

SERVICE OF PROCESS ABROAD

ROBERT CASAD*

Resumen

Independientemente de si el emplazamiento es necesario en un litigio incoado en México o en los Estados Unidos la Sección 1781 del Título 28 del Código de los Estados Unidos regula el procedimiento a seguir en los Estados Unidos. Por su parte, el Código Procesal Civil apropiado en México rige el procedimiento a seguir en el vecino país. Cartas Rogatorias en todo caso pueden ser tramitadas a través de canales diplomáticos y, a menos que lo prohíba el Código Procesal Civil en cuestión, pueden ser enviadas directamente de un tribunal a otro.

When process issued by one country must be served in another, compliance with the laws of both countries, of course, is necessary. If the two countries are parties to a treaty governing extraterritorial service, the treaties' provisions, too, must be observed. The United States is a party to the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters.¹ That treaty, however, is not in force in Mexico. Another treaty dealing with this subject is the Inter-American Convention on Letters Rogatory.² That treaty is in force in Mexico but not in the United States. The law governing service of United States process in Mexico and Mexican process in the United States, then, must be found in the local laws of the appropriate states.

SERVICE OF UNITED STATES PROCESS IN MEXICO

The long-arm statutes of all American states authorize extraterritorial service of process. They generally do not distinguish between service in a sister state or in a foreign country. Some long-arm statutes provide that process may be served in the manner and by an official prescribed by the law of the place where service must be made. Other long-arm statutes provide for service by mail, and this form of service

*Professor of Law, University of Kansas, Lawrence, Kansas; author, *Jurisdiction in Civil Actions: Territorial Basis and Process Limitations on Jurisdiction of State and Federal Courts* (1983). This article was presented in conjunction with the author's panel participation at the Symposium for Judicial Cooperation Between the United States and Mexico, April 13-15, 1984 at the University of Arizona College of Law, Tucson, Arizona.

¹20 U.S.T. 361, T.I.A.S. 6638. See R. CASAD, *JURISDICTION IN CIVIL ACTIONS*, §4.06[2] (1983).

²O.A.S. Doc. OEA/Ser. A/21 (SEPF). See Carl, *Service of Judicial Documents in Latin America*, 53 DENVER L.J. 455, et seq. (1976). The text of the convention is reproduced in the appendix to Professor Carl's article, pp. 472-75.

may be perfectly valid, so far as the law of that state is concerned. Some countries, however, regard this service of foreign process by mail an affront to their sovereignty and prohibit it. In those countries, it will generally be necessary to have the process served by some local official of the place where service must be made.

Mexico apparently does not permit the service of foreign process by mail or by a person designated by a foreign court. Accordingly, service of the process of a United States court — state or federal³ — in Mexico requires the assistance and cooperation of Mexican authorities. That means that service in Mexico must be sought through a letter rogatory.

Service by way of letters rogatory is generally an expensive and time-consuming process, since the request generally must be transmitted through diplomatic channels. The process is governed by a federal statute, 28 U.S.C. §1781, and State Department Regulations, 22 C.F.R. 92.54 (1979). The regular procedure has been described by Gary Horlick in the following terms:

A letter rogatory must be requested from the court in which the action is pending. A suggested form for that application can be found attached to Memorandum No. 386, available in U.S. marshals' offices. Once the application for the issuance of a letter rogatory has been granted, the judge must sign it, after which the clerk of the court should affix the seal of the court. An original, and one copy of the letter, together with two copies of the documents to be served and a certified translation of each, plus a certified check for \$60 payable to the U.S. Embassy in the country in which service is to be made, should be sent either directly to that Embassy or to the Office of Special Consular Services of the Department of State in Washington, D.C. The Embassy will transmit the request to the foreign country's Ministry of Foreign Affairs, which will transmit the documents to the appropriate officials for service, after return of service will be made to the requesting American court via the same channels.⁴

The statute, however, does not prohibit transmittal of the letter rogatory directly from one court to another without diplomatic intervention, if the law of the receiving country permits it, as the law in most Mexican states apparently does. If the Mexican court to which

³FED. R. CIV. P. 4(i) deals with service abroad of a federal court's process. Federal process can also be served in the manner provided by the long-arm statutes of the state in which the federal court sits. Rule 4(e). Special federal statutes also provide for service abroad in certain kinds of cases.

⁴Horlick, *A Practical Guide to Service of United States Process Abroad*, 14 INT. LAW 637, 640-41 (1980).

the letter is addressed is governed by the Código Federal de Procedimientos Civiles (1942), or a state code like it, the request from the United States court can be sent directly to the Mexican court. Certain formalities, however, must be observed:

1. The request must be legalized by the Mexican counsel having jurisdiction at the place of the requesting court.
2. The request must be accompanied by an officially certified Spanish translation of the letter, the summons and the complaint. The Mexican court may order a second translation.
3. Mexican procedural formalities, such as spelling out numbers and the absence of any erasures or corrections, must be complied with.⁵

Accordingly, it appears that the most effective method of serving United States process in Mexico is through a letter rogatory addressed directly to the Mexican court in the place where service must be made, at least in those Mexican states whose codes of civil procedure permit it.

SERVICE OF MEXICAN PROCESS IN THE UNITED STATES

The United States has no objections to the service of foreign courts' process in the United States. A Mexican court's process could be served in the United States by mail or by some person designated by the Mexican court if Mexican law permitted that form of service. Generally, however, it does not, and so Mexican courts cannot take advantage of the United States' more tolerant attitude about service of a foreign country's process. Thus, service of a Mexican court's process in the United States generally requires the issuance and transmittal of a letter rogatory.

The actual transmittal of letters rogatory is governed by 28 U.S.C.A. §1781 (1979), and 22 C.F.R. § 92.54 (1983). Section 1781 of the federal judicial code referred to above also authorizes the Department of State to receive letters rogatory from foreign tribunals, to transmit them to the proper United States tribunal to whom they are addressed for service and to return them after execution. Generally, the Department has the choice of forwarding the letters rogatory through the Department of Justice or state officials, or it may deal directly with the tribunal to which the letters are addressed.

⁵See Stern, *International Judicial Assistance. Part I: Service and Discovery Abroad*, 14 *PRAC. LAW*, at 17, 22 (Dec. 1968).

A letter rogatory can also be sent directly to a court in the United States. A federal statute, 28 U.S.C. §1696 (1964), empowers federal district courts to order service of a foreign court's process on persons found in or residing in the district. That statute provides as follows:

(a) The district court of the district in which a person resides or is found may order service upon him of any document issued in connection with a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon application of any interested person and shall direct the manner of service. Service pursuant to this subsection does not, of itself, require the recognition or enforcement in the United States of a judgment, decree, or order rendered by a foreign or international tribunal.

(b) This section does not preclude service of such a document without an order of court.

At one time United States courts were hesitant to comply with such letters, fearing that lending their assistance in serving the foreign courts' processes would obligate them to enforce the resulting foreign judgment.⁶ Now, however, §1696 makes it clear that lending judicial assistance in serving process does not entail that obligation.

It would appear, then, that the most effective method of obtaining service of a Mexican court's process in the United States (given Mexico's insistence upon service by a government official⁷) would be through a letter rogatory under 28 U.S.C. §1696 (1964), directly to the federal district court in the district where service is to be made.

⁶See e.g., *In re Letters Rogatory Out of First Civil Court of City of Mexico*, 261 F. 652 (S.D. N.Y. 1919); *In re Romero*, 56 Misc. 319, 107 N.Y.S. 621 (Sup. Ct. 1907).

⁷Carl, *supra* note 2, at 455.

