



1-1-1992

A Uniform NAFTA Power of Attorney between Canada, Mexico and the U.S.

Mark D. Becker

University of the Pacific; McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>



Part of the [International Law Commons](#)

Recommended Citation

Mark D. Becker, *A Uniform NAFTA Power of Attorney between Canada, Mexico and the U.S.*, 5 TRANSNAT'L LAW. 341 (1992).

Available at: <https://scholarlycommons.pacific.edu/globe/vol5/iss1/16>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

A Uniform NAFTA Power of Attorney Between Canada, Mexico, and the U.S.

Table of Contents

I. INTRODUCTION	343
II. BACKGROUND ON THE IMPORTANCE OF THE MEXICAN NOTARY AND PUBLIC DEEDS	345
<i>A. The Mexican Notary: the Full-Proof Rule</i>	345
<i>B. Public Deeds</i>	348
III. THE HYPOTHETICAL	350
IV. THE POWER OF ATTORNEY IN MEXICO:	
THE NEED FOR A PUBLIC DEED	350
<i>A. Mexican Civil Code</i>	350
1. <i>Analysis of General Powers of Attorney: Article</i>	351
2. <i>Where the Transaction Exceeds 5000 Pesos:</i> <i>Article 2555(2)</i>	353
3. <i>Where the Transaction Otherwise Requires</i> <i>Recording in a Public Instrument: Article 2555(3)</i>	353
<i>B. Legalization, Authentication, and Protocolization of</i> <i>Foreign Powers of Attorney for Use in Mexico</i>	354
1. <i>Legalization</i>	355
2. <i>Authentication</i>	355
3. <i>Protocolization</i>	356
<i>C. Obtaining a Valid Foreign Power of Attorney for</i> <i>Use in the U.S.</i>	357
<i>D. Governing International Law</i>	358
1. <i>The Protocol on Uniformity</i>	360
<i>a. Retention of Mexico's Legalization</i> <i>Requirements</i>	361
<i>b. Retention of Mexico's Authentication and</i> <i>Protocolization Requirements</i>	362

c. <i>The Presumption of Equal Authority of Foreign and Domestic Notaries</i>	363
2. <i>Bilateral Convention Between the U.S. and Mexico Respecting Consular Officers</i>	364
V. DEVELOPMENT OF A UNIFORM POWER OF ATTORNEY AMONG CANADA, MEXICO, AND THE U.S.	
A. <i>Rationale Behind the Development of a Uniform NAFTA Power of Attorney</i>	365
1. <i>Economic Analysis</i>	365
2. <i>Mexican Case Law Demonstrating the Mexican Court's Focus on Technicalities in the Power of Attorney</i>	367
B. <i>Practical Difficulties in the Creation of a Uniform Power of Attorney</i>	369
1. <i>The Special Requirements for Corporations</i>	369
a. <i>Cases Denying Recognition of Foreign Powers of Attorney Granted on Behalf of Corporations</i>	371
b. <i>A Solution to the Juridic Personality Problem</i>	374
2. <i>Costs of Creating a Valid Power of Attorney for Use in Mexico</i>	375
3. <i>The Problem with Utilizing a General Power of Attorney as the Form for a NAFTA Uniform Power of Attorney</i>	376
4. <i>Theoretical Difficulties</i>	377
5. <i>The Inclusion of the Calvo Clause</i>	378
VI. HELPFUL SOLUTIONS ON LEGALIZATION, AUTHENTICATION, AND PROTOCOLIZATION FOR A UNIFIED NAFTA POWER OF ATTORNEY	
A. <i>The Apostille: a Practical and Effective Solution to the Chain-Legalization Problem</i>	379
B. <i>Simplifying Compliance with Mexico's Public Document, Authentication, and Protocolization Requirements</i>	382

C. The Need for a Treaty and the Special Requirements for Canada's Adoption of a Uniform NAFTA Power of Attorney	384
--	-----

VII. CONCLUSION	384
---------------------------	-----

I. INTRODUCTION*

Europe's goal of creating an economic union by 1992 reflects the recent international interest in removing economic boundaries and trade barriers.¹ With a similar interest in mind, the leaders of Canada, Mexico, and the United States announced their intention to begin negotiations on a North American Free Trade Agreement (NAFTA).² Passage of the agreement will create a common market with the world's largest free trade area containing more than 360 million consumers and a combined annual output of \$6 trillion.³ The NAFTA, which has the potential of promoting increased foreign investment among the participants,⁴ will also facilitate an increase in trade between Canada, Mexico, and the U.S.⁵

*The author wishes to express his gratitude to both Dr. Boris Kozolchyk, Professor of Law, University of Arizona College of Law, Director of the Committee for Legal Implementation of NAFTA (CLIN); and Lic. Octavio Rivera Farber, licensed Federal Mexican Notary, Mazatlán, Sinaloa, Mexico. Dr. Kozolchyk suggested the topic of this paper, based on future work to be done by CLIN in the development of a uniform NAFTA power of attorney, and provided numerous comments and guidance which were essential to this paper. Lic. Octavio Rivera Farber was instrumental in correcting and discussing numerous points of Mexican law. Others whose contributions are also sincerely appreciated include: Ricardo J. Diez, licensed to practice law in New York and Mexico; Carolina Zaragoza, Mexican Consul, Sacramento, California; and Christiana Alamilla, notary at the Mexican Consul's office, Sacramento, California.

1. INT'L TRADE ADMIN. OFFICE OF MEX., U.S. DEP'T OF CONGRESS, NORTH AMERICAN FREE TRADE AGREEMENT GENERATING JOBS FOR AMERICANS 3 (May 1991) [hereinafter FREE TRADE AGREEMENT].

2. *Id.* at v.

3. *Id.* at 3.

4. See David B. Hodgins, Comment, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But Is It Enough?*, 12 HOUS. J. INT'L L. 361 (1990) (describing Mexico's President Carlos Salinas's dramatic liberalization of the rules governing foreign investment in Mexico).

5. FREE TRADE AGREEMENT, *supra* note 1, at 3.

The appointment of agents by international corporations, through the use of a power of attorney, is a critical component in creating an economic union among the NAFTA parties.⁶ However, creating a valid power of attorney often poses difficulties where the grantor of the power is from a country based on the common law, such as the U.S. and most of Canada, and the agent exercises the power in a civil-law country, such as Mexico.

The power of attorney follows only the bill of exchange and the bill of lading⁷ as the most frequently used instrument in international business.⁸ As with domestic transactions, international powers of attorney allow others to act on behalf of principals in the formation and execution of contracts.⁹ Valid powers of attorney provide three major benefits: (1) A division of labor within an enterprise, such as a corporation or partnership, (2) a means to facilitate transnational transactions,¹⁰ and (3) a method that allows lawyers to act on behalf of clients in litigation matters.

In November 1991, UNCITRAL representatives of Canada, Mexico, and the U.S. began informal discussions concerning the feasibility and requisites of a uniform power of attorney, among other legal instruments, for the countries.¹¹ Three problems exist in creating a uniform NAFTA power of attorney. First, unlike the U.S. and Canada, Mexico requires a three step process to officially register most powers of attorney. The second area of contention is that the three countries differ in the types of general powers of attorney recognized by their laws. Third, Mexican courts will not accept powers of attorney unless the power granted by the foreign

6. RUDOLF B. SCHLESINGER, *COMPARATIVE LAW* 535 n.3 (3d ed. 1970).

7. A bill of lading is a document describing freight, name of the consignor, and terms of the contract for delivery; the document is also a receipt for the goods and evidence of title. BLACK'S LAW DICTIONARY 152 (5th ed. 1979) [hereinafter BLACK'S].

8. Phanor James Eder, *Powers of Attorney in International Practice*, 98 U. PA. L. REV. 840, 842 (1950).

9. Peter Hay et al., *Agency in the Conflict of Laws and the 1978 Hague Convention*, 27 AM. J. COMP. L. 2 (1979).

10. *Id.*

11. Interview with Boris Kozolchyyk, Professor of Law, University of Arizona College of Law; Director of the Center for Legal Implementation of NAFTA (CLIN); D.C.L. 1956, University of Havana; LL.B. 1959, University of Miami; LL.M. 1960, S.J.D. 1966, University of Michigan; in Tucson, Arizona (Jan. 4, 1992).

corporation explicitly demonstrates compliance with the laws of the state of incorporation.

This comment focuses on the power of attorney in transactions between Canada, Mexico, and the United States. Part II provides a background discussion of Mexican notaries and public deeds. Part III presents a hypothetical which is used throughout the comment to explore the current process and difficulties in granting foreign powers of attorney in civil-law countries and those following the common law.¹² Part IV, through the use of the hypothetical, describes the requirements for creating valid foreign powers of attorney. Part V examines the rationale behind the creation of a uniform power of attorney between Canada, Mexico, and the U.S., and the practical difficulties involved in developing a uniform power of attorney. Part VI proposes a solution for simplifying grants of powers of attorney for agents transacting between the three countries. Part VII summarizes the problems in creating foreign powers of attorney and briefly discusses the solutions proposed.

II. BACKGROUND ON THE IMPORTANCE OF THE MEXICAN NOTARY AND PUBLIC DEEDS

A. *The Mexican Notary: the Full-Proof Rule*

To understand the rigid requirements of obtaining a valid power of attorney for transactions taking place in Mexico, one must examine the sharp distinctions between common and civil-law notaries and their issuance and certification of public deeds.¹³ The common-law American lawyer is usually surprised by the differences between a notary in the U.S and a Mexican notary.¹⁴ Mexican notaries perform functions which the common-law lawyer

12. Quebec, one of the important provinces of Canada, follows civil law, while the rest of the country follows common law. René David, *The International Unification of Private Law*, in 2 *LEGAL SYSTEMS OF THE WORLD/THEIR COMPARISON AND UNIFICATION*, INT'L ENCYCLOPEDIA COMP. L., ch. 5, at 205-06 (René David ed. 1971).

13. Eder, *supra* note 8, at 841-46.

14. WOODFIN L. BUTTE, *SELECTED MEXICAN CASES* 209 (1970).

might consider unrelated.¹⁵ Mexican notaries perform functions of U.S. lawyers, county clerks, county recorders, state secretaries of state, and other tasks similar to those rendered by U.S. notaries.¹⁶

Mexico's notarial laws originated in Spain where notaries were highly respected public officers authorized by law to authenticate deeds.¹⁷ Today, Mexican notaries of the federal district are appointed by the executive branch of government.¹⁸ The following discussion of the functions and requirements to become a Mexican notary is based on the Notarial Law for the Federal District of Mexico. Although the functions of Mexican federal and state notaries are equivalent, Mexican states have divergent requirements to become notaries.¹⁹

The Mexican notary's primary function is to create documents and contracts that require the intervention of a notary and to give public faith to facts.²⁰ Notarial Law defines a notary public as a public officer, vested with the public faith, who may authenticate documents.²¹ Public faith is defined as a public function designed to strengthen acts or facts submitted by giving them a presumption of authenticity.²²

The intervention of the Mexican notary in the certification of documents allows a privileged method of proof rarely questioned.²³ When the Mexican notary authenticates facts personally seen or heard, the notary's declaration, without anything more, constitutes full or complete proof of what the notary saw or heard.²⁴ However, where the notary certifies what the parties

15. JAMES E. HERGET ET AL., AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM 97 (1978).

16. *Id.*

17. MANUEL GARCÍA BARRAGÁN M., *Highlights of Mexican Law Concerning Contractual and Procedural Formalities*, in 1 DOING BUSINESS IN MEXICO § 4.02 (Susan K. Lefler ed. 1988) [hereinafter BARRAGÁN].

18. Facsimile from Lic. Octavio Rivera Farber, Mexican notary, Mazatlán, Sinaloa, Mexico (Mar. 10, 1992).

19. Guillermo Floris Margadant, *The Mexican Notariate*, 4 CAL. W. L. REV. 218, 222-25 (1969) [hereinafter Margadant].

20. Facsimile from Lic. Octavio Rivera Farber, *supra* note 18.

21. BARRAGÁN, *supra* note 17, § 4.02.

22. *Id.*

23. Margadant, *supra* note 19, at 227.

24. *Id.* Only a court decree that establishes what the notary saw or heard did not occur, can rebut a Mexican notary's authentication of facts. *Id.*

expressed in a document, the full-proof rule applies only to the notary's declaration that the parties were there, and that they expressed themselves in some manner.²⁵ Thus, litigators may question the content of what the parties expressed before the notary, because the complete proof rule does not apply to content.²⁶

The licensing process for the Mexican notary is onerous. An applicant to become a notary public in Mexico must fulfill stringent requirements.²⁷ For example, a notary applicant must be a lawyer who previously worked with a practicing notary for at least eight months and passed a difficult notarial exam.²⁸ In addition, the total number of federal district notaries is limited to 200.²⁹

Mexican notaries are under a strict duty to ensure that the parties understand the terms of their transaction.³⁰ They are held accountable for their professional acts, and must post a bond to cover potential claims.³¹ Also, the Mexican notary must act neutrally to ensure that the documents are binding on all interested parties.³²

In addition to authenticating acts and alleged facts, the notary may function as a legal draftsman by giving expert advice on the meaning and effect of legal documents.³³ The Mexican notary also routinely conducts title searches for real estate transactions in Mexico, even though the Mexican Registrar issues certificates of title for land transfers.³⁴ Finally, the notary functions as a public

25. *Id.*

26. *Id.*

27. BARRAGÁN, *supra* note 17, §§ 4.02-4.02[3].

28. Margadant, *supra* note 19, at 224.

29. BARRAGÁN, *supra* note 17, §§ 4.02-4.02[3].

30. Paul Karon et al., *Commercial Real Estate Practices and Development in Northwestern Mexico: A Comparative Living Law Description*, 1984 ARIZ. J. INT'L & COMP. L. 1, 41.

31. Margadant, *supra* note 19, at 225.

32. Karon, *supra* note 30, at 41.

33. HERGET, *supra* note 15, at 97-98.

34. Interview with Boris Kozolchik, *supra* note 11; Octavio Rivera Farber, *An Introduction to Secured Real Estate Transactions in Mexico*, 12 ARIZ. L. REV. 290, 305-06 (1970) (quoting Professor Kozolchik's response to a question at a seminar on the law of real property acquisition in Mexico). Each certification of title by Mexican notaries only applies to the most recent transfer of the property, and subsequent certifications of title by notaries do not guarantee defects caused by prior notaries. *Id.* Furthermore, notaries are not accountable for recording errors in the size of the

recorder.³⁵ Only Mexican notaries, or those vested with equivalent authority, such as the Mexican Secretary of Foreign Relations,³⁶ can execute public deeds³⁷ appearing in the protocol.

B. Public Deeds

Execution of public deeds is one of the most important functions of the civil-law notary. All acts or contracts authorized by Mexican notaries must be recorded in the protocol.³⁸ The notary's protocol is the set of books in which the notary records his public deeds and notarial acknowledgements.³⁹ In civil-law countries today, the parties themselves negotiate and draft all documents, such as powers of attorney, for notarial execution.⁴⁰ When the document is complete and ready for notarial signature, the final draft is taken to the notary for review.⁴¹

The notary prepares the notarial deed on officially stamped paper.⁴² Notarial deeds are written without blank spaces and in the first person.⁴³ All public deeds must bear the signatures of the parties and the notary at the end of the document.⁴⁴ Whenever a person appears before the notary on behalf of another, the notary must describe, and verify, in the public deed the manner in which the agent proved his authority to represent a third party.⁴⁵

property. *Id.* Even where a notary can be accountable for a defect in the recording, recovery may be impossible. *Id.* If the defect occurred in a prior transfer, the notary who made the error may no longer be living, thus frustrating recovery. *Id.*

35. HERGET, *supra* note 15, at 98.

36. B. PEREZ FERNANDEZ DEL CASTILLO, *DERECHO NOTARIAL* 90 (*Cuarta ed.* 1989) [hereinafter PEREZ].

37. Public deeds are documents which must be recorded in a public registry. BARRAGÁN, *supra* note 17, §§ 4.02[3]-4.02[4]. In Mexico, the public registry consists of an accumulation of individual notarial *protocolo* books. Margadant, *supra* note 19, at 229-30. The *protocolo* books are also referred to as the protocol. *Id.*

38. BARRAGÁN, *supra* note 17, § 4.02[3].

39. *Id.* § 4.02.

40. BUTTE, *supra* note 14, at 211.

41. *Id.*

42. *Id.*

43. *Id.* The blank spaces prevent future fraud by limiting the ability to insert clauses. *Id.*

44. Facsimile from Lic. Octavio Rivera Farber, *supra* note 18.

45. BARRAGÁN, *supra* note 17, § 4.02[4]; Facsimile from Lic. Octavio Rivera Farber, *supra* note 18.

Each book of the protocol contains an *indice*, or index, which alphabetically lists all the entries by party name.⁴⁶ The notary keeps the original public deed in the notary's book, and after five years, the notary sends his protocol book, index, and related documentation to a centralized storage location.⁴⁷ At the request of the parties, the notary prepares certified copies of the original.⁴⁸ In addition, where documents relating to the public deed are in a foreign language, Mexican law requires a translation into Spanish before their entry into the public deed.⁴⁹ If the parties before the notary do not speak Spanish, an appointed translator must assist them.⁵⁰

While the reasons why civil-law countries, such as Mexico, require such formality for public notarial deeds rarely appear in the statutes, courts and scholars advance numerous theories. These include: (1) Assuring deliberation and freedom in the decision to enter the contract, (2) preventing people from entering into certain transactions without legal advice, (3) facilitating execution of the act, (4) drafting of documents by a qualified person, (5) precluding some defenses by the creation and preservation of highly regarded evidence, (6) assuring certainty in the act and notification of third parties of the act, and (7) assuming fiscal duty requirements.⁵¹

Because of the extreme differences in training and qualifications of common and civil-law notaries, Mexican officials may be unwilling to accept certifications by common-law notaries.⁵² Therefore, the role and *modus operandi* of the Mexican notary suggests that any proposal for a uniform NAFTA power of attorney must recognize the importance in civil law of notarial deeds and certifications.

46. Facsimile from Lic. Octavio Rivera Farber, *supra* note 18. Mexican notaries also have a folder, or *apéndice*, in which all documents relating to the public deed are kept. *Id.*

47. BARRAGÁN, *supra* note 17, § 4.02[3]; Facsimile from Lic. Octavio Rivera Farber, *supra* note 18.

48. BUTTE, *supra* note 14, at 213.

49. BARRAGÁN, *supra* note 17, § 4.02[4].

50. *Id.*

51. EMIL SCHLESINGER, THE NOTARY AND THE FORMAL CONTRACT IN CIVIL LAW, REPORT N.Y. LAW REVISION COMMISSION 403, 407 (1941).

52. RUDOLF B. SCHLESINGER, COMPARATIVE LAW 732 (4th ed. 1980).

III. THE HYPOTHETICAL

The following hypothetical explores the differences and problems of granting valid and effective powers of attorney in Canada, Mexico, and the United States. In addition, the hypothetical examines potential solutions to the creation of a uniform NAFTA power of attorney. A Canadian corporation (C), desiring to do business in Mexico and the U.S., hires an agent (A) to lease buildings in Mexico and the United States. In addition, C needs an agent (B) to act as its representative in obtaining secured transactions guaranteeing the leases. Unless otherwise indicated, the requirements to which C must adhere in creating a valid power of attorney for use in Mexico apply equally to U.S. corporations desiring to do business in Mexico.

IV. THE POWER OF ATTORNEY IN MEXICO: THE NEED FOR A PUBLIC DEED

A. Mexican Civil Code

In Mexico, the relationship between the principal and agent is contractual in nature.⁵³ Mexico's Civil Code governs the law of agency.⁵⁴ Furthermore, Mexico's Civil Code governs all leases of property in Mexico.⁵⁵

Although a literal reading of Mexico's agency laws shows that not all powers of attorney require a public deed, as a practical matter, most do.⁵⁶ Article 2555 of the Mexican Civil Code requires⁵⁷ a public deed for the following types of agency

53. S.A. BAYITCH ET AL., *CONFLICT OF LAWS: MEXICO AND THE UNITED STATES* 134 (1968).

54. TORIBIO ESQUIVEL OBREGÓN, *LATIN AMERICAN COMMERCIAL LAW* 315 (1921); see MICHAEL W. GORDON, *THE MEXICAN CIVIL CODE 459-70* (1980) (translating CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] arts. 2546-2604 (Mex.)).

55. BARRAGÁN, *supra* note 17, § 4.06[1].

56. Telephone Interview with Octavio Rivera Farber, Mexican notary, Mazatlán, Sinaloa, Mexico (Feb. 8, 1992).

57. See GORDON, *supra* note 54, at 459-60 (translating C.C.D.F. arts. 2551(II), 2555). Although article 2555 of Mexico's Civil Code contains a provision allowing for an alternative to the public document requirement, the alternative is of limited use. *Id.* (translating C.C.D.F. art. 2551(II)).

relationships and transactions: (1) General powers of attorney, (2) when the amount involved in the business transaction reaches 5000 pesos⁵⁸ (approximately U.S. \$1.63), or (3) when the agent will execute a transaction which otherwise requires recording in a public deed.⁵⁹

1. Analysis of General Powers of Attorney: Article 2555(I)

Mexican law does not include a general power of attorney allowing an agent to handle all the affairs of the principal.⁶⁰ Instead, general powers of attorney are limited to three types: (1) Lawsuits and collections, (2) administration of property, and (3) exercising acts of ownership of property.⁶¹ Also, Mexico's general powers of attorney require the insertion of a special clause allowing the agents to sign negotiable instruments on behalf of the grantor.⁶²

In civil law, acts of administration are generally characterized as renewable acts, tying up property for only a short period.⁶³ Managerial functions exercised by the agent, such as hiring and firing employees and renting property, fall within Mexico's general powers of administration.⁶⁴ A's general power of attorney to lease

The alternative to the public document requirement only applies where the agency is granted for administrative matters. *Id.* In practice, all corporate powers of attorney are put in the consular official's protocol. Interview with Christiana Alamilla, Mexican Consular Official, Sacramento, California (Feb. 2, 1992); Interview with Carolina Zaragoza, Mexican Consul, in Sacramento, California (Mar. 3, 1992); Telephone Interview with Eduardo Alanso, Mexican Consular Official, Powers of Attorney Section, Los Angeles, California (Mar. 13, 1992).

58. C.C.D.F. art. 2555(II).

59. GORDON, *supra* note 54, at 461 (translating C.C.D.F. art. 2555).

60. *Id.* at 460 (translating C.C.D.F. arts. 2553-54). The only general powers of attorney allowed are those specifically enumerated in article 2554. *Id.*

61. GORDON, *supra* note 54, at 460 (translating C.C.D.F. art. 2554).

62. Telephone Interview with Octavio Rivera Farber, *supra* note 56 (referring to Ley General de Títulos y Operaciones de Crédito, art. 9).

63. OBREGÓN, *supra* note 54, at 321-25. Acts falling within the administration classification include disbursement of ordinary expenses and payments on other similar small amounts such as expense accounts. H. P. CRAWFORD, U.S. DEP'T OF COMMERCE, THE POWER OF ATTORNEY IN LATIN AMERICA 24 (1935).

64. Telephone Interview with Octavio Rivera Farber, *supra* note 56.

buildings in Mexico falls within the general power of administration.⁶⁵ Therefore, a general power of attorney allowing A to lease buildings may require a public deed.

Authorization of the agent to compromise claims, transfer property, mortgage property, submit the principal's claims to arbitration, or do other acts affecting the more permanent ownership of the principal's property are examples of acts of dominion.⁶⁶ Although Mexico's general powers provisions seem to allow agents to exercise acts of dominion and administration, other civil-law jurisdictions such as Lower Canada do not accept general powers of attorney for acts of dominion.⁶⁷ Lower Canada only accepts special powers of attorney for acts of dominion.⁶⁸ Therefore, a general power of attorney that is valid in Mexico might not be valid throughout Canada. Due to the lack of general powers of attorney for acts of dominion in Lower Canada, and the limited use of general powers of attorney allowed in Mexico, lawyers in both jurisdictions often draft special powers of attorney.⁶⁹

Creation of special powers of attorney are long, detailed, and expensive to create.⁷⁰ Because of a narrow interpretation of the agent's powers, the power must specifically list every conceivable transaction or act desired by the grantor.⁷¹ These complexities concerning conflicts of law in accepting general powers of attorney will make it difficult for the three countries to agree on a suitable form for a uniform NAFTA power of attorney.

65. *Id.*

66. OBREGÓN, *supra* note 54, at 321-25.

67. PEREZ, *supra* note 36, at 87.

68. LISE SAINTONGE-POITEVIN, *LES CODES CIVILS/THE CIVIL CODES* arts. 1701-05 (1984) (translating Code Napoleon, art. 1986, and Civil Code of Lower Canada, art. 1710).

69. See Interview with Christiana Alamilla, *supra* note 57 (indicating the danger of giving general powers of attorney to agents in Mexico).

70. SCHLESINGER, *supra* note 52, at 733-36; see *infra* notes 223-31 and accompanying text (Preparation costs for a corporate special power of attorney by an associate averages U.S. \$1000).

71. SCHLESINGER, *supra* note 52, at 734-36.

2. *Where the Transaction Exceeds 5000 Pesos: Article 2555(2)*

Article 2555(2) requires a public deed for powers of attorney where the transaction exceeds 5000 pesos.⁷² As a practical matter, every commercial lease and secured transaction will exceed this amount. Because of the unrealistically low threshold amount triggering the need for a public deed under this section, *C* may need to execute a public deed appearing in the protocol for both *A* and *B*'s powers of attorney.⁷³

3. *Where the Transaction Otherwise Requires Recording in a Public Instrument: Article 2555(3)*

Article 2555(3) triggers the need for a public deed in two ways, because the acts which *A* and *B* will execute otherwise may require a public deed.⁷⁴ First, a contract for the sale of movable goods does not require any special formality in order to be valid.⁷⁵ However, a contract for sale of real estate always requires a public deed,⁷⁶ and any sale, creation, or transfer of immovable property⁷⁷ with a reasonable value of more than 365 times the Federal District's current minimum daily wage requires a public

72. C.C.D.F. art. 2555(II).

73. See GORDON, *supra* note 54, at 461 (translating C.C.D.F. art. 2555(2)).

74. *Id.* (translating C.C.D.F. art. 2555(3)).

75. *Id.* at 419 (translating C.C.D.F. art. 2316).

76. *Id.*

77. BLACK'S, *supra* note 7, at 676, 914. Many civil-law countries make a distinction between movables and immovables. *Id.* The distinction influences the choice of applicable law. *Id.* Movables are chattels that can be carried from one place to another, while immovables refers to property which cannot move itself. *Id.* Courts categorizations of assets, such as shares of companies and negotiable instruments, as movables or immovables are conflicting. JEAN-GABRIEL CASTEL, CANADIAN CONFLICT OF LAWS 330-72 (1977). In private international law, the law of the domicile of the owner governs movable property, while the law of the place where the property is situated governs immovable property. JEAN-GABRIEL CASTEL, THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC 75 (1962). In Canada, courts have jurisdiction in rem over movables within their district. JEAN-GABRIEL CASTEL, PRIVATE INTERNATIONAL LAW 160 (1960). Notwithstanding this approach, in Quebec, the domicile of the owner of the property determines rights in movables. *Id.* at 161.

deed for validity (this product equals approximately U.S. \$1309).⁷⁸ Therefore, practically any substantial lease entered into by *A* will be a transfer of immovable property which exceeds the established threshold and may require the execution of a public deed. Such transfers of immovable property, as well as the power of attorney granting those powers, require a public deed.⁷⁹ It is doubtful that the parties could evade the threshold requirement by substituting a lower amount in the contract, as was often done in Mexico in order to evade taxes.⁸⁰

Second, article 2317 requires that secured transactions exceeding the product of the 365 and the Federal District's minimum wage, appear as a public deed for validity.⁸¹ Therefore, a power of attorney allowing *B* to enter into secured transactions on behalf of *C* may require a public deed.⁸² If *A* and *B*'s powers of attorney are not in the form of a public deed, the powers of attorney may be invalid.⁸³

B. Legalization, Authentication, and Protocolization of Foreign Powers of Attorney for Use in Mexico

In addition to Mexico's public deed formalities, foreign powers of attorney are legalized,⁸⁴ authenticated,⁸⁵ and protocolized.⁸⁶

78. C.C.D.F. arts. 2317, 2320. The current federal minimum wage is approximately 11,000 pesos per day. Facsimile from Lic. Octavio Rivera Farber, *supra* note 18.

79. GORDON, *supra* note 54, at 325 n.461 (translating C.C.D.F. arts. 2317 with note, 2555(II)).

80. Interview with Boris Kozolchyk, *supra* note 11; Boris Kozolchyk, *Fairness in Anglo and Latin American Commercial Adjudication*, 2 B.C. INT'L & COMP. L. REV. 219, 238-42 (1979).

81. C.C.D.F. arts. 2317, 2320.

82. C.C.D.F. arts. 2317, 2320.

83. GORDON, *supra* note 54, at 335 (translating C.C.D.F. art. 1832). If the will of the parties to make a contract is unequivocal, either party may demand that the other take the necessary steps to meet the form requirements. *Id.*; BARRAGÁN, *supra* note 17, § 4.02[6].

84. See *infra* text accompanying notes 87-90 (discussing the legalization process).

85. See *infra* text accompanying notes 91-93 (discussing the authentication process).

86. See *infra* text accompanying notes 94-97 (discussing the protocolization process). Each of these steps, including the requirement of a public deed, is necessary to complete the validation process of foreign powers of attorney. Interview with Carolina Zaragoza, *supra* note 57; Telephone Interview with Edwardo Alanso, *supra* note 57.

1. Legalization

Legalization involves a chain of certifications of foreign documents, such as powers of attorney, which succeeding government officials must sign.⁸⁷ The chain of certifications begins with the local notary, and concludes with the consul of the foreign country.⁸⁸ Each signature certifies the preceding governmental authority's signature.⁸⁹ In general, the Mexican process for legalization of C's power of attorney would be as follows: (1) Notarization of the party appearing before the notary on behalf of C, (2) the signature and seal of the notary requires legalization by the county clerk or department of state, and (3) the Mexican consul then legalizes the county clerk's signature.⁹⁰

2. Authentication

After legalization, C's power of attorney is authenticated. Mexico's authentication process checks the consul's entry of the power of attorney into the protocol for compliance with Mexican law.⁹¹ C's power of attorney would be authenticated through an additional two step process. First, the power of attorney would be sent to Mexico City for authentication of the Mexican consul's

87. 20 I.L.M. 1407-08 (1981) [hereinafter Letter of Submittal]. "The purpose of the chain of certificates is to provide a foreign recipient of a document of evidence of authenticity upon which he may rely without undertaking the difficult task of personally certifying the document directly with the original issuer." *Id.*

88. *Id.*

89. *Id.*

90. CRAWFORD, *supra* note 63, at 32-33; BARRAGÁN, *supra* note 17, § 4.02[6]; Interview with Christiana Alamilla, *supra* note 69; PEREZ, *supra* note 36, at 89-90; Interview with Carolina Zaragoza, *supra* note 57.

91. Interview with Christiana Alamilla, *supra* note 57. Although the Mexican consul transcribes the power of attorney into a protocol book, the legality of the entry into the protocol book must be checked by the Mexican Minister of Foreign Affairs. Interview with Carolina Zaragoza, *supra* note 57. The entry of the Mexican consul does not finalize the process, because consuls are not attorneys at law. *Id.* If everything is legally correct, the documents are sent to a notary in Mexico for authentication of the consul's entry into the protocol. *Id.* If there are any errors or corrections by the Minister of Foreign Affairs, the consul's entry into the protocol must be corrected. *Id.*

signature by the Secretary of Foreign Relations.⁹² Second, in most jurisdictions, a Mexican notary certifies the Mexican consul's protocolization of the foreign power of attorney.⁹³

3. *Protocolization*

Foreign powers of attorney are also protocolized. Protocolization is the process of recording a public deed in a notary's, or consular officials', book of protocol.⁹⁴ When a notary, or official with equivalent authority, executes a contract in notarial form, the signature merely ratifies the formalities of the law; the notary gives faith to the capacity and the manifestation of the willingness of the parties to enter into a transaction.⁹⁵ Without more, the signature of a notary, or officer with equivalent authority, does not meet the protocolization requirements of Mexican public deeds.⁹⁶ Mexico's local protocolization requirements are only met when an official with notarial authority enters the public deed into the protocol.⁹⁷ Where a Mexican consul enters the public deed into the protocol, a Mexican notary must certify the Mexican consul's entry of *A* and *B*'s powers of attorney into the protocol.

92. CRAWFORD, *supra* note 63, at 32-3; BARRAGÁN, *supra* note 17, §4.02[6]; Interview with Christiana Alamilla, *supra* note 69; PEREZ, *supra* note 36, at 89-90.

93. BARRAGÁN, *supra* note 17, § 4.02[6]; Interview with Christiana Alamilla, *supra* note 57; PEREZ, *supra* note 36, at 89-90. Some jurisdictions in the U.S. are legally allowed to streamline the authentication and protocolization process. Interview with Carolina Zaragoza, *supra* note 57. These consular jurisdictions are limited to Los Angeles, Chicago, and San Francisco. *Id.* In those consular jurisdictions, the Mexican Consul legalizes the signatures according to the normal process. *Id.* Then the power of attorney documents, without the consul's entry into a *protocolo* book, are sent to Mexico's General Director of Judicial Affairs. *Id.* The Director of Judicial Affairs checks the powers of attorney for legality and enters the documents into a computer, rather than a *protocolo* book. *Id.* This completes the authentication process. A Mexican notary can then access the computer, and retrieve the document prepared by the Director of Judicial Affairs, so the document can be protocolized by a Mexican notary. Interview with Carolina Zaragoza, *supra* note 57. This process is referred to as the *protocol abierto* process. *Id.*

94. CRAWFORD, *supra* note 63, at 12.

95. PEREZ, *supra* note 36, at 121.

96. *Id.*

97. *Id.*

C. *Obtaining a Valid Foreign Power of Attorney for Use in the U.S.*

In contrast to the Mexican process, obtaining valid powers of attorney on behalf of C, for use in the U.S., and even in civil-law Canada,⁹⁸ is simple. In the U.S., legalization of the foreign power of attorney completes the process, because there is no counterpart to the Mexican public deed requirements, authorization, and protocolization. There are two ways to legalize foreign powers of attorney for use in the U.S.⁹⁹ First, where the power of attorney originates from a foreign country not a member of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents [hereinafter Legalization Convention],¹⁰⁰ rule 44(a)(2) of the Federal Rules of Civil Procedure and rule 902(3) of the Federal Rules of Evidence apply.¹⁰¹

Despite the different titles, these rules are identical in practice.¹⁰² The U.S. rules on legalization require that the power of attorney be notarized.¹⁰³ Then, the notary's signature must be legalized by a consul to the U.S. or other specified governmental officer.¹⁰⁴ Nonetheless, this legalization requirement may be

98. The certificate of the Secretary of State of any foreign government, together with the original documents and copies of the requirements in subsection 5, create a properly authenticated power of attorney when executed outside of Lower Canada, and is prima facie proof of the validity of the power of attorney. SAINTONGE-POITEVIN, *supra* note 68, at 272-73 (translating Civil Code of Lower Canada, arts. 1220, 1220(5)). Article 1220(5) requires that powers of attorney executed outside the Province of Quebec be executed in the presence of at least one witness "and authenticated before an ambassador, minister plenipotentiary, high commissioner, chargé d'affaires or consul of Canada or of His Majesty, before an agent-general of the Province or before the mayor of the place or a notary or other public officer of the country where it bears [the] date." *Id.*

99. 1 B. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (CIVIL AND COMMERCIAL) 269-70 (1986).

100. Convention Abolishing the Requirement of Legalization of Foreign Public Documents, *done* Oct. 5, 1961, 33 U.S.T. 833, T.I.A.S. No. 10,072, 527 U.N.T.S. 189 [hereinafter Legalization Convention] (Entered into force for the U.S. on Oct. 15, 1981).

101. 1 RISTAU, *supra* note 99, at 269-70.

102. 1 *Id.*

103. FED. R. CIV. P. 44(a)(2).

104. FED. R. CIV. P. 44(a)(2). The U.S. rules on legalization require that the power of attorney be "attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to

excused if good cause for its absence is shown, and if all parties have an opportunity to investigate the authenticity and accuracy of the document.¹⁰⁵

Thus, under the Federal Rules of Civil Procedure and Federal Rules of Evidence, C need only execute the power of attorney in Canada before a Canadian notary, and take the power of attorney to the American Consul in Canada for legalization.¹⁰⁶ The power of attorney does not need to be authenticated or be recorded in a public registry.

The second method of legalization only applies to countries which are signatories to the Legalization Convention.¹⁰⁷ This method further simplifies the legalization process by eliminating the need for foreign consular legalization.¹⁰⁸ Because Mexico and Canada are not signatories to the Legalization Convention, this method of legalization does not apply to the hypothetical.¹⁰⁹

D. Governing International Law

The international practitioner might wonder why C's power of attorney may require satisfaction of Mexico's public deed requirements when the laws of the country of execution, Canada in this hypothetical, ordinarily govern the form¹¹⁰ of most

the attestation. A final certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul or consul agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States." FED. R. CIV. P. 44(a)(2).

105. 1 RISTAU, *supra* note 99, at 270; FED. R. CIV. P. 44(a)(2).

106. Eder, *supra* note 8, at 840, 849; FED. R. CIV. P. 44(a)(2).

107. See *infra* text accompanying notes 256-78 (describing the *apostille* method of legalization).

108. The Legalization Convention substitutes the *apostille* form for the legalization by the foreign consular official. See *infra* text accompanying notes 256-78 (describing the *apostille* method of legalization).

109. U.S. DEP'T OF COMMERCE, TREATIES IN FORCE 333 (1991).

110. "The concept of form [or formalities] includes the problems whether oral conclusion suffices or there is required written documentation, use of certain words, signature with one's own hand, seal; co-operation of a public official, such as authentication of signatures and minutes of declarations of consent, taking oaths, or entry into a public register . . ." 2 ERNST RABEL, *THE CONFLICT OF LAWS* 471 (1960); BLACK'S, *supra* note 7, at 586. The proper technical terms, phrases, writing requirements, and whatever else the law requires to make a document formally correct. BLACK'S, *supra*, at 586. The form requirements of a transaction are distinct from substance requirements; form means "[t]he legal or technical manner or order to be observed in legal instruments or juridical proceedings, or in the construction of legal documents or processes." *Id.*

international transactions. C must determine whether Canadian or Mexican law governs the validity of the power of attorney for use in Mexico. Actually, the laws of both countries control the validity of the powers of attorney.

To begin with, compliance with Canada's form requirements is critical, because Mexico's Civil Code adheres to the rule of *locus regit actum*.¹¹¹ The rule of *locus regit actum* states that if a transaction complies with the form or formalities of the country of execution, the transaction also complies with the form or formalities of the country of use—even if the country of use ordinarily requires different form or formalities.¹¹²

The rule facilitates international transactions by recognizing the lawyer's difficulty in meeting the form or formality requirements of some foreign countries.¹¹³ A foreign country's substantive law is easier to determine than a country's procedural requirements as to form.¹¹⁴ Translations of foreign substantive statutes and codes are readily available, while local procedural requirements are not. Also, the rule overcomes the difficulties of foreigners needing to learn foreign law, by allowing the law of the place of the transaction to govern.¹¹⁵

International practitioners desire rules permitting compliance with the form of international transactions through the quickest and easiest method.¹¹⁶ Thus, C's adherence to the formalities of the place of execution, Canada in this hypothetical, in compliance with the rule of *locus regit actum*, is most desirable.¹¹⁷ Although the rule of *locus regit actum* is simple and practical, it is illusory in

111. GORDON, *supra* note 54, at 3. According to article 15 of Mexico's Civil Code, the laws of the place of execution govern the form of juridical acts. *Id.* at 3 (translating C.C.D.F. art. 15). Wills made in a foreign country which comply with the foreign country's laws are valid in Mexico's federal courts. *Id.* at 294 (translating C.C.D.F. art. 1593).

112. BLACK'S, *supra* note 7, at 586. This principle is a well-established rule in international conflicts of law. 2 RABEL, *supra* note 110, at 487-93.

113. Eder, *supra* note 8, at 849-59.

114. *Id.*

115. *Id.*

116. Eder, *supra* note 8, at 851 (citing BATIFOLL, LES CONFLICTS DE LOUIS 364 (1938)).

117. *See id.* (The Canadian corporation's attorney is most familiar with Canada's form and formality requirements).

practice.¹¹⁸ Perhaps the reason why Mexican consular officials require C to adhere to Mexico's special requirements for creating a valid power of attorney, is because Mexico's law governs the effect of acts and contracts made in foreign countries.¹¹⁹ Moreover, most Latin American countries require the execution of a public deed and all its requisites, not as a matter of form but as a substantive requirement for recognition of the agent's power.¹²⁰

Separate and apart from meeting Canada's form requirements, most powers of attorney for use in Mexico must be in the form of a public deed.¹²¹ In addition, Mexico consular officials require the formalities of legalization, authentication, and protocolization.¹²² Once a public deed is valid in any state in Mexico, the public deed will be recognized in all other Mexican states.¹²³ Since Mexican law governs the effect of foreign powers of attorney, the grants of power of attorney by C may, in addition to meeting Canadian form requirements, need to meet Mexico's public deed formalities, unless Mexico adopted a treaty or other change in its law to the contrary.¹²⁴

1. The Protocol on Uniformity

Two treaties adopted by Mexico affect foreign powers of attorney discussed in this paper; these are the Protocol on Uniformity of Powers of Attorney Which Are to Be Used Abroad [hereinafter Protocol on Uniformity]¹²⁵ and, to a lesser extent, the

118. *Id.* at 851.

119. *Id.* at 3 (translating C.D.D.F. art. 13).

120. OBREGÓN, *supra* note 63, at 318; *See supra* part II.B.

121. CRAWFORD, *supra* note 63, at 10.

122. Interview with Christiana Alamilla, *supra* note 57; Interview with Carolina Zaragoza, *supra* note 57; Telephone Interview with Eduardo Alanso, *supra* note 57.

123. BARRAGÁN, *supra* note 17, § 4.03 (referring to CONST. art. 121) (The principle of full faith and credit applies to acts carried out by any state of the United Mexican States).

124. *See* GORDON, *supra* note 54, at 461 (translating C.C.D.F. art. 2557). The omission of the public document requisites in granting powers of attorney when a public document is needed, annuls the agency and leaves in existence only the obligations between a third party and the agent, as if the latter had acted for himself. *Id.*

125. Protocol on Uniformity of Powers of Attorney Which Are to be Utilized Abroad, art. V, opened for signature Feb. 17, 1940, 56 Stat. 1376, 1386, 161 U.N.T.S. 229 (entered into force for the U.S. Apr. 16, 1942) [hereinafter Protocol on Uniformity].

Convention Between the United States and Mexico Respecting Consular Officers [hereinafter Convention].¹²⁶

Although Mexico and the U.S. adopted the Protocol on Uniformity, the Protocol did not clearly dispense with the form requirements for granting foreign powers of attorney used in Mexico.¹²⁷ At a minimum, Mexican case law clearly demonstrates that powers of attorney executed abroad must facially comply with the form requirements of the country of execution for recognition in Mexico.¹²⁸

a. Retention of Mexico's Legalization Requirements

Article V of the Protocol on Uniformity contains a practical solution to the conflict of laws problem with respect to form requirements.¹²⁹ Powers granted in any member country executed in conformity with the Protocol on Uniformity shall be given full faith and credit by the signatories of the Protocol on Uniformity.¹³⁰ For example, C would only need to comply with the Canadian form requirements to create a valid power of attorney for use in Mexico.

However, article V qualifies this practical solution by indicating that the full faith and credit rule only applies where the power of attorney is "legalized in accordance with the special rules governing legalization."¹³¹ Therefore, Mexico's special rules governing legalization may still apply. Instead of specifying which

126. Convention Between the U.S. and Mexico Respecting Consular Officers, Aug. 12, 1942, U.S.-Mex., 57 Stat. 800, 125 U.N.T.S. 301 (entered into force July 1, 1943) [hereinafter Convention]. The Hague Convention to the Law Applicable to Agency is not discussed in this comment, because it does not apply to the requirements as to form or the capacity of the parties. Hague Convention to the Law Applicable to Agency, art. 2, 26 I.L.M. (1977).

127. BAYTCH ET AL., *supra* note 53, at 134.

128. Judgment of Nov. 22, 1968 (American Home Products), CXIV Semanario Judicial de la Federación [Semanario] 3:36; Judgment of Mar. 2, 1966 (Helycopter Service Inc.), CV Semanario 6c:55; Judgment of Aug. 31, 1966 (Hoffman La Roche, Inc.), CX Semanario 6c:34.

129. Protocol on Uniformity, *supra* note 125, art. V.

130. *Id.*

131. *Id.*

country's rules on legalization control, the Protocol on Uniformity is silent on this issue.¹³²

b. Retention of Mexico's Authentication and Protocolization Requirements

Moreover, the Protocol on Uniformity does not attempt to streamline the authentication requirements possibly encountered in a foreign country.¹³³ In addition, the Protocol on Uniformity inadequately attempts to simplify Mexico's protocolization requirements.¹³⁴ The Protocol on Uniformity leaves intact local registration or protocolization requirements if the local law, where the power of attorney will be used, demands it.¹³⁵ Thus, in addition to the retention of legalization and authentication requirements, protocolization of the power of attorney remains a problem.

Since the Protocol on Uniformity does not eliminate local protocolization requirements, *A* and *B*'s powers of attorney, intended for use in Mexico, may require protocolization in accordance with Mexico's local law. Therefore, the Protocol on Uniformity does not clearly simplify the legalization, authentication, or protocolization requirements that Mexico's local law demands.

132. *Id.* "Powers of attorney granted in any of the member countries of the Pan American Union, which are executed in conformity with the rules of this Protocol, shall be given full faith and credit, provided, however, that they are legalized with the special rules governing legalization." *Id.* art. V; BAYTCH, *supra* note 53, at 134-35.

133. See Protocol on Uniformity, *supra* note 125 (Authentication requirements are not mentioned).

134. BAYTCH, *supra* note 53, at 134. Powers granted in a foreign country do not require registration or protocolization. Protocol on Uniformity, *supra* note 125, art. VII. However, this rule does not prevail when the local law requires registration or protocolization. *Id.*

135. Protocol on Uniformity, *supra* note 125, art. VII.

c. *The Presumption of Equal Authority of Foreign and Domestic Notaries*

In another attempt at simplifying the procedure for validation of a power of attorney for use abroad, the drafters of the Protocol on Uniformity gave foreign and domestic notaries equal power under the law.¹³⁶ Article IX of the Protocol on Uniformity establishes a presumption in favor of foreign notaries of equal authority with local notaries.¹³⁷ For example, if Canada were a signatory to the Protocol on Uniformity, C might bring the power of attorney to a Canadian notary for protocolization for use in Mexico, under Article IX. The Canadian notary would have the same authority to certify documents as a Mexican notary.

However, the Protocol on Uniformity qualifies the presumption of equality among notaries.¹³⁸ Where local law requires the use of special formalities, such as authentication and protocolization, the Protocol on Uniformity abandons the presumption of equal authority among foreign and domestic notaries, and the local requirements remain intact.¹³⁹ In summary, despite the Protocol on Uniformity, Mexico's legalization, authentication, and protocolization requirements for public deeds still apply to A and B's powers of attorney.¹⁴⁰

136. BAYTCH, *supra* note 53, at 135. "Powers of attorney, executed in any of the countries of the Pan American Union in accordance with the provisions of the Protocol, to be utilized in any other member country of the Union, notaries duly commissioned as such under the laws of their respective countries shall be deemed to have authority to exercise functions and powers equivalent to those accorded to native notaries by the law and regulations of the signatories to the Protocol, without prejudice, however, to the necessity of protocolization of the instrument in the cases referred to in article VII." Protocol on Uniformity, *supra* note 125, art. IX.

137. Protocol on Uniformity, *supra* note 125, art. IX.

138. *Id.*

139. *Id.*

140. See *supra* text accompanying notes 53-83 (discussing the public deed requirement for foreign powers of attorney to be used in Mexico).

2. *Bilateral Convention Between the U.S. and Mexico
Respecting Consular Officers*

Article VII of the Convention also ineffectively addresses the legalization of documents.¹⁴¹ This article gives consular officers the power to draw up, certify, and authenticate written instruments provided that such instruments have legal effect in the territory of the country which appointed the consular officer.¹⁴² Thus, a U.S. corporation can take its power of attorney to the Mexican consul in the U.S. for legalization.¹⁴³ The Mexican consul assumes the role of the Mexican notary, and may execute public deeds as long as the documents conform to Mexico's public deed requirements.¹⁴⁴

This equality of power between the Mexican consul and the Mexican notary dissolves if the power of attorney does not conform with Mexico's public deed requirements or if the power would not otherwise have legal effect in Mexico.¹⁴⁵ Determining whether a power of attorney conforms with Mexico's requirements for such documents is an extremely difficult task which usually requires the assistance of a Mexican notary. The task not only involves a complete understanding of the legalization, authentication, and protocolization processes, but also requires an understanding of Mexico's general and special powers of attorney¹⁴⁶ as well as the special requirements for recognition of foreign corporations.¹⁴⁷

Failure to comply with Mexico's public deed formalities leaves such powers of attorney vulnerable to attack in Mexican courts. Third parties transacting with agents in Mexico must inquire into the conformity of the power of attorney with Mexican laws

141. Convention, *supra* note 126, art. VII.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* art. VII(2).

146. *See supra* part IV.A.1.

147. *See infra* part V.B.1.

regulating such documents, to ensure the validity of the agent's power.

In addition, failure by the consul to properly enter the power of attorney in the protocol may annul any contracts the agent executed on behalf of the grantor with the third party.¹⁴⁸ This result could be disastrous for U.S. corporations and third parties transacting with their agents. If the power of attorney fails to meet Mexico's special requirements for foreign powers of attorney, neither the corporation nor the third party can enforce their contractual rights with the other.¹⁴⁹ The preceding discussion indicates that Mexico's public deed, legalization, authentication, and protocolization requirements may remain intact despite the Protocol on Uniformity and the Convention.

V. DEVELOPMENT OF A UNIFORM POWER OF ATTORNEY AMONG CANADA, MEXICO, AND THE U.S.

A uniform NAFTA power of attorney can reduce the costs of preparing special powers of attorney as well as simplifying the processes of legalization, authentication, and protocolization. First, this part discusses the economic and equitable rationales for the development of a uniform NAFTA power of attorney. Second, this part explores the practical difficulties in creating a uniform NAFTA power of attorney.

A. *Rationale Behind the Development of a Uniform NAFTA Power of Attorney*

1. *Economic Analysis*

Developing laws which streamline the legalization, authentication, and protocolization process reduces transaction costs

148. GORDON, *supra* note 54, at 461 (translating C.C.D.F art. 2557).

149. *See id.*

and encourages bargaining.¹⁵⁰ Laws which set out the clearest possible rules, where potential litigants always know their rights, encourage trade, decrease future litigation, and promote early settlements.¹⁵¹

Without a valid power of attorney that is simple to execute and on which third parties can rely, principals must enter into all contracts on their own. Transaction costs remain high because of the difficulty in creating and certifying powers of attorney for use abroad.¹⁵²

In civil-law countries, such as Mexico, the costs of obtaining valid powers of attorney necessary for litigation are prohibitive.¹⁵³ Mexican rules of procedure require a valid power of attorney, on behalf of a lawyer, where an attorney represents a client.¹⁵⁴ Under the current law, the expense of preparing detailed powers of attorney frequently prevents collection of small claims.¹⁵⁵

In addition, where a power of attorney is used in Mexican lawsuits, technical flaws in the power of attorney may prove disastrous.¹⁵⁶ The opposing party may challenge the validity of the power of attorney.¹⁵⁷ If the power of attorney does not fully comply with the technical requirements of Mexican law, the suit is lost.¹⁵⁸ Mexican courts treat petitions and answers with defective powers of attorney as if they were not filed with the court.¹⁵⁹

150. Mark Wohar, *Alternative Versions of the Coase Theorem and the Definition of Transaction Costs*, 27 Q. J. BUS. & ECON., Winter 1988, at 1, 14 (discussing those following Cooter's theories).

151. *Id.* (discussing those following Williamson's theories).

152. *See infra* part V.B.2.

153. Eder, *supra* note 8, at 862.

154. *See infra* text accompanying notes 189-92 (discussing the power of attorney requirements for litigation in Mexico).

155. *See infra* text accompanying notes 189-92 (discussing the power of attorney requirements for litigation in Mexico).

156. BARRAGÁN, *supra* note 17, § 4-10.

157. *Id.*

158. *Id.*

159. *Id.*

2. *Mexican Case Law Demonstrating the Mexican Court's Focus on Technicalities in the Power of Attorney*

The rejection of foreign powers of attorney by Mexican courts inhibits trade between countries because equitable claims are difficult to enforce. Recent Mexican case law illustrates the courts' focus on technicalities in powers of attorney, in effect, denying parties relief rather than deciding issues on the merits. In one recent case, Ralston Purina, a U.S. corporation, authorized an agent to contract for the purchase of beans in Mexico.¹⁶⁰ After entering into contracts with bean growers, the Mexican government devalued the peso.¹⁶¹ A dispute arose concerning the proper contract price.¹⁶² Both parties engaged in expensive and time consuming legal maneuvering by attacking the powers of attorney of the other party.¹⁶³ Despite the parties' efforts, the Mexican court dismissed the suit due to a technical failure in the power of attorney.¹⁶⁴ Instead of focusing on the intent of the parties to determine price, the court opted to scrutinize a collateral issue: the validity of the power of attorney.¹⁶⁵

Amparo Arce Hermanos is another example of the technical defects in powers of attorney that Mexican courts rely upon to dismiss cases.¹⁶⁶ Arce Hermanos brought suit against the Mexican State Treasurer and Administrator of Rents, for an improper tax assessment on loads of wheat which Arce Hermanos alleged it did not own.¹⁶⁷ Although the trial court accepted the power of attorney, on appeal the state claimed that the lower court

160. Unreported decision on reserve at the University of Arizona College of Law, Documents Collection on Latin American law (1990).

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Edward Schuster, *The Judicial Status of Non-Registered Foreign Corporations In Latin America-Mexico*, 7 TUL. L. REV. 341, 380 n.123 (1933); Judgment of Aug. 20, 1929 (*Amparo Mexican Sinclair Petroleum Corp.*), 26 *Semanario* 4:2227; Judgment of June 17, 1927 (*Amparo Cia. Agrícola y Colonizadora*), 20 *Semanario* 4:1178; RAMÍREZ, U.S. DEPT. OF COMMERCE, SPECIAL CIRCULAR NO. 300, POWERS OF ATTORNEY IN MEXICO (Feb. 1, 1932).

167. Judgment of Aug. 11, 1926 (*Amparo Arce Hermanos*), 19 *Semanario* 4:259, 260.

improperly accepted the power of attorney, and that the district court could review the trial court's determination.¹⁶⁸ The Mexican Supreme Court held that although the trial court accepted the power, appellate courts had the right to reverse the trial court's determination at any stage of litigation.¹⁶⁹

The court invalidated the power of attorney and made four conclusions of law.¹⁷⁰ First, the plaintiff failed to prove the validity of its power of attorney beyond a reasonable doubt, because the notary did not clearly certify that he read the partnership agreement allowing grants of powers of attorney.¹⁷¹ Second, the power of attorney required the execution of a public deed certified by a notary.¹⁷² The Mexican Supreme Court agreed with the district court, that the failure to execute the public deed invalidated the power of attorney.¹⁷³ Third, the lower court's acceptance of the power of attorney was not determinative of the power's validity.¹⁷⁴ Any higher court can and should dismiss a complaint if there is a defect in the power or its recording.¹⁷⁵ Finally, the invalidation of the power of attorney relates back to the date the suit was filed.¹⁷⁶ All legal steps and decisions after the power's improper acceptance are void.¹⁷⁷ If Mexican courts continue to focus on technical defects in powers of attorney, while ignoring the merits of claims, foreign parties will not invest in Mexico because valid claims will be dismissed. Because foreign businesses cannot rely on powers of attorney in entering contracts, or are not able to enforce such contracts, the increased trade supposedly associated with NAFTA may not occur due to the dismissal of meritorious claims.

168. *Id.*

169. *Id.*

170. *Id.* at 259-62.

171. *Id.* at 260-61.

172. *Amparo Arce Hermanos*, 19 *Semanario* at 4:261.

173. *Id.*

174. *Id.*

175. *Id.* at 261-62.

176. *Id.* at 262.

177. *Id.*

B. Practical Difficulties in the Creation of a Uniform Power of Attorney

1. The Special Requirements for Corporations

Corporate grantors of powers of attorney for use in civil-law countries, such as Mexico, require special formalities not essential in common-law jurisdictions.¹⁷⁸ Although corporations usually receive their legal recognition from their state of incorporation, the competence of agents to appear in court on behalf of the corporation can be influenced by the procedural law of the forum.¹⁷⁹ The juridic personality,¹⁸⁰ or legal recognition of corporations and their agents, is governed in Mexico primarily by its commercial codes on foreign companies¹⁸¹ and secondarily, by the civil code.¹⁸²

Mexican courts might require an explicit statement, in the power of attorney, showing the corporate officer's authority to execute the power on behalf of the corporation.¹⁸³ To ensure a valid power of attorney, the following documents in the power of attorney may be required:

(1) The section of the general corporation law of the [s]tate [or province] in which the corporation is organized, relating to the power of the board of directors, (2) the section of the by-laws of the corporation relating to the powers of the board of directors, (3) the resolution of the board of directors authorizing the president or other officer to execute the power of attorney under discussion [o]n behalf

178. CRAWFORD, *supra* note 63, at 13; Interview with Christiana Alamilla, *supra* note 57; Telephone Interview with Ricardo J. Diez, licensed to practice law in N.Y. and Mexico (Feb. 27, 1992).

179. 2 RABEL, *supra* note 110, at 73-74.

180. Edward Schuster, *Litigation by American Corporations in Foreign Courts*, 8 TUL. L. REV. 563, 564 (1934). The civil-law juridic person is equivalent to the artificial person or corporate entity of common law. *Id.*

181. See COMMERCIAL LAWS OF THE WORLD-MEXICO 8-12 (rev. 1989) (translating Código de Comercial (Cód.Com.) arts. 19, 24, 26).

182. Schuster, *supra* note 180, at 8.

183. CRAWFORD, *supra* note 63, at 14; Interview with Christiana Alamilla, *supra* note 57; Telephone Interview with Ricardo J. Diez, *supra* note 178.

of the corporation, (4) the minutes of the annual meeting of stockholders showing that the person granting and executing the power of attorney was duly elected president or other officer of the corporation, the legal right to which he holds himself out to enjoy at the moment of executing the power, and (5) a certificate of incorporation from the respective state [or province's] official of the state [or province] of corporate domicile.¹⁸⁴

In addition, the notary or consular official should include a statement in the acknowledgement with the following information: (1) That the notary or consular official examined the original of a state's or province's corporate law, (2) that the notary or consular official examined the corporation's by-laws and minutes, and (3) that the minutes, resolutions, and copies thereof perfectly reflect the originals.¹⁸⁵ These requirements present a major problem when powers of attorney are granted before Mexican consuls.¹⁸⁶ The consuls are usually not lawyers, and determining the proper incorporation of the granting corporation, along with the other requisites, is a difficult task.¹⁸⁷ Although article I of the Protocol

184. CRAWFORD, *supra* note 63, at 14; BARRAGÁN, *supra* note 17, § 4.02[6].

185. CRAWFORD, *supra* note 63, at 14-15. Powers granted by partnerships and individuals also require much more detail than common law requires. *Id.* To meet the utmost legal requirements for the grant of a power of attorney by a partnership, "unless all the members of the firm execute the instrument, the power of attorney should recite the articles of partnership agreement or so much thereof as shows the date, place of organization, and domicile of the partnership, and most important of all, the clause or clauses authorizing any particular individual to execute the power of attorney under discussion in behalf of the partnership." *Id.* The requirement in the corporate discussion, that the notary has compared the transcript of the instruments with the originals and that they compare exactly, is also required in the partnership context. *Id.* Although much space and additional costs of translation could be saved if all members of the firm execute the power of attorney jointly, the previously stated partnership requirements may be necessary when it is impracticable or impossible for all the partners to execute the document jointly. *Id.* "Where an individual desires to execute a power of attorney in the United States on behalf of another for use by a third person in Latin America, he must recite and show authority for his acts, and the acknowledgment of the notary public should include the same statement as to that which reference was made in the (sections on corporation and partnership) relative to the exactness of the transcripts of such original documents as may exist in support of the authority claimed by the grantor." *Id.* Where an individual executes his own power of attorney in his own behalf for use by his own agent, the "parties must be identified with far more meticulous care as to name, nationality, age, civil status, profession or occupation, and domicile, than would be in the case of our own practice." *Id.*

186. BARRAGÁN, *supra* note 17, § 4.02[6].

187. *Id.*

on Uniformity gives consuls the authority to certify the legal personality of foreign corporations, one may invalidate the certification according to article II if one shows that any of the requirements were based on erroneous legal construction or interpretation.¹⁸⁸

a. Cases Denying Recognition of Foreign Powers of Attorney Granted on Behalf of Corporations

Courts may deny recognition of foreign powers of attorney granted by corporations if the juridic personality of the corporation is not explicit in the power of attorney. Mexican rules of procedure require all plaintiffs to either appear personally in court or be represented by an attorney-in-fact who must attach to the complaint a sufficient power of attorney.¹⁸⁹ Unlike American practice, the Mexican lawyer has no authority to sign the complaint for his client without a properly attached power of attorney.¹⁹⁰ Mexico's Federal Supreme Court, particularly its Second Administrative Chamber, views failures to include the special requirements of corporations in a technical and meticulous fashion.¹⁹¹ Once a Mexican court discovers a defect in the power of attorney, the court dismisses the case, and allows no procedure for amending the defective power.¹⁹²

*Amparo Palmolive*¹⁹³ and *Mexican Sinclair Petroleum*¹⁹⁴ depict the technicalities that Mexican courts may require.¹⁹⁵ In *Amparo Palmolive*, the court denied the juridic personality of the corporation. The Palmolive Corporation had a registered trademark in Mexico for its soaps.¹⁹⁶ Mexico's Supreme Court held that

188. Protocol on Uniformity, *supra* note 125, arts. I, II.

189. Schuster, *supra* note 166, at 379-80.

190. *Id.*

191. *Id.*

192. Telephone Interview with Octavio Rivera Farber, *supra* note 56.

193. Judgment of Oct. 26, 1929, 27 *Semanario* 4:1249.

194. Judgment of Aug. 20, 1929, 26 *Semanario* 4:2227.

195. Schuster, *supra* note 166, at 380 n.123; BARRAGÁN, *supra* note 17, § 4.02[6].

196. Schuster, *supra* note 180, 567-78 (translating Judgment of Oct. 26, 1929, 27 *Semanario* 4:1249).

Palmolive Corporation did not have juridic personality in Mexico because its corporate documents were not recorded in Mexico.¹⁹⁷ Because of this failure to record the corporate documents, the court did not allow Palmolive to sue a Mexican firm for imitating Palmolive's soaps.¹⁹⁸ Mexico's Supreme Court ignored Palmolive's arguments that Palmolive did not need to record its documents, because they were not established in Mexico.¹⁹⁹ Actually, under a treaty with the U.S., Palmolive was entitled to judicial protection of its trademark despite the provisions in Mexico's Code of Commerce, which require additional filings by many foreign corporations.²⁰⁰ Thus, since judicial protection of Palmolive was established by treaty, the denial of relief could have been based on procedural requirements of foreign corporations bringing suit in Mexico.

In *Mexican Sinclair Petroleum*, the court denied the juridic personality of the agents of the corporation. A Mexican attorney appeared before the court with a power of attorney granted by the Mexican Sinclair Petroleum Corporation [hereinafter Corporation].²⁰¹ The Corporation sought relief in Mexico's Federal District Court against acts of the Secretary of Industry, Commerce, and Work, who revoked oil drilling permission previously granted to the Corporation.²⁰² Although the district judge accepted the power of attorney, Mexico's Supreme Court reexamined it on appeal and dismissed the Corporation's complaint based on a technicality in the agent's power of attorney.²⁰³

Mexico's Supreme Court scrutinized the general power of attorney granted by the Corporation to its agent, which allowed the latter to act on behalf of the Corporation in litigation matters in Mexico.²⁰⁴ The Vice President of the Corporation (V.P.) and delegate of the board of directors, authorized the agent's power of

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Mexican Sinclair Petroleum*, 26 *Semanario* at 4:2227-29.

202. *Id.*

203. *Id.*

204. *Id.*

attorney.²⁰⁵ A notary in New York notarized the agent's power of attorney.²⁰⁶ Before the notary, the V.P. declared that the board of directors of the Delaware corporation, voted in favor of a proposal allowing the V.P. to grant the agent a general power of attorney.²⁰⁷ The V.P. verified his authority before the New York notary with the minutes of the board meeting.²⁰⁸ The minutes said that the Corporation authorized the V.P. to grant the agent a general power of attorney.²⁰⁹

The V.P. also verified his authority to grant a power of attorney to the agent through selected articles of Delaware's General Corporate law.²¹⁰ The agent's power of attorney included the Delaware provisions in the document.²¹¹ The provisions of Delaware law included in the power of attorney consisted of the following: (1) That corporations organized according to the section of this chapter were managed by a joining of no less than three directors; (2) that the corporation can have other functionaries, agents, and employees that were considered necessary; (3) that the directors did not need to be stockholders; and (4) that each director was elected for a one year term.²¹²

Mexico's Supreme Court rejected the agent's power of attorney because neither the corporation's by-laws, certificate of incorporation, nor Delaware provisions listed, indicated that the board of directors of the Corporation had the power to name agents or employees.²¹³ Furthermore, the supreme court noted that the New York notary did not have objective proof that the shareholders elected the board.²¹⁴ The court went on to say that corporations, like moral persons, are fictions of the law and thus, their existence

205. *Id.*

206. *Mexican Sinclair Petroleum*, 26 *Semanario* at 4:2227-29.

207. *Id.*

208. *Id.* at 2230.

209. *Id.*

210. *Id.*

211. *Mexican Sinclair Petroleum*, 26 *Semanario* at 4:2230.

212. *Id.*

213. *Id.* at 2231.

214. *Id.*

ought to conform exactly with the law.²¹⁵ The court rejected the New York notary's power of attorney on two grounds.²¹⁶ First, there was no proof, written in the power of attorney document, showing that the directors had the power to appoint agents.²¹⁷ Second, there was no objective proof that the V.P., even with board approval, had the power to appoint an agent on behalf of the board.²¹⁸ Therefore, the case was dismissed based on a lack of juridic personality of the Corporation.²¹⁹

b. A Solution to the Juridic Personality Problem

A NAFTA uniform power of attorney could solve the problem of the juridic personality of corporations and their agents. Agreeing on a complete list of requirements that signatories to the NAFTA uniform power of attorney would require for recognition of a corporation's juridic personality is the first step. Broad statements, such as those used in article I of the Protocol on Uniformity,²²⁰ requiring "other legal documents [which] substantiate the authority conferred" should be discouraged. In addition, unlike article II of the Protocol on Uniformity,²²¹ the parties must agree that the certifying authority's certification be final. Otherwise, future courts might reintroduce the issue of juridic personality by questioning the certification.

Since the requirements of establishing juridic personality of the corporation are based solely on compliance with local law, the certifying authority should be from the country of execution. The certifying authority in the country of execution is most familiar with its local laws, and is the most appropriate person to certify whether a corporation complies with those laws. Translation of

215. *Id.*

216. *Mexican Sinclair Petroleum*, 26 *Semanario* at 4:2231.

217. *Id.*

218. *Id.*

219. *Id.*

220. Protocol on Uniformity, *supra* note 125, art. I.

221. *Id.* art. II.

local corporate by-laws, articles of incorporation, statutes, and other requirements for establishing the juridic personality of a corporation, would be unnecessary if certification of a corporation's juridic personality was done by an official of the country of execution.

Furthermore, the person appearing before the local certifying authority would not need to bring a translator to the certifying authority's office. Overall, this solution to the juridic personality problem would drastically reduce the current fees required to establish juridic personality in Mexico.²²²

2. *Costs of Creating a Valid Power of Attorney for Use in Mexico*

The costs associated with the creation of special powers of attorney, the special requirements for corporations, and the formalities for validating the power, are excessive. For example, according to a Mexican consular official in Sacramento, California, all powers of attorney that require a public deed must be presented to the consular official in Spanish.²²³ Some U.S. attorneys prepare Mexican powers of attorney in Spanish, thereby saving the cost of paying a translator.²²⁴ However, the average cost for preparing a special power of attorney for use in Mexico, approximately ten pages in length, exceeds U.S. \$1000.²²⁵

Furthermore, the person appearing before the consul must bring documents proving that the party before the notary has the authority and capacity to act on behalf of the corporation.²²⁶ These documents also must be translated into Spanish and brought before the Mexican consul.²²⁷ The Mexican consul must certify each of these documents separately at a cost of U.S. \$25 for each

222. See *infra* part V.B.2.

223. Interview with Christiana Alamilla, *supra* note 57. The consul will only certify powers of attorney drafted in English where a public deed is not necessary. *Id.*

224. Telephone Interview with Ricardo J. Diez, *supra* note 178.

225. *Id.*

226. *Id.*

227. Interview with Christiana Alamilla, *supra* note 57.

document.²²⁸ Therefore, where the party proves their capacity by producing the corporation's by-laws, the resolution of the board of directors, and the appropriate sections of law of the state of incorporation, the consular certification costs for these documents would be U.S. \$75.²²⁹

In addition, there are numerous costs associated with the legalization, authentication, and protocolization of the power of attorney. The consul charges an additional U.S. \$120 for these formalities.²³⁰ If the person appearing before the Mexican consul does not speak Spanish fluently, the Mexican consul requires that the party, at their own cost, bring an interpreter.²³¹

3. The Problem with Utilizing a General Power of Attorney as the Form for a NAFTA Uniform Power of Attorney

Because of the difficulty in creating a uniform NAFTA special power of attorney, development of a general power of attorney may be necessary. One of the major difficulties is drafting a power of attorney that permits the agent to act on behalf of the principal under a wide range of problems.²³² Failure to create a power of attorney which does not include all acts that the principal desires the agent to perform will reduce the effectiveness of a uniform NAFTA power of attorney.

Furthermore, institutions and individuals not accustomed to a general power of attorney may refuse to recognize such a document, and may narrowly interpret the powers given.²³³ Third parties might require a power of attorney which details every conceivable act that the agent may perform.²³⁴ Third parties may be apprehensive in accepting a general power of attorney because

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. LAW REVISION COMM'N, STATE OF N.Y., LEGIS. DOC. NO. 65, 676-91 (1946).

233. *Id.*

234. *Id.*

they fear that courts will not enforce contracts entered into by the agent unless the agent's authority to act is explicit.²³⁵

4. Theoretical Difficulties

Wide theoretical differences exist between common and civil-law systems of agency, thereby making a uniform power of attorney difficult to draft.²³⁶ Classic Roman law, and those following it (including French and Spanish law), experienced conceptual difficulties in developing agency principles.²³⁷ Germany, on the other hand, developed a complex theoretical structure of its agency law.²³⁸

According to German law, the *mandatum*, or contractual relationship between the principal and agent (the internal relationship), is distinct from the *procuratio*, or power (the internal relationship between the third party and the principal).²³⁹ This distinction is both logical and practical; the third party dealing with the agent does not need to inquire into the details of the legal relationship between the principal and the agent.²⁴⁰ Instead, the concern lies with the protection of third parties.²⁴¹ Making the agent's power of representation largely independent of the existence of a valid contract between the principal and agent simplifies the protection of third parties.²⁴²

Under the German system,²⁴³ or the so-called "abstract" nature of powers of attorney, the power of representation creates direct legal consequences between the principal and third party, irrespective of the legality of the relationship between the principal and agent.²⁴⁴ This abstract, or independent nature of the agent's

235. *Id.* at 677.

236. Hay et al., *supra* note 9, at 4-35.

237. *Id.* at 4-5.

238. *Id.*

239. *Id.*; SCHLESINGER, *supra* note 52, at 722-23.

240. SCHLESINGER, *supra* note 52, at 722-23.

241. *Id.*

242. *Id.*

243. *Id.* Many civil-law countries follow the German system. *Id.*

power, is necessary in the creation of a uniform power of attorney between Canada, Mexico, and the U.S.²⁴⁵ Importation of the abstract nature of the agent's power protects third parties who contract through an agent.²⁴⁶ Although there might be a legal defect in the contractual relationship between the principal and agent, the third party's contract remains legally valid.²⁴⁷

With the import of the abstract nature of the agent's power into a uniform power of attorney, contracts between the principal and agent, which ordinarily require form requirements, will give third parties rights as long as the external power is valid.²⁴⁸ These third party rights exist even if there are defects in the internal relationship.²⁴⁹ Therefore, if the countries adopt a uniform NAFTA power of attorney, third parties need only inquire into the validity of the external power. European conflict of laws codifications adopt this approach, and require the agent to act openly in the name of the principal in order to create a legal relationship between the principal and third party.²⁵⁰

5. The Inclusion of the Calvo Clause

In addition to the requirement of adoption of the abstract nature of powers of attorney, Mexico's law has some special public law constraints that might require the inclusion of certain clauses. One such required clause is the so-called "Calvo clause." The Calvo clause, which appears in Mexico's Constitution, requires that all foreigners who acquire ownership of land consider themselves as nationals with respect to the property.²⁵¹ Any foreigner who acquires such property agrees not to invoke the protection of a

245. Interview with Boris Kozolchyk, *supra* note 11.

246. SCHLESINGER, *supra* note 52, at 724-25.

247. *Id.*

248. *Id.*

249. *Id.*

250. Hay et al., *supra* note 9, at 5-6. Adoption of this approach extinguishes agency relationships on behalf of undisclosed principals. *Id.* Also, there would be no such thing as agency on behalf of an undisclosed principal. *Id.*

251. Gisbert H. Flanz & Louise Moreno, *Mexico, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 25 (Albert P. Blaustein & Gisbert H. Flanz eds. 1988).

foreign government.²⁵² If a foreigner violates this agreement, the property is forfeited.²⁵³ Mexico adopted this section in its constitution as recently as 1976.²⁵⁴ Moreover, when Mexico signed the Protocol on Uniformity, it expressed reservation and required that the *Calvo* clause apply.²⁵⁵ Although the applicability of the clause to transfers of land other than in fee simple absolute is debatable, the clause clearly applies to purchases of property in fee. Because of the importance of Mexico's *Calvo* clause, a uniform NAFTA power of attorney may need to include it.

VI. HELPFUL SOLUTIONS ON LEGALIZATION,
AUTHENTICATION, AND PROTOCOLIZATION FOR A UNIFIED
NAFTA POWER OF ATTORNEY

Any proposal to unify powers of attorney between Canada, Mexico, and the U.S. must address the public deed, chain-legalization, authentication, and protocolization requirements of civil-law countries such as Mexico.

A. *The Apostille: a Practical and Effective Solution to the Chain-Legalization Problem*

The drafters of the Legalization Convention,²⁵⁶ to which Canada and Mexico are not signatories, solved the chain-legalization problem for signatories of the Legalization Convention. Under the Legalization Convention, legalization is "the formality by which diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signed the document has acted, and where appropriate, the identity of the seal or stamp

252. *Id.*

253. *Id.*

254. *Id.* at 25 n.26.

255. U.S. DEP'T OF COMMERCE, *supra* note 109, at 333; Jueves 3 de Diciembre de 1953 Diario Oficial, Tomo CCI Núm. 27, 1-2.

256. Legalization Convention, *supra* note 100.

which it bears.”²⁵⁷ Since the Legalization Convention’s adoption at the Ninth Session of the Hague Conference on Private International Law in October of 1960, thirty-seven countries have become parties to the convention, thereby making it one of the most widely accepted international conventions on civil procedure.²⁵⁸

The Legalization Convention provides that the *apostille* (French for “certificate”) is the maximum requirement for legalization of foreign public documents.²⁵⁹ The *apostille* is fairly simple considering the complex legalization problem that it corrects.²⁶⁰ It is a piece of paper with ten entries attached to public documents.²⁶¹ A serial number requirement prevents the issuance of false *apostilles*, thereby demanding respect from courts as to the authenticity of the *apostille* and its contents.²⁶² Each of the issuing authorities must keep a register or card index of all certificates granted.²⁶³ A litigant who questions the legality of the *apostille* may ask the issuing authority for verification.²⁶⁴ The issuing authority checks the register or card index corresponding to the serial number on the *apostille*.²⁶⁵

If the legalization is to serve its evidentiary purpose of demonstrating that the form requirements comply with those

257. *Id.* art. 2.

258. U.S. DEP’T OF COMMERCE, *supra* note 109, at 334.

259. William C. Harvey, Comment, *The United States and the Hague Convention Abolishing the Requirements of Legalization for Foreign Public Documents*, 11 HARV. INT’L L.J. 476, 478-79 (1980). Although the Legalization Convention covers powers of attorney, it excludes certificates of origin and import-export licenses (which are exempted from legalization in many countries) as well as documents which may occasionally be used for commercial operations such as certificates issued by patent offices. *Id.* at 274-75.

260. *Id.* at 478-79. The required entries are the following: the country issuing the *apostille*, identification of the signature and seal of the person attesting to the document and the capacity which that person acted, the name of the person issuing the *apostille*, identification of the signature and seal of the person attesting to the document and the capacity in which that person acted, the name of the person issuing the *apostille*, the issuing person’s signature and seal, the date and place of issue and a serial number. *Id.* at 479; Legalization Convention, *supra* note 100, Annex (Model of the certificate).

261. Harvey, *supra* note 259, at 478-79.

262. *Id.* at 479.

263. Legalization Convention, *supra* note 100, art. 7.

264. *Id.*

265. *Id.*

required by the place of execution,²⁶⁶ there must be a close connection between the issuing authority and the certifying authority.²⁶⁷ With this in mind, the Legalization Convention required that an official of the country of execution, rather than the country of use, legalize the document.²⁶⁸

Each country which ratified the Legalization Convention designated authorities competent to issue the *apostille*.²⁶⁹ The drafters of the Legalization Convention desired that the number of legalizing authorities be limited in number and not arranged in multiple levels of certification.²⁷⁰ If multiple levels of certification were allowed, the chain-legalization problem would be reintroduced in a different form.²⁷¹

Although the Legalization Convention defines legalization narrowly, the new system is a definite improvement over the old.²⁷² The single page simplicity of the *apostille* form permits recognition at a glance in any country.²⁷³ In addition, the *apostille* provides an effective method of checking against the introduction of false documents.²⁷⁴ Since the document is legalized by authorities of the country of execution, following the rule of *locus regit actum*, greater weight can be given to the legalization regarding the form requirements of the local law.²⁷⁵

This practical and effective solution to the chain-legalization problem is a useful model for drafters developing a uniform power of attorney between Canada, the U.S., and Mexico.²⁷⁶ The

266. See *supra* notes 111-24 (discussing the rule of *locus regit actum*).

267. Harvey, *supra* note 259, at 488.

268. *Id.* at 478-79.

269. Legalization Convention, *supra* note 100.

270. Harvey, *supra* note 259, at 479-80.

271. *Id.* at 479-80.

272. *Id.* at 481-82.

273. *Id.*

274. *Id.*

275. *Id.*

276. See *supra* part IV.B.2. The authentication of public documents is the process by which a document issued by a local authority would have to be legalized by a series of higher agencies. Harvey, *supra* note 259, at 477. The *Rapporteur's* report emphasizes that the Legalization Convention does not refer to documents signed by persons acting in their private capacity but solely covers, for example, official certificates and official and notarial authentications of signatures. 1 RISTAU, *supra* note 99, at 273.

drafters of the Legalization Convention clearly recognized that the strict requirements of legalization were a nuisance to all countries, and the drafters promoted a simpler method.²⁷⁷

Thus, if Canada and Mexico were both signatories to the Legalization Convention, C would take the power of attorney to a Canadian notary for notarization. Then, C would take the powers of attorney to the Canadian *apostille* certifying authority for legalization. Once the Canadian authority attached the *apostille* to A and B's powers of attorney, no further evidence would be necessary to prove the capacity in which the person legalizing the document has acted or the identity of that person's seal or stamp if required.²⁷⁸ Although the costs of establishing such a system between Canada, Mexico, and the U.S. would be spread across fewer countries, thus making it less cost effective than the *apostille*, the practical effect of establishing such a system justifies its introduction to solve the legalization problem.

B. Simplifying Compliance with Mexico's Public Document, Authentication, and Protocolization Requirements

Although the use of the *apostille*, or a form with similar effect, would legalize the document, this would not encompass protocolization or authentication.²⁷⁹ After legalization, the power might still need to be authenticated because Mexico's definition and rationale for authentication falls outside of the Legalization Convention's narrow definition of legalization. Although the Mexican authentication requirement appears to be a partial duplication of what a common-law notary requests before notarizing a document, the previous discussion on the differences between common and civil-law notaries explains and justifies the requirement that a Mexican notary (or its equivalent such as the

277. Kurt H. Nadelmann, *The Hague Conference on Private International Law*, 9 AM. J. COMP. L. 583 (1960).

278. Legalization Convention, *supra* note 100, art. v.

279. See *id.* at 121 (Mexico's process of authentication and protocolization serves functions, such as determining the capacity of the parties and the legality of the documents, which are different from legalization).

Mexican consul) determines the law as well as the consent and capacity of the parties.²⁸⁰

Mexico's requirement of a public deed, requiring protocolization, must also be simplified.²⁸¹ Mexican notaries or consular officials only protocolize documents after examining the law and determining the consent and capacity of the parties.²⁸² Protocolization, without authentication, only proves the date of delivery of the document into the protocol.²⁸³

Due to the extreme differences between common and civil-law notaries, and the importance of public documents in civil-law countries, the procedure for protocolization and authentication should be done through consular agents of the country of use, unlike the *apostille*. Initially, the countries should give their consular agents the power to execute, protocolize, and authenticate public deeds, and extinguish the requirements for certification and authentication of the consular agent's entry of documents into the protocol.

If this were done, the procedure for notarizing, legalizing, protocolizing, and ratifying powers of attorney on behalf of the hypothetical Canadian corporation for use in Mexico would be as follows: The C would take (1) the uniform power of attorney drafted by the Committee, and already translated into English, French, and Spanish, to be notarized by a Canadian notary (notarization), (2) present it to Canada's *apostille* and juridic personality certifying authority (legalization), and (3) present the uniform power of attorney, with the attached *apostille*, to Mexico's consular officer located in Canada (authentication and ratification).²⁸⁴ Finally, the consular official would enter the power of attorney into the *protocolo* book without the need for further authentication by the Department of Foreign Affairs and certification by a notary of the country of use. The legality of the

280. See *supra* part II.A.

281. PEREZ, *supra* note 36, at 122.

282. *Id.*

283. *Id.*

284. This person would be empowered to authenticate and ratify the document, and would attach a certificate of authentication and ratification.

form of the document would already have been approved by the NAFTA parties, thereby abolishing the need for authentication and certification by other officials of the country of use.

C. The Need for a Treaty and the Special Requirements for Canada's Adoption of a Uniform NAFTA Power of Attorney

In light of the complexities of developing a uniform NAFTA power of attorney, and the solutions proposed, a treaty may be necessary. However, development of a uniform NAFTA power of attorney by treaty may be problematic in Canada. A decision by Canada's highest court of appeal held that legislation on commercial matters is within the domain of Canada's provinces rather than the federal government.²⁸⁵ Also, the Supreme Court of Canada and the Judicial Committee of the Privy Council have held that, although the federal authorities had the power to execute treaties, if a treaty dealt with matters within the legislative domain of the provinces, the provinces had the discretion not to adopt the treaty.²⁸⁶ Thus, if the Canadian courts would consider powers of attorney as legislation on commercial matters, the provinces would each have to adopt the uniform NAFTA power of attorney.

VII. CONCLUSION

In March 1992, the Governor of Arizona appointed Dr. Boris Kozolchyk as director of the Committee for Legal Implementation of NAFTA (CLIN). CLIN's successful development of a uniform NAFTA power of attorney between Canada, Mexico, and the United States will undoubtedly facilitate trade between the three countries. Without a change in the current process to obtain valid powers of attorney between the NAFTA countries, creation of powers of attorney for use between Canada, Mexico, and the U.S. will remain highly technical and expensive. Under current law, failures to meet the technical requirements of legalization,

285. David, *supra* note 12, at 206.

286. *Id.* at 208.

protocolization, authentication, and form requirements of civil-law public documents will continue to cause meritorious cases to be lost solely based on failure to meet these technicalities. Furthermore, the expense of creating such powers of attorney will inhibit trade.

CLIN's development of a uniform NAFTA power of attorney should be encouraged even though there are many practical difficulties associated with creating such a uniform power of attorney. The difficulties involved are all solvable. Allowing final certification of the juridic personality of corporations by the country of execution, will decrease some of the costs in creating a corporate power of attorney for use abroad. Furthermore, the development of a standard form for valid powers of attorney, acceptable by third parties, will decrease the drafting costs of creating special powers of attorney. Legalization problems can be overcome by incorporating the *apostille*. Finally, Mexico's authentication and protocolization requirements can be streamlined, while still accomplishing the same objectives, by allowing the consular agent in the country of use to perform these tasks.

Mark D. Becker

