

THE FIRST PRECAUTIONARY MEASURE IN EXEQUATUR: THE LOST ORDER OF THE FOURTH CHAMBER OF THE SUPREME COURT OF PANAMA

BY PUBLIO CORTÉS



In February 1990, two months after the shameful invasion of Panama that dealt the final blow to the military dictatorship, the Supreme Court of Justice was working in temporary offices and with many files still scorched, because they had been rescued from the fire that had taken hold of the old Court building.

In the midst of this process of reorganization of the country in the face of the complicated scenario, the firm ICAZA, GONZALEZ-RUIZ Y ALEMÁN, acting on behalf of a liquidator of an insurance company that carried on the insurance business in a southern state of the United States of America, if I remember correctly Louisiana, appeared before the Fourth Chamber of General Business of the Supreme Court of Justice and filed a petition for the Execution of a Foreign Judgment, in connection with the decision from the competent courts of the United States of America, which had ordered the intervention of the insurance company and the appointment of the Liquidator.

The file came into my hands as the only Assistant to the Justice Rapporteur, Dr. CARLOS LUCAS LÓPEZ TEJADA. It is worth remembering that the Assistants draft sentences and decisions that must be reviewed, corrected, and endorsed by the respective Justice.



Dr. Carlos Lucas López Tejada
Fuente: La Prensa

I had already carried out several Exequatur proceedings and the verification of requirements did not show any major complications. At first glance, this case seemed similar, except for a special request: the plaintiff attorneys had asked for the urgent application of a precautionary measure, before the Court decided whether to grant the execution of the foreign court order in Panama or not. That request threw me off balance. With my short judicial experience, I had not seen something like that before and my first reaction was to consider that it was not feasible.

Before writing anything, I went to consult Justice LÓPEZ. In the midst of his many administrative occupations, as President of the Court, we had a

meeting every day to analyze the cases and receive his instructions. He always said that, despite the administrative work, his first responsibility was to be a Justice, that is: to decide the cases.

After listening to my description of the scenario and my objections to the precautionary measure requested, he told me categorically that I was wrong. That his decision was that it had to be granted: *"The only thing they are looking for, Publio, -he told me- is to make sure that the money deposited in an account in Panama is not taken by someone else and that it remains in the hands of the legally appointed Liquidator"*. And he ordered me to look for the most appropriate procedural basis, which he was sure existed because that was precisely why the precautionary measures had been invented.

I went back to my desk to comply with the instruction and drafted a draft order granting the precautionary measure. When we discussed it, my distinguished Boss did not find the support I presented sufficient. Let us remember that we are talking about a Justice who has a Ph Degree in Civil Procedural Law from the Central University of Madrid (currently Universidad Complutense) and is a former student of JAIME GUASP, with decades of litigation experience in his firm GALINDO, ARIAS & LÓPEZ. Therefore, in his view, it was not only about the result of the decision, but the legal support had to be correct.

Dr. LÓPEZ took the document I had prepared, used it as a basis, made the

changes and issued a not very extensive order that at the time was a novel precedent.

As you can see, I know that the order exists. Well, I have been looking for a copy for a couple of years now and I cannot find it. It is not in the printed Judicial Registry of those chaotic first months of 1990. Nor can I find it in the digital search for Jurisprudence of the Judicial Branch.

As in previous occasions, Dr. JORGE FÁBREGA P. (R.I.P.) passed by the Court in those days of 1990, and we spoke. Not surprisingly, he was preparing a new book on Procedural Law and asked me if I had any interesting precedents. I shared with him a copy of the order of precautionary measure in Exequatur issued by Justice LÓPEZ. He told me that he had heard about it. I am sure he published the subject in one of his books.



For a long time, I was looking for Dr. FÁBREGA's book where the ruling was commented, and I couldn't find it either. *"If I don't have the Order, -I thought-, at least I will have the commentary of the book"*.

Recently I was on a routine work visit to the Supreme Court building and I happened to take a break and went to the RODRIGO MOLINA AMUY Library. In 5 minutes, the distinguished Librarian SILKA SANJUR, located for me Volume III of the PROCEDURAL STUDIES (ESTUDIOS PROCESALES) of JORGE FÁBREGA P., published in 1990, I believe it is the volume that had less circulation of that series. There, in Chapter LXIV, page 788, there is a review of the order and even paragraphs of the decision are transcribed. That is the only evidence I have that the order exists.

The review by JORGE FÁBREGA P.

Let us comment Professor FÁBREGA's succinct review from two perspectives: first, the elements of the order he comments on and partially transcribes, and then the author's personal comments.

It is a ruling issued by the Chamber of General Business of the Supreme Court of Justice on February 5th, 1990, regarding a petition for the execution of a foreign judgment requested, by means of judicial representatives, by a gentleman with the surname GREEN. The Judicial Registry is not cited as a source. The author literally transcribes

two sections of the order issued by Justice LÓPEZ TEJADA. These sections are transcribed below, including the updated numbering of the articles of the Judicial Code in square brackets:

"1. Contrario sensu of the provisions of paragraph 1 of Article 521 [531] of the Judicial Code, it is inferred that the precautionary measures contemplated in the Judicial Code (among which is the suspension provided for in Article 554 [565]) are applicable in contentious proceedings, since in non-contentious proceedings only those expressly determined by law are applicable.

2. The enforcement of foreign judgments are processed in accordance with the rules that regulate the summary proceeding, which indicates that we are in the case of a contentious proceeding."

"4. With the documentation provided by the plaintiff, it is evidenced that there are well-founded fears that if Banco Agroindustrial y Comercial de Panamá, S.A. delivers the amount corresponding to the interest to a person other than the officer who has been appointed liquidator, it would cause serious and irreparable damage to the company owner of the Certificate of Deposit, from which such interest derives.

5. Finally, it is on record that a surety has been deposited to guarantee the possible damages that may be caused by the suspension measure filed, which, for the time being, is considered sufficient, without prejudice that it may be subsequently increased in accordance with

the provisions of Article 555 [566], paragraph 2 of the Judicial Code".

Based on these data, Professor FÁBREGA says:

(1) By the date of publication of the book (year 1990) the criteria had "just" been established by the Fourth Chamber of the Court, therefore, by that time it was a recent matter.

(2) In Dr. FÁBREGA's words, it is "an important precedent", that is, in his wise judgment it was the first time that such criteria was applied.

(3) Regarding the content of the decision, it expressly states that "*The precedent has an undeniable legal basis, since precautionary measures are applicable in contentious proceedings and, evidently, the enforcement of a foreign judgment constitutes a contentious proceeding. (Summary: Art.1409 [1419] of the J.C.)*".

(4) Finally, it adds that "*if in a foreign judgment enforcement proceeding no precautionary protection is granted, in the cases where it is needed, the enforcement becomes illusory*". From which it concludes that "*the referred ruling has been a success of the Corporation*".



FINAL COMMENT

In summary, the case establishes the precedent according to which, while the Court, acting through the Fourth Chamber, decides whether a foreign court order granting all powers of administration over the assets of a foreign insurance company to a liquidator is recognized as valid in Panama, a bank located in Panama may be ordered to suspend as a precautionary measure any transaction affecting funds deposited in Panama, in the name of the company under

intervention, upon the posting of sufficient security.

I do not know if an equivalent, equal, or similar order of precautionary measure has been subsequently issued in an Exequatur Procedure. In any case, everything indicates that the precedent of Justice LÓPEZ TEJADA was the first case in Panama. It would be of great value if a copy of the complete decision could be obtained.

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