put an extreme burden on the court in many cases; rather, the rule provides flexible procedures for presenting and utilizing material on issues of foreign law by which a sound result can be achieved with fairness to the parties. For appellate purposes, the rule treats foreign law as an issue of law. <sup>n170</sup>

Where the plaintiff does not invoke or does not ascertain the contents of the applicable foreign law, U.S. courts have followed a variety of solutions which come very close to the doctrines that were espoused above in connection



with the European and Brazilian civil law systems.

The more radical solution is to deny the plaintiff's action based on "foreign created" rights if he does not give evidence of the applicable foreign law. One of the better-known cases that followed this line is *Cuba R. Co. v. Crosby*,<sup>n171</sup> where an American citizen was denied recovery against his employer, an American railroad company operating in Cuba, for the loss of his hand. Justice Holmes argued that "the accident took place in Cuba, and no evidence was given as to the Cuban law."<sup>n172</sup>

In *Walton v. Arabian American Oil Co.*,<sup>n173</sup> judgment was given against the plaintiff in a case of injury resulting from a traffic accident that occurred in Saudi Arabia because the plaintiff did not plead or prove the law of the place of the [\*260] delict, and the trial judge refused to take judicial notice of Saudi Arabian law. Both *Cuba R. Co.* and *Walton* were justly criticized by prominent scholars.<sup>n174</sup>

The other solution found in U.S. as well as English case law is the application of forum law. There are different theories, along the same lines as in the civil law doctrine, that courts and scholars have employed to justify this approach. One is the presumption that foreign law is the same as English law until the contrary is proven.<sup>n175</sup> This theory, however, has not found sympathy in many cases where courts find it difficult to employ such a presumption, especially when the applicable law is not a common law. Ehrenzweig is also very critical of this theory, invoking Italian authors who stigmatized it as "*manifestamente priva di senso*," and he himself characterized it as "nothing but a crude fiction," becoming absurd where an American court is dealing with a civil law rule.<sup>n176</sup>

Another theory advocates the implied choice of the forum law by the parties. This was the basis for the decision of the Supreme Court of New Jersey in *Leary v. Gledhill*,<sup>n177</sup> which repudiated the presumption theory and embraced the choice theory.<sup>n178</sup> In England, Dicey and Morris also reject the presumption theory and [\*261] suggest that the rule should simply be that when foreign law is not proven, the court applies English law without making any reference to the parties' choice theory.<sup>n179</sup>

United States writers have detected and understood the difficulties American courts feel in applying foreign legal rules. One of the most explicit and sincere manifestations of this difficulty was expressed by Justice Holmes, who referred to a civil law system as a "wall of stone."<sup>n180</sup> And even American scholars very well versed in the civil law system have accepted the difficulties inherent in applying foreign legal systems that are "alien in language and structure."<sup>n181</sup> A most welcome exception is Judge Milton Pollack's presentation to the American Foreign Law Association in 1978, in which he expressed optimism that courts could adequately comprehend foreign legal authorities.<sup>n182</sup>

#### [\*262] B. Proof of Foreign Law

In England, proof of foreign law is very strongly concentrated in testimony by experts. Dicey and Morris summarize English court decisions as follows:

Foreign law cannot be proved merely by putting the text of a foreign enactment before the court, nor merely by citing foreign decisions or books of authority. Such materials can only be brought before the court as part of the evidence of an expert witness, since without his assistance the court cannot evaluate or interpret them.<sup>n183</sup>

The Civil Evidence Act of 1972, section 4(1) provides that:

it is hereby declared that in civil proceedings a person who is suitably qualified to do so on account of his knowledge or experience is competent to give expert evidence as to [foreign law], irrespective of whether he has acted or is entitled to act as a legal practitioner [in the foreign country].<sup>n184</sup>

The English system of allowing expert testimony can reach paradoxical levels. For instance, courts have allowed testimony by a person who has never practiced nor been entitled to practice in the country whose law is to be applied,

but has practiced in a second foreign country whose law is the same as that of the first. <sup>n185</sup> In addition, England has even allowed testimony by a person who, although having no knowledge or experience of the foreign law based on study or practice, has nevertheless become conversant through work involving contact [\*263] with that foreign law. <sup>n186</sup> To accept this kind of testimony over a recently published work by a legal authority of the country whose law is in question is indeed a paradox. <sup>n187</sup>

In the United States this matter has evolved, there being a more sensible acceptance of different ways of ascertaining the content of foreign law:

[A] printed copy of a statute or other written law . . . contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law. . . .

. . . Statements and declarations by officials of a foreign country, extracts from books which are not physically in the courtroom, opinions by scholars not available for cross-examination -- all of these [\*264] may be submitted or referred to, or may be woven into the examination and cross-examination of those experts who do testify in open court. <sup>n188</sup>

Furthermore, according to Rule 44.1 of the Federal Rules of Civil Procedure, a court is not limited to material presented by the parties and may engage in its own research and consider any relevant material thus found. <sup>n189</sup> As prominent U.S. comparatists clarify, a

court may have at its disposal better foreign law materials than counsel have presented, or may wish to reexamine and amplify material that has been presented by counsel in partisan fashion or in insufficient detail. On the other hand the court is free to insist on a complete presentation by counsel. <sup>n190</sup>

As Professor Hans Baade wrote, "judicial notice and expert testimony are not mutually exclusive categories." <sup>n191</sup> Judge Pollack prefers that experts on foreign law not take the witness stand, but rather do desk work. <sup>n192</sup>

### [\*265] C. **Interpretation of Foreign Law**

The auto-limitations that English courts have established over themselves in relation to proof of foreign law extend to the **interpretation of foreign law** after its content has been proven. Dicey and Morris <sup>n193</sup> opine that "since the effect of foreign sources is primarily a matter for the expert witness, it is desirable, when proving a foreign statute, also to obtain evidence as to its interpretation," but when that evidence does not materialize or when parties expressly ask the court to interpret foreign law, "the court acts on the assumption that the foreign rules of construction are the same as those of English law." <sup>n194</sup> The result being that English courts rely on the expert's knowledge and understanding of the foreign rules of interpretation of its laws to a higher degree than on their own capacity to study and reach an understanding of the foreign law's rules of legal interpretation. The same complex of self-incompetence is applied to the interpretation of decisions by foreign courts. <sup>n195</sup>

A tendency to allow a court's discretion in interpreting foreign law according to its own understanding exists in the United States. <sup>n196</sup> The discussion in the Italian doctrine about the manner of interpretation, whether a court should interpret foreign law as if it were local law -- formal reception -- or as the foreign courts and authorities interpret their law -- material reception -- has some correspondence in two U.S. cases. In *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, <sup>n197</sup> Judge Learned Hand remarked: "The embarrassment is . . . that we have to interpret another system of law according to notions wholly foreign to it." <sup>n198</sup> Professor Gregory S. Alexander, in his comment of *Wood*, writes of the difficulties that arise in the **interpretation of foreign law**:

Finding that the French law of prescription did not provide for the substance-procedure distinction inhering in American law, the court [\*266] attempted to adapt the foreign law to the domestic law of limitations in the manner most faithful to the essence of the foreign rule. As the court acknowledged, it did not strictly apply the foreign law, but

only its idea of the Civil Code provision on prescription, which, admittedly, may be quite different from the intention of the French statute.

. . . The court in *Wood & Selick* felt it was bound to apply French law and, therefore, found it necessary to interpret provisions from the French code. It sought to accommodate the foreign elements by adapting the French law to the forum's legal norms. <sup>n199</sup>

In 1955, however, the same court in *Bournias v. Atlantic Maritime Co.* <sup>n200</sup> retreated and, according to Alexander's analysis, expressed an attitude that if the forum cannot address the foreign law problem, "the preferable course is a retreat to its own legal notions. The *Bournias* approach ignores the basic function of foreign law in the conflicts approach: 'applying' foreign law requires more than mere reference to that law; it demands that foreign law be considered on its own terms." <sup>n201</sup>

In actuality, U.S. courts rarely decide legal actions based on a foreign country's law. This is primarily due to the courts' tendency to find justifications to apply local law. Two cases illustrate different views on foreign civil law by American courts. In the first case the application of foreign law was rejected against the most traditional and universal rules of private international law, without any consideration to the sense and objectives of the connected foreign law, with the excuse that New York public policy demanded that its own law be applied. In the second case, the application of the foreign law was rejected, but only after a careful analysis of its purpose and a finding that New York law had more interest in the particular case than the foreign law.

In *Wyatt v. Fulrath*, <sup>n202</sup> the main issue was whether the law of Spain should be applied to property placed in New York during the lives of the Spanish spouses, in which event only half of the property would have gone to the wife at her husband's death, or whether to apply the law of New York, in which event all of such jointly-held property would have gone to the widow as a survivor. By a four-to-three majority, the New York court applied New York law and considered that with the death of the Duke of Arion, the Duchess inherited the whole estate, which consisted of moneys and securities deposited in New York banks. Chief Judge Desmond, in his dissenting opinion, stated that the majority of the court was throwing overboard not one but three of the oldest and strongest conflict rules: first, that the law of the domicile of the owner governs as to the devolution [\*267] of personal property; second, that the law of the matrimonial domicile controls as to the property and contract rights of husband and wife *inter sese*; and third, that whether such personalty is separate or community property is determined by the law of the matrimonial domicile. <sup>n203</sup>

In the dissent's opinion, the Spanish Civil Code was directly applicable to the case. The Code subjects all marriages of Spanish nationals in Spain to the statutory regime of community property. In addition, the Code applies to property outside as well as within Spain and makes all property acquired by the married couple or either of them during marriage community property. Lastly, the Code forbids the alteration of such community property either unilaterally or by mutual consent. The Duke and Duchess of Arion were Spanish nationals, were married in Spain, and had continually maintained their domicile in Spain, as had their ancestors for generations before them. Neither was ever in New York. For purposes of convenience or safety, the husband and wife left valuable property in the custody of New York banks for safekeeping only; this was the State's only contact with the property. The banks were mere bailees without other title or interest. To say that setting up of joint accounts of personalty in New York subjected that personalty to New York law rather than to the law of the matrimonial domicile is to refuse to follow one of the most basic of Conflict of Laws rules.

The majority opinion held that New York has the right to say as a matter of public policy whether it will apply its own rules to foreigners who choose to place their property in New York for custody or investment, and whether or not to honor the formal agreements or suggestions of such owners by which New York law would apply to the property they place here. "[T]hus we would at once honor their intentional resort to the protection of our laws and their recognition of the general stability of our Government which may well be deemed inter-related things." <sup>n204</sup>

Students of conflicts have come to learn Judge Cardozo's lesson that public policy is the sovereign's defense against

"some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common wealth." <sup>n205</sup> It is not easy to detect how the disposition of the Duke's fortune was a matter of concern to the justice, good morals or common wealth of New York, but it appears that any excuse is good enough to apply *lex fori*. With such an approach to choice of law, the problems related to proof and **interpretation of foreign law** are formidably reduced for the benefit of bench and bar.

Exceptionally, some American judges will delve into the foreign law, examine its content, interpret its meaning, and reject it in favor of local law. In *Kristinus v. H. Stern Com. E Ind. S.A.*, <sup>n206</sup> a New York court held that U.S. law [**\*268**] had more interest than that of the foreign law. The plaintiff, while visiting Rio de Janeiro, purchased gems from H. Stern. According to the plaintiff, a flyer advertising H. Stern's wares had been slipped under the door of his hotel room and stated that every sale carried a one-year guarantee for refund at H. Stern Jewelers, New York. The plaintiff also asserted that a vice president of defendant had assured him that he would be able to return the gems for a complete refund in New York. Two months after his purchase, he tendered the gems to H. Stern in New York and asked for a refund, which was denied, so he sued for specific performance. H. Stern moved to dismiss the complaint on the ground that the alleged oral promise was unenforceable under the laws of Brazil, which defendant claimed governed the transaction. He relied on articles 141 and 142 of the Brazilian Civil Code, which provide:

Article 141 - Except in cases specifically provided for to the contrary, evidence which is solely by testimony is only admitted as to contracts whose value does not exceed ten thousand cruzeiros.

Whatever the amount of the contract, evidence by testimony is admissible as a subsidiary to or complement of evidence in writing.

Article 142 - There cannot be admitted as witnesses:

...

IV. The person interested in the object of the litigation, as well as the ancestor and the descendant, or collateral relative through the third degree of one of the parties, whether by blood or by affiliation. <sup>n207</sup>

The judge then proceeded to weigh the interests of both jurisdictions in accordance with the New York rule that "the law of the jurisdiction having the greatest interest in the litigation will be applied and that the facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." <sup>n208</sup>

Examining the provisions of the Brazilian Civil Code, the judge found that they promote two interests. First, they protect the integrity of the judicial process in Brazil against the taints of perjured and biased testimony by requiring that testimony regarding a contract be corroborated by written evidence <sup>n209</sup> (article 141) and barring testimony from interested parties <sup>n210</sup> (article 142). In this case, said the judge, the interest is not implicated since the integrity of the Brazilian judicial process is not threatened in a suit in the U.S. District Court for the Southern District of New York.

Second, article 141 protects persons who transact business in Brazil from unfounded contractual claims by requiring that such claims be supported by a writing to be enforceable. This interest of Brazil does have a bearing on this case [**\*269**] since presumably Brazil seeks to provide this protection to anyone who transacts business there, regardless of where suit on the transaction is brought. <sup>n211</sup>

On the other hand, Judge Lasker considered that New York had contacts with this case because: (1) H. Stern transacts business in New York through its franchisee and agent H. Stern Jewelers, Inc. and (2) the alleged promise that the plaintiff seeks to enforce was to refund the purchase price in New York through that franchisee. New York has some interest in ensuring that persons who transact business within its borders (and thus to some extent subject themselves to the authority of the state) honor obligations, including contracts made elsewhere. <sup>n212</sup>

In weighing the two state interests, Judge Lasker said that when the contract is to be performed in New York, its

interest is heightened since its ability to regulate business affairs and the rights and obligations of those within its territory is then directly implicated. In such circumstances, a New York court would decline to apply foreign law where that law would foreclose enforcement of a contract valid under New York law. <sup>n213</sup>

The decision concludes by saying that a New York court would not permit H. Stern of Brazil to contract in Brazil to refund Kristinus' purchase price in New York and then rely on the laws of Brazil in order to avoid its obligation under the contract. Accordingly, New York law should apply. <sup>n214</sup>

This was not a simple decision in which to apply *lex fori*. The judge analyzed the foreign law, its objectives, and the interest of its application against the interests of New York to apply its own law. This Article is not the right occasion to examine whether Judge Lasker's interpretation of rules 141 and 142 of the Brazilian Civil Code is in accordance with the interpretation given to the dispositions by Brazilian authorities. Because the decision of the court was in favor of applying New York and not Brazilian law and since we are not here confronting a case of application of foreign law, there is no reason to discuss how and according to whom the foreign applicable law should be interpreted. But it is worthwhile to stress that this decision shows how an American court can interpret sensibly and intelligently a disposition of a civil law country.

Thus, while England remains steadfastly loyal to the foreign law-fact theory, only applying foreign law when duly invoked by parties and proved by them as a matter of fact, the United States has exhibited some change in position. Specifically, under the discretion of the judge, foreign law may be admitted even where not invoked by the parties, and the courts, when applying foreign law, must treat it as a matter of law. Additionally, statutory innovations within the United States have allowed courts to endeavor their own research on the content and **interpretation of foreign law**; whereas in England, foreign law can only be ascertained -- proof and interpretation -- through expert testimony.

#### [\*270] V. UNILATERALISM V. MULTILATERALISM

One of the most important debates in the theory of private international law -- perhaps the most important one -- with considerable repercussions in various aspects of this complex field of law is what has come to be known as the bilateralist or multilateralist approach or method versus the unilateralist one.

The debate starts at what this author has called the "perception of the discipline," <sup>n215</sup> which compares two different ways of viewing the whole field of conflicts. The first one looks at the legal dispositions of different jurisdictions and detects the differences that characterize them. Ulrich Huber's very short and very famous *De Conflictu Legum Diversarum in Diversis Imperiis* deals with the question of "what is the territorial extension of my law." <sup>n216</sup> The central point of his essay is based on the three axioms he establishes as the basis for solving the problems that arise from different legal dispositions in different jurisdictions and that have to be reconciled: (1) the laws of a State have force only within the territorial limits of its sovereignty; (2) all persons who, whether permanently or temporarily, are found within the territory of a sovereign are deemed to be his subjects and as such are bound by his laws; and (3) by reason of comity, however, every sovereign admits that a law which has already operated in the country of its origin shall retain its force everywhere, provided that this will not prejudice the subjects of the sovereign by whom its recognition is sought. <sup>n217</sup>

An English master of private international law has offered a very clear analysis of Huber's dictum, which sheds light and understanding on a fundamental aspect of the Anglo-American approach to conflict of laws.

In his first two maxims Huber states, more clearly than anyone before him, that all laws are territorial and can have no force and effect beyond the limits of the country where they were enacted, but bind all persons within that country, whether native-born subjects or foreigners. It was this insistence on the territorial nature of law that made Huber's doctrines so congenial to English and American judges. Then in his third maxim Huber offers, almost casually, two explanations of the apparent paradox that, despite the doctrine of territorial sovereignty, foreign law is applied beyond the territory of its enacting sovereign. His first explanation is that this is done simply by the tacit consent of the second

sovereign. His second explanation is that what is enforced and applied is not foreign law as such but the rights to which it gives [\*271] rise. The third maxim also contains the seeds of the doctrine of public policy. . . . n218

So Huber starts by looking at the laws of the sovereign, establishes their territoriality, and allows exceptions to extraterritoriality. There is a fundamental preoccupation with the sovereign and the respect its laws must command.

The other approach to conflicts does not look at the legal dispositions nor inquire about their long-arm effects, but starts at the other side, at the legal relations and situations, and inquires which law should be applied to them. Instead of asking "when does my law apply," it inquires what law applies to a given legal situation. The famous German Friedrich Carl von Savigny was the main European defender of this theory, fighting the territorialist doctrine, and proposing a multilateralist approach to choice of law. n219 His basic theory centered around the idea of a "community of law" between different states, n220 and his practical proposition was to discover the most appropriate law for every legal relation in conformity with the nature of this relation, for which it is necessary to find the seat of the legal relation. n221 In this way, a person's status and capacity are to be governed by the law of his domicile, property by the law of its location, and contracts by the law of the place of their performance. One does not look at the law and inquire about its territorial extension; rather, one looks at the legal relation and then chooses the appropriate law.

It is very important to have a clear understanding of these two different views, which have been appropriately synthesized by an American professor as follows:

The unilateral approach focuses directly on the content of the competing substantive laws and tries to resolve conflicts problems by delineating the intended sphere of operation of the involved laws, on the basis of their underlying purpose. The multilateral approach classifies legal relationships into pre-established categories, borrowed from domestic law, and then assigns each such relationship to the legal order to which "it belongs". (sic) Unlike the previous approach, the focus is on the legal relationship and its territorial or other factual connection with a given state, rather than on the unilateral "wish" of the involved states to apply their law. n222

[\*272] These different approaches are reflected in the language used by different codes for their conflict rules. An easy way to detect this is by comparing the French and the Italian rules for status and capacity of physical persons. Article 3, paragraph 3 of the French Civil Code reads: "The laws concerning the status and the capacity of people govern the French, even when they reside abroad." In contrast, Article 17 of the Italian Dispositions on the Laws in General reads: "The state and capacity of peoples and their family relations are ruled by the law of the State of their nationality."

Both precepts dispose that in matters of status and capacity people should be ruled by the law of their nationality. The French concentrates the rule in the disposition that French law rules French nationals, whereas the Italian universalizes the rule, disposing that all people, of whatever nationality, are governed by the law of their nationality. The French rule is unilateral, while the Italian multilateral.

Another interesting illustration can be obtained from comparing article 19, paragraph 1 of the Italian law with article 15 of the original German Introductory Law (no longer in force; in 1987 the EGBGB was entirely reformulated). The Italian provision reads: "The property relations between spouses are governed by the law of the husband's nationality at the time of the celebration of the marriage." The German law reads: "The property relations between the spouses are governed by German law if the husband was a German national at the time of the celebration of the marriage." The Italian rule answers the question, "what law is to be applied to property relations between spouses," whereas the German rule answers the question "when is the German law to be applied."

The conflicts legislator that looks at the laws and tries to find what option to follow in case the possible applicable laws are in disagreement, and has in mind the question of how far does his law -- the law of his sovereign -- extend, will naturally be more inclined to settle for the application of his own law, the *lex fori*. However, the system that does not look at the laws, but rather at the legal relationships, and inquires what law should apply to it, is more tuned to the

juridical phenomenon and to its analysis. This leads him to search for that law which is more conducive to a just solution, resulting in more objectivity and more capacity to universalize.

In the United States, one of the most influential theories has been Currie's government interest analysis, <sup>n223</sup> which stresses above all the interests and the [\*273] policies of the forum, notwithstanding the interests of the parties involved in the case. This doctrine has influenced the Restatement (Second) of Conflict of Laws, Rule 6(2). In balancing the forum's interests against the other jurisdiction's interests, the tendency will invariably be to decide for the application of *lex fori*, as courts will inevitably tend to find the interests of their own law superior to the interests of the other sovereign's law, which results in an unequivocal unilateral approach in choosing the applicable law.

Anglo-American conflict of laws doctrine was influenced by Ulrich Huber's theory, which was imported to the United States by Joseph Story, <sup>n224</sup> and continued throughout the nineteenth century and the earlier part of the twentieth century, as can be seen in Joseph Beale's theory on vested rights. The local law theory of Walter Wheeler Cook is equally influenced by territorialistic thinking, as can be seen in his enormous care to stress that the forum "enforces not a foreign right but a right created by its own law." <sup>n225</sup> Beale and Cook circumvented the direct application of foreign laws through the theories of "vested rights" and the "right created by its own law." In England, Dicey was the legitimate heir to Huber's ideas and had his share in influencing Beale and the other U.S. conflict scholars of the earlier part of this century.

In France, the basic doctrinary ideas remain loyal to the territorialistic approach of Bertrandus Argentraeus, better known as D'Argentre, who defended in his *De statutis personalibus et realibus* [Personal and Real Statutes] the prevalence of the laws of his province, Brittany, over any other foreign laws. Additionally, the ideas of Huber had considerable influence over the first modern [\*274] French writer on private international law, M. Foelix. <sup>n226</sup> These ideas continued alive in France through Louis Lucas <sup>n227</sup> and J.P. Niboyet. <sup>n228</sup>

On the other side of the spectrum Savigny rejected Huber and his territorialism and left a strong mark on successive generations of conflicts scholars in Germany as well as in other countries such as Holland, Spain, Portugal, and Brazil. In Brazil, Augusto Teixeira de Freitas' consolidation of the civil legislation of 1857 <sup>n229</sup> and his draft for a civil code of 1860 <sup>n230</sup> followed Savigny's universalism, <sup>n231</sup> and this has been the line followed by the absolute majority of Brazilian private international law scholars.

In the United States, earlier European theories on choice of law such as "the seat of the legal relationship," <sup>n232</sup> and "the most real connection," <sup>n233</sup> and U.S. case law criteria, such as "the center of gravity," <sup>n234</sup> "the grouping of contacts," and the "most significant contacts," <sup>n235</sup> were consolidated in the Restatement (Second) of Conflict of Laws sections 145 (Torts) and 188 (Contracts) into "the most significant relationship" criterion. This criterion is the basic rule for ascertaining the law that should be applied when a legal relationship is connected with more than one jurisdiction. This is an universalistic approach because the [\*275] inquiry is not directed at the jurisdictional extension of the law, but at the most appropriate law to a certain legal relationship.

Yet, the same Restatement (Second) of Conflict of Laws accepted Brainerd Currie's "interest analysis," <sup>n236</sup> which is outrightly unilateralist, as it concentrates on whether the law of a given state claims application to a specific legal relationship. Restatement, section 6 includes among the factors to be considered for choosing the applicable law, "the relevant policies of the forum," <sup>n237</sup> "the relevant policies of other interested states, and the relevant interests of those states in the determination of the particular issue." <sup>n238</sup>

U.S. conflicts law has thus blended "interest analysis" with "most significant relationship," unilateralism and multilateralism, which Professor Juenger has qualified as "eclecticism codified" and "syncretic draftsmanship." <sup>n239</sup>

## VI. CONCLUSION

The universalistic, multilateral approach to international conflict of laws leads to perception of the foreign applicable law as law, with all the implications that this notion brings about. For the multilateralist, a conflicts rule is a

legal rule to be enforced just like any other legal disposition. When the conflicts rule orders the application of a foreign law, it tells us that for this legal relation the more appropriate rule of law, the most adequate norm to produce a just result, is the rule of the other state and that has to be recognized and enforced by the forum as a matter and a rule of law. This is the way foreign legal rules are perceived and enforced in countries such as Brazil, where private international law has always followed a multilateral approach and where foreign law has always been treated as law and not as fact.  
n240

The advocates of the unilateral approach to private international law, those that have been influenced by the territorialistic ideas and ideals of D'Argentre and Huber, that care about and consider above all the territorial extension of their own law, that are wary of applying the legal rules of other sovereigns, are inclined to see the foreign rule of law, when it has to be applied in the forum, as a matter a fact. Therefore, French courts do not feel obliged to apply foreign law in accordance with French rules of conflicts when none of the parties to the case plead and prove the content of the foreign law.

[\*276] For the same reason, Anglo-American doctrine has considered the application of foreign law as a mere recognition of vested rights<sup>n241</sup> or a right created by local law,<sup>n242</sup> and theorized about government interest.<sup>n243</sup> The doctrine did not accept that choice of law leads to the direct application of the foreign state's legal rules as such, and, therefore, a U.S. court is not obliged to take judicial notice of foreign law.<sup>n244</sup>

### Legal Topics:

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General Overview

### FOOTNOTES:

n1 See T.M.C. Asser, *Elements de Droit International Prive ou du Conflit Des Lois* 33 (Paris Arthur Rousseau ed. 1884).

n2 *Id.* at 34. Andre Weiss added that a judge would be failing in his obligation if he applies his own law where the legislature had prescribed the application of foreign law. Andre Weiss, *Manuel de Droit International Prive* 398-99 (6th ed. 1909).

n3 Code civil [C. civ.], art. 3, P 3 (Fr.), disposes that Frenchmen will be ruled by French law in matters of status and capacity, even when they are abroad. This rule has been interpreted bilaterally so that foreigners will be judged according to the law of their nationality.

n4 Judgment of May 12, 1959 (*Bisbal*), Cass. civ. 1re, *reprinted in* 49 *Revue Critique de Droit International Prive* [R.C.D.I.P.] 62 (1960) (Fr.).

n5 *Id.* There had been decisions since the mid-nineteenth century that parties may not invoke foreign law for the first time in an appeal to the highest French court, but the principle that the judge can decide a case involving foreigners in accordance with French law if the parties



did not invoke the rule of private international law commanding the application of foreign law was clearly stated in *Bisbal* for the first time. See Judgment of May 12, 1959 (*Bisbal*), Cass. civ. 1re, *reprinted in* 49 R.C.D.I.P. 62 (1960), note Henri Batiffol (Fr.).

n6 *Id.* at 64.

n7 Judgment of Mar. 2, 1960 (Compagnie Algerienne de Credit et de Banque v. Chemouny), Cass. civ. 1re, *reprinted in* 49 R.C.D.I.P. 97 (1960) (Fr.).

n8 See Batiffol, *supra* note 5, and Judgment of Mar. 2, 1960 (Compagnie Algerienne de Credit et de Banque v. Chemouny), Cass. civ. 1re, *reprinted in* 88 Journal de Droit International 408 (1961) note Berthold Goldman (Fr.).

n9 See Batiffol, *supra* note 5, at 65.

n10 A.V. Dicey & J.H.C. Morris, *The Conflict of Laws* 226 (12th ed. 1993).

n11 I Henri Batiffol & Paul Lagarde, *Droit International Prive* 382 (1981).

n12 *Id.* at 383.

n13 Henri Motulsky, III *Ecrits* 132 (1978). This author has been considered the "most ardent defender of the ex officio application of foreign law." Yves Lequette, "*L'abandon de la jurisprudence Bisbal (a propos des arrêts de la Première chambre civile des 11 et 18 octobre 1988)*", 78 R.C.D.I.P. 277, 289 n.34 (1989).

n14 Lequette, *supra* note 13 (citing M. Massip, *Rep. Defrenois*, 1987.774).

n15 Pierre Mayer, *Droit International Prive* 149 (1977).

n16 *Id.*

n17 *See supra* notes 4-9 and accompanying text.

n18 Dicey & Morris, *supra* note 10, at 226. Rule 18 states:

(1) In any case to which foreign law applies, that law must be pleaded and proved as a fact to the satisfaction of the judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the court will apply English law to such a case.

*Id.*

n19 Actually, on November 25, 1986, the French Supreme Court had already shown that "it was ready to abandon the Bisbal solution" in a case of child legitimization where the courts had to check whether the child had been legitimized according to Tunisian law. Judgment of Nov. 25, 1986, Cass. civ. 1re, *reprinted in* 76 R.C.D.I.P. 383, 389 (1987) (Fr.). Other French commentators have detected a change of heart by the Cour de Cassation in decisions of 1983 and 1984, where the Court held that the lower courts had been right in not spontaneously applying foreign applicable law because the cases concerned matters that stemmed from the parties' free choice or matters where the parties had the free disposition of their rights, which those authors interpreted *a contrario sensu*, i.e., that in matters where parties have no freedom of choice, foreign law should be applied by courts. *See* 116 Journal de Droit International 349, 354 (1989) (note by D. Alexandre on the two 1988 decisions by the *Cour de Cassation*).

n20 Judgment of Oct. 11, 1988 (Rebouch v. Bennour), Cass. civ. 1re, *reprinted in* 78 R.C.D.I.P. 368 (1989) (Fr.). Judgment of Oct. 18, 1988 (Schule v. Phillipe), Cass. civ. 1re, *reprinted in* 78 R.C.D.I.P. 368 (1989) (Fr.).

n21 Rebouch v. Bennour, 78 R.C.D.I.P. 368.

n22 Schule v. Phillipe, 78 R.C.D.I.P. 368. *See* Andre Ponsard, *L'office du juge et l'application du droit étranger*, 79 R.C.D.I.P. 607, 613, n.18 (1990) (remarking that in the first case the conflict rule was statutory and in the second case the rule was a jurisprudential one).

n23 Lequette, *supra* note 13, at 283.

n24 Paul Lerebours-Pigeonniere and Yvon Loussouarn make a distinction between foreign law and convention rules, saying that the latter ones are incorporated into the domestic law through treaty ratification and must be published in France before becoming enforceable, whereas the foreign laws are supreme abroad, but they are not enacted nor published in France. Paul Lerebours-Pigeonniere & Yvon Loussouarn, *Precis de Droit International Prive* 393 n.314 (1990). This author does not accept this distinction for the purposes here discussed, as well as in Pigeonniere's text, because the conventions do not encompass material rules, only conflict rules that determine which

substantive law should be applied in different situations. So, if according to a convention rule, a certain foreign law is applicable, the judge is in exactly the same situation as if it was his own law -- through its conflict rules -- that ordered the application of foreign law. Andre Ponsard, a member of the Cour de Cassation, writes that perhaps the reason for considering the convention rules obligatory stems from Article 55 of the French Constitution which establishes the preeminence of conventions over domestic law. Ponsard, *supra* note 22, at 612.

n25 See *infra* notes 46-51 for the position of some of these countries.

n26 Ponsard, *supra* note 22, at 610.

n27 Alexandre, *supra* note 19, at 358 (note on the two 1988 Cour de Cassation decisions).

n28 Judgment of Dec. 4, 1990 (Coveco v. Vesoul), Cass. civ. 1re, *reprinted in* 80 R.C.D.I.P. 558 (1991) (Fr.).

n29 *Id.* at 559. The Court said: "Il ne peut être reproché à une cour d'appel de n'avoir pas recherché d'office si une loi étrangère était applicable au fond du litige, lorsque les parties n'ont pas invoqué d'autres lois que celles . . . spécialement tirées du droit français" [One may not reproach a court of appeals for not having taken the initiative of searching if a foreign law was applicable to the substance of the case, if the parties did not invoke other rules but the ones . . . specially taken from French law]. *Id.*

n30 Judgment of Dec. 4, 1990, Cass. civ. 1re, *reprinted in* 80 R.C.D.I.P. 558, 560, 569 (1991), note Marie-Laure Niboyet-Hoegy (Fr.).

n31 With the same wording ("*il ne peut être reproché*") the Cour de Cassation decided another case, Judgment of Dec. 10, 1991 (Sarkis v. Soc. Sidem), Cass. civ. 1re, *reprinted in* 81 R.C.D.I.P. 314 (1992) (Fr.).

n32 Judgment of Nov. 18, 1992 (Maklouf v. Benali), Cass. civ. 1re, *reprinted in* 82 R.C.D.I.P. 276 (1993) (Fr.).

n33 Code de Procédure Civile [C. Pr. Civ.] art. 12(I)(Fr.).

n34 See Tulio Treves' comment on Judgment of Mar. 12, 1980 (Union Européenne du Commerce de Betail et de Viande v. Associazione Nazionale fra Importatori di Bestiame e Carni), Cass. (Italy) *reprinted in* 110 Journal di Droit International 175 (1983) (Fr.) (reference to the

1966 decision and how it was not followed in subsequent decisions by the Cassation Court). *See also* Rudolf B. Schlesinger et al., *Comparative Law, Cases-Text-Materials* 227 (5th ed. 1988) quoting a 1985 decision of the Supreme Court of Italy, reported in 22 Riv. Dir. Lit. Privato e Processuale 648, 651 (1986), where the Court reversed the trial court's dismissal for plaintiff's failure to establish Libyan law, saying:

Taking into account the general principle that the legal order does not know of *lacunae* and that it is not permitted to the judge to respond to party demands by *non liquet*, it appears unavoidable that the judge arrives at the substitution (and application) of the known for the unknown, on the basis of the presumption that the different legislative systems are all inspired by common principles of a most general kind.

*Id.*

n35 Treves, *supra* note 34.

n36 *Id.* at 176.

n37 Anzilotti, Marinoni, Fedozzi, and Pacchioni, authors of private international law, and Chiovenda and Carnelutti, authors of procedural law, advocated the "nationalization" of the foreign rule, which becomes a material precept of Italian law. *See* I Edoardo Vitta, *Diritto Internazionale Privato* 217 (1972); Yvon Loussouarn & Pierre Bourel, *Precis Dalloz Droit International Prive* 317 (1978).

n38 I Vitta, *supra* note 37, at 217. Loussouarn & Bourel, *supra* note 37, at 317.

n39 I Batiffol & Lagarde, *supra* note 11, at 380.

n40 Loussouarn & Bourel, *supra* note 37.

n41 Ghirardini, Perassi, Morelli, Ago, Sperduti and Monaco are advocates of this theory. I Vitta, *supra* note 37, at 218.

n42 *See* Rodolfo de Nova, *Scritti di Diritto Internazionale Privato* 45 (1977) (denominating the subject of reception as the "transformation problem"). Edoardo Vitta says that according to this school, foreign law is considered as a fact of legal production ("fatto di produzione giuridica"). I Vitta, *supra* note 37, at 127 n.26.

n43 Loussouarn & Bourel, *supra* note 37, at 318.

n44 Lerebours-Pegionniere & Loussouarn, *supra* note 24, at 392.

n45 See I Batiffol & Lagarde, *supra* note 11, at 381; Lerebours-Pigeonniere & Loussouarn, *supra* note 24, at 394.

n46 Article 337 of the Greek Code of Civil Procedure disposes that a court will consider *ex officio* the law in force in another country. Code of Civil Procedure art. 337 (Greece).

n47 The Austrian Civil Code, article 3, states that the foreign applicable law must be applied *ex officio* in the same manner that it is applied in its original domain. Allgemeines Burgerliches Gesetzbuch [ABGB] art. 3 (Aus.).

n48 Spanish Civil Code, revised in 1974, commands in article 12, paragraph 6, that courts and authorities apply *ex officio* Spanish conflict of law rules. Código Civil [C.Civ.] art. 12(6) (Spain).

n49 The Portuguese 1966 Civil Code, article 348, paragraph 2, establishes the obligation of the court to acquire judicial notice of foreign law when the parties did not invoke it, and paragraph 1 refers to the obligation of the party that invoked foreign law to prove its existence and content. Código Civil Portugues [C.Civ.] art. 348(1) and (2) (Port.).

n50 The 1979 Hungarian law on Private International Law, article 5, deals with proof of foreign law, disposing that courts have to take the initiative to inform themselves about the foreign law when they do not know it. Hungarian Law on Private International Law art. 5 (1979) (Hung.) *reprinted in* 70 R.C.D.I.P. 158 (1981).

n51 Article 16 of the Swiss law states: "The contents of foreign law shall be ascertained *ex officio*." 29 I.L.M. 1244, 1256 (1990). This orientation had already been followed by Swiss case law. See 42 R.C.D.I.P. 390 (1953) and Schlesinger et al., *supra* note 34, at 225 n.6.

n52 See I Francois Rigaux, *Droit International Prive* 314 (1977).

n53 See Lequette, *supra* note 13, at 283 n.23. On Germany's system and opinions that article 293 of the German Code of Civil Procedure does provide a judicial duty of courts to ascertain *ex officio* the foreign law, see Schlesinger et al., *supra* note 34, at 224-25, and *infra* notes 116 and 169.

n54 D. Alexandre writes: "As Motulsky and Pierre Mayer, we also think that the obligation of the French judge to apply *ex officio* the rule of conflicts law must be accompanied by the obligation of the judge to search the content of the foreign law." Alexandre, *supra* note 19, at 363. This, Alexandre writes, was clearly established in the two October 1988 Cassation decisions. *Id.*

n55 C.Civ. art. 348 (Port.).

n56 C.Civ. art. 12(6) (Spain). The Code adds in paragraph 6 that the party invoking the foreign law must prove its content and may do so by all means of proof accepted by the Spanish law. *Id.* The Code also states that the judge may apply any means of verification in order to apply the foreign law. *Id.*

n57 Code of Civil Procedure art. 337 (Greece). The Code adds that the Court may order the proof of foreign law or defer to all available means in order to discover the foreign law independently of the proofs furnished by the parties. *Id.*

n58 Switzerland: Statute on Private International Law art. 16, *reprinted in* 29 I.L.M. 1244, 1256 (1990). The law adds that "[i]n order to achieve this, the parties may be enjoined to collaborate. In the case of pecuniary matters, the burden of the proof may lie with the parties." *Id.*

n59 On France, see I Batiffol & Lagarde, *supra* note 11, at 386, and Ponsard, *supra* note 22, at 617. On Belgium, Francois Rigaux writes: "to complete his information the judge should recur to the parties. The surest way of getting to know the content of foreign law is to open a contradictory debate on this point." I Rigaux, *supra* note 52, at 315. The Belgian author adds that when a point of domestic law is difficult or controversial, the debate between the parties that invoke legislative sources or case law is of great help for the judge. *Id.* On Italy, Rodolfo de Nova writes:

A compromise solution is often reached in practise, for instance in Italy. One starts from the assumption that the law, both domestic and foreign, is known to the courts, but one realizes that the main effort towards imparting such knowledge in litigation must be made by the parties. However, when the litigants are unable or unwilling to marshal sufficient evidence about the foreign law, judges will not keep passive, but engage in intensive and impartial research with whatever help they can obtain from other agencies of the government. de Nova, *supra* note 42, at 459.

n60 *See* Ponsard, *supra* note 22, at 618.

n61 *See* III Antonio Sanchez de Bustamante y Sirven, *Derecho Internacional Privado* 254 (1943).

n62 See 61 R.C.D.I.P. 758 (1972); 9 I.L.M. 477 (1970). Under the Convention, judicial authorities of contracting states may request information on the law and the procedure of another contracting state to a designated national liaison office of the other contracting state. The Convention is in force in Austria, Belgium, Costa Rica, Cyprus, Denmark, France, Germany, Greece, Great Britain, Iceland, Italy, Liechtenstein, Luxembourg, Malta, The Netherlands, Norway, Spain, Sweden, Switzerland, and Turkey. *Id.* In 1978, an Additional Protocol extended the Convention rules to criminal law. Additional Protocol to the European Convention on Information on Foreign Law, Mar. 15, 1978, 17 I.L.M. 797 (1978). See Schlesinger et al., *supra* note 34, at 226 n.8. John Henry Merryman considers the possibility of American courts, faced with foreign-law cases, to resort to the European Convention system, but he concludes that for most cases this solution would be inadequate. John Henry Merryman, *Foreign Law as a Problem*, 19 Stan. J. Int'l L. 151, 160 (1983).

n63 May 8, 1979, 18 I.L.M. 1231 (1979). See also *infra* text accompanying note 121.

n64 de Nova, *supra* note 42, at 457.

n65 See Loussouarn & Bourel, *supra* note 37, at 321; Alexandre, *supra* note 19, at 364; the Bustamante Code art. 409. For information and opinions provided by comparative law centers, most prominently by the Max Planck Institute for Foreign and International Private Law, see Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 Nw. U. L. Rev. 602, 637-38 (1976).

n66 French case law will not dismiss a case due to lack of proof of the applicable foreign law; the only dismissal that French jurisprudence has practiced is when the defendant party wants the plaintiff's case to be dismissed based on a rule of the foreign law and does not succeed in proving the content of the foreign law he invokes: the court will simply throw out his dismissal request. See the Cour de Cassation's decisions in Judgment of Jan. 24, 1984 (Thinet et Dumez v. Soc. des Etablissements Rogue), Cass. civ. 1re, *reprinted in* 74 R.C.D.I.P. 89 (1985) (Fr.); Judgment of Feb. 2, 1988 (Defontaine v. Merten et autres), Cass. civ. 1re, *reprinted in* 78 R.C.D.I.P. 55 (1989) (Fr.); Judgment of June 21, 1988 (*Balenciaga*), Cass. civ. 1re, *reprinted in* 78 R.C.D.I.P. 55 (1989) (Fr.), and more recently in Judgment of Jan. 8, 1991 (UAP v. Mme Mainier et autres), Cass. civ. 1re, *reprinted in* 80 R.C.D.I.P. 569 (1991) (Fr.), where the syllabus reads:

[A]n appeals court decided correctly when it verified that the proof of the exact content of the foreign law was not reported, applied French law due to its subsidiariness and at the same time rejected the defendant's position, who has the obligation to prove the specific disposition of the foreign law which he specially invoked. *Id.* Andre Ponsard explains: "If the foreign law cannot be ascertained, French law will be applied. But, if on the contrary, the lack of proof concerns a certain disposition of the foreign law, specially invoked, the consequence will be the dismissal of the claim based on that specific rule of law." Ponsard, *supra* note 22, at 617.

n67 *Codigo Civil Portugues* arts. 23 and 348 (Port.). Article 23 states that if it is not possible to discover the content of the foreign law, recourse should be made to "the law which is subsidiarily competent." In a system like the Portuguese, the national law is competent for a person's status; in the case of a stateless person the applicable law is the law of his domicile. Paragraph 3 of article 348 states that "in the impossibility to determine the content of the foreign applicable law, court will recur to the Portuguese rules of law." *Id.*

Polish Law on private international law of 1965, article 7 disposes that when it is not possible to determine the content of the foreign law, Polish law will apply. III I Vitta, *supra* note 37, at 685.

Swiss law on private international law says: "Swiss law shall apply if it proves impossible to ascertain the contents of the foreign law." Swiss law on private international law art. 16(2) *in* 29 I.L.M. 1244, 1256 (1990).

n68 *See supra* note 34.

n69 Judgment of June 22, 1970, Trib. gr. inst., *reprinted in* 99 Journal de Droit International 311 (1972) (Fr.).

n70 *Id.*

n71 Judgment of Nov. 25, 1971, Trib. gr. inst., *reprinted in* 62 R.C.D.I.P. 499 (1973) (Fr.).

n72 *Id.* Antarctica, a sovereignless region with no government, has no law of its own, which should lead to the application of forum law. *See Smith v. United States*, 113 S.Ct. 1178 (1993).

n73 *See* 111 Journal de Droit International 162 (1984).

n74 de Nova, *supra* note 42, at 461.

n75 *See supra* notes 37-45 and accompanying text.

n76 Batiffol & Lagarde, *supra* note 11, at 387.

n77 This recalls the distinction so dear to some authors that when applying his own law, the judge is an architect, whereas when applying foreign law, he is merely a photographer. *See infra* note 180.

n78 Case of the Brazilian and Serbian Debts, 1929 P.C.I.J. (ser. A) Nos. 20-21 (July 12) and Henkin, Pugh, Schachter & Smit, *International Law -- Cases and Materials* 115 (1980).

n79 Judgment of Oct. 9, 1980, Cass. civ. Ire (Belg.), *reprinted in* 111 Journal de Droit International 360 (1984).



n80 Austrian Civil Code, article 3: "The foreign applicable law must be applied *ex officio* and in the same manner as in its original domain of validity." ABGB art. 3 (Aus.).

n81 The Portuguese Civil Code states that "the foreign law is interpreted within the system to which it belongs and in accordance with the interpretative rules that it establishes." C.Civ. art. 23(1) (Port.).

n82 Article 9 of the private international law of the former Yugoslavia states that "the law of a foreign state is to be applied considering its sense and its notions." 72 R.C.D.I.P. 353, 355 (1988).

n83 See Jacob Dolinger, *A Civil Law Lawyer Looks at a Common Law Lawyer's Views on Civil Law: John Henry Merryman's The Civil Law Tradition*, 17 Brook. J. Int'l L. 557 (1991).

n84 Brazil has extradition treaties with many countries. Requests for extradition from countries with which she has not signed a treaty are granted in accordance with the generally accepted rules on extradition, as disposed in Law 6.815 of 1980 with changes introduced by Law 6.964 of 1981, provided the requesting state promises reciprocity.

n85 The Brazilian Constitution establishes the exclusive competence of the Supreme Court for the grant of extradition requests, confirmation of foreign judgments and the order to comply with rogatory letters, both of which are then enforced by the federal courts. See Constituicao Federal (Constitution) [C.F.] art. 102, I, (g) and (h) (Braz.), and *Panorama of Brazilian Law*, North-South Center and Editora Esplanada 442 (Jacob Dolinger & Keith S. Rosenn eds., Keith S. Rosenn trans., 1992).

n86 As a member of GATT, the Supreme Court of Brazil has ruled against any State tax imposed on imports from member states that offend the principles established in that international agreement. See Jacob Dolinger, *Brazilian Supreme Court Solutions for Conflicts Between Domestic and International Law: An Exercise in Eclecticism*, 22 Cap. U. L. Rev. 1041 (1993).

n87 Lei de Introducao ao Codigo Civil Brasileiro [Law of Introduction to the Brazilian Civil Code] art. 7 (1942).

n88 Introducao ao Codigo Civil Brasileiro [Introduction to the Brazilian Civil Code] art. 8 (1916).

n89 See Paul Griffith Garland, *Bilateral Studies American-Brazilian Private International Law* 99-102 (1959) (referring to various cases decided by Brazilian courts on matters regarding application of foreign law, most of them under the 1916 regime of the national law).

n90 Brazil had four different drafts before submitting the last one to Congress. Teixeira de Freitas' draft, the famous *Esboço*, dates from 1860. Article 6 stated that the application of foreign laws in the cases foreseen in the Code will only occur if the parties request it and they will be encharged with proving the existence of such laws as one proves an alleged fact. In his notes, Freitas explained that with this rule the strongest objection against the application of foreign law -- that judges do not have the duty to know the laws of the whole world -- is excluded. Domestic law is law that one simply alleges without any need of proof. A foreign law is a fact that must be proven. This remained for some time the accepted understanding about the application of foreign law, as is seen in the *Nova Consolidacao das Leis Civis*, a consolidation of the existing rules of civil law, published in 1899 by Carlos de Carvalho, which stated in article 46 that whoever bases his right on foreign law will have to prove that it exists and is in force.

n91 The Argentinian Civil Code states: "*La aplicacion de las leyes extranjeras, en los casos en que esteCodigo la autoriza, nunca tendra lugar sino a solicitud de parte interesada, a cuyo cargo sera la prueba de la existencia de dichas leyes,*" [the application of foreign laws, in those cases that are authorized by this code, will only take place if the interested party will so request provided it proves the existence of said laws]. *Codigo Civil* [Cod. Civ.] art. 13 (Arg.) in *Codigo Civil del la Republica Argentina* 12 (Victor P. de Zavalia ed.) Argentinian scholars have been very reticent about accepting this rule in the sense of the Freitas draft and have given various interpretations to it in order to reduce its sphere of influence. There is even a school that considers it unconstitutional. See 1 Werner Goldschmidt, *Sistema y Filosofia del Derecho Internacional Privado* [System and Philosophy of International Law] 420, 421 (1952).

n92 The first Brazilian author on private international law, Jose Antonio Pimenta Bueno conditions the application of foreign law to the party's request, both in personal matters and in matters concerning properties. Jose Antonio Pimenta Bueno, *Direito Internacional Privado* 15 (1863).

n93 See *supra* notes 1-2 and accompanying text.

n94 Amilcar de Castro, *Direito Internacional Privado* 243 (3d ed. 1977) (quoting, among other advocates of the same theory, Walter Wheeler Cook, *The logical and Legal Bases of the Conflicts of Law* 20-21). See *infra* note 163 and accompanying text.

n95 The Montevideo Conference of 1889 approved private international law treaties on civil law, commercial law, admiralty, procedure, penal law, literary and artistic property, intellectual property, trademarks, patents, and the exercise of liberal professions. Brazil signed some of these, but ratified none. Ricardo M. Zuccherino, *Los Tratados de Montevideo, Analisis, Historico, Comparativo y Critico* (1973).

n96 In 1939-1940, the Second Montevideo Conference approved treaties containing small changes of the 1899 diplomas, as well as a new Additional Protocol, with the same rule of article 2 of the original 1899 Protocol. Zuccherino, *supra* note 95.

n97 Convention on Private International Law, Feb. 20, 1928, Peru-Uru.-Pan.-Ecuador-Mex.-EL Sal.-Guat.-Nicar.-Bol.-Venez.-Colom.-Hond.-Costa Rica-Chile-Braz.-Arg.-Para.-Haiti-Dom. Rep.-U.S.-Cuba, 86 L.N.T.S. 111; ratified by Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, Salvador and Venezuela [hereinafter Bustamante Code].

n98 *See infra* text corresponding to note 105 and the Bustamante Code, *supra* note 97, art. 412, 86 L.N.T.S. 252, relating to the appeal of decisions that infringe, apply improperly, or interpret erroneously the law of another contracting State.

n99 Bustamante Code, *supra* note 97, 86 L.N.T.S. 252. *See* Schlesinger et al., *supra* note 34, at 127-35.

n100 Eduardo Espinola, *Elementos de Direito Internacional Privado* 58 (1925).

n101 *See supra* note 2.

n102 1 Oscar Tenorio, *Direito Internacional Privado* 146 (1976).

n103 1 Haroldo Valladao, *Direito Internacional Privado* 465 (1980).

n104 18 I.L.M. 1236.

n105 86 L.N.T.S. 252. *See also supra* note 98.

n106 *See* Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, art. 3, 19 I.L.M. 1492 (1980); United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 6, 19 I.L.M. 671 (1980); The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, Oct. 30, 1986, art. 7, 24 I.L.M. 1573 (1985). The same principle has been accepted in March 1994 in Mexico, where CIDIP-V approved an Inter-American Convention on the Applicable Law to Contractual Obligations. *See infra* note 120 for background on CIDIP.

n107 *See generally* Irineu Strenger, *Autonomia da Vontade em Direito Internacional Privado* (1968).

n108 1 Valladao, *supra* note 103, at 466.

n109 The Hague Convention, *supra* note 106, art. 7, 24 I.L.M. 1575, and the Rome Convention, *supra* note 106, art. 3, 19 I.L.M. 1493.

n110 Brazil is a Federative republic with a unitary legal system; it has one civil code, one penal code, one code of civil procedure, one code of penal procedure, one consolidation of labor laws, and one National Tax Code, which are applied in the whole national territory. On the Brazilian system of civil procedure, see Keith S. Rosenn, *Civil Procedure in Brazil*, 34 Am. J. Comp. L. 487 (1986).

n111 The Law of Introduction to the Civil Code of 1942 replaced the introductory section to the civil code of 1916, changing the nationality regime to the domicile regime. See *supra* notes 87-89 and accompanying text. The Code has nineteen articles, the first six regard when laws become effective, conflict of laws in time, and sources of law. The following thirteen involve conflict of law in space.

In the 1960s, Professor Haroldo Valladao, at the government's request, drafted a new law for these basic subjects, which has not actually been made into law. Justice Philadelpho de Azevedo stated that Brazilian judges rarely demand proof of the foreign law due to their familiarity with the laws of countries from where many nationals had established domicile in Brazil, such as the laws of Syria. Justice Philadelpho de Azevedo, *Recurso Extraordinario* no. 7.076, Official Gazette of March 6, 1945, at 1.125.

n112 Código do Processo Civil [C.P.C.] art. 337 (Braz.). This rule of the 1973 Code of Civil Procedure replaced the 1939 code, which in article 212 stated that "the party that will allege state, city, customary, singular or foreign law, will have to prove its content and enforceability, unless the judge will dispense with such proof." C.P.C. art. 212 *repealed by* C.P.C. art. 337 (Braz.).

n113 See text of these mandatory rules *infra* text accompanying note 119.

n114 P. Balmaceda Cardoso, *O Direito Internacional Privado Em Face da Doutrina, da Legislação e da Jurisprudência Brasileiras* 183 (1943).

n115 1 Valladao, *supra* note 103, at 466, 469; 3 Serpa Lopes, *Comentário Teórico e Prático da Lei de Introdução ao Código Civil* 308 (1946). Brazilian scholars often comment on and explain Brazilian codes and statutes using a comparatist methodology.

n116 Zivilprozessordnung [ZPO] art. 293 (F.R.G.). The German Code of Civil Procedure dates from 1877; this particular rule originates from the 1898 amendment.

n117 Since all these laws -- state, municipal, customary, and foreign -- are obligatorily applied, the legislator should have been more precise in article 337. Instead of saying "the party that will invoke," the article should have read "when municipal, state, foreign, or customary law applies, the party, if the judge should so order, will prove its content and enforceability."

n118 *But see* Dolinger, *supra* note 86 (on conflicts between domestic and international law).

n119 Garland, *supra* note 89, at 111 (translation of the Law of Introduction to the Civil code).

n120 The Conference is a body of the Organization of American States which meets every four years to discuss and approve short conventions on matters pertaining to private international law. The Conference has met five times, in Panama, 1975, in Montevideo, 1979, in La Paz, 1983, in Montevideo again, 1989, and in Mexico, 1994. The Conference has become known by the initials CIDIP, and its meetings are referred to as CIDIP-I, CIDIP-II and so on. *See supra* note 63.

n121 *See supra* note 62 and accompanying text.

n122 Brazil has signed some of the CIDIP Conventions but has only ratified three of them in 1994; this particular convention on proof of foreign law has been signed but not yet ratified. Jacob Dolinger & Carmen Tiburcio, *Vademecum de Direito Internacional Privado* 675 (1994).

n123 Cardoso, *supra* note 114, at 186.

n124 *See* 2 Machado Villela, *Tratado Elementar Teorico e Pratico de Direito Internacional Privado* 264 (1922) (reasoning that it "is of elementary legal logic that if the legal grounds for a request presented to court cannot be shown, the request should be dismissed."). Nicolau Nazzo is another Brazilian author who advocates dismissal when it is impossible to prove the content of foreign law. Nicolau Nazzo, *Da Aplicacao e da Prova do Direito Estrangeiro* 53 (1941). Nazzo refers to Machado Villela as well as to Gaetano Morelli's work on international procedural law, *Il Diritto Processuale Civile Internazionale*.

n125 Espinola, *supra* note 100, at 59.

n126 *See supra* notes 66-67 and accompanying text.

n127 See *Embargos* n. 15.584, Judgment of Aug. 21, 1928 (*Dasinger*), Tribunais de Justica Sao Paulo [TJSP], 69 Revista dos Tribunais [R.T.] 115 (1929) (Braz.), *Recurso Extraordinario* n. 9.667, Judgment of Nov. 9, 1948 (*Cury*), Supreme Tribunal Federal [STF], 128 Revista Forense [R.F.] 452 (1950) (Braz.) and *Apelacao* 75.970, Judgment of Apr. 24, 1956 (*Abud*), TJSP, 252 R.T. 206 (1956) (Braz.).

n128 I Tenorio, *supra* note 102, at 155.

n129 3 Lopes, *supra* note 115, at 315-16. See Severo da Costa, *Da Aplicacao do Direito Estrangeiro Pelo Juiz Nacional* 32 (1968).

n130 Martin Wolff, *Derecho Internacional Privado* 140 (Jose Rovira Y Ermengol trans., 1936).

n131 *Id.* See Schlesinger et al., *supra* note 34 (whether a lawyer who has practiced in one civil law country is qualified to testify concerning the law of any other civil law country).

n132 See *supra* note 67.

n133 Valladao, *supra* note 103, at 472.

n134 The cases cited *supra* note 127 dealt with matters which occurred before 1942. Therefore, those cases had to be ruled by the law of the parties' nationality, in accordance with the Introduction to the Civil Code of 1916.

n135 I Zitelmann, *Internationales Privatrecht* 287 (1897) *quoted in* Werner Goldschmidt, *La Consecuencia Juridica de la Norma del Derecho Internacional Privado* 66 (1935).

n136 See *supra* text accompanying note 99.

n137 May 8, 1989, 18 I.L.M. 1236 (1979).

n138 *Id.*, art. 2, 18 I.L.M. 1236.

n139 See Alexander, *supra* note 65, at 630, *supra* notes 130-31 and accompanying text, and *supra* text accompanying notes 138-39, and *supra* note 154. In the debates of CIDIP-II, Werner Goldschmidt said that when an Argentinian judge applies English law -- a forum that does not admit parliamentary debates as a means of interpretation of the law (historical interpretation) -- he may not employ this method even though access to parliamentary debates is extremely important in Argentinian law. See III *Actas y Documentos Segunda Conferencia Especializada Interamericana Sobre Derecho Internacional Privado* [Acts and Documents Pertaining to the Second Conference of the Inter-American Convention on General Rules of Private International Law] (CIDIP-II) 223, OAS Doc. OEA/Ser.K/XXI.2 CIDIP-II/103, (Feb. 22, 1980).

n140 Lei de Introducao ao Codigo Civil Brasileiro, 1942.

n141 See Jacob Dolinger, *Derecho Internacional Privado* 236 (1993). The Venezuelan draft for a new law on private international law contains an interesting rule in its article 2: "*El Derecho extranjero que resulte competente recibira igual tratamiento que el Derecho nacional. Se aplicara de acuerdo con los principios que rijan en el pais extranjero respectivo y de manera que se realicen los objetivos perseguidos por las normas venezolanas de conflicto*" [The applicable foreign law will be treated as the domestic law is treated. Foreign law will be applied in accordance with the principles that rule its application in the corresponding foreign state and in such a way as to guarantee the purposes of the Venezuelan rules of conflicts]. Tatiana B de Maekelt, *Normas Generales de Derecho Internacional Privado en America* 271 (1984).

n142 In Brazil, appeals are numbered and the reference is made to their number. This case, which can also be referred to as Judgment of Dec. 17, 1981 (*Banco do Brasil v. Antonio Champalimaud*), STF, 101 *Revista Trimestral de Jurisprudencia* [R.T.J.] 1149 (1982) (Braz.), concerned a very complicated series of financial guarantees executed in Portugal and in England, which ended up being litigated in the Brazilian state of Minas Gerais and was finally decided by the highest Brazilian court. Antonio Boggiano, an Argentinian professor, referred to this decision in various papers connected with the preparation of CIDIP conventions and has insisted that from this judgment one implies that the Brazilian legal system does not accept the freedom of parties to choose the applicable law to their contracts, an erroneous interpretation of the decision. There was indeed a contract between the litigants that had chosen English law as the ruling law, but the decision of the Supreme Court clearly states that the litigation is not based on that contract, but on another one, exclusively connected to Portugal, and that therefore Portuguese law was applicable. *Id.* at 1168.

n143 The 1988 Constitution has transferred some of the Supreme Court's jurisdiction to the newly created Superior Tribunal of Justice, so that presently a case such as *Champalimaud* would be decided by the new court. *Constituicao Federal* [C.F.] art. 105 (Braz.).

n144 1 Valladao, *supra* note 103, at 470. See also 1 Tenorio, *supra* note 102, at 163.

n145 A later precedent in *Recurso Extraordinario* no. 73.542, *Pirelli S.A. v. Banco do Chile*, STF, 65 R.T.J. 745 (1973) (Braz.) was not relevant because in that case the Supreme Court merely agreed with the Sao Paulo state court of appeals that since the contract was executed in Chile, Chilean law was applicable, there being no discussion regarding the correct interpretation of that law.

n146 *Champalimaud*, 101 R.T.J. at 1171.

n147 *Id.* at 1182.

n148 *Id.* at 1177.

n149 In France, Batiffol and Lagarde are against such a "political" initiative by the French judge, not because the French legislator does not grant him this power but because this resistance would amount to subordination, and the French judge is not subordinated to the foreign legislator. I Batiffol & Lagarde, *supra* note 11, at 390. For Portugal, see Rui Manuel Gens de Moura Ramos, *Direito Internacional Privado E Constituicao* 236 (1979).

n150 da Costa, *supra* note 129, at 40.

n151 I Valladao, *supra* note 103, at 475.

n152 Embargos de Declaracao *in* Extradition case no. 417, STF, 113 R.T.J. 1 (1985) (Braz.).

n153 *Id.* at 2.

n154 *Id.* at 8.

n155 *Id.* at 5.



n156 *Id.* at 7.

n157 *Id.* at 7-8.

n158 *Id.* at 7.

n159 Article 17 of the Brazilian Law of Introduction to the Civil Code states that "[l]aws, acts, and judgments of another country, as well as any kind of declaration of private intention, shall not be effective in Brazil when they offend national sovereignty, public order or good customs." Garland, *supra* note 89, at 113. Additionally, article 4 of the Bustamante Code states that "[c]onstitutional precepts are of an international public order." *Id.* at 19 n.33.

n160 Dicey & Morris, *supra* note 10.

n161 *Id.* at n.4.

n162 Joseph Story, Conflict of Laws 398 (1846). See the same reference in I Albert A. Ehrenzweig, Private International Law 184 (1974) and in Friedrich K. Juenger, Choice of Law and Multistate Justice 83 (1993). See also Schlesinger et al., *supra* note 34, at 53 (referring to Lord Mansfield as the first to announce that foreign law should be treated like a matter of commercial custom). "[T]he element that is common to foreign law and commercial customs is that ordinarily both are unknown to judge and jury." *Id.* Scoles and Hay refer to Lord Mansfield's decision as dating from 1774 and add that Justice Marshall adopted it in Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804). Eugene F. Scoles & Peter Hay, Conflict of Laws 418 (1992).

n163 G. C. Cheshire, Private International Law (1965).

n164 *Id.* at 8. Eventually it has come to be recognized that some qualification is necessary, as it is difficult to assimilate that the law of other sovereignties should actually be equated to facts. One way of formulating it was that foreign law "is a question of fact of a peculiar kind." See Dicey & Morris, *supra* note 10, at 229. The creation of a right "as nearly as possible similar to that which would have been created by the foreign court" comes very close to the idea that Amilcar de Castro describes referring to Cook's The Logical and Legal Bases of the Conflict of Laws. de Castro, *supra* note 94. In the United States, Cramton, Currie and Kay referring to this theory, asked, "Can you imagine a more burdensome, inconvenient, or absurd method of ascertaining foreign law?" Roger Cramton, David P. Currie & Herma Hill Kay, Conflict of Laws 54 (1975).

n165 See Willis L.M. Reese & Maurice Rosenberg, Conflict of Laws 399 (1984). It has been admitted that *status* cases require *ex officio*

application of the applicable foreign law, as one's status as a married person cannot be left to the whim of the parties to a litigation and generally judges should take judicial notice of foreign laws where public interest, prevailing over party autonomy, so requires. See I Ehrenzweig, *supra* note 162, at 183, 185, and Scoles & Hay, *supra* note 162, at 424 n.4.

n166 See I Ehrenzweig, *supra* note 162, at 194.

n167 Uniform Interstate and International Procedure Act, art. IV; N.Y. Civ. Prac. L. & R. 4511 (b) (McKinney 1992); Fed. R. Civ. P. 44.1. Rule 44.1 reads:

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 Rules of Evidence. The court's determination shall be treated as a ruling on a question of law. See Schlesinger et al., *supra* note 34, at 81, 109, for the present status of Rule 44.1 and other judicial notice statutes.

n168 See *infra* note 190 and accompanying text.

n169 Schlesinger et al. state:

[A] fair reading of subd. (b) makes it plain that in deciding whether to take judicial notice of foreign law, the court normally has broad discretion. If in the exercise of such discretion the court declines to take judicial notice of the foreign law, then Rule 4511 becomes inoperative, and in that event the common-law rules enshrining the "fact" doctrine necessarily reassert themselves. Thus it would be quite erroneous to think that modern judicial notice statutes, where they exist, have *completely* assimilated the procedural treatment of foreign law to that of domestic law.

Schlesinger et al., *supra* note 34, at 59 (footnote omitted). See also *id.* at 79, 109; Wachs v. Winter, 569 F.Supp. 1438, 1442-43 (E.D.N.Y. 1983).

n170 Schlesinger et al., *supra* note 34, at 61-62, 63. See *id.* at 62 for a precise distinction between the U.S. and German positions on the whole approach to foreign law.

n171 Cuba R. Co. v. Crosby, 222 U.S. 473, 477 (1912). See I Ehrenzweig, *supra* note 162, at 178. See also Schlesinger et al., *supra* note 34, at 101, for what would happen if a case like *Crosby* were to come up today.

n172 *Cuba R. Co.*, 222 U.S. at 477.

n173 *Walton v. Arabian American Oil Co.*, 233 F.2d. 541 (2d Cir. 1956). See Reese & Rosenberg, *supra* note 165, at 400.

n174 See Brainerd Currie, *Selected Essays on the Conflict of Laws* 2-76 (1963); I Ehrenzweig, *supra* note 162, at 190, who qualified these decisions as miscarriages of justice. *But see* Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. Chi. L. Rev. 1301, 1306 (1989) (arguing that "the court, quite properly, dismissed the case"). Kramer argues:

What is so harsh about dismissing the case on the ground that the plaintiff failed to establish the content of Saudi law? Why is dismissing on this ground harsher than dismissing on the ground that the plaintiff failed to prove one of the elements required to recover under New York law?

*Id.* at 1307-08. *See also* Schlesinger et al., *supra* note 34, at 102 (making a distinction between *Cuba* and *Walton*).

n175 3 Joseph Beale, *The Conflict of Laws* 1675 (1935). *See, e.g.*, *Savage v. O'Neil*, 44 N.Y. 298 (1871), 3 Beale, *supra*, at 1676-77, and Dicey & Morris, *supra* note 10, at 238.

n176 I Ehrenzweig, *supra* note 162, at 187.

n177 *Leary v. Gledhill*, 84 A.2d 725 (N.J. 1951).

n178 The Supreme Court of New Jersey affirmed the trial court's decision that denied the motion of the defendant to dismiss the case. In so doing, the court reasoned:

The court below based its decision upon the presumption that the law of France in common with that of other civilized countries recognizes a liability to make repayment under the facts here present, and its decision is not without substantial merit in reason and support in the authorities. . . . The utilization of this presumption has decided limitations, however, for in many cases it would be difficult to determine whether or not the question presented was of such a fundamental nature as reasonably to warrant the assumption that it would be similarly treated by the laws of all civilized countries. The presumption that in the absence of proof the parties acquiesce in the application of the law of the forum, be it statutory law or common law, does not present any such difficulties for it may be universally applied regardless of the nature of the controversy. . . . We are of the opinion, therefore, that in the instant case the rights of the parties are to be determined by the law of New Jersey which unquestionably permits recovery of the facts proven.

*Id.* at 730.

*See* Reese & Rosenberg, *supra* note 165, at 404. Scoles and Hay enumerate the different presumptions that courts have referred to in order to avoid dismissal of actions where foreign law is applicable, the matter having been raised by the party that subsequently failed to sustain its burden of proof: (1) that the foreign law is based on the common law and is thus the same as the common law of the forum; (2) that the foreign law is the same as forum law; (3) that the foreign law is based on generally recognized principles of law common to civilized nations, and (4) that the parties acquiesced in the application of forum law in the alternative. Scoles & Hay, *supra* note 162, at 427. *See* Schlesinger et al., *supra* note 34, at 104 (the theory of choice of forum law by the parties when they do not invoke foreign law is today accepted by American courts, but forum law will not be accepted in marriage and family cases and transactions totally unconnected with the forum). *See id.* at 103 n.31, and Restatement (Second) Conflict of Laws § 136, cmt. on subsection (2)h.

n179 Dicey & Morris, *supra* note 10, at 238.

n180 See Schlesinger et al., *supra* note 34, at 54-55 (commenting that "[e]ven where library facilities are ample, it is not easy for one trained exclusively in the common law to find and to understand a civil law rule without the guidance of an expert.").

n181 See I Ehrenzweig, *supra* note 162, at 193; Juenger, *supra* note 162, at 85-86, 158. The well-known distinction that when a judge applies his own legal system he acts as an architect -- as he contributes to the evolution of his own legal system -- but when he deals with foreign law he acts as a mere photographer, is attributed by Juenger and others to Werner Goldschmidt, whereas Ehrenzweig refers it to Kegel.

n182 Milton Pollack stated:

I am less pessimistic than Justice Holmes as to our ability to handle foreign legal authorities. . . . Yet, if what is relied on is *law*, and not some primitive religion or the whim of a tyrant, the form of reasoning will be familiar. In civil law countries, the express language of statutes may be entitled to more weight than we give it, and judicial decisions to less -- but the law is still proved by pronouncements of suitably constituted authorities.

Milton Pollack, *Proof of Foreign Law*, 26 Am. J. Comp. L. 470, 474 (1978) (footnote omitted).

A very sensible argument was raised by Professor Gregory S. Alexander:

Rules cannot be fully understood in isolation; they are interrelated and in some instances interdependent. When the court is called upon to learn and apply a foreign rule, it will necessarily view that rule in relative isolation. Even if it attempts to develop its understanding of the foreign law by examining related provisions, the forum still lacks that exposure to the foreign system which is essential to a complete understanding of the single provision.

Alexander, *supra* note 65, at 604 (footnote omitted).

A well organized bibliography on pleading and proof of foreign law in U.S. courts was published by Adrien K. Wing, *Pleading and Proof of Foreign Law in American Courts, A Selected Annotated Bibliography*, 19 Stan. J. Int'l L. 175 (1983).

n183 Dicey & Morris, *supra* note 10, at 230.

n184 *Id.*

n185 This brings to mind Martin Wolff's illustration based on countries with similar legal systems. See *supra* text accompanying note 130.

n186 G. C. Cheshire tells of a case in which a hotel keeper in London, a native of Belgium who had formerly been a commissioner of stocks in Brussels, was admitted to prove the Belgian law of promissory notes on the ground that his business had made him conversant with mercantile law. Cheshire, *supra* note 163, at 117. See *id.* for other interesting decisions of English courts on who is and who is not a qualified expert to testify on foreign law.

n187 The following passage is quite revealing of the paradoxical approach of English courts:

An English court will not conduct its own researches into foreign law. But if an expert witness refers to foreign statutes, decisions or books, the court is entitled to look at them as part of his evidence. But the court is not entitled to go beyond this: thus if a witness cites a passage from a foreign law-book he does not put the whole book in evidence since he does not necessarily regard the whole book as accurate. Similarly, if the witness cites a section from a foreign code or a passage from a foreign decision the court will not look at other sections of the code or at other parts of the decision without the aid of the witness, since they may have been abrogated by subsequent legislation.

Dacey & Morris, *supra* note 10, at 232.

Additionally, Dacey and Morris say that foreign court decisions can only be referred to if referred to in the evidence of an expert witness. *Id.* at 235. I will not discuss the possibility of abrogation of part of a statute or of a decision by subsequent legislation, but I do find it preposterous that a witness' testimony on part of a law book does not allow a court to research in other parts of the book because the expert did not necessarily regard the whole book as accurate. A major law treatise by a prominent scholar needs the approval of a court's expert, who could turn out to be a hotel keeper or a stock broker! But English law does allow courts to look into the foreign sources when the expert's evidence is obviously false, extravagant, absurd, or where there is conflict between the evidence of several experts. *Id.* at 233.

n188 Schlesinger et al., *supra* note 34, at 57-59 (citing N.Y. Civ. Prac. L. & R. 4511). Even a "simple letter by foreign counsel . . . if plausible and uncontradicted, suffices to establish a proposition of foreign law." *Id.* at 106 n.46. *See also id.* at 128-46. On Federal Rule of Evidence 706, see *id.* at 221-24.

n189 Fed. R. Civ. P. 44.1.

n190 Schlesinger et al., *supra* note 34, at 61. This dual approach of a court -- conducting its own research coupled with requesting counsel to make a full presentation of the foreign law -- is very close to the Brazilian system of article 14 of the Law of Introduction to the Civil Code and article 337 of the Code of Civil Procedure. *See supra* text immediately preceding note 112. And the New York Supreme Court, in *Arams v. Arams*, 45 N.Y.S.2d 251 (1945), stated that "in case [the parties] may omit something pertinent, [we need] to give the judge the right to make further researches in order to supplement or round out what the parties have presented so as to make an accurate determination of what the law of that state or country really is. . . ." *Id.* at 253-54. Alexander, *supra* note 65, at 615. *See also* Restatement (Second) Conflict of Laws § 136, cmt. on subsection (2)d.

Very judiciously, Ehrenzweig praises European courts' inclination to rely on expert opinions of comparative-law institutes and criticizes the American lawyer for excessive trust in the virtues of cross-examination of expert testimony, which he prefers to affidavits and other written advice. In order to avoid the problematic sight of experts contradicting each other, Ehrenzweig, probably inspired by the civil law system, suggests court-appointed advisers who would be subject to questioning by both the parties and the judge. I Ehrenzweig, *supra* note 162, at 191. This method has been incorporated in Rule 706 of the Federal Rules of Evidence in the form of permission to the court to appoint an expert witness agreed upon by the parties or of its own selection. A strong defense of this method is presented by John Henry Merryman. Merryman, *supra* note 62, at 164-73.

n191 Hans Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 Va. J. Int'l L. 619, 641 (1978). Baade defends the "hybrid" or "two step method," which in his opinion offers "a viable method for feeding expert evidence into the judicial process, while avoiding in-court expert testimony." Under this method, the expert prepares a memorandum analyzing the case from the perspective of his expertise, submits the memorandum in an appropriate manner to the court, and remains available for possible examination and cross-examination. "This method," says Professor Baade, "better harmonizes with normal litigation patterns, and results in more expeditious, accurate, and economical verdicts." *Id.* at 643.

n192 Pollack, *supra* note 182, at 473-75.

n193 Dicey & Morris, *supra* note 10, at 234.

n194 *Id.*

n195 Dicey and Morris also argue that "[decisions of foreign courts] must be interpreted in the light on (sic) the meaning attributed to the decisions by the expert rather than according to the court's independent research involving material not referred to by the expert." *Id.* at 235.

n196 *See* Scoles & Hay, *supra* note 161, at 426.

n197 *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930).

n198 *Id.* at 943.

n199 Alexander, *supra* note 65, at 627-28.

n200 *Bournias v. Atlantic Maritime Co.*, 220 F. 2d. 152 (2d Cir. 1955).

n201 Alexander, *supra* note 65, at 628-29.

n202 *Wyatt v. Fulrath*, 211 N.E.2d. 637 (1965). *See* Andreas F. Lowenfeld, *Conflict of Laws: Federal, State, and International Perspectives* 328 (1988).

n203 *Wyatt*, 211 N.E.2d. at 641.

n204 *Id.*

n205 Loucks v. Standard Oil Co., 120 N.E. 198 (N.Y. 1918).

n206 Kristinus v. H. Stern Com. E Ind. S.A., 463 F. Supp. 1263 (S.D.N.Y. 1979).

n207 C.P.C. arts. 141, 142 (Braz.).

n208 *Id.* at 1264.

n209 C.P.C. art. 141 (Braz.).

n210 C.P.C. art. 142 (Braz.).

n211 *Id.* at 1265.

n212 *Id.*

n213 *Id.*

n214 *Id.*

n215 Dolinger, *supra* note 141, at 14 ("*Otica da Disciplina.*").

n216 Ulrich Huber, *De Conflictu Legum Diversarum in Diversis Imperiis* [On The Conflict of Diverse Laws of Different States] available in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws 136 (1947).

n217 See Cheshire, *supra* note 163, at 24. A slightly different translation can be found in J.H.C. Morris, The Conflict of Laws 518 (1971).

n218 Morris, *supra* note 217, at 518.

n219 Friedrich Carl von Savigny, A Treatise on the Conflict of Laws (William Guthrie trans., 2d ed. 1880). This volume is part of von Savigny's System of Modern Roman Law [System Des Heutigen Romischen Rechts] and represents volume eight -- Private International Law -- of that comprehensive series.

n220 *Id.* at 145.

n221 *Id.* at 133.

n222 Symeon Symoenides, *Louisiana's Draft on Succession and Marital Property*, 35 Am. J. Comp. L. 259, 288-89 (1987).

n223 Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in Selected Essays on the Conflict of Laws 188 (1963). The last two of the five axioms proposed by Currie state:

4. If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law.

5. If the court finds that the forum state has an interest in the application of its law and policy, it should apply the law of the forum even though the foreign state also has such an interest, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest.

*Id.*

n224 Story, *supra* note 162. But see note (a) on paragraph 38 which, according to Melville M. Bigelow's preface to the eighth edition, was authored by J.L. Thorndike; in this note Huber's theory of comity is contested. *Id.*

n225 Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws* 20-21 (1942).



n226 M. Foelix, *Traite Du Droit International Prive Ou Du Conflit Des Lois De Different Nations En Matiere de Droit Prive* (1856). The first edition is of 1843, the second of 1847, and in the preface to this second edition, Foelix demonstrates the influence he has received from Huber's ideas:

Il faut donc admettre que si une loi devient applicable en pays etranger, ce n'est point a raison d'une necessite materielle ou d'un devoir proprement dit, mais par suite d'une concession faite par le pouvoir souverain du pays ou la loi etrangere trouve acces. Le motif des concessions de ce genre a ete generalement (les faits en sont la preuve) que le souverain ou ses sujets en avaient deja recu ou en esperaient de semblables de la part de l'Etat ainsi favorise (Ob reciprocam utilitatem; ex comitate).

n227 P. Louis Lucas, *L'imperieuse territorialite du droit*, Revue 1935/633.

n228 III J.P. Niboyet, *Traite de Droit International Prive Francais* 197 (1944).

n229 *Consolidacao das Leis Civis* (3d ed. 1896).

n230 *See supra* note 90.

n231 *See* I Valladao, *supra* note 103, at 179.

n232 *See* von Savigny, *supra* note 219, at 133.

n233 " The law by which to determine the intrinsic validity and effect of a contract will be selected in England on substantial considerations, the preference given to the country with which the transaction has the most real connection, and not the place of the contract as such." Juenger, *supra* note 162, at 57 n.394 (citing J. Westlake, *A Treatise on Private International Law* 288 (6th ed. 1922)).

n234 *See* Barber Co. v. Hughes, 63 N.E.2d. 417, 423 (Ind. 1945); Rubin v. Irving Trust Co., 113 N.E.2d. 424, 431 (N.Y. 1953), *cited in* Juenger, *supra* note 162, at 57 n.400.

n235 *Auten v. Auten*, 124 N.E.2d. 99 (N.Y. 1954) *cited in* Juenger, *supra* note 162, at 57 n.400.

n236 Currie, *supra* note 174.

n237 Restatement (Second) of Conflict of Laws § 6(2)(b).

n238 *Id.* § 6(2)(c).

n239 *See* Juenger, *supra* note 162, at 105.

n240 It must be admitted, though, that Teixeira de Freitas did perceive foreign legal rules as a matter of fact, as established in the Esboco, article 6. *See supra* note 90 and accompanying text.

n241 Beale would apply foreign law as a vested right, which is close to considering it as a fact. *See* Juenger, *supra* note 162, at 90.

n242 *See supra* note 224 and accompanying text.

n243 *See supra* note 235 and accompanying text.

n244 *See supra* note 169.