JANUARY/FEBRUARY/MARCH 2024
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CLW COMMERCIAL LAW WORLD MAGAZINE

*An Official Publication of the **Commercial Law League of America***

INTERNATIONAL ISSUE

CLLA

COMMERCIAL LAW LEAGUE OF AMERICA

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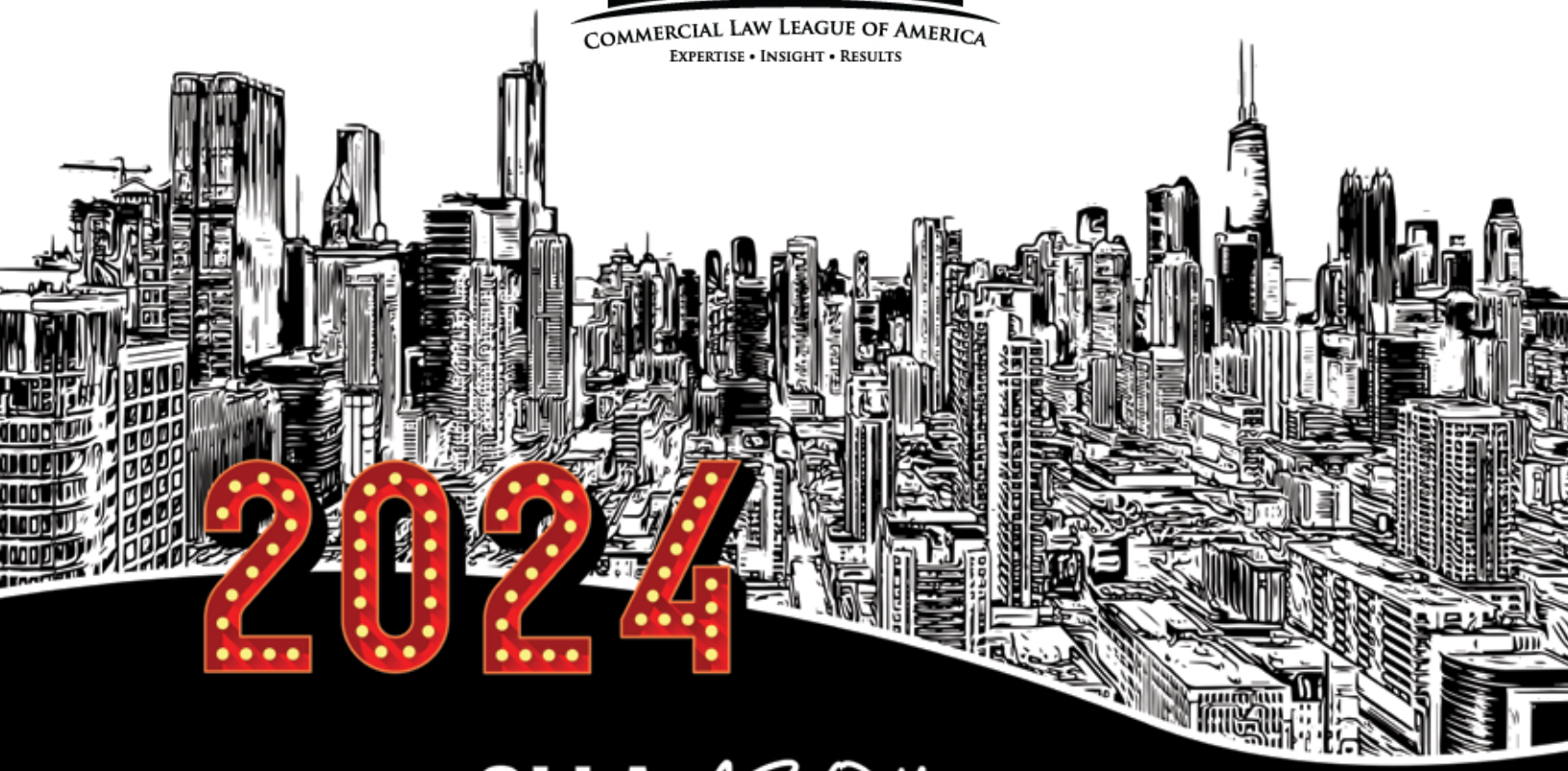

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FROM THE CO-CHAIR

"The fast freight of time made the years hurry by

Like the crossties in an old hobo song.

'Keep your eyes wide' Dad said with a smile,

'The ride just don't last all that long.'"

—Mike Cross, "Green of His Eyes"

Holy cats! It is already 2024 and we are past the point where this year's Resolutions have all fallen by the wayside. (I have an annual Resolution which I usually make stick– not to write 2023 on a check. You see the trick is to set the bar really low.). The speed at which the freight train of life is traveling seems only to accelerate. One result is that there always seems to be a new deadline for putting another issue of this publication to bed.

It probably seems that way to the handful of regular contributors too. Wasn't it just last week that I sent a friendly reminder that their last column was due (or overdue)? And so I wanted to give a special note of thanks to these folks, along with the usual notes about the issue in your hand. Tim Wan has been banging out his *Tales from the Front* for a decade now and it is now five years that Emory Potter has added his version of *Tales*. I have it on good authority that there are some people who don't really read anything else in these pages (which I guess means that they aren't reading this), but even if that is true, they are getting some value. I'll say again that *Heard and Overheard* was always one of my favorite reads in each issue, and I am glad that Wanda Borges has undertaken to keep that tradition alive too. And I always look forward to what our current President thinks should be shared with the League and to Phil Lattanzio's commentary about the state of the organization.

We are pleased to present an *International* issue–filled with articles from members around the world, members of the League and members of the IACC. Debt Collection in Poland (no jokes; those are so 70s). Judgment Enforcement in Mexico. New Debt Recovery Rules in the Middle East/North Africa. The New Italian Insolvency Code. Litigation in Brazil. How COVID has impacted debt collection in Turkey. And of particular interest to me as a student of history and lover of liturgy, Courtroom Attire in Canada.

There is another article in this Issue that we are proud to publish. It is the initial winner of the Southern Region Essay Writing Competition. Kaitlin Ford, a student at Stetson University College of Law, writes on the effectiveness of personal guaranties in Florida. Informative and well-written, Kaitlin's article is a genuine contribution to the magazine. She received the Award at the Southern Region's meeting held on February 10. The Southern Region has started the Essay Competition as a means of reaching beyond the existing membership and getting the League's name out there. Next, we need to expand it. ■

Beau Hays
Co-Chair of the Board
of Associate Editors

CALL FOR WRITERS

The Commercial Law League of America and CLW magazine are looking for articles from our membership. We know many of you are subject matter experts in one field or another and we are hoping you will be willing to share your knowledge with your fellow members. ***Our next issue, April/May/June is focused on Trending News. Submission deadline: April 15.*** If you are interested in being a contributing author for CLW, please contact Beau Hays at **beau@hayspotter.com**.

CONTRIBUTORS

Ayman Al-Wadi
Group Executive Chairman
AW Holding, UAE

Ayman Al Wadi is a spouse, father, and visionary leader, with over 26 years of expertise in the domain of Debt Settlement and Legal Debt Settlement Credit Risk. This paved the way for him to take the helm of AW Holding INT'L, a market pioneer with the goal of "redefining corporate excellence". Presently, the Group Executive Chairman of AW HOLDING INT'L and its marketplace in AW UAE, AW KSA, AW Oman, AW Egypt, and AW Cross Border Center in 150+ countries. An innovative organization with a portfolio of industry-leading business and established its own B2B Debt Settlement Supply Chain which comprises the following solutions – AW Business Advisory Risk Management, AW Debt Settlement, AW Legal Debt Settlement, AW Cross Border Services, AW Credit Risk Advisory, and AW Professional Translation Services. *www.alwadiholding.com*

Octavio Aronis
Partner
Aronis Advogados/Brazil

For the past 30 years, Mr. Aronis has continued to provide a wide range of legal expertise under the same standards of excellence as his father, to small, medium, and multinational companies that are doing business throughout Brazil and South America.
www.aronisadvogados.com.br

Wanda Borges, Esq.
Principal Member,
Borges and Associates, LLC

Wanda is the principal member of Borges & Associates, LLC, a law firm based in Syosset, NY. For more than 40 years, Ms. Borges has concentrated her practice on commercial litigation and creditors' rights in bankruptcy matters, representing corporate clients and creditors' committees throughout the United States in Chapter 11 proceedings, out-of-court settlements, commercial transactions and preference litigation. *www.borgeslawllc.com*

Aleksander Chojnacki
Junior Lawyer, Litigation
Gostyński & Partners, Kraków, Poland

Aleksander Chojnacki is a junior lawyer in the litigation department of Gostyński & Partners. He graduated from Jagiellonian University in Krakow and is interested in sociology of law, protection of personal rights and commercial law. *www.gostynski.net*

Ayşe Burcu Arslan Demirtas
Managing Director|Founder
ARS Consultancy

Ayşe Burcu Arslan Demirtas is an international debt collection expert, industry consultant, entrepreneur, and a professional manager. She has worked in the field of 'International Receivables Management' since 2007. She gives seminars and webinars at the Istanbul Chamber of Commerce (ITO), and Turkish Exporters Assembly (TIM), and also at international conferences as well as more than 50 invited seminars worldwide.
www.arsconsultancy.com

Kaitlyn H. Ford
Student
Stetson University College of Law

Kaitlyn was awarded first place in the Southern Region Essay Writing Competition. The presentation was held on Saturday, February 10 at the Hotel Haya in Tampa, Florida. The topic for the essay was Personal Guaranties in Florida – do they really obligate the person signing? As the winner, Kaitlyn received a cash prize along with her essay published in CLW. *Congratulations Kaitlyn!*

Jerzy Gaweł, Esq.
International Claims Manager
Gostyński & Partners, Kraków, Poland

Jerzy Gawel is a Polish lawyer with over 15 years of experience in international B2C credit management and debt collection. He is the International Claims Manager with the Kraków based law firm of Gostyński & Partners focusing on international commercial collections and litigation. Jerzy speaks Polish, English and German. *www.gostynski.net*

Beau Hays
Partner, *Hays & Potter, LLP*

James W. "Beau" Hays is a 1986 graduate of the University of North Carolina School of Law, after receiving a B.A. in Political Science from UNC in 1983. He was admitted to the Georgia Bar in 1986, and has been admitted in the federal courts in all three districts in Georgia. He has acted as lead counsel in litigation matters for over twenty years, specializing in commercial disputes and bankruptcy law. Mr. Hays is a Past President of the Commercial Law League of America, having served as Recording Secretary of the League and Chair of the Creditor's Rights Section and chaired numerous committees. In addition to being active in the Bankruptcy Section of CLLA, he is an Associate Member of the National Association of Bankruptcy Trustees, and has been a presenter to that organization on issues involving hiring outside counsel. He has also served as Legislative Liaison for the Georgia Bar's Creditor's Rights Section. Mr. Hays is an editor for the National Association of Credit Management's Handbook of Credit and Commercial Laws, chapters related to materialman's liens and construction bonds.

– *Continued from page 3*

Romelio Hernandez
President, *HMH Legal*

Romelio Hernandez is President at HMH Legal, a Law Firm that focuses on creditor protection in Mexico and Latin America, with services of debt collection, litigation, secure transactions and due diligence investigations. Based in Tijuana-Baja California, México, he works extensively with foreign law firms, collection agencies, exporters, private lenders, credit insurers, and financial institutions, assisting them with out-of-court and legal collection efforts throughout the region. His litigation experience of 20+ years and exposure to international commercial law has allowed him to provide guidance to foreign firms in mitigating the various risks of selling or extending loans internationally. Romelio graduated from Universidad Autónoma de Baja California and was admitted to practice law in Mexico in 1997. Romelio holds a Masters' Degree in Comparative Law (LL.M.) from the University of San Diego School of Law (2011). *www.hmhlegal.com*

Emory Potter, Esq.
Partner, *Hays & Potter, LLP*

Emory Potter is a construction, commercial and civil litigation attorney with extensive trial experience. His specialties include materialmen's lien and construction bond work, creditor's rights, and commercial collections, handling a large volume of litigation from initiation of suit through post-judgment collection.

Flavio Primiceri
Lawyer
Studio Legale Primiceri - Debt Collection & Legal Assistance in Italy

Flavio Primiceri is a lawyer practicing dispute resolution and debt collection matters, admitted to practice before the Italian Supreme Court (Corte di Cassazione). For years he has been advising and defending several foreign companies in their business in Italy before the Italian courts. Occasionally he also collaborates with Italian and foreign magazines. *www.studiolegaleprimiceri.com*

Timothy Wan, Esq.
Senior Partner and CEO
Smith Carroad Wan & Parikh

Timothy Wan, Esq. is Senior Partner and the Chief Executive Officer (CEO) of Smith Carroad Wan & Parikh. His areas of expertise include managing the creditor's rights and collection law practice, serving as General Counsel to various small businesses in the local business community and spearheading practice areas of entertainment law, music law, copyright and intellectual property. *www.smithcarroad.com*

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WELCOME NEW MEMBERS | JANUARY/FEBRUARY/MARCH 2024

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EMBRACING GENERATIVE AI IN CREDITOR'S RIGHTS, BANKRUPTCY, AND COMMERCIAL LAW: A STRATEGIC IMPERATIVE*

Recently the Board of Governors met to discuss the strategic plan of the CLLA as it moves into the future. More on that at a later date, but one of the topics we discussed was the role of generative AI in the League and in the profession as a whole. Everyone agreed that leaning into that technology is absolutely essential to the survival of our industry.

In the rapidly evolving landscape of legal practice, where traditional methods meet the forefront of technology, attorneys practicing in creditor's rights, bankruptcy, and commercial law are finding themselves at a crucial crossroads. The introduction of generative artificial intelligence (AI) into the legal profession is not just a fleeting trend but a transformation that promises to redefine the way legal services are delivered. As members of the Commercial Law League of America, we are uniquely positioned to lead the charge in adopting these technological advances, ensuring we remain at the cutting edge, if not the bleeding edge of legal practice. This piece explores why embracing generative AI is not only beneficial but essential for us.

The American Bar Association Model Rules of Professional Conduct implicitly recognize the importance of technology in legal practice. Specifically, Comment 8 to Rule 1.1 on Competence suggests that lawyers should maintain knowledge of the benefits and risks associated with relevant technology. This directive is not arbitrary; it stems from an understanding that to best serve their clients, lawyers must utilize the most effective and efficient tools at their disposal. For practitioners in creditor's rights, bankruptcy, and commercial law, this means integrating generative AI into their workflows to enhance their ability to analyze cases, manage documents, and forecast legal outcomes.

One of the most compelling arguments for the adoption of generative AI in legal practice is the significant boost in efficiency and accuracy it can provide. Attorneys in the CLLA often handle caseloads that require the analysis of vast amounts of financial data and legal documents. Generative AI can process this information more rapidly than any human, identifying patterns and critical issues that might not be immediately apparent. This efficiency not only speeds up the legal process but also reduces the likelihood of human error, leading to more accurate outcomes for clients.

The integration of generative AI into legal practices can also make legal services more cost-effective for clients. By automating routine tasks and streamlining case management, attorneys can reduce the hours billed to clients while still delivering high-quality legal advice and representation. This cost-saving benefit is particularly important in creditor's rights, bankruptcy, and commercial law, where clients are in need of efficient, effective legal solutions that do not exacerbate their financial challenges, and where lawyers are operating on thin margins.

**Disclaimer: This article was written with the assistance of generative AI, illustrating the practical application of the technology it discusses. While AI has contributed to the research and drafting process, final editing and ethical considerations were managed by human oversight to ensure accuracy, integrity, and compliance with professional standards.*

The adoption of generative AI in legal practice is not without its ethical considerations. Lawyers have a duty to maintain client confidentiality, ensure the accuracy of the information they provide, and avoid conflicts of interest. The use of AI tools must be approached with these ethical obligations in mind. Attorneys must ensure that the AI systems they employ are secure, to protect client data, and that they are transparent with clients about the use of AI in their cases. Furthermore, lawyers must remain ultimately responsible for the work produced with the assistance of AI, ensuring that it meets the profession's high standards of quality and integrity.

In a competitive legal market, the firms that adapt to technological advancements are the ones most likely to thrive. Clients are increasingly looking for legal advisors who can offer innovative, efficient solutions to their legal issues. By embracing generative AI, attorneys in creditor's rights, bankruptcy, and commercial law can demonstrate their commitment to leveraging the latest technologies to provide superior service. This leverage not only enhances their appeal to potential clients but also positions them as leaders in the legal profession, capable of navigating the complexities of modern commercial law with agility and expertise.

The call for attorneys in creditor's rights, bankruptcy, and commercial law to adopt generative AI is not just about keeping pace with technological advancements; it is about reimagining what is possible in legal practice. By embracing AI, we can enhance our efficiency, accuracy, and cost-effectiveness, providing unparalleled service to our clients while upholding our ethical obligations. As members of the CLLA, we have a unique opportunity to lead by example, demonstrating how technology can be harnessed to advance the interests of clients and the legal profession alike.

As we contemplate the future of legal practice, it is clear that generative AI will play a pivotal role in shaping that future. The attorneys who recognize this potential and act to integrate AI into their practice will not only enhance their own capabilities but will also contribute to the broader evolution of the legal profession. ■

Bill Thrush, Esq.
2023-2024 CLLA President
Friedman, Framme & Thrush, P.A.

VIEWPOINT

In early February seven Board members, Dawn Federico and I held a two-day strategic planning meeting prior to the Southern Region Conference to discuss the direction of CLLA in the near and not-so-near future. Discussed were top issues, less prominent issues, synergies with other organizations for marketing purposes, and diversity and diversification. New Mission, Vision and Value Statements were developed along with a new Value Proposition Statement. CLLA's need to support a charity; perhaps expanding on Dress for Success.

Membership growth and engagement were discussed at length, specifically growth in membership through both acquisition and retention, mentorship and engaging young and new members. The benefits and drawbacks of co-locating meetings with other associations were reviewed. The benefit would be less meetings, but the drawbacks would be loss of revenue, networking opportunities and connectivity with members.

Also discussed at length was the organizational structure of the League. We reviewed all the Sections, Regions, and committees. Finally, we conducted an ethics review. It was agreed that the League should track complaints against members and that we should adopt a new Code of Ethics.

The meeting resulted in both specific actions we can take now and further discussions of some topics to benefit the League. This undertaking will certainly be ongoing.

In other news, I had an enjoyable conversation with our representative at EBSCO. EBSCO is a leading provider of research databases. EBSCO collects information from outside sources like the CLW magazine and allows students to research access to the information electronically through libraries around the world. CLLA's relationship with EBSCO dates back to 1995. I was curious how many times CLLA articles were retrieved. In 2023 alone, the CLW articles were retrieved over 3,500 times. To my surprise, this was fabulous news. This goes to show you that the CLW magazine reaches far more than just CLLA members. It is educating people around the world while giving the CLLA unlimited exposure.

Looking forward to seeing you all in May at the National Convention! ■

Phil Lattanzio
Executive Vice President

ABOUT US

Commercial Law World (ISSN 0888–8000) is published quarterly by the Commercial Law League of America®, 3005 Tollview Drive, Rolling Meadows, IL 60008, (312) 240-1400.

Please email your comments to the editor to editor@clla.org

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HEARD & OVERHEARD

This column focuses upon how the CLLA and its members work so well with others. It brings to mind a quote from a 1980's TV show, "The A-Team". "I love it when a plan comes together." When your editorial board first conceptualized the international theme for this issue, we had to think about the sources from which we could obtain content. For several years, the CLLA and IACC have enjoyed a symbiotic relationship. So, it was only logical to turn to our IACC friends and solicit articles from them. Some were contacted by email and telephone and others were invited to participate while we were together at the IACC conference in January. We were overwhelmed with the enthusiastic willingness to contribute original articles or grant permission to reprint articles from our international colleagues.

It was a pleasure to receive articles from Turkey, Poland, Italy, Brazil, Mexico, MENA. And, it is an even greater pleasure to hear that at least one person has now joined the CLLA after hearing about us at the IACC conference.

In the last issue of CLW, there was a report on the initial meeting of the Uniform Laws Commission Committee on the Drafting of a Uniform Assignment for the Benefit of Creditors. Subsequent to that initial meeting, on January 31, 2024, a first draft of a proposed uniform ABC law was circulated among the committee and its observers, including the three CLLA members who have been appointed as observers. Preparatory to the next meeting scheduled for February 16th and 17th comments on the draft were submitted by the CLLA observers and we participated in that meeting. Some of the discussions centered on the conflict of laws when property of an assignor might be located in more than one state. There is still an undecided issue over how much court involvement should be put into the proposed uniform law since some states currently have total court involvement over ABC's, some states have no involvement by the court, and other states have some involvement. A second draft of the proposed uniform law is expected to be released to the committee and the CLLA observers at the beginning of April. The CLLA will continue to work with the Uniform Laws Commission Committee on this project.

Another example of the good that can be accomplished when organizations work together was demonstrated recently in connection with a bill introduced both in the house and senate of the state of Minnesota. HF4100/SF4065 is described as a "bill for an act relating to consumer protection; modifying various provisions governing debt collection, garnishment, and consumer finance; providing for debtor protections; requiring a review of certain statutory forms" and revising various statutes or creating new statutes relative thereto. Of particular interest to the CLLA were the provisions in the draft bill which were to provide for small businesses to be treated as consumers. The CLLA had opposed such language in a Michigan bill proposed last year and will continue to oppose such legislation.

Objections to the proposed legislation were prepared and brought to the attention of the legislators prior to the committee hearing, which was scheduled for Monday, March 11th. By 10:30 on Sunday night, we were informed that all references to commercial business and/or small businesses were being removed from the proposed bill. Many hours were spent during the week of March 4th by constituents of the CLLA, IACC, ACA, CCAofA, RMA, National Creditors' Bar Association, MN Creditors' Rights Association, and others. This coalition of creditors' rights organizations will continue to remain in existence so that an open line of communication will exist for this kind of issue or proposed legislation in the future. This is one more splendid example of how CLLA, working with other associations continues to be the creditors' rights association, par excellence. ■

Wanda Borges, Esq.
Co-Chair of the Board of Associate Editors

WELL, OF COURSE, ONCE YOU BRING FACTS AND LAW INTO THIS

Our firm receives a significant number of cases against restaurants, whether for unpaid food suppliers, breaches of leases for industrial kitchen equipment, past due linen or cleaning product vendor invoices (Remember, "Ocean Breeze Soap"?), or unpaid commercial rental arrears (Remember "TJI Cobra-Kai"?).

We were referred a case for unpaid commercial rent against a national restaurant chain that I will refer to as "Red Chix", for a specific location right here in Gotham City. While Red Chix can do well in many parts of the country, we here in Gotham truly have great food everywhere we turn, and thus, halfway-decent comfort food doesn't necessarily outweigh the sheer options of various ethnic and gourmet foods that one can find in Gotham City, merely just by walking to the next corner.

Unfortunately, Red Chix had to close this location, and literally abandoned the shop, without any notice. No eviction was necessary, so we obtained a judgment for about $120,000 in rental arrears. Further unfortunately for us, Red Chix did a lot of things right. Each chain location is independently owned, so we couldn't impute liability on the corporate parent or other affiliates. Additionally, there was no personal guarantee.

My judgment enforcement team noted that there were no banks left with any funds, no assets left at the location, and no leviable assets. The client, along with most of my staff, were severely concerned that the matter would be uncollectible. In fact, I moved onto other files, not really giving this case much more thought. I headed back to my office, and before long, I lost track of time. I realized I'd skipped lunch, so I tried to consider my options. Too much work to go find some take out, nothing good saved up in the office freezer. But I could easily hop online and order something to be delivered via Grubdash. And then it occurred to me!

Did Red Chix have a Grubdash account? Or maybe an Ubub Chow account? Or Door Eats? I quickly performed some quick internet searches, and didn't locate any Red Chix accounts on any of the food delivery services, but maybe it was worth a shot! We immediately served subpoenas on all the food delivery services as a non-party garnishee. To our luck, about three weeks later, Grubdash responded, and advised that they were holding over $300,000 in unpaid amounts due to Red Chix! The bad news, there were four other judgment creditors, one with a secured UCC filing for equipment.

Grubdash's attorney decided to email all the attorneys and all the marshals, with the four competing judgment creditor claims, and basically said to us all "You figure it out".

Cue the massive flurry of emails, none of which were bcc'd. One of the other creditors suggested that we split the $300K pro rata. Another said that because of the UCC filing, they took priority. The third said that since their marshal already filed their execution, they got dibs. Of course, there wasn't enough money to cover all the creditors.

I waited for the deluge to die down, and I came in with an email explaining that:

Our judgment was the first one entered, and therefore, our secured interested was filed prior to the UCC claim;

Our marshal actually filed the execution first;

There was no basis to any pro rata proposal. Quite simply, our judgment was to be satisfied in full, and after that, I didn't much care what happened to the remainder. Of course, I cited all the applicable statutes and evidence to demonstrate the timeline.

We received two responses. The first was from Grubdash, saying "Yes, in light of Mr. Wan's email and information, we will be remitting to satisfy his client's judgment first."

The second was from one of the judgment creditors attorney, admitting that I was right, and stated, "Well, of course, once you bring facts and law into this."■

Timothy Wan, Esq.
Contributing Editor

WANDA BORGES, Esq.
Borges & Associates, L.L.C.

ACCEPTANCE SPEECH OF THE RECIPIENT OF THE 2023 WARREN PINCHUCK VOLUNTEER SERVICE AWARD

The Warren Pinchuck Volunteer Service Award is awarded to a CLLA Eastern Region member in good standing, based on their exemplary service and volunteerism to the CLLA. The award is presented at the Commercial Law League of America's Annual Eastern Region Conference. This conference was held most recently on November 8, 2023, at the Manhattan Penthouse, New York, New York. The 2023 recipient was Wanda Borges, Esq. of Borges & Associates, L.L.C. Following is Wanda's acceptance speech.

My first exposure to the Commercial Law League of America was attending the Monday night banquet of the Eastern Region Conference held at a New York city hotel. My mentor, boss and finally partner – Jules Teitelbaum – was an active member of the Eastern Region and would procure a ticket for me to go in someone else's name. It wasn't until several years later after Miriam Teitelbaum was Eastern Region Chair that I attended a CLLA National Conference, so for me the Eastern Region has always been my home!

Warren Pinchuck, ever a pillar of the Eastern Region of the CLLA, never hesitated to lend his ear and advice where needed. As I became more involved with the CLLA, I had to opt between becoming an officer of the Eastern Region Executive Council or taking a seat on the National Board of Governors. Warren Pinchuck and Ira Leventhal both recommended that I move forward on the National Board. Ultimately, I had the privilege of serving as the President of the CLLA.

This recognition today from the Eastern Region means the world to me, not only as a testament to my commitment to this incredible organization, but as a reflection of the dedicated work by so many individuals who make the CLLA what it is today – individuals like Joseph Marino who was the first recipient of the Warren Pinchuck Volunteer Service Award and who is my dear friend and colleague.

I am grateful to the Eastern Region of the CLLA for this award. I remain proud of the time I spend working alongside remarkable colleagues and friends who share a common passion for the principles of commercial law.

The CLLA has been and continues to be a dynamic force for positive change in our industry. Many years ago I was an active member of the Eastern Region Executive Council and am now again on the Executive Council. As such, I have the privilege of seeing the dedication and tireless efforts of our members who work diligently to promote and protect the interests of businesses and individuals in the realm of commercial law. This award is not a testament to me but a testament to the collective commitment of our organization's membership. Many members of the CLLA dedicate countless hours to this organization through advocacy, education or the invaluable networking opportunities the CLLA provides. This award is as much a recognition of your time as it is of mine.

Of course I would be remiss if I didn't extend my gratitude to my family my friends and my associates sitting here today for their unwavering support. Were it not for the support of David, my husband, Sue Chin and Christine Hansen, my associates and their support and encouragement I wouldn't be able to do the things I do for the CLLA. It is with immense appreciation and dedication to the principles that the CLLA represents that I accept this award.

Together we can continue to make a lasting impact on the world of commercial law and maintain integrity in all our endeavors.

Thank you once again for this honor. Thank you my friends from the Eastern Region of the CLLA. Thank you to the CLLA.

But. Wait, I'm not going anywhere so fast! I look forward to many more years of service and collaboration with this extraordinary organization. ■

CLLA SOUTHERN REGION CONFERENCE

FEBRUARY 9-10, 2024
HOTEL HAYA, TAMPA, FLORIDA

On behalf of the Southern Region Executive Council, we would like to extend our sincere gratitude to our attendees, speakers and sponsors at the Southern Region Conference in Tampa, FL. Your presence played a significant role in making the event a success. We are truly grateful for your commitment to advancing knowledge and fostering collaboration within our industry.

Southern Region Chair,
Gil Singer, *Marcadis Singer, PA*

THE CLLA RETURNS TO THE HILL

On March 5th and 6th, the Commercial Law League of America returned, in-person, to Capitol Hill for its Annual Hill Day. This year's delegation included CLLA members from five states who met with Congressional members and staff. The group was broken into three teams: student loan, bankruptcy venue, and bankruptcy subchapter V. The bankruptcy venue team continued its effort to build support for the bi-partisan legislation for venue reform with co-sponsors, Ken Buck (R-CO-04) and Zoe Lofgren (D-CA-18). Student loan reform continues to be a hot topic on the Hill, and the CLLA position provides relief to borrows and clarity for courts and lenders through statutory reform to modify the current "undue hardship" standard for dischargeability. Several congressional aides interested with the CLLA proposal asked the CLLA take the next step and draft a formal bill with the CLLA's proposed amendment to Bankruptcy Code §523(a)(8) along with defining "adequate standard of living". The Bankruptcy Chapter 11, Subchapter V, group, which proposes an increase and permanent codification to the current law set to expire in roughly one year was met with agreement across the board at virtually every Congressional meeting. First time attendees, Zack Shelomith, Esq. and Ian McCarthy, Esq., rounded out the CLLA delegation, who traveled across the rainy, pre-State of The Union Hill with a total team effort this year! Please see the CLLA website for CLLA policy positions, papers and critical issues lists. ■

COLLECTING DEBTS UNDER POLISH LAW

Jerzy Gaweł, Esq.
International Claims Manager
Gostyński & Partners , Kraków, Poland

Aleksander Chojnacki
Junior Lawyer, Litigation
Gostyński & Partners , Kraków, Poland

INTRODUCTION

Poland is one of the most dynamic and resilient economies in Europe, with a remarkable record of growth and poverty reduction over the past three decades. Despite the challenges posed by the COVID-19 pandemic and the Russian invasion of Ukraine, Poland has maintained its economic stability and competitiveness. Over the past 20 years, Polish GDP skyrocketed 381%, averaging an impressive 5.4 annual growth. The Polish economy is the 6th largest economy in the European Union, with GDP per capita being above 70% of the EU average (in terms of purchasing power parity).

In 2023, Polish ports like Gdansk and Gdynia saw a 20% increase in cargo turnover, handling over 80 million metric tons of goods. Product imports climbed 15% in 2023, fueled by rising consumer demand. This surge positions Poland as a vital European trade gateway. Poland is currently home of multiple distribution businesses, which acquire products outside of Poland and sell them throughout Europe. This naturally translates into an increased number of international trade collection cases.

EXTRA JUDICIAL DEBT COLLECTION

Similar to foreign debt collection cases worldwide, Polish scenarios also exhibit three primary reasons for non-payment: quality disputes, suspected fraud, or financial hardship. The initial, amicable stage aims to secure immediate payment or a structured repayment plan documented in a written debt acknowledgment. This signed document often holds legal weight and can expedite litigation, saving costs. Effectiveness in this pretrial phase hinges on the approach taken toward the debtor. Below we outline some commonly used tools in such situations.

When dealing with debtors, we emphasize our status as a licensed law firm. This sends a clear message that the matter is no longer casual and has escalated to professionals who can pursue legal action. Debtors often take notice of licensed lawyers more seriously, recognizing the issue promptly, and can significantly enhance the chances of securing an amicable resolution and obtaining a written acknowledgment of the debt.

Our initial contact with the debtor always begins with presenting a legally binding power of attorney (PoA). It informs the debtor that we have legal authorization to pursue various options for debt collection.

When immediate payment is not feasible, we prioritize obtaining a written debt acknowledgment recognized by Polish courts. This crucial document strengthens our legal position, potentially expediting and minimizing the cost of any necessary legal action. It often incorporates a payment plan and may stipulate Polish law and jurisdiction for resolving disputes. Notably, in Poland, a simplified payment order procedure exists, offering a faster, more cost effective option with limited appeal possibilities. However, accessing this streamlined process hinges on securing the aforementioned written acknowledgement. Consequently, we ensure all settlements include this court accepted document, thereby maximizing the potential avenues for successful debt collection.

In certain circumstances, incorporating a notarial execution clause into a settlement agreement can be strategically advantageous. This clause requires both parties to sign the document before a notary public. In the event of a breach of the agreement, the clause allows for direct enforcement by a bailiff without the need for formal litigation. This can significantly expedite the collection of a claim compared to traditional legal proceedings.

It is useful to leverage the United Nations Convention on contracts for the international sale of goods (CISG), ratified in Vienna in 1980, to potentially surprise the debtor's lawyer. This convention offers mechanisms to limit the seller's liability regarding quality claims. Frequently debtors cite quality concerns from end customers as grounds for nonpayment. However under the CISG rules the buyer has a defined window after receiving the goods to conduct an inspection. Once lapses, they waive their right to raise quality-related claims and cannot withhold payment based on such complaints. This legal framework can be a valuable asset in debtor negotiations.

The convention on the limitation period in the international sale of goods establishes a four year limitation period for international commercial claims. This can be crucial for transactions involving Polish parties, as many mistakenly believe that the two year limitation period under Polish law applies to international sales as well.

JUDICIAL PROCEEDINGS

Creditors pursuing legal action to recover unpaid debts should be aware of the associated court fees. The standard fee stands at 5% of the claimed amount, but this can be significantly reduced to 1.25% if a written debt acknowledgement exists.

After the lawsuit is filed, the court will obligate the debtor to present a statement of defense in 14 days under the pain of omission of their argumentation. Any pleading, including the statement of defense, must specify the details of the court to which the document

is submitted, details, and addresses of the parties and their attorneys if any and the type of the pleading. The third step is the court hearing. Sometimes the court ends the case with an order for payment without the participation of the parties and sometimes the court decides that the case should go to trial. If the circumstances of the case are more complex and the claimant expects the defendant to challenge the existence of the claim or its value the court will likely set it down for trial. The average time to get to a trial in Poland is between 7 and 10 months.[1] Polish civil judgments can be challenged through an appeal process. This involves submitting a formal complaint arguing legal errors or factual misinterpretations in the original decision. The average time frame for appeal proceedings varies depending on case complexity and court workload, but typically falls within 12 to 18 months. In principle, the losing party will be ordered to pay the costs of the proceedings to the winning party as well as statutory legal representation costs.

Polish law provides for various types of the process, depending on the circumstances of the case. If both the creditor and the debtor are entrepreneurs, the proceedings will be conducted in a special commercial mode. When you have an unpaid invoice, you may use the "writ of payment procedure" provided for in the Civil Procedure Code. This is also possible via an electronic writ-of-payment procedure (EPU), known as an E-court, which can make the procedure for issuing a payment order quicker, simpler, and cheaper. The code of Civil Procedure also provides for simplified proceedings – for claims below PLN 20.000, so the creditor's catalog of options is quite broad. The fees also vary between variants of procedures and claim values.

Despite the variety of choices available in Polish courts, they may not offer the friendliest environment for international trade disputes. Several factors contribute to this: all documents require translation into Polish, incurring additional time and expense. Defendants can potentially obstruct and prolong proceedings by requesting additional witnesses who need to travel from abroad. Additionally, verdicts necessitating a decision based on a convention like CISG or a foreign material law, introducing further complexity. As a result, the proceedings may last much longer than anticipated. A practical solution for expediting such a situation is obtaining a written acknowledgement of debt, which enables an expedited proceeding with no witness hearings and document translations.

ENFORCEMENT PROCEEDINGS

The enforcement procedure in Poland is held by a specialized public bailiff the debt enforcement takes place upon an application filed by the creditor – it is mandatory to indicate from which assets of the debtor we want the enforcement proceedings to be conducted (most popular are bank accounts, real estate, movables, remuneration, tax overpayment). The process must be accompanied by the relevant enforcement order (mentioned above). We may commission a public bailiff to search for the debtor's assets for remuneration. The bailiff, after we have received an advance for the costs they will have to incur, will take action himself or herself and establish the debtor's assets. Such a procedure may lead to a quicker and more efficient conclusion of the enforcement proceedings. Naturally, there are limitations on enforcement, related to debtor protection (e.g. part of the remuneration is exempt from execution). At the same time it should be noted that the effectiveness of bailiff enforcement in Poland is at a low level of 25%. This is related to the fact that entities with solvency problems are typically collected by many different predators this is not helped by the low number of bailiffs (2198) who prosecute 7,924,964 enforcement cases.[2]

SUMMARY

Poland's economy is thriving making it a key player in European trade however navigating debt collection in this environment can be tricky. Fortunately, various legal tools and strategies can help you recover what you are owed. By utilizing written debt acknowledgements, understanding court procedures, and employing effective enforcement tactics you can increase your chances of success. Remember the legal system can be complex so seeking professional guidance is always recommended. Additionally staying informed about cultural nuances and economic trends can further smooth your client's debt collection journey in Poland. ■

1 Data from the Ministry of Justice for the year 2022

2 https://www.kormornik.pl/?page_id=189

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Romelio Hernandez
President
HMH Legal

ENFORCING A U.S. JUDGMENT IN MEXICO: HIDDEN RULES ON HOMOLOGATION

INTRODUCTION TO JUDGMENT ENFORCEMENT IN MEXICO

This article discusses the process to enforce foreign judgments in Mexico *(homologation or exequatur),* pointing out requirements under Mexican law, while making suggestions to avoid risks and problems during homologation proceedings. The focus is on judgments from judicial courts and does not address arbitral awards. Mexico's unique and extremely formal legal system is an unpleasant reality. For some naive and unprepared souls, it is a nightmare. This is most visible when someone tries to enforce a foreign judgment in the Mexican courts.

Generally, in the United States, a party planning to enforce a judgment across state lines, needs only a few things. They must obtain a certified or exemplified copy of the judgment, and file that judgment in the neighboring state, perhaps accompanied by an attorney's affirmation. Thanks to the Uniform Enforcement of Foreign Judgments Act, which most US states have adopted, a judgment obtained in a federal or state court may be filed, often without notice to the debtor. In some states, domestication of a default judgment may be more complex.

In Mexico, the process for enforcing a foreign judgment (known as *"homologation"* or *"exequatur"*) is a different story. The process is quite a rigorous one, where both local and federal rules of procedure come into play.

This happens within a *civil law* tradition that relies heavily on strict adherence to rules (*"legality"*) and sacramental formalities. Most of the time, this carries over any sense of justice, or plain common sense, as *legality* is how justice is better served. Thus, it is wise to understand and anticipate requirements for *homologation* in Mexico even before commencing legal proceedings abroad.

This article will explain the process of *homologation* for judgments of foreign courts. We will point out requirements and formalities provided under State and Federal laws in Mexico. We will make further suggestions that your clients will need to consider before starting legal proceedings abroad, or homologation itself.

This article addresses foreign judgments from judicial courts, and we will not address enforcement of foreign arbitral awards.

MEXICAN LAW ON ENFORCEMENT OF FOREIGN JUDGMENTS

There are two main international treaties that govern the recognition and enforcement of foreign judgments in the American region, pertaining to civil and commercial matters:

1. The Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards; and
2. The La Paz Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments.

While Mexico adopted both international conventions, they come into play only when judgments originate from countries that are also signatories. The United States adopted The Montevideo Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards in 1979 but has not adopted The La Paz Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgment.

As a general rule, Mexican procedure laws will apply and will set the standards for *homologation*.

Therefore, we should first consider the local laws of civil procedures of the State where we are seeking recognition and enforcement. Many of these laws include a distinct and unique regulation of their own for homologation, which will apply exclusively to civil matters (as opposed to commercial matters which are subject to federal law). It is important to review the process of homologation under these rules as they will depart from the homologation process under federal law.

However, all these rules require that a petition for homologation is made through a formal letter rogatory. Letters rogatory from a foreign court must conform with Federal Code of Civil Procedure (FCCP or "federal code or rules").

Under the FCCP (article 554), letters rogatory that carry or imply forced execution upon property or persons are subject to its rules on *homologation*. Because most States follow the federal rules for *homologation*, we shall refer in this article to the federal code only.

RULES FOR *HOMOLOGATION* IN MEXICO UNDER THE FCCP

Under article 571, a foreign judgment will be recognized and enforced by a competent judge in Mexico only when the following conditions are met.

I. Letters rogatory must satisfy all formalities under procedure laws.

For Mexican courts to execute a foreign judgment, the foreign court must make a formal request. The letter

rogatory is a formal petition that serves as a vehicle for this request. While there is an Inter-American Convention that governs letters rogatory for commercial and civil proceedings, it does not apply to execution (or any act that involves measures of compulsion). This is also the case with the Hague Convention on Gathering of Evidence Abroad. Nonetheless, we can generate strong guidelines for letters rogatory by looking into these Treaties.

Basic formalities for letters rogatories

At all times, the following information must be included from the inception : 1) identify the foreign court making the request, and the Mexican court to which it is directed; 2) identify the parties involved and their domiciles or addresses, including that where the defendant can be served; 3) include the nature, purpose and extent of the request; 4) provide a brief statement of facts that justify the proceedings; and 5) identify all judicial acts requested throughout the proceedings; etc.

Essential formalities for validity

There are other essential formalities that we must comply with, for validity and effectiveness of the letter rogatory.

6) Authentication. A letter rogatory must be certified or authenticated. When possible, present original documents, that is, those that the issuing judge and clerk sign. The clerk must certify or attest that the documents and exhibits are a true and correct copy from the case file. A Mexican judge will want to see all documents that are integral to the file, so make sure that all pages in the exhibits are referenced in the certification.


State of California

SECRETARY OF STATE

APOSTILLE

CERTIFIED

Sample

Apostille from the California Secretary of State

7) Legalization. You must legalize all documents. You legalize by obtaining a document called *"Apostille",* which you attach to the authenticated document in question. The State Department or Secretary of State in your State will issue an *Apostille*. Its purpose is to give a public document validity abroad. (Based on the 1961 Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents).

8) Translation. Documents must be translated. Under article 553 of the federal code, you must translate the letter rogatory and exhibits into Spanish. It is recommended that a certified translator authorized in the State court in Mexico where you intend to enforce is used. Plaintiff's counsel in Mexico must review the end-product to make sure it is accurate and suited for its intention.

Strategic formalities for effectiveness

9) Reciprocity. Request must include a statement that helps satisfy the comity condition (reciprocity). (Article 571 of the FCCP.) Mexican courts will not enforce a foreign judgment if there is evidence that the issuing court does not follow reciprocity. This means evidence that the foreign court will not enforce a Mexican judgment under similar circumstances. We recommend that letters rogatory include a short statement confirming reciprocity. (Example: "under equal circumstances this court would enforce a judgment from a Mexican court"). You should reference any authority or case law applicable.

10) Res judicata. The request must include a statement that helps prove that the foreign judgment is final. The judgment to be enforced must be considered final, with force of *res judicata*. No legal recourse should be pending or available to the defendant. You should obtain a specific statement or resolution that confirms this and attach it to the letter rogatory. If this is not possible, you should include this statement in the letter rogatory by the foreign judge.

11) Court authority. The issuing foreign court should grant full and express powers to the requested court. Many consider that the requested court has implicit complete authority for execution. Why leave things to assumptions or chance? We recommend including a statement where the issuing court "grants full powers to the requested court for execution of the foreign judgment".

The issuing court should also include specific authority, INCLUDING BUT NOT LIMITED TO: a) seize debtor's property; b) issue attachment or garnishment orders; c) issue and make use of preventive or security measures; d) impose fines; e) order the temporary arrest of any person refusing to comply with the court's order; f) order the entry into private property upon the use of public force; g) carry out judicial auctions or bid sales for execution of seized property; assign or pay money or funds out to plaintiff, etc.

12) Legal counsel. You should appoint a lawyer in Mexico as counsel of record and designate an address. The letter rogatory must include the designation of an attorney to act on behalf of plaintiff. It should also provide an address for the plaintiff within the requested court's jurisdiction. We also recommend designating or appointing a legal representative of the plaintiff, through a power of attorney. There is limitation in the authority of counsel of record. For instance, the right to point out assets for seizure is specially conferred to the plaintiff himself or his legal representative, not to counsel of record.

II. The judgment must not be the result of an *in rem* right.

According to Barron's Law Dictionary, actions *in rem* are "those which seek not to impose personal liability but rather to affect the interests of persons in a specific thing (or *res*)... Typical modern examples are actions for foreclosure of a lien upon real estate". This means that judgments that are enforceable are those that derive out of actions from tort, contract, restitution, etc.

III. The judge or court rendering the judgment must have had proper jurisdiction to try the matter and to pass judgment on it.

The judge or court that issued the foreign judgment should have had jurisdiction to hear the case and rule on it. Such jurisdiction must be justified under international private law rules, and compatible with conflict of laws rules under Mexican law. It will be important then, to consider the following rules on jurisdiction based on the FCCP:

1) Forum selection clauses are valid and enforceable if there is no actual obstacle or denial of justice. You should make sure that the court afforded due process, considering the circumstances involved and its relations among parties. Article 566, FCCP.

2) Forum selection clauses are invalid when the right to select a forum works exclusively in favor of one party. Article 567, FCCP.

3) If there is no forum selection clause, jurisdiction is conferred upon the following courts (article 24 FCCP):

   a) Those in the place designated by the defendant to be notified of demanding performance.

   b) Those in the place where the parties agreed to perform its obligations.

   c) Those in the place of residence or address of the defendant.

4) A Mexican court will not recognize jurisdiction to a foreign judge who ruled on matters that Mexican law considers to be of the exclusive jurisdiction of Mexican courts. Under article 568 of the FCCP, these are matters related to land and water in Mexico, matters related to Mexico's exclusive economic zone, and all matters related to government authority at the State and Federal level, to Mexican Embassies or Consulates, etc.

IV. The defendant was served in due legal form.

A request for homologation must present evidence that proves that there was proper service of process on the defendant. Such notice should have afforded the defendant due process of law.

If the defendant was served in Mexico, there is one thing you should keep in mind, to confirm validity of service. Only a court clerk can make a service of process in Mexico. Mexican law does not recognize or allow private process-servers. In other words, you must go through Mexican courts. You request this service through letters rogatory also, at the beginning of your case abroad.

If the defendant was served abroad, other rules apply. Unlike the Montevideo Inter-American Convention, the FCCP does not require that the service of process meets any special formality provided under Mexican law. It is also not necessary that the service of process is substantially equivalent to that accepted by the law of the State where the judgment is to take effect.

V. The foreign judgment must be final and have the force of *res judicata*.

We have already made the relevant comments in the letter rogatory section. Just keep in mind that article 572 of the FCCP requires proof that the judgment is *res judicata*. Any Mexican judge will automatically deny recognition and enforcement of the foreign judgment if you fail to prove this condition.

VI. There must be no case tried by a Mexican court that is a result of the same legal actions.

You should confirm that there is no case pending in a Mexican court regarding the same legal actions. If a case is pending, the Mexican judge may deny homologation if service of process was made (on the foreign party). The same happens if the Foreign Affairs Ministry in Mexico (*Secretaría de Relaciones Exteriores)* receives the letter rogatory for service of process.

VII. The foreign judgment must not be contrary to Mexican public policy.

The foreign judgment must not contradict public policy principles provided under Mexican law. This includes the legal claim that originated the judgment, the legal issues involved, the judgment itself, its ruling, or any of the restitutions or indemnities, or the relief granted.

Mexican courts may consider that indemnities or relief not recognized under Mexican law may contradict public policy. A judgment of such kind may not be enforceable. Awards obtained out of tort actions or for punitive damages are one example. Labor laws in Mexico restrict relief to a maximum cap amount. These rules apply to bodily injuries claimed in civil actions. Mexican law also did not recognize or regulate punitive damages. However, the Supreme Court in Mexico issued groundbreaking rulings on these issues out of actions for moral damages. These cases have paved the way to break the cap amount and construct claims of relief for punitive damages. But these rules are still not binding on all cases, so you should use with care. Thus, we recommend reinforcing your pleadings and referencing the latest applicable authority.

PARTIAL RECOGNITION AND ENFORCEMENT OF A FOREIGN JUDGMENT IN MEXICO

On the other hand, article 577 provides an opportunity to request the partial recognition and enforcement of a judgment. This helps when the judgment may not be valid and enforceable in its entirety. (Thus, you should grant express authority to counsel of record in Mexico to allow him to make this request. You can accomplish this in the letter rogatory or through a separate power of attorney.)

Due process of law under Mexican law

Proceedings must have met the basic legal standards provided under the Mexican Constitution. This is due process of law, under Mexican law. These legal standards include: 1) proper service of process on the defendant, 2) the opportunity for the defendant to appear in court, 3) the right to offer evidence in court, and 4) the right to make allegations. A judgment is against public policy if it fails to meet any of these standards. Mexican courts will deny enforcement of a judgment if these formalities are not shown during the initial proceedings abroad. If the judgment passes the test during homologation proceedings, the defendant can always raise the issue later during Amparo proceedings. (The action of Amparo is afforded to challenge acts or resolutions of authorities that breach fundamental rights.)

VIII. The judgment must fulfill all the formal requirements necessary to be deemed authentic.

Authentication of a foreign judgment involves a two-step process: 1) certification by court officials to be a true and correct copy from its original file; and 2) obtaining an *Apostille* from the proper authorities such as the State Department or Secretary of State. (Please refer to section on formalities of letters rogatory in general.)

PROCEDURE FOR *HOMOLOGATION* IN MEXICO

Step-by-step process and legal procedure

The process for *homologation* in Mexico takes the form of a summary proceeding. Article 574 of the FCCP highlights the process. After the letter rogatory is filed, the court serves the judgment-debtor and grants nine days to answer. The debtor can oppose through allegations and with the introduction of evidence. After the court decides which evidence proposals are admitted, it schedules a hearing date. Once the parties render their evidence and the court hears it, the court will rule. It can either grant or deny homologation. Both parties can appeal the ruling within five days.

Options for filing letters rogatory

The plaintiff can file the letter rogatory directly through a formal petition or incidental complaint pleading. It is not necessary to go through the official or public channels, although it is an option.

Service of process of homologation to judgment-debtor

A critical step during the process of *homologation* is the service of process to the judgment-debtor. This is a different notice, independent from the service of process practiced by the foreign court. This notice must be personal, as per rules of civil procedure in Mexico, which make it "sacramental". A notice is "personal" when the debtor receives such notice himself or receives it at his domicile. The domicile is the current place of residence, and there must be confirmation that he currently lives there. Corporations must be served at their head office of management. Please note that process-servers are not allowed in Mexico. Clerks of the court are responsible for all notices and service of process.

Strategic considerations based on State laws

The process of homologation in some States differs substantially from the federal rules. In some States, service of process is not even necessary upon judgment-debtors. Whether you can pursue homologation based on the federal rules or on State law (under the respective Codes for civil procedures) will depend on the nature of the claim, the relief, and judgment itself. Commercial claims or cases are considered federal matters subject to the federal rules. That is why it is critical to seek advice of Mexican counsel before commencing legal proceedings abroad. Legal counsel can also assist with proper service of process in the proceedings abroad through letter rogatory. This notice

is critical, and the Mexican court will scrutinize it during homologation. You should develop a strong strategy from the start.

Intervention of State or Federal prosecutor

Finally, you should note that the State Prosecutor (*Ministerio Público adscrito*) is a party to the homologation proceedings. The court will summon and serve him with the petition for homologation, granting an opportunity to file an opinion. The prosecutor can object to the homologation if it concludes that the foreign judgment conflicts with or violates public policy in Mexico.

Conclusions and final considerations

Although the enforcement of US judgment in Mexico may seem complex and daunting, we can digest it with less resistance if we summarize the process. There are four main steps to comply with all requirements:

First: Check if the judgment meets the conditions of recognition and enforcement in the Mexican courts.

1. It is not a result of an *in rem* right.
2. The court of origin had proper jurisdiction.
    1. Check private international law rules, as provided under
        1. international law (international agreements), and
        2. Mexican law.
    2. The matter should not be of the exclusive jurisdiction of Mexican courts.
3. The foreign judgment is final (*res judicata*).
4. No case is pending in the Mexican courts involving same legal action.
5. The foreign judgment is not contrary to public \ policy in México.

Second: Prepare and obtain a letter rogatory that meets all items disclosed above.

1. Use the information under the general guidelines discussed.
2. Include a statement from the foreign judge to confirm reciprocity.
3. Add a statement that proves that the foreign judgment is final.
4. Give full powers and specific authority to the Mexican court.
5. Appoint legal counsel and specify an address for legal notices in Mexico.

Third: Get all documents ready.

1. Letter rogatory.
2. Foreign judgment.
3. Documents that prove proper service of process.
4. Statement or resolution proving that judgment is final.
5. Separate power of attorney for legal counsel in Mexico.

Fourth: Legalize every document.

1. Authenticate all documents (get a certification by judge or clerk).
2. Legalize all certifications under applicable law (*Apostille*).
3. Translate everything (letter rogatory and all exhibits) into Spanish.
4. File letter rogatory in the proper and best court in Mexico through a pleading of homologation. You will be able to accomplish this the help of legal counsel in Mexico. Going through the official channels leaves many things to chance. You should only do this as a last option or to address a specific concern, based on strategy.

We recommend following these guidelines for the recognition and enforcement of a foreign judgment in Mexico. Failure to do this will not only hurt the judgment-creditor in a contested case. It will hurt him also even when the judgment-debtor fails to appear in court and opposes the homologation. Thus, it is crucial not to give opposing counsel—or the judge himself—any grounds for argument or objections. This could slow down or deny homologation where it is legal and justified. Lastly, teaming up with legal counsel in Mexico is key. You should do this not just upon starting homologation, but from the very start of legal proceedings abroad. ■

Ayman Al-Wadi
Group Executive Chairman
AW Holding, UAE

RECENT REGULATORY UPDATES IN MENA IMPACTING DEBT RECOVERY

WHAT EXACTLY IS "MENA"

MENA is an acronym for the Middle East and North Africa region, popularly used by academic, economic, social, and international organizations and sometimes referred to as the Arab World or the Greater Middle East. There are 19 countries that are generally considered part of the MENA region. These are Algeria, Bahrain, Egypt, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Syria, Tunisia, United Arab Emirates, and Yemen. Sometimes an additional 16 countries are included as MENA countries. These are Afghanistan, Armenia, Azerbaijan, Chad, Comoros, Cyprus, Djibouti, Eritrea, Ethiopia, Georgia, Mali, Mauritania, Niger, Somalia, Sudan, and Turkey.

The MENA region has witnessed significant regulatory developments in recent years, particularly concerning debt recovery. These updates aim to streamline processes, protect creditor rights, and foster economic stability.

MENA AND EUROPE DIFFER IN SEVERAL WAYS

The regulatory environment in Europe has more standardized and stringent regulations governing debt collection, while the MENA region has a more varied regulatory landscape. On the other hand, the region has recently witnessed a bold development in legal debt collection regulations which are attracting investments.

Concerning cultural sensitivity, whereby MENA debt collectors often prioritize maintaining personal relationships and use culturally sensitive approaches, European collectors tend to have a more standardized and formalized approach.

Cash payments and post-dated checks are still prevalent in some MENA countries while digital payment methods are much more widespread in Europe. Add to that the European debt collection agencies are often early adopters of technology while technology adoption and debt collection has only started rapidly increasing in the MENA region in the last five years. Finally language and multilingualism may be common between both regions as debt collectors may need to communicate in multiple languages but the need is more pronounced in the MENA region due to its diverse population and expatriate communities.

Despite these differences both MENA and European debt collection agencies are adapting to change consumer behaviors and regulatory landscapes to navigate these differences effectively. Collection agencies often require a deep understanding of local markets and a commitment to compliance with regional regulations.

RECENT REGULATORY CHANGES IN THE MENA REGION

Let's explore how the recent regulatory changes in the MENA region are impacting debt recovery for businesses and individuals.

Imagine a region where debt recovery is becoming more efficient, creditor rights are strengthened, and economic stability is prioritized. This vision is becoming a reality in the Middle East and North Africa (MENA) region, as governments implement regulatory reforms to enhance debt recovery processes. Let's delve into the recent updates and their implications.

The regulatory updates in the MENA region have led to the introduction of clearer guidelines and stricter enforcement mechanisms, ensuring a fair and expedited debt recovery process for all parties involved. Specialized commercial courts have been established, offering expedited procedures and specialized judges with expertise in commercial law. Additionally, alternative dispute resolution methods such as mediation and arbitration have gained popularity, providing efficient ways to resolve debt-related disputes.

To bolster creditor protections, governments have strengthened the legal rights and remedies available to creditors. These measures include enhancing the enforceability of security interests, introducing effective mechanisms to enforce judgments, and establishing credit reporting systems that provide comprehensive information on borrowers' creditworthiness.

INSOLVENCY AND BANKRUPTCY LAWS HAVE BEEN REVAMPED

Furthermore, countries in the MENA region have revamped their insolvency and bankruptcy laws. On 31 October 2023, Federal Law Decree No. (51) of 2023 concerning Financial Restructuring and Bankruptcy (referred to as "**New Law**") was published in the UAE Federal Gazette. The New Law will become effective on May 1, 2024. An updated "Preventive Settlement" provision offers more balanced and efficient mechanisms for debt restructuring and resolution, allowing troubled businesses to continue commercial activities while negotiating with creditors and proposing repayment plans. The aim of the Preventive Settlement mechanism, which is supervised by Court, is to prevent liquidation and preserve businesses and employment opportunities. A stay of any judicial and execution proceedings commenced by creditors against the debtor will be in effect until the ratification of a restructuring plan or the finalization of the restructuring and bankruptcy proceedings.

CROSS-BORDER TRANSACTIONS

In the context of cross-border transactions, the MENA region has taken steps to improve mechanisms for cross-border debt recovery. By strengthening international cooperation frameworks and entering into bilateral and multilateral agreements, countries in the region facilitate the recognition and enforcement of foreign judgments, reducing the challenges associated with pursuing debt recovery across jurisdictions.

As the MENA region continues to refine its regulatory landscape, businesses and creditors can expect a more favourable environment for debt recovery. The commitment to strengthening creditor rights, streamlining procedures, and fostering economic growth is evident. These reforms create a conducive environment for lending and investment, enabling a more efficient and predictable process for debt recovery.

SUMMARY

In summary, the MENA region's recent regulatory updates have brought about significant changes in debt recovery practices, offering clearer legal frameworks, improved creditor protections, and efficient resolution mechanisms. By promoting economic stability and bolstering creditor rights, these reforms contribute to the region's growth and development.

As we witness the positive impact of these regulatory updates, it is clear that the MENA region is embracing a future where debt recovery is more streamlined, creditor rights are protected, and economic goals are pursued. The journey toward a thriving business environment continues, and these reforms are paving the way. ■

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Lawyer
Studio Legale Primiceri - Debt Collection & Legal Assistance in Italy

THE NEW ITALIAN INSOLVENCY CODE

In line with the trend throughout the European Union, the principles contained in the European directives on insolvency have also recently been implemented in Italy. Unlike in the past, the new Italian Bankruptcy Code aims to resolve crises in the least traumatic way possible for the company. For Italian bankruptcy law, this is a momentous innovation, marking the transition from a basic philosophy that was characterized by a largely punitive profile to a more modern approach consistent with current issues.

It was a significant step toward modernizing the discipline of business crisis, whose objectives were essentially two: (a) to diagnose and identify from the very first symptoms companies "in crisis" of liquidity, limiting the damage as much as possible and, at the same time, (b) to safeguard the most deserving entrepreneurial activities that for one reason or another find themselves (albeit in a time course that may prove to be limited) experiencing a moment of difficulty. Among the innovations introduced by the new code is a view of crisis as a physiological phenomenon of business. Thus, a definition is created that seeks to exclude the concept of bankruptcy to leave room for the expression "judicial liquidation."

The main actor in the new legislation is no longer personified by the entrepreneur involved in the crisis, but by the company and its preservation. It introduces a profound change to the underlying philosophy of insolvency law, evolving from a static approach, based on the exclusive safeguarding of the principle of equal treatment of creditors and a maximizing of creditor satisfaction, to a dynamic perspective, in which the preservation of the company as a going concern constitutes a protected value. Below, we provide a general overview of the Insolvency Code and its main remedies.

The new Italian Insolvency Code went into effect on July 15, 2022, after a postponement caused by the COVID-19 pandemic, due to the need to comply with the implementation of EU Directive No. 1023 of June 20, 2019 (EU Restructuring Directive).

The Insolvency Code represents a key development for the Italian legal system, opening it to the principles contained in the EU Restructuring Directive, which states that preventive restructuring frameworks should first and foremost enable debtors to effectively restructure their indebtedness at an early stage and thus prevent the further insolvency and avoid the relevant liquidation proceedings.

The new legal framework provides certain remedies for companies in financial distress to help them to address their financials and allow them to overcome their crisis by restructuring their outstanding exposure. The following are the key remedies available under the Insolvency Code:

*(a) A **negotiated settlement** under articles 12-25 (composizione negoziata);*

*(b) An **agreement in execution of a certified recovery plan** under article 56 (accordo in esecuzione di piano attestato di risanamento);*

*(c) A **debt restructuring agreement** under article 57 (accordo di ristrutturazione dei debiti);*

*(d) A **moratorium agreement** under article 62 (convenzione di moratoria);*

*(e) A **composition of debt with creditors** under articles 84-120 (concordato preventivo).*

THE NEGOTIATED SETTLEMENT

It is a **voluntary out-of-court settlement** that may be applied for by any entrepreneur facing financial or economic distress that could potentially lead to insolvency, provided that a restructuring of the company is feasible. *Article 56 of the Insolvency Code is innovative in its regulation of the typical content of this out-of-court agreement.* The negotiated settlement represents one of the most important provisions of the Insolvency Code and has the following characteristics:

1) *It is a negotiated and confidential instrument (except for the information published publicly in the Italian Business Register);*
2) *It is a voluntary instrument; thus, reports received from qualified public creditors (article 25-novies of the Insolvency Code) or from a supervisory body (article 25-octies of the Insolvency Code) will not determine the occurrence of any obligation of activation upon the entrepreneur*
3) *It is intended to support preservation of the ongoing business, even indirectly;*
4) *It is an out-of-court measure, provided that the entrepreneur does not apply for involvement of the judicial authorities (in accordance with articles 18 and 19 of the Insolvency Code) unless the entrepreneur applies (a) for application of asset protection measures (misure protettive) or (b) to be authorized to enter into new financing (nuova finanza).*

AGREEMENT IN EXECUTION OF A CERTIFIED RECOVERY PLAN UNDER ARTICLE 56 OF THE INSOLVENCY CODE

Article 56 of the Insolvency Code is innovative in its regulation of the typical content of this out-of-court instrument, specifically providing that the plan for recovery of the business (as well as the agreement and the relevant executing acts) must be in writing and bear a date.

The typical and simplest form for such plan is a business plan wherein the reasons for the financial distress are described along with a series of appropriate measures aimed at restructuring the company, which may be intended to:

1) rebalance the business's assets (e.g. capital increase),

2) rein in the company's expenses (e.g. divestments, workforce reductions),

3) remove technological or market obstacles (e.g. relaunching the activity, partnership, etc.), or

4) restore profitability of the company's business.

DEBT RESTRUCTURING AGREEMENT UNDER ARTICLE 57 OF THE INSOLVENCY CODE

A debt restructuring agreement is reached between a debtor company and creditors representing at least 60 percent of the company's total indebtedness and is aimed at restructuring the debtor company's liabilities. The nature of this remedy is strictly contractual; thus, there are no binding effects on creditors not a part of this group (the non-adherent creditors), who will be repaid on contractual or by-law terms. That said, there is a possibility for the debtor, provided that the agreement has been approved by the creditors, to be granted a moratorium of up to 120 days in accordance with article 57, paragraph 3 of the Insolvency Code.

MORATORIUM AGREEMENT UNDER ARTICLE 62 OF THE INSOLVENCY CODE

The purpose of the moratorium agreement—also referred to as a "moratorium and standstill agreement"—is to regulate the relations between the company and its creditors or lenders to avoid recovery initiatives or enforcement actions during negotiations that could jeopardize an already-commenced restructuring process. It may involve (i) a postponement of the repayment terms of loans, (ii) a waiver of deeds or (iii) a suspension of enforcement and precautionary actions.

COMPOSITION OF DEBT WITH CREDITORS UNDER ARTICLES 84–120 OF THE INSOLVENCY CODE

The composition of debts with creditors is a **judicial proceeding** that involves a judicial intervention by the competent court (i.e., the court where the company in distress has its main center of business activities) and allows financially distressed or insolvent companies to propose a plan requiring creditors' approval.

Under article 84, paragraph 1 of the Insolvency Code, a composition of debts with creditors has to achieve, on the basis of a plan, **satisfaction of creditors to an extent not less than what would be achieved in a judicial liquidation** through one or more of the following:

1) business continuity on a going-concern basis;

2) a liquidation of the assets;

3) an allocation of the assets to an assignee (assuntore); or

4) In any other form.

Since this legislation has only recently come into effect, it is still too early to judge whether it has achieved the positive effects that lawmakers set as their goal, i.e.

a) enable early diagnosis of the state of difficulty of enterprises, preventing that the delay in perceiving the signs of crisis in an enterprise may later lead to an irreversible state of crisis. Thus, an alert system is introduced to enable the early emergence of the crisis, with a view to recovery;

b) Preserve, as much as possible, the business activity in crisis due to particular contingencies;

c) Ensure creditors obtain satisfaction (albeit partial) of their claims;

d) Avoiding to the community the negative consequences associated with the closure of a business, especially in terms of job losses;

e) Safeguard the entrepreneurial capacity of those who face business failure.

In the coming time, it will be possible to start verifying what kind of impact these regulatory changes have had on the Italian economic system and whether they are in line with the legislator's desiderata. ■

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LITIGATION IN BRAZIL – THE DIFFICULTIES & ALTERNATIVES

Octavio Aronis
Partner
Aronis Advogados/Brazil

As an attorney with a law firm in São Paulo, Brazil, despite the significant developments in Brazil in recent years, and the progress of our country, civil litigation and navigating the Brazilian legal processes can be difficult, time-consuming, and is a far cry from an efficient process.

I always carefully explain to all of my clients, whether domestic or international, that due to the cumbersome, slow, and costly bureaucratic process, commercial litigation should only be pursued when all other alternatives have failed. Most notably, regardless of the merits of a case, obtaining a judgment through a civil lawsuit can require anywhere between five to ten years, or even longer.

ESTABLISHMENT OF CONSELHO NACIONAL DE JUSTIÇA

That said, Brazil has established an excellent regulatory and monitoring agency called the Conselho Nacional de Justiça, which has been effective in prosecuting unethical and corrupt judges, and has worked to monitor court procedures to ensure that litigation processes are not unduly delayed, including reducing the number of cases eligible for presentment to the Supreme Court.

However, and despite this oversight, there is still a lack of management reform and a weakness in aiming for conciliation, mediation, and arbitration and alternative resolution methods throughout the legal system. There is also a lack of control in the number of frivolous lawsuits filed, which ultimately clogs the legal system and contributes to the delay of justice, with approximately 63.5 million pending lawsuits awaiting judgment. Further, there is a lack of regulation over which trial judgments can be appealed, which has led to excessive appellate filings, which further contributes to the delay.

CONSIDERATION OF TIME AND EXPENSE

Another essential element to be considered before entering into litigation is the legal costs. Due to the length of time required to obtain judgment, the ongoing costs, and the ultimate risk that even after obtaining a money judgment, there is no guarantee of collection, litigation is generally not recommended on commercial claims less than USD $50,000.

In addition to legal fees, there are general costs which must be considered, particularly with foreign claimants, whereby all pertinent documents must be translated into Portuguese by an official translator, as well as certified by the local Brazilian Consulate.

Further contributing to the inherent difficulties in pursuing litigation in Brazil, Brazilian law states that foreign claimants must provide a legal bond, between 10 – 20% of the claim value, prior to the commencement of a lawsuit, to be available for execution in the event that the plaintiff does not prevail in the lawsuit and is found liable for the defendant's legal fees. While judges have the ability to not require foreign plaintiffs to carry a legal bond, there is always a possibility that it will be required.

Regarding legal fees, I often receive inquiries from companies abroad that are already involved in litigation in Brazil and suddenly realize they have paid hourly fees equivalent to almost 50% (or more) of the original claim value. As the ongoing and slow bureaucratic process requires significant legal work, in which significant legal fees may accrue a rigorous investigation should be performed of a defendant's assets, operational status, as well as long term financial viability to pay a claim, prior to commencing a lawsuit.

Generally speaking, it is considered reasonable to pay legal fees either completely on a contingency basis or as a combination of a handling fee and a success fee based upon the amount collected. Including a contingent fee element provides Brazilian attorneys motivation to resolve legal matters swiftly and encourages the avoidance of unnecessary or lengthy legal processes.

ARBITRATION, MEDIATION AND CONCILIATION

In Brazil, there are several Chambers of Arbitration to support the arbitration process. These Chambers employ highly qualified legal personnel who are adept at understanding complicated legal issues and who encourage negotiation amongst parties. While costs for these Chambers of Arbitration remain relatively high, resolution often comes quicker than through the court system, and should be considered as a forum when negotiating contracts, particularly when high claim amounts may be involved.

Binding Mediation and Conciliation are two other excellent alternatives if all parties have a genuine interest in a resolution. With either of these alternatives, both parties must be willing to present their respective arguments as well as accept the ultimate decision of the mediator(s).

Payment by installments, cash payment with a discount, and loans and personal guarantees are some of the ways in which settlements with a debtor are reached. In some cases, it is recommended to offer a reasonable discount against the amount owed as an initial negotiation strategy, rather than invest significant capital and risk a significant delay in time before payment is eventually made. Further, all efforts should be made to obtain signed acknowledgements of a debtor's obligation as well as payment installment terms, which may ultimately expedite any future possible legal proceedings, should terms for payment is not upheld.

PERSONAL GUARANTY ISSUES

In Brazil, it is common practice for a personal guarantee to be used to support a company's credit or debt obligations. However, due to local requirements as to the enforceability of personal guarantees, a local attorney is recommended to verify the legal terms, conditions, and value of the guarantee. It is furthermore advisable register personal guarantees with a Brazilian Notary Public.

Over the years, we have noticed a significant difference in the positive outcome of international claims which have been entrusted to local Brazilian counsel or collection agencies, compared to when they are dealt with directly from overseas. It is the local professional's experience and knowledge regarding local laws, legal infrastructure, and cultural peculiarities that helps to minimize expenses, particularly since substantial losses may have been incurred in a creditor not receiving a customer's payment. In particular, this experience and knowledge can provide foreign companies with a level of comfort not only in collection activities, but in initial work in establishing operations in Brazil and developing relationships with local vendors, customers, and suppliers.

ADVANCE INVESTIGATION AND REVIEW RECOMMENDED

Finally, it is highly recommended that prior to doing business with a new customer in Brazil, the financial and legal circumstances surrounding that customer should be thoroughly investigated with all contracts and other legal documentation properly reviewed by local counsel. This will minimize potential problems and future misunderstandings, and will ultimately lead to a more positive and profitable experience in Brazil. ■

POSITIVE EFFECTS OF COVID-19 ON THE DEBT COLLECTION MARKET IN TURKEY

Ayşe Burcu Arslan Demirtas
Managing Director|Founder
ARS Consultancy

Many difficulties as well as opportunities have entered into our lives with Covid-19. In this content we are going to discuss an important subject, the effects of the pandemic on the debt collection market in Turkey.

EFFECTS OF COVID-19 ON THE DEBT COLLECTION MARKET IN TURKEY

Since the worldwide realization of the pandemic in March 2020, businesses were compelled to face the outcomes of the pandemic forcing an evolution in the debt collection market.

As the founder and manager of ARS Consultancy, the leading debt collection agency in Turkey, I have had the opportunity to monitor changes in the Turkish market closely.

Two main changes in the Turkish Debt Collection market as after-effects of COVID-19 became prevalent.

WRITTEN 'AGREEMENTS' BECOME MORE IMPORTANT

Before the pandemic, not all international export & import companies were entering into written agreements with their Turkish customers. Especially in some sectors, a contract may be perceived as a 'slowing down' item. However, no matter in which sector companies are operating, making a plain and simple contract is a strong tool. Following COVID-19 we saw that some Turkish debtor companies or individuals did not pay, blaming COVID-19 as the reason, The pandemic was being used a "force majeure" to avoid paying just debts.

It is not just in Turkey, but all around the world, this development has been an issue actually. This compelled our company to take on the role of a mediator between the international creditor and the Turkish debtor. The first thing to investigate was whether there was any agreement between the two parties. More often than not, we discerned that there were no written agreements between the parties. Even when there was a written agreement, the terms and conditions were not clear about what could happen to the debt as a result of this pandemic. Of course, this conflictual issue has caused a delay in payments. Carefully, keeping a pulse on the developments of the pandemic and a thorough review of documentation, we succeeded in bringing parties together to achieve a reconciliation table where payment agreements were reached.

Learning from the issues raised during the pandemic, Turkish export and import companies have become more sensitive not to trade without a written contract. Hopefully, the importance of written contracts will continue to be remembered. It is indeed a strong tool to minimize non-payment risks in the debt collection industry and our creditor clients must be reminded of the importance of written contracts in the international market.

ONLINE MEETINGS WITH DEBTORS BECOME MORE USUAL

There are several tools for debt collection and face-to-face meetings have always played a considerable role in addition to phone calls, emails and direct mail by cargo or post. On the one hand, face-to-face meetings are the most effective way to manage a successful debt recovery. On the other hand, it is the most expensive tool, considering the costs of a site visit, together with the time and effort expended.

In the past few years, virtual meetings with debtors located in various parts of Turkey have become a strong alternative. While foreign creditors could also participate in online meetings with their customers in Turkey, having a collection agency with native speakers makes a huge difference in building a healthy communication for understanding the reasons for non-payment. This ability to communicate in Turkish makes providing solutions before legal action easier. Either a payment plan is agreed upon, or a settlement is made within approximately 3 days after we make an online meeting with Turkish debtors.

Debt collection claims have a higher chance of recovery in a shorter timespan, thanks to the possibility of online meetings with Turkish debtors. Although virtual meeting were available before the pandemic, creditors and debtors alike have now become more accustomed to virtual meetings and even the most conservative people are more open to online gatherings.

MORE AND MORE CHANGES ARE ABOUT TO COME

After-effects of covid-19 on the debt collection market, are not limited to these two issues. I wanted to share the most significant changes which positively affect debt recovery activities in Turkey.

International trade credit grantors have started to make more in-depth investigations into their potential new clients before they engage in business with these new clients. The pandemic has shown all of us the importance of working with reputable and financially strong companies which are more likely to survive difficult times.

Similarly, cash-flow management has regained its value and more fresh cases have started to be placed at debt collection agencies. Digitalization of debt collection activities has also increased. ■

(Reprinted with permission from the ARS Consultancy Blog dated February 24, 2022)

Richard J. Payne
Group Executive Chairman
AW Holding, UAE

COURTROOM ATTIRE IN CANADA

Sometimes, people are surprised to learn that in Canada we continue to wear legal robes for most court appearances. I thought it might be interesting to look at what we wear and why.

HISTORICAL BACKGROUND

The tradition of robing for court goes back to the 14th century when the King required that judges must robe in order to distinguish them from the other people in the Royal Court.[1] Just as an aside, the use of the word "court" to describe the room in which litigation is conducted goes back to these royal antecedents.

The robes worn by High Court Judges at that time would not have seemed unusual in those times.[2]

The dress code continued to include other participants in the legal process including lawyers. As time went on the particular court dress for the various participants evolved. Some of these could be quite ornate and decorative.

By the 17th century the robes worn by lawyers had developed into something resembling what lawyers in Canada wear in court today. It was also at that time that wigs made their first appearance in the Courts of England. Again, as with the legal robes, this reflected the current fashion in society.

The legal attire worn in the courts of England spread throughout the British Empire and continues to be worn in the courts of Canada, the Caribbean and the British Commonwealth.

LEGAL ATTIRE TODAY

Lawyers in Canada have not been required to wear wigs to court for more than a century. However, legal robes continue to this day.

Generally, when a student is about to be called to the Bar they make an appointment to go to one of the robemakers to get fitted for legal robes. The robes are made to measure. The candidates for a Call to the Bar ceremony must be robed in order to appear.

People sometimes tend to focus on the robe itself but there are other pieces to the legal attire and generally those are purchased at the same time. The first piece is the legal shirt. This is a long-sleeved white shirt with a winged collar and French cuffs. The French cuffs necessitate the second piece which are the cufflinks. There are Law Society cufflinks but there is no requirement that those be worn. The legal shirt has a

separate piece that attaches around the neck and under the winged collar called "Tabs" and those are the third piece. They are kept in a special case to keep them flat. The Tabs are two long pieces of cloth that go down the front of the shirt and outside the opening in the robe. The fourth piece is a Waistcoat which is a long-sleeved black vest which goes over the shirt and under the robe. There are also court trousers and skirts but those are not mandatory, and most lawyers simply wear black or grey trousers or skirts under their legal robes.

Most lawyers also order a robe bag which is a blue cloth bag with your initials on it to carry your robes to and from court. The practice is that lawyers carry their robes to court and all courthouses in Ontario include a "Robing Room" which includes space to change and lockers for your street clothes.

The requirement to wear robes is set out in Notices to the Profession issued by the Superior Court of Justice. The most recent rule (which covers both in-person and virtual proceedings) is as follows:

Effective April 19, 2022, counsel must be gowned for any virtual proceeding that, if conducted in person, would require gowning. For greater clarity, unless a region-specific Practice Direction states otherwise, counsel are not required to gown for the following court attendances:

- Trial scheduling court (also known as assignment court, "speak to" court or "purge court") in family, criminal or civil proceedings;
- Case conferences, settlement conferences, trial management conferences, or pre-trials; and
- Small Claims Court proceedings.

Counsel must be gowned for all other in-person or virtual proceedings. They must do so regardless of whether the presiding judicial official is a judge or an associate judge.[3]

Yes, we do have to robe for virtual proceedings as well!

Some lawyers feel that mandated court attire is an anachronism and should be eliminated. My own take it that it is an important part of the court process that adds to the solemnity of the occasion, demonstrates that the lawyers are part of the legal system and eliminates the need for fashion consultants to brief lawyers on their choices of what to wear to appeal to a judge or jury. ■

1 History of Black Robes", harcourts.com
2 History of Court Dress", judiciary.uk

3 Notice to the Profession and Public Regarding Court Proceedings, March 17, 2022 update Ontariocourts.ca

Kaitlyn H. Ford
Student
Stetson University College of Law
Winner of the 2024
CLLA Southern Region Essay Competition

FLORIDA LAW'S AMBIGUITIES INVOLVING PERSONAL GUARANTEES

Personal guarantees have become increasingly vital in business, agency, and contractual relationships by providing a safeguard in the event of contract breach or a debtor's default.[1] A personal guarantee is widely regarded as a promise to pay the debts of a business or individual if such person defaults on their responsibility, thus adding an additional layer of liability.[2] The enforceability of such guarantees, however, is a question with varying answers across the United States.[3] For instance, in Florida, the validity of personal guarantees does not require specific criteria be met, but relies on the totality of the circumstances with enforceability determined on a case-by-case basis.[4] Moreover, Florida courts have held the guarantor's intent when making the statement at issue must be examined in determining whether it is a valid personal guarantee, rather than relying on a rigid formula of elements.[5] When creditors are entering into business dealings involving a personal guaranty, the creditor should thus be cautious to rely on such a promise due to Florida courts' ambiguous holdings.[6]

Through long-standing precedent, courts across the United States have held that corporations are separate legal entities; thus, shielding its shareholders from personally liable to the corporation's creditors.[7] Despite limited liability being an attractive benefit of starting a corporation in comparison to other business entities, there are some exceptions.[8] For example,shareholders

1 *E.g.*, Daniel Morman, *How to Guarantee Enforcement of a Guaranty*, The Florida Bar Journal, n.86 (June 2001), https://www.floridabar.org/the-florida-bar-journal/how-to-guarantee-enforcement-of-a-guaranty-agreement/ (explaining a guaranty at its core is a promise to a creditor of personal liability in cases of breach or default).

2 *Brewfab, LLC v. 3 Delta, Inc.,* 580 F. Supp. 3d 1201, 1205 (M.D. Fla. 2022).

3 *Id. 14E.g. Scott v. Tampa, 158 Fla. 712, 716, 30 So. 2d 300, 302 (1947) (suggesting due diligence is a required element to enforce certain personal guarantees). See also Anderson v. Trade Winds Enters. Corp., 241 So. 2d 174, 177 (Fla. Dist. Ct. App. 1970) (explaining there are two types of personal guarantees, each requiring different criteria be met).*

4 *Id.* (emphasizing there are no "magic words" which create an enforceable personal guarantee in Florida).

5 *Id. See also Fort Plantation Invs., LLC v. Ironstone Bank, FSB,* 85 So. 3d 1169, 1171 (Fla. Dist. Ct. App. 2012) (holding there are both conditional and absolute guarantees, each requiring different circumstances to be considered enforceable in Florida).

6 *See Pardo v. Goldberg*, 92 So. 3d 295, 297 (Fla. Dist. Ct. App. 2012) (holding personal guarantees do not make the guarantor liable for attorney's fees unless there is express language indicating such or if the language is broad enough to encompass attorney's fees). *See also Brewfab, LLC,* 580 F. Supp. 3d at 1206 (explaining there is no required language to make a personal guarantee enforceable and it is instead decided based on the surrounding circumstances).

7 *E.g. De Witt Truck Brokers, Inc. v. W. Ray Flemming Fruit Co.*, 540 F.2d 681, 683 (4th Cir. 1976).

8 *Id.*

can be held personally liable for the debts of a corporation if they enter into a personal guaranty – yet enforceability of such promise is not ensured.[9] This was explored in *De Witt Truck Brokers, Inc.*, where creditors sought to impose personal liability after a company's president orally promised to pay the creditor if the corporation were to default on their deal.[10] Although a personal guarantee was seemingly present, the oral promise was not enough to constitute a valid guaranty due to the Statute of Frauds requiring such statements be in writing.[11]

The Statute of Frauds is rooted in contract law; suggesting a personal guarantee is not merely an informal promise, but rather a contractual agreement.[12] Consequently, we must look to contract law principles in determining a personal guaranty's validity and enforceability. Based on such principles, it becomes clear that personal guarantees must also include an offer, acceptance, and consideration to be valid.[13] Although these requirements provide insight into when a personal guarantee is enforceable against the promisor, various ambiguities remain regarding additional required factors.[14]

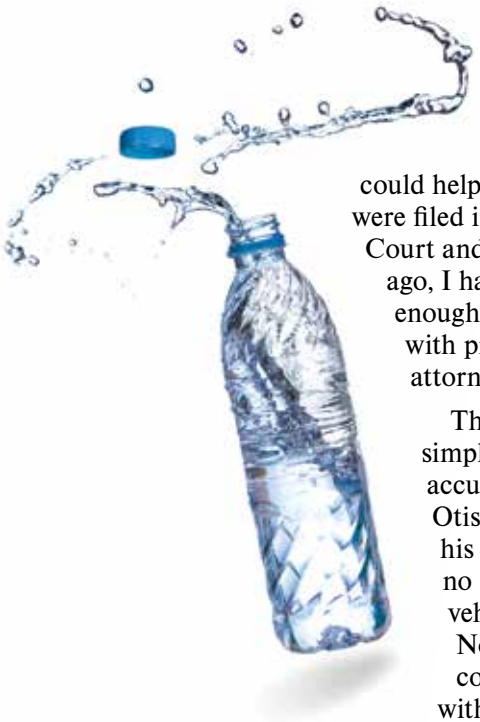
The enforceability of such guarantees is further complicated by Florida courts' recognition of both absolute guarantees and conditional guarantees.[15] An absolute guaranty imposes immediate liability upon default, but only if the guaranty is written in unambiguous terms.[16] A conditional guaranty, however, does not impose liability until specific conditions occur.[17] Florida courts' ambiguity regarding these conditions creates further confusion in enforcing personal guarantees.[18] For instance, conditional guarantees require the creditor make a diligent effort to collect from the debtor; and, if such debtor neglects to pay, the creditor may then collect.[19]

Nevertheless, what constitutes a "diligent effort"[20] is unclear amongst courts.[21] For example, the Supreme Courts of Wisconsin[22] and Michigan[23] have historically held that a creditor has not exercised its due diligence if it fails to take legal action against its debtor within a reasonable time following default.[24] New York courts generally agree, adding there cannot be unnecessary or great delay in pursuing appropriate legal action.[25] Florida courts take a similar stance, yet they use a stricter approach.[26] Specifically, Florida courts analyze the clarity of the promisor's intent in determining whether a personal guarantee is enforceable.[27] According to long-standing Florida precedent, if the intent of the parties is clear and the guaranty was written in unambiguous language, then the guaranty is more likely to be found enforceable.[28]

Personal guarantees are not a clear topic amongst courts in the United States, but rather an ambiguous one with different approaches – all varying by state.[29] Specifically, Florida courts add an additional layer of complexity by recognizing both absolute and conditional guarantees, requiring differing elements including due diligence and unambiguous language.[30] While Florida courts' criteria for due diligence offers some clarity, uncertainties persist concerning parties' intent and how to properly analyze such a concept.[31] Understanding these nuances is crucial for Florida creditors participating in business dealings involving personal guarantees; therefore creditors must take a cautious approach to such promises ensuring they adhere to contract law, precedent, and evolving caselaw. ■

9 *De Witt Truck Brokers, Inc.*, 540 F.2d at 683.
10 *Id.*
11 *Id.* at 689.
12 *See Brewfab, LLC*, 580 F. Supp. 3d at 1203.
13 *Id.* at 1207.
14 *E.g. Scott v. Tampa*, 158 Fla. 712, 716, 30 So. 2d 300, 302 (1947) (suggesting due diligence is a required element to enforce certain personal guarantees). *See also Anderson v. Trade Winds Enters. Corp.*, 241 So. 2d 174, 177 (Fla. Dist. Ct. App. 1970) (explaining there are two types of personal guarantees, each requiring different criteria be met).
15 *Fort Plantation Invs., LLC*, 85 So. 3d at 1171.
16 *Id.*
17 *Fort Plantation Invs., LLC*, 85 So. 3d at 1171. *See also Mullins v. Sunshine State Serv. Corp.*, 540 So. 2d 222, 223 (Fla. Dist. Ct. App. 1989).
18 *E.g. Fort Plantation Invs., LLC,* 85 So. 3d at 1171. *See also Scott v. Tampa,* 158 Fla. At 716.
19 *Scott*, 158 Fla. at 716.
20 *Id*. at 715.
21 *Id.* at 716 (explaining due diligence refers to using the means by which the law allows, therefore leaving the phrase ambiguous).
22 *French v. Marsh*, 29 Wis. 649, 654 (1872).
23 *Bosman v. Akeley*, 39 Mich. 710, 711 (1878).
24 *Id. See also French*, 29 Wis. At 654.
25 *E.g. Thomas v. Woods*, 4 Cow. 173, 188 (1825).
26 *Bryant v. Food Mach. & Chem. Corp. Niagara Chem. Div.*, 130 So. 2d 132, 134 (Fla. Dist. Ct. App. 1961).
27 *Anderson*, 241 So. 2d at 177.
28 *Bryant*, 130 So. 2d at 134. *See also Friedman v. Va. Metal Prods. Corp.*, 56 So. 2d 515, 516 (Fla. 1952).
29 *E.g. French,* 29 Wis. at 654. *See also Bryant*, 130 So. 2d at 134.
30 *Anderson*, 241 So. 2d at 177.
31 *E.g. Brewfab, LLC*, 580 F. Supp. 3d at 1205.

WATER, WATER EVERYWHERE, AND NOT A DROP TO DRINK



A construction client of mine had an employee that was charged with a DUI and asked if I could help him out. The charges were filed in Atlanta Municipal Court and, as it was many years ago, I had practiced there enough to be comfortable with proceeding as the attorney.

The facts were both simple and sad. The accused, a man named Otis Campbell, had lost his driver's license and no longer even owned a vehicle. He resided in North Georgia and commuted to job sites with co-workers. This required some planning, because our citizen of the year here had been bestowed the honor of an electronic anklet that tracked his every move, courtesy of his local judiciary. He was allowed a release to work as long as he updated the court in a timely fashion.

So, how did the accused who did not own a car, commuted to work and was under constant surveillance manage to get pulled over for a DUI you ask? Simple, he was working in a rather non-skilled position and determined that he could use the opportunity to partake of some of his local liquor store's finest rotgut whiskey while maintaining steady employment. The present jobsite was a subdivision located in Atlanta. It was unfinished and the streets had yet to be deeded to the city as right-of-ways.

This detail is what led to his arrest. As you have probably seen, silt fencing at construction sites is ubiquitous in America, as it is required to prevent erosion during construction. But, merely putting up silt fencing is not enough. Local codes uniformly require that the streets and concrete areas be rinsed each day to further avoid erosion.

Otis was given the task of the daily rinsing of the streets using a water truck filled with non-potable water for that purpose. There was one hitch, the subdivision had more than one entrance and all the roads were not interconnected, meaning to get from one section of the job to another, there was a very short trip on the right-of-way. Of course, a police office happened to see our well-buzzed hero driving poorly on this short stretch and pulled him over.

Fast forward to the plea calendar. The prosecutor and I worked out a plea deal and waited to present it to the judge. The Judge Honeybadger was a gruff, elderly gentleman (a word I use sparingly now) who had become rather ill-disposed to DUI cases. The ankle bracelet was clearly visible and did not help our position.

Upon presenting the plea, the judge wanted an additional measure: a Guardian Interlock ["GI"] device must be installed on his vehicle and remain there for 6 months. This device is essentially a breathalyzer that will not allow ignition unless the driver is alcohol free. I explained that his license was suspended, and he did not have a car, so that was an impossibility. True to form, I learned that Honeybadger don't care. That was our only option.

So, what did we do? Well, I had my client get someone to purchase a wrecked car and haul it to the GI facility. I arranged to lease a parking space from them for six months and they installed the device. After six months, the device was removed, the wreck hauled away and Otis was likely drunk at home and all was right with the world again. ■

Emory Potter, Esq.
Hays & Potter, LLP

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