INTERNATIONAL JURISDICTION AND THE FAIR TRIAL: INTERNATIONAL JURISDICTION, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL MATTERS

LATIN-AMERICAN REPORT

RICARDO PERLINGEIRO MENDES DA SILVA[1]

INTRODUCTION

This Latin-American report consists of a descriptive and individual analysis of the national systems of international jurisdiction, recognition and enforcement of foreign court decisions for civil matters in Brazil, Argentina, Chile, Cuba, Paraguay, Colombia, Venezuela, Bolivia, Peru, Panama and Mexico as well as the Model Code system for interjurisdictional cooperation to Latin America.

This report is intended to support the general report "International Jurisdiction and Elements of Fair Trial", which shall be presented in the XIV World Congress of Procedural Law (July 2011 in Heidelberg) by Remo Caponi, University of Florence.

Therefore, the analysis will be limited to the domestic laws from internal sources. Treaties and international agreements have been disregarded.

For each system, the idea was to have a synthesis of the basic laws and to focus on the meaning of international jurisdiction, types and procedures of the recognition and enforcement of foreign judgments as well as other kinds of civil cooperation. The same strategy was used for the Model Code of international jurisdiction to Ibero-America.

As a matter of fact, the expressions "international legal cooperation", "international judicial cooperation" and "interjurisdictional cooperation", frequently found in the legislation used as reference, have the same scope and are related to transnational judicial protection. Because its effectiveness needs to cross the boundaries of a state, it requires the cooperation among the

[1] Full professor at the School of Law at the Federal University in Rio de Janeiro (Universidade Federal Fluminense); federal judge in the judiciary section in Rio de Janeiro; member of the International Association of Procedural Law, the Ibero-American Institute of Procedural Law, the American Association of Private International Law, the Brazilian Institute of Procedural Law and the Brazilian Society of International Law.

organs of the Judiciary or the public administration of different states. This way, such expressions comprehend the international jurisdiction and the recognition and enforcement of foreign judgments in most of the legal systems analyzed.

ARGENTINA

1. Basic domestic laws

They can be found both in the Civil Code and in the National Commercial Code and of Civil Procedure.

2. International jurisdiction

As a rule, the Argentine legal system lacks a law which can collect the provisions about international jurisdiction. Not only is the system irregular, but also incomplete.

Thus, the solution presented by the doctrine and the national jurisprudence is the transfer of the domestic laws to the international context (Klor et al, 2003) and, by analogy, the use of conventional rules (treaties) (Arroyo, 2003). The phenomenon may as well be observed in other Latin-American legal systems, as it will be mentioned later.

According to the National Procedural Code[2], the legal competence of the national courts may not be extended. Notwithstanding the provisions of international treaties and the article 12, paragraph 4 of Law 48, there is an exception towards the territorial jurisdiction exclusively for property matters, which may be extended whether the parties agree. If it is the case of an international issue, the extension may be admitted even in favor of foreign judges or arbitrators acting out of the Republic, except in the cases in which Argentine courts have exclusive jurisdiction or when that extension is forbidden by law.

3. Procedures for the recognition and enforcement of foreign judgments

Foreign judgments shall be enforced as long as[3]:

- the decision, being "*res judicata*" in the state where it was made, comes from a competent court according to the Argentine rules of international jurisdiction and came as a decision for a personal action or for a real action brought for the protection of a possession;
- the defendant, against whom the decision will be enforced, was notified in person and granted the right to defense;

[2] Cf. Art. 1
[3] Cf. Art. 517 of the National Procedural Code

- the decision meets the requirements to be considered as such in the place where it was made and have the conditions of authenticity required by the national law;
- the decision does not affect the principles of public policies in the Argentine law;
- the decision is not inconsistent with any other decision that had been issued before or simultaneously by an Argentine court.

The enforcement of the judgment made by a foreign court shall be presented to the corresponding trial judge together with its certificate, duly legalized and translated, and the documents in the lawsuit which prove that the decision is definitive and meets the other requirements if they do not result from the decision itself.[4] To the procedures of the "*exequatur"* all the procedural incident rules will be applied. Once the execution begins, the proceedings will be the same as those of the Argentine courts.

The allegation of foreign "*res judicata*" shall be presented to the judge in charge of the lawsuit. It will be considered as an incident and will prevail only if it meets all the requirements to be enforced.[5]

4. Other types of civil cooperation

The foreign judicial authorities will communicate with each other by means of "*exhortos"* and the fulfillment of the actions requested by those authorities, whenever the request has been determined by a competent court, will follow the Argentine rules for international jurisdiction provided that the resolution does not conflict with the principles of public policy in the Argentine law. Finally, all the other guarantees established in the treaties and international agreements as well as the administrative rules shall be applied.

BRAZIL

1. Basic domestic laws

The national laws, from internal source, are irregular. They are fragmented over some articles of the Federal Constitution (CRFB/88), the Law to the Introduction of the Brazilian Legal Rules (Decree-law 4.657/42, wording based on Law 12.376/2010), the Code of Civil Procedure (Law 5.869/73) and the Bylaws of the Supreme Court (RISTF). The Resolution 9/2005 from the Supreme Tribunal of Justice is not a law in its nature but it is also frequently used. However, it is important to point out that this topic is currently on the agenda in the Brazilian Congress due to the changes in the Code of Civil Procedure (CPC)

[4] Cf. Art. 518 of the National Procedural Code
[5] Cf. Art. 519 of the National Procedural Code

2. International jurisdiction

It may be classified as concurrent jurisdiction and exclusive jurisdiction. According to the Code of Civil Procedure, the Brazilian judicial authority is competent in relation to a foreign judge in the following cases:

- the defendant is domiciled in Brazil no matter his/her nationality;
- the obligation must be accomplished in Brazil;
- the fact that caused the lawsuit must have happened in Brazil

Excluding any other court, it is part of the Brazilian judicial authority to:

- know of lawsuits of properties located in Brazil;
- oversee probate proceeding and the partition of property located in Brazil even though the deceased was a foreigner and used to live abroad.

Except for the situations above, the Brazilian judge shall not have any jurisdiction although some exceptions ought to be considered as, for instance, the probate jurisdiction or the cases of family law and alimony (Araujo, 2008, p. 230; Moreira, 1994, p. 144). The express submission (choice of international jurisdiction) and the tacit submission are not included in the legislation. It is a tendency of the jurisprudence to disregard both kinds of submission when excluding, in absolute terms, the jurisdiction of the Brazilian judge (Rechsteiner, 1996, p. 179).[6]

Indeed, both the limit of the "public policy"[7] and the principle of the effective judicial protection (the right to justice) are sometimes used so that a lawsuit may be judged by a Brazilian judge.

The doctrine of the "*forum non conveniens*" is not consolidated in Brazil nor there is a clear forecast of the "indirect jurisdiction"; therefore, the only situation in which a foreign court decision may be rejected because of the lack of international jurisdiction is when it contradicts the rule of exclusive jurisdiction of the Brazilian judicial authority.

Neither a similar suit pending in a court abroad (international pendency) nor a connection is effective enough to suspend a lawsuit in progress in Brazil.[8] That may happen only in the case of foreign "*res judicata*" previously acknowledged in the proceedings of homologation or confirmation of a foreign decision.

3. Procedures for the recognition and enforcement of foreign judgments

[6] Beat Walter Rechsteiner thinks that the rules of international jurisdiction are not supposed to be a free agreement among the parties
[7] Cf. Art. 17, Decree-law 4.657/42; art. 216 RISTF
[8] Cf. Art. 90 of the Code of Civil Procedure

In order to be enforced in Brazil, a foreign court decision must be ratified by the Superior Tribunal of Justice[9] to confirm that it has become definitive. The legal requirements for the recognition are as follows:[10]

- the decision must have been made by a competent authority;
- the parties must have been duly notified or, otherwise, it has to be proved that they are in default;
- the decision must be "*res judicata*";
- the decision must be legalized by the Brazilian consul and properly translated by an official or sworn translator in Brazil;
- sovereignty and public policy must not be disrespected.

However, the foreign court decisions may be partially confirmed.[11] The procedure of homologation is a prior condition for the decision to be effectively enforceable and become "*res judicata*" in Brazil.[12] There are some effects that come as a consequence as, for instance, a foreign court judgment that declares the unconstitutionality of a foreign law or the merely material or documental effects without any binding power (Moreira, 1994, p. 144).

That is an autonomous procedure which includes the acts of the adversary system; however, it is limited to the compliance with the requirements of the recognition itself without any chance of questioning the original decision again.[13] It is worth noting that the provisional remedies and preventive measures (injunction) may be authorized under this procedure provided that the "*fumus boni iuris*" and the "*periculum in mora*" are ascertained.[14]

Although the so-called "letter rogatory" has traditionally been the initiative of the foreign court and is intended to exchange procedural acts of communication (subpoena, summons and notification) as well as the steps of disclosure, it is now used in Brazil as an instrument of recognition of foreign court judgments which cannot be reached by the "homologation of foreign decisions," that is, it can also be useful to the recognition of non-definitive foreign court decisions or even provisional or anticipatory remedies[15]. Its requirements are generic and associated with the observance of the sovereignty and public policies in Brazil. Just as it happens with the "homologation of foreign decisions", the letter rogatory is a procedure for which the adversary system is restricted to the compliance with its own requirements without any interference in the original decision.[16]

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[9] Cf. Art. 105, I, I, CRFB/88
[10] Cf. Articles 216 and 217, RISTF
[11] Cf. Art. E, paragraph 2, Resolution 9/STJ
[12] The law generically uses the expression "efficacy", without exception. Cf. Art. 483, CPC
[13] Cf. Art. 221, RISTF
[14] Cf. Art. 4, paragraph 3 of the Resolution 9/STJ
[15] Cf. Art. 7 of the Resolution 9/STJ
[16] Cf. Art. 226, paragraph 2, RISTF

The Superior Tribunal of Justice is competent to process and judge the original decision (art. 5, I, i, CRFB/88) and its partial recognition is admitted as well.[17]

The first-instance federal judges[18] are in charge of the enforcement of the foreign court judgments and of the letter rogatory, no matter what the issue is. All the other rules, valid for the enforcement of the domestic decision with the same nature, shall be applied.[19]

If there is not any special reason, the adversary brought incidentally on the enforcement of the letter rogatory (already authorized) and initiated by the defendant (stay of execution) belongs to the jurisdiction of that Superior Court.[20]

4. Other types of civil cooperation

The "direct aid" is a procedure of passive cooperation that claims the performance of a jurisdictional or non-jurisdictional act from a Brazilian judicial or administrative organ in order to fulfill the requirements of a pending or future lawsuit abroad.[21] Owing to its real nature, in the case of direct aid the recognition of a foreign court decision does not exist. The necessary actions are requested directly to the authority in charge, without any letter rogatory procedure. The direct aid includes mainly the provisional and anticipatory remedies brought directly in Brazil whose cause of action is from a lawsuit abroad (e.g. breach of confidentiality as well as the request for information about administrative or judicial proceeding in progress in Brazil. The rules of jurisdiction to process the direct aid, the adversary and all the other procedural acts are subject to the general rules of the domestic Code of Civil Procedure.

BOLIVIA

1. Basic domestic laws

The topic is dealt with in the article 552 and following of the Code of Civil Procedure.

2. International jurisdiction

The rules about international jurisdiction are not clearly identified in the domestic laws from internal source; however, they can be extracted from the rules about the requirements needed to the recognition of foreign judgments.

[17] Cf. Art. 4, paragraph 2 of the Resolution 9/STJ
[18] Cf. Art. 109, X, CRFB/88
[19] Cf. Art. 484, CPC
[20] Cf. Art. 228, RISTF
[21] Cf. Art. 7, only paragraph of the Resolution 9/STJ

3. Procedures for the recognition and enforcement of foreign judgments

The conditions for a foreign court decision to be enforced in Bolivia are the following:[22]

- the decision was made for a personal action or for a real action brought for the protection of a possession which was transferred to Bolivia during or after the action procedure abroad;
- the defeated party, domiciled in Bolivia, must have been duly notified;
- the obligation for the action must be valid according to the Bolivian laws;
- the decision must not contradict the public policy;
- the decision must be issued as per the laws of the country where it was made;
- the decision needs to have the necessary requirements to be considered a decision in the place where it was made and be authentic according to the domestic law;
- the decision must not be inconsistent with any other decision that had been made before or simultaneously by a Bolivian court.

Reciprocity is one of the conditions for the foreign judgment to be enforceable in Bolivia.[23]

The procedure towards the recognition is held by the Supreme Court of Justice[24] and the adversary acts are optional, at that Court's discretion.[25]

4. Other types of civil cooperation

In order to carry out the services of summons and subpoena by means of the "*exhorto",* required by foreign judges or tribunals, neither the adversary nor the "*exequatur*" is necessary. The single presentation of the "*exhorto*", duly legalized by the "Party Judge" from the place where the services will be carried out, is enough.[26]

CHILE

1. Basic domestic laws

The topic is dealt with in the article 243 and following of the Code of Civil Procedure.

[22] Cf. Art. 555, Code of Civil Procedure
[23] Cf. Art. 554, Code of Civil Procedure
[24] Cf. Art. 557, Code of Civil Procedure
[25] Cf. Art. 559, Code of Civil Procedure
[26] Cf. Art. 561, Code of Civil Procedure

2. International jurisdiction

No rules of international jurisdiction were found in the domestic laws from internal source.

3. Procedures for the recognition and enforcement of foreign judgments

The conditions for a foreign judgment to be enforceable in Chile are as follows:[27]

- the decision must not oppose the laws of the Republic; however, the procedural laws applicable to the claim in Chile are disregarded;
- the decision must not oppose the national laws;
- the defeated party must have been legally notified. However, the party is allowed to prove that, for some reason, he/she was prevented from being defended;
- the decision must have been issued as per the laws of the country where it was made.

The Chilean legal system uses the principle of reciprocity as a condition to the recognition of a foreign judgment[28], whose proceeding will be ruled by the Supreme Court.[29]

The wording of the article 248 of the Code of Civil Procedure points out that such recognition aims at the enforcement, whose proceeding is subject to the adversary system, except in the cases of probate jurisdiction.[30] The enforcement of the foreign judgment will be ruled by the judge who would be competent according to the rules of the national jurisdiction.[31]

4. Other types of civil cooperation

When the services have to be carried out in a foreign country, the communication will be directed to the civil servant in charge by means of the Supreme Court. The Supreme Court will forward the information to the Ministry of Foreign Affairs, which, in turn, will continue the procedure according to what is established in the treaties in force or in the general rules issued by the Government. The above mentioned communication shall mention the name(s) of the person (people) to whom the interested party will confer power to carry out the service or will nominate someone to represent him/her or anybody else able to do it. The communication from foreign tribunals for the services in Chile will happen in the same way.[32]

[27] Cf. Art. 245, Code of Civil Procedure
[28] Cf. Art. 244, Code of Civil Procedure
[29] Cf. Art. 247, Code of Civil Procedure
[30] Cf. Articles 248 and 249, Code of Civil Procedure
[31] Cf. Art. 251, Code of Civil Procedure
[32] Cf. Art. 76, Code of Civil Procedure

COLOMBIA

1. Basic domestic laws

The matter is dealt with under Title XXXVI, article 693 and following of the Code of Civil Procedure (Decrees 1400 and 2019).

2. International jurisdiction

There are no express rules about international jurisdiction; however, some provisions about indirect international jurisdiction may be extracted from the requirements for the recognition of foreign judgments.

By reading the above mentioned Code of Civil Procedure it is possible to conclude that the Colombian law does not recognize the effects of international pendency as a disadvantage to a lawsuit in progress in Colombia.

3. Procedures for the recognition and enforcement of foreign judgments

The requirements for a court decision to be enforceable in Colombia are the following:[33]

- it must not be about real law regarding possessions that were in the Colombian territory at the moment of the beginning of the lawsuit to which the decision refers;
- it must not oppose the laws or other Colombian provisions of public policy, except the procedural ones;
- it must be notarized according to the country of origin and a copy of it, duly legalized, must be presented;
- the matter of the decision cannot be of the Colombian judges' exclusive jurisdiction;
- there must not be any lawsuit in progress in Colombia or any decision made by domestic judges on the same matter;
- the decision must have been made within the adversary system as long as the defendant was summoned and had the chance to defense, according to the laws of the country of origin. That may be presumed by the "*res judicata*" (whose importance will be focused later);
- the requirement of the "*exequatur*" must be accomplished.

The recognition procedure will take place before the Room of "*casación civil*" of the Supreme Court of Justice (Corte Suprema de Justicia).[34]

[33] Cf. Art. 694, Code of Civil Procedure
[34] Cf. Art. 695, Code of Civil Procedure

Liable to the adversary acts, that procedure is a prior condition for the start of the enforcement, which, in turn, is subject to a procedure that will be ruled by the procedural general rules.[35]

The Colombian legal system seems to be against the automatic effect of the foreign judgments. The article 695, 7, is conditional on the topic when it states that "[…] if the court grants the "*exequatur*" […] and if the decision needs enforcement […]". Therefore, it is possible the existence of the "*exequatur*" in the court decision for which be enforcement will not be required. It is evident, then, that the "*exequatur*" is a condition not only for the enforcement but also for the "*res judicata*" and any other possible effect.

4. Other types of civil cooperation

The circuit judges of the place where the foreign judgment will be enforced are supposed to service the "*exhortos*" related to the evidence provided by a foreign civil servant either of the jurisdictional rank or of the arbitration tribunal as well as the notices, forms or similar acts required by the judge, whenever they do not conflict with the law or any other domestic provision of public policy.[36]

CUBA

1. Basic domestic laws

The issue is comprehended by the Code of Civil Procedure (Law 7) and the Law of the Organization of the Judiciary (Law 4).

2. International jurisdiction

The role of the Cuban jurisdiction is to know of:

- the civil litigations between natural people or legal entities, whenever at least one of them is of Cuban nationality;
- the litigations of natural people or foreign legal entities, which are represented or domiciled in Cuba, whenever the suit does not refer to possessions located out of Cuba;
- the issued submitted to the jurisdiction of the Cuban tribunals because of contracts or treaties;[37]

The jurisdiction of the Cuban tribunals cannot be declined, that is, the tribunals may not refuse to acknowledge the litigation if any of the litigants is of Cuban nationality even if they may be

[35] Cf. Art. 696, 7, Code of Civil Procedure
[36] Cf. Art. 696, Code of Civil Procedure
[37] Cf. Art. 2, Law 7, Code of Civil Procedure

involved in any dispute pending in another country or if there might have been submission to a foreign court, even to an arbitral one. However, the controversies that may arise as a consequence of foreign trade and are submitted to an arbitral court, expressly, tacitly or due to legal provisions or international agreements are excluded.[38]

4. Procedures for the recognition and enforcement of foreign judgments

The decisions of foreign tribunals which were legalized in the country where they were issued will have, in Cuba, the force granted to them by the treaties and, in the absence of treaties, they will be accomplished according to the national rules as long as the following conditions are ascertained:

- they must have been issued as a result of a personal action;
- they must not have been issued in default towards the defendant;
- they must refer to legal obligations as per the Cuban laws;
- the document must bear the same requirements which are necessary for its authenticity in the country where they came from; also, they must be in conformity with the requirements of the Cuban laws so that they have faith in the national territory;
- the decision to be enforced must contain a notice by the Ministry of Foreign Affairs from the country where it was issued stating that the authorities in that country will enforce, as a sign of reciprocity, the decisions issued in Cuba;
- the defeated party's domicile in Cuba must be precisely declared.[39]

The application for the enforcement of foreign judgments must be filed before the Supreme Popular Tribunal except if, due to an international agreement, the jurisdiction is to be exercised by another tribunal.

Therefore, the document containing the judgment shall be presented at the corresponding Room of the above mentioned Tribunal, with its official translation in case the document is drafted in any other language than Spanish, and the corresponding copies to be used in the service at the moment of summoning the person against whom the judgment is to be enforced. The tribunal shall hear, within ten days, the party against whom the decision was made and the Agent. The deadline will be counted as from the date of the summons of that party at his/her domicile in Cuba.[40] After the hearing has or hasn't taken place and when the deadline is due the enforcement of the judgment will be confirmed or rejected, without any chance to further appeal. If the suit is sustained, the enforcement application will be forwarded to the tribunal that has the jurisdiction where the defeated

[38] Cf. Art. 3, Law 7, Code of Civil Procedure
[39] Cf. Art. 483, Law 7, Code of Civil Procedure
[40] Cf. Art. 484, Law 7, Code of Civil Procedure

party is domiciled; on the other hand, if the suit is rejected, the enforcement will be given back to the claimant.[41]

4. Other types of civil cooperation

For the due service of the orders and letters rogatory from foreign tribunals, when those orders are about the fulfillment of some judicial act, their format and procedure will be established by the treaties[42]. Otherwise, the proceedings will be through the Ministry of Foreign Affairs, being their format and wording adjusted to the provisions and regulations established by that Ministry.[43]

MEXICO

1. Basic domestic laws

The topic is in the Political Constitution of the United Mexican States, in the Code of Civil Procedures and in the Federal Code of Civil Procedures.

2. International jurisdiction

The national tribunals have exclusive jurisdiction over the following matters:[44]

- land and bodies of water located in their national territory, including the underground, the airspace, the territorial waters and the continental shelf either as a consequence of the rights "*in rem*" , that is, the rights derived from their concession of use, exploration, extraction or benefits or as a consequence of lease;
- the resources coming from the Exclusive Economic Zone or that have any relation to whatever rights of sovereignty in that zone, as per the Federal Law of the Sea;
- the acts of authority or related to the Government regime, the Federation and the Federative Units;
- the internal organization system in the Mexican embassies and consulates abroad as well as their official activities;
- other situations determined by other laws.

Concerning the enforcement of the judgments, the jurisdiction claimed by a foreign tribunal will be recognized in Mexico if the reasons for the claim are compatible with or similar to the domestic law, except if the matter refers to the exclusive jurisdiction of the Mexican tribunals.[45]

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[41] Cf. Art. 485, Law 7, Code of Civil Procedure
[42] Cf. Art. 174, Law 4, Code of Civil Procedure
[43] Cf. Art. 58, Law 4, Law of the Organization of the Judiciary
[44] Cf. Art. 568, Federal Code of Civil Procedures
[45] Cf. Art. 564, Federal Code of Civil Procedures

The domestic tribunals will also recognize the jurisdiction claimed by a foreign tribunal if, at their discretion, the intention is to avoid a denial of justice because of the lack of a competent jurisdictional organ. The Mexican tribunal may take over the jurisdiction in similar cases.[46]

The same way, the jurisdiction claimed for by a foreign jurisdictional organ, which had been agreed with the parties before the suit, will be recognized when, owing to the circumstances and relations towards them, this choice will not bring about difficulty of denial to the right to justice.[47] The clause for the choice of venue will not be valid when the right to choose the venue is exclusive in favor of one of the parties.[48]

It is important to point out that the pendency exception and the connection exception are not valid because of the fact that it is a suit in course abroad.[49]

3. Procedures for the recognition and enforcement of foreign judgments

The judgments, the private non-commercial arbitral awards and the judicial orders issued abroad may be enforceable under the following conditions:[50]

- all the legal procedural formalities concerning the "*exhortos*" coming from abroad must have been accomplished;
- the decision must not have been made as the result of a real action;
- the judge or tribunal must have jurisdiction to acknowledge and decide over the matter according to the rules recognized by the international law and compatible with the rules in the Code. The foreign judge or tribunal does not have jurisdiction when there is a clause of exclusive choice of the Mexican tribunals in the legal acts resulting from the decision to be enforced;
- the defendant must have been summoned or legally notified personally in order to guarantee that he/she will be heard and will be granted the right to defense;
- the judgment must have become "*res judicata*" in the country where it was made, without any possibility of review;
- the original suit must not be the matter of a suit pending between the same parties before a Mexican tribunal and for which suit there was a provisional remedy. The "*exhortos*" or the letter rogatory for the summoning must, at least, have taken place or been delivered to the authorities of the Secretary of Foreign Affairs in the State where the summoning will be done. The same rule is applied when the final sentence is issued;

[46] Cf. Art. 565, Federal Court of Civil Procedures
[47] Cf. Art. 566, Federal Court of Civil Procedures
[48] Cf. Art. 567, Federal Court of Civil Procedures
[49] Cf. Art. 40, III, Code of Civil Procedures for the Federal District
[50] Cf. Art. 571, Federal Code of Civil Procedures; art. 606, Code of Civil Procedures of the Federal District

- the accomplishment of the obligation must not oppose the Mexican public policy;
- the necessary requirements for the decision to be considered authentic shall be met.

The principle of reciprocity is also a condition for the enforcement of a foreign judgment: "Notwithstanding the fulfillment of the listed conditions, the Mexican court may deny the enforcement if it is proven that in the country of origin the foreign judgments or awards were not enforced in similar cases."[51]

If a foreign judgment, award or judicial order cannot be entirely enforced, the Mexican court may admit its partial validity, at the request of the interested party.[52]

The Mexican court having jurisdiction to enforce a foreign judgment is the court of the defendant's domicile or, in the absence of it, the court of the place where his/her possessions are located in the Mexican Republic.[53]

The procedure for the homologation/confirmation of the judgment, award or foreign judicial order shall start with both the plaintiff and the defendant being personally served with the summons, giving each of them nine working days to present their defense or exercise their corresponding rights. If there is evidence, a date shall be scheduled to acknowledge the evidence authorized by the court. The arrangements will be the responsibility of the proponent, except if there is a well-grounded reason. In all cases, a prosecutor will take part in the proceedings to exercise the pertinent rights. The decision made by the judge is subject to appeal, under both effects in case the enforcement is rejected or under the effect of devolution in case it is granted.[54]

Neither the first-instance court (trial court) not the court of appeals is allowed to examine or decide over the justice or injustice of the foreign judgment, not even over the reasons, the statements of fact or the legal cause on which the decision was based. The role of the court is limited to examine the authenticity of the judgment and to determine whether it should be enforced according to the applicable Mexican laws.[55]

The decisions and other judicial foreign orders will be valid and recognized by the Republic as long as they do not oppose the domestic public policy.[56]

The Mexican laws are not very clear towards the other effects of the foreign judgments; however, the Federal Superior Tribunal of Justice declared that the "*res judicata*" of foreign

[51] Cf. Art. 571, Code of Civil Procedures of the Federal District; art. 606, Code of Civil Procedures of the Federal District
[52] Cf. Art. 577, Federal Code of Civil Procedures; art. 608, 5, Code of Civil Procedures of the Federal District
[53] Cf. Art. 573, Federal Code of Civil Procedures
[54] Cf. Art. 574, Federal Code of Civil Procedures
[55] Cf. Art. 575, Federal Code of Civil Procedures; art. 608, Code of Civil Procedures of the Federal District
[56] Cf. Art. 575, Federal Code of Civil Procedures; art. 608, Code of Civil Procedures of the Federal District

decisions depends on a procedure of recognition ("*exequatur*") by the Mexican tribunals and the enforcement will be effective in a further procedure (Castro, 2009, p. 255).

If the decisions or judicial orders shall be used solely as evidence, it will be enough that they have the necessary requirements to be considered as authentic public documents.[57]

4. Other types of civil cooperation

The court where the homologation proceeding happened will have jurisdiction to decide over any issue related to attachment, deposit, appreciation, auction and other steps related to the realization and coercive execution of a decision issued by a foreign court.[58] The distribution of any funds resulting from the auction shall be the responsibility of the foreign judge who made the decision.

The international "*exhortos*" that are received shall depend on homologation only when there is coercive execution over people, property or rights. On the other hand, the "*exhortos*" related to notices, collection of evidence and other procedural acts will be serviced upon request. That procedure will not start a suit and the following rules shall be observed:[59]

- the fulfillment of the "*exhortos*" or the favor of any other requests of single procedural international cooperation will be carried out by the tribunals in the Federal District in accordance with the terms and limits in this Code and other applicable laws;
- without detriment to the topic above, the addressed tribunal may agree to simplify the formalities or the accomplishment of formalities other than the domestic ones provided that it does not mean any harm to the public policies, mainly regarding the individual guarantees;
- upon request of the legitimate party, the acts related to legal notification, summons or disclosure may be carried out so that they may be used in suits abroad by means of the probate jurisdiction or the preparatory service stated in that Code;
- the tribunals that send the international "*exhortos*" abroad or that receive them shall proceed with them the double and keep them in order to certify what was sent or received during the suit.

[57] Cf. Art. 569, 2, Federal Code of Civil Procedures; art. 605, Code of Civil Procedures of the Federal District
[58] Cf. Art. 576, Federal Code of Civil Procedures
[59] Cf. Art. 604, Code of Civil Procedures of the Federal District

PANAMA

1. Basic domestic laws

The national sources for the topic correspond to some articles of the Judicial Code of 1986 (wording changed by the Law 23 of June 1, 2001)

2. International jurisdiction

There are no express provisions for the rules of international jurisdiction in the domestic laws from internal sources.

The national pendency and connection are not authorized by the Panamanian laws. Therefore, the domestic laws cannot be disregarded in favor of any similar suit pending abroad.[60] Furthermore, the Panamanian laws do not recognize the doctrine of the "*forum non conveniens*" (Boutini, 2006, p. 175)

3. Procedures for the recognition and enforcement of foreign judgments

For a foreign judgment to be enforceable in Panama, the requirements are the following:[61]

- the decision must have been made as a result of a personal issue, except if there is any specific provision in the law of descent in foreign countries;
- the judgment must not have been in default. As far as this article is concerned, it means the lack of a legal notice to the defendant when ordered by the tribunal in charge of the suit, except when the enforcement is requested by the defendant in default;
- the obligation must be legal in Panama;
- the copy of the decision must be authentic.

The Panamanian law recognizes the principle of reciprocity;[62] the recognition of foreign provisional remedies is avoided (Boutini, I, 2006, p.911 and p. 925).

The recognition of foreign judgments is a procedure that aims at the enforcement in the exact terms of the law[63], which is silent towards the other effects of foreign judgments. It is possible to understand that neither a decision that has not become "*res judicata*" (like the decisions from probate jurisdiction) nor the mere documental effects of the foreign judgment would be subject to a control of "*exequatur*". A single procedure of homologation/confirmation of the judgment would be enough (Boutini, 2006, p. 207 and p. 764).

[60] Cf. Art. 232, Judicial Code of the Republic of Panama
[61] Cf. Art. 1419, Judicial Code of the Republic of Panama
[62] Cf. Art. 1419, Judicial Code of the Republic of Panama
[63] Cf. Art. 1419, Judicial Code of the Republic of Panama

The Supreme Court of Justice is in charge of that procedure for which there must be the acts of the adversary system.[64] It is worth pointing out that there is a parallel procedural system concerning maritime law, which has been criticized (Boutini, 2006, p. 732).[65]

4. Other types of civil cooperation

In the laws that were analyzed, it was not possible to identify other types of civil interjurisdictional cooperation.

PARAGUAY

1. Basic domestic laws

The topic is in the Code of Civil Procedure (Law 1337, November 4, 1988) ad in the Code of Judicial Organization (Law 879, February 2, 1981).

2. International jurisdiction

The rules of international jurisdiction have grounds on the Code of Judicial Organization, which does not admit the extension to the foreign judges.[66] Furthermore, the jurisdiction of the Paraguayan judge exists up to the end of the suit as long as it had been brought before a Paraguayan judge even if the circumstances that initially determined his/her jurisdiction were changed.[67]

It is possible to plead, before a Paraguayan judge, the fulfillment of a contract of which execution is to be carried out within the Paraguayan territory even though the defendant is not domiciled or resident there. On the other hand, if the defendant is domiciled in Paraguay he will be allowed to litigate there although the contract execution may be carried out abroad.[68]

3. Procedures for the recognition and enforcement of foreign judgments

The decisions issued by the foreign tribunals shall be enforceable if they obey the following requirements:[69]

- the decision must have become "*res judicata*" in the State where it was made and should have been issued by a tribunal with jurisdiction in the international order as a result of a personal action or a real action involving a possession, which was

[64] Cf. Art. 1420, Judicial Code of the Republic of Panama
[65] Cf. Law 8, 1982
[66] Cf. Art. 3, Code of Civil Procedure
[67] Cf. Art. 5, Code of Civil Procedure
[68] Cf. Art. 19, Code of Judicial Organization
[69] Cf. Art. 532, Code of Civil Procedure

transferred to the territory of the Republic during or after the suit was brought abroad;

- there must not be any pending suit in a Paraguayan tribunal concerning the same subject matter and involving the same parties;
- the defeated party, domiciled in the Republic, must have been officially notified and represented in the suit or, otherwise, have been declared in default according to the law of the country where the suit was brought;
- the obligation of the subject matter must be valid according to the national laws;
- the decision must not oppose the domestic public policy;
- the decision must have the necessary requirements to be considered as such in the place where it was issued; it must also have the conditions of authenticity required by the domestic laws;
- the decision must not be incompatible with any other decision issued by a Paraguayan tribunal before or simultaneously.

The enforcement of the decision made by a foreign tribunal will be brought before the corresponding first-instance court and shall contain the certificate, duly legalized and translated, as well as the documents of the suit which can confirm the legality of the decision and the fulfillment of the other requirements, in case they are not a result of the judgment itself.[70]

Before reaching a decision, the judge shall notify, within six (06) days, both the defeated party and the Fiscal Ministry. In case of opposition, the incidental rules shall be applied. In case the requested enforcement is determined, the procedure shall be ruled by the Code of Civil Procedure.[71] Finally, when the force of a foreign decision is judicially invoked, it will only be effective with the requirements which are necessary for its enforcement.[72]

4. Other types of civil cooperation

The Paraguayan judges will proceed with the provisional remedies if they are requested by a foreign judge whenever those remedies are in accordance with the Paraguayan laws.[73]

In case of "*exhortos*" received from abroad, the following rules shall be applied:[74]

- they must be duly legalized and notarized by a diplomatic or consular agent of the Republic;
- in case the Paraguayan judge comply with their fulfillment, the services will be carried out in accordance with the domestic laws;

[70] Cf. Art. 533, Code of Civil Procedure
[71] Cf. Art. 534, Code of Civil Procedure
[72] Cf. Art. 535, Code of Civil Procedure
[73] Cf. Art. 537, Code of Civil Procedure
[74] Cf. Art. 129, Code of Civil Procedure

- those ones that are released, upon the request of the interested party, shall expressly bear the name of the person in charge of their fulfillment, who shall pay for the costs; the ones required ex-officio will be free of charge for the claimant.

PERU

1. Basic domestic laws

The topic can be found in the Civil Code and in the Code of Civil Procedures

2. International jurisdiction

The Peruvian tribunals have jurisdiction to know of the lawsuits against people domiciled in the national territory[75] as well as about property actions even if they are brought against someone domiciled abroad, as follows:

- when the suit refers to real rights over possessions located in the Republic; however, in case of a real estate the jurisdiction is exclusive;
- when the suit refers to an obligation that must be enforced in the territory of the Republic or deriving from contracts arranged or fulfilled in the national territory; however, if it is the case of a tort or fault committed in the Republic as well as its consequences, the jurisdiction is exclusive;
- when the parties are expressly or tacitly submitted to their jurisdiction. Except for any other resolution, simultaneous or prior to the submission, the choice of the tribunal is exclusive.

The above mentioned tribunals also have jurisdiction to know of the litigations resulting from universal assets actions even if they are brought against people domiciled abroad whenever the Peruvian laws are applicable to rule the matter in accordance with the rules of International Private Law. However, the Peruvian jurisdiction is considered to know of actions related to bankruptcy assets if the possessions are located in Peru.[76]

Finally, those tribunals have jurisdiction to know of suits resulting from actions related to people's condition and capacity or concerning family relations, even if the parties are domiciled abroad in the following situations:

- when the Peruvian law is applicable to rule the matter, in accordance with the rules of Private International Law

[75] Cf. Art. 47, Code of Civil Procedures; art. 2057, Civil Code
[76] Cf. Art. 2061, Civil Code

- when the parties are expressly or tacitly submitted to their jurisdiction whenever the suit has an effective link with the territory of the Republic.[77]

The express submission (choice of jurisdiction) the law establishes the following:[78] "The choice of a foreign tribunal or the favorable extension of jurisdiction so that it may know of the subject matters deriving from property actions will be recognized whenever they do not refer to issues related to the Peruvian exclusive jurisdiction, abuse of rights, or opposition to the Peruvian public policy." The Peruvian tribunals may decline their jurisdiction if the parties had agreed to have an arbitral decision for a matter of optional Peruvian jurisdiction unless it is stated in the arbitral clause that there should be a submission to the Peruvian jurisdiction.[79] Concerning the tacit submission, it is pointed out that the defendant shall join the suit and shall not oppose the plaintiff's choice.[80]

On the other hand, the Peruvian tribunals do not have jurisdiction to know of:[81]

- the actions related to real actions over property located abroad;
- the matters that had been submitted to a foreign jurisdiction by the parties;
- the suits related to people's condition and capacity or concerning family relations if there is not any effective link with the territory of the Republic.

In Peru, the international pendency may cause the stay of the proceedings for up to three (03) months as long as it is clearly shown the possibility that an enforceable judgment may come out.[82] The foreign "*res judicata*" may cause the termination of a similar suit.[83]

3. Procedures for the recognition and enforcement of foreign judgments

For a foreign judgment to be enforced in Peru there must be the following requirements:[84]

- they must not be about the Peruvian exclusive jurisdiction;
- the foreign tribunal must have been competent to know of the matter, in accordance with the rules of the Private International Law and with the general principles of the international procedural jurisdiction;

[77] Cf. Art. 2062, Civil Code
[78] Cf. Art. 2060, Civil Code
[79] Cf. Art. 2064, Civil Code
[80] Cf. Art. 2059, Civil Code
[81] Cf. Art. 2067, Civil Code
[82] Cf. Art. 2066, Civil Code
[83] Cf. Art. 2066, Civil Code
[84] Cf. Art. 2104, Civil Code

- the defendant must have been legally notified, as per the laws of the venue of the suit. He or she must have been given a reasonable time to joint the suit and must have been granted the guarantees for defense;
- the decision must have become "*res judicata*" according to the laws of the venue of the suit;
- there must not be in Peru any pending suit between the same parties and about the same matter and which had been brought before the start of the litigation that caused the decision;
- the decision must not be incompatible with any other decision that bears the requirements for its recognition and enforcement and must not have been issued before;
- the decision must oppose neither the public policy not the morality;
- reciprocity must have been proven (it is considered lack of reciprocity the cases in which the foreign nation revises the Peruvian judgments).[85]

The enforcement of the foreign judgment will depend on the declaration of enforcement, which is a delibation procedure according to the rules of the Code of Civil Procedures, without any specifications.[86] The procedure for the enforcement of the foreign judgment is the same as for the enforcement of domestic judgments.[87]

The effect of the foreign "*res judicata*" does not depend on a prior court of delibation and may be enforced, directly or incidentally, by the court where the suit is supposed to be brought as long as the requirements for the recognition of the foreign judgment are fulfilled.[88]

The judgments of probate jurisdiction will produce effects automatically and do not depend on a prior court of delibation, either.[89] The same happens to the enforcement of the legalized foreign judgment.[90]

4. Other types of civil cooperation

The domestic tribunals are competent to provide provisional remedies in order to ascertain the protection of people who are in the Peruvian territory even though they are domiciled abroad. This jurisdiction of the Peruvian tribunals does not depend on the international jurisdiction to decide over the merits.[91]

[85] Cf. Articles 2101 and 2103, Civil Code
[86] Cf. Art. 2108, Civil Code
[87] Cf. Art. 719, Code of Civil Procedures
[88] Cf. Art. 2110, Civil Code
[89] Cf. Art. 2108, Civil Code
[90] Cf. Art. 2109, Civil Code
[91] Cf. Art. 2063, Civil Code

VENEZUELA

1. Basic domestic laws

The topic is in the article 39 and following of the International Private Law Statute of August 6, 1988, in the article 850 and following of the Code of Civil Procedure and in the articles 42 and 43 of the Organic Law of the Supreme Court of Justice.

2. International jurisdiction

The Venezuelan courts will always have jurisdiction when the defendant is domiciled in Venezuela, or, being domiciled abroad, fits into one of the situations established in the articles 40, 41 and 42 of the International Private Law Statute.

The Venezuelan courts shall have jurisdiction in the property actions, as follows:

- when the suit refers to the disposition or holding of personal possessions or real estate located in the territory of the Republic;
- when the suit refers to obligations to be complied within the territory of the Republic or deriving from contracts or facts that took place in the said territory;
- when the defendant was duly serviced within the Venezuelan territory;
- when the parties are, expressly or tacitly, submitted to their jurisdiction.

Likewise, the Venezuelan courts shall have jurisdiction in actions of universal assets, as follows:

- the Venezuelan law is competent to rule over the merits of the action, according to the provisions in the law;
- when the universal assets are located in the territory of the Republic.

Finally, the above mentioned tribunals are competent in the suits related to people's status or family relations, as follows:

- when the Venezuelan law is competent to rule over the merits of the action, according to the provisions in the law;
- when the parties are, expressly or tacitly, submitted to their jurisdiction whenever the suit has an effective ling with the territory of the Republic.

Without detriment to the above mentioned rules, the exclusive jurisdiction of the Venezuelan courts is an imposition whenever the action refers to property located in Venezuela, or the matter does not admit any transaction, or, still, when the principles of the Venezuelan public policy may be affected.[92]

[92] Cf. Art. 4, International Private Law Statute

The lack of jurisdiction of the Venezuelan tribunals may be recognized ex-officio or upon the parties' request.[93] Likewise, the Venezuelan law does not recognize the jurisdiction of foreign tribunals. The foreign decision, which is in disagreement with the principles of concurrent and exclusive jurisdiction included in the International Private Law Statute, will be rejected (indirect jurisdiction).[94]

The express submission (choice of the international jurisdiction) and the tacit submission are included in the International Private Law Statute; the first shall be in writing and the latter will depend on the defendant's participation in the suit and on the practice of some acts, except for the act of declining the jurisdiction or bringing a provisional remedy.[95] Submission is avoided when the matter affects the constitution, the modification or the extinguishment of real rights towards property, except in the cases allowed by the law of the real estate status.[96]

The jurisdiction (concurrent) of the Venezuelan courts may be withdrawn because of conventions favorable to foreign courts as long as the matter does not affect the exclusive jurisdiction.[97]

The effects of international pendency and connection are implicitly established in the law, except if the matter belongs to the exclusive jurisdiction of the Venezuelan court and, thus, may be the cause for the exclusion of those courts' jurisdiction.[98] The wording for the laws related to the matter opposes the effectiveness of the foreign judgments issued abroad irrespective of the above mentioned law.[99] The best exegesis, however, is that the foreign judgment will be rejected only if the defendant was summoned in the foreign suit after his being summoned in the Venezuelan suit. The foreign judgment will also be rejected in the case of pendency in favor of the suit abroad if the matter is the one of the exclusive jurisdiction of the Venezuelan courts (Hernandez-Breton, 2004, p. 134).

3. Procedures for the recognition and enforcement of foreign judgments

The following are the condition for the effectiveness of foreign judgments in Venezuela:

- they must have been issued for a civil or mercantile suit or, in general, for private legal relations;
- they must have become "*res judicata*" in accordance with the laws of the State where they were issued;

[93] Cf. Art. 57, International Private Law Statute
[94] Cf. Art. 53, 3 and 4, International Private Law Statute
[95] Cf. Articles 44 and 45, International Private Law Statute
[96] Cf. Art. 46, International Private Law Statute
[97] Cf. Art. 47, International Private Law Statute
[98] Cf. Art. 5, International Private Law Statute
[99] The article 53, 6, opposes the article 58 of the International Private Law Statute

- they must not refer to real rights of property located in the Republic or in the case that the Venezuelan exclusive jurisdiction for that kind of suit has not been withdrawn;
- the tribunals of the State where the judgment was issued must have jurisdiction to know of the suit, according to the general principles of jurisdiction established in Chapter IX of this law;
- the defendant must have been summoned, must have been given enough time to join the suit and must have been granted procedural guarantees for the defense;
- they must not be incompatible with a decision issued before and that became "*res judicata*"; also, there must not be in Venezuela any pending suit between the same parties and about the same matter and which had been filed before the foreign judgment was issued;[100] It is also required from the defendant that the application is in writing and that the corresponding documents are authentic and legalized by the competent authority.[101] The reciprocity principle, formerly existing in the Code of Civil Procedure[102], does not appear in the International Private Law Statute, which came later, and, thus, it is not a condition for enforcement (Hernandez-Breton, 2004, p. 135).

As a rule, the procedure to declare the effectiveness of a foreign judgment is in charge of the Supreme Tribunal of Justice.[103] However, if the matter is emancipation, adoption and other non-contentious issues the jurisdiction is of the Supreme Tribunal of Justice where the judgment shall be enforced.[104]

The automatic effect of the decision (not the enforcement) of the foreign judgments is a controversial topic even with the wording of the article 55 of the International Private Law Statute, which mentions a previous procedure of recognition just for the start of the enforcement suit without any other effect.[105] This happens because the article 850 of the Code of Civil Procedures (formally still in force) states that the foreign judgments without the previous declaration of the Supreme Court "will not have any effect as a means of evidence, not even to produce "*res judicata*" or to be enforced". Therefore, part of the scholars understands that the procedural effects of the "*res judicata*" as well as the material effects of the foreign judgment are automatic (Hernandez-Breton, 2004, p. 136-138).

The adversary acts in the procedure for the declaration of effectiveness assures that the defendant "may propose all the matters and defenses, accumulatively, and the suit may be decided

[100] Cf. Art. 54, International Private Law Statute
[101] Cf. Art. 852, International Private Law Statute
[102] Cf. Art. 850, International Private Law Statute
[103] Cf. Art. 850, Code of Civil Procedure; articles 42 and 25, Organic Law of the Supreme Court of Justice
[104] Cf. Preface by Tatiana B. de Maekelt in the book by Eugenio Hernandez-Breton (2004, p.10)
[105] Id. Ibidem

as being a mere right with the examination of the authentic documents offered by the parties; however, if the court finds it valid, they may, ex-officio, demand that other evidence be disregarded and the corresponding fault will be fixed in the case, according to the circumstances."[106] However, the review of the subject-matter is not allowed.

For the procedure of enforcement of foreign judgments there are no specific references in the domestic law.

4. Other types of civil cooperation

The domestic laws allow the jurisdiction of the Venezuelan courts to issue provisional remedies, aiming at the protection of the people who are in the territory of the Republic although they lack jurisdiction to decide over the merits of the suit.[107] In a way, this makes up for the lack of clear legal statements for the enforcement of provisional remedies granted abroad. The law just mentions "foreign judgments", without any indication that the expression comprehends "provisional judgments".

According to the domestic rules of jurisdiction "the orders from foreign tribunals regarding witnesses inquiry, expert evidence, oaths, interrogation and other acts of discovery to be carried out in the Republic shall be implemented by the first-instance judge, who must have jurisdiction in the place where those acts will be fulfilled, as long as those orders come with the rogatory from the authority that required them, duly legalized by a diplomatic or consular agent, or via the Diplomatic Service."[108] This same procedure is applicable when people domiciled in Venezuela are summoned to show up before the foreign authorities and to respond to the notices of acts ordered from abroad.[109]

THE IBERO-AMERICAN INSTITUTE OF PROCEDURAL LAW[110]

1. The Ibero-American Model Code of interjurisdictional cooperation

The model Code of interjurisdictional cooperation to Latin America was approved by the Ibero-American Institute of Procedural Law (IIDP) during the "XXI Jornadas Ibero-Americanas de Direito Processual" (Ibero-American Journeys of Procedural Law), which took place in October,

[106] Cf. Art. 855, Code of Civil Procedure
[107] Cf. Art. 43, International Private Law Statute
[108] Cf. Art. 857, Code of Civil Procedure
[109] Cf. Art. 857, Code of Civil Procedure
[110] The notes below were extracted from the Preface of the Ibero-American Model Code of interjurisdictional cooperation, whose text is in the site of the Brazilian Institute of Procedural Law http://novo.direitoprocessual.org.br/content/blocos/76/1, access in January, 2011

2008, in Lima, Peru. The members of the Committee that designed the Code were: Ada Pellegrini Grinover, chairwoman (Brazil); Ricardo Perlingeiro Mendes da Silva, general secretary (Brazil); Abel Augusto Zamorano (Panama); Angel Landoni Sosa (Uruguay); Carlos Ferreira da Silva (Portugal); Eduardo Véscovi (Uruguay); Juan Antonio Robles Garzón (Spain); Luiz Ernesto Vargas Silva (Colombia); and Roberto Omar Berizonce (Argentina).

It is worthwhile pointing out that the above mentioned Code is not intended for the cooperation in "Ibero-America" only, but a model Code for the "interjurisdictional" cooperation in Ibero-America so that it will not remain any false impression that the cooperation would be only among the Ibero-American States. It does not mean a proposal for an international treaty to be ratified, but a proposal for additional laws to be internally incorporated by the Ibero-American countries and aimed at the interjurisdictional cooperation with any State (Ibero-American or not).

2. International jurisdiction

The rules for civil international jurisdiction (articles 7 and 8) are guided by the principle of effectiveness, which, together with the principles of the natural judge and the "*forum non conveniens*" impose limits to the principle of submission whenever it may lead to the "*forum shopping*", meaning harm to the right to justice, legal defense, the knowledge of the facts, the compliance with the acquired rights or factual fulfillment of the protection of execution and of urgency (article 7, paragraph 1). Generally speaking, such rules follow the guidance of the domestic legislator, who will preferably choose the tribunal of the State closest to the demand; closest to the defendant, ensuring the legal defense (article 7, III); closest to the facts, ensuring the effective disclosure (article 7, I, second part and 8, I); closest to the material law which may regulate the "*sub judice*" grounds of the right (article 7, II); or, still, closest to the venue of execution, ensuring the effectiveness of the protection of execution and of urgency (article 8, I and II). In this context, the tribunal of the State that has any effective link with the demand and is able to ensure a fair trial (article 7, III) will have the jurisdiction; in a subsidiary nature, the tribunal of the State object of the agreement, expressly or tacitly, by the litigants will have the jurisdiction (article 7, paragraph 1).

The submission or choice of jurisdiction in the transnational context is subsidiary to the compliance with the rules of absolute jurisdiction (concurrent and exclusive) except if no other tribunal shows the conditions to render an appropriate jurisdiction in the real case or on behalf of the principle of effectiveness (article 7, paragraph1, second part). However, the extension of the jurisdiction is not allowed if the defendant is absent or, still, if the choice of jurisdiction opposes the rule of absolute jurisdiction or if it is forbidden by the international procedural law itself. In the article 7, paragraph 1, it is suggested the submission, express or tacit, only for the cases when the tribunal of the State that had been selected or indicated is the one legally intended or, still, if it is in accordance with the rule of absolute jurisdiction in the real case. Therefore, the submission (express or tacit) to tribunals of unfamiliar States or to tribunals that are fully incompetent in

absolute terms is not allowed; nor the tacit submission is permitted if the defendant is absent. This is because the concern of the above mentioned Code is to assure the right to defense; in the transnational context, this fact is more relevant and the surrender or tacit submission to the jurisdiction chosen by the defendant cannot be drawn from the default. The defendant must join the suit and, at the moment of contesting the pleading, he/she must not mention anything about the lack of jurisdiction (article 7, paragraph 3).

The pendency and the connection between pending suits may cause their stay but not their extinguishment so that there is no risk of causing harm to the right to justice, as per article 9. The stay, however, shall last up to the moment there is a final decision for the original suit or for a time considered reasonable. The stay of the proceedings for indefinite time is more serious than admitting conflicting decisions or legal insecurity. Furthermore, the pendency and the connection may only be effective if, at the discretion of the State in charge of the stay, the original suit is likely to have a final decision compatible with the fundamental principles of that State. Thus, that is why reference is made to "tribunal which has international jurisdiction, which is internationally competent."

3. Procedures for the recognition and enforcement of foreign judgments

The transnational effectiveness – the "*res judicata*", conditions for the enforcement and mere material effects – of a foreign judgment is one of the main types of interjurisdictional cooperation (article 3, III). The effectiveness of the foreign judgments, automatic and independent from prior recognition (article 10) means, in practice, to admit the retroactivity of the foreign "*res judicata*" (to the date of the original transit *in rem judicatam*) and the immediate enforcement of the foreign judgments before the administrative organs or by means of any legal procedure. Only the enforcement of a foreign judgment – because it claims for the exercise of the jurisdiction by the State required – implies a previous judicial recognition even if it is implicit (article 49). It is worthwhile pointing out that, the indirect automatic effectiveness of the foreign judgment legitimates the admission of international pendency and connection.

The effectiveness of the foreign judgment will depend on the compliance with the requirements comprehended among the fundamental principles of the State required and on the rules of international jurisdiction (article 11, I, II and III). The merely procedural requirements are considered as well, such as the fact that the foreign judgment has effects from its origin (article 11, IV) or the existing compatibility with the foreign judgments issued in the State required or in any other State as long as it has the conditions to be effective in the required State (article 11, V).

The enforcement of foreign judgments must comply with the requirements which are necessary for them to become effective (article 12). It is clear, then, that the enforcement does not fit among the automatic effects of the foreign judgment. At this point it is sensible to point out the importance of the "compliance with the requirements" since the enforcement procedure will depend

on the incidental “previous recognition” by the judicial act that will authorize the start of the enforcement and will declare the enforceability of the foreign judgment. It is important to point out that a pending appeal in the original court will not prevent the foreign judgment from being enforced, that is, the enforcement of a foreign judgment that did not become “*res judicata*” shall be admitted (article 14) provided that the appeal that was filed there does not have supersedeas (article 11, IV) and, if possible, the necessity of bond will be optional to the defendant.

In the case of the enforcement of a judgment related to a judicial remedy of urgency, it is essential that the main suit (future or in progress) in which the subject-matter will be decided meet the conditions to provoke a decision with the requirements for its effectiveness in the State required (article 13). The procedure for the enforcement of foreign judgments is the same as for the enforcement of an arbitral award (article 57).

If the jurisdiction or the delibation of the State required is necessary, the procedure – unavoidably contentious and of cognition exauriating – shall analyze who will be responsible for the interjurisdictional cooperation. If the initiative comes straight from the tribunals, the procedure will be the letter rogatory; however, when the interjurisdictional cooperation is the parties’ initiative and responsibility, the procedure will vary depending on the issue intended from the State required (lawsuit and incident of plea against the effectiveness of foreign judgments, enforcement of foreign judgments, extradition). What basically makes the distinction between the letter rogatory and those various procedures is its ex-officio nature since it comprehends the “information about the administrative or judicial procedure”, the “disclosure” that demands jurisdictional acts in the State required and the “enforcement of judicial remedies of urgency”, ordered by the tribunal of the State required (article 41).

According to the meaning of the word “delibation”, the suit in the State required is limited to the fundamental principles of that State and to the compliance with the rules of international jurisdiction. It does not mean exactly that the tribunal of the State required is not allowed to decide over the merits of the foreign decision; however, the tribunal will only do this in the proportion to the necessity and based on the fundamental principles of the State required. It is important to remember that the tribunal in the State required is not an appellate instance of the tribunal in the State requiring (article 44, second part) but may deny the enforcement of the decision or of part of it, especially the part that confronts its fundamental principles. The possibility of this judicial delibatory control – without which there would certainly be offense to the sovereignty – is established in the proceedings of the letter rogatory (article 40), of the lawsuit and incident of plea against the effectiveness of the foreign judgment (article 44) and of the enforcement of the foreign judgments (article 49).

In the procedure for the enforcement of a foreign judgment the tribunal of the State required is asked to give notice, previously and shortly, so that the foreign judgment may be considered, without detriment to a phase of cognition exauriating, “*a posteriori*” (articles 49, second part, 51, first part and 52). In the procedure of enforcement, the summons will not be serviced before the tribunal

issues a judgment equivalent to an act of declaration of enforcement; likewise, the preventive detention of the extradited shall not be ordered and a judicial remedy of urgency shall not be granted without previous and short delibatory proceedings. In the proceedings of letter rogatory and lawsuit and incident of plea against the effectiveness of the foreign judgment, the delibation court is the one of cognition exauriating and always after the start of the foreign judgment effects (articles 39 and 43).

The Ibero-American Model Code rejects the idea of the jurisdiction being concentrated in just one tribunal of the State required to exercise the delibation court since the concept of the diffuse jurisdiction prevails among the tribunals that would have jurisdiction to decide over the subject-matter, in accordance with the rules of jurisdiction in force in the State required. Besides making the proceedings faster by unifying the jurisdiction for the delibation and the enforcement of the foreign judgment before the same tribunal, it favors a degree of quality of the jurisdiction while the suit is delivered to a specialized tribunal. This is the rule for the proceedings of the letter rogatory (article 38, paragraph 2), for the lawsuit and incident of plea against the effectiveness of the foreign judgment (articles 42, only paragraph and 46, only paragraph) and for the enforcement of foreign judgments (article 48).

As for the name “lawsuit and incident of plea against the effectiveness of the foreign judgment”, the above mentioned Model Code does not mean the “recognition” of the foreign judgment but to “impeach the effectiveness” considering that the foreign judgments provoke automatic effects in the territory of another State and they do not depend on a prior recognition. In fact, it means the correction of a contradiction of Regulation (CE) 44/2001 so that the further discussion in the judicial court is the impeachment of the automatic effects of the foreign judgment. Such impeachment may be brought directly or incidentally. Anyone feeling damaged by the automatic effects of the foreign judgment will have standing to sue “*ad causam*”, that means that not only the parties in the original suit are able to do it but also those who, directly or indirectly, feel damaged by the effects of the foreign judgment in the State required (articles 42, 46 and 47).

As a matter of fact, the foreign “*res judicata*” (article 46) and the international pendency (article 47) will be judged in the incident of plea against the effectiveness of the foreign judgment. The retroactive effects of the judgment that grants the impeachment (article 45) is a natural consequence of the fact that the effectiveness of the foreign judgment does not depend on a prior recognition. Finally, the incompatibility between the foreign judgment and the public policy has naturally been present since the effectiveness was first felt in the State required; that is why the recognition of that incompatibility shall have a retroactive effect.

4. Other types of civil cooperation

The proceedings of interjurisdictional cooperation, as per the Model Code, consider the nature – administrative or jurisdictional – of the act object of the exchange, if they claim or not a

jurisdictional remedy before the State required and, consequently, if they need or not a court of delibation. According to the article 34, if only one tribunal is involved, it will mean a judicial procedure of probate jurisdiction (judicial mutual help) while for the other cases, when the jurisdiction or delibation is not claimed for in the State required, the procedure of cooperation will be that of administrative mutual help of probate jurisdiction (non-contentious), in accordance with the administrative laws of that State.

In the proceedings of mutual help, the types of cooperation are the following:

- summons, subpoena and legal judicial or extrajudicial notification if mailing is not possible or recommendable;
- information about the foreign law;
- information about the administrative or judicial lawsuit in progress in the State required, except in the case of confidentiality;
- joint investigation between the police officers and criminal organs, except if the remedy claims for jurisdiction in the State required, which shall be the object of a judicial remedy of urgency;
- disclosure.

The Model Code states that the remedies of urgency filed directly in the State required, are dependant on limits related to the following principles:

- principle of the natural judge – the tribunal of the provisional or urgency remedy is always the tribunal of the main suit, with the possibility to transfer the jurisdiction to another tribunal only owing to extreme situations, in which it is proven that the procedure of recognition or the "*exequatur*" of urgent remedies shall make the fulfillment of the mentioned right impossible (article 16, I);
- principle of the public policy and international jurisdiction – the granting of the protection of transnational urgency directly by the tribunal of the State in which it should be enforced, besides the "*periculum in mora*" and the "*fumus boni juris*" (article 17) will depend on: a) the demonstration that the alleged material right is compatible with the fundamental principles of that State and b) the future and definitive judicial declaration, made abroad, of the right will be caused by a lawsuit that can guarantee the due process of law before a competent tribunal, according to the rules of international jurisdiction in force in that State (article 16, II).

The procedure and jurisdiction for the remedies of urgency to be processed in the State required shall comply with the general rules of the usual civil procedural law; their temporary nature limits the effectiveness of the judgment to the issuing, within reasonable time, of the final judgment of the main suit in course abroad (article 18).

FINAL CONSIDERATIONS

First of all, it is worth showing that there is no consensus on in which area of knowledge the analysis of the international jurisdiction and the recognition and enforcement of foreign judgments shall be included. It shall be placed somewhere between the public and the private law, or between the private international law and the civil procedural law or penal procedural law. Such indistinct situation, mainly in Brazil, makes the elaboration of a board of experts difficult, causing consequences both in the legislation (fragmented and not updated) as well as in the jurisprudence, sometimes tending to the principles of the international law, sometimes tending to the principles of the procedural law.

As a matter of fact, there is a strong tendency to include the subject in the Codes of Civil Procedure, consisting, mostly, of some special rules of procedural jurisdiction and enforcement of judgments. In some cases, as in the Cuban and the Paraguayan legal systems, the subject is included in the laws of the organization of the judiciary; in the Brazilian legal system the subject is in the Code of Civil Procedure and in the laws of the organization of the judiciary. The exceptions are the Peruvian system, with the Civil Code, and the Venezuelan system, which is the only system to dedicate a special statute of private international law to the subject. It is also possible to realize that because of the legislative omission in some countries, the treaties and bilateral agreements which, in fact, would not reach some concrete situations, are used by the doctrine and the jurisprudence. That is the reason of the decision of the Ibero-American Institute to create a general rule for all the types of interjurisdictional cooperation, approaching the theme as a specific and autonomous branch of the procedural law.

The rules of international jurisdiction are seldom defined by the law, as it happens in Cuba, Peru, Brazil, Mexico and Venezuela. In the remaining Latin-American systems that were analyzed the rules of exclusive jurisdiction are inferred from the requirements for the recognition of foreign judgments and sometimes are related to the property law, sometimes to the law of possessions (as it happens in Argentina, Bolivia, Colombia, Panama and Paraguay).

The indirect international jurisdiction is an image basically unknown to the legislator in this continent; it is expressly stated only in Argentina and Mexico (… the jurisdiction of a foreign tribunal for the enforcement of judgments, only when the mentioned jurisdiction is a result of rules which are similar to and compatible with the domestic law, except if the matter is of the exclusive jurisdiction of the Mexican tribunals…). On the other hand, in the other systems the laws of internal territorial jurisdiction are frequently used.

The principle of free will in the international context, even being clearly stated only in a few legal systems and in spite of being based on the rules of the usual procedural law, is admitted in most of the States in the form of express submission (choice of the international jurisdiction) and tacit submission. In the Model Code the free will is subsidiary to the rules of exclusive jurisdiction and is admitted only to select the tribunal of one of the States which has concurrent jurisdiction in

order to avoid the exorbitant jurisdiction. It is important to remember that the limit will always be the "public policy", which, because of its subjective and imprecise nature, is, in practice, a useful instrument to avoid exorbitant jurisdictions that happen either as a consequence of legislative gaps or as a consequence of the parties' wish.

Indeed, the rules of jurisdiction based on the nationality and that would be considered as a type of exorbitant jurisdiction (Boutini, 2006, p. 166) cannot be found among the majority of the Latin-American systems. However, the options offered to the defendants because of the simultaneous presence of several elements of proximity between the suit and the State and with several cases of concurrent jurisdiction, may, in fact, allow opinions towards the "*forum shopping*" (Boggiano, 2008, p. 99), mainly when the rules of indirect jurisdiction, pendency or international connection of the State required are not quite clear or efficient.

The international pendency, among most of the Latin-American systems analyzed, is not enough to stop the course of a domestic lawsuit. The exception is the Peruvian law; however, even in this case, the international pendency may cause the stay of proceedings for three (03) months only. Indeed, the Model Code shares the same concept because it also admits the international pendency and connection and agrees that to stay the proceedings during indefinite time is more serious than to accept conflicting decisions or legal insecurity.

The public policy clause, as a limit to the foreign judgments, is not express in the Chilean, Cuban or Panamanian legislation. Although in the remaining systems the denomination "public policy", if present, is mentioned in a way to permit a flexible and imprecise interpretation, the Model Code, differently, added it to the fundamental principles of the State required.

The reciprocity of treatment is still a condition for the recognition of foreign judgments in Bolivia, Chile, Cuba, Mexico, Panama and Peru and represents a restriction to the judicial transnational protection. On the other hand, in most of the systems, the following requirements are mentioned as being necessary for the recognition of a foreign judgment: compliance with the due process of law, the proper summoning or the proven default, the transit in "*rem judicatam*" of the foreign judgment, the nature of a real decision in the place where it was issued, the lack of a judgment on the same matter in the country required.

The recognition of a foreign judgment has the jurisdiction concentrated on the Supreme Courts and is an autonomous proceeding and prior to the enforcement in the following countries: Brazil, Bolivia (the adversary is optional), Chile, Colombia, Cuba, Panama and Venezuela. When the recognition is of diffuse jurisdiction among the judges who would be internally competent to decide over the matter, the mentioned procedure will appear as a mere incident of execution as, for instance, in Argentina, Mexico and Peru. This is, by the way, the criterion adopted by the Model Code. As a general rule, in those systems, where the recognition is a mere incident of the execution, the foreign "*res judicata*" is considered an automatic effect of the decision made abroad and always needs an incidental judicial declaration in the suit for which it was required. The exceptions are

Panama and Venezuela where, although they have an autonomous and concentrated system for the recognition, there are controversies about the automatic effect of the foreign "*res judicata*".

On the whole of the analyzed systems, the court of delibation is exercised by means of the previous adversary system, except for Bolivia, where the tribunal has the power to dismiss the adversary acts in case they are deemed unnecessary. Depending on what is understood by "public policy", the court of delibation may mean a review of the original decision, of which Bolivia is an example and where the foreign judgment may not oppose the Bolivian law. The same happens in Chile: "…that the judgments do not oppose the laws of the Republic…"

As per the other instruments of cooperation, there is, in the analyzed systems, a tendency to admit simpler and faster devices for the direct communication among the involved judicial authorities regarding the services for the procedural communication (summons, subpoena and legal notice) and the disclosure acts, without the necessity of a previous court of delibation (e.g. Argentina, Bolivia, Colombia, Mexico, Venezuela and the Model Code). There are also express regulations towards the provisional or urgency remedies filed before the tribunal of a State and, concerning the matter, filed before the tribunal of another State (e.g. Paraguay, Peru, and Venezuela).

Finally, it is important to say that, for what was covered in this report, the conclusion is that the view of the future of the judicial transnational protection is not a pessimist one. This point of view had already been explained by José Carlos Barbosa Moreira in his general report for the VIII International Congress of Procedural Law (Ultrecht) (Moreira, 1989, p. 243 and following. However, there are still some internal rules, some of them of constitutional nature, that are contradictory or that are subject to contradictory comprehension among the Latin-American States. This way, according to the explanation in the preface of the Ibero-American Model Code of interjurisdictional cooperation, the ideal image featured by the conventions and treaties in the context of the international organizations (Mercosul, OAS, Hague, UNO) as well as the search for an Ibero-American judicial space by the Ibero-American Net of Judicial Cooperation (IberRED) will depend, preliminarily, on a basic consensus for the collection of the fundamental principles and of the general rules of transnational jurisdiction, which, with the necessary adjustments by each State, are likely to be applied to all the legal systems where the State of Right prevails. In this context, the International Association of Procedural Law may significantly contribute for this goal.

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