

SIMPLE STEPS TO DRAWING UP A PAGARÉ THAT WILL BE ENFORCEABLE IN MEXICO

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INTRODUCTION

There is a well-known primary concern for companies and individuals each and every time they are about to extend credit to third parties, either through direct loans or through the sale of goods on open account credit terms. They want to secure their debt in a way that allows them for a fast and reliable relief should their debtors fail to comply with their obligations.

One way of effectively securing loans is through the use of promissory notes or “pagarés”, as they are known and recognized by law in Mexico and most Latin American countries. In Mexico, such device will allow for an executive proceeding in Court, which will result in a faster and less troublesome case when seeking collection.

Because a successful enforcement of a promissory note will highly depend on the note itself and the way it is executed, it will be essential to know the rules that come into play and regulate such process. This article will briefly explain therefore: 1) Mexican rules on conflict of laws that affect international promissory notes to be enforced in Mexico; 2) the basic laws and rules that govern promissory notes in Mexico; 3) the basic drafting of common used promissory notes in Mexico; and 4) important issues to consider before executing promissory notes to be enforced in Mexico.

MEXICAN RULES ON CONFLICT OF LAWS THAT AFFECT INTERNATIONAL PROMISSORY NOTES TO BE ENFORCED IN MEXICO.

A promissory note is affected by the laws and rules of those countries in which the note has contacts with based on several issues: the place where the note is issued, the place where the obligation is to be discharged (payment will be made), the domicile of the debtor, the governing law provided for in said note, etc.

That means that if a promissory note is issued in the USA and it is to be paid or enforced in Mexico or any other foreign country, chances are that some laws from the USA will come into play when seeking enforcement outside American jurisdiction.

Consequently, we need to address the importance of such rules so that we can better assess and resolve whether it is recommended or not to execute such promissory notes outside of Mexico, if eventually an enforcement action will be sought in Mexican territory.

Although general conflict of law rules are provided for under articles 12, 13, 14 and 15 of the *Mexican Federal Civil Code*, specific conflict of law rules are provided for promissory notes under the *General Law of Commercial Paper and Credit Transactions* (LCPCT), specifically, articles 252 through 258.

In general terms, article 253 provides that the general conditions for the validity of a promissory note issued overseas will be determined by the law of that place where the note is subscribed. However, if the note is to be paid in Mexico, such note will be deemed valid and enforceable if it contains the basic requirements provided for under Mexican Law (i.e. LCPCT).

Although this may sound reassuring for parties issuing notes overseas to be enforced in Mexico, there is a downside for choosing this option.

Article 252 of LCPCT provides that the legal capacity to issue any note overseas will be determined according to the law of such State where the note is issued. Furthermore, article 254 provides that if no governing law is chosen for any note, the rights and obligations that derived from it will be those governed by the law of the State where note is issued.

This means that foreign laws regarding legal capacity of individuals or corporations and rights and obligations that arise out of promissory notes will have to be pointed out and probed in a Mexican Court when seeking direct enforcement in Mexico. This only makes for a more troublesome, lengthier and costlier case, something you can avoid by accommodating your promissory notes to be subscribed in Mexico; at least when you are anticipating a future enforcement in Mexican territory.

REQUIREMENTS OF PAGARÉS ACCORDING TO MEXICAN LAW.

If you are anticipating that a collection attempt through legal action will be best pursued in Mexico, it will be very important to take into account the basic requirements for promissory notes as requested by Mexican Law. Some of these requirements will be assessed by Mexican Courts to resolve if the note is valid and enforceable. Other requirements will help the Court decide other issues such as proper venue and jurisdiction, governing law, statute of limitations or "*prescripción*", etc. It should be pointed out that credit instruments are a matter of federal law in Mexico, and they are all regulated by the LCPCT, regardless of the particular State or jurisdiction where the document is issued.

According to article 170 of the LCPCT, a promissory note that is compliant with Mexican Law must contain the following:

1. The express statement that the document is a pagaré, contained within the note itself. This is one essential requirement for the promissory note to be valid and enforceable. Take notice that Courts will look for the wording “pagaré”, and not promissory note.
2. The unconditional promise to pay a certain amount of money. This statement is also essential for validity of the document. This includes 1) the unconditional promise: “*I unconditionally promise to pay...*”, or in Spanish: “*pagaré incondicionalmente...*”; and 2) the amount that the note is worth. This amount can be either in foreign or national currency, but it has to be specific and determined. Although an interest rate can be established, a fixed principal amount must be clearly pointed out in the document.
3. The name of the company or individual to whom the payment is to be made. Needless to say, the name of the beneficiary contained within the note is also essential. The beneficiary can be either an individual or a corporation (national or foreign). A note made payable to “bearer” is not acceptable and will not be enforceable.
4. The time and place where the payment is to be made. This is not essential for the validity of the note. Still, such clause will determine the proper venue and jurisdiction to bring suit. This may be useful when the creditor has corporate offices and a legal department in one part of Mexico, and wishes to bring every suit there, regardless of the domicile of their Mexican debtors. If no specific place is pointed out, the place where the document was issued will be considered. If the date of payment is missing (date of maturity), it will be considered payable upon demand.
5. The time and place where the note is subscribed. A promissory note will be deemed null and void if either the time or place of issuance is missing. As pointed out previously, the place of issuance will be essential to determine the governing law of such promissory note. The time of issuance will help resolve if the note is being enforced within the Statute of Limitations or period (term) of “*prescripción*”.
6. The original signature of the issuer of the note. The signature is also essential for validity of the note. A faxed or copied promissory note will not have any legal effect in Mexico (at least not for an executive proceeding). The document will have to bear an original signature to be enforceable.

BASIC DRAFTING OF PROMISSORY NOTES TO BE ENFORCED IN MEXICO.

If you want to keep it simple and assure that you are drafting a promissory note that complies with Mexican Law, you should look no further than the requirements mentioned previously. You can also add many other clauses or features to customize the note according to your needs, including a fixed rate, late payment fees, collection fees, payment plan or scheduled of payments, collateral, etc. These however should be carefully drafted, and therefore will not be addressed by this article.

Other information that is also important and should be carefully drafted is the debtors name at the bottom of the note, right below his signature. It should be pointed out if the debtor is a company or an individual, and following that (if the debtor is a corporation) you should include the full name of the individual who is signing on behalf of the company. Finally, the address of the debtor should also be included with that reference.

The following is a promissory note that contains all of the basic conditions mentioned in the previous section, as well as the information pointed out in the previous paragraph. The note also contains a clause that provides for a late payment fee:

PAGARE

GOOD FOR \$10,000.00 US DOLLARS

By this pagaré, I acknowledge owing and WILL UNCONDITIONALLY PAY to the order of **CREDITOR, INC.**, in the City of Tijuana, Baja California, México, on the 17th of December, 2002, the amount of **\$10,000.00 dls.** (Ten thousand dollars 00/100, USCY), for value received. If payment is not made within the maturity date, I will additionally pay late charges at a rate of 3% (three percent) per month.

This pagaré is ISSUED at Mexicali, Baja California, México, on October 17th, 2002

ISSUER/DEBTOR

By DEBTOR, S.A. DE C.V.
Mr. Julio Méndez Huerta
ADDRESS: Calle Sinaloa #123, Col. Alameda
Mexicali, Baja California, México

PAGARE

BUENO POR \$10,000.00 DOLARES DE E.U.A.

Por el presente PAGARE reconozco deber y ME OBLIGO A PAGAR INCONDICIONALMENTE a la orden de **CREDITOR, INC.**, en la Ciudad de Tijuana, Baja California, México, el día 17 de diciembre del 2002, la cantidad de **\$10,000.00 dls.** (Diez mil dólares 00/100, moneda de los Estados Unidos de Norteamérica), valor recibido a mi entera satisfacción. De no verificarse el pago en la fecha de vencimiento, me obligo a pagar adicionalmente intereses moratorios a razón del 3% (tres por ciento) mensual.

Este pagaré se EXPIDE en Mexicali, Baja California, México, el día 17 de octubre del 2002

OTORGANTE/DEUDOR

Por DEBTOR, S.A. DE C.V.
Sr. Julio Méndez Huerta
DOMICILIO: Calle Sinaloa #123, Col. Alameda
Mexicali, Baja California, México

Although the example promissory note is presented in English and Spanish language, drafting notes in English will necessarily force a creditor to probe its accurate Spanish translation in Court (through an

expert translator) when seeking enforcement. This is something you can easily avoid by drafting your notes in plain Spanish, or accommodating an English/Spanish version in the same document.

FINAL CONSIDERATIONS BEFORE EXECUTING A PROMISSORY NOTE IN MEXICO.

The following are some important suggestions and words of advice to keep in mind upon execution of promissory notes, and upon filing suit when seeking enforcement. These will definitely help you reduce debtor's arguments and defenses through an executive proceeding.

1. When the issuer/debtor is a corporation, make sure that the individual signing the note has full powers to sign or issue credit instruments (*títulos de crédito*) on behalf of said corporation. This can be simply done by requesting a copy of his power of attorney (POA), which he must have. The POA should contain a specific clause that mentions this specific authority to sign or issue "*títulos de crédito*".
2. When the issuer/debtor is a corporation, make sure that the act of signing promissory notes or credit instruments is provided for under its corporate purpose. This can also be easily done by examining the company's corporate deed or articles of incorporation and corporate bylaws (*acta constitutiva*). If such corporate deed does not specifically provide the authority to issue "*títulos de crédito*" within the corporate purpose section (*objeto social*), the note will be deemed null and void.
3. Make sure that the signature is genuine and from the individual who is actually supposed to be signing the note. A copy of his identification with his signature or previous checks issued by him can help examine this.
4. When seeking enforcement of a promissory note, make sure that you file suit within three years of the date of maturity. The Statute of Limitations for the enforcement of promissory notes is three years in Mexico, regardless of where the note was signed.
5. A co-signer or "*aval*" is a great way to reinforce your guarantee of payment by the primary debtor. This is especially helpful when your debtor is a corporation, and you don't want to run the risk of encountering an undercapitalized company down the road, when seeking enforcement. The individual signing the note can personally commit towards the company's debt (jointly and severally) just by including a statement that says "*por aval*", and signing it below along with his full name printed (excluding the company's name).

A final reminder and suggestion is to keep your promissory note short and simple, only essentials should be included for your everyday transaction (not so if you are actually securing an important loan or financial transaction). If notes are used to secure everyday sales made on open account credit terms,

many companies will be reluctant to sign them if they find it difficult and time-consuming to read. In this case you want your promissory note to be just that, a “note”, not a sacramental contract.

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