Debt Collection in Mexico
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I. Introduction

This article discusses some of the legal issues relating to commercial debt collection in Mexico. Included are some legal strategies behind the interplay of international laws affecting both the creditor and debtor, and the impact of international treaties related to international contracting and litigation.

II. Issues

A. Fee Structure

While contingency fee mandates are common in the United States, local bar association rules in many Latin American countries may prohibit contingent fee arrangements. However, there is no legal obligation in Mexico for attorneys to belong or be admitted to a bar association in order to practice law: The successful conclusion of a law school program in Mexico is enough. Thus, Mexican lawyers are not necessarily bound to a Code of Ethics for the practice of law, including arrangement of fees. Typically, each one of the states that comprise Mexico will offer some regulation with regard to legal fees, but these will typically apply when there is a dispute as to what amount the attorney is entitled, and for purposes of obtaining a court award for attorney fees against a losing party. These laws, however, do not restrict fee arrangements between professionals and their clients, who are free to agree on any detail or amount, subject only to the general regulations and limitations imposed by the law of contract, such as the absence of duress, error, bad faith, arrangements contrary to public policy, etc.

Because of this lack of limitation, attorneys and clients are free to choose any kind of fee arrangement that best accommodates their firm structure or the clients’ needs. There is no “usual” practice. In Mexico you can find all sorts of arrangements, from contingency to hourly and fixed fees. Contingency fees for collection cases are very common, and the rate will usually range anywhere from five percent to thirty-five percent, depending on many factors such as dollar amount of matter at hand, nature of claim and risks involved based on supporting documents, and the collectability estimate that is based on the debtor’s legal and financial situation. Hourly fee arrangements, made more prevalent due to the influence of the large US Law firms that have opened in Mexico, also vary substantially. Some firms will have a variation of their hourly schedules ranging from US$100 to US$400, depending on several factors, such as involvement of partners and associates, size and reputation of firms, etc.

The last type of arrangement that is common is based on a fixed fee that is paid in stages. Many attorneys (usually, although not exclusively, small firms or solo practitioners) use this type of arrangement to handle the case throughout the stages of litigation, usually in the form of a percentage of the total dollar amount of the claim. Under this arrangement it is common to see requests for an initial retainer or advance of fees prior to or at the time of filing of the complaint. It is also common for attorneys to request an advance for costs (for example, translations, certifications, etc.), which may be substantial and must be considered by counsel representing foreign clients.

B. Powers of Attorney

Companies that intend to pursue legal actions in Mexico must usually appoint a legal representative through a formal power of attorney to act on its behalf before the courts. An exception to this rule would be in situations where foreign creditor companies have properly assigned such credit rights to an individual who is to act before the courts and exercise rights in its own right. Absent such an assignment, a formal power of attorney will be needed. Such powers of attorney must be carefully drafted, and must also conform to either one of the following international treaties:

- The Washington Protocol on the Uniformity of Powers of Attorney Which are to be Utilized Abroad of 1940.
- The Panama Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad of 1975.

Both of these treaties provide for the minimum of legal requirements that will have to be satisfied in order to have full effect in Mexico. Some of the requirements include the following:

- Certification and attest by a Notary Public. A Notary Public must attest that the company granting the power of attorney was duly formed and is legally existing and that the individual acting on behalf of the company has capacity and authority to delegate special and general powers of attorney, etc.
- Purpose and extent of the power of attorney. The purpose and limitations of the power of attorney must be established in precise terms, e.g., for lawsuits and collections, to buy and sell goods, to manage the company’s business, etc.
- Language. The power of attorney may be granted in a foreign language, but it must be submitted with a Spanish translation.
- Authentication of power of attorney. The Notary Public’s signature and certification must be authen-
ticated for it to be effective in Mexico: This can be by way of an Apostille or by consular legalization, depending on the location of the grantor of the power of attorney.

- **Filing.** Although not mandatory, it is recommended that powers of attorney be filed in the Public Registry for Commerce in such city or state office where the power of attorney is to be used. Although the Supreme Court of Mexico has already ruled that this is not a mandatory requirement, the filing nevertheless will avoid challenges by defendants as well as further delays in the courts while ruling on them.

These are just some of the requirements provided under the treaties. In Mexico, the issue of capacity and legal representation is examined ex officio and sua sponte by the courts. Therefore, securing and preparing a valid power of attorney from clients to represent foreign companies in Mexican courts, you should seek further legal advice from a Mexican attorney to make sure that all requirements are met and that the risks of a challenge are mitigated as much as possible.

**C. Arbitration**

Any discussion of international debt collection should consider the effectiveness or even the desirability of an arbitration clause.

Mexico has been a party to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards since 1971. In 1993 Mexico amended its Commercial Code substantially to incorporate the 1985 UNCITRAL Model Law on International Commercial Arbitration (“Model Law”). In 2011, the Mexican congress passed legislation to amend the Commercial Code, to reflect some of the 2006 changes to the Model Law. These last changes sought to bring Mexico up to date with current international trends and eliminate the risks associated with the enforcement of arbitration clauses and arbitral awards. The 2011 changes touch on key areas such as: (i) the enforceability of the arbitration clause and, thus, settling the Compétence-Compétence principle; (ii) identification of specific judicial proceedings for enforcement of arbitral awards, as well as for resolution and handling of other important issues such as nullity actions, challenge of venue, appointment of arbitrators, court assistance for the taking of evidence, etc.; and (iii) state court recognition of interim measures issued by the arbitration tribunal.

The first issue regarding Compétence-Compétence has now been properly addressed under the Commercial Code to settle once and for all an issue that was recurring in litigation, which the Supreme Court had previously left to the judicial courts. Today, the Commercial Code overrides that principle and provides that the arbitration tribunal will be the one with jurisdiction to hear nullity actions or challenges against the arbitration clause or to the agreement thereof. This is a big step in achieving certainty and in support of arbitration.

The last two issues, regarding identification of judicial proceedings and recognition of interim measures, were grey areas within Mexican law, and allowed for delaying tactics and further litigation because of uncertainty. Proper proceedings have now been identified to address all these many challenges and remedies, which make for a more predictable process, both of arbitration and of enforcement of arbitral awards through the state courts.

Without a doubt, the 2011 amendments have made arbitration in Mexico -- at least from a theoretical standpoint -- a much more predictable and reliable form of dispute resolution. This is an option that should merit serious discussion in planning or evaluating prosecution of legal actions abroad through the courts or through arbitration, when the potential of enforcing such awards in Mexico is real.

**D. Jurisdiction and Choice of Law**

Often in international commercial claims, one sees clauses, either in contracts or in credit applications, dealing with “applicable law” and “choice of jurisdiction”. These are two distinct items with distinctly different legal meanings.

Historically, Mexican courts have resolved problems of choice of law and choice of jurisdiction in inconsistent ways. This is particularly so in the order of how these issues are addressed, which has significant consequences. The trend -- and probably the best course of action -- is to first resolve the question of jurisdiction and leave the issue of choice of law second.

Following Mexico’s adoption of the 1979 Inter-American Convention on Proof of and Information on Foreign Law in 1983 (“Convention on Foreign Law”) and the 1979 Inter-American Convention on General Rules of Private International Law in 1984 (the “Montevideo Convention”), key amendments were made to Mexico’s Federal Civil Code in 1988 to introduce new conflict of law rules that explicitly authorize a Mexican court to apply foreign law. Prior to 1988, Mexico had followed a heavy territorial or local policy approach, where foreign law was rarely considered -- as was evidenced by the lack of adoption in the Code of a method for interpreting and incorporating foreign law. Based on this policy, choice of law clauses were at times interpreted as jurisdiction clauses, and jurisdiction and venue were subject to choice of applicable law rules.

In other words, courts would usually assess choice of applicable law first, and only if those rules pointed to Mexican law would they assert and confirm jurisdiction for adjudication in the specific matter at hand, based on Mexican laws of procedure. Under that view, courts could
find it difficult to assert jurisdiction over a matter with a choice of law clause that pointed to foreign law.

Although the amendments of 1988 were intended to change the system to make Mexican courts receptive to foreign law, some old practices still persist. Thus some courts are still hesitant to follow the modern trend, and instead choose first to solve choice of applicable law, leaving the issue of jurisdiction to be decided based on their prior finding. Moreover, many problems of insufficient court infrastructure, constrained budgets, and overwhelming workload in most jurisdictions make courts more friendly and open to challenges on jurisdiction based on these and other related grounds.

This historical introduction is important in showing us how some courts might react to these issues and in allowing us to come up with the best strategy beforehand, in connection with forum shopping. The lesson here is that jurisdiction and governing law clauses in international contracts that are to be enforced in Mexico are important, and clarity as well as consideration for Mexican law will always be key. With this in mind, we now turn to some drafting suggestions for enforceable clauses.

In regard to choice of law clauses, the 1994 Inter-American Convention on the Law Applicable to International Contracts (the “Mexico Convention”) can provide some insight as to the way in which these clauses will be construed by the courts. The problem with this Convention thus far is that only five countries are signatories (including Brazil, Bolivia, and Uruguay), and only two of them have ratified (Venezuela and Mexico). Although the scope of applicability is defined and limited to States that are parties to the Convention, an argument may be made in contracts that have points of contact or close ties with other countries that are not parties to the Convention (for instance, a contract that has close ties with Mexico and the USA, which is not a party to the Convention). While this argument could sound risky, the Mexico Convention can still provide clear guidelines for the interpretation of internal choice of law rules and for the policy that Mexico is following on this matter. Based on this, it could still be argued that any clause that is consistent with the Mexico Convention does not constitute a threat against public policy, and therefore, should be enforced.

Before moving to jurisdiction clauses, it is important to point out that the Mexico Convention has also proved helpful in making a clear distinction between jurisdiction and choice of law issues, which will eventually help litigants with the conflict of law issues discussed previously. This comes from Article 7, which provides in the last paragraph that the “selection of a certain forum by the parties does not necessarily entail selection of the applicable law”. Although it does not strictly follow from this provision that choice of law does not necessarily entail selection of jurisdiction, in an important way it does give clarity to the courts by distinguishing two different issues of conflict of law that at least merit different discussions and different reasoning in reaching a fair and correct solution to each problem.

Finally, in regard to jurisdiction clauses, we can also use the Hague Convention on Choice of Courts Agreements (“Convention on Choice of Courts”) in helping us draft a better clause by providing insight into how the courts might react to these clauses or agreements. Mexico signed the Convention in September 2007, but it has not become effective because it has not been ratified. The EU and the USA also became parties (since early 2009), but ratification is still pending. As discussed in regard to the Mexico Convention, even if the Convention on Choice of Courts is still not binding over current matters, it will prove helpful in showing us what the policy is in Mexico regarding these issues. Any agreement that includes a jurisdiction clause consistent with the Convention will at least allow us to extend an argument that such a clause is to public policy.

In general, the Convention on Choice of Courts applies in international settings to “exclusive” choice of courts agreements in civil and commercial matters, reinforcing and confirming the jurisdiction of chosen courts, as long as the following conditions are met: (i) it is an exclusive choice (excluding jurisdiction for all other courts); (ii) the agreement is in writing; and (iii) the agreement is not illegal, pursuant to the law of the jurisdiction chosen. While the Convention only addresses the law from the jurisdiction of the chosen court (for purposes of determining the validity of the agreement), in scenarios where enforcement of a judgment will eventually be sought in Mexico, it would be wise to consider a couple of issues that are of concern under Mexican law.

- **What constitutes an express and voluntary choosing of jurisdiction?** In matters that are commercial in nature, and thus within the scope of the Commercial Code, Article 1093 provides that an express submission to the jurisdiction of a certain court will be recognized as long as the affected parties (i) clearly and conclusively renounce any other jurisdiction and venue afforded by law; and (ii) for purposes of future controversies appoint as courts with jurisdiction any of those relating to (x) the domiciles of any of the parties, (y) the place where the obligations are to be performed, or (z) the place where the thing is located (for actions in rem). In considering the adoption of a clause that gives exclusive jurisdiction to U.S. courts in a matter that has ties with Mexico, it is wise to make sure that the jurisdiction clause is clearly stated and that the parties expressly “renounce” the jurisdiction of the Mexican courts. A weak clause might allow the other party to move first and choose a state in Mexico as the proper forum, should the conditions under Article 1093 be met.
• Are optional choice-of-courts clauses valid in Mexico? Optional choice-of-courts clauses that operate exclusively to the benefit of one of the parties are deemed invalid, pursuant to Article 567 of the Federal Civil Procedure Code. These would be the type of clauses that give exclusive option to choose jurisdiction (among several stated forums) or arbitration to a specified and predetermined party to the transaction, such as the creditor, the seller, Company “X”, etc. To avoid any such conflict it would be wise either to give any such option to both parties (“any party acting as plaintiff”), or to avoid the optional clause entirely. It is hard, but sometimes we have to recognize that we can’t have the best of both worlds.

E. Statute of Limitations

A key issue in pursuing international commercial claims is what is the applicable statute of limitations. While the jurisdiction of the debtor is a critical consideration, what about rights created by the contract entered into in another jurisdiction where the time period may be longer and in favor of the creditor?

Since 1988, Mexico is a party to both United Nations Conventions on Contracts for the International Sale of Goods (“CISG”) and Limitation Period in the International Sale of Goods (“Convention on Limitation”). Thus, in commercial transactions where the parties are sitting in different countries that are signatories to the CISG and to the related Convention on Limitation, the statute of limitations will generally be four years. In cases where these treaties do not apply and where Mexican law is the clear choice of applicable law, either because all parties are located in Mexico, because the parties agreed to such choice of law, or because there is no controversy to that effect in general, then the law applicable to address prescription (limitation) is the Commercial Code (for transactions that are commercial in nature) and the Civil Codes (for transactions outside the scope of the Commercial Code). In general, the period of limitation in most situations is ten years, with some exceptions that reduce that period -- in specific settings -- to five years and two years, the most important of these settings being torts, where a two-year limitation period is provided.

But the challenge is in situations where the CISG or the Convention on Limitation does not apply and the underlying transaction or event has points of contact or close ties with more than one country (including Mexico). Here, the matter turns into a conflict of law issue, and because prescription (limitation period) is considered in Mexico a matter of substantive law, as opposed to being a matter of procedural law (as in other countries generally from the common law tradition), then the matter must be settled according to the rules on choice of law that apply to the underlying transaction/event. In controversies where Mexican law on limitation is confronted with that of another jurisdiction where limitation is considered a matter of procedural law, Mexican law should prevail and the general or exceptional limitation periods pointed out above would apply. But in situations where the conflicting jurisdictions all treat limitation as a matter of substantive law, then a solution is not clear beforehand and we would have to refer to Mexican rules on conflict of law to solve any matter at hand, either to the Mexico Convention pointed out before, should the controversy arise out of a contractual obligation, or to other rules from the (Federal) Civil Code or from the 1979 Inter-American Convention on General Rules of Private International Law (the “Montevideo Convention”), should the origin of the controversy not be contractual. (For more information on conflict of law please refer to our discussion on choice of law and jurisdiction clauses, as well as forum shopping).

F. Damages

Assuming that the claim goes forward in a legal proceeding, what amounts can be claimed as damages? Issues such as attorney’s fees, administration and collection charges, and, in some jurisdictions, the items of interest and court costs should be considered.

Mexico’s legal system follows a slightly similar pattern than the one in the USA in terms of attorney’s fees and court costs (hereinafter referred jointly as “costs and fees”). Just like the “American Rule”, the rule in Mexico is that each party is responsible for its attorney’s fees, but there are several exceptions to the general rule, where the losing party will pay the winner not just attorney’s fees but also court costs and general expenses of the litigation. In commercial litigation, a Mexican court will usually award such costs and fees to the party who has litigated in good faith, which may be in cases where false evidence is offered and introduced, or when a party fails to produce any evidence whatsoever to support its defenses or claims. Costs and fees are also awarded to a winning party in an executive type of proceeding. In all other cases, the winning party is awarded costs and fees when he wins the case in first instance and the judgment is appealed and confirmed in all parts. (A further note on attorneys’ fees is in regard to regulation, that is, how much can parties be awarded. This was discussed initially under Part II.A “Fee Structure”. Please refer to that section for additional information).

In terms of interest, Mexican law allows parties to agree on whatever percentage is in their best interests, without any statutory restriction other that being moderately fair and not so disproportionate that it could be presumed that it was a result of one of the parties being taken advantage of because of urgent necessity, inexperience, or ignorance. Parties can agree to and ultimately demand, simultaneously, a general or fixed interest fee (finance charges), as well as a late interest fee (penalty charges). If parties do not agree to finance charges beforehand, it will be deemed that the loan or credit is free of charge and they will not be allowed to claim any finance charges as damages.
However, when parties don’t agree to late interest beforehand, they are allowed to claim them as damages during litigation, but these will be limited to the statutory (legal) late interest fee. The legal late interest for transactions that are commercial in nature is six percent per year. For all other transactions the legal late interest will depend on the Civil Code of each state, ranging usually from six to nine percent per year.

Mexican law -- in both state and federal jurisdictions -- recognizes actual as well as consequential damages in most settings (torts, contracts, etc.), and will award them as long as they are properly claimed in the initial brief of complaint. These damages can be proved during the proceedings (before trial), or after judgment has been rendered with a damages award. Penalty clauses in contracts are also recognized under Mexican law, but their nature is compensatory (such as liquidated damages clauses), that is, to compensate for any actual and/or consequential damages rather than to punish. These clauses will be recognized and awarded as long as they do not surpass the amount provided as the main obligation in the contract. Finally, punitive damages are not recognized or provided under Mexican law and will not be awarded. Because of the compensatory nature of damages in the Mexican legal system, it is doubtful that a Mexican court will recognize and enforce a foreign judgment that includes an award for punitive damages. It might homologate the judgment and enforce it partially, setting aside the part relating to punitive damages. This, however, is not set in stone, and a plaintiff might make an argument for enforcement that defeats that of the defendant.

It is important to keep in mind that Mexico is a party to the CISG. Thus, under the CISG, Mexican courts will recognize all the remedies for buyers and sellers under articles 45 and 61, including damages pursuant to Articles 74 through 77, and interest pursuant to Article 78. This applies, of course, to sales transactions that are “international” in nature, where the parties have their domiciles in different countries that are parties to the CISG.

G. Guarantees

Personal guarantees allow creditors to extend credit. However, the question is whether such guarantees are enforceable -- no matter how well drafted. Is it necessary that it be a separate document, or can a guarantee be included in a commercial credit application? Are there formalities, such as authentification, that might be necessary to give it effect?

In drafting a personal guarantee that is to be enforced in Mexico, special attention should be given to the choice of law that is to govern such an agreement. If the guarantee is to be included in the credit application (which is valid and acceptable), a creditor will want to make sure that the governing law that is to apply to the transaction is Mexican law. If the transaction takes place in Mexico and the effects are limited to within Mexican territory, Mexican law will automatically govern based on Mexican conflict of law rules, unless a valid choice of law clause provides differently. Under this scenario, Mexican law does not require any kind of formality to be met in order for the guarantee to be valid and have full binding effect upon the parties (not even that the guarantee be made in writing). Nevertheless, a few suggestions are in order.

Even when Mexican law does not require for the personal guarantee to be made in writing, for practical reasons and in anticipation of litigation, we cannot stress enough that the agreement should be in writing. The same goes for signature or ratification before a Notary Public. This is not required by law, but it is heavily recommended for the sake of avoiding time-consuming and risk-elevating evidence such as expert witnesses in handwriting and signature analysis, which would be required in cases where parties deny any signature thereof. Thus, whenever possible, a ratification of the guarantor’s signature should be requested before a Notary Public, for assurance. Authentication is not required unless the ratification occurs before a foreign Notary Public.

In terms of content, three things stand out:

- **Type of guarantee.** It is highly recommended that the agreement is worded to commit the personal guarantor as a joint obligor by including a statement whereby the guarantor waives any right to second order of litigation after the main debtor has been sued (“beneficio de orden”), and to the exclusion of seizure of assets until after execution against the main debtors has been done (“beneficio de excusión”). Otherwise these concepts could lead to delays in executing against any of the debtors, whether primary debtors or personal guarantors.

- **Identification of main obligation.** Because the personal guarantee agreement might be contained in a different document from those relating to the terms of sale or the main contract or transaction, specific and clear reference needs to be made to the obligation or set of obligations that is being guaranteed, including reference to any past, current, or future obligations or transactions (such as sale of goods based on a credit line), to avoid exclusion of any such obligations.

- **Nature of guarantor and authorization thereof.** Corporations (legal entities) can also act as guarantors, as long as the granting of guarantees is authorized and expressly included within the corporate purpose of the entity (as per the ultra vires principle), whether in the articles of incorporation or its bylaws. If a corporate guarantee is to be requested from a Mexican corporation, it is a good idea to check its corporate documents to make sure that the act of guarantee will be a valid one as authorized under the corporate purpose.
Should the transaction have close ties (or points of contact) with another country and there is potential that such law will govern, either entirely or in part, creditors should analyze the different alternatives in conflict of law rules to make sure that there will be no risks in enforcing the guarantee in Mexico. Such a situation would be, for instance, where the guarantee is signed and/or executed in a foreign country. Under Mexican conflict of law rules, absent a provision or clause making Mexican law the applicable choice of law, such a guarantee agreement would have to meet the formalities provided under the laws of the foreign country, and this would be examined by the Mexican courts should such a challenge or objection be made by the litigants. Therefore, it is a good idea either to meet the forms provided under the laws that will potentially govern the agreement, or to include a choice of law clause that refers controversies on interpretation to the law of the state where the potential for enforcement is greater.

H. Forum Shopping

When a decision has been made to proceed with a particular legal action in regard to an international transaction (one where parties or assets are located in different countries, or where elements of the transaction are governed by laws of different countries), there are many factors to consider in choosing the best forum as plaintiffs, that is, one that will provide a strategic advantage in court. The key factors in such a decision are not just to win the case, but also to execute and collect on any resulting judgment effectively and without delay. The following is a list of issues that should be evaluated in regard to potential lawsuits in Mexico. These come from the particular traits of the Mexican legal and court systems, and should be weighed against the issues arising in other available forums. (Additional issues from the perspective of the Mexican forum are also evidenced from the rest of our discussion throughout this article).

1. Does the Mexican legal system afford parties the legal and/or equitable remedies available in your country?

(a) Equitable remedies.

Mexico does not recognize within its legal system the equitable remedies generally available in common law countries. Thus, the injunction remedy will not be available as an equitable remedy backed up by the power of contempt. Nor is there any other legal remedy that is as effective or comparable as the injunction, acting in personam. The remedy for specific performance acquires a different legal nature, where the court will compel the debtor to perform on the contract based on its obligation to perform a specific act or service. Failure to comply could result in criminal liability, but more generally will result in an award for damages. The remedy of restitution under the unjust enrichment doctrine is very limited in scope, with no presence of the specific remedies of constructive trusts and equitable liens. Therefore, “tracing” of property is limited and ineffective (and contributing to the ineffectiveness is the lack of equitable contempt power), and there is no priority over other creditors.

(b) Piercing the corporate veil.

There is no fixed recognized alter ego doctrine that allows effective relief for piercing the corporate veil. A creditor who has found out that the debtor has commingled assets with the intention of turning its debtor company bankrupt (while illegally transferring the profits to another controlled company) will either have to sue through a myriad of civil actions for nullity (simulation) and civil fraud, or will have to file a criminal accusation before the prosecutor for the crime of fraud. Neither of these remedies is efficient or effective, and courts are not used to dealing with these matters, which will set the tone for the struggles ahead.

(c) Legal remedies.

Remedies that are legal in nature, including damages, will be recognized in Mexico. However, punitive damages are not recognized under Mexican law and enforcement of a foreign judgment that awards them is questionable. Penalty clauses are valid and can result in an award, but their nature is more of a liquidated damages clause, and thus, should be considered as such. For more information please refer to Part II.F on damages, discussed previously.

2. Do the facts in the matter and the evidence supporting it make for a strong case, based on the particularities of the Mexican legal process?

(a) Pre-trial discovery.

Pre-trial discovery is not recognized in the Mexican legal system. Consequently, additional evidence in the defendant’s control or possession (such as documents or information through depositions) will not be available before the filing of the initial complaint brief. Adding to the harshness on plaintiffs is the fact that there is no opportunity to amend an initial complaint. Thus, facts have to be pleaded with particularity in order to support any stated claim and provide full opportunity to a defendant for producing arguments and defenses. This means that a plaintiff will have to be ready from the outset with a strongly argued case (stating its claims with supporting detailed facts), and with good and reliable supporting evidence (especially documents) to prove such a case effectively.

(b) Jury trial.

Mexican judicial procedure does not contemplate jury trials. Thus, the judge will always be the trier of fact. Evidence will be considered and weighed at the end based on a mixed system of law and free but reasoned evaluation
of fact, as specifically provided by law. Thus, room for persuasion on the facts is limited, based on what the law affords the litigants. Nonetheless, the judge is required to give a reasoned opinion as to how the facts were determined.

(c) Standard of proof.

In civil and commercial cases, the judge must rule based on an “intimate conviction” of the facts. That is, for the judge, the facts will have to be fully proved. This contrasts with the usual standard of preponderance of evidence from common law countries (for civil cases), which provides grounds for some attorneys arguing that the standard is higher in Mexico. Although the Mexican legal system appears to be built for this approach based on the responsibilities of the trier of fact (from the mixed system of evaluation of evidence, as discussed above in the preceding Part II.H.2(b)), it is in a way harder to meet that standard in many cases where documentary evidence is missing.

(d) Witnesses.

Witnesses may be a key part of the adversary system under the common law, but they carry much less significance in Mexico. Reasons may be found both in theory and practice. First, two witnesses will always be necessary in civil cases to prove any stated fact. One witness will carry no weight unless both litigants (jointly) offer him as their witness. Second, a hostile witness will rarely help build your case, as extracting truth out of cross-examination is much harder, based on many factors, including the intermediate and supervisory role of the judge or secretary (which disrupts the flow of questioning), and the prohibition of asking leading questions to these hostile witnesses. Therefore, either you bring two good witnesses to the case that you can call, that are not hostile, and which statements do not constitute hearsay, or you will have to bring key documents that will help bring a strong case.

3. Are the Mexican courts the best suited to hear your complex case?

As explained before, many courts in Mexico still follow a territorialistic philosophy, which creates problems in interpreting or applying foreign law. This situation is more common than one would imagine, and it merits serious consideration. While there are many judges that welcome these cases (and the challenges that they present), there are other judges who will simply ignore foreign or international law (like the CISG). Others will apply foreign law to the best of their knowledge, with usual disregard upon interpretation to its international character and the obligation to promote uniformity in its application. But the worst case is where some judges look to get away with the responsibility, and thus, will look for ways to get rid of such cases through deficiencies in jurisdiction or choice of law clauses, powers of attorney, etc. Since this situation varies widely from jurisdiction to jurisdiction, consultation with local counsel is of outmost importance to determine the best strategy as to forum.

4. How difficult will it be to enforce a foreign judgment in Mexico?

(a) Treaties.

Multiple international treaties regulate enforcement of foreign judgments and make the process more predictable. Since 1984, Mexico is a party to both the 1979 Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (hereinafter the “Convention on Foreign Judgments”) and the 1984 La Paz Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (hereinafter the “La Paz Convention”). As of this date, the La Paz Convention has really not been supported by any countries other than Mexico and Uruguay. The Montevideo Convention on Foreign Judgments has been signed by several countries of the OAS, with the absence of Canada and the United States. As usual, the Conventions come into play only when the judgments to be enforced come from a country that is also a party to such treaties. Thus, enforcement of judgments from Canada, the USA, or any other country around the globe outside of Latin America, will not be governed by such rules. Instead, it will be Mexico’s local procedure laws which will set the standards and the specific procedures for recognition.

(b) General process.

The general process of homologation and enforcement of foreign judgments is complex and carries many risks to those parties that seek enforcement. In light of the extensive discussion that this topic merits, we would recommend obtaining full information by referring to a specific paper on the topic at www.hmhlegal.com/avoidingpitfalls.htm.

(c) Jurisdiction.

Before finalizing this discussion, we believe jurisdiction to be so important for enforcement that we will touch on it again. In this connection, there is a key question creditors considering suing Mexican debtors abroad should ask themselves: Did the debtor expressly submit to the jurisdiction of the foreign court (through a verbal or written agreement), or did the debtor at some point in time have a domicile in that foreign country whereby the foreign court assumed jurisdiction? If the answer to this question is “no”, it is wise to think twice before embarking on litigation abroad, if the ultimate plan is to execute upon the debtor’s assets in Mexico. Local procedure laws in some states provide such grounds for jurisdiction (express submission or domicile) as a precondition for enforcement. Although this precondition is not provided under federal civil procedure law, it is an open question whether homologation of foreign judgments in Mexico is a matter of federal or local
jurisdiction, and thus, whether federal or local law should be applied. This issue can be argued either way, but nonetheless, it carries a great risk, since the argument of jurisdiction will probably be introduced by a defendant, regardless of whether the matter of homologation is considered federal or local.

I. Service of Process

In making a decision on how to make service of process upon a defendant located in Mexico in aid of foreign legal proceedings, it is prudent to ask two questions to determine the best strategy: (i) whether the defendant has assets in Mexico; and (ii) whether the foreign legal proceedings are being followed through a judicial court or through arbitration.

If no enforcement will eventually be sought in Mexico, there may be no need to comply with Mexican procedural rules for service of process, unless the procedural law that governs the foreign proceeding so provides. If at least substantial formalities are required by the foreign law, then the options provided below will be helpful. Otherwise, you may want to stick with the simpler process (probably by private process servers), since the official methods provided below and available through the judicial system and the central authorities are troublesome and lengthy, which will surely delay your proceedings abroad.

If enforcement of that foreign judgment or award will eventually be sought through the Mexican courts, then consideration of the official methods for service of process is highly recommended. Although Mexico’s Federal Code of Civil Procedure, in regulating the process of homologation and enforcement of foreign judgments, does not explicitly provide as a precondition for enforcement that any service of process done in Mexico must strictly comply with the formalities provided under local procedure rules, it does provide as a precondition that the request or petition for enforcement be supported by authentic documents that prove that personal service of process was properly done. This evidences that the defendant was afforded its procedural due process rights (as provided under the Constitution) as well as full opportunity to argue and defend its case.

Under these premises, a strong argument can be made that the proper way to satisfy essential service of process requirements, so as to afford procedural due process rights, is only through the judicial courts, subject to the specific procedure rules governing such courts. In regard to arbitration, the argument is much weaker, since by agreeing to the arbitration clause (and to the arbitration process in general), a counterargument exists that the parties agreed that the specific procedure for service of process was the one provided under the rules for such arbitral proceedings, which, in the case of Mexico, is allowed by private process servers or even by certified mail. Thus, meeting the strict formalities under Mexican law is more a recommendation for judicial proceedings than for arbitration.

Should a decision be made to execute the service of process through the Mexican courts and to satisfy the formalities provided under Mexican procedure laws, the best way to make sure that this is done properly is by making a formal request from the foreign court through letters rogatory. Mexico is a party to the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters since 2001 (hereinafter referred as the “Hague Convention on Service”), and to the 1975 Inter-American Convention on Letters Rogatory as well as its 1979 Additional Protocol, both since 1979 (hereinafter the “Inter-American Convention on Service”). If the foreign court is a party to any of these treaties, it is wise to channel the service of process through the methods provided therein. Otherwise (non-party countries), the letter rogatory from the foreign court should at least comply substantially with the information provided under these Treaties.

There are two things that stand out from both these Conventions on Service. From the Hague Convention, Mexico has confirmed through reservations that private process servers will not be authorized to proceed with notifications, and nor will notification by mail or by foreign judicial or police authorities be authorized, as provided under Article 10. However, Mexico does authorize for service of process or notifications to be executed directly through consular authorities (avoiding the need to channel the letters through the central authorities), although limited to notifications of foreign nationals, as per Article 8. The Inter-American Convention also has another advantage in allowing the same litigant parties to transmit the letters rogatory directly (by themselves), thus, avoiding the lengthy and troublesome process through the central and consular authorities. When this method is chosen, authentication and legalization of letters is required, but the Inter-American Convention gives further discretion to courts situated along the border to waive the legalization requirement, as per Article 7. This is of outmost importance because of the difference in practices of authentication and legalization of documents between the Latin American countries, and those of other countries, including the USA and Canada. This method of directly delivering the letters by the litigant parties is also advantageous because it allows a party’s attorney to monitor the process closely with the local courts to make sure that there is no unjustified delay. In this sense, involvement of local counsel is key.

Finally, although the service of process procedure for arbitration if fairly simple and straightforward (even authorized by certified mail), it is prudent to try to reinforce it with good evidence to avoid any merit to a future challenge. This can easily be done by retaining local counsel
to do the service of process while complying substantially with the formalities provided under Mexico law and with the help of a Notary Public (or Commercial Broker), who can attest to the details and the particularity of the service, as well as to the formalities undertaken therein. With this, risks of potential challenges against the service of process will be minimized upon enforcement of the arbitral award.

J. Local Counsel

Before embarking on a lawsuit against a foreign debtor in the jurisdiction of the creditor, it is prudent that the creditor contact local counsel in Latin America in order to obtain important information such as the correct corporate description of the debtor, what type of service and notification is recommended, and what will become necessary to enforce a foreign judgment in that jurisdiction.

A strong relationship with local counsel will always be key in making the best decisions for legal action because every consideration of alternative forums of dispute resolution requires local knowledge not only of the laws, but also of current practices in the court system that abide or deviate from the strict rule provided under the laws. I believe this insight can only be provided by local counsel who specializes in these issues and deals with them in the courts on a day-by-day basis. Without a doubt, the endeavors of the International Section of the New York State Bar Association will prove successful in creating the relationships necessary for elevating the quality of the legal services in this new globalized world.

Endnotes

1. A few years ago (2005) there was a case in a civil court in Tijuana that involved the application of the UN Convention on Contracts for the International Sale of Goods (CISG). Following final arguments, as I was discussing the case with the judge in chambers and suggesting ways of interpreting the CISG, he stopped me abruptly at one point and in an exasperated way rebuted: “I will only apply Mexican law in my court, and that is final.” Just as many judges before him, he was being very localistic and proud of defending national sovereignty by not allowing strange and foreign laws in his courtroom. Little did he know that the CISG was also part of Mexican law. Another case that comes to mind is one from the Superior Court for the State of Baja California (2003). That case involved a contract that contained a governing law clause along with an “optional” arbitration clause. Both pointed to North Carolina (USA), and nothing was provided in terms of jurisdiction. The defendant had its domicile in Tijuana, where he continued to do business and had assets (with no presence anywhere else at any time), so jurisdiction was effective for the Tijuana courts based on Mexican commercial procedure law. Jurisdiction was challenged by the defendant, and the Superior Court (acting as a court of appeals) ruled in his favor. In the opinion, the court said that “a case can only be heard by a judge that has jurisdiction in the territory where the applicable law is binding over the matter at hand.” Because that case involved North Carolina law as the choice of law, the Court reasoned that it was a North Carolina judge who should hear the case. The decision was confirmed by a Federal Circuit Court in a final Amparo proceeding.

2. The executive proceeding is a specific type of proceeding in Mexico that is afforded to plaintiffs who hold special title for execution (título ejecutivo). The executive proceeding provides many advantages to creditors over the ordinary proceeding, which is the regular proceeding that plaintiffs have to follow if they lack title of execution or a specific guaranty for enforcement (such as mortgages, security interests, or pledges). First of all, the special title on which the proceeding is based creates a presumption that the claim exists and that it’s legally valid, which turns the burden of proof on the defendant. Second, the same title gives a preliminary certitude of the plaintiff’s claims, allowing an immediate ex parte prejudgment attachment order without placing bond. Third, it is rather a summary proceeding in which evidence is limited to the initial stages through the complaint and answer’s briefs. This makes for a shorter and faster proceeding in which a final resolution is usually going to be rendered in less time.

3. This is provided under Article 2395 of the Federal Civil Code, and reproduced in most states’ codes. That same provision authorizes the judge, under such circumstances of disproportionate high interest and acting in “equity” (or “equality”), to reduce the agreed interest fee to the legal interest fee, as provided under the Code. Although the provision is very subjective, it is hard to prove such disproportionality, and courts are reluctant to grant relief based on such defenses or claims, especially in commercial settings where there is a high presumption that the parties know the business and therefore knew, or should have known, what they were doing.

4. Reference for Mexican conflict of law rules is to be made to the Federal Civil Code, specifically, Articles 12, 13, and 14. The Mexico and the Montevideo Conventions are both consistent with the Civil Code rules, and would apply in cases involving other States (along with Mexico) that are parties to the Conventions.


6. See Part IID supra on jurisdiction and choice of law.

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