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ENFORCEMENT IN A NEW AGE: JUDGMENTS IN THE UNITED STATES AND MEXICO
MATTHEW H. ADLER*

I. INTRODUCTION

Enforcement means "getting the money." It is the most important part of any case, but is usually the most overlooked. Lawyers spend most of their time and their clients' money trying to win the case, and usually give little thought as to whether, if successful, the pot of gold will be at the end of the rainbow.

If the litigation is domestic, then assuming a solvent opponent, this confidence is usually justified, for at least four reasons:

1. The United States Constitution guarantees full faith and credit to the judgments rendered by the several states, so that the courts of one state are bound by the Constitution to recognize the judgments of a sister state;¹
2. Most of recognition and enforcement is based on a legal doctrine called comity, which is essentially a lawyer's word meaning mutual respect. It is easier for a state in the United States or Mexico to grant comity to a sister state, with whom it shares essentially the same legal system, than for one country to grant comity to another country, separated by miles, legal system, language, culture and politics;
3. Many states, including the border states of California and Texas, have made it much easier to enforce judgments by enacting a law called the Uniform Foreign Money-Judgments Act,² which obligates a state to execute upon the assets of one found liable under another state's judgment; and
4. Most important, it is usually both easier and cheaper to find assets located domestically than overseas. Therefore, a delinquent defendant will generally have more trouble hiding and sheltering his bank account in New York City than in Mexico City.

But if your opponent's assets are located abroad, you may have just spent three years of litigation, twenty depositions of your senior staff, and more fees than you care to think about having won nothing more than a piece of paper. At the very least, you will have to engage in an entirely new series of legal steps, this time in a foreign court.

Since, increasingly, business disputes are transnational, this absence of rules stands out as a glaring vacuum. From the particular standpoint of

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1. U.S. CONST., art. IV, § 1.
the United States and Mexico, there are no rules. In a relationship governed by dozens of treaties on a myriad of subjects, enforcement is not addressed. Nor does Mexico stand alone. The United States has no judgment enforcement treaty with any country. Nor, to compound the problem, is there anything approaching a multi-national pact on the subject. (There are regional treaties, as discussed below, but these are not relevant to the U.S.-Mexico arena)."3

International lawyers may abhor a vacuum even more than does nature, and so, for the past several years, the United States has stood at the forefront of an effort to introduce some set of order to this chaos. As described below, these efforts face serious obstacles and will require difficult policy decisions involving accommodations among competing interests. The effort, however, is welcome, and the need is clear.

II. THE CURRENT ENVIRONMENT OF JUDGMENT ENFORCEMENT

Presently, enforcement of judgments between the United States and other countries, including Mexico, takes place on an ad hoc basis. The decision on whether to enforce a judgment is not only up to the individual judge in the enforcing country, but takes place in the absence of clear rules.

A. Arbitration

Let us detour for a moment into arbitration, which increasingly is a dispute resolution instrument of choice among companies transacting business across borders. There, the rules are precise and are established by treaty. This is because transactional enforcement arbitration is governed by a single treaty, commonly known as the New York Convention.4 The New York Convention is signed by the overwhelming majority of industrialized nations. As a consequence, it is easier to enforce an arbitration rendered by private parties than it is to enforce a judgment rendered through the courts of a sister country. As long as the parameters of the treaty are met, enforcement should, and usually does, follow.

B. Enforcement Abroad of Judgments Rendered in the U.S.

The absence of a treaty between any Latin country and the United States on judgment enforcement means that there are no hard and fast

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rules in this area. Again, there is nothing unique in the legal landscape about the absence of a U.S.-Mexican treaty; in the late 1970's, the United States tried to negotiate a judgments treaty with the United Kingdom, but the effort failed due to the political pressure exerted in the United Kingdom by the British insurance industry, which was less than enthusiastic about having to pay based on high United States jury awards. That the United States could not even negotiate a bilateral convention, with the one country with which it shares both language and a common law system, speaks worlds about the lack of popularity of U.S. judgments abroad.

Why is this? Two reasons: jury awards and treble damages. U.S. jury awards are by far the highest of any nation's. There are provisions in U.S. law that let a jury make awards far in excess of the pecuniary loss; once a jury is allowed to assess punitive damages or pain and suffering costs, the sky is the limit. We read about those verdicts and shake our heads. Foreign government leaders and lawyers read about those verdicts and say "we will not buy into that system."

Nor is the perceived excess limited to products liability cases. In the commercial law area, U.S. law permits punitive damages in securities cases and treble damages in antitrust cases. Both securities and antitrust enforcement in the United States have expanded in recent years to overseas activities, leading to a still further perceived risk by other countries.

These fears do not result in an outright refusal to enforce U.S. judgments. They have, however, caused a great reluctance to enter into a treaty with the United States. The result is a middle ground between outright refusal and the almost unyielding acceptance that we see in enforcement of arbitration awards. A foreign court asked to enforce a U.S. judgment will lift up the hood of the car and inspect what is underneath. The formal name for this process throughout Latin America is *exequatur* [exequatur], or, in Mexico, *homologación* [homologation]. Depending on the particular country involved, the *exequatur* process involves an examination by the enforcing court of a number of factors, including the following:

1. Jurisdiction: Did the rendering court have jurisdiction over the defendant?
2. Competence: Was the rendering court competent to hear this dispute? Some courts will turn this into a subject matter jurisdiction inquiry.

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3. Due Process: Was the defendant personally served notice of the proceeding? Did he have a fair opportunity to defend?

If we stopped here, there would be nothing inherently difficult about the enforcement process. Most U.S. judgments could easily satisfy all of these tests, especially because all must be met even before the U.S. judgement is rendered. Before they leave the confines of U.S. courts, defendants have the opportunity to argue that they were never served, or that the court did not have jurisdiction, or that the court below did not afford them a full and fair opportunity to present evidence, and U.S. courts have proven themselves sympathetic to all of these arguments where the facts so warrant.

There are, however, further tests imposed by other states, and Mexico’s are among the most stringent. Mexico requires that the judgment be rendered according to rules of jurisdiction compatible with Mexican law; the enforced obligation is not contrary to Mexican public policy; the judgment does not result from an *in rem* action. This means that the defendant, not just the defendant’s property, must be present in the rendering state. In addition, the judgment does not result from an action which is subject to pending litigation between the same parties in a Mexican court, even if the Mexican litigation was filed after the U.S. litigation. This, of course, leaves open the possibility that a litigant faced with a loss in the United States, and upcoming enforcement of that loss in Mexico, can file a case in Mexico, perhaps years after the U.S. case was filed, and thereby block enforcement as a matter of law.

The public policy requirement has striking implications. Certainly, there is room for some form of public policy exception in enforcement; if, for example, a court ordered that a defendant’s hand be severed where it was found delinquent on a contract obligation, we would expect the enforcing court to decline to carry out this order based on public policy grounds.

But assuming a less draconian remedy, the public policy exception means that a defendant doing business in the United States, if it can insulate its assets outside of the United States, can export its own legal system for purposes of enforcement. That is, whatever relief a U.S. court might order against a defendant, the award will be meaningless unless that remedy is also acceptable on the defendant’s home turf. This runs counter to U.S. notions of expansive personal jurisdiction, although the U.S. Supreme Court has, in recent years, attempted to limit that expansion in international cases. As a consequence, the ability to enforce more novel, uniquely-based U.S. judgments is not something that should

9. Id.
be assumed. This may even continue to extend to investment dispute judgments, based on whether the Calvo Clause remains strong.\(^\text{10}\)

C. Latin Judgments in U.S. Courts

Many of the above comments run both ways. Because the U.S. does not have a judgments enforcement treaty with any nation, U.S. courts are free to inquire into the legitimacy of the rendering foreign court's award. But, according to many observers over the years, they do not do so.\(^\text{11}\) Rather, the overwhelming characteristic of U.S. courts is to give effect to foreign judgments.\(^\text{12}\)

The reason for this trend is that U.S. courts look less closely. The U.S. basis for inquiry of foreign judgments is much more sharply limited than the basis applied by other countries to U.S. judgments.

This attitude has historical roots. The seminal American foreign judgment recognition case was an 1895 U.S. Supreme Court decision.\(^\text{13}\) In *Hilton*, a French citizen obtained a judgment in a French court against an American defendant who was conducting business in France. The

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10. Historically, Latin countries would refuse to recognize awards secured by investors who contested expropriations. This refusal extended to arbitrations as well as to court judgments, and was known as the "Calvo Clause," after the Argentine diplomat and jurist Carlos Calvo (1824-1906). The *Calvo* Clause was essentially an escape clause which provided that expropriation actions had to be brought in the Latin courts to be recognized. Because this rendered diplomatic protection of investors next to impossible, the *Calvo* Clause proved to be both controversial and a hindrance to foreign investment. Recent investment treaties, including NAFTA and the U.S.-Venezuela Bilateral Investment Treaty, appear to find it out of favor. See *Daly, Has Mexico Crossed the Border on State Responsibility for Economic Injury to Aliens? Foreign Investment and the Calvo Clause in Mexico After NAFTA*, 25 St. Mary's L.J. 1147, 1162-63 (1994); *Mason, The Corporate Counsel's View: International Commercial Arbitration*, 49-Jun Disp. Resol. J. 22, 23 (1994).


plaintiff then filed a petition for recognition and enforcement in the appellate court, which granted the petition. The defendant appealed to the Supreme Court, which by a narrow margin (5-4), reversed the Circuit Court’s grant of recognition, basing its decision on the doctrine of reciprocity.\textsuperscript{14}

Although the explicit holding in \textit{Hilton} on reciprocity has been rejected, the \textit{Hilton} dictum continues to influence modern recognition practice in the United States. \textit{Hilton} held that before a foreign judgment is recognized, the plaintiff must establish that the court rendering the judgment met the following criterion:

1. subject matter jurisdiction;
2. jurisdiction over the parties or the \textit{res}; and
3. timely and proper notice of the proceedings; and an opportunity to present a defense to an unbiased tribunal.\textsuperscript{15}

Most jurisdictions in the United States adopted these requirements almost verbatim, and \textit{Hilton} remains the predominant statement of the American approach to foreign-country judgment recognition.\textsuperscript{16} However, there remains a lack of a single uniform approach.\textsuperscript{17}

Perhaps more important than outlining the prerequisites to recognizing foreign judgments in United States Courts, \textit{Hilton} clarified the doctrine of comity. According to the \textit{Hilton} court, comity is

\begin{quote}
[n]either a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.\textsuperscript{18}
\end{quote}

Comity, as defined in \textit{Hilton}, is a concept which survives to this day in enforcement jurisprudence.\textsuperscript{19} U.S. courts pay lip service to comity; but in truth, they usually grant enforcement whether or not they satisfy themselves that the other country enforces U.S. court judgments.


\textsuperscript{15} \textit{Hilton}, 159 U.S. at 204-05; Bishop & Burnette, supra note 14.


\textsuperscript{19} See, e.g., \textit{Cunard S.S. Co. v. Salen Reefer Serv.}, 773 F.2d 452, (2d Cir. 1985); \textit{Somportex Ltd. v. Philadelphia Chewing Gum Corp.}, 453 F.2d 435 (3d Cir. 1971) cert. denied, 405 U.S. 1017 (1972); Bishop & Burnette, supra note 14.
D. Enforcement of Intra-Latin American Judgments in Latin America

Our last area, intra-Latin judgments, is governed by several treaties. As in Western Europe, the Latin countries are party to a number of treaties on enforcement.\textsuperscript{20} The principal treaties are the La Paz Convention, the Bustamante Code, and the Montevideo Convention. Mexico is party to two of these, and, in fact, is the only country to have ratified one of them.

The Bustamante Code, known more fully as the 1928 Pan American Code of Private International Law, is subscribed to by the following countries: Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru and Venezuela.\textsuperscript{21} It provides that a judgment rendered in one contracting state would have force in another if:

1. The rendering court was competent;
2. The parties were served;
3. The judgment does not conflict with the public policy of the enforcing state;
4. The judgment is officially translated; and
5. The judgment is authentic in the State in which it was rendered (i.e. was published, etc.).

One commentator has correctly pointed out that "the major weakness of the Bustamante Code was that it deferred excessively to the local interests of the State addressed."\textsuperscript{22} Consequently, in 1979, a number of Latin countries ratified the Montevideo Convention.\textsuperscript{23} Its criteria for enforcement are:

1. The foreign judgment must be authentic where rendered;
2. The judgment must be translated;
3. The judgment must be duly legalized in accordance with the law of the State addressed;
4. The judge or tribunal rendering the judgment must be competent in the international sphere to try the matter and to pass judgment on it in accordance with the law of the state addressed;
5. The defending parties had notice and opportunity to be heard;
6. The judgment is final and has the force of res judicata in the State of origin; and
7. The judgment is not manifestly contrary to the principles and laws of the public policy of the State addressed.


\textsuperscript{22} Amado, \textit{supra} note 6, at 105.

\textsuperscript{23} The Montevideo Convention has been ratified by Argentina, Columbia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela. Congressional ratification is pending in Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, Honduras and Panama. Organization of American States, \textit{supra} note 3, at 23.
Mexico also stands alone in being the only country which has ratified the La Paz Convention, although there are other signatories.\textsuperscript{24} It is primarily devoted to elaborating the meaning of the phrase "competent in the international sphere" under the Montevideo Convention.\textsuperscript{25} It establishes a set list of criteria for how to find that the rendering court had jurisdiction. For corporate purposes, jurisdiction will be found either where the corporation is domiciled or has its principle place of business in the host state, or when the activities giving rise to the suit were performed in the host state. There is also a savings clause: jurisdiction will be assumed where the rendering court assumed jurisdiction in order to avoid a denial of justice because of the absence of a competent judicial or other adjudicatory authority.\textsuperscript{26}

The significance of the intra-Latin treaties for purposes of the present discussion is to show that there is nothing inherent about this subject that bars its treatment under treaty. However, a second conclusion may also emerge to the less optimistic among us: the potential success of a treaty may be directly proportional to the similarities of the legal systems of the compacting parties. Even more so, perhaps, than with trade pacts, judgment enforcement may be successful only at the regional level. To date, this is more than a hypothesis, as witness the regional (European and Latin American) but not multinational agreements on this subject.

III. THE CURRENT EFFORT TO NEGOTIATE A JUDGMENTS TREATY

A. The Hague Conference

The striking differences discussed here between enforcement of court judgments and enforcement of arbitral awards have not been lost on the international community. Over the past two decades, there have been great strides in the international community on cooperation in other areas of litigation. We now have treaties in the two areas where litigation has its start: service of process, and discovery.\textsuperscript{27} To some it therefore makes sense that there be a similar treaty on the process needed to bring litigation to a close execution.

Given the problems U.S. judgments apparently encounter abroad, it should come as no surprise that it is the United States that is leading the effort to have a judgments convention. There is a group of government lawyers that meets under the auspices of an organization known as the Hague Conference on International Law. On May 5, 1992, the United

\begin{footnotes}
\footnotetext{24. Other signatories are Bolivia, Brazil, Chile, Colombia, Dominican Republic, Ecuador, Haiti, Nicaragua, Peru, Uruguay and Venezuela. Organization of American States, supra note 23, at 26.}
\footnotetext{25. For further discussion of this point, see Amado, supra note 6, at 107-08.}
\footnotetext{26. La Paz Convention, supra note 3, art. 2.}
\end{footnotes}
States proposed that the Hague Conference prepare a convention on the recognition and enforcement of judgments. The proposal was discussed at a June 1993 conference and, at the suggestion of the Secretary General of the Hague Conference, a small Working Group was established to review the U.S. proposal.28

The Working Group issued its initial conclusions on the feasibility of a judgment recognition treaty on November 19, 1992.29 The Working Group is currently considering the project, primarily the issue of what deference should be granted to the rendering court’s jurisdiction. More contentious issues, especially jury and treble damage awards, have yet to be considered.

The Working Group presented its recommendations to the 17th Session of the Hague Conference, which met on May 10-29, 1993. At a subsequent meeting of the Hague Conference in June 1994, the issue was assigned to a Special Commission.

Since then, there have been a number of further sessions of the Commission. There are a number of additional meetings scheduled including a two-week session in June 1997, two two-week sessions in 1998, and one two-week session in 1999. The process is expected to result, at the present pace of negotiations, with the promulgation of a treaty in the year 2000.

B. Issues Before the Hague Conference

According to a State Department statement,

[...]he still somewhat tentative status of the project results from the expressed concern that many issues to be dealt with in a convention are complex and will require substantial give and take by the United States and other countries. It is also attributable to the continuing perception that this project is a U.S. proposal, and that the United States should be prepared to concede on a number of matters in order to obtain the advantage of recognition and enforcement of U.S. judgments as a treaty-based entitlement.30

At the outset of this process, the State Department offered its view of the potential difficulty facing the U.S. in these negotiations: "the feeling may persist that the United States has substantially more to gain from a convention . . . than other states, the judgments of the courts of which are, for the most part, already recognized and enforced by courts in the United States."31

28. The Working Group is composed of experts from Argentina, China, Egypt, Finland, France, Hungary, the United Kingdom, the United States and Venezuela.


30. Memorandum from Peter F. Pfund, Assistant Legal Adviser for Private International Law, U.S. Dep't. of State, to Members of Study Group on Judgments of the Secretary of State's Advisory Committee on Private International Law (July 1, 1993) [hereinafter Pfund Memo] (copy on file with author).

In the United States, there is an expansive system of jurisdiction, that often results in large damages awards. Either one of these events — a large judgment, or one based on jurisdictional bases that in other countries would be considered fleeting at best — can strike terror into the heart of a foreign Justice Ministry. Taken together, they have led to great caution by other nations in entering into a judgment pact, as witness the failure of the U.S-U.K. judgment treaty discussed above.  

1. Jurisdiction

Any enforcement treaty must have a jurisdictional clause — that is, a clause in the treaty that tests whether the rendering court actually had, in the eyes of the court asked to enforce the judgment, proper jurisdiction in the first place. Adjudicatory jurisdiction, as this is known, is one of the most difficult issues in the enforcement arena. Initially, two approaches to this issue had developed. Under a *convencion simple* [single convention], a judgment is enforced when it conforms to the enforcing country's jurisdictional requirements. Under a *convencion doble* [double convention], the parties enumerate, in advance, the jurisdictional grounds on which a judgment will be entitled to recognition. Assuming, though, that even with such a so-called white list of adjudicatory criteria in the treaty, there will still be a threshold issue (as in every court) on jurisdiction. The double convention approach leads to a jurisdictional test within a jurisdictional test.

The following are among the items one would expect to see in a white list:

1. Finality — the judgment must be final in the rendering jurisdiction;
2. Subject matter jurisdiction must have existed in the rendering court;
3. Personal jurisdiction over the parties or res must have existed; and
4. Notice — the party against whom enforcement is sought must have had timely and proper notice of the proceedings;
5. The party against whom enforcement is sought must have had an opportunity to present a defense;
6. The rendering court must have been unbiased.

The rendering court's proceedings must have been regular and conducted according to a system of civilized jurisprudence.  

32. See text associated with note 31 above.
34. See generally Adler, supra note 11 at 96-98.
35. Id. at 97-98.
One could simplify these issues still more: issues 1-3 above are pure jurisdictional issues, while issues 4-7 are more in the lines of what we would call due process. That is, first, was the court properly seized of the matter and, if so, did the court conduct the proceedings fairly?

These, of course, are subjective issues. Not only is fairness perhaps in the eyes of the beholder, but jurisdiction as well is a question that differs depending on the vantage point. So-called tag jurisdiction, in which a fleeting presence in a jurisdiction leads to a lawsuit, may prove to be a more palatable doctrine in the United States, with large borders that demand that persons be easily reached, than elsewhere.

A compromise approach that has developed is a convencion mixte [mixed convention], in which controversial jurisdictional bases are placed on a so-called grey list.36 This approach has guided the United States’ position in early negotiating rounds at the Hague Conference, as a way to negotiate a middle path between other countries’ fears of excessive United States jurisdictional concepts, and the United States’ desire for a wider reach. To date, however, there has been no progress toward this compromise goal.

2. Public Policy

Even a judgment rendered according to the most stringent standards of personal contact with the forum, which came down only after a trial that could not have been more fair or replete with opportunities for the defendant to make his case, can be denied enforcement if it conflicts with the public policy of the enforcing state. Here, the subject of high jury awards, and the interrelated subject of punitive and treble damages, must be confronted.

One solution is simply to leave an otherwise unspecific escape hatch in the treaty, which will bar enforcement of a judgment where contrary to "public policy." One could envision opposition to such a perhaps-obvious judgment avoidance technique from, for example, the trial lawyers lobby — but the rejoinder would be that something is considerably better than the nothing which currently governs. To the extent that public policy today would operate to bar enforcement in another country of a high U.S. jury award, putting this into a treaty would not worsen the situation. To the contrary, having a treaty would likely lead to a greater chance of enforcement.

3. Conclusions

It remains an unfortunate truth that litigation is a by-product of contacts. The greater the number of such contacts, the greater the incidence of litigation. It is by now a rather worn cliche that the world is getting smaller and transnational contacts increasing, but the cliche is true, and especially true for the United States and Mexico after NAFTA.

It is the task of international lawyers to provide for some measure of greater certainty and predictability in this new world. A judgments convention, therefore, is a very necessary step, and one which should not be avoided simply because of the difficulties involved. Rather, those difficulties flow from the very differences in national perspectives which currently place enforcement efforts in jeopardy. They need to be accommodated and codified, not papered over.

For these reasons, the efforts by the State Department, and the Hague Conference, are to be admired and supported. It is too early to speculate about what might be the best position to take, but it would appear that the proposal for a mixed convention, for example, is a welcome step at compromise. Similar compromise efforts are to be expected regarding public policy. Once a text emerges, it will be for those on the forefront of international commerce and the law, notably including the readers of this Journal, to take up the challenge and ensure the success of the effort.