Some Post-Litigation Issues: Enforcement of a Foreign Judgment Which Includes Compensatory, Moral and/or Punitive Damages; Enforcement of Injunctive Relief and Specific Performance: Enforcement of Costs, Interest, and Attorneys' Fees, Determination of the Proper Currency in an Enforcement Proceeding: Panel Discussion Part 2

Michael W. Gordon
Matthew H. Adler
Christopher P. Bauman
David Epstein
Cesar Garcia Mendez

Follow this and additional works at: https://digitalrepository.unm.edu/usmexlj

Part of the International Law Commons, International Trade Law Commons, and the Jurisprudence Commons

Recommended Citation
Available at: https://digitalrepository.unm.edu/usmexlj/vol5/iss1/16
Some Post-Litigation Issues: Enforcement of a Foreign Judgment Which Includes Compensatory, Moral and/or Punitive Damages; Enforcement of Injunctive Relief and Specific Performance: Enforcement of Costs, Interest, and Attorneys' Fees, Determination of the Proper Currency in an Enforcement Proceeding: Panel Discussion Part 2

Authors
Michael W. Gordon, Matthew H. Adler, Christopher P. Bauman, David Epstein, Cesar Garcia Mendez, and Ted Occhialino

This article is available in United States - Mexico Law Journal: https://digitalrepository.unm.edu/usmexlj/vol5/iss1/16
SOME POST-LITIGATION ISSUES: ENFORCEMENT OF A FOREIGN JUDGMENT WHICH INCLUDES COMPENSATORY, MORAL AND/OR PUNITIVE DAMAGES; ENFORCEMENT OF INJUNCTIVE RELIEF AND SPECIFIC PERFORMANCE: ENFORCEMENT OF COSTS, INTEREST, AND ATTORNEYS' FEES, DETERMINATION OF THE PROPER CURRENCY IN AN ENFORCEMENT PROCEEDING.

PANEL DISCUSSION PART TWO
PANEL MEMBERS
MICHAEL W. GORDON, MODERATOR;
MATTHEW H. ADLER,*
CHRISTOPHER P. BAUMAN,**
DAVID EPSTEIN,***
CÉSAR GARCÍA MENDEZ,****
MARIO E. OCCHIALINO*****

* Member of the firm Pepper, Hamilton & Scheetz, Philadelphia, Pennsylvania, specializing in domestic and international commercial litigation.
** Mr. Bauman is a partner in the Albuquerque office of Thomas, Bauman & Dow, C.P. He is also Vice-Chair of the U.S.-Mexico Law Institute.
*** Mr. Epstein is Director of the Office of Foreign Litigation, Civil Division, in the Department of Justice.
**** Mr. Mendez is a partner in Bufete García Jimeno, S.C., Mexico City.
***** Professor M.E. Occhialino teaches Civil Procedure, Conflicts of Law and Federal Jurisdiction at the University of New Mexico School of Law. He is also a member of the Rules Committee of the New Mexico Supreme Court.

Michael W. Gordon: We will now look at enforcement of foreign judgments, as well as enforcement of some specific kinds of relief such as punitive damages, or, as the Civil Law countries call them, moral damages. We will also look at the differences of such damages and other forms of relief including injunctive relief and specific performance.

There are some twenty-six states of the United States that have adopted the Uniform Foreign Money-Judgments Recognition Act.¹ I think we are going to see a quantum leap from state law to an international convention, rather than from state law to a federal law and then to an international convention. Obviously, an International Convention on Enforcement of Foreign Judgments would, upon ratification, become federal law.

Rogers Gallery has received a judgment against Sanchez de Vega in a Texas court while Sanchez de Vega has received a judgment in a

Monterrey court. Will courts of the other country enforce not only the judgment, but each one of the elements of the judgment? What is the applicable law regarding enforcement of foreign judgments in each nation? The English agreed to the European Judgements Convention that is both a jurisdiction convention and an enforcement convention. I find those two areas so inextricably linked that one of the major sections of the enforcement of judgment statutes is the interpretation of what personal jurisdiction means.

Matthew A. Adler: In this area the problems begin with jurisdiction and often end there. The issue is whether we are going to have a convention that ignores the issue of jurisdiction or a convention that goes little further.

David Epstein: The European countries are very suspicious of both the jurisdictional concepts and the due process concepts as enunciated by the U.S. Supreme Court. I think they would be unwilling to enter any treaty with the United States that did not set forth concrete jurisdictional limitations.

Gordon: If a claimant obtains a judgment in Mexico, would it be enforced in either federal or state court in the United States?

Christopher P. Bauman: You could get the judgment enforced in a U.S. federal court on diversity grounds. In addition, pursuant to Texas state law, you could also enforce a Mexican-obtained judgment in Texas state court as well.

Gordon: Enforce it in any federal court in the United States?

Bauman: Unless there is a federal question, which does not appear to exist under our facts, you are basing jurisdiction on diversity to get in the federal court, so you are probably looking primarily at Texas.

Gordon: Where the assets are?

Bauman: Yes.

Adler: Let us imagine a hypothetical situation in which the Texas court is asked to enforce the Mexican judgment for execution purposes, but the assets have somehow migrated from Texas to California. Can you ask the California court to recognize the Mexican judgment? It seems to me that at that point it would simply be enforced under the full faith and credit clause.

Gordon: What you do is get a Texas judgment enforcing the Mexican judgment, and then enforce the Texas judgment in California.


Mario E. Occhialino: I think of this as an American court becoming a transformation court. You start with a Mexican judgment and then you look for the American court that has jurisdiction, and once you find an American court with jurisdiction that has relatively liberal rules on enforcement of a Mexican judgment, you transform the Mexican judgment into a state judgment. Under the liberal full faith and credit concept, you now have an American judgment that you can take to all forty-nine other states to enforce. So if all the assets are in California and they are very tough on Mexican judgments, find a place where you can get jurisdiction and transform your Mexican judgment into an American judgment, and then insist on full faith and credit in the state that is relatively strict. That is a product of the fact that American courts are free to design their own systems for enforcement of foreign country judgments and some are more liberal than others. This two-step process, can be very valuable if you think you might not be able to enforce the judgment in State A, but can in State B, and then return to State A asking that the State B judgment be enforced.

Gordon: Where would a judgment obtained against one of the Mexican parties in the United States be enforced in Mexico? In what state or federal court? Could the judgment be enforced wherever the assets are located in Mexico?

César Garcia Mendez: The general rule is that jurisdiction lies in the domicile of the party to be executed against. The court would be either the federal or the local state court. The homologation process would have to be carried out in the normal way in the court with ordinary venue. If assets are located elsewhere, execution of the judgment would have to be through the issuance of what we call *exhortos* [letters rogatory] to the judge with competence in the place where the assets are located.

Gordon: If Sanchez de Vega were to send all of his assets to Acapulco, where he plans to move and you did obtain a judgment against him in Monterrey, what could you do?

Mendez: Obtain judgment in Monterrey, and then take it by *exhorto* to the competent judge in Acapulco, and then execute that judgment rendered by the Monterrey judge in Acapulco.

Gordon: We have not looked at the various elements of a judgment in the United States in order to see what could be enforced. Would Mexican courts enforce a judgment for punitive damages?

Mendez: In Mexico, you would be entitled only to damages in the amount of your actual losses due to non-compliance with the agreement. Punitive damages would not be executable in Mexico. As I understand them, punitive damages in the United States are punishment and could not be enforced in Mexico. However, you would have the right to obtain compensation for the legal gain you would have obtained had the contract been fulfilled.

Gordon: What if the judgment is a million dollars in compensatory damages, not punitive damages, and the Mexican court knows that a third of that is going to be given to the U.S. lawyer under a contingent
fee arrangement. Would the Mexican courts enforce the entire million? Or would they deduct the attorney's fees?

Mendez: The Mexican courts would enforce the award. The Mexican judge would only be an executioner; he would not deal with how the trial was conducted. How the trial is conducted is a matter of the homologation process.

Hope H. Camp, Jr.: What if the compensatory damages included compensation for mental anguish? Assume a fraud action where the person is claiming that they have suffered economic damage of $200,000 and $2,000,000 in mental anguish. The jury in the United States has awarded $200,000 in economic damages and $800,000 as compensatory damages for mental anguish.

Mendez: I do not think the Mexican court would execute judgment on that basis. To be granted, damages have to be linked immediately and directly to the non-fulfillment of the contract. Under Mexican law, you would not be able to link the non-fulfillment of a contract with mental anguish.

Gordon: There are currently two different kinds of moral damages in Mexico, the one adopted in the Federal District Civil Code and the more specific ones in most state civil codes, which are essentially a factor of so many days times the minimum wage. Would it be possible to argue that the punitive damages ought to be at least enforced up to the amount of what the equivalent moral damages would be?

Mendez: No. In Mexico, that would require a specific action.

Gordon: And yet an American court would not, I assume, grant moral damages unless they applied Mexican law. So if you were in the United States and you wanted to get a judgment that would be enforced in Mexico, you would want to ask the court to apply the Mexican law of damages, not the American law of damages. If compensatory damages would be the same, and if you could get an American judge to rule on moral damages as well, I would think that the Mexican court would uphold those.

Mendez: There should be a specific action brought against the Mexican party. Specific evidence must be presented and proved.

Epstein: The approach of U.S. courts is very different. Based on cases I know, a U.S. court will look at various components of the relief entered by the foreign court and fragment the enforcement. There is a Second Circuit case, Ackerman v. Levine, involving the enforcement of attorney's fees awarded in Germany, under the German fee schedule. The New York court broke it down into components based on New York public policy and disallowed a substantial portion of the German attorneys'
fees. In Texas there is a case, *Compania Mexicana Rediodifusora* in which the Texas court went ahead and awarded attorneys’ fees and costs against the unsuccessful plaintiff in the Mexican case, notwithstanding the fact that they would not have been granted in Texas. In the United States, it is a state-by-state question.

Vicente Gómez: I would like to clarify one point of Mexican civil procedure. Punitive damages may be imposed but only if they have been agreed upon in the contract. We call it a *clausula penal* [penalty clause]. If there is no penalty clause, the judge cannot require the defendant to pay any punitive money. Mexico is just beginning to consider the concept of punitive damages, and unfortunately, is behind many other Latin American countries on this matter such as Peru, Venezuela, and Argentina.

Gordon: Are there situations where people have agreed to punitive damages in contracts? We call these liquidated damages and they are not enforceable unless they are reasonable.

Gómez: In Mexico, reasonable punitive damages may be imposed if they have been agreed upon as part of the contract.

Camp: The clause that Mr. Gómez is referring to is a liquidated damages clause, and that is not what we understand punitive damages to be. Punitive damages are an exemplary type of damage to discourage the person against whom they are awarded from continuing in that activity.

Mendez: The *clausula penal* is a pre-arranged agreement on the damages and losses a party suffers by the non-fulfillment of a contract. In fact, if you bring an action based on a *clausula penal*, you cannot bring an action for damages based on actual losses. In fact, if the contract provides for damages in a *clausula penal*, you cannot bring an action for damages based on actual losses.

Gordon: Can you explain to us what moral damages are in Mexican law, what they mean, and perhaps how they fit it into this hypothetical. Assume Sanchez de Vega cannot paint any more because of all the emotional distress that he has undergone.

Mendez: The Civil Code describes moral damages as the moral suffering you may have had as a consequence of the non-fulfillment of the contract. It is very casuistic because it is so open. In this case, the claim for moral damages would probably be based on the diminished reputation of the painter himself.

Gordon: The civil codes of most Mexican states provide a formula for fixing the amount of moral damages. Have other states been following the federal district’s more open provision?

Mendez: The general tendency is to limit the amount based on a certain number of days’ salaries.

Gordon: In a case in Miami in preparation for trial involving a claim for punitive damages where Aruban law applied, Exxon received an

---

opinion from the other party's lawyers which had been drafted by an Aruban lawyer and stated that Aruba, which follows Dutch law, could allow punitive damages because there is no specific prohibition of punitive damages in Dutch law. I wrote an affidavit for the court suggesting such an omission was not to be considered an opening for granting punitive damages, and that civil law countries historically have rejected punitive damages. The court refused to accept the Aruban lawyer's argument.

**Epstein:** There is a recent decision of the German Supreme Court refusing to enforce an American award of punitive damages. The German court separated out the compensatory from the punitive damages. Most countries refuse to recognize punitive damages.

**Gordon:** That decision has been translated into English with other German decisions in Professor Lowenfeld's casebook. They are very interesting to read because they do show that in some cases the foreign court will separate the punitive damages from the other.

**John Rogers:** We have heard that under Article 571 of the Mexican Federal Code of Civil Procedure there are various requirements for enforcement of foreign judgments, including the one about reciprocity. This says that, notwithstanding the fulfillment of the enumerated conditions, the Mexican court may deny enforcement if it is proven that in the country of origin, foreign judgments or awards are not enforced in similar cases. We have heard that some U.S. states, have adopted the Uniform Foreign Money Judgments Recognition Act (Act) with such a condition of reciprocity. Under § 36.005 of the Texas statute, a foreign country judgment is not conclusive if the foreign country in which the judgment was rendered does not recognize judgments rendered in that state. I have two questions. First, would the requirement in Mexico that there be reciprocity with the country of origin be satisfied if it were shown that the state where the judgment was rendered has adopted this Act. Second, would your answer be affected by the fact that this Act has a provision that a judgment is not conclusive if the judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirement.

**Mendez:** The answer to the first question is yes, that would be enough. The answer to the second question is also yes, the court's judgment would be affected by that provision because the process of homologation is, in fact, a trial just to review the process itself, just to see that the judgment was achieved in a proper and legal manner.

**Rogers:** If the State where the judgment was rendered has not adopted the Act, I assume that you would look to case law to determine whether that state had ever enforced a Mexican judgment?

---

12. UNIFORM FOREIGN MONEY-JUDGMENTS ACT, supra, note 1.
Mendez: If the U.S. state had not adopted the Act, it would be very difficult to execute the judgment in Mexico.

Rogers: Even if we provided the judge with an actual U.S. case in which a Mexican judgment was enforced?

Mendez: Even in that case, because if the State had not adopted the Act, there would be no guarantee that a State court would enforce another judgment in a similar situation.

Gordon: The mere passage of the Uniform Foreign Money Judgments Recognition Act would be sufficient. It would seem to me the answer to the second part is that the judge may find a reason for not enforcing the U.S. judgment if the Act was not adopted and that would certainly seem to be one of the possible reasons for not enforcing. My personal view is that Mexico would enforce a judgment of such a state if you presented to the Mexican court a clear judgment in the state that has not adopted that Act that said, "We will adopt Mexican judgments. We are a judgment enforcing state." The implication of both our answers is that it is really quite uncertain how courts of civil law countries would treat the judgment of a U.S. state which has not adopted the Act.

Would it influence the enforcement of the U.S. judgment that there is an outstanding judgment in Mexico dealing with much the same matter?

Bauman: If you were a Texas attorney that was hired by Sanchez de Vega to enforce his Mexican judgment in Texas, one of your biggest hurdles would be the Texas judgment that was rendered in favor of Rogers. Now you would have inconsistent judgments. Certainly, you could expect Rogers' attorney to raise that issue in the forum where you are seeking enforcement of the Mexican judgment.

Gordon: Would a U.S. court reduce the damages in enforcing a Mexican judgment if one could prove that the party had already received Social Security medical treatment? If either of these judgments were default judgments, would it change the results? Would Mexico enforce a default judgment where there has been no appearance?

Mendez: It all depends. Mexico would grant execution of a default judgment given in Mexico. In this case, a default judgment granted in the United States would be executable.

Gordon: The other way around, in the United States?

Bauman: My sense is that a default judgment is not entitled to enforcement just because it is a default judgment. I think that any American court would be particularly careful to make sure that all the other requirements of the Uniform Foreign Money Judgments Recognition Act, were taken care of. I think a U.S. court would be very careful before they entered a default judgment for substantial damages unless they were very comfortable that, on balance, there was proper service, jurisdiction existed, and there was basic fairness.

Adler: I think you need to look at why there was a default judgment. I cannot think of a more uncomfortable question to be asked by a client than, "Should I not appear in Mexico because they are probably not going to get jurisdiction over me down the road and a U.S. court four
years from now is not going to enforce a default judgment?” I do not want to be the attorney telling him not worry about it.

Gordon: I have recently confronted someone who has been called back to Brazil on business. He does not know whether to go back because there is a default judgment outstanding against him as a defendant in a contract case. What do we tell clients? One of the first questions I asked him was whether he ever planned to go back to Brazil. However, what happens if Brazil joins NAFTA, and we finally get an enforcement convention? Or there is an enforcement convention between Brazil that joins the judgment and jurisdiction convention in Europe?

Occhialino: If the issue is whether or not the court does have jurisdiction, if there has been service of process in Brazil and the question is whether or not it is valid, I think that the thinking process simply is, shall we go down there and do our best, try to convince the court that it does not have jurisdiction? And if we lose there, then there will be a judgment against us? And when it comes back to the United States someday for enforcement, then we would have to figure out whether or not it is enforceable. But having already litigated once and lost in a foreign country on the jurisdiction question, most American courts would probably prefer to defer to the original court’s decision that it did have jurisdiction. So it is a little bit of Catch-22. I think if you litigate in a foreign country, and lose, you are much more likely to lose without a new hearing in an American court thereafter.

Gordon: The best advice is to advise the client of the consequences if they do go and if they do not go.

Occhialino: The fact that you have malpractice insurance and you do not want to call upon it, you would leave that decision ultimately to your client, after laying out all the pluses and minuses.

Bauman: One of the problems is that there is a surfeit of case law which states that if you voluntarily appeared in the foreign court and voluntarily allowed the action to be taken, you cannot come into another court and claim there was not personal jurisdiction. Therefore, in advising a client of the consequences if he does not appear, is a U.S. court likely to decide that there was no jurisdiction? That is a tough question.

Gordon: In a case in Aruba, a former Dutch Colony, we raised the question under whose laws determine whether there was a voluntary and general appearance. Is the U.S. court going to look at this question

---


15. Nahar v. Nahar, 656 So.2d 225 (Fla. 3d DCA 1995).
and apply U.S. law, or will the court look at Aruban law? We have had a very difficult time trying to determine what a limited appearance or special appearance is under Dutch law. I think that is just another problem.

Camp: With respect to going back to a country where a judgment, whether by default or otherwise, was taken against you, we do know in Texas that our judgments have a life of ten years, lapsing after that period of time unless they are specifically renewed. What is the life of a judgment in Mexico?

Mendez: The same. Ten years is required for prescription of the action or judgment.

Camp: Is it possible to renew the judgment for another ten years by moving the court?

Mendez: No, only by mutual agreement. In Mexico, a party submitting to jurisdiction of a foreign court would solve the Mexican court’s problems about jurisdiction. It is a very delicate question of whether you have to appear or not. I would lean towards not appearing rather than appearing, because if you appear and you answer the claim, you are waiving all jurisdictional issues.

Adler: I would add one other practice point. If one were relatively convinced that there was going to be an action brought against your client in a foreign court, then I would be more likely to try to rush to the courthouse in the United States first because I think there is still a general recognition here of the first filed rule. I might think about filing a declaratory judgment in an American court and, if nothing else, you might ask the American court whether there is jurisdiction in a Mexican court over your client. It is a little bit creative and a little far out. I would be much more comfortable taking a default judgment in Mexico. In one case, I obtained a declaratory judgment from an American court that Brazil had no jurisdiction. When the claimants returned from Brazil, they would be confronted with the declaratory judgment of the U.S. court.

Epstein: There is a Japanese case involving Americans who were suing the Japanese on a products liability claim in a U.S. court.16 The Japanese company went into the Japanese court and got a declaratory judgment from the Japanese court that judgment would be null and void. Do you go ahead with your trial back in the United States when you know it is not going to be enforced and it is the only place where the defendant has any assets? It certainly has a chilling effect on the U.S. lawsuit.

Gordon: We have talked about how difficult it is to get other countries to an agreement or a treaty with the United States because it is perceived to be easy for them to get their foreign judgments executed in the United States. But it is not easy for U.S. parties to get their U.S. judgments

---

enforced abroad. Would it not be easier to put pressure on U.S. states to negotiate enforcement treaties of reciprocity.

Adler: Would other nations be more willing to negotiate enforcement treaties with the United States if they understood that the enforceability of their judgments in the United States was determined on the basis of reciprocity in this country?

Epstein: In the cases that I have been involved in, the foreign company may be doing business in the United States, but they do not have significant assets here. There are many, many default judgments entered in the United States against foreign persons.

Gordon: We have not entered into an era with Mexico where we have complex litigation issues that we have seen with other parts of the world. I think we are heading for some of those. For example, Mexico has enacted a blocking statute against the Cuba Liberty and Democracy Act (Helms-Burton Law) with very strong language and some claw-back provisions. This is obviously troubling.

United States legislatures are increasingly adopting laws that will apply broadly. We have applied our securities acts, and our anti-trust laws rather extensively. We are beginning to find that legislative bodies in other countries are responding with increasing opposition to these American laws. Blocking laws have been enacted in probably a dozen countries around the world, including our two neighbors.

Can we rely upon the judiciary to deal with this? In looking at the current U.S. litigation, I have serious reservations that we can because we are finding an increasingly hostile judiciary. We not only have difficulties where lower judges are less and less tactful in commenting on the nature of foreign legal decisions, but I also find this is true in our own Supreme Court and federal Courts of Appeal. I do not think sensitive drafting by legislatures can be expected to handle this. I tend to think the obligation is going to be on the jurists, and that is us; we are all members of the United States legal system.

17. "Ley de Protección al Comercio y la Inversión de Normas Extranjeras que Contravengan el Derecho Internacional," D.O., 23 de octubre de 1996.