

Complex Commercial Litigation 2021

Contributing editor
Simon Bushell



Publisher

Tom Barnes

tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall

claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent

adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and October 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020

No photocopying without a CLA licence.

First published 2017

Fourth edition

ISBN 978-1-83862-315-9

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Complex Commercial Litigation 2021

Contributing editor**Simon Bushell**

Seladore Legal

Lexology Getting The Deal Through is delighted to publish the fourth 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 Australia, Bermuda, China, Mexico, Portugal and Thailand.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

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.

 **LEXOLOGY**
Getting The Deal Through

London

October 2020

Reproduced with permission from Law Business Research Ltd

This article was first published in November 2020

For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	Mexico	76
Simon Bushell Seladore Legal		Alejandro Luna F, José Eduardo Peña and Eduardo Arana OLIVARES	
Australia	4	Netherlands	84
Howard Rapke, Alexandra Tighe, Chris Brodrick and Kim MacKay Holding Redlich		Jessica de Rooij and Ellen Soerjatin Evers Soerjatin NV	
Bermuda	15	Nigeria	93
Jennifer Haworth and Andrew Martin MJM Barristers & Attorneys		Funke Agbor, Abayomi Alagbada and Folahan Adebayo Ajayi ACAS-LAW	
China	23	Portugal	101
Zhan Hao, Wang Xuelei and Wan Jia AnJie Law Firm		Raquel Ribeiro Correia, Bárbara de Bastos Viegas and Diana Beatriz Campos PLMJ – Sociedade de Advogados	
Cyprus	31	Romania	108
Yiannis Karamanolis and Andreas Karamanolis Karamanolis & Karamanolis LLC		Ioana Ivaşcu MPR Partners Maravela, Popescu & Asociații	
Denmark	39	Switzerland	115
Mikkel Theilade Thomsen and Bjarke Fonager Larsen THOMSEN-FONAGER Advokatfirma		Martin Molina and Christoph Bauer Kellerhals Carrard	
England & Wales	48	Thailand	124
Simon Bushell Seladore Legal Daniel Spendlove Signature Litigation		Olaf Duensing, Jerrold Kippen, Weeraya Kippen and Tippaya Moonmanee Duensing Kippen	
Gibraltar	60	United Arab Emirates	132
Elliott Phillips and Steven De Lara Signature Litigation		Charles Russell Speechlys LLP	
Japan	69	United States	139
Tomoki Yanagisawa and Kazuhide Ueno TMI Associates		Ryan Frei and Ashley Peterson McGuireWoods LLP	

Mexico

Alejandro Luna F, José Eduardo Peña and Eduardo Arana

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: burdensome of formalities and time frame to get a final decision tends to be quite long. Therefore, alternative dispute resolution methods are always an option. Arbitration is getting more popular between international companies and 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.

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.

BRINGING A CLAIM - INITIAL CONSIDERATIONS

Key issues to consider

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

Depending on the specific case, the formalities and preparation of documents must be considered. In our jurisdiction, the documentary evidence should be submitted, prepared or announced, along with the original writ of the action.

The Mexican system is very formalistic, therefore, all formalities, preparation of evidence should be taken into consideration before filing the action.

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

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

Establishing jurisdiction

- 5 | How is jurisdiction established?

Depending on the case, there are several ways to establish the jurisdiction of a judge. However, the jurisdiction of a judge is typically established by the territory (defendant domicile), subject matter or the economical amount under dispute may decide the jurisdiction. For certain cases, there is federal and state concurrent jurisdiction to be chosen. Consensual jurisdiction is accepted by the law.

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'?

Inter alia, it is important to present all the documentation to demonstrate the factual and legal situation; formulate pre-requirements and warnings in the case of non-compliance and identify the type of evidence that the counterpart should 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. 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.

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.

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?

- Civil actions are mainly written proceedings. There are some procedural rules with the minimal requirements of the claim (ie, it is necessary to include the name of the parties, and to include the address of the counterpart).
- Original briefs should also include the competent court for dealing with this litigation and the type of procedure requested.
- Evidence or power of attorney for representation and authorising the lawyers and clerks who will participate in the trial so they can have access to the judicial file.
- Narration of facts and cause of action.
- The court can request plaintiff to clarify the scope of the action or to correct their brief or to attach a missing document.
- Likewise, in the lawsuit it is necessary to attach the evidence (ie, all the documents that ground and prove the action), or mention the witnesses that will participate in the trial.
- In some specific procedures it is possible to file an injunctions request, same that will be solved by the judge at the beginning of the procedure.

These are the general rules and structure that a lawsuit must have, and the extension will depend exclusively on the case.

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 the compliance of 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?

As a general rule, in our legislation it is possible that the affected party is 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.

To obtain compensation for damages, 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 or not the damage was caused, 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 Justices of 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 the decision in comment, the Supreme Court awarded as damages the amount of 30,259,200 Mexican pesos which is the highest economical indemnification in Mexico ever. It is much higher than the regular compensation derived from death caused by negligence, and 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 defendant, which deserved to be sanctioned.

With this resolution, the Supreme Court of Justice introduced a punishment for objective responsibility and the amount imposed was the first in the country with this quantity for the 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 its defences and objections.
- 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.

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.

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 a 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.

Alternative dispute resolution 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.

PROGRESSING THE CASE

Typical procedural steps

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

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

The ordinary commercial 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, 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 evidences 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.

It is important to mention that in these trials there is no appeal stage, only constitutional action.

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.

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 must also be issued in accordance with the essential formalities of the procedure.

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

It is important to mention that the evidence will be evaluated and assessed by the judge. Usually in a commercial trial, the judge values both pieces of evidence, the arguments provided by the parties, and will verify whether the claim of the plaintiff is proven or if, on the contrary, the defendant has proved its defence.

As a general rule, all evidence will be evaluated by the judge in the final resolution, but there are some points that should be taken into account depending exclusively on the type of the evidence submitted.

First of all, 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 very evidence have particular rules, therefore, if the evidence is not submitted according with the law, it can be dismissed.

In this regard, all documents must be filed in Spanish (or in the original with its 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 have also presumption of validity on its content but it will be only applicable when specialist knowledge is required. Both parties can assignee their own experts, but if their opinions are contradictory the judge will name a third expert. The judge can use any part of the opinions to provide the final response, so the judge may take elements from all the opinions.

However, 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 happens.

As a conclusion, the judge will value all the evidence with its specifications and will make a logical analysis for the final decision. However, all evidence contains specific rules for the execution and for the judge to follow.

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

Judicial decisions will be made taking into consideration the issues that were submitted to the dispute between the parties, and a determination will be made by the judge based on the evidence submitted and the arguments provided by the parties.

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

The structure of this resolution is the following:

- The judge proceeds in identifying the parties, then sums up the dispute and the litigation between them. The evidence and arguments of the parties are submitted and evaluated, and finally the judge issues a judgment based exclusively on the evaluation made between the arguments of the parties and the evidence offered during the development of the procedure.
- Decisions should have three parts: precedents, reasoning and orders.

Evidence

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

With respect to documentary evidence, there is either private documentary evidence or public documentary evidence. 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 is accompanied in the initial writ and 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 previous approved questions.

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 USB with 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 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?

Cross-examination is permitted.

Time frame

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

Usually, a 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.

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.

Impact of technology

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

Our legal system has been renewed and it is now possible to present writs electronically, and it is also possible to consult legal resolutions electronically, and review the judicial file; however, an authorisation from the judge is needed.

It is reported that the Judicial Authority is working on alternatives to make use of electronic resources even more efficient. In turn, and stemming from the covid-19 pandemic, the possibility of lobbying efforts through electronic means has been explored.

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

To date, it is not possible to conduct testimonial evidence or an expert's opinions by this means.

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 typically commercial trial will have the following procedure:

The lawsuit is filed with the judge in the relevant jurisdiction, who may admit, dismiss or prevent the lawsuit.

Once the lawsuit is admitted, it will be notified to the defendant, who will have a certain time to reply the lawsuit, stating the 'exceptions' (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 plaintiff's arguments. If the defendant files a counterclaim, it will be notified to the other party so that it may present any objections and evidence.

After this stage, several hearings take place and, finally, a period for submitting the final allegations is established. The final stage of the procedure is the decision of the judge, which can be challenged.

If the decision has already become firm and beyond appeal, the losing party will be required to execute the decision. If the decision is not executed, it can be enforced through different measures, such as seizure of the party's property.

To reach a final resolution can take around four years.

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, but there are some rules and requirements to follow.

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

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 of the fees of the attorneys, experts and other costs regarding the litigation, such as the expenses of documents and the fees of the experts and other diligences. There are some guidelines for the courts to order payment of costs and attorney fees, which are very modest.

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.

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 executed 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.

Jurisdictional disadvantages

54 | 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 more efficient and fast. Another disadvantage is that the procedure can be interrupted by an appeal and that Mexican courts take more time to issue judgments.

Finally, it is necessary to modernise our legal system, to allow real digitalisation of procedures.

Needless to say, there is a need for specialisation and continued update of judges and officers of the courts.

Corruption has been reduced but, unfortunately, remains.

Special considerations

55 | 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.

UPDATES 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?

During the current year, owing to the extraordinary situation under covid-19, many litigations have been delayed.

Notwithstanding the above, it is important to note that from November we will have a new Industrial Property Law. Under this law, owners of intellectual property rights will be able to apply for 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 in our country.

In addition to this, several regulatory laws were amended in the past year.

Finally, T-Mec entered into force.

Coronavirus

57 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

First measures adopted to prevent the covid-19 outbreak

One of the first measures adopted to prevent covid-19 spreading was the suspension of activities of several federal entities from 18 March 2020, along with the suspension of procedural terms during said period. The first authorities to adopt these measures were the Supreme Court of Justice, circuit courts, district courts, civil and commercial courts and the Federal Court of Administrative Affairs.

On 19 March, the Federal Commission for Protection against Sanitary Risk (COFEPRIS) announced the requirements that must be complied with to carry out covid-19 diagnostic tests.

On 23 March, the Mexican Institute of Industrial Property (IMPI) ordered the suspension and interruption of procedural terms from 24 March. The suspension of deadlines did not apply to procedures that were necessary to mitigate the consequences of the pandemic and those related to the release of preliminary injunctions imposed by IMPI during infringement proceedings. New online applications were still able to be pre-filed during the suspension.

On 24 March, the President announced that Mexico had officially entered phase 2 of the covid-19 measures. New and additional measures to contain the spread and 'flatten the curve' of transmission were announced.

On 26 March, the Ministry of Health (MH) issued a decree suspending the legal terms running from that date until the date of submission of the paper applying to all administrative actions and procedures before the MH, including COFEPRIS. The MH specified that it would continue to work on essential or urgent procedures to deal with the situation.

On 27 March, the President published a Decree in the Federal Gazette, implementing the following extraordinary measures in relation to covid-19:

- the use of all medical resources available in the public and private sectors in the regions and the surrounding areas;
- the acquisition of all types of goods and services, at national or international level, such as medical equipment, diagnostic agents, surgical and healing materials and hygiene products, as well as any other type of good or service, without any public tender procedure, for the quantities or concepts are necessary to deal with the situation;
- the import and authorisation of imports of the above-mentioned goods and services with minimal or no administrative procedure requirements, for the required quantities or concepts;
- taking the corresponding measures to avoid price speculation and stockpiling of the essential products mentioned above; and
- any other measure that is considered necessary by the MH.

Mexico declares a state of emergency

On 31 March, due to the increase in cases of contagion, the MH established the following extraordinary actions:

- Immediate suspension of all activities from 30 March to 30 April 2020, with the exception of essential activities. The activities considered to be essential are:
 - those dealing with the health emergency;
 - those involving public safety;
 - fundamental sectors of the economy;
 - those directly related to the operation of government social programmes; and
 - those related to critical public services.
- The following practices were imposed:
 - meetings must consist of fewer than 50 people;
 - people must practise frequent hand washing;
 - people must practise remote greeting; and
 - people must observe sneezing 'etiquette' (ie, under the elbow).
- The entire population of Mexico was asked to stay at home, with the exception of those participating in essential activities.
- Stay-at-home restrictions were strictly applied to people in vulnerable groups, including those who participate in essential activities.
- The return to activities will be staggered, orderly and under the coordination of the Ministry of Economy and Labour.
- Suspension of censuses and surveys.



Alejandro Luna F

alejandra.luna@olivares.mx

José Eduardo Peña

jose.pena@olivares.mx

Eduardo Arana

eduardo.arana@olivares.mx

Pedro Luis Ogazón 17
Col. San Ángel, 01000
Ciudad de México
México
Tel +52 55 5322 3000
Fax: +52 55 5322 3001
www.olivares.mx

The Ministry of Health will determine all the activities that are necessary in the emergency. The measures will be applied with strict observance of human rights.

Other emergency initiatives to address the pandemic in Mexico.

COFEPRIS has remained open to receive and attend to those procedures that are required to continue with the supply of medical products to respond to the general health needs of the population (not necessarily related to covid-19). As mentioned, some temporary sanitary authorisations have even been granted for medicines, medical devices and import of supplies, among others, that are strictly related to the attention of the covid-19 pandemic.

However, on 3 August, the civil and commercial courts returned to regular activities, and the Mexico City Judicial Council issued new dispositions regarding this return:

- the courts are alternating to work one day behind closed doors and another with access to the public, depending on their number (odd or even);
- the courts are receiving a maximum of 10 people at a time to review files;
- people may schedule appointments to file any type of writs, not only initial briefs;
- the working hours of the courts was reduced; and
- in federal courts, it is necessary to make an appointment to enter the court.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security			
Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)