

EXECUTION OF FOREIGN JUDGMENTS IN THE STATE OF SONORA

FRANCISCO ACUÑA GRIEGO*

Resumen

En Mexico prevalece el sistema de exequatur para la ejecución de sentencias extranjeras. Si no existen convenciones o tratados internacionales, las reglas de procedimiento de cada uno de los Estados Mexicanos controlan el proceso de ejecución de sentencias. La Corte Suprema del País ha resuelto que los estados tienen capacidad para legislar sobre la ejecución de sentencias extranjeras.

La mayoría de los códigos de procedimientos civiles de los estados contienen artículos relativos a la ejecución de sentencias extranjeras. Este sistema resulta muy confuso para litigantes extranjeros. Para simplificar el proceso, se debería concertar un tratado internacional. Si esta vía no resulta práctica, los Estados Unidos Mexicanos deberían adoptar normas uniformes para la ejecución de sentencias extranjeras.

INTRODUCTION

The inherent purpose of any judicial process is to resolve the conflict at hand by issuing a definitive judgment. The essence of a legal norm is the possibility of its coercive enforcement. However, the power of law can be rendered void if territorial borders impede the recognition of foreign judgments. Accordingly, it has been written that:

Legal judgments have effect not only within the limits in which the organs which rendered them exist, but also outside such territory under determined conditions in consideration of the principle that justice, because of its universal character, should not be affected by territorial limits of any state.¹

The notion that a judgment rendered in one state should be enforced in another state is based on international comity—the need to co-exist with other nations—and the binding force of law.

The application of the law is a sovereign act. Jurisdiction is essentially territorial since tribunals only have authority over that territory that the law specifies and over which the state is sovereign. Beyond

*Former Chief Justice, Supreme Court of the State of Sonora, Hermosillo, Mexico. This article was presented in conjunction with the author's panel participation at the Symposium for Judicial Cooperation Between the United States and Mexico, April 13-15, 1984 at the University of Arizona College of Law, Tucson, Arizona.

¹J. CASTILLO LAIRAÑAGA & R. DE PINA, *DERECHO PROCESAL CIVIL* 3 (3d ed. 1954).

that limit, the state has no power, nor do the courts of the state have any jurisdiction. Once aware of these principles, it is easy to comprehend that tribunals lack the power to execute their judgments in the territories of other states. Execution of judgments implies territorial sovereignty; where there is no territorial sovereignty, the judgment cannot be given effect.²

Because judicial decisions must be executed and because the courts of one state cannot directly enforce their judgments in the territory of another state, there is a clear need to establish principles and standards for the extraterritorial recognition of judgments.

RECOGNIZED SYSTEMS

There are four universally recognized systems for obtaining execution of a foreign judgment. These include:

1. The Territorial System. A system which refuses to recognize any foreign judgments, it requires a new judicial process in the courts of the state in which execution of the judgment is sought.

2. The Revision System. This system conditions enforcement of the judgment on a comprehensive examination of the judicial process and of the foreign sentence. The examination culminates in a new judgment that will affirm, reverse or modify the foreign judgment.

3. The *Procedural Exequatur* System. This system recognizes the foreign judgment by using a brief procedure to ensure that the judgment complies with predetermined formal requirements established by its domestic law or by international treaties and that the judgment is in accordance with national public policy.

4. The Discretionary System. This system determines whether to recognize the foreign judgment by examining the "circumstantial factors system."³

Professor Jose Castillo Larrañaga also mentions a system based on reciprocity, "recognizing the judgments of states which also enforce the judgments of your state."⁴

²E. PALLARES, *DERECHO PROCESAL CIVIL* 542-543 (7th ed. 1978).

³J. BECERRA HERNANDEZ in J. OVALLE FAVELA, *DERECHO PROCESAL CIVIL, COLECCION TEXTOS JURIDICOS UNIVERSITARIOS* 250 (1st ed. —).

⁴Castillo Larrañaga, *supra* note 1, at 311.

MEXICAN LAW

Although Mexican codes require international reciprocity before allowing the enforcement of a foreign judgment,⁵ Mexican law generally follows the system of *procedural exequatur*. Mexican procedural codes authorize the recognition of foreign judgments upon an examination of the form of the judgment. Such an examination is necessary before a Mexican court can probe the substantive law of the case or the facts upon which the decision is based. This preliminary step examines the authenticity of the foreign judgment and checks whether it meets all of the requirements for authenticity specified by law.⁶

It is obvious that Mexico has always had an interest in enforcing the decisions of foreign courts that are not contrary to public policy and which meet the requirements set out in the procedural codes. Commenting on the Mexican system, Professor Friederich K. Juenger of the University of California once noted that such liberality in the recognition of foreign judgments, as governed by the codes of civil behavior, is laudable.⁷ Juenger also observed that, despite the fact that the older Mexican procedural codes were based on the Napoleonic Code, the Mexican codes managed to escape the French penchant for jingoism.⁸

COMPETENCE TO RECOGNIZE AND EXECUTE

Since Mexico is a federation, federal law and federal courts co-exist with state law and state courts. Invariably, the question of whether federal or state law should govern the execution of foreign judgments arises. Similarly, one must consider whether the federal courts should be the only ones competent to recognize foreign judgments or whether the decisions of a local tribunal should also be considered legitimate and constitutionally binding.

⁵In Mexico, foreign sentences and other judicial resolutions will have the status established by treaties, or by the international norms of reciprocity. The second paragraph of Article 475 of the Sonoran Code of Civil Procedure states, "the declaration of validity can be achieved through diplomatic means, as permitted by treaties or by the principle of reciprocity."

⁶CODIGO DE PROCEDIMIENTOS CIVILES DE SONORA, art. 479; and CODIGO DE PROCEDIMIENTOS DEL DISTRITO FEDERAL [hereinafter CODIGO CIV. (D.F. Mex.)], art. 608. According to Professor Ovalle Favela's article, *supra*, note 3, Mexico has adopted the *Exequatur* system of procedure with respect to the manner in which a domestic tribunal will recognize the validity of a foreign judgment. The court will ensure that certain formal requisites have been met and that the judgment is not contrary to public policy. This procedure entails both recognizing and executing the foreign judgment.

⁷Juenger, *Reflexiones Sobre Competencia Internacional* 2(14) *Juridica* 1016 (1981).

⁸*Id.*

Curiously, Article 428 of the Federal Code of Civil Procedure disposes of the subject in a manner which is both vague and terse.⁹ Consequently, local jurisdictions have been the ones to expand and delineate the recognition process. Most of the state statutes have been fashioned after the provisions found in Articles 604 through 608 of the Code of Civil Procedure for the Federal District in a chapter devoted to execution of foreign judgments.

Commenting on the provisions of the Code of Civil Procedure for the state of Chihuahua, the legal scholar Niceto Alcala Zamora asserted that conducting international relations was strictly a function of the central Mexican government and that the local codes exceeded their power by regulating the execution of foreign sentences.¹⁰ The same principles were espoused by Sergio Torres Eyras, who is cited by Celestino Porte Petit as asserting that, if the constitution does not recognize the capacity of local governments to enter into treaties, it cannot recognize jurisdictional sovereignty without federal intervention, since the foreign judgment is viewed as an act of sovereign authority meant to take effect in Mexican territory.¹¹

The question of the competency of the foreign court is of special concern because some procedural codes refer to federal treaties or to international treaties.¹² It should be noted that, despite the fact that Mexico has signed the United Nations Convention on the Recognition and Execution of Foreign Arbitral Awards in New York in 1958, and

⁹Article 428 states:

In cases involving foreign judgments to be executed by Mexican courts, the courts must first determine whether the foreign sentence was contrary to the laws of the Republic or of the international principles of law. If contrary to these laws, the court will return the judgment to the foreign country, designating the factors which caused it to reject the judgment.

¹⁰It is interesting to note that while the Code of Civil Procedure for the Federal District and the codes of the majority of the remaining Mexican states address both the execution of sister state judgments and foreign judgments, the Federal Code of Civil Procedure, which should contain provisions for the execution of both types of judgments, does not address the subject. In effect, even though the components of the Republic are called "sovereign and free states," it is obvious that they are not subject to public international law. The material consideration regarding international relations is that Mexico believes its concerns are solely its own, and in consequence, the local codes have been extended to cover the execution of foreign sentences, in compensation, however, these codes are obliged to parrot the Federal District Code, which has usurped the Federal Code on this point. N. ZAMORA, *EXAMEN CRITICO DEL CODIGO DE PROCEDIMIENTOS CIVILES DE CHIHUAHUA* 148-149 (1st ed. 1959).

¹¹C. PORTE PETIT, *CODIGO DE PROCEDIMIENTOS CIVILES DE CHIHUAHUA* 403-404 (2d ed. 1983).

¹²CODIGO CIV. (D.F. Mex.), art. 604; CODIGO DE PROCEDIMIENTOS CIVILES DEL ESTADO DE CHIHUAHUA, art. 756; CODIGO DE PROCEDIMIENTOS DEL ESTADO DE AGUIASCALIENTES, art. 488.

although Mexico has deposited its instrument of ratification on April 14, 1971, promulgated by the decree of June 22, 1971,¹³ Mexico has never signed a treaty governing the execution of foreign judgments. To date, Mexico has not yet signed or ratified the Inter-American Convention on the Extraterritorial Effect of Foreign Judgments and Arbitral Awards, concluded in Uruguay on May 6, 1979.¹⁴

The Mexican system of *procedural exequatur* is purely procedural, with an eye toward verifying the authenticity without delving into the case underlying the judgment. Such state legislation does not regulate any relationship that existed between sovereigns, nor does it regulate the legal status of foreigners. Rather, the states promulgate laws establishing procedural mechanisms to verify the veracity of the foreign judgment. Similarly, in accordance with Article 124 of the General Constitution of the Republic, those functions that are not expressly granted to the federal government are understood to be reserved for the states. As indicated by Article 73, among the functions conceded to the National Congress, no reference is made concerning the execution or recognition of foreign judgments. The Mexican Supreme Court stressed this point in an appeal in which the constitutionality of the Code of Civil Procedure of the State of Sonora was questioned.¹⁵

PROCEDURAL STEPS IN THE EXEQUATUR

According to the Sonoran procedural code, there are two distinct procedural steps involved in the recognition of foreign judgments: (1) actual recognition, in which the document is examined to ensure that it meets the formal requirements specified by law and (2) actual execution of the judgment.¹⁶

¹³J.L. SIQUEIROS, RECONOCIMIENTO Y EJECUCION DE LAUDOS EXTRANJEROS EN LA REPUBLICA MEXICANA 107-108 (1977).

¹⁴Ovalle Favela, *supra* note 3, at 252.

¹⁵The sentences was rendered in revised appeal §6474/56 5(4) SEMANARIO, *sexta epoca*, at 121: "Articles 9(III), 356, 475 and 484 of the Code of Civil Procedures for the State of Sonora simply establish procedural requirements which must be satisfied before the foreign judgment can be considered authentic and valid in Sonora. These provisions do not affect the legal status of the foreign litigants, nor do they affect the substantive law underlying the case. Clearly, said provisions cannot be considered unconstitutional, especially in the light that the provisions are equally applicable to foreigners and Mexicans who wish to execute their judgments in Sonora."

¹⁶Article 607 of the Code of Civil Procedure for the Federal District divides the process into three distinct steps:

1. The translation of the judgment in accordance with Article 330 of the Code;
2. Examination of the judgment and case file to determine whether the judgment can be executed;
3. The execution itself.

These two steps are clearly distinguished in the Code of Civil Procedure for the State of Sonora. Article 478 details the summary route that should be used. The action is initiated by a complaint, accompanied by the following documents:

- 1) A complete copy of the judgment and proof of adequate service of process.
- 2) Proof of the competency of the court that issued the judgment.
- 3) Proof that the judgment has neither been judicially executed nor voluntarily complied with abroad.

The documents should be legalized, and they should be translated and certified by an expert if the documents are in a language other than Spanish.¹⁷ In accordance with Article 478, the procedure should include the Attorney General (Ministerio Público) as a party.

The process of validating the judgment is outlined in Article 497 through 499 of the Sonoran Code of Civil Procedure. The provisions specify a five-day period for the service of process, a fifteen-day evidentiary period and a five-day period for final arguments. A definite ruling on whether to honor the foreign judgment should be issued five days after the close of the arguments or five days after the hearing provided for by Section IV of Article 498.

Once the validity of the foreign judgment is established by final decision (*resolución firme*), Article 356 creates a presumption that the judgment is *res judicata* (*autoridad de cosa juzgada*). At this point, according to Article 482 of the procedural code, the decision to enforce the foreign judgment can be made. The foreign judgment can be forcibly executed (pursuant to Article 402, Section VIII, of the Code of Civil Procedure) and, consequently, can be legally executed under Article 481 of the Sonoran Code of Civil Procedure. It is interesting to distinguish between these two steps, because, in practice, as will be shown, this is important to the efficacy of the judgment that one intends to execute.

¹⁷Article 141 of the Code of Sonora requires that when one shows trial documents written in a foreign language, they must be accompanied by a Spanish translation. Article 168 of the same ordinance promulgates requirements of the letters rogatory that one remits to the foreigner, foreseeing in Section IV that the notarization of the signature is not necessary when the law or the practice of the target country has not established this requirement. Section VII tells of the remittance of the letters rogatory directly to the rogatory court when the legislation (law) of the country to which it is sent authorizes it, and without more authentication that is required by the laws of this country. Section VII contemplates the possibility that the remitted letters rogatory, by foreign courts to the judges of the state, could be directly sent, given adequate authentication, by the Mexican consul who resides in the nation or place of the rogatory court.

REQUIREMENTS OF THE EXECUTABLE JUDGMENT

The sections of Article 480 of the Sonoran Code of Civil Procedure confer executive power to any foreign judgment that meets the following requirements:

I. The authenticity of the documents referred to in Article 478 must be demonstrated.

II. It must be shown that the foreign judge was competent to hear the case.

III. Proof must be presented that the defendant in the case was personally served.

IV. The underlying cause of action must be cognizable in Mexico.

V. The foreign judgment must be a matter *res judicata*; additionally, it cannot be subject to impeachment in accordance with the laws of the jurisdiction where it was issued.

VI. The foreign judgment cannot be contrary to a ruling issued by a Mexican tribunal.

VII. An action cannot be pending in a Mexican court between the same parties concerning the same cause of action that was initiated before the foreign judgment was declared *res judicata*.

VIII. The foreign judgment cannot be contrary to Mexican public policy.

These requirements are fairly obvious and do not require much explanation. Nevertheless, it is important to reflect on some related topics. The requirement established by Section III of Article 480 of the Sonoran Code of Civil Procedure is essential to demonstrate the validity of the entire process; on the other hand, it also ensures the rights guaranteed by Article 14 of the Mexican Constitution, which provides that all people must be duly heard and protected by the law before any of their rights are affected.

The requirements specified in Sections IV and VIII, regarding the legality of the underlying cause of action of the foreign judgment and the judgment's falling within Mexican public policy, are readily understood as essential; no sovereign state would permit the execution of judgments that are not in accordance with its laws and public policy. It is logical, as set forth by Section V, to require that the foreign judgment intended for execution not be subject to impeachment. But the requirement that the foreign judgment enjoy the status of *res judicata* (*autoridad de cosa juzgada*) could give rise to confusion if one pays attention to the distinction between an executable judgment (*sentencia ejecutoriada*) and a final judgment entitled to *res judicata* treatment, as provided in Articles 350 and 352 of the Sonoran Code.

Mexican state codes, including Article 355 of the Sonoran Code of Civil Procedure, contains provisions which refer to judicial decisions which enjoy "provisional" *res judicata* status as long as the circumstances that affect their execution have not changed. Among these are decisions dealing with future payments, family support, the exercise and suspension of paternal authority, civil commitment or incapacity, and *ex parte* jurisdiction. The judgment may be altered or modified when the circumstances change; until then, however, it will be considered different from a judgment that has been declared *res judicata* under Articles 350 and 352. This is why Section V should refer to judgments not subject to impeachment rather than *res judicata* judgments.

The requirement of Section VI is based on the principles of territorial jurisdiction set forth in Article 9 of the Sonoran Code. Section VII's requirement, regarding pending suits in Mexican courts, is also based on the same principles of Sections I and II of Article 9, in the sense that the jurisdiction that local courts have over the case is not negated by litigation pending abroad.

Although the Sonoran Code of Civil Procedure does not specify that the judgment rendered must be in connection with a "personal action," the condition is implicit. Such a restriction is explicitly set out in Article 605, Section II, of the Code of Civil Procedure for the Federal District, as well as in the majority of local codes. It is obvious that a foreign court cannot assume jurisdiction over real property outside its territory. In Mexico, this is especially true, because Article 27 of the Constitution limits the right of foreigners to acquire real property within Mexico. Furthermore, Article 167 states that letters rogatory must be denied if "the judgment whose execution is sought affects rights of real property located within the territory of the requested state, and if the judgment is contrary to the laws of the state which issued it."

UNSURPASSABLE OBSTACLES TO THE EXECUTION OF A FOREIGN JUDGMENT

At this point, I would like to provide a practical overview of the state of the law. We have already discussed the need to distinguish between two basic procedural steps: the validation of the judgment as *res judicata* under Articles 475-479 of the Sonoran Code, and the actual execution of the judgment under Article 481.

In the first step, which should be accomplished in a summary and adversarial fashion and must include the Attorney General (Ministerio Público), as dictated by Article 479, the defendant in the case can

challenge the judgment by alleging the absence of conditions required by Article 480: the authenticity of the documents; the competence of the foreign judge; the validity of service; the executability of the judgment; the illegality of the underlying cause of action in Mexico; or the existence of pending litigation in Mexico. The requested judge must be careful not to permit the defendant to attack the foundations of the judgment or to examine evidentiary questions or questions of law or equity. Such judicial review is prohibited by Article 479. The question of not attacking the foundation becomes particularly important when the defendant seeks to challenge the foreign judgment using Sections IV and VIII of Article 480, which deal with the legality of the underlying obligation associated with the judgment and which ask whether the judgment is against public policy.

Even in the purely executory phase of the process, problems can arise. When one refers to a foreign judgment that has been declared valid by a sovereign act of jurisdiction, one talks about a foreign judgment that has met all of the legal requirements imposed by the requested state. Once the judgment has passed through the *exequatur* process, in the absence of a treaty, it is subject to national laws for its execution. Accordingly, the exceptions detailed in Article 422 of the Code of Civil Procedure of Sonora can be asserted against the validated foreign judgment. They are:

- a) payment, if made within 180 days of the date of the foreign judgment.
- b) compromise, settlement with or without the aid of an arbitrator, or set-off. All these defenses must be raised within one year of the foreign judgment.
- c) novation, accord and satisfaction, moratoria, and any other arrangement that modifies the underlying obligation, as well as fraud or forgery in the decision. These can be alleged beyond a year from the date of the execution of the foreign judgment.

All these exceptions must be found in public or private documents which are judicially recognized or admitted.

The above exceptions can only be heard in a procedure known as "incidental." The terms set by law for raising these exceptions commence running from the date of the first instance decision (per Article 422 of the Sonoran Code), unless by agreement the parties fix a different term for execution of judgment, in which case such a term will be appropriate. These rules give rise to certain doubts related to the tolling of the time periods. When does the clock start running? For reasons of logic and equity, it would appear that the time begins to run at the completion of the summary trial declaring the validity of

the foreign judgment. It bears noting, however, that in Mexican practice, even a summary trial to declare the validity of a foreign judgment can take some time.

TIME PERIOD FOR EXECUTION

Article 421 of the Sonoran Code of Civil Procedure states that the statute of limitations for enforcement of a judgment is five years from the final day of the time period allowed for voluntary compliance with the judgment. Again, the question arises as to when the five-year period will begin to run for foreign judgments. Will it be from the time that the foreign judgment could have been executed in its place of origin, or from the time that the Mexican judge declares its validity?

APPEALS

A judgment declaring the foreign decision to be valid is appealable under Article 479 of the Code of Sonora. The judgment denying validity to the foreign judgment stays all proceedings (*efecto suspensivo*). The decision granting execution can be appealed. The appeal does not stay the proceedings (*efecto devolutivo*) but may be reversed and remanded.

There are those who wonder why the staying effect is provided when an *exequator* is denied since, in that case, there is nothing to suspend.¹⁸ It may be that if the request is denied, there is the possibility that the request will have to be returned to the requesting party, along with an explanation of why the judgment was not recognized. This is required by Article 428 of the Federal Code of Civil Procedure. The stay prevents the request from being returned until all the pertinent Mexican appeals have been made and a final ruling issued. During the stage of execution, only an ordinary appeal (*queja*) is allowable, as provided in Article 392 through 398 of the Sonoran Code.

The Amparo Appeal

The *amparo* appeal is a device in Mexican law for controlling the constitutionality of governmental acts. In the case of execution of foreign judgments, the *amparo* can be raised at the validation or execution stage of the foreign judgment that is not subject to an ordinary appeal. An additional requirement is that the final decision, unless precluded by the *amparo*, would otherwise have irreparable effects. Obviously, *amparo* should also be available for the final appellate de-

¹⁸*supra* note 2.

cision that confirms or denies the decision that has declared the validity of the foreign judgment.

The exercise of *amparo* raises the question of whether the appealed-from decision will be stayed. It may be argued that, in Mexican law, a stay of judgment does not lie when the *amparo* is demanded by one of the parties because there is a strong public interest in reaching a final solution as quickly as possible. However, in this writer's opinion, when what is involved is the appellate decision that confirms or revokes the lower court decision that declared valid the foreign judgment, such an appeal does not involve the *execution* of the foreign judgment but its validation, and the *amparo* involved should stay the proceedings. This opinion has been repeatedly confirmed by the Supreme Court of Mexico.¹⁹

CONCLUSIONS AND RECOMMENDATIONS

1. Mexico has adopted the *exequatur* system for the recognition and execution of foreign judgments.

2. In the absence of any international agreements, the procedural rules of each Mexican state are applicable in the recognition and execution process.

3. The Supreme Court of Mexico has decided that state legislatures have power to pass laws on the execution of foreign judgments.

4. The Federal Code of Civil Procedure contains few provisions on the subject.

5. The majority of state procedural codes regulate the manner of recognition and execution.

6. The diversity of regulation among the various statutory sources can result in confusion for anyone wishing to have a foreign judgment recognized in Mexico.

7. The writer suggests that the most effective way to establish uniform rules concerning the recognition and execution of foreign judgments is to enter into an international agreement on the subject.

8. The writer suggests that as long as no international agreement is in effect, Mexico should establish uniform laws to be applicable in all states.

¹⁹SEMINARIO, *quinta epoca*, at 1415.

