

AVOIDING PITFALLS: ENFORCEMENT OF US JUDGMENTS IN MEXICO

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INTRODUCTION

A foreigner can't help but to ask the reasons why the Mexican legal system requires the compliance of so many formalities during proceedings, many times considered hurdles. This question takes special place when a US party plans to enforce a judgment in Mexico. Based on the Uniform Enforcement of Foreign Judgments Act —which most US states have adopted—, a party in the US needs only to ask a court clerk to complete a registration form and attach a certified copy of the judgment to have it filed in another district within the US, and then proceed to enforce it. In the case of a judgment from a federal court, it is not even necessary to give notice of such filing to the debtor. Mexico's enforcement proceedings are a totally different story.

The process involved for the recognition and enforcement of a foreign judgment in Mexico — called "*homologación*", is quite a rigorous one. It is a process in which both local and federal rules of procedure come into play, and one that goes hand in hand with another procedure on letters rogatory. This all happens within a *Civil Law* System that relies heavily on strict and full compliance of all formalities provided under all statutes. It will be wise then, to consider all requirements and formalities for *homologación* even before commencing proceedings, to make sure that such requirements and formalities can and will be fully and strictly complied with throughout this process.

This article will explain therefore, the process of *homologación* for judgments of foreign courts, pointing out all requirements and formalities provided under Mexico's local and federal laws, and making important suggestions to take into consideration when planning to initiate proceedings. This article will not address however, and considerations herein do not apply to, arbitral awards of any nature.

LAWS REGULATING THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

There are two main International Treaties that govern the recognition and enforcement of foreign judgments in the American region:

- 1) The Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; and
- 2) The La Paz Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments.

Although these Conventions were adopted by Mexico, its provisions come only into play when the judgment to be enforced comes from a country that is also part to such Treaties. This means that the enforcement of judgments from Canada, the United States, or any other country around the Globe outside Latin America, are not going to be bound by such rules but instead, it will be Mexico's procedure laws which will set the standards for recognition.

With this scenario in mind, we should first consider the local laws of civil procedure of the particular State where we are seeking enforcement. Most of the local laws however (including laws from Baja California, Nuevo León, Jalisco, Distrito Federal, etc.), besides giving a brief regulation of its own for recognition and enforcement, provide that the process of foreign letters rogatory —by which a petition for enforcement is requested, has to conform with the rules set forth in the Federal Code of Civil Procedure (FCCP). This Code requests at the same time —under article 554, that every letter rogatory that implies forced execution upon property or persons shall be subject to its regulations on *homologación*. Because the FCCP will most likely require the same conditions for *homologación* as every State in Mexico (it happens so in Baja California), we shall refer on this article to the Federal Code only. (It is recommended to seek further legal advice if looking to execute in another State).

CONDITIONS FOR *HOMOLOGACIÓN* ACCORDING TO THE FCCP

According to article 571 of FCCP, the recognition and enforcement of a foreign judgment will take place only when the following conditions are met:

I. All formalities for letters rogatory are satisfied.

As we mentioned previously, the execution of a foreign judgment has to be formally requested by the court that has rendered said judgment, and such request has to take place by means of a letter rogatory. Although there is an Inter-American Convention that governs the use of letters rogatory in commercial and civil proceedings, this Convention does not apply to acts involving measures of compulsion (execution). This is also the case with the Hague Convention on Gathering of Evidence

Abroad. Nevertheless, we should look into both of these Treaties to come up with general guidelines for letters rogatory such as: 1) issuing authority and court or authority whose execution is requested from; 2) identity and domicile of parties involved, including place where defendant can receive notice; 3) nature, purpose and extent of the request; 4) brief statement of facts that justifies the proceedings; 5) all judicial acts requested throughout proceedings; etc.

There are also other several —more important formalities that should be strictly complied with:

6) Letter rogatory should be certified or authenticated. This generally means having all documents originally signed by the issuing Judge and Clerk, and certifying or attesting that said documents are a true and correct copy from its originals;

7) Documents must be legalized. The process of legalization is simply done by obtaining another document called “*Apostille*”, which will be attached to the authenticated copy in question. This document is obtained from the State Department or Secretary of State, and its purpose is to give a public document full binding effects abroad. (According to a 1961 Hague Convention);

8) Documents must be translated. According to article 553 of the FCCP, letters rogatory and all documents pertaining to them should be translated into Spanish language. It is highly recommended that such translation work is done by a certified translator —appointed by the State Supreme Court of the State where enforcement is intended, and that such work is monitored by plaintiff’s counsel in Mexico);

9) Request must include a statement that helps satisfy the comity condition. According to article 571 of the FCCP, Mexican courts will not enforce a foreign judgment when it is proven that the issuing court would not enforce a foreign judgment under similar circumstances. It is highly recommended that all letters rogatory include a short statement acknowledging this situation, that is, that “under equal circumstances the issuing judge would recognize and enforce a judgment coming from the requested court”;

10) Request must include a statement that helps prove that the judgment is final. As we will look up ahead, the FCCP requires that the judgment to be enforced is considered final and that there is no legal recourse pending or available to the defendant (force of *res judicata*). Therefore, if there is no possibility of obtaining a separate statement or resolution that proves this situation, a statement of such kind could and should be contained in the letter rogatory.

11) Full and express powers are to be given to the requested court. Although it is considered that the executing court may have full powers for execution, the letter rogatory should also include a statement by which the requesting court “grants full powers to the requested court for execution of the judgment”. Equal important to point out, is to include specific powers, INCLUDING BUT NOT LIMITED TO: a) power to seize debtor’s property; b) to issue attachment or garnishment orders; c) to issue and make use of preventive or security measures; d) to impose fines; e) to decree the temporary arrest of any person rebel to comply with the court order; f) to order the entering into private property

upon the use of public force; g) to carry out judicial auctions or bid sales for execution of seized property; to assigned moneys and funds out to the plaintiff, etc.

12) Counsel in Mexico should be appointed and an address must be designated. The letter rogatory must include a statement appointing an attorney to act on behalf of plaintiff, and an address must be provided under the requested court's jurisdiction. You should be careful however, not to rely just on appointing an attorney as plaintiff's counsel but instead, to provide him with a formal power of attorney. This is suggested since the right to point out goods to be seized during execution, is a right specially conferred to the plaintiff himself or his legal representative, and NOT to his *Counsel of Record*. Nevertheless, an express statement in the letter rogatory should include an authorization according to article 577 of the FCCP, for plaintiff's counsel to request partial executions, should an execution of a judgment not be granted in its entirety.

II. Judgment is not the result of an *In Rem* right.

According to Barron's Law Dictionary, actions *In Rem* are "those which seek not to impose personal liability but rather to affect the interests of persons in a specific thing (or *res*)... Typical modern examples are actions for partition of, or for foreclosure of a lien upon, or to quiet title to, real estate".

III. The court rendering the judgment had proper jurisdiction to try the matter and to pass judgment on it.

According to the FCCP, the judge or court that rendered the judgment must have had proper jurisdiction to try the case and to decide upon it. Such jurisdiction should have been foreseen in accordance to the rules of international law, which in turn must be compatible with the rules provided under national laws. It will be important then, to consider the following rules on jurisdiction according to the FCCP:

1) Forum selection clauses will be valid and enforceable if there is no actual obstacle or denial of justice, considering the circumstances involved and its relations among parties (article 566, FCCP);

2) Forum selection clauses will not be valid when the right to select a forum works exclusively in favor of one of the parties (article 567, FCCP);

3) If there is no forum selection clause —according to FCCP's article 24, territorial jurisdiction is conferred to the court of:

- a) The place designated by the defendant to be notified by court for discharge of obligations;
- b) The place where the fulfillment of the obligation was agreed to; and
- c) The address or place of residence of the defendant.

IV. Service of process has been completed upon defendant in due legal form.

According to article 572 of the FCCP, a request for recognition and enforcement of a judgment has to be supported by documents that prove that proper service of process was done. Accordingly, such notice should have provided the defendant with the opportunity to fully defend himself under due process of law rules.

Unlike the Montevideo Inter-American Convention, the FCCP does not require that such service of process meets any special form provided under Mexican law, nor that the service of process is substantially equivalent to that accepted by the law of the State where the judgment is to take effect.

V. The judgment must be final and have the force of *res judicata*.

We have already made the relevant comments to this requirement during review of the formalities provided for letters rogatory. It is important to keep in mind, that article 572 of the FCCP requires proof that the judgment is *res judicata*. Failure to provide this either in the letter rogatory or in separate form will automatically deny enforcement.

VI. There must be no case tried by a Mexican court that is a result of the same legal actions.

Precautions should be taken just to make sure that there is no case filed or pending by a Mexican court regarding the same legal actions. The FCCP provides however, that if there IS a case, such proceedings must already account for legal notice upon defendant —plaintiff during enforcement— (*prevención*), or that at least the letter rogatory for service of process has already been carried out and filed with the Foreign Affairs Ministry in Mexico (*Secretaría de Relaciones Exteriores*). (There is no need for the plaintiff to provide any evidence to the contrary of this provision).

VII. The judgment must not be contrary to Mexican public policy (*ordre public*).

This means that the legal claim that originated the judgment, the legal issues involved, the judgment itself, its ruling, or any of the restitutions, indemnities or relief granted, must not contradict public policy principals provided under Mexican law.

Usually, courts will consider that indemnities or any relief that is not recognized under the laws of Mexico will contradict public policy and therefore, a judgment of such kind will not be enforceable in court. This could be the case of awards granted out of tort actions, which are restricted in Mexico to a

maximum amount cap according to the Federal Labor Code. Another possible situation could be the case of awards for punitive damages, which are not recognized at all under Mexican Law.

Nevertheless, article 577 provides an opportunity to plaintiff to request the partial recognition and enforcement should a judgment not be considered valid and enforceable in its entirety. (Like we said before, full powers should be granted to *counsel of record* in Mexico to be able to file this petition. Again, this can be accomplished with the letter rogatory or with a separate power of attorney)

It is also considered against public policy, any proceeding that has not met the basic legal standards provided under our Mexican Constitution for *due process of law*. These basic legal standards comprise the proper service of process, the opportunity to defend yourself in court, to make allegations and to introduce evidence in court. The absence of any of these formalities during the initial proceedings that resulted in the judgment to be enforced will invalidate the judgment itself, either at the process of *homologación*, or later on through a Constitutional Injunction Proceeding (*Amparo*).

VIII. The judgment must fulfill all the formal requirements necessary to be deemed authentic.

Authentication of a foreign judgment involves a two-step process: 1) certification by court officials to be a true and correct copy from its original file; and 2) obtaining an *apostille* from the proper authorities such as the State Department, Secretary of State, etc. (This requirements have been already explained above in analyzing the letter rogatory)

PROCEDURE FOR *HOMOLOGACION* ACCORDING TO THE FCCP

The process for *homologación* can be considered a summary proceeding. This process provided for under article 574, requests that the parties involved are given a nine-day period —after filing documents for enforcement— to defend themselves either through allegations or requesting the introduction of evidence in court. After the court has decided which evidence proposals are admitted, it will set up a hearing date for reproduction. Once the evidence is fully rendered, the court will be ready to issue a judgment either granting the enforcement or denying it. An appeal process is also available to both parties, for which a five-day period is granted for filing. (NOTE: The Letter Rogatory can be carried out and filed directly by the parties. It is not necessary to do it through a public official or public channel)

An important step to point out during the process of *homologación* is the service of process that the requested court must execute upon defendant. This is a totally different notice, independent from

the one practiced by the court of origin, and it requires being personal in nature, with strict compliance of Mexican rules of civil procedure. For the notice to be considered “personal”, it has to be delivered either directly to the defendant himself, or delivered at his main place of residence. In the case of corporations, it has to be done where the main management office is located.

For this reason, if it is not possible to personally find the defendant in the same place where the execution is sought and there is no possibility to serve him directly, it is highly recommended that the necessary steps are taken to make sure defendant gets served in his main place of residence, probably in the country where the judgment comes from.

Under this scenario, the executing Judge can and should issue another letter rogatory to the court of origin to undertake this new service of process. Although this may seem very redundant and time consuming, it is highly recommended to see to it that it gets done. This may save you the frustrating experience of having to initiate proceedings all over because of failure to comply with *due process of law* rules provided for under the Mexican Constitution.

Finally, special consideration should be taken towards the State Prosecutor (*Ministerio Público*), who is an important part to these proceedings and should be equally summoned and served at the initial stage of enforcement, upon filing the request.

FINAL CONSIDERATIONS

Although the process for *homologación* may seem very complex and troublesome, it can be much more simpler if we summarize this briefing into four easy steps to fulfill all requirements:

Firstly: Check if the judgment meets the conditions to be enforceable in Mexico: 1) it is not a result of an *In Rem* right; 2) court of origin had proper jurisdiction; 3) the judgment is *res judicata*; 4) no case is pending in Mexico involving same legal action; and 5) judgment is not contrary to public policy in México.

Secondly: Obtain a letter rogatory that meets all suggestions made earlier: 1) general guidelines and information; 2) statement from court to satisfy comity condition; 3) statement proving that judgment is *res judicata*; 4) statement giving full and specific powers to executing court; and 5) statement appointing counsel and specifying address in Mexico.

Thirdly: Get all documents needed ready: 1) letter rogatory; 2) judgment; 3) copy proving proper service of process; 4) copy proving that judgment is *res judicata* (if it is not included in the letter rogatory); and 5) separate power of attorney for counsel in Mexico.

Finally: 1) Authenticate all documents (certification); 2) legalize all certifications (*Apostille*); 3) translate everything into Spanish; and 4) file in proper court in Mexico.

A final reminder: it is highly recommended to follow these guidelines closely for the enforcement of foreign judgments. Failure to do this will not only hurt you in a contested proceeding, but could hurt as well on default recognitions. It is crucial then —not to give opposing counsel any arguments that could slow or deny a legal and justified execution.

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