

Litigation 2013 – Mexico

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1 Outline the court system in your jurisdiction.

Mexico is a federal state and therefore its court system is divided into federal and local courts. In addition, commercial matters are distinguished from and governed separately from strictly civil matters. The constitution has established that civil law matters, both substantive and procedural, are of local jurisdiction, whereas commercial matters are governed by federal law. Since commercial matters are federal, they are regulated in the Commerce Code, which is applicable to the entire country. On the other hand, since civil matters are local, each state and the federal district have its own civil code and code of civil procedures. There is also, however, a Federal Code of Civil Procedures, which applies to the resolution of federal administrative and civil conflicts. Although commercial matters are federal, local judges may resolve commercial disputes. In fact, there are no commercial judges; the judges that resolve commercial disputes are civil judges, both local and federal.

In addition to being a dual federal or state system, the court system in Mexico is also divided by material into civil, commercial, administrative, labour, agricultural and criminal matters. Each of these areas has its own set of substantive and procedural rules, and administrative, labour, agricultural and criminal matters have their own courts and judges.

The courts at the federal level include the Supreme Court of Justice with 11 ministers, the collegiate circuit courts, having three magistrates, the unitary circuit courts, having one magistrate, and the district courts, having one judge. Each state has a state high court and specific courts divided by material such as civil, commercial, family, leasing, labour and criminal.

The Supreme Court functions as a full court or in two chambers of five ministers each. Among other matters, it resolves conflicts between states and between the federal government and a state, as well as conflicting decisions by the circuit courts. It also addresses challenges to the constitutionality of laws and is the last resort for appeal of certain cases involving constitutional matters.

The collegiate circuit courts were created to exercise powers originally corresponding to the Supreme Court, which is to resolve amparo proceedings involving questions of legality of decisions issued by the unitary circuit courts. The latter courts in turn resolve appeals from the district courts, which are the federal courts of first instance.

Both the district courts and the unitary and collegiate courts are divided territorially in the number or circuits that the Federal Judicial Board, an administrative body of the judicial power, establishes for the entire country.

With respect to the Federal District, under the superior court of justice are the civil courts that act as courts of first instance, and the civil chambers, having three magistrates, which resolve civil and commercial cases at second instance. As at the federal level, separate courts handle family, leasing, bankruptcy and labour matters.

Within the civil sphere in the Federal District, there are also judges called justice of peace judges, who settle claims involving very low amounts.

2 What remedies are available to a party that is in a dispute with a foreign entity? Do the laws provide foreign entities the same rights afforded to local entities? Are there laws requiring foreign entities to post a bond or other security before they can defend a suit?

Mexican laws provide foreign private entities with the same rights afforded to local entities.

There is no requirement to post a bond or other security before the defence of a suit.

3 What is the most common type of litigation encountered in your jurisdiction by foreign entities (for example, claims for breach of contract, employment or some other issues)?

Commercial disputes are the most common type of litigation brought in Mexico, specifically those related to collection matters.

4 How frequently do parties pursue criminal actions (eg, querellas) in the context of commercial disputes? May criminal trial evidence be adduced in follow-on civil litigation? May civil cases be brought concurrently or after criminal litigation?

Criminal actions are not commonly initiated in the context of commercial disputes. However, exceptionally there have been some cases in which the same cause of action may give rise to both criminal and civil actions. In this regard, civil and criminal actions may be brought concurrently and in some cases it is even possible to ask for the suspension of the civil lawsuit while the criminal trial is pending resolution.

Criminal trial evidence can be adduced in a follow-on civil litigation; however, it has no evidentiary weight and is only considered as indicia.

5 Is there a right to a trial by jury in a commercial dispute?

No.

6 Do courts require or strongly encourage mediation before or during a litigation proceeding?

In Civil disputes the courts are obliged as an initial procedural stage to invite the parties to conciliate the dispute. However, in practice there is no much effort from the courts in this regard. In addition, a court cannot compel the parties to participate in a mediation process.

7 Will choice of law and choice of forum provisions in a contract be recognised?

The courts generally respect the choice of law selected by the parties to a commercial agreement. However, there are some areas of law, which must be governed by local law, as follows:

- criminal liability;
- real estate;
- tax; and
- corporate insolvency.

Any dispute related to the following matters is subject to Mexican law:

- land and water resources located in Mexican territory;
- actions of federal agencies and the Mexican state; and
- disputes relating to e

8 Does your jurisdiction have specific arbitration law? Are arbitration awards enforced by the courts? May courts enjoin or prohibit arbitration proceedings in matters that are also pending in a court proceeding?

The law governing arbitration proceedings is the Commerce Code and it incorporates under Book Five, Title Fourth, the UNCITRAL Model Law on arbitration, with some modifications.

Arbitration awards are enforced by the courts, unless such enforcement entails a violation to due process or public policy. Regardless of the country in which an award has been issued, such award shall be deemed to be valid and binding and shall be enforced, upon written request to the judge. The party asserting an award or requesting its enforcement shall file the original award duly authenticated or a certified copy of it, as well as the original arbitration agreement or a certified copy of it. If the award or the agreement to arbitrate are not in Spanish, the party asserting it shall file a translation made by a certified translation expert (Article 1461, Commerce Code).

For the recognition and enforcement of awards no homologation procedure is needed. Pursuant to the Commerce Code, the recognition and enforcement of awards shall be conducted through a special procedure regarding commercial transactions and arbitration. Once the request has been filed, the judge shall summon the parties and provide them with a period of fifteen days to submit an answer. Upon the expiration of such term, and if the parties do not file any evidence and the judge does not deem it necessary, the parties shall be summoned to the pleadings hearing, which shall take place within the following three days, with or without the parties presence. If the parties file evidence or if the court deems it necessary to present evidence, an evidentiary period of ten days shall be granted. Once the hearing is held, the judge shall summon the parties to hear its final resolution. Intermediate resolutions and the final resolution rendered in this special procedure are not subject to appeal. (Articles 1471 to 1476, Commerce Code).

In the event that a court proceeding is initiated despite the existence of an arbitration agreement, the judge before whom such proceeding has been initiated shall, prior request of either party, remit the parties to arbitration, unless it is determined that the agreement to arbitrate is null and void, ineffective or impossible to enforce. (Article 1424, Commerce Code).

If such an action has been initiated, arbitration may nevertheless be initiated or completed, and an award may be entered while the matter is pending before the judge.

9 Do the courts recognise attorney-client privilege? If so, is the privilege applicable to in-house lawyers

Attorney-client privilege is not recognised under Mexican law, as such. However, under criminal law, attorneys are not subject to the provisions regarding concealment (Article 321, Criminal Code for the Federal District).

10 Are legal proceedings public? In other words, can the general public observe hearings and review the filings of the parties?

Pursuant to the Commerce Code hearings must always be held in public (Article 1080 of the Commerce Code). Pursuant to the Federal Code of Civil Procedures, the general rule is that hearings must be held public, exceptionally of those that the Court considers appropriate to be held in private. (Article 274 Federal Code of Civil Procedures).

However, court documents are private and only the parties can access the court file and the final judgment. During the trial, parties are requested their consent to publish the award without their names and all explicit references to them are erased from the copy.

In recent years the Supreme Court declared that all information previous to 2003, relative to federal procedures is public. This statement was issued due to the approval of the Federal Law of Transparency and Public Access to Governmental Information that allows any individual to request any documentation relative to federal trials. Article 8 of the Federal Law of Transparency and Public Access to Governmental Information states that all the resolutions that are non-appealable shall be made public; nevertheless, the parties may object to the publication of their personal data. Therefore, once the resolution is non-appealable, it becomes public to anyone who wishes to consult it.

11 May a defendant join other potentially liable parties into the existing lawsuit?

In a procedure in which two or more parties intervene, a third party may also intervene and assert a different claim. Such third party may join an existing lawsuit in support of either the plaintiff's or the defendant's position.

Third party interventions may be asserted in any action, regardless of the nature of the claim and at any stage of the proceedings, before a final decision is issued.

12 How may a party enforce a foreign judgment?

In accordance with international treaties (enforcement of domestic judgments abroad) and the Federal Code of Civil Procedures, Article 571, Mexican courts are willing to recognise and execute a foreign judgment, provided that:

- the formalities and conditions regarding rogatory letters have been met;
- the resolution did not result from the exercise of an action in rem;
- the foreign court had correctly assumed jurisdiction;
- the claim was properly served on the defendant;
- the foreign judgement is non-appealable and res judicata in the country in which it was rendered;
- the action that gave rise to the resolution is not a pending matter between the same parties in Mexican Courts; unless a letter rogatory had been processed and delivered to the Foreign Ministry or to the authorities of the State where the claim should be served; and
- the judgment does not conflict with a mandatory law or Mexican public policy.

13 How much time does a party have to answer a complaint? Can a party extend this time?

Pursuant to the Commerce Code, a party has a general term of fifteen working days to answer a complaint starting from the date such party is served. This term cannot be extended by request of the parties, however, it may be extended ex officio by the court in the event that the party answering the complaint is located in a place different from the place in which the proceedings are taking place. In such case, one additional day per each 40 km should be added to the original term (Article 289, Federal Code of Civil Procedures).

14 How long does it take to obtain a first-instance judgment in a typical commercial litigation case?

The ordinary commercial proceeding regulated by the Commerce Code develops generally as follows: once the claim is presented, the defendant is notified and must respond within fifteen days, and may, during this period, file a counterclaim. Once the claim is answered or a counterclaim is filed the proceeding will be opened to an evidentiary period, which cannot exceed 40 days. Once the evidentiary period has concluded, the parties are given a period of three days to formulate and present pleadings, after which the judge must issue the decision within 15 days. The parties may file an appeal within nine days from the issuance of the decision.

Despite the relatively short time limits mentioned above, as a result of the case overload of the courts and the innumerable procedural motions that can delay the process, the time periods applicable to the courts are not always respected and it can take from six months to one-and-a-half years to obtain a first instance judgment.

15 Is a party required to submit all facts, arguments and supporting evidence with its initial pleading?

With the initial pleading, all facts and arguments shall be submitted. Additionally, all documents existing in the possession of the claimant and which shall serve as evidence shall be annexed to such pleading.

Notwithstanding the foregoing, further documents and evidence may be filed after the submission of the initial pleading, provided that such additional documents and evidence refer exclusively to the defences filed by the respondent or are deemed as supervening (Article 1061 (IV) Commerce Code, Article 324, Federal Code of Civil Procedures).

16 Does litigation provide a process for investigating claims or right to discovery of evidence prior to trial?

Pre-trial discovery/disclosure is not regulated or allowed by Mexican legislation. There are, however, some specific and limited procedures that entitle a party to obtain specific information or testimony for preparing a lawsuit (Article 1151, Commerce Code).

17 Does litigation provide a process to subpoena or obtain documents or testimony from third parties?

Third parties are compelled, at all times, to assist the courts when investigating the truth and shall exhibit all documents and goods in their possession whenever they are required to do so. The courts have the power and the obligation to compel third parties, through any constraining means, to comply with such obligations. However, in the event of refusal, the courts shall hear the third party's arguments and issue a final non-challengeable decision.

Ascendants, descendants, spouses and those obliged to keep professional privileges, are exempt from such obligation whenever the evidence requested is in prejudice of the party to which they are related (Article 90, Federal Code of Civil Procedures).

18 Does the judge or opposing counsel examine witnesses?

The statement of witnesses of fact must be presented orally during the witness' examination. Prior to the examination, the parties must file their corresponding interrogatory, but the questions must be formulated orally and directly during such examination. Both the judge and the opposing counsel can examine witnesses.

The parties cannot interrupt the witnesses during their examination, or formulate questions, which are not included within their interrogatory. Only if the witness fails to answer a question or his answer is contradictory or ambiguous, the parties can ask the judge, if he deems appropriate, to order the witness to clarify.

19 How may evidence be challenged? Are there specific rules of evidence?

Evidence may not be challenged directly by the parties, and the courts shall receive the evidence submitted by the parties, provided that such evidence is not contrary to the law. Court decisions admitting evidence may not be challenged, however, decisions dismissing or rejecting evidence may be appealed by the parties.

20 Do courts typically allow hearings at or before a trial? At what state may parties present expert witness testimony?

Hearings must be held by the courts during the trial, specifically after all evidence has been submitted and produced. Hearings before trial are not allowed under Mexican law.

Expert witness testimony may be presented by the parties during the special term provided for the submission of evidence.

21 What must be demonstrated to collect a debt based on a written instrument?

For the collection of a debt based on a written instrument, the existence and validity of such written instrument must be demonstrated and the lack of payment should be asserted.

22 What remedies are available in your jurisdiction to a minority shareholder of a corporation in a dispute with the corporation or the majority shareholders?

Shareholders holding 33 per cent of the capital stock of the company may object the resolutions adopted in a general shareholders' meeting through a judicial procedure, provided that the following requirements are met (Article 201, General Law of Commerce Entities):

- that the claim is filed within fifteen days following the termination of the shareholders' meeting;
- that the shareholders objecting the resolution have not attended the meeting or have voted against the resolution; and
- that the claim makes express reference to the specific article of the bylaws or the legal provision contravened by virtue of the resolution.

Notwithstanding the foregoing, no judicial remedy shall be available against resolutions taken in connection with directors' liability.

The execution of a resolution being challenged pursuant to the above may be suspended by the judge, provided however, that the claimants present a bond in order to cover any damages and losses, which may be caused to the company due to the non-execution of such resolutions and in the event that the judicial objection filed is declared groundless.

23 What rights are available in the courts for someone holding a maritime lien interest in a vessel?

A party holding a maritime lien interest in a vessel may request the attachment of such vessel (Articles 268 and 269, Navigation and Maritime Commerce Law).

Such attachment shall be declared by the competent judge without prior notification or notice to the other party. The competent judge would be the one residing in the place where the vessel is located or the judge residing where the landing of the goods takes place, if such is the case. However, if the attachment order was issued before the commencement of the trial, it will be revoked, unless a claim is filed within five days following to the attachment. In the event that the proceedings are not initiated pursuant to the above or if the final ruling overrules the petitions of the claimant, such party shall be liable for any damages and losses caused by the attachment. (Article 274, Navigation and Maritime Commerce Law).

After the attachment of the vessel has been executed, the party holding the maritime lien may request the judicial sale of such vessel. The amount resulting from the judicial sale shall be applied to payment of the corresponding party, provided however that debts corresponding to creditors holding preferential rights shall be paid first.

Additionally, any party holding a maritime lien may request the assignment of the vessel at the price agreed by the parties.

24 What rights are available for a party holding a security interest in real property and personal property? Are there expedited proceedings to allow the recovery of property serving as security for debt obligations?

Regarding interests in real property, the creditor may acquire the assets through a judicial sale or may request the assignment of such assets (Article 2916, Federal Civil Code). The amount resulting from the judicial sale shall be applied to payment of the corresponding party, provided however that debts corresponding to creditors holding preferential rights shall be paid first.

Parties holding a security interest in real or personal property are not required to participate in an insolvency proceeding to collect their credits. Instead, they may assert their rights through special trials provided by law, in order to receive payment through the value of the secured assets (Article 2981, Federal Civil Code).

Such expedited proceedings allow the attachment and recovery of the property serving as security at the commencement of the trial.

25 Describe the types of employment disputes that frequently result in litigation.

Employment disputes that frequently result in litigation are: wrongful dismissal of an employee, early termination of labour relationships and unjustified decrease of benefits or privileges.

26 Does your jurisdiction allow class actions or some form of collective litigation proceeding?

On July 29, 2010 the Federal Official Gazette amended article 17 of the constitution in order to introduce “collective actions” in Mexico, providing that Federal judges would hear these proceedings and mechanisms in an exclusive manner. On 30 August 2011 the Federal Official Gazette amended the following laws in order to include collective actions: Federal Code of Civil Proceedings; Federal Civil Code; Federal Law of Economic Competence; Federal Law of Consumer’s Protection; Organic Law of the Federal Judicial Power; General Law of Ecological Equilibrium and Environmental Protection; and Law of Protection to the User of Financial Services. Such amendments entered into force on 1 March 2012.

Mexican Law limits collective actions to matters related to the consumption of goods or services, public or private, and those related with the environment, specifically those related with the following matters:

- consumer protection;
- environmental protection matters;
- protection and defence of the users of financial services; and
- antitrust matters.

A collective claim can be filed by Public Entities such as the Federal Protection Consumer Office, Federal Protection Environmental Office, National Commission for the Protection and Defense of the Users of Financial Services and the Antitrust Federal Commission; the legal representative of the collectivity affected, provided it is formed by at least thirty members; and non-profit civil associations legally formed at least one year prior to the filing of the collective action.

The resolution will benefit all the members of the affected group and each member must liquidate and prove the damage caused.

27 Do government-owned or controlled entities enjoy any privilege when they are engaged in commercial activity and involved in a commercial or administrative litigation?

Pursuant to the Federal Code of Civil Procedures, the institutions, services, and entities of the Federal Government Public Administration, as well as the states have the same status as any other party in judicial proceedings. Nevertheless, no enforcement or attachment orders can be imposed to them and they shall not be obliged to exhibit any guaranties (Article 4, Federal Code of Civil Procedures).

28 Is injunctive or other relief available on an emergency basis?

Interim injunctions can be obtained without prior notice to the defendant. However, they cannot be granted on the same day due to the fact that even though the law does not establish a time limit for the court to decide on the granting of interim injunctions, in practice the average time is three to five days.

29 Is injunctive relief or other relief available as part of a final award? If so, in what types of cases do courts usually provide injunctive relief?

In general, the remedy for civil tort liability is the restoration of the status quo prior to the damage, when possible, or the payment of damages and lost profits. The basic contract remedies are specific performance or termination of the contract with damages and profits in both cases. If, in a contractual relationship, an interest rate is not specified, the legal interest rate is 9 per cent annually in civil matters and 6 per cent annually in commercial matters on the principal.

Injunctive relief may be granted by a court only if the claimant proves a justified fear that the defendant may occult himself, or when there is justified fear that the defendant may hide his assets or intentionally lose a specific good (in actions in rem). Injunctive relief in principle is limited to attachment of assets or an order regarding the debtor to stay in its domicile.

30 What are the typical court fees and costs required to file a civil lawsuit?

In Mexico it is a constitutional principle that the courts must grant justice in a free and expedited manner. In a commercial action, therefore, the following are not charged:

- court fees;
- witnesses’ expenses; and
- costs for court activities conducted outside the place of the trial.

The parties lawyers’ fees can be calculated either:

- as a percentage of the amount of the claim or of the amount recovered. The percentage is agreed on between the lawyer and the client, and is based on the specific circumstances of the case, and can vary according to:
- the complexity of the matter;
- the client’s economic situation; and
- the reputation of the lawyer.
- as an hourly rate for time spent; or
- as a fixed fee depending on the amount of the claim.

31 Is a bond required for non-residence? What is the amount of the bond?

There is no bond required for non-residences under Mexican law.

32 What damages are available? How are damages quantified? Are punitive damages available?

Under Mexican law, only direct, necessary and immediate damages can be claimed. Neither punitive nor consequential damages or any other type of damages are permitted.

33 Is the losing party liable for attorneys’ fees and costs? If so, how are attorneys’ fees and costs determined and proved?

The Mexican system for attorney’s fees is always fixed. The system follows two alternatives.

The percentage system

In commercial disputes, the Code of Commerce does not establish clear rules as to how to determine the quantum. However there are judicial precedents that clearly establish that the local law determines the way to liquidate costs.

Article 128 of the Organic Law of the Superior Court of the Federal District (Mexico City) which would be the applicable law in a commercial dispute in Mexico City reads as follows.

“Article 128. The first instance costs shall be caused according to the following basis:

- a) When the amount of the suit does not exceed the equivalent to three thousand minimum wages in the Federal District, it will cause 10%;*
- b) When the amount of the suit exceeds the equivalent to three thousand minimum wages in the Federal District and is up to six thousand minimum wages in the Federal District, it will cause 8%; and*
- c) When the amount of the suit exceeds the equivalent to six thousand minimum wages in the Federal District it will cause 6%.*

If the dispute were to be solved by a second instance the percentages will be raised by a 2%.”

Most of the other state codes of procedure follow the same rules.

The fixed fees system

If the amount claimed was not originally determined in the suit, but left to an ancillary proceeding for quantum, then the percentage system does not apply. In this case, the law establishes fees for the attorney’s specific work and tasks performed.

34 Will courts enforce a liquidated damages provision in a contract?

Courts do enforce liquidated damages provisions in a contract, however, under civil law, the amount of liquidated damages may not exceed the amount of the principal obligation under the contract (Article 1843, Federal Civil Code).

35 What is the appeal process against trial court decisions?

First instance judgments can be appealed before an appellate court. The appellate court stands in a superior hierarchical level to the court that issued the judgment.

According to article 1337 of the Commerce Code, the appeal can be made in the following cases:

- whenever the unsuccessful party adduces a violation of rights or a grievance;
- when the successful party, even though it has succeeded pursuant to the first instance judgment, has not been awarded with the indemnification of damages and losses, the payment of costs or the restitution of products;
- when the successful party wishes to adhere to an appeal previously filed; or
- a third party with legitimate interest, whenever the final resolution affects him.

When the first instance judgment is final, the appeal must be filed before the court that issued it, within nine days following the date on which such first instance judgment was notified to the parties..

36 How frequently do appellate courts reverse trial court decisions?

Trial court decisions are frequently reversed by appellate courts.

37 May the courts entertain challenges to administrative decisions made by federal or local governments? If so, how frequently do courts reverse administrative decisions in favour of a private party?

Mexico has a long standing system to challenge administrative and governmental decisions of federal, local or county governments. In this context, Mexico has basically two systems of challenge in place. The first one is the contentious administrative trial which entitles the individuals and private companies to challenge administrative decisions. The second one is the amparo procedure which allows individuals to challenge administrative decisions when they are contrary to the principles established in the Constitution. In general terms we can say that it is not uncommon that administrative decisions are set aside or nullified by these Courts.

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