

Complex Commercial Litigation 2022

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Seladore Legal

Lexology Getting The Deal Through is delighted to publish the fifth edition of *Complex Commercial Litigation*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Brazil, India and the United States.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Simon Bushell of Seladore Legal, for his continued assistance with this volume.



London
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OLIVARES

BACKGROUND

Frequency of use

- 1 | How common is commercial litigation as a method of resolving high-value, complex disputes?

Civil and commercial litigation is very common for resolving high-value, complex disputes. However, there are two important limitations that need to be considered: (1) the burdensome nature of the formalities; and (2) the timeframe to get a final decision tends to be quite long.

Based on the foregoing, alternative dispute resolution methods are always an option and have proved to be an effective avenue for resolution of any commercial controversy, not only high-value and complex disputes. Arbitration is getting more popular between international companies in complex disputes.

Litigation market

- 2 | Please describe the culture and 'market' for litigation. Do international parties regularly participate in disputes in the court system in your jurisdiction, or do the disputes typically tend to be regional?

There is a great amount of domestic litigation, mainly owing to the execution or enforcement of the eventual rulings.

However, an international party may be involved in litigation in Mexico if there was a prior agreement or arrangement in which it was stated that any type of dispute would be handled before Mexican courts.

Legal framework

- 3 | What is the legal framework governing commercial litigation? Is your jurisdiction subject to civil code or common law? What practical implications does this have?

In Mexico, there are specific codes applicable to each, civil and commercial matters. Each code establishes the procedural rules of the corresponding proceedings. One of the advantages of the Commercial Code is that the proceedings are structured to be shorter than in civil litigation.

Another practical implication of having a Commercial Code is the possibility granted to the plaintiff to choose between the oral or traditional venue.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

- 4 | What key issues should a party consider before bringing a claim?

Considering the structure of the judiciary in Mexico, there are three key issues that the plaintiff must consider prior to filing the claim: (1) the legal venue (civil or commercial); (2) the court before which the claim will be filed; and (3) the statute of limitations.

We emphasise these three points because, if there is an error regarding any of them, it could delay the action or even cause it to be dismissed, resulting in the loss of the right being asserted.

Then, once the plaintiff is clear on the three issues listed above, depending on the specific case, formalities and preparation of documents must be considered. Given that the Mexican system is very formalistic, the preparation of evidence is very important prior to filing the action, as the evidence must be submitted, prepared or announced (or both) along with the initial writ.

Moreover, the party must consider the amount of the controversy (monetarily speaking), as depending on the amount, Mexican legislation may establish a specific type of proceeding or even so grant the party the opportunity to choose it.

Choosing the venue is relevant for the future of the action. Depending on the nature of the case, federal, local, civil or commercial proceedings might be available.

There is also the possibility to implement previous measures to prepare the case and request preliminary injunctions.

Establishing jurisdiction

- 5 | How is jurisdiction established?

In the Mexican system, the jurisdiction of a judge is typically established by the territory (defendant domicile), subject matter, or economical amount under dispute. For certain cases, the controversy can be heard by a federal or state judge, to be chosen by the parties involved. Consensual jurisdiction is accepted by the law.

It is very common in commercial or civil actions to agree that, in case of controversy, the parties expressly waive any jurisdiction other than the Mexican courts, whether federal or state.

Preclusion

- 6 | Res judicata: is preclusion applicable, and if so how?

There are multiple periods of preclusion of actions or rights, depending on the case and the specific matter. Both the Civil Code and the Commercial Code establish terms and conditions for preclusion. Res judicata is recognised in the Civil and Commercial Codes and as a general principle of law.

Applicability of foreign laws

- 7 | In what circumstances will the courts apply foreign laws to determine issues being litigated before them?

In general terms, judges may obtain and use whatever means he considers appropriate to obtain information about the scope of foreign law. There are stricter rules to apply the foreign law: it should not be contrary to Mexican law and should not affect public order.

Initial steps

- 8 | What initial steps should a claimant consider to ensure that any eventual judgment is satisfied? Can a defendant take steps to make themselves 'judgment proof'?

It is important, for example, to (1) present all the documentation that fully demonstrates the factual and legal situation; (2) formulate prerequisites and warnings in the case of non-compliance; and (3) identify the type of evidence that the counterparty is likely to present, while taking into account the preparatory means and preliminary injunctions available to the specific case.

Freezing assets

- 9 | When is it appropriate for a claimant to consider obtaining an order freezing a defendant's assets? What are the preconditions and other considerations?

In these procedures, it is common that when there is a guarantee that is being executed, or when there is a risk that the goods will be damaged, measures can be requested to make provision for damage liability.

There are cases in which, due to the nature of the controversy, the seizure of assets is part of the procedure, precisely for the purpose of ensuring that, if the defendant does not pay, there are sufficient assets to auction them and, with the proceeds, pay the claimant.

Usually, when requesting a bond or guarantee the judge is obliged to check that the requirements established by law are met (appearance of good standing, danger of delay; or proportionality in the measure).

Pre-action conduct requirements

- 10 | Are there requirements for pre-action conduct and what are the consequences of non-compliance?

There are requirements provided by law so that provisional, precautionary or preparatory measures can or should be requested or ensured prior to starting the proceeding. Sometimes, prior notice or request of payments or duties are required to be exhausted previously or as a requirement to file the action.

Other interim relief

- 11 | What other forms of interim relief can be sought?

The Federal Code of Civil Procedures provides some cautionary measures, such as seizure of sufficient assets to guarantee the outcome of the trial and the deposit or insurance of the objects, books, documents or papers on which the lawsuit is presented.

Such measures are required to be in accordance with the law (ie, there must be an appearance of good standing, danger of delay and proportionality of the measure). In addition, there must be a cause that justifies such measures.

Alternative dispute resolution

- 12 | Does the court require or expect parties to engage in ADR at the pre-action stage or later in the case? What are the consequences of failing to engage in ADR at these stages?

According to the civil law, the judge has the obligation to encourage the parties to reach a conciliation before starting the litigation. For that reason, there is a prior conciliation hearing where procedural issues are resolved and evidence periods are opened. In commercial matters, on the other hand, there is no such previous conciliation hearing, since the procedures tend to be shorter.

The trial may be terminated at any time during the proceedings if the parties have submitted to some form of alternative dispute resolution, but only if no ruling has been made.

However, this conciliation hearing is not a formal ADR, there is no obligation to exhaust ADR but parties may agree to resolve the dispute through arbitration and indeed, there is a rule and a chapter to govern arbitration and its execution by the Mexican courts.

It is worth mentioning that, with the entry into force of the new Federal Law for the Protection of Industrial Property, the conciliation procedure was formally introduced as an ADR mechanism, expressly indicated for infringement proceedings.

This new conciliatory stage before the Mexican Institute of Industrial Property (IMPI) can be useful to reduce timing in the resolution of controversies, if the circumstances of the conflict allow it, and should help to reduce the IMPI's backlog regarding the issuance of resolutions related to contentious procedures.

Claims against natural persons versus corporations

- 13 | Are there different considerations for claims against natural persons as opposed to corporations?

In the Mexican system, there is no legal or procedural difference that can be pointed out between natural persons or corporations. However, there are certain legal measures and means that are more effective – if it is a natural person, for example, there is a provisional measure of arrest, which is evidently aimed at individuals.

Class actions

- 14 | Are any of the considerations different for class actions, multiparty or group litigations?

It is important to take into consideration that there are several differences between formal class actions and the actions executed by a group or a multiparty.

Class actions are always executed when related to consumers' rights, environment matters or in connection with community rights. Class actions need to have a group of at least 30 persons and an

administrative entity or an authority that can represent the community in the trial. For example, if the trial relates to consumer matters, the Federal Consumer Authority (PROFECO) can represent this community in a trial.

The regulation for class actions, and the list of those with legal standing for filing them, is contained in a specific chapter in the Federal Code of Civil Procedure. However, those with legal standing to submit class actions can also be found in the applicable law of the subject matter on which the class actions will be based. For example, the Federal Consumer Protection Law provides for the submission of class actions related to consumer products, but at the same time refers to the Federal Code of Civil Procedure regarding the procedure itself. The reason for this is that prior to being defined in the above-mentioned Code, class actions could only be found in the specific bodies of law of each subject matter.

On the other hand, when there are multiple plaintiffs or defendants, the procedure will be ordinary, although it may be accumulated. In any event it will be based on the rights of a person or groups of persons, but not the interests of a community.

The course of the litigation will be ordinary commercial trial, and the resolution will not affect a community but only the parties of the procedure.

Third-party funding

15 | What restrictions are there on third parties funding the costs of the litigation or agreeing to pay adverse costs?

In general terms, there are no restrictions in the agreements to pay costs. A third party can take the costs and even damages derived from the litigation.

Contingency fee arrangements

16 | Can lawyers act on a contingency fee basis? What options are available? What issues should be considered before entering into an arrangement of this nature?

It is possible to negotiate and agree to act on a contingency fee basis.

THE CLAIM

Launching claims

17 | How are claims launched? How are the written pleadings structured, and how long do they tend to be? What documents need to be appended to the pleading?

Both civil and commercial claims begin with a written initial brief, regardless of whether the proceeding is to be conducted in written or oral form.

There are some procedural rules with the minimal requirements of the claim, such as: it is necessary to include the names of the parties, the address of the counterparty, the competent court for solving the litigation and the type of procedure requested, narration of facts and cause of action. The plaintiff or the legal representative can authorise lawyers and clerks who will participate in the trial, so they can have access to the judicial file.

In some specific procedures it is possible to file an injunctions request, which will be dealt with by the judge at the beginning of the procedure.

As to the length of the brief, it depends on each case, the nature of the controversy, and the facts, arguments, and evidence that the plaintiff raises before the court. There is no limitation in this matter.

In the lawsuit it is necessary to attach the evidence, namely, all the documents that ground and prove the action, or mention the witnesses who will participate in the trial. If needed, the power of attorney for representation must be exhibited as well.

The court can request the plaintiff to clarify the scope of the action, correct their brief or attach a missing document.

Finally, as a consequence of the covid-19 pandemic and the precautionary health measures adopted by the courts, online filing of actions and prosecution became very important and, in some cases, necessary.

To use the online tools, in addition to the minimum requirements detailed above, an 'electronic signature' is required, through which the parties can file their pleadings and follow up on their case on the court webpages.

Serving claims on foreign parties

18 | How are claims served on foreign parties?

Usually, the claims on foreign parties are notified by a special procedure within international collaboration between national authorities and foreign authorities. In this procedure, the Mexican Authority sends a letter of request to the other country informing about the procedure.

To execute this procedure, parties should include in their lawsuit that it will be necessary to make use of this international collaboration. Once this notification is served, the procedure will continue.

The procedure depends also in the country of the foreign party, since there are different international treaties applicable and it is important to study the case to determine which treaty is applicable.

Key causes of action

19 | What are the key causes of action that typically arise in commercial litigation?

There is a wide scope of possibilities regarding causes of action in commercial litigation. Collecting all type of credits is the typical commercial cause of action before the Mexican courts.

Claim amendments

20 | Under what circumstances can amendments to claims be made?

In our jurisdiction, it is not possible to make any amendment to a claim or to a lawsuit once it has been submitted to the Authority. The only exception is provided when there are supervening facts.

Remedies

21 | What remedies are available to a claimant in your jurisdiction?

The decision of the judge can be to absolve the defendant, to let the parties to continue the case before another authority or establish a ruling ordering the party to conduct or cease certain actions.

This condemn can order a specific conduct to comply with the obligation (the most common is the payment) but it will depend exclusively on the type of procedure and the request made in the lawsuit. It is important to mention that in commercial trials the typical case is to condemn a party for the payment of the obligation.

Depending on the ruling, the law provides several options to ensure compliance with the resolution. One of these measures is that the judge can order the seizure of the defendant's goods, and even the sale of these goods, to comply with the resolution. The goods seized or the money received after selling the goods will be used to pay to the plaintiff if the defendant does not comply with the obligation.

Recoverable damages

22 | What damages are recoverable? Are there any particular rules on damages that might make this jurisdiction more favourable than others?

In Mexico, depending on the case, the affected party may be entitled to request the payment of actual damages caused by an illegal conduct, including moral damages.

Our legislation establishes that the defendant can choose between the payment of an economical amount or to reinstate the right prior to illicit conduct of the damages itself. In most cases, the defendant chooses the payment of an economical amount, for example damages caused by violation of intellectual property rights.

Importantly on this point, prior to the entry into force of the Federal Law for the Protection of Industrial Property, to claim damages for

infringement of industrial property rights it was a prerequisite to obtain a resolution from the administrative authority declaring such violation or infringement. With the new law, the titleholders can go directly to a civil court to claim the violation of their rights and damages. This now goes hand in hand with the claim for damages in the matter of copyrights, where it was possible to claim damages without having to exhaust the administrative instance.

In any damages claim, it is necessary to demonstrate that there is a causal link between the damage and the conduct. As a general rule, it is sufficient to demonstrate the causal link before the judge, and he or she will determine, based on the evidence and arguments, whether the damage was caused or not, and if so, the amount of compensation.

Eventually, the plaintiff would require conclusive and high-level evidence to demonstrate that the harm was caused directly by the conduct of the counterparty.

If the judge is convinced about the causal nexus of the conduct and the harm, an indemnification will be very likely to be ordered. In Mexico, so far, the only available rules for compensating in the human body or death are established in the Federal Labour Law, which provides some criteria for this quantification.

Nevertheless, in a landmark case, the Supreme Court of Justice introduced into our system something similar to the doctrine of punitive and exemplary damages as they are not expressly established in our civil system.

In this decision, the Supreme Court awarded as damages the amount of 30,259,200 Mexican pesos which is the highest economical indemnification in Mexico ever, much higher than the regular compensation derived from death caused by negligence. The reasoning of the court was very similar to what punitive damages are, since it stated that there was a reprehensible action on the part of the defendant, which deserved to be sanctioned.

With this resolution, the punishment for objective responsibility was introduced and the amount imposed was the first in the country with this quantity of damages.

This precedent is raised to support high financial compensation in many of the current civil cases within the country and can be considered as a precedent for quantification of damages.

RESPONDING TO THE CLAIM

Early steps available

23 | What steps are open to a defendant in the early part of a case?

In an ordinary civil or commercial trial, the procedure is normally as follows:

- The lawsuit is filed with the judge with proper jurisdiction, who may admit, dismiss or request clarification of the lawsuit.
- Once the lawsuit is admitted, the court will serve the defendants.
- After service, the defendant will have a statutory term to respond to the lawsuit, stating the corresponding arguments of defences and evidence. At the same moment, the defendant can file a counterclaim. If the defendant files a counterclaim, it shall be notified to the other party so that he or she may file their brief of response.
- The defendant may indicate that the judge does not have jurisdiction to decide the matter. This may be done by stating so in the response of the lawsuit. In some cases, there is a possibility of filing the response or motion directly to the judge considered with proper jurisdiction. The ground of this challenge can be the territory (defendant domicile), subject matter or economical amount under dispute.

Defence structure

24 | How are defences structured, and must they be served within any time limits? What documents need to be appended to the defence?

The response to the lawsuit must contain mainly the following: the address to hear and receive notifications, the 'exceptions' or defences (for example, the lack of legal representation), the counterarguments to the lawsuit, the refutation of the plaintiff's evidence and if necessary the evidence offered by the defendant to rebut the arguments of the plaintiff.

Depending on the type of proceeding (civil/commercial, written/oral), the law establishes the deadline within which the writ of defence must be filed.

In the defence, the document that attests to the personality must be attached, and this must also be attached when offering any evidence. As a general rule, documentary evidence should be filed along with the writ of response.

Changing defence

25 | Under what circumstances may a defendant change a defence at a later stage in the proceedings?

The legal analysis is essential to ensure an effective defence, because as general rule, everything that is not included in the original brief, cannot be used later. This demonstrates that the legal strategy must be adequate from the beginning, which involves an important study of the case and the correct strategy for further steps in the trial.

However, it is possible to adjust defences when new information, facts or evidence appear during the trial, which were not known at the beginning of the proceedings. In this case, the law allows parties to file supervening arguments of defence.

Sharing liability

26 | How can a defendant establish the passing on or sharing of liability?

In general terms, it is possible to file a defence falta de legitimación pasiva, namely a defence of no personal liability. Calling third parties as defendants is also possible, while clearly demonstrating the share liability or the facts to pass liability on to third parties.

Avoiding trial

27 | How can a defendant avoid trial?

The most common way to avoid a legal dispute is through an agreement between the parties before the lawsuit is filed or decided. The agreement could be reached from the principal obligation or subsequently, through negotiations.

Alternative dispute resolution (ADR) is also available.

Case of no defence

28 | What happens in the case of a no-show or if no defence is offered?

If defence does not file a response and the defendant does not participate in the trial, then the lawsuit will continue to be processed, taking into account only the plaintiff's claims.

In general terms, if there is no response, all facts and causes of actions are considered as accepted by defendant, unless they would be contrary to the law.

Claiming security

29 | Can a defendant claim security for costs? If so, what form of security can be provided?

In our legal system, an order for the payment of expenses costs and attorney's fees is issued at the end of the procedure. In some cases, and under some circumstances, it may be possible to request injunctions to secure the payment of costs.

However, even if no injunctions are requested, if the request for payment of the costs is received, it is possible to proceed to the seizure of assets and, subsequently, their sale.

PROGRESSING THE CASE

Typical procedural steps

30 | What is the typical sequence of procedural steps in commercial litigation in this country?

In the Mexican legal system, there are several types of commercial trials, the most common being the ordinary commercial trial.

This trial begins with the filing of the lawsuit and the reply by the defendant. After this, a hearing is set for the preparation and to conduct evidence, and, if applicable, for the conciliation of the parties if they so decide.

Once the evidence has been filed, the period of allegations is opened, which are the last declarations of the parties before the judge issues a resolution to the procedure.

Once the period of allegation has concluded and the parties submit their briefs, the judge will issue a resolution, which may be challenged through an appeal.

Another procedure is the commercial oral trial, and the general rule is that parties can follow this trial, depending on the amount under dispute.

In these cases, the procedure of the trial is similar to an ordinary trial at the beginning, with the filing of the lawsuit and the response by the defendant. However, the difference is that after this initial stage, there are three hearings that will be conducted by the judge:

- The preliminary hearing in which the parties can reach an agreement and the judge will admit the evidence filed.
- The second hearing in which the parties can expose their final arguments and the evidence will be presented.
- Finally, the judge will issue their final decision in the matter.

Importantly, in these trials there is no appeal stage, only constitutional action called *amparo* lawsuit before a federal court.

Bringing in additional parties

31 | Can additional parties be brought into a case after commencement?

There is a possibility that third parties who were not originally contemplated in the procedure may appear before it.

One of the most common cases is when a third party appears because the resolution affects them indirectly, and they may even oppose the execution of the resolution, which must be resolved by the judge.

As mentioned above, it is essential that the third party has a legal interest in the matter so that it can appear in the litigation.

Consolidating proceedings

32 | Can proceedings be consolidated or split?

With the purpose to avoid contradictory resolutions in certain cases that are related to each other, the accumulation to be decided jointly is possible. It shall be ordered by the judge and may be at the request of the parties or ex officio.

Court decision making

33 | How does a court decide if the claims or allegations are proven? What are the elements required to find in favour, and what is the burden of proof?

The Mexican Constitution establishes that all resolutions issued by the authorities must be based on the applicable law, and in accordance with the essential formalities of the procedure.

In this sense, the court must base its resolution strictly on the arguments of the parties, along with the evidence offered by them to reinforce their arguments, and the judge must use the applicable body of law to issue the resolution.

Regarding the burden of proof, as a general rule anyone who asserts a fact is obliged to prove it. The plaintiff is not obliged to prove negative facts. Some documents have presumption of validity, which means that the content of the document will be considered authentic, unless proven otherwise.

The evidence will be evaluated and assessed by the judge. In either a commercial or civil trial, the judge must evaluate all the evidence that was legally submitted by the parties, analyse their arguments, and then verify whether the claim of the plaintiff is proven, or if on the contrary the defendant proved the defences.

As mentioned, the general rule is that all evidence will be evaluated by the judge in the final resolution, but it is important to note that there are some points that should be considered depending exclusively on the type of evidence submitted.

First, the evidence must be pertinent to the case, and the parties must provide arguments to justify it. Along with this, the evidence must be offered according to the applicable law, since different types of evidence have particular rules; therefore, if the evidence is not submitted in accordance with the law, it can be dismissed.

Moreover, all documents must be filed in Spanish (or in the original with a translation), and if there are international documents, they must be duly apostilled and notarised.

All public documents submitted as evidence will have presumption of validity; this means that their content will be considered as true, and those documents that do not have such nature will not have full value as evidence.

Expert evidence will also have presumption of validity on its content, but it will only be applicable when specialist knowledge is required. Both parties can assign their own experts, but if the experts' opinions are contradictory the judge will name a third expert. The judge can use any part of the opinions to provide the final decision, so may take elements from all the opinions.

Confessional evidence developed and executed in the trial will be taken into account at the time of issuing the resolution. If the confessional evidence is related to other evidence, its legal value will increase and the judge will consider this evidence in a more forceful way.

Finally, for witness evidence, there are also several rules the judge will take into consideration, and the witness must specify when, where and how the action happened.

To conclude, even though every type of evidence has specific rules regarding execution and evaluation of the judge, its value may depend on the analysis of the judge, and he or she will use its logical rules as support for the final decision.

34 | How does a court decide what judgments, remedies and orders it will issue?

Judicial decisions will be made taking into consideration the evidence, arguments and facts submitted to the dispute between the parties, and a determination will be made by the judge based on these elements.

The judge can only issue a resolution regarding the request of the plaintiff and the defence. This means that the judge cannot extend the effect of the resolution to something that was not expressly requested by the parties.

The decisions of the judge consist of three elements – precedents, reasoning and orders, and are structured as follows:

- the judge proceeds, identifying the parties;
- an account of the dispute and the litigation between the parties is raised;
- the evidence and arguments of the parties are pointed out and evaluated; and
- the judge issues a resolution based exclusively on the evaluation made between the arguments of the parties and the evidence offered during the development of the procedure.

Evidence

35 | How is witness, documentary and expert evidence dealt with?

As for documentary evidence, this is either private or public. Private documentary evidence has no legal presumption, and is usually related to private documents such as agreements. However, public documentary evidence has a presumption of validity, since it is a document issued by an authority or attested by or through a notary public. This evidence must be accompanied in the initial writ and is evaluated by the judge.

Testimonies in the ordinary commercial trial are conducted in an oral format and before the judge. The witness must be indicated before the court and will be summoned to appear on a specific date and answer the questions prepared by the party that offered the testimony evidence. The party that offered the evidence asks the questions. However, before the witness answers, the judge qualifies and determines if the question is related to the case. If so, the witness must answer. If not, the judge dismisses the question.

Finally, for expert evidence, it is necessary to mention in the suit who will be the expert and his or her expertise, capabilities or academic degrees. The proof should be prepared, establishing the justification of the evidence and providing the questions that will be answered in the expert's report. The expert will offer his or her opinion; and prior to issuing an expert opinion, the other party may propose an expert.

Oral evidence does not have a higher evidential level, but will be suitable depending on whether strict rules are adhered to for approving the questions. As mentioned, our system is very formalistic, thus the questionnaire should be approved under very general strict rules governing its construction before any oral deposition.

36 | How does the court deal with large volumes of commercial or technical evidence?

The courts are obligated to receive any type of evidence. In some cases, it is possible to file technological and digital media, such as a USB drive, containing the information.

37 | Can a witness in your jurisdiction be compelled to give evidence in or to a foreign court? And can a court in your jurisdiction compel a foreign witness to give evidence?

Our country is part of the Inter-American Convention on the Taking of Evidence Abroad, so it is possible to request the collaboration of a

witness in a foreign court, or on the contrary, foreign authorities can request the collaboration of a national witness.

The Convention establishes that a letter of request must be issued, stating the details of the evidence to be disclosed and the information requested. This Convention not only mentions testimonial evidence, but it is also possible to release expert evidence in this manner.

It is also possible to present foreign documents as evidence in the trial, and the same must be duly legalised or apostilled. By complying with these requirements, the evidence will be fully valid in Mexico.

38 | How is witness and documentary evidence tested up to and during trial? Is cross-examination permitted?

As for documentary evidence, this is either private or public. Private documentary evidence has no legal presumption, and is usually related to private documents such as agreements; on the other hand, public documentary evidence has a presumption of validity, since it is a document issued by an authority or attested by or through a notary public. This evidence must be accompanied in the initial writ of lawsuit and is evaluated by the judge.

Testimonies in the ordinary commercial trial are conducted in an oral format and before the judge; the witness must be indicated before the court and will be summoned on a specific date to appear and answer the questions prepared by the party that offered the testimony evidence. The party that offered the evidence asks the questions. However, before the witness answers, the judge qualifies and determines if the question is related to the case. If so, the witness must answer. If not, the judge dismisses the question. Cross-examination is permitted.

Time frame

39 | How long do the proceedings typically last, and in what circumstances can they be expedited?

Usually, a traditional commercial procedure can take one to three years to obtain a resolution at the first stage.

This resolution can be challenged through an appeal, and then can be challenged through an *amparo* lawsuit.

Therefore, and considering the three stages, it is possible that the whole procedure may take a minimum of 2.5 years up to four to six years in normal cases. Very complex cases can stretch to more than a decade.

Commercial controversies where a credit is involved, according to the amount, may be prosecuted through an oral 'expedite' procedure or the traditional written way. If it is an oral proceeding, the decision cannot be appealed, namely, a final decision can be expected in approximately one to two years.

Gaining an advantage

40 | What other steps can a party take during proceedings to achieve tactical advantage in a case?

In our legislation, there is a motion called *medios preparatorios*, which allows means of evidence to be obtained for a subsequent judgment.

The *medios preparatorios*, or with the recognition of the debt before the judge, give more certainty to the action that is possessed. Nevertheless, this depends exclusively on the circumstances of every case.

It is possible to initiate an administrative procedure to obtain a document that will be filed as evidence.

Impact of third-party funding

41 | If third parties are able to fund the costs of the litigation and pay adverse costs, what impact can this have on the case?

If the defendant reaches an agreement with a third party to cover the costs of litigation, it will have no real impact on the merits of the case, as the third party will not have any participation in the litigation.

Impact of technology

42 | What impact is technology having on complex commercial litigation in your jurisdiction?

The Mexican legal system has been equipped with new technology and it is now possible to present writs, consult legal resolutions and review the judicial file electronically. However, it is necessary to obtain authorisation from the judge, and, in most cases, an additional tool called 'electronic signature' is required by the involved parties.

It is reported that the Judicial Authority is working on alternatives to make the use of electronic resources even more efficient, for example facilitating lobbying efforts through electronic means.

Documentary evidence may include chats, conversations and emails; however, it is still necessary to present the evidence in paper form. In some cases, it is possible to submit evidence contained in a CD or USB drive.

Until now, it has not been possible to conduct testimonial evidence or expert opinions by this means. However, in some cases, experts appointed by the parties have been allowed to accept the charge and ratify their technical opinions via video conference.

Parallel proceedings

43 | How are parallel proceedings dealt with? What steps can a party take to gain a tactical advantage in these circumstances, and may a party bring private prosecutions?

It is possible for a dispute to involve several procedures and various venues. Depending on the strategy of the case, the restriction is that the case can have different causes of action.

TRIAL

Trial conduct

44 | How is the trial conducted for common types of commercial litigation? How long does the trial typically last?

The typical commercial trial will have the following procedure.

The lawsuit is filed with the judge deemed to have proper jurisdiction, who may admit, dismiss or prevent the lawsuit.

Once the lawsuit is admitted, the defendant will be served with the claim and granted a term within which to reply to the lawsuit (defence), stating the 'exceptions' (for example, the lack of legal representation), the counter-arguments to the lawsuit, the refutation of the plaintiff's evidence and, if necessary, the evidence offered by the defendant to rebut the arguments of the plaintiff. If the defendant files a counter-claim, it shall be notified to the other party so that they may present their objections and evidence.

After this stage, several hearings take place, and afterwards a period for submitting the final allegations is established. The last stage of the procedure is the decision of the judge, which either can or cannot be challenged, depending on the venue and amount of the controversy.

In case the decision has already become *res iudicata*, the losing party will be required to enforce the decision. If the decision is not enforced, it can be made through different measures, such as a seizure of the party's property.

To reach final resolution can take around four years, depending if later instances are involved.

Use of juries

45 | Are jury trials the norm, and can they be denied?

In our judicial system, jury trials are not allowed.

Confidentiality

46 | How is confidentiality treated? Can all evidence be publicly accessed? How can sensitive commercial information be protected? Is public access granted to the courts?

Trials are private and only those persons expressly authorised by the parties can have access to the judicial file. Without the recognition of this authorisation by the court, no one can consult the judicial file.

In addition, it is possible to classify some information and evidence as confidential; thus, there are some rules and requirements to follow regarding its analysis.

Expert analysis of the commercial information submitted by the parties is often required. This information, being confidential, needs to be handled with caution, so the judge uses discretion in deciding on the measures necessary to allow access to the parties, always trying to maintain confidentiality.

Media interest

47 | How is media interest dealt with? Is the media ever ordered not to report on certain information?

It is possible to limit information on the identity of persons, personal data or data of minors, as long as it is for their protection.

If the media obtains information from the claim or its prosecution, there is no provision in the law that prevents them from disclosing it. However, if the disclosure of the information caused damage to any of the parties, the possibility of bringing an action against the media can be considered.

Proving claims

48 | How are monetary claims valued and proved?

Typically, the determination of the amounts in monetary claims derives from the title or credit but other estimation can be claimed, some of them are provided by the statutory law and others through a proof of experts.

POST-TRIAL

Costs

49 | How does the court deal with costs? What is the typical structure and length of judgments in complex commercial cases, and are they publicly accessible?

Our authorities are obligated to deal with the costs of the litigation, since our Constitution establishes that justice is free for everyone. However, every party is responsible for the fees of the attorneys and experts, and other costs regarding the litigation, such as expenses relating to documents, and other diligences. There are guidelines for the courts to follow regarding orders for payment of costs and attorney fees, based on a percentage of the amount expressly claimed.

Appeals

50 | When can judgments be appealed? How many stages of appeal are there and how long do appeals tend to last?

In our country, it is possible to appeal the main decision of the judgment, but also any provisional or incidental decisions issued by the judge. Every appeal have a legal term to be submitted.

Decisions on the merits can be challenged through an ordinary appeal that will be resolved by the superior judge. The appeal must be submitted in the 12 working days term after the final decision has been served with and this procedure can take from eight months to 12 months.

The resolution of such appeal can also be challenged through an *amparo* lawsuit that will be resolved by the Federal Circuit Court. The procedure can take one year, approximately.

Commercial controversies where a credit is involved, according to the amount, may be prosecuted through an oral 'expedite' procedure or the traditional written way. If it is an oral proceeding, the decision can only be appealed through an *amparo* lawsuit, namely, a final decision can be expected in approximately one to two years.

Enforceability

51 | How enforceable internationally are judgments from the courts in your jurisdiction?

Decisions issued in other jurisdictions can be enforced through the Mexican courts.

Preparation of execution requires a notice to the court with proper jurisdiction depending on the case. Once the court has this notice, it will notify the parties, providing a nine-day term to file a brief of allegations and submit all the evidence that they have so the court can decide whether the foreign decision can be executed in Mexico or not. During this procedure, the court will only evaluate whether this decision can be executed in Mexico, if the determination submitted is final and beyond appeal.

In this regard, the Mexican court will issue a decision declaring whether the foreign resolution will be enforced or not. This resolution (which declares the possibility to execute the decision in Mexico) can be challenged by means of an *amparo* lawsuit (constitutional action).

52 | How do the courts in your jurisdiction support the process of enforcing foreign judgments?

Our legislation contains all the dispositions necessary regarding international cooperation and the obligation for our authorities to collaborate with the execution of foreign judgments.

However, to execute this resolution, the court can order the seizing of the defendant's properties, among other measures, to grant compliance with the foreign judgment.

OTHER CONSIDERATIONS

Interesting features

53 | Are there any particularly interesting features or tactical advantages of litigating in this country not addressed in any of the previous questions?

One of the most important points within our legislation is the possibility of filing an *amparo* lawsuit against the final decisions of the Authority. This procedure is exclusive to Mexican law and protects the rights of the parties and can be considered as another stage in a trial, if a favourable resolution is not reached.

Similarly, commercial and civil litigation in the country has been demonstrated to be effective in the alternative dispute resolution mechanism, with relevant precedents and with a tendency to

increase the effectiveness of the parties and the possibility of using different means to resolve a dispute, which can also constitute a tactical advantage.

Along with this, Mexico has executed many international instruments regarding international collaboration, therefore most resolutions made in Mexico can be enforceable in another country.

Finally, our system is changing and improving, incorporating oral procedures in commercial disputes, which is a more efficient way to resolve a dispute. With an oral trial, judgments will be made more efficient and since it is possible to file an appeal, albeit only an *amparo*, it will reduce the time involved.

Special considerations

54 | Are there special considerations to be taken into account when defending a claim in your jurisdiction, that have not been addressed in the previous questions?

In civil and commercial cases, there is a possibility to choose the venue, whether federal or local, and this would be crucial for the case.

Jurisdictional disadvantages

55 | Are there any particular disadvantages of litigating in your jurisdiction, whether procedural or pragmatic?

It is evident that our legal system needs to be updated to be faster and more efficient. Other disadvantages are that the procedure can be interrupted by an appeal and that Mexican courts take more time to issue judgments.

There is a need to specialise and continue with developing the judges and officers of the courts. Corruption has been reduced, but unfortunately remains.

Finally, it is necessary to keep modernising our legal system, to allow a complete digitisation of the procedures.

UPDATE AND TRENDS

Key developments of the past year

56 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Recently, a civil court issued a non-binding criterion regarding the claim for damages in civil proceedings derived from an infringement of industrial property (IP) rights.

To understand this criterion, it is important to have in mind that, in both the IP abrogated law and the one currently in force, there is a provision stating that the compensation of damages caused by the violation of IP rights in no case shall be less than 40 per cent of the retail price of the infringing products or services. For practical purposes, we will refer to this as the '40 per cent rule'.

Additionally, it is important to consider two decisions of the Supreme Court of Justice:

- 1 Only a firm decision from the Mexican Patent and Trademark Office declaring the infringement would give legal standing to the titleholder to file the damage claim before a civil court. This is a binding criterion, based on the abrogated IP Law.
- 2 As a general rule, to obtain the 40 per cent compensation, the firm decision is not enough, being mandatory to also prove: (1) the materialisation of a damage as a consequence of the infringement; and (2) the causal link between the infringing conduct and the damages. In other words, the 40 per cent regulation does not presume the existence of damages because they must be proven. This is a non-binding decision.

However, in this recent precedent, the civil court decided that the 40 per cent rule does presume that damages were caused at least in the proportion indicated and do not require proof of their existence and amount, since proof of the wrongful act (infringement conduct) implies the need for compensation to be ordered.

In this sense, if there is a final decision declaring the infringement of IP rights, this implies that the material damage to the titleholder has necessarily occurred, so that the compensation in accordance with the 40 per cent rule operates as a matter of law.

Although this decision is not binding for the courts and was issued on the grounds of the abrogated IP Law, it may serve as a parameter for analysing future civil and commercial cases in which compensation of this nature is claimed, regarding the fact whether the infringement procedure was prosecuted on the grounds of the IP Law currently in force or the abrogated one.

Moreover, we are before a contradiction of criteria regarding the obligation to prove the causal link, between the one sustained by the Supreme Court and the one issued by the civil court, so it is possible that the Supreme Court will have to resolve this contradiction and set a binding criterion regarding this issue.

As for legislative developments, it is worth mentioning that, along with the Agreement between the United Mexican States, the United States of America and Canada (T-MEC), the Federal Law for the Protection of Industrial Property (new IP Law) came into force in November 2020. Among the changes, we can highlight that owners of intellectual property rights can request the damages caused by an infringer without the need to carry out the infringement procedure before the Mexican Patent and Trademark Office, which constitutes an evolution in the civil and administrative matters of our country.

This means that the titleholder now has two options:

- 1 Filing the civil action without the requirement of the infringement procedure. This means that civil courts now have the authority to solve controversies in accordance with the new IP Law.
- 2 Following the traditional path and filing an infringement action before the administrative authority. In this scenario, the new IP Law adds the possibility to request the determination of the damages directly before the Mexican Patent and Trademark Office in an ancillary proceeding once the infringement is declared. Then, this determination can be executed before the civil courts.

Finally, considering the impact that the covid-19 pandemic has had in Mexico and the need to implement online trials and other electronic tools, our courts issued important criteria related to procedural and formal issues in this regard, namely, the use of 'electronic signatures' and how online official communications must be legally served.



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