

Recognition and enforcement of a foreign plan of reorganisation in Mexico

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This article deals with an issue of private international law that arises when a debtor submits before a Mexican court, for its enforcement and recognition, a foreign judgment that approved a reorganisation plan. Since this issue does not relate to recognising a foreign proceeding, but rather a recognition of a foreign judgment, it is outside the scope of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (MLCBI), which has been adopted in Mexico.¹ Accordingly, the Mexican private international law regarding bankruptcy will govern this issue.

This article intends not to resolve private international law problems related to insolvency but rather to identify them through the Mexican perspective.² It will compare the rules derived from the Mexican private international law and those from the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIRJ) – not yet adopted by Mexico – and the International Bar Association’s Cross-Border Insolvency Concordat (IBA Concordat).

Sources of private international law in Mexico

The First Chamber of the Mexican Supreme Court holds that there are two sources of private international law in Mexico: the national and the conventional.³

National private international law is located in positive law. The principles of private international law contained in Article 121 (II) of the Mexican Constitution and the Federal Civil Code are *lex loci contractus*, *lex rei sitae*, *lex domicilii*, *locus regit actum* for substantive law and *lex fori* for procedural law.

Treaties are the sources for conventional private international law. According to Article 34 of the Vienna Convention on the Law of Treaties (of which Mexico is a party), and notwithstanding the several treaties that Mexico is a party to, those treaties do not create either obligations or rights for a third state.

Courts are authorised to apply foreign law as long as it is not contrary to public policy or constitutes fraud to the law.⁴

Private international law related to insolvency in Mexico

There is no express rule in any legal text in Mexico relating to private international law in the field of bankruptcy. General rules of private international law, both national and conventional, will apply. If insolvency is a question of status, it should be governed by the law of the debtor’s domicile,⁵ and if a reorganisation plan is a contract approved by a court, it should be governed by the *lex fori*.⁶ The only conventional source of private international law relating to insolvency issues in Mexico is the C173 – Protection of Workers’ Claims (Employer’s Insolvency) Convention, 1992 (No 173).

Recognising and enforcing the foreign judgment that approved a foreign plan

In February 1986, Mexico signed the Inter-American Convention on extraterritorial validity of foreign judgments and arbitral awards and the Inter-American Convention on jurisdiction in the international sphere for the extraterritorial validity of foreign judgments. In January 1988, Mexico subsequently amended the Federal Code of Civil Procedure (FCCP) regarding international judicial cooperation.

Foreign judgments may be utilised in Mexico either as evidence, as a binding resolution or as a resolution to be enforced. In the first case, the foreign resolution is utilised as evidence of facts but not of law and, in the second, as evidence of law (*res judicata*). The First Chamber of the Mexican Supreme Court stated that an *exequatur* proceeding is needed only in the third case. The second case requires a verification by the national court that the foreign judgment does not contravene public policy.⁷

According to the FCCP, a foreign judgment shall be recognised and enforced through an *exequatur* if:

- the judgment is submitted before the Mexican courts through international letters of request;
- the judgment does not derive from an *actio in rem*;
- the competence of the foreign court derives from generally known rules of international law consistent with those adopted by the FCCP;
- the issue does not pertain to the exclusive jurisdiction of Mexican courts;
- the defendant was personally served in the foreign process;
- the judgment is conclusive or unappealable;
- the judgment does not involve an issue still pending by a Mexican court that was preempted;
- the judgment fulfills all the formal requirements necessary for it to be deemed authentic in the state of origin; or
- the judgment is not contrary to the public policy in Mexico.

Notwithstanding fulfilling those requirements, the Mexican court may still refuse the enforcement for lack of reciprocity. Additionally, if a foreign judgment cannot be executed in its entirety, the court may agree to its partial execution at the request of an interested party.

If the foreign judgment is submitted as a defence within the answer to a complaint, the Mexican court will recognise it if there is no contravention to public policy without the need of an *exequatur*.⁸ If it is submitted to be recognised and enforced, then an *exequatur* must be started.

The *exequatur* process comprises:

- the filing of the complaint;
- the defendant's services of process;
- the answer to the complaint;
- the hearing of evidence;
- the first ruling sentence;
- the appeal before a Court of Appeals;
- the *Amparo* (constitutional trial, similar to a cassation) before a District Court; and
- the appeal from the *Amparo* before a Circuit Collegiate Tribunal.

There are a number of possible grounds to refuse recognition or enforcement of a foreign judgment that approved a reorganisation plan.⁹

Competence

A Mexican court will recognise a foreign judgment if the foreign court had competence according to principles of private international law consistent with national private international law.

The debtor's domicile determines the competence of Mexican courts in a bankruptcy case. For legal entities, the competent court is the one located at the corporate domicile or place of main administration; for natural

persons, the place of main administration or personal domicile; and for branches of foreign companies, the place of main administration.

A plan approved by a foreign court that assumed jurisdiction based on rules other than those recognised by the national private international law would not be recognised or enforced by a Mexican court (eg, location of assets, contractual domicile). This is consistent with Article 14, subparagraphs (g) and (h) of the MLIRJ.

Service of process

The Mexican court will not recognise the judgment that approved the plan if the creditor against whom the plan is invoked was not served process or notified to participate in the foreign proceeding. This is consistent with Article 14, subparagraph (a) of the MLIRJ.

Preemption of a Mexican court

If the foreign judgment that approved the foreign plan derives from a bankruptcy proceeding started after the commencement of a bankruptcy proceeding in Mexico regarding the same debtor, it will not be recognised.

Exclusive jurisdiction

Some matters are so strongly connected to a specific interest of the state, or even to its sovereignty, that the state declares itself to be to the exclusive jurisdiction of its courts.¹⁰ This may include matters related to the state's territory, exclusive economic zone, or internal affairs of the government agencies.

There are certain debtors whose bankruptcy proceedings must be tried before Mexican courts and with the supervision of administrative agencies. The following types of bankruptcies are known as *special bankruptcy proceedings*:

- A debtor that, under a concession title, provides a federal, state, or municipal public service may be adjudicated in bankruptcy. In these special proceedings, the governmental agency that granted the concession constitutes another party in the proceeding. The granting agency appoints the insolvency officers, decides whether the debtor will retain possession and can veto the reorganisation plan.
- The financial institutions can also be adjudicated in bankruptcy but only through an involuntary petition filed by the supervising governmental agency that supervises them. These bankruptcy proceedings will always commence at the liquidation stage. In these special proceedings, the supervising governmental agency constitutes another party in the proceeding.

The supervising agency will ask the court to order the closing or suspension of the enterprise and will appoint the liquidation officer.

- In the case of mixed-economy debtors (state-owned companies), the functions of the visitor (the auditor that reports to the court whether the debtor is on general default), reorganisation officer or liquidation officer will be assumed by the Institute of Administration of Assets.

If, for any reason, a foreign court assumed jurisdiction to hear a bankruptcy case of those debtors, the foreign judgment that approved the plan would not be recognised by a Mexican court. However, it is debatable whether the bankruptcies of debtors under Mexican concessions are of the exclusive jurisdiction of Mexican courts (eg airlines, *apropos* the Chapter 11 case commenced by Aeromexico in the United States).

Public policy

Since no nation can be justly required to yield its fundamental policy and institutions in favour of those of another nation,¹¹ foreign judgments will not be recognised in Mexico if they contravene public policy. This ground of refusal is consistent with Article 7 of the MLIRJ.

The First Chamber of the Mexican Supreme Court established the same standard to apply when determining the contravention of public policy in matters of arbitral awards or foreign judgments.¹² Hence, an arbitral award or a foreign judgment contravenes the public policy in Mexico when it alone represents an attack against the country's institutions, principles or and norms, making the award or judgment inadmissible or intolerable.

Certain matters constitute public policy in Mexico. However, the analysis of the contravention of the public policy when submitting a foreign judgment that approved a reorganisation plan must be narrowed to the public policy regarding bankruptcy in Mexico.

Bankruptcy in Mexico is a matter of public policy. A contravention of public policy in a bankruptcy proceeding occurs:

- at the liquidation stage, when the proceeds of the assets are not correctly allocated or distributed to the creditors; or
- at the reorganisation stage, when the plan does not comply with the best interest test.

A foreign judgment that approved a foreign plan would contravene the public policy in Mexico if it does not respect the best interest test. To decide if the best interest principle was respected, it needs to be determined:

- which assets are part of the estate and which are exempted; and
- which law will govern to determine which are the exempted assets.

Mexico has a domestic disposition with an extraterritorial effect since all assets, wherever located, are part of the bankrupt estate.¹³ However, the estate of a foreign branch adjudicated in bankruptcy by a Mexican court will comprise only the assets and liabilities located in Mexico.

Movables follow the person (*mobilis sequuntur personam*), and immovables are part of the territory of the state.¹⁴ However, in bankruptcy, the property is considered in special connection with a person.¹⁵ The IBA Concordat's guiding principle is that all common creditors should be treated as creditors of a single 'world-wide estate'.

Reciprocity

Lack of reciprocity is a ground for refusing the recognition or enforcement of a foreign judgment. Why should one country recognise foreign plans when foreign recognition of their own plans does not seem guaranteed?¹⁶

For instance, it is well known that there has been reciprocity between Mexico and the United States regarding the enforcement and recognition of judgments derived from civil or commercial affairs. In cases of a bankruptcy proceeding, there have been insolvency-related judgments from Mexico, as in the cases of *Philadelphia Gear Corp v Philadelphia Gear de México, SA*, 44 F.3d. 187 (3d Cir. 1994) and *In Re Banco Nacional De Obras y Servicios Públicos*, 91 B.R. 661 (Bankr. S.D.N.Y. 1988). *Vitro* in particular is a landmark case regarding a Mexican judgment that approved a reorganisation plan.

In the *Vitro* case, the US Court of Appeals for the Fifth Circuit affirmed a decision to refuse the enforcement of the reorganisation plan approved by a Mexican court. The ground for refusal was that the foreign plan contravened US public policy by imposing a non-consensual discharge on third parties.

Should the *Vitro* case be enough for Mexican courts to refuse recognition and enforcement of insolvency-related judgments coming from the US? Will the Mexican courts strike back when the US Aeromexico plan is submitted for enforcement or recognition?

In Mexico, reciprocity is presumed, and the one that invokes lack of reciprocity has the burden to prove it. There is no precedent in Mexico's jurisprudence or case law that states how many cases must be to determine a lack of reciprocity. Nevertheless, said ground of refusal to recognise and enforce a foreign

judgment depends exclusively on the court's judicial discretion. Notwithstanding the lack of reciprocity, the Mexican court may still recognise and enforce the foreign judgment.¹⁷

Partially recognising and enforcing a foreign plan

Principle 2, subparagraph (f) of the IBA Concordat states that a discharge granted by the main forum should be recognised in any forum. That would hardly be the case in Mexico, since workers' claims and tax claims are not dischargeable. However, the FCCP authorises the partial recognition or enforcement of a foreign judgment, which is consistent with Article 14, subparagraph (f), and Article 16 of the MLIRJ.

It could be possible to enforce the foreign plan regarding the foreign debts but not the national debts (workers and tax), according to the *lex loci contractus*. Alternatively, it could be possible to enforce the foreign plan regarding the national debts but according to the *lex loci contractus* compatible with the national law.

Parallel plans

Mexico adopted the MLCBI almost in its entirety but added that, upon recognition of a foreign proceeding (whether main or non-main), a national proceeding must be opened if the debtor has an establishment in Mexico. If recognising a foreign insolvency-related judgment constitutes recognition of a foreign insolvency proceeding, then, by recognising a foreign judgment that approved a plan of a debtor that has an establishment in Mexico, a bankruptcy case under Mexican law will be opened in the reorganisation stage.

Here is where the question arises: which plan would the Mexican court apply – the foreign one or the one approved under the Mexican insolvency proceeding? Principle 9 of the IBA Concordat suggests cooperation among courts so that the objectives of all relevant nations may, to the extent possible, be realised. A possible solution to the parallel plans would be to limit each plan to domestic assets.¹⁸

Conclusion

The problems that arise from cross-border insolvency are yet to be resolved with a national source of private international law in Mexico. In a matter of international bankruptcy, the comity has proven wholly inadequate.¹⁹ States must coordinate their proceedings to avoid juridical anarchy by a plurality of bankruptcies.²⁰

Notes

- 1 Francisco Rodriguez-Nepote, 'Cross-Border Insolvency: Recognition of Foreign Proceeding Under the Mexican Bankruptcy Law' (SSRN, 21 June 2020). See <https://ssrn.com/abstract=3638706> or <http://dx.doi.org/10.2139/ssrn.3638706>, accessed 27 September 2021.
- 2 Francisco Rodriguez-Nepote, 'Bankruptcy Law in Mexico' (SSRN, 1 September 2020). See <https://ssrn.com/abstract=3683133> or <http://dx.doi.org/10.2139/ssrn.3683133>, accessed 27 September 2021.
- 3 *Contradicción de tesis* 372/2015 and *amparo en revisión* 887/2005.
- 4 Alberto G Arce, *Derecho Internacional Privado*, (Universidad de Guadalajara, Guadalajara 1965), 114.
- 5 Burgin, Leslie, 'Private International Law and Bankruptcy and Liquidation of Companies', 1923, 9, *Transactions of the Grotius Society*, 71–88. See www.jstor.org/stable/742961, accessed 19 August 2021.
- 6 Pasquale Fiore, *Del fallimento secondo il diritto privato internazionale*, (Tipografia Nistri, 1873), 88. Giuseppe Carle, *La natura giuridica del fallimento nel diritto privato internazionale*, (Stamperia Della R. Università, 1872) 81.
- 7 *Amparo en revisión* 578/2016.
- 8 Alberic Rolan, *Des conflits de lois en matière de faillite*, (Librairie Hachette, 1927), 135.
- 9 Raoul Bloch, *Des conflits de lois en matière de faillite*, (Libraires-Éditeurs, 1892), 81.
- 10 Jorge Alberto Silva, *Derecho internacional sobre el proceso*, (Porrúa, 2011), 195.
- 11 Joseph Story, *Commentaries on the conflict of laws*, (Hilliard, Gray and Company, 1824), 26.
- 12 *Amparos en revisión* 527/2011, 755/2011 and 1357/2015.
- 13 Kurt H Nadelmann, 'International Bankruptcy Law Its Present Status', 1944, 5(2) *The University of Toronto Law Journal* 324–351. See www.jstor.org/stable/824487, accessed 27 August 2021.
- 14 Josephus Jitta, *La codification du droit international de la faillite*, (Belifante Frères, 1895) 11.
- 15 John Westlake, *A treatise on private international law* (Sweet & Maxwell, 1912) 163.
- 16 Kurt H Nadelmann, 'The Recognition of American Arrangements Abroad', 1942, 90(7) *University of Pennsylvania Law Review and American Law Register*, 780–880. See www.jstor.org/stable/3309249, accessed 27 August 2021.
- 17 Fernando A Vázquez Pando, *Comentarios sobre el nuevo derecho internacional privado mexicano* (Revista de la Facultad de Derecho de la Universidad Autónoma de México No.163–165, 1989) 61.
- 18 Kurt H. Nadelmann, 'The Recognition of American Arrangements Abroad', 1942, 90(7) *University of Pennsylvania Law Review and American Law Register*, 780–880. See www.jstor.org/stable/3309249, accessed 27 August 2021.
- 19 Kurt H Nadelmann, 'Bankruptcy Treaties', 1944, 93(1) *University of Pennsylvania Law Review and American Law Register*, 58–97. See www.jstor.org/stable/3333807, accessed 19 August 2021.
- 20 André Weiss, *Quelques mots sur la faillite des commerçants en droit international privé* (Annales de Droit Commercial Français Etranger et International, 1888) 113.

About the author

Born in Guadalajara, Jalisco, **Francisco José Rodríguez Nepote** received a law degree from the Universidad Panamericana Campus Guadalajara. He is the founding partner of Corona & Nepote, a law firm located in Mexico City and Guadalajara. Rodríguez-Nepote has represented clients in matters of civil, commercial and *Amparo* litigation, litigating before federal and local courts since 2005. His practice specialises in contentious matters of bankruptcy, civil and commercial litigation, and commercial arbitration.

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