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# Practical Issues When Litigating the Trans-Border Dispute in Texas

BY JUDGE RANDY WILSON  
AND SUYASHI AGRAWAL

Illustration by Gilberto Saucedo

Your client is in a dispute with a Mexican maquiladora. Litigation seems inevitable. But as you contemplate the potential lawsuit, pitfalls swirl about. How to serve the defendant? How to obtain necessary discovery? Can you even enforce a judgment if you win? This article will attempt to address some of the practical issues that surround a Texas lawsuit involving international commerce.

## Service of Process

Assuming that the Mexican defendant has sufficient contacts with Texas to establish personal jurisdiction,<sup>1</sup> Rule 108a prescribes the permitted methods for service of process on foreign defendants.<sup>2</sup> But proceed with care when selecting from among the alternative methods, particularly if you hope to enforce your judgment abroad. Although Rule 108a(1)(c) allows service of process “in the manner provided by Rule 106,” the general provision applicable to in-state defendants, it is prudent to choose a method that complies with (1) state, (2) U.S. federal, and (3) the laws of the foreign jurisdiction.<sup>3</sup> Treaties trump state law,<sup>4</sup> so service under an applicable treaty or convention will help shield any judgment from a collateral attack based on ineffective service.<sup>5</sup>

Two of the principal treaties regulating service are the Hague Service Convention<sup>6</sup> and the Inter-American Convention on Letters Rogatory.<sup>7</sup> Mexico is a party to both; therefore, service according to either treaty increases the chance that any favorable judgment you secure will be recognized and enforced both here and in Mexico. The countries that have signed these treaties have done so with myriad exceptions and qualifications, so navigating them for the inexperienced international litigator can be tricky. One option to ensure that all of the current treaty requirements are satisfied is to engage a professional process server that specializes in international service. If you elect that route, select a process server carefully and expect the costs to be significant.<sup>8</sup> If you proceed on your own, carefully examine the latest treaty declarations and exceptions of the country in which you are attempting service. The U.S. State Department also publishes helpful general and country-specific circulars for guidance.<sup>9</sup> Remember the following practical pointers:

- International service, particularly if done through letters rogatory, can be time-consuming and expensive.
- Some countries require that the forum court specially issue an order appointing the person or entity that will serve process.
- Identify an accurate service address for the defendant, and verify that it is correct on all of the documents.
- Obtain proof that the defendant was actually served, preferably in accordance with the laws of the foreign country.
- With the service papers, include translated copies of all judicial and extrajudicial documents that you serve. The local consulate or embassy may have a list of professional translators that the foreign country has approved.

## Interpreters

Evidence Rule 604 provides two qualifications for an interpreter: (1) they are subject to the same qualifications as any other expert; and (2) they must take an oath to make a true interpretation.<sup>10</sup> For depositions, the party noticing the deposition must provide the interpreter. At trial, the court may, but is not required to, provide an interpreter.<sup>11</sup>

If you believe an incorrect interpretation was made, you must challenge the interpretation at trial in the same way you would challenge any expert testimony. Methods of challenge include: (1) cross-examining the witness; (2) presenting a different interpreter to testify; or (3) calling the interpreter and examining her about the accuracy of the translation.<sup>12</sup> Any question about the accuracy of the translation is up to the fact-finder.<sup>13</sup>

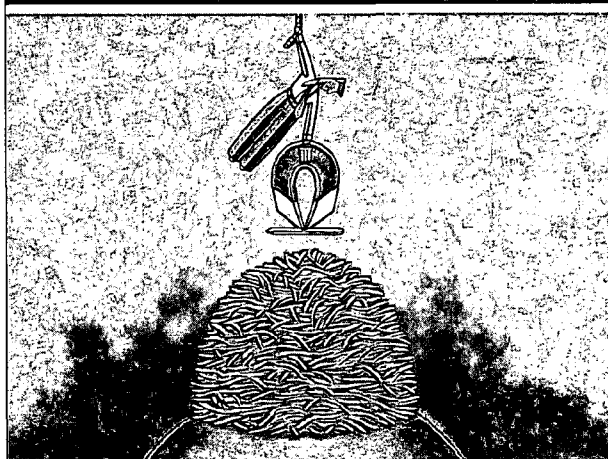
In questioning a witness through an interpreter:

- Direct your questions to the witness, not the interpreter; do not ask, “Ask the witness whether the light was red or green.”
- Keep your questions short and simple; break the questions into simple clauses to allow the interpreter to keep up.
- Keep the questions in the affirmative. “Was the light green?” instead of “Is it not true that the light was green?”
- You cannot effectively cross-examine a witness through an interpreter. It simply cannot be done; don’t try. Leading questions just don’t work.

## Translating Documents

Many of your exhibits will be in Spanish. They must be translated into English to be admissible.<sup>14</sup> To be admissible,

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exhibits must be accompanied by an English translation that is properly proven.<sup>15</sup> This is usually accomplished by a witness testifying that the English translation is accurate; then, both the English and Spanish versions are admitted into evidence. The better practice is to exchange translations in advance of trial through Requests for Admissions. However, some courts have held that a written translation is not essential; a duly qualified witness can translate the document on the stand without creating an English version.<sup>16</sup>

### Obtaining Evidence in Foreign Countries

Suppose you need a deposition of a witness in Mexico. Of course, if the witness is amenable to providing a deposition and thus no subpoena is required, you may simply notice the deposition.<sup>17</sup> If the witness is a party to the litigation, and thus the court has obtained jurisdiction over the witness, you may simply proceed under the Texas Rules of Civil Procedure.<sup>18</sup> You are not required to proceed under the more cumbersome Hague Convention or letters rogatory.

If the witness is not a party and thus is not subject to the Texas courts' jurisdiction, you have two options for obtaining

foreign discovery. If the witness resides in a country that has signed the Hague Convention on the Taking of Evidence in Criminal or Civil Matters (Hague Evidence Convention),<sup>19</sup> you may use the more streamlined Hague Evidence Convention procedures to obtain discovery. Fortunately, Mexico is a signatory.<sup>20</sup> To proceed under the Hague Evidence Convention, you must obtain a letter of request from the Texas court; the Texas Rules of Civil Procedure authorize such letters of request.<sup>21</sup> The request, which is addressed to the designated central authority of the foreign country, must contain specific information (*e.g.*, the name of the issuing court, the parties and the nature of the proceedings, and a description of the evidence sought).

If the witness resides in a non-Hague Evidence Convention country, you must proceed under the more formal letters rogatory.<sup>22</sup> These are formal requests presented through diplomatic channels and may require many months. Moreover, there is no requirement that the recipient country honor the letter rogatory; such letters are honored only by comity.

The U.S. State Department provides detailed instructions on how to obtain evidence abroad<sup>23</sup> and letters rogatory.<sup>24</sup>

### Judicial Notice of Foreign Law

Evidence Rule 203 governs proof of foreign law. Rule 203 is a hybrid rule, meaning that presentation of foreign law to the court resembles presentment of evidence, although it is decided as a question of law.<sup>25</sup> Although Rule 203 contains the heading "Judicial Notice," the procedure detailed in that rule is not a true judicial notice procedure since the term refers only to adjudicative facts and not issues of law.<sup>26</sup> Thus, you are required to follow Rule 203 requirements.

Under the rule, notice must be given of the intent to rely on foreign law, and the movant must furnish 30 days in advance all materials or sources the party intends to use as proof of foreign law, along with English translations if the materials were originally written in a foreign language.<sup>27</sup>

The trial court can consider a variety of different proof of foreign law, including affidavits, testimony, briefs, and treatises.<sup>28</sup> If there's no question about the foreign law, affidavits from foreign lawyers or professors are more than adequate.<sup>29</sup> However, when disputes arise about the content or interpretation of foreign law, live testimony could be essential.<sup>30</sup>

Of course, in the absence of proof of foreign law, the court will simply assume that the foreign law is the same as Texas and apply Texas law.<sup>31</sup>

### Enforcing the Judgment Abroad

If your foreign defendant does not have seizable assets here, successfully obtaining a money judgment for your client may prove to be a pyrrhic victory. Indeed, enforcing a money judgment from a Texas court may be the most challenging aspect of

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litigating the trans-border dispute, particularly if the defendant is in Mexico.

Whether you can enforce your Texas judgment abroad depends on whether the foreign country is party to one of the several conventions that govern the enforcement of such judgments. Because the United States and Mexico have not signed a treaty controlling the cross-border enforcement of money judgments, your practical ability to enforce a judgment in Mexico is highly unpredictable. In 1997, a leading scholar on Mexican law surveyed several major law firms in the United States and Mexico and reported that "none had ever enforced any judgment whatsoever in Mexico."<sup>32</sup> If your client wants even to entertain the possibility of enforcing a judgment in Mexico, you should engage and consult with local Mexican counsel from the commencement of your action.<sup>33</sup>

You should rely on Mexican attorneys to counsel you on the technicalities of the Mexican legal system, but remember several important considerations:

- The formalities under Mexico's Federal Code of Civil Procedure for letters rogatory must be satisfied.
- Your judgment must not affect Mexican real property.
- The rendering court must have had jurisdiction, and the defendant must have been personally summoned or served in a manner assuring him a "fair trial" and the exercise of his defenses.
- The judgment must be final (*i.e.*, accorded *res judicata* effect), and litigation concerning the same subject matter should not be ongoing in Mexico.
- The judgment must not run afoul of Mexican public policy.<sup>34</sup>
- The judgment must be properly authenticated.<sup>35</sup>

Unfortunately, satisfying these and all other Mexican requirements still provides no assurance that your judgment will be enforced.<sup>36</sup>

## Conclusion

Trans-border disputes are tricky. A great deal of thought must be given at each stage of the litigation.

## Notes

1. For a discussion of the pitfalls associated with establishing personal jurisdiction over a non-resident defendant, *see, e.g.*, Louis S. Muldrow & Kendall M. Gray, *Treading the Mine Field: Suing and Defending Non-Residents in Texas State Courts*, 46 Baylor L. Rev. 581 (1994).
2. Tex. R. Civ. P. 108a. Courts have recognized that Rule 108a uses permissive language, so it does not provide the exclusive means for serving foreign defendants. *See Comm'n of Contracts v. Arriba Ltd.*, 882 S.W.2d 576, 584-85 (Tex. App. — Houston [1st Dist.] 1994, no writ) (permitting service on a foreign defendant under the Texas Long-Arm Statute, rather than Rule 108a).
3. For example, in *Kreimerman v. Casa Veerkamp, S.A. de C.V.*, 22 F.3d 634, 643-44 (5th Cir. 1994), the court recognized that service according to the Inter-American Convention on Letters Rogatory "provides plaintiffs with a 'safe harbor' — a dependable mechanism — but not necessarily the only



**Patricia Begné** is a professor at the University of Guanajuato School of Law in Guanajuato, Mexico, where she has taught civil law, family law, international law, and gender law since 1980. She has also practiced law and serves as a consultant to law firms in the United States.

### What are some things U.S. lawyers should know when dealing with Mexican clients/businesses?

Know the way to do business in Mexico. Be patient, expect the unexpected, know the formal dress code, understand that social meetings — business lunches — are very common. In Mexico, lawyers do not charge per hour. They usually charge a flat fee per case resolution.

### What advice would you offer lawyers who are interested in working in this area of law?

Learn the legal system. Next, become very familiar with Mexican culture and the economic and business world in Mexico. A person has to be comfortable with the Mexican way of thinking, otherwise they will never succeed.

### How are lawyers in Mexico regarded by the general population?

Lawyers are well regarded in Mexico. Attorneys need to spend five years in law school and do a clinical or practical training before they graduate. Most attorneys specialize in a particular field and observe the highest standards of ethical conduct and professionalism. Occasionally, however, lapses in the judgment of attorneys occur and "lawyer jokes" are as common in Mexico as they are in the United States.

### What inspires you to teach law?

To show subsequent generations of women that success in the legal profession is possible. When I first started practicing law, female attorneys were very uncommon and it was difficult, at times, to be a female lawyer in Mexico. People were reluctant to consult a female lawyer. Female law professors were extremely uncommon when I began teaching law in 1980. After all these years I consider myself a role model to the new generations of female attorneys.

### What is your most memorable moment working with U.S. lawyers?

The worst time I have had in my professional life was when I missed an appointment with a colleague in the United States due to a miscommunication. We arranged to meet at the lobby of my hotel, and I was running late. I called the front desk to let him know that I was going to be late. However, due to my poor English, the person at the front desk did not understand me and cancelled the appointment with my colleague. In those years there were not cell phones. When I arrived at the hotel he was gone.



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- lawful mechanism — by which they may effect service on defendants residing in another signatory nation.” Not serving under a treaty carries with it the risk that your subsequent ability to enforce a judgment will become more difficult or even impossible. See *id.*
4. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988) (“By virtue of the Supremacy Clause, U.S. Const., Art. VI, the [Hague Service] Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”).
  5. See Tex. R. Civ. P. 108a(1)(d) (expressly permitting service of process “pursuant to the terms and provisions of any applicable treaty or convention”).
  6. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 164 (the “Hague Service Convention”). For a current list of other signatory countries, see [http://travel.state.gov/law/info/judicial/judicial\\_686.html](http://travel.state.gov/law/info/judicial/judicial_686.html).
  7. Inter-American Convention on Letters Rogatory, Jan. 30, 1975, S. Treaty Doc. No. 98-27 (1984), 1438 U.N.T.S. 287 (“Inter-American Convention”). For a list of signatories, see <http://www.oas.org/juridico/english/signs/b-36.html>.
  8. See *Vinewood Capital, L.L.C. v. Al Islami*, No. 4:06-CV-316-Y, 2006 WL 3151535, at \*3 (N.D. Tex. Nov. 2, 2006) (“It’s not commonplace for a plaintiff located in the United States to be required to effectuate service of process on a foreign defendant in accordance with the Hague Convention and the Court is sure that not every company specializes in such a complex and expensive process to effectuate service.”). Currently, the U.S. Department of Justice has contracted with Private Forwarding International, a Seattle-based private process server, to manage all formal service of process for the United States of judicial documents under the Hague Service Convention and the Inter-American Convention. See [http://www.hagueservice.net/forms/Official\\_Hague\\_Circular\\_Notice.pdf](http://www.hagueservice.net/forms/Official_Hague_Circular_Notice.pdf).
  9. The State Department’s general circular on service of legal documents abroad is available at [http://travel.state.gov/law/info/judicial/judicial\\_680.html#treatyobligation](http://travel.state.gov/law/info/judicial/judicial_680.html#treatyobligation). The Department’s fier for Mexico is available at [http://travel.state.gov/law/info/judicial/judicial\\_677.html](http://travel.state.gov/law/info/judicial/judicial_677.html).
  10. Tex. R. Evid. 604.
  11. Tex. R. Civ. P. 183. Special rules apply to counties that border Mexico. There, on request by a district judge, the county commissioners shall appoint court interpreters on a full- or part-time basis to carry out court functions. Tex. Civ. Prac. & Rem. Code Ann. § 21.022 (Vernon 1997).
  12. Stephen Goode et al., *Texas Practice: Guide to the Texas Rules of Evidence: Civil & Criminal* § 604.1 (3d ed. 2002).
  13. *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994) (“We, as an appellate court, can no more determine whether a translation is accurate. . . than we can determine which of two witnesses is telling the truth. . . [T]hese are questions for the factfinder.”).
  14. *Int’l Commercial Bank of China v. Hall-Fiston Corp.*, 767 S.W.2d 259, 261 (Tex. App. — Beaumont 1989, no writ) (an untranslated foreign language document “would completely lack probative value when offered to prove its contents and should be excluded”).
  15. *Sartor v. Bolinger*, 59 Tex. 411 (1883).
  16. *Gendebien v. Gendebien*, 668 S.W.2d 905 (Tex. App. — Houston [14th Dist.] 1984, no writ).
  17. See Tex. R. Civ. P. 201.1(a)(1).
  18. See *Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987); *Sandsend Fin. Consultants, Ltd. v. Wood*, 743 S.W.2d 364 (Tex. App. — Houston [1st Dist.] 1988, no writ).
  19. 23 U.S.T. 2555, T.I.A.S. No. 7444.
  20. The current signatories to the Hague Evidence Convention are ANGUILLA, ARGENTINA (excludes recognition of the extension of the Convention by the United Kingdom to the MALVINAS, SOUTH GEORGIA and SOUTH SANDWICH ISLANDS), ARUBA, AUSTRALIA, BARBADOS, BULGARIA, CAYMAN ISLANDS, CHINA, CYPRUS, CZECH REPUBLIC, DENMARK, DJIBOUTI, ESTONIA, FALKLAND ISLANDS, FINLAND, FRANCE, FRENCH GUIANA, FRENCH POLYNESIA, GERMANY, GIBRALTAR, GUADELOUPE, GUERNSEY, HONG KONG S.A.R., ISLE OF MAN, ISRAEL, ITALY, JERSEY, LATVIA, LUXEMBOURG, MACAO S.A.R., MARTINIQUE, MEXICO, MONACO, NETHERLANDS, NORWAY, POLAND, PORTUGAL, SAINT PIERRE AND MIQUELON, SINGAPORE, SLOVAK REPUBLIC, SOVEREIGN BASE AREAS OF AKROTIRI AND DHEKELIA, SPAIN, SWEDEN, SWITZERLAND, UNITED KINGDOM, UNITED STATES, and VENEZUELA.
  21. See Tex. R. Civ. P. 201.1(d).
  22. Tex. R. Civ. P. 201.1(c).
  23. “Obtaining Evidence Abroad,” [http://travel.state.gov/law/info/judicial/judicial\\_688.html](http://travel.state.gov/law/info/judicial/judicial_688.html).
  24. “Preparation of Letters Rogatory,” [http://travel.state.gov/law/info/judicial/judicial\\_683.html](http://travel.state.gov/law/info/judicial/judicial_683.html).
  25. *Long Distance Int’l, Inc. v. Telefonos de Mexico, S.A. de C.V.*, 49 S.W.3d 347, 351 (Tex. 2001); *Pennwell Corp. v. Ken Assocs., Inc.*, 123 S.W.3d 756, 760 (Tex. App. — Houston [14th Dist.] 2003, per. denied).
  26. *Lawrenson v. Global Marine, Inc.*, 869 S.W.2d 519, 525 (Tex. App. — Texarkana 1993, writ denied).
  27. Tex. R. Evid. 203.
  28. *Id.*
  29. *Lawrenson*, 869 S.W.2d at 525 (finding motion for summary judgment and attached affidavit from English solicitor regarding English law sufficient under Rule 203).
  30. *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893 (Tex. App. — Houston [14th Dist.] 2000, per. denied)(both sides presented live testimony of multiple practicing lawyers and professors to prove whether the laws of Turkmenistan and Afghanistan recognized the tort of interference with contract).
  31. *Gerdes v. Kennamer*, 155 S.W.3d 541 (Tex. App. — Corpus Christi 2004, no per.).
  32. Jorge A. Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, 5 U.S.-Mex. L.J. 137, 138 (1997).
  33. See *id.* at 144 (“I would recommend for any law firm involved in this process to always hire local counsel because local counsel is the one who knows the judge, knows the judicial and political atmosphere, and is going to provide you with current technical advice regarding the Mexican legal system. Also, local counsel will inform you on the ability and experience of the Mexican judge. Therefore, it is absolutely indispensable to hire local counsel.”).
  34. One such public policy factor that can prove fatal is the so-called “Principle of Negative Reciprocity.” If a Mexican judgment similar in character to the one you are attempting to enforce would not be enforced in the United States, the Mexican court maintains the discretion to refuse enforcement because of this lack of reciprocity. See Jorge A. Vargas, *Enforcement of Judgments in Mexico: The 1988 Rules of the Federal Code of Civil Procedure*, 14 Nw. J. Int’l L. & Bus. 376, 402-03 (1994).
  35. See Roger R. Evans, *Enforcement of U.S. Judgments in Mexico: Illusion or Reality*, 64 Tex. B.J. 139, 145 (2001); Lisa C. Thompson, *International Dispute Resolution in the United States and Mexico: A Practical Guide to Terms, Arbitration Clauses, and the Enforcement of Judgments and Arbitral Awards*, 24 Syracuse J. Int’l L. & Com. 1, 35-36 (1997). See also generally Vargas, *Enforcement of Judgments in Mexico*, *supra* note 34.
  36. See Vargas, *Enforcement of Judgments and Arbitral Awards in Mexico*, *supra* note 32, at 147 (“Even when each of these conditions are fully complied with, there is no guarantee the foreign judgment will be enforced.”).



**Randy Wilson**

is judge of the 157th district court in Harris County.

**Suyash Agrawal**

is an associate in the Houston office of Susman Godfrey, L.L.P.