

LATIN LAWYER REFERENCE LITIGATION 2021

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# Mexico

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## 1 Outline the court system in your jurisdiction.

Federal and state courts integrate the court system. The federal judicial court system is divided into district courts (working as first instance courts and constitutional courts), unitary courts (working as appellate courts and constitutional courts), collegiate courts and the Supreme Court of Justice (both constitutional courts); while state's judicial court systems are usually divided into first instance courts and appellate collegiate courts.

Trials in Mexico are usually two-instance proceedings (first instance and appeal), which are later subject to amparo proceedings. Amparo proceedings are a type constitutional review available for the protection of constitutional rights. Federal courts acting as constitutional courts handle amparo proceedings. There are two types of amparo proceedings, direct and indirect. Direct amparo is a one- instance proceeding against final and definitive resolutions (collegiate courts handle this proceeding), and indirect amparo is a two-instance proceeding against any other act of authority (before district courts and unitary courts for the first instance and the collegiate courts for the second instance). The Supreme Court of Justice handles matters of high relevance.

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

Article 33 of our Constitution grants foreign natural persons and entities with all human rights and guarantees established in the Constitution. There are no specific or different requirements to file or defend a suit for foreign entities.

## 3 What is the process by which a foreign entity may challenge the jurisdiction or venue of the; court where litigation is filed? What factors are considered when a court evaluates whether; to exercise jurisdiction over a foreign entity?

The defendant may challenge jurisdiction or the venue when answering a complaint or filing a brief before the court that the defendant considers competent, in the same term. The arguments to challenge a jurisdiction or venue are: (i) subject-matter jurisdiction; (ii) amount of the dispute; and (iii) grade and territoriality. The defendant should file a “motion for a change of venue”.

An appellate court handles and resolves the motion for a change of venue. If the motion is considered grounded, the docket will be sent to the competent court.

The Commercial Code provides that parties can renounce a venue and choose the venue of the domicile of any of them, the place to fulfil an obligation or the place where the object is.

If the parties do not agree on a specific venue, the Commercial Code provides that the competent court will be determined, in the following order: (i) the court of the place in which the defendant has appointed; (ii) the place agreed in the contract to fulfil the obligation; and (iii) the domicile of the defendant, if the defendant has several domiciles, the claimant may choose from any of them.

## 4 What is the most common type of litigation encountered in your jurisdiction by foreign entities?

If the foreign company has activities and employees in Mexico, litigation related to employment termination litigation is very common (see question 30). Administrative and regulatory litigation is also common. Lastly, depending on the activities and sector of the entity, civil or commercial litigation might be common.

## 5 How frequently do parties pursue criminal actions in the context of commercial disputes? May criminal trial evidence be adduced in follow-on civil litigation? May civil cases be brought concurrently or after criminal litigation?

It is somewhat common for parties to pursue criminal actions in the context of commercial disputes to try to exert pressure on the debtor. However, this tendency may be decreasing, due to the shift from a criminal inquisitorial system to an adversarial one (fully implemented in 2016). Under the new adversarial system, pretrial detention is supposed to be the exception, contrary to the previous system, where it was considered the general rule.

While there is no limitation on adducing criminal trial evidence in follow-on civil litigation, it may be less necessary each day, given that one of the main purposes of the National Code of Criminal Procedure is the compensation or indemnity for the damage caused.

In principle, there is no limitation under Mexican law regarding concurrency of civil and criminal litigation. However, as stated in the examples above, every day we are seeing more parallel civil and criminal proceedings regarding compensation for the same facts.

## **6 Is there a right to a trial by jury in a commercial dispute?**

No. The Mexican Constitution does not provide for the right to a trial by jury in commercial matters.

## **7 Do courts require or strongly encourage mediation or other alternative dispute resolution methods before or during a litigation proceeding?**

Yes. Many proceedings foresee a “conciliation hearing” as part of the proceedings. Judicial settlement agreements are considered *res judicata*, and can be executed in the same terms as a final judgment if breached. Lately, there has been a strong encouragement for mediation or conciliation before and during the litigation proceedings. In 2008, the alternative dispute resolution mechanisms were expressly recognised in the Constitution, stating the obligation to include them in legislation.

For example, the Commercial Code has been amended to include Commercial Oral Proceedings (commercial proceedings are gradually changing from mainly written proceedings, to more flexible mainly oral proceedings – as it happened with criminal proceedings). Conciliation is foreseen as part of the proceeding.

In September 2019, the House of Representatives passed the General Law of Alternative Dispute Resolution Methods which intends to be an all-level government statute unifying ADR’s regulation. Senate approval is still pending.

## **8 Will choice of law and choice of forum provisions in a contract be recognised? Must these provisions meet certain requirements or formalities to be enforceable?**

Yes, parties may validly designate the application of another law, with certain exceptions such as the legal status of a person, rights in rem, lease contracts, and legal forms of certain acts.

In commercial arbitration, “[t]he arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties. ... to the substance of the dispute” (article 1445 of the Commercial Code).

Regarding choice of forum, the Commercial Code provides that the parties can renounce to the corresponding venue and choose the venue of the domicile of any of the parties, the place to fulfil the obligation or the place where the object is (see question 3).

The choice of law and choice of forum provisions in a contract must meet the same formalities that the contract itself requires to be valid. However, waivers of rights, such as the right to appear before a specific court, must be made in clear and precise terms to be enforceable (article 7 of the Federal Civil Code).

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

Our jurisdiction does have a specific arbitration law. Book V, Title IV of the Commercial Code sets the regulation for arbitration. Those rules are based on the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Recognition and enforcement of an award in Mexico may only be denied under the exceptions set forth in article 1462 of the Commercial Code, which are the same as article 36 of the Model Law and article V of the New York Convention (with different wording).

The Commercial Code foresees two hypotheses: refusal of recognition and enforcement and annulment of the arbitral award. The scenarios for refusal to recognise and enforce an arbitral award are identical to the ones of the UNCITRAL Model Law and the New York Convention.

Lastly, a court may only enjoin or prohibit arbitration proceedings in matters that are also pending in a court proceeding, if:

- the parties consented to submit their controversy to a court, even though there is an arbitration agreement (the court will consider that a party consented if it does not request referral to arbitration on the first writ filed before the court);
- the arbitration agreement was declared null and void; or

- the arbitration agreement is declared null, ineffective or of impossible execution (generally, the court will only refuse to do so if there is a final and definitive resolution. However, if the nullity, inefficacy or impossibility to execute the arbitration agreement is notorious when answering the request to refer to arbitration, the court will refuse immediately).

## **10 Do courts in your jurisdiction retain authority to grant interim measures in support of arbitration? Do domestic arbitration laws address the enforceability of emergency arbitrator relief?**

Yes. According to article 1425 of the Commercial Code, courts retain authority to grant interim relief in support of arbitration before the arbitration is initiated or in parallel to an arbitration proceeding.

Domestic arbitration laws do not expressly address the enforceability of emergency arbitrator relief. However, since the Commercial Code provides that courts may enforce interim relief granted by arbitrators, and makes no distinction about the type of arbitrator who dictates the measures, there would be no legal grounds to deny the enforcement.

## **11 Is your country a signatory to any investor-protection treaties? Please comment on any recent investor-state cases to which your country is a party and the impact of its outcome.**

Mexico has built a broad network of more than 35 bilateral investment treaties and 15 free trade agreements providing guarantees of protection for foreign investors. This was further reinforced by Mexico's signing of the ICSID Convention in 2018.

Mexico has been respondent state in over 30 investor-state cases. Around 12 of those cases are currently pending. An important group of cases is related to measures taken by the Mexican government against a shipping company (Oceanografía SA de CV), which resulted in significant damages and lost profits for its creditors. The outcome of those cases will be relevant, as it could set a precedent on the state's liability to third parties in relation to early termination of contracts, seizures of assets, and bankruptcy proceedings.

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

Yes. Several rules impose a general professional secrecy obligation on attorneys and on all professionals. This has been recognised in different binding and non-binding precedents.

Given that there is no specific attorney-client privilege under Mexican law, in principle, the same general obligations regarding professional secrecy apply to private practitioners and in-house counsel. However, on the ruling of a recent non-binding precedent, a Collegiate Court determined that professional secrecy protection to attorney-client communications excludes in-house counsel linked by a labour relationship (Non-binding precedents No I.1o.A.E.193 A (10a.) and I.1o.A.E.194 A (10a.) issued by the First Collegiate Court on Antitrust, Broadcasting and Telecommunications Matters for the First Circuit (Mexico City), published in the Federal Judicial Weekly Report and its Gazette, Volume XXXVIII, January 2017, pp. 2475 and 2721).

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

Not all information is public. Article 1080 of the Commercial Code establishes that all hearings shall be public. Furthermore, certain laws, as the Federal Civil Procedure Code establish that the court will be able to determine in which cases the hearings shall not be public (eg, family matters).

Besides hearings, court orders and filings of the parties are not public. Article 73 of the Transparency and Access to Public Information Law establishes that the following information from the judicial branch shall be public: (i) precedents, (ii) public versions of final judgements that are of public interest – with parties' information redacted, (iii) transcripts of public hearings and (iv) the excerpt of new court orders.

Furthermore, article 113, section XI of the aforementioned law establishes that ongoing judicial proceedings shall be considered as "reserved information". Personal data regarding the identity or to identify a party will always be considered as "confidential", with certain minor exceptions, such as the information that belongs to a public registry or that is obtained by a judicial order.

## 14 May a defendant join other potentially liable parties to the existing lawsuit?

Yes. The Commercial Code establishes that parties having the same rights and interests must participate as co-plaintiffs or co-defendants, through a common representative. If the final judgement necessarily affects third parties, as either plaintiffs or defendants, they must be part of the proceedings.

The Commercial Code also provides for “joinder” of a third party to the proceedings to defend its own interests or to cooperate with one of the parties. A supporting third party may appear before the court at any stage of the proceeding before it issues final judgement. On the other hand, an opposing third party shall file an ancillary proceeding regarding its claim (property or a better right on the goods).

## 15 How may a party enforce a foreign judgment?

Under article 1347-A of the Commercial Code, a foreign judgment shall be enforced if: (i) it meets the formalities set forth in the treaties to which Mexico is signatory, (ii) it is not consequence of a claim on rights in rem, (iii) the court ruling on the matter had proper jurisdiction under international law, in compatibility with Mexican law, (iv) the defendant was properly served to process to guarantee due process, (v) the judgment is res judicata under the laws of the country in which it was issued, (vi) the subject-matter of the claim is not being disputed by the same parties before Mexican courts, (vii) the obligation is not contrary to Mexican public policy, and (viii) it fulfils the requirements to be considered as authentic.

Mexican court shall deny enforcement of the foreign judgment if there is no reciprocity in the country of origin.

Under the rules of the Federal Civil Procedure Code, the court will open a homologation ancillary proceeding, giving the parties the right to file defences or exercise their rights. If the parties offer evidence, it shall be admitted. The Public Prosecutor’s office will always be part of the proceedings. When resolving on the enforcement of a foreign judgment, the court shall limit its resolution to the authenticity of the judgment and if it should be enforced under national law. The court shall not study the merits of the case nor its justice or injustice.

## 16 How is service of process effected? How long does it typically take?

An authorised court clerk called *actuuario* performs the service of process. For service of process, the court clerk must show up on the alleged domicile of the defendant (which shall be designated in the claim), and request for the defendant, his or her representative or agent. Service of process shall be delivered in the form of a writ, which contains: (i) the date and time of the notice, (ii) the kind of proceedings, (iii) the name of the parties, (iv) the handling court, (v) the transcription of the relevant court’s decisions, and (vi) the name of the receiving party. The court clerk shall also state the circumstances by which he or she asserts that he or she is in the correct domicile, and that it is the domicile of the defendant. The court clerk has to deliver a copy of the claim and its annex to the defendant.

If the court clerk does not find the party or his legal representative, after confirming it is the proper domicile, the court clerk shall deliver service of process to relatives, employees or any other person who resides there.

Service of process is very formalistic in Mexico, so it is very important to ensure that the court clerk properly fulfils all the requirements. If the defendant’s domicile is unknown, the court may request information from certain authorities (not necessary in all types of proceedings). Afterwards, the court shall order the service of process through publication in a newspaper.

Service of process usually takes about 30 business days; however, such term may be extended depending on: (i) the court clerk’s agenda (Mexican courts have very heavy workloads), (ii) the ease of finding the defendant’s domicile, and (iii) whether the defendant’s domicile is located within the serving court’s jurisdiction.

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

The ordinary term to answer the complaint is 15 days. However, terms may vary depending on the kind of proceedings. The term to answer the complaint can only be extended if service of process was performed in a locality different to the court, depending on the distance.

## 18 What types of pretrial proceedings are available in court? What kinds of dispositive motions can be filed before trial? Under what circumstances may a lawsuit be dismissed prior to trial?

The Commercial Code only recognises the following types of pretrial proceedings: (i) to obtain a confession or documents from the future defendant regarding its legal representation, possession, legal documents, etc., (ii) to obtain witness testimony or

judicial inspection, due to the difficulties of doing it later, or (iii) to obtain a confession from the debtor regarding the existence and amount of the debt.

If the party that filed the pretrial proceedings obtains a confession from the debtor regarding the existence and amount of the debt, the defendant may initiate summary commercial proceedings in which he or she will be able to seize assets at the time of service of process.

No claim or lawsuit is dismissed before filing with the court. Pretrial proceedings are only for preparing the main proceedings but the court will not analyse the merits of the case or any procedural cause to dismiss it.

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

Owing to the heavy workload of the courts, parties' motions and recourses, and lack of resources, in our experience, a first-instance judgment in a typical commercial litigation case takes around two years.

However, it is worth noting that commercial proceedings are gradually changing to mainly oral proceedings, which should be shorter, given that almost everything is vented in two hearings (preliminary hearing and trial hearing).

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

Parties are required to offer all evidence in the initial claim and answer to the claim (and if applicable in the counterclaim and answer to the counterclaim). However, in certain proceedings evidence other than documentary evidence can be offered in the evidentiary stage of the proceedings.

New documentary evidence can only be filed when: (i) it is posterior, (ii) the party offering evidence did not previously have knowledge of its existence, and (iii) the party offering evidence was not able to obtain it before.

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

No. Under Mexican law, there is no right to discovery prior to trial apart from the pretrial motions previously mentioned (see question 18).

## **22 Does litigation provide a process to subpoena or obtain documents or testimony from third parties?**

Regarding documents, under article 1061, section III, if the interested party does not have access to a document, he or she shall declare it to the court. Then, the court will order the responsible party to file the document.

Regarding testimony from third parties, if the party that offers the testimony is not able to bring a specific witness, he or she shall request the court to summon them, with an arrest warning for up to 36 hours or economic sanctions.

## **23 Does the judge or opposing counsel examine witnesses?**

Both parties can examine witnesses before the court. The party offering the witness shall file a written questionnaire for the witness to answer during the hearing. Questions shall be (i) directly asked of the witness, (ii) related directly to the controversy, (iii) not contrary to law or moral, and (iv) if possible, each limited to one fact. If offering party does not comply with these rules, the court shall dismiss the questions. The counterpart may proceed with its cross-examination based on the questionnaire. Lastly, the court shall also examine witnesses if it deems it necessary.

Rules for the examination of witnesses in oral proceedings are more flexible.

## **24 How may evidence be challenged? Are there specific rules of evidence?**

Documentary evidence shall be challenged (i) with respect to its evidentiary scope and value to prove facts arguing that said evidence does not prove the facts that the offering party alleges, and (ii) with respect to its authenticity. If a document is not challenged, it will be considered as recognised by the other party.

The authenticity of a document can be challenged in the answer to the complaint as a defence, with the necessary evidence. Only if the challenging party offers expert witness testimony will the other party be able to respond.

If the claimant challenges the authenticity of a document regarding the answer to the complaint, or any of the parties challenge a document filed after the answer to the complaint, the court will resolve the case in an ancillary proceeding. This ancillary proceeding shall be resolved as a small trial, in which the parties have the right to file a claim, and its answer, evidence and closing arguments. Finally, the court is obliged to issue a ruling.

A parallel criminal proceeding might also be initiated.

Regarding witness testimony, after the witness has declared, parties may object the credibility of the witness if the witness did not reveal a situation in the examination (eg, kinship with the other party). The objection shall be resolved in an ancillary proceeding.

Regarding expert witnesses, the parties will be able to put questions to the expert witnesses once they have rendered their opinion.

Only the expert witness appointed by the court shall be personally challenged. Said expert witness will only be appointed in case the opinion of the experts appointed by each party are substantially contradictory. Furthermore, the appointment can only be challenged due to a relationship with one of the parties or the court staff, and having a direct interest in the controversy. Parties may also make statements regarding the witness testimony of the other party. The court shall freely appreciate expert witness's reports in accordance with the circumstances of the case.

## **25 Do courts typically allow hearings at or before a trial? At what stage may parties present expert witness testimony?**

Evidence is usually offered when filing the complaint or answer to the complaint. However, in certain proceedings after the answer to the complaint is filed, the court will grant the parties a certain term to file evidence (except documentary evidence and naming the witnesses that will be examined). Afterwards, the court will admit the evidence and set a date for hearings in case it is needed (ie, witness testimony, testimony of one of the parties, judicial inspection, etc), or for expert witnesses to issue their expert reports.

Hearings before trial will only be admitted in pretrial proceedings for very limited issues (see question 18).

Lastly, under the oral commercial proceeding, all evidence must be offered in the claim and answer to the claim (and counterclaim, if applicable). Afterwards, the court will issue a decree admitting the evidence and setting a date for the preliminary hearing. During the preliminary hearing, the parties will issue procedural agreements related to the agreed and disputed facts, and evidence. The court will admit evidence and summon the parties, witnesses and expert witnesses for the trial hearing. In the trial hearing all of the evidence will be admitted.

## **26 What must be demonstrated to collect a debt based on a written instrument?**

To collect a debt based on a written instrument, the claimant must prove by means of the written instrument that there was an agreement by the parties, the other party breached the agreement, and claimant fulfil its obligations.

Regarding negotiable instruments, they have to comply with the requirements of the General Law of Credit Instruments and Transactions (eg, that it is signed by the drawer, that it includes an unconditional promise to pay a specific sum of money, etc). Such instruments include the promissory note, bill of exchange, bank cheques, etc. Said documents may be collected in an executory proceeding in which the claimant shall seize assets in the date of service of process.

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

Shareholders representing at least 25 per cent of the capital stock in corporations and limited liability companies (in investment promotion corporations and stock corporations, percentages are lower and minority shareholders have certain additional rights) may challenge the decisions taken by the majority in shareholder meetings.

Minority shareholders shall also have right to appoint an administrator and a statutory auditor, to summon the shareholders to a shareholders' meeting and to postpone a shareholders' meeting.

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

The party that holds a maritime lien shall be able to file a proceeding against his debtor called "execution of a maritime lien" under the rules of the Navigation and Marine Commerce Law and the Mexico City Civil Procedure Code, in supplementation to said law. The claimant shall seize assets in service of process. Once there is a final judgment, the claimant shall auction the vessel in a public auction and obtain payment from the proceedings of the auction.

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

Mexico City's Civil Procedure Code and the Procedure Codes of the other states foresee an executory proceeding, regarding securities in real property (mortgage proceeding). On the other hand, the Commercial Code foresees an executory proceeding regarding securities in personal property (pledge) in possession of the debtor. In both proceedings, the claimant shall seize the asset when performing the service of process. The claimant will claim from the proceeds of the assets during enforcement of the final and definitive judgment.

### **30 Describe the types of employment disputes that frequently result in litigation.**

Most of the labour law claims that result in litigation are related with employment termination, either by resignation, unjustified dismissal, and even in some cases by justified termination by one of the parties.

### **31 Does your jurisdiction allow class actions or some form of collective litigation proceeding?**

Yes. The Fifth Book of the Federal Code of Civil Procedure establishes the rules that govern class actions, and the list of those with legal standing for submitting them. Class actions are admissible in the following subject matters: (i) public and private relationships of consumer of products or of services, (ii) environmental matters, and (iii) damages to consumers as result of antitrust practices. The Federal Civil Procedure Code provides for an opt-in mechanism, whereby the intent of a member of a class or community to join the class action must be expressly declared.

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

No. Depending on the subject-matter there might be certain restrictions regarding the applicable law or the jurisdiction, but government-owned or controlled entities shall not have sovereign immunity. Certain goods owned by the Mexican state will be protected by immunity. However, under Mexican law, government-owned or controlled entities shall not be owners of those goods. Lastly, these entities might enjoy certain prerogatives, such as not being obliged to issue a guarantee in proceedings (eg, to guarantee damages in case of interim relief).

### **33 Do foreign states or entities controlled or owned by foreign states enjoy any privilege when they are engaged in commercial activity and involved in a commercial or administrative litigation in your jurisdiction (state immunity)?**

In principle, no. While not expressly regulated but recognised by Mexico's Supreme Court of Justice, under the theory of restricted immunity, state immunity shall not be applicable to cases in which the state engages in commercial matters.

Said criteria has been confirmed by Mexico's Supreme Court of Justice, in a binding precedent that declared that state immunity is not an unlimited prerogative (Binding precedent 2<sup>a</sup>./J. 101/2003 issued by the Second Chamber of Mexico's Supreme Court of Justice, published in the Federal Judicial Weekly Report and its Gazette, November 2003, Volume XVIII, p. 149).

### **34 Is injunctive or other relief available on an emergency basis?**

Yes. Article 1168 of the Commercial Code provides that parties may only request two types of injunctions, (i) restriction from leaving the city where court has jurisdiction, if there is well-founded fear that the person will hide, and (ii) seizure of assets, when there is well-founded fear that the defendant is going to dispose of all of his or her assets. However, certain judicial precedents recognise that the Federal Civil Procedure Code may be applied in supplementation, which allows for any kind of injunctive relief that the court deems necessary to preserve the rights of the requestor.

Regarding court intervention in relation with arbitration, the court may be able to discretionally issue any kind of injunction.

### **35 Is injunctive relief available as part of a final award? If so, in what types of cases do courts usually provide injunctive relief?**

Article 1347 of the Commercial Code foresees that if there are no seized assets, once there is *res judicata*, the party may request the seizure of assets, and afterwards request the execution. If the assets are not cash or equivalent, they will need to be appraised and auctioned, under the rules provided by the Commercial Code.

Regarding arbitration, injunctive relief is not expressly available when there is a final award. However, as stated in question 34, the court may be able to discretionally issue any kind of injunction. Once the award has been recognised, it can be executed and the court will be able to seize assets.

### **36 What are the typical court fees and costs required to file a civil lawsuit? Is a bond required for a non-resident? What is the amount of the bond?**

There is no court fee or cost to file a civil lawsuit. However, each party shall bear the costs of attorneys and other expenses (eg, expert witnesses). The prevailing party may be able to claim attorneys' fees and costs (see question 38).

### **37 What types of damages are available? How are damages quantified? Are punitive damages available?**

Under Mexican law, civil liability arises in both contractual matters and extra-contractual matters. In this case, the plaintiff may claim damages and/or lost profits. Besides damages and lost profits, parties may be able to also claim "damages" for strict liability and for non-pecuniary damages.

To claim civil liability (with the exception of strict liability), three elements must be met: (i) breach of an obligation or an illegal conduct in extra-contractual liability, (ii) causation of damages and/or loss profits and (iii) a causal link between the breach of the obligation and the damages and/or loss profits (damages must be an immediate and direct consequence of the breach). In extra-contractual obligations, the party that claims damages shall also prove the existence of wilful misconduct or fault of the debtor.

The plaintiff is entitled to reparation of the harm by demanding either (i) full restitution of the situation of the affected party prior to the damage, when possible, or (ii) an equivalent reparation in money. Non-pecuniary damages are also indemnified in money.

Punitive damages are not available under Mexican statutory law. However, in a 2014 ruling Mexico's Supreme Court of Justice awarded punitive damages (see Non-binding precedents 1a. CCXLIV/2014 (10a.), 1a. CCLXXII/2014 (10a.) and 1a. CCLXXI/2014 (10a.) issued by the First Chamber of Mexico's Supreme Court of Justice, published in the Federal Judicial Weekly Report and its Gazette, Book 8, July 2014, volume I, pp. 142-143).

### **38 Is the losing party liable for the prevailing party?**

In most cases yes. The Commercial Code establishes the cases in which the losing party will be liable for party's attorneys' fees and costs. After there is *res judicata*, the prevailing party may initiate an ancillary proceeding regarding attorneys' fees and costs. Attorneys' fees are generally regulated under local legislation, so the parties may not always obtain full restitution of the fees. Prevailing party must prove all the costs with proper evidence during the ancillary proceeding.

### **39 Will courts enforce a liquidated damages provision in a contract?**

Yes. Article 2117 of the Federal Civil Code (in supplementation to the Commercial Code) provides that "civil liability may be regulated by agreement of the parties, except in those cases where the law expressly provides otherwise." Furthermore, articles 1840 to 1850 establish that parties to a contract may agree on a certain amount in lieu of damages as the indemnity for a breach of the agreement.

Plaintiff cannot claim liquidated damages provisions plus damages or lost profit. Liquidated damages may not exceed the value or the quantity of the principal obligation.

### **40 Will courts enforce a force majeure provision in a contract? If not, are defences of impracticability and impossibility available?**

Yes, in general courts will enforce a force majeure provision in a contract. Specially in commercial contracts, the parties are bound in the manner and terms that they agreed (article 78 of the Commercial Code).

#### **41 Will courts enforce a material adverse change clause in a contract?**

Yes, there is no legal basis for courts to refuse to enforce a material adverse change clause if the parties validly included it in a contract.

#### **42 What is the appeal process against trial court decisions?**

Court decisions may be appealed by the parties, if expressly stated in the applicable law. Appeals are resolved by a superior court. If the law does not allow the parties to appeal, they may request the court to revoke its own determination (motion to revoke), except the final ruling.

There are two kinds of appeals, appeals that will be resolved together with the final judgment, which shall be filed within three days after the order is issued, without the need to state the grievances at the moment (eg. dismissal of evidence), and appeals that are sent immediately to the appellate court, the appellant shall express its grievances.

If expressly provided for in the law, appeals immediately sent to the appellate court can suspend the proceedings.

Appeals must be filed with the court that issued the order. The court will request the other party to answer the appeal and then it will send it to the superior court. When the superior court receives the appeal, it will confirm the admission and if it should suspend or not the proceedings, then it will summon the parties for the final judgment.

#### **43 How frequently do appellate courts reverse trial court decisions?**

According to statistics of the Federal Judicial Power, in most of the cases the appellate court confirms the decision of the inferior court ([www.dgepj.cjf.gob.mx/paginas/informacionRelevante.htm?pageName=informacion%2FevolucionSentencias2017.htm](http://www.dgepj.cjf.gob.mx/paginas/informacionRelevante.htm?pageName=informacion%2FevolucionSentencias2017.htm)).

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

The Federal Administrative Litigation Procedure Law provides the rules to challenge before a court the federal administrative decisions. In the same regard, each state has its own Federal Administrative Litigation Procedure Law.

As mentioned above, courts that resolve challenges to administrative decisions are not dependent on the judicial branch. However, those challenges shall be finally resolved by amparo courts. We do not have the statistics, but we estimate that administrative decisions are reversed in around 50 per cent of cases.

#### **45 How are trade secrets protected in judicial proceedings?**

Article 86 bis of the Industrial Property Law provides that if a party needs to reveal a trade secret in an administrative or judicial proceeding, the authorities shall take any necessary measures to impede its disclosure to third parties. Furthermore, courts have considered that in certain cases to protect the rights of the holder, the counterparty may not have access to such trade secrets (Non-binding precedent I.4o.A.692 A (9a.) issued by the Fourth Collegiate Court on Administrative Matters for the First Circuit, published in the Federal Judicial Weekly Report and its Gazette, January 2010, Volume XXXI, p. 2230).

#### **46 Are settlement agreements confidential? Must the parties' settlement agreement be certified by the court?**

Yes. A settlement agreement between the parties is confidential. Settlement agreements do not need to be certified by the court. However, if the court certifies a settlement agreement, it will be res judicata, and could be enforced in the same terms of a final judgment.

#### **47 Who has the burden of proof at trial? What is the burden?**

The general rules on evidence provide that burden of proof lies on the person affirming or claiming a fact. The party that denies facts or claims will only be obliged to prove when denial implies and affirmation or the other party has the benefit of a legal presumption.

Court weighs the evidence in terms of the rules of the Commercial Code (eg, public documents are considered as conclusive evidence). In certain cases, evidence shall be subject to the reasoned appreciation of the court (eg, witness evidence).

#### **48 What are the most significant recent developments regarding judicial reform? Is any proposed legislation likely to affect the civil litigation market?**

A very important development in commercial matters is the shift from mainly written proceedings to oral proceedings. Oral proceedings were first introduced in 2011. Oral proceedings have been implemented gradually according to the level of the controversy until all commercial proceedings are oral.

Another important development that is currently being discussed in the legislative branch, is the implementation of a National Civil Procedure Code, applicable for the whole country. This would unify civil procedure, which to date is very different in each state and sometimes improperly enacted.

#### **49 Describe any recent noteworthy litigation and arbitral cases.**

Some recent precedents regarding non-pecuniary damage have established that to quantify non-pecuniary damages, courts must consider the parameters established by international courts, such as the Inter-American Court of Human Rights. Furthermore, the previous quantification of non-pecuniary damages has been considered unconstitutional. In this particular case, regarding the loss of life. Lastly, these precedents may open the door to other forms of reparation besides money (Non-binding precedents XXVII.3o.67 C (10a.) and XXVII.3o.68 C (10a.) issued by the Third Collegiate Court for the Twenty-Seventh Circuit, published in the Federal Judicial Weekly Report and its Gazette, August 2018).

Regarding arbitration, collegiate courts have established that ex parte interim measures are legal and do not violate constitutional rights (Non-binding precedent III.2o.C.8 C (10a.) issued by the Second Collegiate Civil Court for the Third Circuit, published in the Federal Judicial Weekly Report and its Gazette, Book XVII, February 2013, volume 2, p. 1385). Furthermore, collegiate tribunals have confirmed that courts may be able to discretionally issue any kind of injunctions (Non-binding precedent I.4o.C.34 C (10a. issued by the Fourth Collegiate Civil Court for the First Circuit, published in the Federal Judicial Weekly Report and its Gazette, Book 34, September 2016, volume IV, p. 2878).



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Adrián is a litigation and arbitration expert admitted to practise in Mexico and New York, with close to 20 years of experience. He has worked in Mexico City, Washington, DC and Beijing.

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Adrián is Vice President of Legality and Rule of Law Committee of the American Chamber of Commerce (AMCHAM) – Mexico, Treasurer of the Arbitration Committee of the International Bar Association, professor of International Litigation at the Escuela Libre de Derecho in Mexico City, and former Chairman of the Arbitration Committee of the Mexican Bar Association (2012-2018).

He has been recognised as a leader in his field by editorials including *Latin Lawyer 250*, *Chambers and Partners* (Global and Latin America), *Who's Who Legal*, *Global Arbitration Review*, and *The Legal 500*. He is described as an “extremely talented practitioner and a great advocate”, an “excellent strategist” and “a very bright and eloquent force in Mexico’s arbitration market”.

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Diego Sierra is the head partner of the bankruptcy and restructuring and anticorruption and compliance practices of Von Wobeser y Sierra. He has approximately 15 years of experience and frequently acts as counsel in complex commercial litigation and commercial arbitration disputes. Diego represents several national and international clients in the resolution and prevention of commercial disputes. He has advised global Fortune 500 companies and financial institutions in the United States and Mexico in FCPA investigations and due diligence matters. In recent years, he has been involved in the most important and complex bankruptcy proceedings taking place in Mexico, advising creditors as well as debtors.

Diego Sierra is a graduate from the Escuela Libre de Derecho where he graduated with honours and was President of the Student Council in 2006–2007. He holds a law master’s (LLM) and a certificate in business administration with honours from Northwestern University School of Law & Kellogg School of Management in Chicago (2011). He was an International Visiting Attorney at Skadden, Arps, Slate, Meagher & Flom LLP, in New York (2011–2012). Diego Sierra is admitted to practise in New York. Diego currently is the co-chair of the Insolvency Committee (2017–2019) in the Mexican Bar Association and Vice President of the Anticorruption Committee of the International Chamber of Commerce (ICC) Mexico.



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