

## Current Notes

# Enforcement of Foreign Judgments in Spain

### Introduction

There is little question but that the vast expansion of international trade in recent years has been singularly rewarding to those participating in it. On the other hand, however, it has served also as the catalyst for an expansion of legal problems, the solutions to which have long been considered as falling within the exclusive domain of a handful of attorneys whose practices have more or less been restricted to the international scene.

This no longer can be said to be true. These problems are now confronting practitioners at all levels of interest and experience, primarily because adequate advice to clients dealing in international markets requires them to have at least a basic knowledge of the precepts of other judicial systems.

When one thinks in terms of these horizons, he usually thinks in terms of contract or property rights secured by, or obligations to which his client may be subject under, the laws of a foreign country. It is perhaps the rare case where there is any concern given to the manner in which a client's rights, vested by reason of a domestic judgment, might be enforced abroad. Yet, with the continued growth of international contacts, the enforcement of domestic judgments in foreign courts takes on equal significance. Nonetheless, this important segment of the law does not seem to have received the degree of attention and exploration which the author believes it merits.

Such is the area to which the present paper is directed. If I have selected Spain for this study, my choice has been prompted not only by personal experience, but by the fact that all too little can be found in American legal writing dealing with a country whose contacts with the United States and its citizens has grown one hundred fold in the past decade.

A cautionary word is in order at the outset. What follows should not be considered as a suggestion that the advice of foreign counsel should not be sought in all circumstances. The contrary is true. My intent here is merely to set out some guidelines that can be utilized by the American attorney who might be

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called upon at some future date to evaluate for a client the wisdom of entering Spain for the purpose of obtaining execution on a domestic judgment against a Spanish national.

### Section I

In every case where a foreign judgment is presented for execution in Spain, a petition must be filed with the Tribunal Supremo, the Spanish Court of last resort, for the issuance of an *exequatur*.<sup>1</sup> Except as otherwise provided by treaty or other international agreement to which Spain is a party, that Court has exclusive jurisdiction to hear and determine such matters.<sup>2</sup>

After the petition has been filed, the Court concerns itself initially with a determination of whether the judgment submitted to it is a final judgment admitting of no further appeal in the jurisdiction from which it proceeds. Once this quality of "finality" is established to the Court's satisfaction, it then passes to a consideration of whether disposition of the petition is controlled by an international agreement.

Thus, the basic precept of Spanish law on the subject is that all "final judgments entered in foreign countries will have the same force and effect in Spain as is established by treaty."<sup>3</sup>

Therefore, if Spain and the national wherein the judgment was entered have agreed upon the treatment to be accorded it, the matter is resolved simply by reference to the terms of that agreement.

Unfortunately, this simplistic approach is not available in the case of a judgment entered in the United States, since none of the treaties or executive agreements presently in force between the United States and Spain deals with the problem. What then of those situations not regulated by agreement?

As a general proposition, a final foreign decree or judgment, not otherwise regulated by treaty, will be given the same force and effect in Spain as a final judgment rendered in a Spanish Court,<sup>4</sup> subject always to the requirement that the decree under consideration was entered in a country whose jurisprudence requires similar treatment to be given to the final decrees of Spanish Courts.<sup>5</sup> Unless this element of reciprocity exists, a concept certainly well known in the decisions of our own courts,<sup>6</sup> the result is as predictable as in those cases where a treaty controls; the judgment simply will not be enforced within Spanish National Territory.

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<sup>1</sup>In French law an endorsement for execution upon the judgment of a foreign Court.

<sup>2</sup>Art. 955 "Ley de Enjuiciamiento Civil," 1881 (referred to hereafter as "L.E.C.').

<sup>3</sup>Art. 951, L.E.C.

<sup>4</sup>Art. 952, L.E.C.

<sup>5</sup>Art. 953, L.E.C.

<sup>6</sup>Vide *Hilton v. Guyot*, 159 U.S. 113, 16 S. Ct. 139, 40 L. Ed 95 (1895).

This principle of reciprocity is most important since it can be found throughout Spanish law extending even to the laws governing the rights and obligations of foreigners renting or leasing real property in Spain.<sup>7</sup>

It is in those cases where no treaty exists, and there is no real evidence available as to the attitude of the foreign jurisdiction vis-á-vis Spanish decrees, that the greatest difficulties are to be encountered. In this posture, one must consider carefully the overriding policy of the Civil Code ("Codigo Civil," 1889) and the remaining "reciprocity" sections of the Procedural Code inasmuch as they will determine the ultimate decision of the Tribunal Supremo.

In Article II of the Civil Code, it is directed that "prohibitive laws concerning persons, their acts or property," and those laws that have as their object the preservation of "good morals" and "public order," can in no wise "be affected by . . . judgments . . . of a foreign country."

From this general principle it is necessary to consider the conditions of Articles 953 and 954 of the Code of Civil Procedure, being always mindful of the above-cited proscriptions of the Civil Code.

In the first of these procedural sections, it is declared that

If the final judgment comes from a nation whose jurisprudence does not give effect to Spanish judgments, it will not be recognized in Spain,

while Article 954 states that

If none of the cases referred to in the preceding articles are applicable, final judgments will be enforceable in Spain if they meet the following requirements: (1) that the final judgment would have been entered as a result of a personal action;<sup>8</sup> (2) that it would not have been entered by default; (3) that the obligation it creates is legal in Spain; (4) that the official certification of the record of the case meets the requirements of the nation wherein it was entered, in addition to those requirements of Spanish law necessary for its recognition.

Perhaps the most explicit treatment given by the Tribunal Supremo to Articles 953 and 954 can be found in two 1935 cases involving French and Argentine judgments.

In the first of these cases, a French plaintiff petitioned a Spanish Court for a decree ordering execution upon a money judgment entered in a Parisian Court against a non-resident Spanish corporation. The relief was denied on two grounds; one, that no reciprocity existed on the part of France with respect to the final decisions of Spanish Courts; and second, that enforcement of the

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<sup>7</sup>Decree of 24 December 1964, which provides that the benefits conferred are extended to foreigners provided they can demonstrate equal treatment of Spaniards by the laws of the nation of which the alien tenant is a citizen.

<sup>8</sup>"acciones personales," the phrase used in the Spanish text, has as its common law equivalent those actions generally considered to be "*in personam*" actions.

judgment would require the Spanish defendant to violate Spanish currency laws which had been enacted in Spain's national interests.

Dealing with the reciprocity issue the Court has this to say:

. . . French jurisprudence is contrary to the recognition of foreign judgments, since according to it, the Court to which the exequatur is presented has the right as a general rule to determine not only the propriety of the decision from the quadruple point of view of procedure, judicial and legislative jurisdiction, and conformity with public order, but (it determines) also with regard to substance (all of which) implies a rigid system of review as to form and substance, or stated otherwise, of absolute non-execution. . . .

As a consequence of this system, and because the principle of reciprocity with Spain is not accepted by French legislation nor the jurisprudence of French tribunals, and neither does there exist any international treaty on such an important point, the jurisprudence (of this Court) is constant and uniform in its opposition to the execution in Spain of judgments pronounced in French Courts.<sup>9</sup>

A few months later, the same court had before it a petition seeking execution upon a judgment entered in a municipal court of the Republic of Argentina. In granting the exequatur, the Tribunal Supremo, in a rather curious (as well as unique) result, concluded that even in the absence of a treaty between the two countries, and notwithstanding the lack of evidence that Argentina would recognize Spanish decrees, Article 954 afforded sufficient authority to rule in favor of the petitioner. It held there that

Since there does not exist between the Republics of Spain and Argentina any convention dealing with the matters, and neither is it clear from the record that there is an established system of reciprocity between both, the full extent of Article 954 is drawn upon in order to resolve the claimants petition . . . (S)ince the final judgment that is examined here has been decreed as a consequence of the exercise of a personal action, the defendant having appeared and was ordered to perform an obligation legal in Spain . . . and said final judgment meets the formal requirements of the cited precepts, it is proper to allow execution in Spain of the judgment of the Juzgado de Paz of the Federal Capital of Argentina. . . .<sup>10</sup>

The concept of reciprocity, upon which Spanish law operated in these two non-treaty matters, has been applied consistently since the latter part of the nineteenth century with the result that enforcement of judgments entered in Belgium,<sup>11</sup> Great Britain,<sup>12</sup> Germany,<sup>13</sup> Portugal<sup>14</sup> and Uruguay<sup>15</sup> has been denied, while during the same period, Articles 953 and 954 have been used to

<sup>9</sup>Decree of 24 March 1935. Vide ARANZADI "*Reportorio de Jurisprudencia*," 1935, No. 621, p. 268.

<sup>10</sup>Decree of 28 October 1935. ARANZADI "*Reportorio de Jurisprudencia*," 1935 No. 2041, p. 895.

<sup>11</sup>Decrees of 24 October 1890 and 26 January 1899.

<sup>12</sup>Decree of 3 July 1890.

<sup>13</sup>Decree of 23 March 1935.

<sup>14</sup>Memorandum decision "F" of 1895.

<sup>15</sup>*Ibid.*

uphold the rights of Mexican citizens to enforce their judgments in Spanish territory.<sup>16</sup>

Based upon the above, several general conclusions can be drawn. The first of these, and the most obvious, is that in any case where Spain has entered into a bilateral or multi-lateral agreement dealing with the enforcement of foreign decrees, such decrees will be dealt with by virtue of and in strict accordance with the provisions of those agreements. One may conclude also that in a case where no treaty exists and there is clear evidence of a systematic refusal by the nation where the judgment was entered to grant enforcement of Spanish decrees, Spain will likewise decline to lend the assistance of her Courts.

A third conclusion which can be drawn refers to those situations where there is no treaty, but it is affirmatively shown that the jurisdiction where the judgment originates grants reciprocity. In this posture, Spain will grant the exequatur, provided of course, that to do so would not offend Article II of the Civil Code, or her public policy in general, and, the additional requirements of Article 954 are found to be present.

In drawing any conclusions from the report decisions cited herein, caution must be exercised in considering the present-day effect of the decree involving the Argentine judgment. Taken literally, Article 953 unequivocally demands affirmative proof of reciprocity or the lack of it. When viewed in this light then, this decision appears to be an aberration which is contrary to stated Code policy. For this reason, it is doubtful that it can now be relied upon with confidence.

## **Section II**

It seems appropriate here to insert a brief word on the procedural mechanics of the Code which are followed if the exequatur is granted and execution is decreed.

As was stated at the outset, all petitions for the enforcement of non-Spanish decrees must be lodged with the Tribunal Supremo. The decisions of this Court admit of no further appeal or re-argument.<sup>17</sup> Both the judgment debtor and the Public Prosecutor ("Fiscal") are parties to the action and may appear and be heard.<sup>18</sup>

Upon presentation of the foreign record, properly certified and translated, a citation is issued by the Court to an intermediate Court, the "Audiencia"<sup>19</sup> sitting in the judicial district wherein the judgment debtor resides. Essentially,

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<sup>16</sup>Decree of 27 October 1887.

<sup>17</sup>Art. 956, L.E.C., 1881.

<sup>18</sup>*Ibid.*

<sup>19</sup>The "Audiencia Territorial" is essentially an appellate Court although it has original jurisdiction in disputes involving patents and trademarks.

this citation, or summons, notifies the debtor that the action is pending and advises him of his right to appear and be heard in the cause within a three day period.<sup>20</sup> Should he fail to do so within that time, the Court, after the expiration of a further nine day period, decides the matter.<sup>21</sup> If the case is determined adversely to the petitioner, an appropriate decree is entered and the record is returned to him. If the *exequatur* is granted, a notification to that effect is issued to the *Audiencia* which in turn notifies the Court of First Instance<sup>22</sup> sitting in the place where the debtor lives. It then becomes the latter's responsibility to oversee the satisfaction of the original judgment.<sup>23</sup>

In the ordinary commercial case, satisfaction itself is achieved by a manner familiar to all American practitioners—voluntary payment by the debtor or seizure of his property.<sup>24</sup> In the situation where the debtor is obligated to pay a fixed sum (“*cantidad determinada*”), and he fails to do so, his property is seized, the value of the goods is determined by experts, and a sale held.<sup>25</sup>

Finally, it should be noted in passing that provisions do exist in the Code for the enforcement of judgments compelling a defendant to deliver a certain object or thing, or compelling him to do or refrain from doing a certain act.<sup>26</sup> In practice however, these latter matters can become technically involved and the appropriate Code provisions must be carefully read and followed.

### Section III

Although research does not disclose any published decisions of the Tribunal Supremo involving enforcement of the judgments of American Courts, the author has been informed of one recent case where the judgment of a New York Court was denied enforcement because of the petitioner's apparent failure to demonstrate as a fact the critical issue of reciprocity. To avoid this defect therefore, it is suggested that the American petitioner be prepared to follow a procedure for proof of reciprocity which, although not formally embodied in the Civil Procedure Code, has evolved through practice and case law.

In Spain, foreign law must be fully proved as a fact, not only as to its text, but also as to its scope and interpretation. This requirement can be complied with by submitting the sworn opinions of two attorneys licensed to practice in the jurisdiction in which the judgment was rendered. Their signatures must be acknowledged by a Notary Public and the appropriate County Clerk's certificate

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<sup>20</sup>Art. 957, L.E.C.

<sup>21</sup>Arts. 957-58, L.E.C.

<sup>22</sup>“*Juzgado de Primer Instancia*”

<sup>23</sup>Art. 958, L.E.C.

<sup>24</sup>Art. 921, L.E.C.

<sup>25</sup>Arts. 922 and 1481 et seq, L.E.C.

<sup>26</sup>Art. 923, L.E.C.

(or that of a similar official), attesting to the notary's authority should be affixed. These documents must then be submitted to the nearest Spanish Consul for authentication ("legalización"). Once authenticated, they should then be filed with the Tribunal Supremo with the petition for exequatur.

While this represents what might be termed to be minimum requirements, it has been suggested that a petitioner's position may be considerably enhanced by submitting a further certificate from the presiding or chief Judge of the district or State wherein the attorneys practice. This certificate should reflect that the attorneys are members in good standing at the bar; that their opinions conform to the local decisional or statutory law on the issue of reciprocity; it should be attested to by the Clerk of the Court, and finally, legalized by the Spanish Consul.<sup>27</sup>

### **Conclusion**

The primary principle which the American client or attorney, seeking the assistance of Spain in enforcing a domestic judgment, must heed, is clear. In all cases they must be prepared to submit adequate proof that decrees rendered in Spain by Spanish Court will be accorded full effect in the jurisdiction from which their judgment proceeds. Failing this, and despite the fact that all other conditions of the Code are met, Spain will not act favorably on any such request.

One final note of caution should be raised. Because Article 954 requires that the judgment of the foreign Court not be entered as the result of a default, it is highly unlikely that the use of "long arm" jurisdictional statutes will satisfy this section should a Spanish defendant elect not to appear after having been served in accordance with local law. This is also true as respects a judgment for divorce and the payment of alimony. Since Spain currently does not recognize absolute divorce, it would no doubt be held that such a foreign decree, at least insofar as it deals with members of the Catholic faith, would be contrary to its public policy and therefore unenforceable.

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<sup>27</sup>The author is indebted to D. Miguel G. Diez y Diez, member of the Madrid Colegio de Abogados for his advice on the matters outlined in this section.

