

Payment, Collections and Enforcing a Contract

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The best way for U.S. exporters to avoid collections problems in Mexico is to demand payment prior to shipment or delivery. The second most important suggestion might be to conduct legal, reputational and financial due diligence on your customer before extending credit or terms.

Other tools available to mitigate the risk of non-payment or make collections easier include:

- Insuring payment of the receivable through US EximBank or similar banks (the bank pays you if your customer does not)
- Taking a security interest in goods sold or other assets of your customer or guarantor, particularly in real property
- Requiring the customer or guarantor to execute promissory note(s) in connection with the sale
- Having a valid and enforceable contract
- Negotiating a settlement

ENFORCING PROMISSORY NOTES

Creditors holding a valid promissory note issued in accordance with Mexican law may take advantage of a “summary proceeding” under the Mexican Commercial Code, in which the court will recognize the note, immediately attach (place a lien on) identifiable assets of the debtor to satisfy the payment obligation, and order payment in the event default is proved. If the debtor continues to deny payment, the property attached may be sold and the proceeds used to satisfy the judgment.

This process (from filing suit to obtaining a judgment) usually takes about six months to complete, assuming all paperwork is in order. The key, however, is to make sure the party signing the note has significant and readily identifiable assets in Mexico to satisfy the debt in the event of default, and to ensure the note is written in accordance with Mexican law. Executing the sentence can also take some time, particularly if the debtor’s assets are hidden.

ENFORCING A CONTRACT

U.S. exporters that have entered into a valid contract with their Mexican customer may enforce the contract in Mexican court to secure payment and damages. However, if the contract was executed without a promissory note or similar security, obtaining a judgment can often take several years and no lien is placed on the debtor’s assets pending the resolution of the controversy.

NEGOTIATING A SETTLEMENT

Regardless of the type of legal documentation you have to support your claim, Mexican courts are unpredictable at best and justice is often illusory. Thus, if you are able to come to a “middle ground” with your Mexican debtor and recover at least part of the debt, you will be much better off than you would be with a judgment for the whole debt but payment of nothing. Therefore, the importance of reaching out to your adversary and coming to a reasonable settlement, if possible, cannot be overstated.



IMPORTANCE OF MEXICAN AGREEMENTS AND LAW

Whenever extending credit or payment terms to Mexican buyers without significant assets in the U.S., it is a good idea to draft and execute all legal documentation in accordance with Mexican law. Security interests on Mexican assets should also be executed and recorded in accordance with Mexican law; otherwise, there is a risk the security interest (a mortgage on Mexican real property, for example) will be rendered unenforceable in Mexico.

Indeed, in the event of default, often the best way to collect will be to attack your debtor on his home turf. The old saying “you can’t get blood out of a turnip” is very applicable in this case; that is, if you sue your debtor in the U.S. and he has no assets there, collecting on a judgment can prove to be virtually impossible. However, if your promissory note or security is in accordance with Mexican law, and your debtor conducts business and owns property Mexico, then he will likely take the suit more seriously and an amenable resolution or settlement will be more probable.

QUESTIONS & ANSWERS

Question: how can I make sure my contract is enforceable in Mexico?

Answer: To ensure your contract is enforceable in Mexico, it is extremely important always to do business in writing, no matter how trustworthy the other party may be. At a minimum, for an agreement to be enforced in Mexican court, both parties should have sufficient written information regarding the transaction(s), such as purchase orders, invoices, and correspondence evidencing a “meeting of the minds” and the agreed price. In addition, Mexican law establishes that some contracts or transactions must satisfy certain formalities to be enforceable (e.g., a real estate purchase *must* be formalized before a Mexican *notario público* to be enforceable in Mexican court in the event of noncompliance).

Doing your legal due diligence on your Mexican buyer will help you enforce your contract with him. If your customer is a Mexican company, then request its incorporation records (articles of incorporation and bylaws) and run a check to make sure the company exists and pays taxes. If the company does not exist, then your contract will not be binding. It is also very important that you make certain the person signing the contract has sufficient power to do so. Powers of attorney are very formalistic in Mexico, and the common law doctrine of “implied agency” does not exist in Mexico. Likewise, if your customer is an individual, make sure you have copies of his identification, proof of address, taxpayer number, and other documents evidencing his personal and business status.

Question: what if I don’t have a written contract?

Answer: If you do not have a written contract, then your best bet is to try and negotiate a settlement with your Mexican buyer to ensure at least partial payment. Such negotiation should be carried out only after consulting an attorney. It usually more effective when done after filing a civil action, which may serve to pressure your debtor into paying you more or all of the debt. Litigation costs your adversary time and money too, so even if your chances of success are not great, filing suit sometimes is all that is needed to wake up a sleeping debtor and convince him to pay you.

Question: can I guarantee the performance of a contract?

Answer: Yes. There are several types of guarantees or security interests available under Mexican law (e.g., mortgage on real property, floating liens on inventory, asset pledges, promissory notes, sale with reservation of title, surety bonds, letters of credit, and promissory notes, among others).

Question: *how strict is Mexican law regarding deadlines and terms set out in a contract?*

Answer: Very strict. According to Mexican law, time is of the essence when determining a delay in performance. Generally, every delay constitutes a material breach of the contract. Therefore, it is recommendable to agree on the exact deadline or circumstances of performance. Otherwise, a party will have to proceed with an extra-judicial notice before a *notario público* to establish default.

Question: *would a party's breach allow me to charge interest?*

Answer: Generally, yes. You may charge the interest rate agreed upon in the contract. However, according to Mexican law, if the parties do not agree on an interest rate, only a 6% annual rate on the amount borrowed may be charged.

Question: *is it legal in Mexico to capitalize interest?*

Answer: Yes. However, such is the case only if the “capitalization of interest” is agreed upon in the contract.

Question: *are there any legal limits on interest rates (usury laws)?*

Answer: Not generally. The parties to a commercial loan agreement are free to agree on any given interest rate, regardless of its percentage. However, if one of the parties demonstrates that the interest rate is disproportionate to the transaction, the interest rate may be reduced by a judge in accordance with the maximum rate established by law.

Question: *may the parties agree on and fix “liquidated damages” in the event of nonperformance or breach?*

Answer: Yes. The parties to a contract may agree on a penalty or “liquidated damages” clause that may be enforced upon default, partial performance, or the suffering of damages with respect to a contract. However, according to Mexican law, whenever parties agree on a penalty clause, they waive the right to ask for damages that may otherwise become due under law. The law also provides that a penalty clause shall not exceed the value of the transaction. Otherwise, it may be reduced by a judge.

Question: *may the parties to a contract stipulate that controversies be resolved in a specific jurisdiction or forum?*

Answer: Yes. Any jurisdiction may be agreed upon in the contract (i.e.; city or state). The parties must expressly consent to waive their right to file in the court that corresponds to their residence. They must clearly indicate the jurisdiction to which they submit, or the clause is voidable. In addition, the contract must specify whether jurisdiction is in federal or local courts. Parties may also agree to settle any dispute through arbitration conducted by an association of their choosing; in such circumstance, they must expressly waive jurisdiction by Mexican courts.

Question: how should I support my claim for breach of contract?

Answer: Generally, with written evidence. In order to enforce a commercial agreement before Mexican courts, it is very important to support the claim with written documentation and evidence.

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