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Litigation in the United States and Mexico: A Comparative Overview

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ARTICLE

LITIGATION IN THE UNITED STATES AND MEXICO: A COMPARATIVE OVERVIEW

ROBERT M. KOSSICK, JR.*

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I. INTRODUCTION

Increased levels of U.S.-Mexican trade under the North American Free Trade Agreement have produced a corresponding rise in the number of cross-border legal disputes. Where disputes between U.S. and Mexican parties lead to the filing of an action in Mexico—either by operation of a valid forum selection clause or otherwise—it is usually the best interest of the U.S. party to either arbitrate or mediate a settlement. Because the common law doctrine of *forum non conveniens* does not exist in Mexico, failure to resolve the dispute by extra-judicial means will leave the U.S. party with no option but to litigate in Mexican courts.

This paper is not intended to prepare or enable U.S. counsel to competently appear on behalf of his or her client before Mexican courts. It is always advisable for a U.S. party facing litigation in Mexico to enlist the support of trustworthy and knowledgeable local counsel. The purpose of this paper is to introduce and orient U.S. counsel to the overall flow of an ordinary civil Mexican trial through the level of the first instance, thereby enabling U.S. counsel to develop a fuller, more efficient understanding of key procedural points and actions pursued by local counsel in the course of litigation. This will, in turn, enhance the potential for cross-border participation trial strategy formulation.

Finally, to the extent that divergences between U.S. and Mexican law are explained, it is also hoped that this paper will help Mexican practitioners better understand the basic rules and doctrine associated with U.S. litigation.

II. OVERVIEW OF MEXICAN COURT SYSTEM, LAWS & LEGAL ACTORS

A. *Mexican Court System*

1. Federal Courts

Mexico's federal courts are generally considered to be the best organized and most efficient. Federal judges, particularly at the Supreme Court level, have a reputation for professional integrity and fairness. These judges handle much of the *Amparo* work at both trial and appellate levels. They are regulated principally by Articles 94 through 97 of the *Constitución Política de los Estados Unidos Mexicanos* and the *Ley Orgánica del Poder Judicial de la Federación*.¹

1. See Appendix A for an overview of the structure of Mexico's courts.

a. *Mexican Supreme Court (Suprema Corte de Justicia de la Nación)*

The Mexican Supreme Court is composed of ten Ministers (Justices) and one President (Chief Justice). The President of the nation is authorized to nominate three candidates for ministership. The Senate then has thirty days within which to elect the proposed Minister by a two-thirds vote. If the Senate fails to do so, then the right to choose reverts to the executive. Ministers serve for fifteen year terms, but are not eligible for service on the Supreme Court if within the year preceding their nomination they served as: 1) the head of a cabinet level department or other administrative agency, 2) the Federal Attorney General, 3) a Senator, 4) a Federal Deputy, 5) a State Governor, or 6) the head of the Federal District.

While the Supreme Court was previously capable of conducting "judicial review," the impact of *Amparo* holdings inured only to the benefit of the aggrieved party, unless the court, by the requisite number of votes, had reached the same conclusion on the matter five separate and consecutive times, thereby forming a generally binding "*jurisprudencia*." Zedillo administration reforms have, however, given the Supreme Court reinvigorated authority to strike down unconstitutional laws. Judicial review via an *Accion de Inconstitucionalidad* can now occur within thirty days of a law's operation at the request of either one-third of the Congress, one-third of a state congress, or the Attorney General. This new law has been criticized for both the insufficiency of its thirty-day time period as well its logic for granting standing to particular individuals or bodies.

The Supreme Court is broken down into two "*Salas*," each of which is composed of five ministers and presided over by the President of the Supreme Court. The Mexican Supreme Court is self-administering, and as such is not under the administrative authority of the *Consejo de la Judicatura Federal*.

b. *Collegiate Circuit Courts (Tribunales Colegiados de Circuito)*

These courts hear direct *Amparos*.

c. *Unitary Circuit Courts (Tribunales Unitarios de Circuito)*

These courts are presided over by a single judge, and hear appeals from the first instance.

d. *District Courts (Juzgados de Distrito)*

These courts hear indirect *Amparos*, in addition to serving as a court of ordinary jurisdiction for matters of federal law.

2. State Courts

Local law establishes the structure and function of the state courts. For the most part, the state court systems are modeled after those in the federal system. Some variations do exist, however, and thus counsel should always determine the degree of deviation on a case-by-case basis.

a. *Superior Court of Justice (Tribunal Superior de Justicia)*

The highest state court is usually located at the state's capital. Candidates for the high court are nominated by the state governor and must be approved by the state congress. Each state's organic law of judicial power regulates the appointment and terms of service. These courts are typically organized into "*Salas*."

b. *Court of First Instance (Tribunales de Justicia del Fuero Comun / Primera Instancia)*

The Superior Court of Justice customarily appoints judges in the court of first instance. Unlike the United States, there are no elected judges in Mexico. There are usually separate state courts

of first instance for civil matters, family matters, and penal matters. However, there may also be state level courts with mixed jurisdiction.

3. Administrative Bodies

There are many administrative tribunals and para-judicial bodies with the capacity to resolve disputes. If anything, these have become more popular through time, and their operation has helped to decongest ordinary court dockets. They have their own procedures and rules, and proceedings conducted therein tend generally to be faster and simpler than proceedings in ordinary courts. These entities may or may not be within the judicial branch. All decisions by such entities are reviewable, except those of the electoral tribunal. Conciliation and arbitration often plays an important part of the dispute resolution process followed by these entities.

B. Sources of Laws Bearing on Litigation in Mexico

The following are the most fundamental laws that have a bearing on litigation in Mexico.

1. Constitución Política de Los Estados Unidos Mexicanos

This is the supreme law of the nation.² The following articles provide important litigation-related guarantees:

Article 13: Nobody shall be judged by private laws or special tribunals;

Article 14: Nobody shall be deprived of their life, liberty, or property except by trial conducted by a legally constituted tribunal, where the essential formalities of procedure operate to the benefit of the litigant;

Article 16: Nobody can be molested in their person, family, domicile, papers, or possessions without a written order from a competent authority issued in full accordance with proper legal procedure;

2. See MEX. CONST. art. 133.

Article 17: No person shall take justice in their own hands, nor should any person ever exercise violence in reclaiming one's rights. Moreover, all people have a right to have justice administered by a tribunal in an expeditious, complete and impartial way.

2. Código de Procedimientos Civiles para el Distrito Federal (CPCDF)

This sets forth the procedural framework governing various causes of action in Mexico City, including "*Juicios Ordinarios*," "*Juicios Ejecutivos*," and "*Juicios Arbitrales*." The rules of civil procedure enacted in Mexico's states traditionally have followed those promulgated in the *Distrito Federal* very closely.

3. Código Federal de Procedimientos Civiles (CFPC)

This code regulates civil litigation on federal matters throughout the Republic and contains the laws relating to, inter alia, international procedural cooperation and the application of foreign laws in Mexico.

4. Código Civil (CC)

This code applies both in Mexico City and throughout the Republic. In addition to containing substantive law in different civil areas (family, property, successions, obligations, contracts, etc.), the code also sets forth guidelines applicable to the attorney-client relationship, including, for example, billing practices, withdrawals, and the qualification of an attorney's duty in cases of negligence, fraud or inexperience. In the event that a public servant is unable to compensate an injured party for the damages caused by his or her illegal acts, this code establishes the state's default obligation for the harm.

5. Código Penal del Distrito Federal (CPDF)

This code contains the penalties that are applicable when either false documentary evidence or untruthful testimony is presented. It also provides legal consequences for disclosing

professional secrets, assisting one's opponent, and abandoning one's client without good cause. These penal provisions are rarely applied.

6. Código de Comercio (CDC)

This is the Federal commercial law. The States do not have commercial law codes because the Mexican Constitution prohibits them from legislating commercial affairs.³ However, plaintiffs may bring actions based on the commercial law code in either federal or state court. In either case, the federal code will be applied. The final right of appeal is to the Supreme Court of Justice. Counsel will note that the litigation procedures set forth in the CDC are slightly different than those set forth in other codes. Generally, a cause of action brought under this code will move along more quickly than one brought under the CPCDF. Where the CDC is silent on a point, it is supplemented by the CPCDF.

7. Ley Federal de los Servidores Publicos (LFSP)

This code sets forth the administrative responsibilities, standards of conduct, and potential sanctions applicable to judges, legal secretaries, and *actuarios*. Under this law, public servants are required to annually make a declaration regarding their patrimonial situation (including real property values and dates of acquisition) with *the Registro de la Propiedad and Controloria de la Federación*. In the event that the illegal acts of a public servant do injure a party, then the assets proclaimed in the declaration can be used to satisfy any award of damages.

8. Ley General de Profesiones (LP)

This is the law that regulates lawyers (as well as other professionals). These regulations may be supplemented by the *Código de Etica Profesional*, which applies to all members of the Mexican Bar Association. Membership in said bar association is not, however, mandatory.

3. Article 73 of the Mexican Constitution grants the national Congress the Power to Legislate in matters of Commerce.

9. Foreign Law

Articles 12 through 15 of the CFPC set forth the terms under which foreign law can be introduced in Mexican courts.

10. Other Sources of Law Bearing on Litigation in Mexico

Other sources of law that bear on litigation in Mexico include the *Ley Orgánica del Poder Judicial de la Federación*, the *Ley Orgánica del Poder Judicial del Estado*, the *Ley Orgánica de la Administración Pública Federal*, the *Ley Federal de las Entidades Paraestatales*, and the *Ley Orgánica de los Tribunales del Fuero Común*.

C. Legal Actors in Mexico

1. Judges

Judges are appointed in accordance with the principles of “excellence, objectivity, impartiality, professionalism, and independence.”⁴ As noted above, the manner in which judges are appointed has been changing dramatically. Implicit in this change are less executive control of the process and more awareness of an individual’s objective qualifications for the bench (as measured by performance on a competitive exam). Regulation and vigilance of the bench is accomplished by the *Consejo de la Judicatura Federal* and through the *Ley Federal de los Servidores Públicos*. All judges must be Mexican citizens. In contrast to the United States, there are no elected judges in Mexico.

2. Secretaries

Judges in Mexico are supported by “secretaries” who themselves are lawyers. Articles 61 through 69 of the *Ley Orgánica de los Tribunales de Justicia del Fuero Común del Distrito Federal* establish several secretaries, including “*de acuerdos*” and “*conciliadores*.” While they are not mentioned in the CPCDF, most courts also have an “*actuario*” secretary as well

4. MEX. CONST. art. 100.

as a secretary "*proyectista*." Although there should be no charge for the services of these professionals, experience indicates a small contribution can help expedite the process. Secretaries are regulated under the terms of the *Ley Federal de los Servidores Publicos*.

3. Ministerio Publico

Where an interest or charge of the state (for example, a minor child) is involved, a lawyer from the office of the *Ministerio Publico* will be appointed.⁵

4. Notary Publics

The United States has no true equivalent to this legal actor found in Mexico. Called the "attorney's attorney," Mexican notaries are lawyers with the power to give public faith to facts or events and execute legal documents. Many legal events in Mexico require the involvement of notaries. For example, the creation of a corporation's "*acta constitutiva*" requires a notary. The work product of notaries is carefully preserved in "*protocolos*." Moreover, Article 68 of the CPCDF permits notaries to be substituted for court secretaries under certain circumstances (although this will surely be more expensive than using the secretary). U.S. counsel will note that many Mexican consuls are authorized to serve as a notary.

5. Mexican Lawyers in Private Practice

Mexican lawyers obtain "*cedulas*" after successfully completing five years of law school. There is no bar exam, although a thesis and professional service are required. Unlike a U.S. law license, which permits the holder to practice only in a specific jurisdiction, a *cedula* enables a Mexican lawyer to practice anywhere in the Republic, either at the Federal or State level. While a U.S. attorney can petition to practice pro hac vice in another court, the nature of any permission granted is fundamentally more limited than a Mexican attorney and a blanket right to practice throughout the country. Additionally,

5. See CPCDF art. 48.

after the passage of a certain number of years (typically five), some U.S. states admit attorneys from other states to practice where there is reciprocity of the privilege between two states. Mexican licensing requirements are established by the Secretary of Public Education, not the state bar association as is the case in the United States.

6. Conciliators, Mediators, & Arbitrators

Conciliation is mandatory in most Mexican proceedings. Unlike in the United States, court conciliators are required to be licensed attorneys.⁶ Mediation, on the other hand, has not really taken hold in Mexico. At present, there are no mandatory certification requirements imposed on a mediator-to-be, as is the case in Texas. Arbitration, however, is an essential part of the international dispute resolution process in Mexico. Procedures and regulations for arbitrations are found in a number of codified⁷ and private sector⁸ sources.

7. Gestores

While a *cedula* is required of all people who intend to practice the legal profession, the CPCDF and certain other codes do allow for non-licensed individuals to represent clients in Mexican courts when the represented party has executed a valid power of attorney designating the non-licensed individual as his or her representative. Provided the non-licensed individual did not misrepresent his or her qualifications, this person (sometimes referred to as a *gestor*) can file an answer, call witnesses, and present evidence in connection with a certain range of controversies (for example, promissory notes, evictions, etc.). The services of such individuals are attractive principally because of the lower rate charged. *Gestores* may be required by the court to post a bond.⁹

6. See *Ley Orgánica de los Tribunales de Justicia del Fuero Comun del Distrito Federal* art. 62.

7. For example, Articles 609-36 of the CPCDF, and Articles 1415-63 of the CDC.

8. For example, the International Chamber of Commerce, American Arbitration Association, and the Asociación Mexicana de Mediación y Arbitraje Comercial, A.C.

9. See CPCDF art 51.

8. Pasantes

Pasantes are law students who are clerking with licensed attorneys. A *pasante* may be expressly designated in pleadings as one of several legal representatives for a party, thereby enabling the *pasante* to represent that party in court. When an attorney is too busy with another matter, a *pasante* may be sent to the court to manage the affair. Unlike the situation in the United States, there is no formal student bar card sponsorship procedure in Mexico, and the unauthorized practice of law is not actively sanctioned.

9. Foreign Lawyers

Foreign lawyers can currently practice as Foreign Legal Consultants in Mexico. Mexican lawyers may do the same in the United States. To become licensed in Mexico, a U.S. lawyer generally must start at ground zero and complete five years of law school, write a thesis, and perform the social service. Mexican attorneys who wish to become licensed in the United States, however, may sit for either the New York or California bar exam after completing only a one-year LL.M. program approved by the American Bar Association. The same opportunity exists in Texas, except that the Mexican attorney must have been licensed in Mexico for three years.

III. LITIGATION IN MEXICO

A. *Overview of Stages in an "Ordinary" Mexican Proceeding in the First Instance*

1. Medios Preparatorios

These are acts intended to clarify an issue or preserve a right in anticipation of a subsequent suit.

2. Expositiva

Petition
Notification
Answer
Providencia Precautoria

3. Previa

“Pre-trial” conference and mandatory conciliation

4. Probotoria y Alegatos

Evidentiary hearings and arguments on the merits

5. Resolutiva

Citacion para Sentencia
Sentence awarding rights

6. Impugnacion

Appeal / (*Amparo*)

7. Ejecucion

Incidente de Costas, Incidente de Liquidacion
Execution of sentence

B. Pre-Trial (Previa)

1. Informal Discovery

Prior to filing suit in the United States, parties conduct “informal” discovery and fact-finding. For example, a potential plaintiff may inquire about complaints against the potential defendant made to the Better Business Bureau or an attorney general’s office. Similarly, the potential plaintiff may check

courthouse records to learn about any previous litigation involving the potential defendant. As for documentary information regarding deeds, property taxes, judgments, incorporations, Uniform Commercial Code filings, births, marriages, deaths, probate, criminal history and the like, U.S. court houses and electronic data bases contain a wealth of information that is readily available to the general public. On a more sophisticated level, a party may raise a request for unpublished federal government material under the Freedom of Information Act.

Gathering litigation intelligence can be quite difficult in Mexico, however. The files from legal proceedings are not public record, as is generally the case in the United States. Rather, the official file is made available only to the parties and, on special motion, to a victim. For parties, obtaining certified copies of the file requires nothing less than a judicial decree.¹⁰ Granted, certain basic information regarding *embargoes* or incorporations is available through the Public Registry and other archives, but the process for obtaining such records is not an easy one. Electronic databases (run by either the state or the private sector) are few in number and rarely, if ever, contain detailed public records.¹¹ As for obtaining previously unpublished information from the government, there is no mechanism like the Freedom of Information Act available to the general citizenry in Mexico. Therefore, U.S. counsel's best opportunity for gaining pre-trial information regarding an opponent may be by contracting with a company which specializes in background checks.

2. Preparatory Measures (*Medios Preparatorios*)

These acts, accomplished before the formal initiation of a lawsuit, are governed by Articles 193 through 200 of the CPCDF. Oftentimes, these measures will inform the determination of whether to file suit in the first place, and if so, against whom. In a written request to the court, the plaintiff must express the reason why the proposed action should be taken. The defendant must receive notice of the request within three days of its

10. See CPCDF art. 71.

11. However, Infosel, Universidad Nacional Autonoma de Mexico, and Secretaria de Comercio y Fomento Industrial do provide a good offering of statutes, articles, newspapers, journals, investment assistance, etc.

submission to the court. The judge has full discretion to grant requests, taking into consideration the urgency of the matter.

The procedural rules governing this type of pre-trial action are those applicable to testimonial proof during a regular trial. Through this type of action it is possible to, *inter alia*:

- a. Clarify some fact relative to the personality or nature of a party's right to possession and control of an item by means of sworn statement from the defendant;
- b. Provide for the exhibition of titles, contracts, wills, and accounting information in matters pertaining to evictions, business dealings, and probate;
- c. Provide for the exhibition of archived documents, or those located in the *Protocolos* of a notary, provided the exhibition is made at the official place of business of the archive or notary, and that the original is not removed from same;
- d. Provide for the exhibition of an item of personal property that will be the subject of a real action;
- e. Provide for the examination of a witness of advanced age, or who may be in danger of losing his or her life;
- f. Provide for the examination of witnesses whose testimony may later be unavailable;
- g. Provide for the examination of a witness for the purpose of proving some exception;
- h. Provide for the examination of witnesses or the rendition of other declarations required by a foreign legal proceeding.

If, upon request, a party in possession of a document or personal property fails to show the item or otherwise destroys or conceals the item, the court can order that party to be responsible for any resulting damages suffered by the party who made the request. The party refusing to cooperate may also incur criminal responsibility.

If a party alleges certain reasons for not exhibiting an item, the judge will hear the matter incidentally. There is no recourse available to the parties in the event the judge grants the request. However, a denied request is subject to appeal in both effects, provided the sentence from the trial is appealable. Such appeal

should be raised immediately, lest the complaining party lose the right. Items or facts established at this point are subsequently admissible at trial, provided they are properly introduced later.

C. Filing Suit (Expositiva)

1. Competence

Article 156 of the CPCDF sets forth the different circumstances under which Mexican courts are competent to hear a matter. Specific examples of competence include:

- a.* In a contract dispute, the court that pertains to the designated place of performance;
- b.* In a real property dispute, the court that pertains to the location of the real property;
- c.* In a personal property dispute, the court that pertains to the domicile of the defendant;
- d.* In an estate action, the court that pertains to the last domicile of the decedent or the location of property;
- e.* In a creditor-debtor dispute, the court that pertains to the domicile of the debtor;
- f.* In an action involving a minor or an incompetent, the court that pertains to the residence of the minors or the incompetents;
- g.* In an action to nullify a marriage, the court that pertains to the domicile of the marital home;
- h.* In a divorce action, the court that pertains to the domicile of the marital home (or, if the home has been abandoned, the court that pertains to the domicile of the abandoned party).

2. Jurisdiction and Mexican Courts

If a Mexican court expressly recognizes another court's jurisdiction over a matter, it is precluded from asserting

jurisdiction over the same matter.¹² A Mexican court is not deemed to have forfeited its ability to claim jurisdiction by merely responding to the judicial request of a foreign court.¹³

3. Jurisdiction and Foreign Courts

A Mexican court can recognize the jurisdiction of a foreign court under certain circumstances, including, *inter alia*: 1) upholding forum selection clauses;¹⁴ and, 2) cases where a foreign court took jurisdiction of a matter solely to avoid a denial of justice due to the lack of a competent foreign court.¹⁵ Mexican law does not, however, permit the filing of an action claiming *forum non conveniens*, as is possible under U.S. law.

4. Exclusive Mexican Jurisdiction

Under no circumstances can a foreign court exercise jurisdiction over any matter or issue exclusively reserved to the Mexican state as specified in Article 568 of the CFPC. These issues include:

- a. Lands and waters located within Mexico's national territory, including its subsoil, air space, the territorial sea and the continental shelf, irrespective of the realty or concession derived rights of use and enjoyment, exploration, exploitation, and leasing;
- b. Marine resources within Mexico's 200 nautical mile exclusive economic zone, or the Federal Law of the Sea;
- c. Acts of authority pertaining to the internal regime of the state, dependencies of the federation, or federate entities;
- d. The internal regulation of Mexican embassies and consulates abroad, as well as their official actions; and
- e. All other cases provided for by law.

12. *See* CPCDF art. 147.

13. *See id.*

14. *See* CFPC art. 566.

15. *See id.* art. 566.

5. Mexico's More Restrictive Approach to In Personam Jurisdiction

While Mexican law does provide for in personam jurisdiction, an individual's mere presence in the country, without more, is not held to be a sufficient basis for a court's assertion of jurisdiction. In addition to physical presence, Mexican courts require evidence of other connections such as doing business in the country or the commission of a tort in the country.

6. Requisites for a Petition (*Demanda*)

The plaintiff's petition should be written in accordance with the requirements set forth in Article 255 of the CPCDF. The usual format utilized contains the following information:

- a. *Preamble (Preambulo)*: The identification of plaintiff and defendant and their domicile (for purposes of notification); the object of the claim; the *via procesal* of the suit (whether ordinary or executive); and any "*accesorios*" (claims for damages, interests, etc.).
- b. *Factual Background (Exposicion de Hechos)*: A succinct, clear and precise narrative of the facts upon which plaintiff's petition is founded. Sufficient detail should be set forth so that the defendant can prepare an answer and defense.
- c. *Applicable Law (Invocacion de Derecho)*: Identification of the class of action and citations to the applicable legal precepts and juridical principles.
- d. *Prayer (Puntos Petitorios)*: A condensed summary of the type and value of relief sought.

Accompanying the petition, in accordance with Articles 95 through 98 of the CFPC, should be:

- a. Information substantiating the power that accredits the personality of any person who will appear in court in the name and on behalf of the petitioner;
- b. Information substantiating the power by which a corporation has designated its legal representative (this may be documented in the articles of incorporation);

- c. A copy of the petition to be served on the opposing party, together with any documents which support either the petitioner's legal position and reasoning or factual claims. These documents can be on plain paper or photocopies, provided they are legible;
- d. The location of the original documents, if such documents are not in petitioner's possession. If the document is public in nature, petitioner can independently obtain an authorized copy. If an authorized copy is unavailable, a simple copy will suffice for filing purposes, but will need to be perfected for trial purposes.

7. Sequestration of Assets (*Providencia Precautoria*)

A plaintiff's petition can request that the court sequester the goods of an intended defendant when there is reason to believe that the defendant will either absent him or herself from the proceeding in bad faith, or conceal property which will serve as the basis for a subsequent action.¹⁶ While this request is filed with the petition, the court will usually not act on it until the defendant has answered. The plaintiff may or may not be required to post a bond. In all cases, however, the party that requests the sequestration remains liable for any damages that may result from the action.¹⁷ As is the case in the United States, Mexican courts are careful in awarding this type of relief.

8. Jury Trials (*Jurado Popular*)

U.S. counsel should note that a request for a jury trial is not part of an original petition to a Mexican court. While Mexican law provides for the use of seven member juries, they are not used in practice. Regulations pertaining to the selection of jurors and the operation of juries are set forth at Title 6, Chapter 1, of the *Ley Orgánica de los Tribunales de Justicia del Fuero Comun del Distrito Federal*, as well as at Article 20 of the Mexican Constitution.

16. See CPCDF art. 235.

17. See *id.* art. 247.

9. Briefs

Mexican petitions and answers are somewhat of a cross between a U.S. petition and brief. On the one hand it is succinct and clear in its allegations and requests. On the other hand, it also lays out—in complete detail—the party's arguments and underlying reasoning. Thus, in reality, a Mexican plaintiff's petition represents one of the best opportunities for that party to argue his or her case. While there does exist a specific procedural moment for making oral arguments, as shall be discussed later, it is not commonly used in practice. Mexican attorneys are not in the habit of preparing and presenting separate "case briefs" on new or highly controverted issues, as is the practice in the United States.

10. Place of Filing & Cost of Filing

Petitions are filed with the *Oficialia de Partes Comun*, where they are randomly assigned to a court. Cases are not assigned to the courts through an oral docket call held in a presiding chamber as in the United States. In fact, there is no presiding chamber in Mexico.

Public policy in Mexico dictates that the administration of justice be free. Consequently, there are no filing fees such as those to which U.S. lawyers are accustomed.

11. Oral Petitions

While the dictates of normal practice require written petitions, it is possible in Mexico to make an oral petition under certain conditions. Such petitions are appropriate, where, for example, the amount of money involved is small, or where there is an imminent possibility of loss of life or liberty in an *Amparo* claim. In the latter case, the oral request can even be made via phone. Where an oral petition is allowed, it should be made in "viva voz." This feature of Mexican law operates to the clear benefit of those individuals who may not know how to read or write, and who otherwise have been unable to avail themselves of counsel.

12. Potential Judicial Responses to Plaintiff's Petition

There are three potential judicial responses to a plaintiff's petition: accept, conform, or reject.

a. Accept

A petition will be accepted if the pleading complies with the requirements of Articles 95, 96 and 255 of the CPCDF.

b. Conform (Prevencion)

Article 257 of the CPCDF gives judges the authority and discretion to point out deficiencies or errors in plaintiff's pleading for correction. Under this Article, the judge can verbally instruct a party to clarify a deficient pleading one time.

c. Reject

A judge can refuse to accept pleadings if they do not comply with the requirements set forth in Articles 95, 96, and 255 of the CPCDF. The fact that a copy of a document was omitted from a pleading is not sufficient grounds for rejecting a petition that is otherwise presented in a timely fashion. If a copy of a document is missing, the judge, consistent with his or her Article 257 *prevencion* power, will give the filing party three days within which to correct the matter. If it is not corrected during that time, the judge will have the court secretary procure the document at the expense of the party who filed the incomplete pleading.¹⁸ There is an exception to the three day grace period for petitions seeking liquidations, which can not be admitted without the corresponding copies. Plaintiffs can challenge a judge's decision to reject a petition via the "*Recurso de Queja*," established by Article 723 of the CPCDF.

18. See CPCDF art. 103.

13. Legal Effects of Presenting a Pleading

The legal effects of presenting a pleading are: 1) the tolling of the statute of limitations, 2) the signaling of the start of the instance, and 3) the determination of the value of the controversy.¹⁹

14. Withdrawal of Petition (*Desistimiento de la Demanda*)

A plaintiff can withdraw a suit pursuant to a "*Desistamineto de Demanda*" up until the moment the opposing side has been served with process. This withdrawal can be accomplished without leave of opposing counsel, and does not prejudice the plaintiff's ability to refile the suit. The effect of the withdrawal is a return to the state of affairs that existed prior to the filing of the petition.

15. Service of Process and Other Notifications (*Notificaciones*)

This aspect of litigation is of fundamental importance in Mexico. While there do exist alternative means of service in accordance with different circumstances, the procedures and rules for accomplishing service of process tend to be more rigid and narrow than in the United States. Rules governing service of process in Mexico are generally covered in Articles 110 through 128 of the CPCDF.

16. Forms of Service

a. Personal Notice

Personal notice is accomplished by the *actuario* attached to each court, and is required when the document to be served is the first pleading of a proceeding. U.S. counsel should note that neither constables nor private process servers are used for serving

19. See *id.* art. 258.

process in Mexico. Service of process can be made to directly to the defendant or, if known, to the defendant's legal representative. If the *notificador* does not encounter the party required, he or she can then leave notice by way of *cedula*.

b. Cedula

When the defendant cannot be located personally, the *notificador* can leave a *cedula* with a relative, employee, *domestico*, or any other person who lives in that domicile, provided that the *notificador* has first confirmed that the defendant does in fact live there. In addition to the *cedula*, the *notificador* will also leave a simple copy of the suit and all other documents submitted by the plaintiff. After having tried at the domicile of the defendant, the *notificador* can try to locate and serve the defendant at his or her place of work, without need of prior judicial order.²⁰

c. Edicts

Notification can be accomplished by edicts when there are unknown parties involved, or where there are parties with uncertain domiciles. Application must be made and supported by a police *informe* regarding their lack of knowledge regarding the sought after party's whereabouts. Edicts are published in the *Boletin Judicial* as well as a local paper designated by the judge on three separate occasions. This form of notice gives the cited party no less than fifteen and no more than sixty days to respond. When the edict concerns real property, the notification procedure to be followed is that set forth in Article 122 of the CPCDF. In reality, courts are reluctant to authorize this type of notification.

d. Certified Mail

Certified mail can be used to notify non-party witnesses, experts, and otherwise disinterested third parties. This method is rarely used in practice.

20. See CPCDF art. 118.

e. Telegraph

Telegraphs can be used to notify non-party witnesses, experts, and otherwise disinterested third parties. This method of notice is also rarely used in practice.

17. International Notifications

The most appropriate mechanism for accomplishing cross-border service of process is the Inter-American Convention on Letters Rogatory (IACLR).²¹ Both Mexico and the United States are parties to the IACLR. Article 10 of the IACLR requires service to be made in accordance with the internal laws of the state of destination, and Mexico consistently demands that inbound international service of process requests be managed in strict conformity with the requirements of its law. This position has generated some conflict in the past, as Mexico's procedures for service of process are more limited than those used in the United States, and what may qualify as valid service under U.S. law will be struck down in Mexico. Compounding matters, U.S. courts have held that the language of the IACLR is precatory in that it lacks an express statement of preemptive intent.²² Accordingly, U.S. courts view the procedure outlined in the IACLR merely as an alternative to those procedures available under U.S. law. In light of these discordant perspectives, U.S. counsel's best approach is to accomplish international service of process in perfect conformity with Mexican law, or run the risk of having the service nullified.

18. Exequatur (Incidente de Homologacion)

U.S. counsel should also note that, in Mexico, letters rogatory are appropriate for accomplishing procedural acts of a merely formal nature (i.e. service of process, issuance of subpoenas, notice

21. Jan. 30, 1975, U.S. Treaty Doc. No. 98-27, 14 I.L.M. 339.

22. See *Pizzabioche v. Vinelli*, 772 F. Supp. 1245, 1249 (M.D. Fla. 1991); *Laino v. Cuprum, S.A. de C.V.*, 663 N.Y.S.2d 275 (N.Y. App. Div. 1997); *Kreimerman v. Casa VeerKamp, S.A. de C.V.*, 22 F.3d 634, 639 (5th Cir. 1994); *Coca-Cola Foods v. Empresa Comercial Internacional de Frutas, S.A.*, 941 F. Supp. 1175 (11th Cir. 1996); *Black v. Bryant*, 905 F. Supp. 1046 (M.D. Fla. 1995); *Voorhees v. Cilcorp, Inc.*, 837 F. Supp. 395, 399 (M.D. Fla. 1993).

of intent to take deposition, etc.). Letters rogatory are not, by themselves, appropriate for accomplishing the co-active enforcement of specific acts. These types of acts must be resolved, instead, through a formal procedure known as an "*Incidente de Homologacion*" (the common law term for same is "Exequator").

19. Presumptions Regarding Service

Regular mail is not used for service in Mexico as it is in the United States, and there is no presumption regarding receipt that applies to a letter sent with proper postage in duplicate via both regular and certified (return receipt requested) mail. Therefore, Mexican counsel is particularly careful to avoid, as a general proposition, any procedural action that is not squarely recorded, documented, or otherwise memorialized in the court's file.

20. Cost of Service

Again, consistent with Mexico's public policy of making the administration of justice free, there is no charge for service of process. The reality of the situation is different however. Usually attorneys contribute some small cash to the cover the transportation costs of the *notificadores*. Also, when there is a backlog of documents to be served, an additional cash contribution may help expedite the service of one's document, be it an original petition or otherwise. There is no option of using a private process server, as is the case in the United States.

21. Time Period for Accomplishing Notifications

Notifications must be realized within a three day time period from the time the petition or document is delivered to the *notificadores*.

22. Legal Effect of Properly Conducted Service of Process (CPCDF art. 259)

Properly realized service of process results in two distinct legal outcomes. First, it obligates the defendant to proceed with the action before the instant judge. Second, service of process

operates as the starting point for calculations regarding the accumulation of interest on pecuniary obligations.

23. Correction

Service of process is considered to be an essential formality of Mexican procedure. According to Article 74 of the CPCDF, any proceeding that does not provide for an essential formality is null. That said, however, Article 271 empowers a judge to order the correction of an incorrectly realized notification where a default has resulted.

24. Challenges to Service of Process

An improperly realized service of process can be challenged in the following ways:

- a. *Incidente de Nulidad*
- b. *Apelacion Extraordinaria*
- c. *Amparo Indirecto*

25. Waiver of Imperfect Notice (CPCDF art. 76)

Even though notice may not have been accomplished in strict conformity with the law, if the party who was entitled to proper notice nonetheless makes an appearance on the scheduled day, the proceeding will continue as if the notice had been legitimately accomplished.

26. Subsequent Notifications

Unlike the situation in the United States, where documents filed subsequent to the petition can be delivered to opposing counsel by hand, fax, mail (registered or certified), courier, or any other manner as the court in its discretion may direct, notice of post-petition pleadings in Mexico must continue to be by way of the court and its secretary. The secretary will post notice of the new filing on the announcement board at the courthouse and publish notice in the daily *Boletin Judicial*. Mexican counsel does not have the freedom to notify the opposing side directly in the

ways available to an U.S. attorney. Instead, that attorney will have to assign somebody from his or her office to check both the announcement board and the *Boletín* on a daily basis.

27. Answer (*La Contestación*)

A defendant's answer must refer to each of the facts alleged by the plaintiff, confessing or denying each. No general denials are permitted in Mexico, as is the case in Texas. If the defendant is silent or evasive in answering, the judge can deem the fact confessed or admitted.²³ As is the case with defects in plaintiff's petition, Article 272-D of the CPCDF, authorizes the judge to clarify and correct the error or omission. In all cases a defendant's answer is due within nine days from the moment service was accomplished.²⁴ This period is much shorter than that allowed by state or federal law in the United States.

There are several different postures a Mexican defendant can take by way of response, including:

a. *Allanamiento*

In taking this position, the defendant accepts plaintiff's claims, and commits to resolve the dispute. If the defendant accepts all of the issues raised in plaintiff's petition, it is possible to "execute the citation for issuing a sentence."²⁵ If the conflict involves a debtor-creditor issue, Article 404 of the CPCDF grants a grace period. Moreover, pursuant to Article 508 of the CPCDF, the judge can sequester goods as an assurance.

b. *Answer / Exception*

The defendant may respond with an answer that raises certain affirmative defenses or exceptions including:

Competencia: The court is not competent to hear a matter.

23. See CPCDF art. 266.

24. See *id.* art. 256.

25. *Id.* art. 274.

Litispendencia and *Conexidad*: The same matter is already pending before another court. When this defense is raised the plaintiff will be able to put on any necessary proofs.²⁶

Res Judicata: The matter has already been heard and settled by way of definitive sentence.

A defendant must raise these defensive exceptions at the time of his or her answer, and not after.²⁷ When a defendant's answer raises any of these exceptions (save that of competence), the judge shall hold a hearing on the matter within three days from the time of the answer.²⁸ Challenges to a court's competency shall be heard in the way addressed below in Part III(C)(34).

c. Answer / Counterclaim (Reconvenccion)

Defendant's answer may also be in the form of a counterclaim against the plaintiff, procedurally known as "*Reconvenccion*." If the defendant is to avail him or herself of this right, the counterclaim must be asserted at the time of the answer, and not afterwards. By way of contrast, if a Texas attorney fails to raise a counterclaim at the moment of answer, he or she will not be subsequently precluded from raising one. Also, Mexican courts are very formalistic about requiring a defendant to first respond to the allegations in the way specified by Article 266 of the CPCDF, before raising a counterclaim. If the answer and counterclaim do not follow this order, they may not be allowed. The plaintiff must answer defendant's counterclaim within six days. The CPCDF does not contemplate a supplemental answer, as is the case in U.S. courts where a defendant is permitted to make additional exceptions, denials, and allegations in response to those alleged by plaintiff.

28. Plea in Abatement

Nothing in the CPCDF expressly addresses a defensive pleading that does not result in the outright dismissal of an action but suspends further proceedings until such time as some issue is

26. *See id.* art. 260.

27. *See id.*

28. *See id.* art 272-A.

clarified or some obstacle to trial is removed (a U.S. Plea in Abatement). Dilatory responses are possible in Mexico, but they do not interrupt a proceeding.²⁹

29. Cross-Claims

Nothing in the CPCDF expressly addresses what a Texas attorney calls a cross-claim, whereby the defendant is able to sue a co-party in a matter arising out of the transaction or occurrence that is the subject matter of either the original action or a counterclaim therein.

30. Third-Party Practice

Nothing in the CPCDF expressly authorizes a defendant to engage in third party practice, whereby the defendant, acting as a third party plaintiff, is able to sue a person that is not a party to the action or who is liable to him.

31. Joinder

The CPCDF does note that when there are various actions regarding a singular subject brought against one person, they should be joined together into one petition.³⁰ Regarding this rule, it is essential that the various actions not be contradictory in the relief they seek. Where permitted, Mexican courts liberally permit joinder. Nothing in the CPCDF, however, expressly authorizes a judge to sua sponte join a person where that person opposes being joined, even if that person's absence will impede obtaining complete relief for the parties.

32. Intervention

Any interested party can intervene in a judicial proceeding in Mexico, as is the case in the United States.³¹

29. *See id.* art. 262.

30. *See id.* art. 31.

31. *See id.* art. 1.

33. Class Actions

Class action suits, as they are conceived, defined, and carried out in the United States, are not realized in Mexico.

34. Challenging Competence

In Mexico, a challenge to the court's competency over a matter must be raised at the time of the answer, and not afterwards.³² A Mexican court's competence is determined by, and can be challenged in, four different aspects:³³

Subject Matter: The court must be competent to hear and rule on matters involving the subject matter presented by the controversy.

Amount in Controversy: The amount in controversy must be more than the equivalent of 182 times the average daily minimum wage for Mexico City.³⁴ U.S. counsel will note that, unlike the situation in courts where different threshold amounts are required by each court, there is only one sectioning point used in Mexico for evaluating jurisdiction in relation to amount in controversy. The convenience and simplicity of this approach is self-evident.

The Grade of Court: Jurisdiction must be proper at the federal or state level.

Territory: The jurisdiction of a particular court must be valid in relation to the location of the event or thing giving rise to the action.

Such challenges are raised in one of two ways:

Inhibitoria: If a party thinks that a tribunal is not competent to hear a matter, that party can invoke the involvement of the court he or she thinks should have competence within nine days from the time of service. The doubtful party will ask the latter court to request the former judge to forward all pleadings already

32. See *id.* art. 260.

33. See *id.* art. 144.

34. See *id.* art. 2. (CPCDF, *Titulo Especial*, Art. 2)

submitted, so that the latter can make a decision on the issue of competence.

Declinatoria: In this action, the party challenging a court's competence will ask that judge to abstain from the matter and that any pleadings be submitted to that court which the challenging party contends is competence to the matter. The *Declinatoria* proceeding approximates the basic effect of a "special appearance" in Texas for the purpose of objecting to a court's jurisdiction.

The raising of such a challenge does not interrupt or suspend the overall proceeding.³⁵ If a challenge to a court's competence was raised in bad faith, the promoting party can be sanctioned.³⁶

35. Removal

Even though Mexico is a federal republic, litigants do not have the ability to "remove" a case from state to federal court under all the circumstances possible in the United States. As indicated above, a Mexican state court will properly decline to exercise jurisdiction over a matter that constitutes a Mexican federal question when that state court is not legally competent to consider matters pertaining to the subject matter of the dispute. Thus, to the extent the federal court will ultimately hear such a matter, there is a "removal." However, as was the case on the issue of changing venue, Mexico's laws do not provide for "removal" in response to the existence and operation of a prejudice that may work to a defendant's detriment (such as a diversity based removal in the United States).

This said, U.S. counsel will note that the substance of certain Mexican federal codes can be applied and interpreted by both federal and state courts (for example, the *Código de Comercio* or the law applicable to the protection of intellectual property). In this situation the plaintiff must elect which system to enter—either the federal or state. Once this election is made, there is no chance to switch back to the other jurisdiction. Experience indicates that when this is the case, plaintiffs opt for state courts. Federal courts do not object to this situation as this enables them

35. *See id.* art. 169.

36. *See id.* art 167.

to remain more focused on *Amparos*. In other areas, however, federal codes may specifically require that a matter be heard in federal court (for example, environmental issues or anti-trust matters). Counsel would be well advised to always check, on a case by case basis, the exact scope of a particular code's applicability.

36. Forum Non Conveniens

When there is a more appropriate forum and the balance of interests are appropriately distributed, a U.S. defendant may seek to have an action dismissed on the basis of forum non conveniens by arguing that a non-U.S. forum provides an adequate and available alternative for resolving the dispute. While Mexican courts are legislatively able to recognize that a court in foreign jurisdiction may be better situated to hear a matter, there is no formal motion such as the forum non conveniens.

37. Challenging Venue

A party in Mexico can not formally raise the issue of "venue," as attorneys in Texas can do by claiming that: 1) the county where the action is pending is not a proper county; 2) mandatory venue lies elsewhere as established by statute; or 3) so great a prejudice exists against him or her that a fair and impartial trial cannot be obtained in the original county. With respect to the first two points, the closest that parties in Mexico can get is to argue that the court lack territorial competence. Regarding the last point, there is no need for a similar provision in the CPCDF as judges, judicial secretaries, witnesses, experts, etcetera, are required to be impartial by law.

38. Recusal

Mexican judges and secretaries are impeded from hearing or being involved with cases where, inter alia: 1) they have either a direct or indirect interest (or where their spouse or close relatives have an interest); 2) they have some familial relationship with an attorney for one of the parties; 3) they have made promises, threats, or otherwise manifested their hatred for one of the parties; and 4) they or their family members have accepted gifts,

donations, or services from one of the parties.³⁷ When this is the case, the Mexican judge or secretary is obligated to excuse him or herself from the case.³⁸

If the Mexican judge or secretary fails to excuse him or herself, the parties can proceed with a recusal action.³⁹ This action can be brought from the time of the answer up until ten days before the time of the first hearing. If a judge is recused, another will be substituted, and everything ordered by the recused judge up until the moment of the new judge's substitution will be nullified.⁴⁰ A pending recusal action does not serve to break or otherwise suspend legal proceedings. Any determination upholding a request for recusal can be subsequently challenged by an appeal in the *efecto devolutivo*.⁴¹

39. Default (*Rebeldia*)

If after the time period permitted by law the defendant has not answered, Mexican courts will apply the procedure applicable to default judgments (*Juicio de Rebeldia*), and the judge will presume all unanswered facts raised by the petition to be confessed. However, the facts will be presumed to be denied where the matter pertains to familial relations or the civil status of individuals, and when notification was accomplished by edict.⁴²

40. Post-Notification Dismissal of Action with Prejudice (*Desistimiento de la Accion*)

A plaintiff may dismiss his or her entire action at any point, with or without the consent of the defendant. If this dismissal is accomplished after service of process, the plaintiff may be obligated to pay any damages suffered by defendant as a result of the suit.⁴³ The effect of this renunciation is total, and a party cannot re-file the claim. Mexican procedure is slightly different than that of the United States on this point. In the United States,

37. See *id.* art. 170.

38. See *id.* art. 171.

39. See *id.* art. 172.

40. See *id.* art. 180.

41. See *id.* art. 192.

42. See *id.* art. 271.

43. See *id.* art. 34.

a plaintiff can dismiss his or her petition at any time up to the introduction of plaintiff's rebuttal evidence without prejudicing the right of an adverse party to be heard on a pending claim. Significantly, the U.S. litigant can dismiss with or without prejudice to re-file the claim, whereas the Mexican litigant only has the ability to dismiss without prejudice where the opponent has not yet been served with process.

41. Post-Notification Withdrawal from Instance (*Desistimiento de la Instancia*)

When a defendant has already been served, a plaintiff can only withdraw his or her petition with the leave of opposing counsel. As is the case with the *Desistimiento de la Instancia*, the plaintiff may be obligated to pay any damages suffered by defendant as a result of the suit.⁴⁴

42. Alternative Claims

In Mexico, alternative claims can be made in a single petition or an answer, provided they are not contradictory.⁴⁵

43. Amending Pleadings

Parties in Mexico do not have the same freedom to amend pleadings as parties in the United States. This is partly due to the procedural disposition which encourages parties to present all their documentation and other information up front, in the spirit of laying one's cards on the table in good faith. By this means, the system tries to mitigate the use of surprise tactics in litigation. A very clear articulation of this policy is found at Article 98 of the CPCDF, which prohibits the admission of other documents submitted by either side after the filing of the petition and answer. Article 34 of the CPCDF echoes this rule by establishing that neither an admitted petition nor an answer can be altered or modified, except in the way provided by law. The implication of this rule is that counsel must be very careful in preparing and presenting petitions and answers in Mexico. If a particular angle,

44. *See id.* art. 34.

45. *See id.* art. 31.

strategy, or remedy is overlooked early on, it will be very difficult to recover it later.

The exception to the foregoing concerns what are called "*hechos supervenientes*." These are documents which: 1) are dated after the time of the original petition and answer; 2) counsel did not know existed until after the time of the original petition and answer; and 3) counsel could not obtain previously for reasons which can not be attributed to counsel's negligence.

The restriction on amendments is clearly unlike the situation in the United States where petitions and answers can be amended with relative ease (even to the point of pleading new matter so as to constitute an additional claim or defense). For example, in the United States amendments are permitted up until seven days before trial (after which time they can still be done, but only with leave of the judge) and even during trial provided the change does not operate as a surprise or cause an unfair prejudice to the opposing side.

44. Citing Authority

In their initial pleadings, parties will present not only the facts and the general theories of their cases, but also specific points of supporting statutory law and jurisprudence. The statutory citations will be extracted from Mexico's federal and state codes. Both Mexican and U.S. counsel should be careful to investigate and rely on not just the substantive content of statutes as they appear in the foundational legislation, but also the corresponding enacting *reglamentos*. Sometimes it is the case in Mexico that *reglamentos* are issued only after a statute has been on the books for years. For example, the corresponding *reglamentos* for the Foreign Investment Act of 1972 were not published until 1989. Subsequently, the Foreign Investment Act of 1972 was replaced by the Foreign Investment Law of 1993. As the latter body of law was passed without its enacting *reglamentos*, the 1993 law had to rely on the old *reglamentos*, thus creating even further confusion in terms of citing statutory authority. *Reglamentos* (as well as laws) are regularly published in the *Diario Oficial*, and both Mexican and U.S. lawyers need to stay abreast of these legislative developments as they occur. To this end, there are Mexican lawyers who daily track the laws, decrees and other legislative news in the *Diario Oficial*,

meticulously noting the relevant changes and later implications in a master database of Mexican laws.

Jurisprudence in support of a party's case is also always cited. As jurisprudence is created only after five consecutive majority decisions on a specific issue, lawyers in Mexico usually cite to each of the five cases constituting the jurisprudence, as well as the *jurisprudencia* in its own right. Article 395 of the CPCDF specifies that if this type of authority is presented, the judge can demand the item's presentation. Mexican lawyers, unlike their Texas counterparts, do not have an express obligation to indicate to the judge authority known to be adverse to their client's interests.

Lastly, "educators" created by the Supreme Court, federal *Circuitos*, and the state level *Tribunales Superiores* are persuasive, but not binding. Although published, these are not widely circulated.

45. Translation Requirements

All proceedings must be conducted in Spanish. Documents written in foreign languages must be translated into Spanish.⁴⁶

46. Drafting Requirements

Facts recited in a petition or answer should be clearly numbered.⁴⁷ All dates and numbers must be written out, and abbreviations shall not be used.⁴⁸

47. Pre-Trial Conference and Conciliation (*Audencia Previa y de Conciliacion*)

The judge must set a time for this hearing within ten days from the time of the answer to the petition or counterclaim. The judge may or may not participate in this hearing (the court's secretary can give faith to the proceeding in the judge's absence). The purpose of this hearing is for the parties to try to find a solution to the dispute and thereby avoid litigation. Unlike the

46. *See id.* art. 56.

47. *See id.* art. 255.

48. *See id.* art. 57.

situation in the United States where parties are not always required to try to reach an out of court settlement, conciliation is mandatory in Mexico. Mexican courts do not, however, order cases to mediation at this point in a proceeding, as often happens in the United States. If a party in Mexico does not appear as required, the court is authorized to issue a disciplinary fine. If an agreement is reached through this hearing, the judge's approval of the settlement will give it the force and effect of a binding judgment. Any resolution dictated by a Mexican judge at this phase is appealable in *efecto devolutivo*.⁴⁹ One interesting point of distinction concerns the results achieved by Mexican conciliation on the one hand and U.S. mediation on the other. Subjective estimates by Mexican practitioners put the rate of settlement in the vicinity of one percent. In contrast, statistics compiled by U.S. mediation groups put the settlement success rate at anywhere between fifty and eighty percent, depending on the mediation group or the individual mediator.

Pre-trial conferences in Texas, by way of contrast, are used for purposes other than just trying to reach a settlement. At these conferences, the court will consider all pending dilatory pleas, motions and exceptions, set up a discovery schedule, and seek to establish stipulations as to facts and law.

48. Motions in Limine

Pre-trial conferences in the United States are frequently the time where a party will try to prevent certain evidence from entering the trial on the grounds that it was illegally obtained or is too prejudicial. The vehicle for accomplishing this is the motion in limine. There being no real "trial" in Mexico (rather, a series of conciliation and fact gathering hearings), such motions are neither used nor necessary.

On the issue of prejudice, the law presumes that the judge is sufficiently impartial so as to not be swayed by the presentation of potentially inflammatory items of evidence. Moreover, there is no need to be concerned about the entry of extraneous information during hearings because judges in Mexico are required to reject proofs that do not conform to the facts alleged in the pleadings previously admitted by the court.

49. See *id.* art. 272-F.

49. Summary Judgment

Where the issues in a case are purely legal, as opposed to factual, the court can set the matter for the *Audencia de Alegatos* hearing. Said hearing can be accomplished through written means.⁵⁰ The guidance offered by the CPCDF on this type of proceeding is substantially less than that offered by Texas Rules of Civil Procedure. There is no requirement in Mexico, as in Texas, that a motion stating the specific grounds for summary judgment be filed and served twenty-one days before the hearing. Moreover, in Texas a motion for summary judgment can be heard even if there remains a genuine issue of material fact pertaining to the amount of damages. Mexican parties are also not required to claim that they are entitled to judgment as a matter of law in order to have their case submitted to a summary judgment proceeding.

50. Declaratory Judgments (*Sentencia Declarativa*)

Both U.S. and Mexican attorneys can ask the court for a declaratory judgment to settle some issue as to the parties' rights or status.

51. Guardian Ad Litem

Mexican courts do not appoint private sector attorneys to serve as Ad Litem as is the case in the United States. Because the intended beneficiaries of Ad Litem appointments are considered to be under the protection of the State, Mexican courts charge the *Ministerio Publico* with the responsibility of representing such interests where circumstances so require.

52. Masters in Chancery

Texas courts may, in exceptional cases and for good cause, appoint a Master in Chancery to investigate and report on particular issues, thereby freeing up the trial court to accomplish other tasks. The findings contained in the Master's report are not binding on the court, and the court is free to confirm, modify,

50. *See id.* art. 276.

correct, reject, reverse, or recommit the report. There is no such parallel proceeding available to litigants in Mexican courts.

53. Hearings in Mexico, Generally

Hearings in Mexico are dissimilar to those conducted in the United States. First, there is no court room, *per se*. All proceedings take place in what a U.S. attorney would recognize as the judge's chambers. Hearings are technically open to the public in Mexico,⁵¹ as is the case in the United States, but given the nature of the proceeding's locus, it is easy (and common) for Mexican judges to exclude the general public. Mexican divorce and marriage nullification proceedings are to be conducted in privacy, as is any other proceeding that the judge thinks should be closed to the public.⁵² Considering, again, that there is truly no such thing as a trial as U.S. attorneys understand the concept, it should come as no surprise that Mexican counsel has no recourse to procedural mechanisms such as "The Rule."⁵³ In this regard, however, U.S. counsel will note that Article 364 of the CPCDF provides the Mexican judge with the authority to designate the place where witnesses are to remain while waiting to give testimony. Nowhere does the CPCDF expressly prohibit witnesses from communicating with each other.

54. The *Ex Parte* Problem

One of the most basic problems engendered by Mexico's system of conducting hearings pertains to *ex parte* communications. Not having a courtroom necessarily forces parties to have most communications in the judge's chambers (or worse—over lunch), thereby opening the door to *ex parte* correspondence. Compounding this situation is the fact that in Mexico the law does not expressly prohibit *ex parte* communications, as it does in the United States.⁵⁴ All parties can do in this situation is hope that the judge will abide by his or her duty to remain impartial.

51. *See id.* arts. 387 & 398.

52. *See id.* art. 59.

53. TEX. R. CIV. P. 267.

54. Consider, for example, TEXAS DISCIPLINARY RULE OF PROFESSIONAL CONDUCT 3.05.

55. Decision Making

Decisions in the United States, particularly at hearings, are often made immediately following the oral or written presentations of the lawyers. With this fact in mind, U.S. counsel often goes to a hearing with a prepared order in hand. Following this practice, the only thing a judge will have to do (once persuaded) is sign the prepared order. In Mexico, this almost never happens. Instead, it is customary for the judge to study the matter for some time before making a decision, which is published in the *Boletín Judicial*. Consequently, when Mexican counsel is awaiting a decision, he or she must make time to search the contents of the *Boletín Judicial* each day.

56. Compelling Compliance

Mexican judges have at their disposal a number of different means for compelling compliance with their orders, most of which track those available to U.S. judges. Sanctions can range, depending on the offense, from a fine to suspension or jail time.⁵⁵

57. Dismissal for Want of Prosecution (*Caducidad de Instancia*)

If after 180 days from the time of a properly conducted notification neither party has made any motion or appearance with respect to a pending matter, a Mexican court can *de oficio* declare the proceeding extinguished.⁵⁶ When this happens, the situation between the parties returns to what it was prior to the filing of the law suit. This declaration can be challenged in a *revocación* proceeding. As a party is subsequently able to refile on the same issue, the equivalent U.S. action would be a Dismissal for Want of Prosecution.

55. See CPCDF arts. 61 & 73.

56. See *id.* art 137.

D. Probatory Phase (Fase Probatoria)

1. What is Subject to Proof

Only controverted facts or points raised in the parties' pleadings, together with the very uses and customs upon which the Mexican legal system is founded, are subject to proof.⁵⁷

2. What Does Not Need to be Proved

According to Article 286 of the CPCDF, items which do not need to be proved include:

- a. Confessed facts;
- b. Facts recognized and agreed on by stipulation;
- c. Facts linked to legal presumptions;
- d. Facts derived from maxims of experience, scientific principles of causation, logic, reasoning, and mathematics; and
- e. Notorious facts known to all people of a social, cultural or economic group.

3. Presumptions

In Mexico and the United States, certain presumptions apply with regard to evidence. Mexican presumptions can be either a legal presumption (meaning that the presumption is established by law), or a human presumption (meaning that a fact is deducted from another that has already been proved). When a party has a presumption in his or her favor, the attorney need only prove up the facts underlying the presumption.⁵⁸

4. Standard of Relevance

The standard employed by Mexican judges in assessing the admissibility of an offered item of proof is whether it will help the

57. See *id.* art. 284.

58. See *id.* art. 381.

judge know and understand the truth regarding the controverted points.⁵⁹ This standard is slightly narrower than that used by Texas courts, which focus on relevancy. Texas courts, unlike Mexican courts, permit the discovery of evidence that may, itself, not be relevant provided that it is reasonably calculated to lead to the discovery of admissible evidence.⁶⁰ This bootstrapping technique is not available in Mexico.

5. Burden of Proof (*La Carga de la Prueba*)

The party that alleges a fact has a duty to prove it up.⁶¹ Basically this means that the plaintiff is responsible for all facts alleged in the petition, and the defendant for everything alleged in the answer. While this singular allocation tracks that in the United States, Mexico's legal system does not offer the trier of fact further guidance by making such sub-distinctions as "a preponderance of the evidence," "clear and convincing evidence," and "proof beyond a reasonable doubt."

6. Practice / Judges Authority

During the probatory phase of a Mexican proceeding, the parties offer all the proofs that are in their possession. When an item is not in their possession, the parties must indicate where it is located, if known.⁶²

Mexican judges have broad authority to manage the collection, introduction, and qualification of information. If a document is missing, or if a particular person's testimony is needed, the judge, either *sua sponte* or on the motion of the parties, can issue an order compelling the document or person's submission to the court. The scope of this power extends to parties and non-parties alike. The bases of authority for this action are Articles 278 and 279 of the CPCDF, which grant a judge the freedom to do whatever he or she feels is necessary to secure the best proof and know the truth regarding the controverted facts. Similarly, Article 356 of the CPCDF mandates that all people with knowledge of the facts provide testimony. This power

59. *See id.* art. 278.

60. *See* TEX. R. CIV. P. 166(b)(2)(a).

61. *See* CPCDF art. 281.

62. *See id.* art. 295.

is essentially a U.S. court's subpoena power, although in Mexico no distinction is made between a general subpoena and a subpoena *duces tecum*. Moreover, the CPCDF is silent as to whether there exists any geographical restriction on a judge's authority to issue such orders. This stands in contrast to the practice in the United States where subpoenas for compelling attendance are generally only valid within a certain number of miles of the courthouse.

The limits on a court's power to compel the disclosure of information or the testimony of people are set forth in Article 288 of the CPCDF. Ascending and descending relatives, spouses, and people who are charged with the responsibility of guarding professional secrets are exempt from providing compelled testimony. In this connection it will be noted that Mexican law exempts a broader range of family members from testifying than is the case in the United States, where only spouses have a privilege. This is perhaps a legislative manifestation of the Latin America's traditionally protective orientation towards family.

Notice is required to all people who will testify and should be realized by the party offering the evidence. Experts and non-party lay witnesses can be notified by either certified mail or telegraph. If a person ordered to appear or produce documentary evidence does not comply, the judge can use whatever pressure he or she deems appropriate to secure their cooperation, including signing that person's name in their absence, the issuance of fines, and awards of jail time.⁶³

A third party witness in Mexico is always able to argue that disclosure of particular information will be prejudicial to his or her interests, and, for that reason, the judge should refrain from making such an order. In the event that the judge nonetheless orders disclosure, it is possible to seek and obtain indemnification either from one or both parties.⁶⁴

Through a variety of techniques, U.S. parties to a dispute collect the information to be introduced at trial during a discrete phase in the litigation process known as "discovery." To the extent that success at trial is a function of the level of spontaneity and creativity the parties are able to achieve in open court, litigants have a natural interest in the procedures the law sets

63. See *id.* arts. 73 & 288.

64. See CPCDF art. 280.

forth to protect against overreaching requests for information. For example, one side may respond to a discovery request perceived to be excessive or in violation of their client's rights by filing for a protective order.⁶⁵

As has been pointed out, there is no trial per se in Mexico. Rather, following the filing of argument bearing petitions and answers, Mexican litigants participate in a series of hearings, the purpose of which is to provide the judge with sufficient insight so as to subsequently make a decision on the matter. While there are certain *prueba* related practices that are "discovery like" (for example, the "*confesion*"), there is no such thing as "discovery" per se in Mexico. Because parties in Mexico will have presented all arguments possible at the trial court level through the initial pleadings and evidentiary hearings, and because nothing remains following the close of the *pruebas* period (save the judge's sentence), there is no practical need to seek U.S. style orders protecting the confidentiality of one's work product, witness statements, or experts. In the same vein, because the judge (or the court secretary) is a central part of any proof offered, discovery techniques which are utilized out of the courtroom (such as depositions), have no place in Mexican litigation.

7. Opening Period for Offering Proofs

From the conclusion of the *Audencia Previa y de Conciliacion*, the judge formally opens up a ten day period during which time the parties must offer their proofs.⁶⁶ Where a party indicates that it will call experts or lay witnesses, it must provide their precise names and domiciles, or risks having the judge reject the offer.⁶⁷ At the end of this time period, the judge will issue an *Auto* either admitting or rejecting the proposed proofs. If the judge rejects the material, the party who offered the proof can appeal the decision in *efecto devolutivo*, provided the sentence is appealable in the principal. Otherwise, the only recourse is that of "*Responsibilidad*."⁶⁸

65. See TEX. R. CIV. P. 166(b)(5)(a)-(b).

66. See CPCDF art. 291.

67. In contrast to U.S. practice, the Mexican legal system does not distinguish between testifying and consulting experts.

68. See CPCDF art. 298.

8. Standards of Admissibility

Judges in Mexico shall admit an item offered as proof provided:

- a. It is relevant to controverted facts;
- b. It produces *animus* in the conviction of the judge regarding the facts;
- c. It is not raised in bad faith, contrary to good morals, or prohibited by law; and
- d. It does not involve impossible facts.⁶⁹

9. Period for Proving Up (*Desahogar de Pruebas*)

From the time of the *Auto de Admision*, the judge opens a thirty day period during which the parties are to present their proofs. In the event of extraordinary circumstances—such as where the object of the proof is located outside of Mexico City—the judge can extend this time period to sixty days. Similarly, where the object of proof is located outside the country, a Mexican judge can extend the basic time period to ninety days.⁷⁰ In both cases, there are certain other prerequisites which must be met.

10. Types of Proof

There are five main types of proof used in Mexican courts: 1) confessions, 2) public and private documents, 3) experts, 4) non-party witnesses, and 5) judicial inspections. The basic attributes of each of these are discussed below.

a. *Confession (Confesion)*

Known as the queen of proofs in Mexico, confessions represent somewhat of a cross between what a U.S. attorney would recognize as a deposition and a request for admissions.

Only parties to the action are eligible to give confessions. In developing a confession, the party that wishes to question another

69. See *id.* arts. 291 & 298.

70. See *id.* art. 300.

party will submit a list of questions (the "*Pliego de Posiciones*") to the court in a sealed envelope.⁷¹ At that point the party which is to answer the questions (the "*Absolvente*") is notified of the pending question session.⁷² The *Absolvente* must appear and answer at the time designated, otherwise the judge will deem the matters raised by the questions confessed. At the time of the hearing, the judge opens and reviews the questions, making any qualifications before approving them. The *Absolvente* must sign the final version of the *Pliego*.

The actual questioning can be done either by counsel for the party seeking the proof (the "*Articulante*") or a court's secretary. The responding party is not permitted to have his or her lawyer available for help.⁷³ If the respondent is a foreigner, the court will provide an interpreter. If there are multiple parties to be questioned, the judge should order them to appear on the same day. Answers given by an *Absolvente* must be categorical—"yes" or "no." The *Absolvente* is free to add more to his or her statement after the categorical response.⁷⁴ If the *Absolvente* refuses to answer or answers in a way considered to be evasive, the judge can deem the matter confessed.⁷⁵ All information is recorded by stenographic means.

If a party has objections, he or she must object within three days of this particular hearing. If the court denies the objection, the objecting attorney can ask the court to put its ruling in writing. This mechanism serves the same function as a Bill of Exceptions in Texas.

In the case of extra-judicial confessions, the interview and questions must comply with the essential formalities required by the law.⁷⁶ If they do not, the confession can be challenged with a "*Nulidad de Confesion*."

There is no limit on the number of questions which can be asked, nor on the amount of time which can be spent developing the information. Once an opposing party has been called, he or she can not be re-called. Finally, Mexican counsel is under no duty, as is U.S. counsel, to supplement information previously

71. See *id.* art. 292.

72. See *id.* art. 309.

73. See *id.* art. 315.

74. See *id.* art. 314.

75. See *id.* art. 316.

76. See *id.* arts. 74 & 78.

imparted in accordance with new factual developments. Logic would dictate, however, that at least to the extent such information would be helpful to a party's case, counsel would be diligent in supplementing the answer.

b. *Documentary Proof (Pruebas Instrumentales)*

This type of proof, consisting principally of public and private documents, is becoming increasingly important in Mexican courts, thereby displacing the old wisdom that "*testigos vencen escritos*" (roughly translated to mean that witness testimony trumps written documents).

c. *Public Documents*

These include all documents authorized or executed by public authorities, notary publics, *corredores publicos*, judicial secretaries, or other governmental functionaries in the exercise of their official duties. Such documents are deemed to have "public faith." Examples of public documents include orders, statutes, regulations, articles of societies and associations, *constancias*, and *escrituras publicas*.

If the document involved is from a foreign jurisdiction, it must be presented in accordance with the requirements of the *Código Federal de Procedimientos Civiles*.⁷⁷ Moreover, if the foreign document was translated, opposing counsel has three days to object to the translation, after which time it is deemed acceptable.⁷⁸ Any foreign document in a language other than Spanish must be translated.

For the purpose of an evidentiary hearing, certified copies obtained from the public source should be used. Where a notary prepared the document, the original must at all time remain in the protocol. Properly certified public documents are not subject to further authentication requirements. These rules are substantially similar to those in Texas, where a public document can be authenticated either by a certified copy or by the testimony of a person who has compared the documents involved.⁷⁹

77. See *id.* art. 329.

78. See *id.* art. 330.

79. See TEX. R. CIV. P. 901.

Should a party object to the authenticity of a public document, the court secretary will make a comparison of the offered document with the original as housed in the public archive or protocol.

d. Private Documents

Examples of what constitute private documents include: *vales*, *pagares* (promissory notes), check books, letters, and other privately created writings. To be admissible in Mexican court, the original must be presented and, if applicable, signed.⁸⁰ Under limited circumstances, a non-original document can be sufficiently perfected so as to be admitted, but this is difficult to do. In the event the authenticity of the document becomes controverted, a handwriting expert can examine and render an opinion regarding the item's authenticity.⁸¹ These rules are substantially the same as those in Texas, which require an original of a private document, but will admit a duplicate if there is no question raised as to the authenticity of the original, or it is not unfair to admit the duplicate in lieu of the original.⁸²

Any objection to a private document must be made within three days of the issuance of the *auto* that orders its reception.⁸³ As was the case with alleged forgeries of public documents, if the authenticity of a private document should ever come into question, the court can have a handwriting expert examine and render an opinion with respect to the genuine character of the item.

Mexico does not create an express privilege for the protection of trade secrets. Rather, a Mexican judge has broad powers to order the production of either public or private documents. If a commercial entity is ordered to produce sensitive documents, that party should object and point out the commercially valuable nature of the information. If the judge rejects the objection, the producing party need only make available the ordered information at its place of business. It need not deliver the requested items to the courthouse.⁸⁴

80. See CPCDF art. 339.

81. See *id.* art. 341.

82. See TEX. R. CIV. EVID. 1003.

83. See CPCDF art. 340.

84. See *id.* art. 337.

Texas, on the other hand creates a limited privilege for trade secrets—although the privilege cannot be used to conceal fraud or to be unjust. The matter is left to the discretion of the judge, and his or her perception of the weight of the competing interests.⁸⁵ Should the judge order disclosure, he or she must take protective measures to protect the interests of the holder of the privilege (for example, taking the testimony *in camera* or making disclosure to the opposing attorney but not his or her client).

e. Experts (Prueba Pericial)

Experts in Mexico are of two basic types: degreed and non-degreed. A degreed expert will have completed certain formal training and possess a "*Titulo*" in the science or art in which he or she will testify. The non-degreed expert is one who draws from extensive practical experience in the absence of formal, regimented academic training.

When a party intends to call an expert, he or she must indicate the name and domicile of the individual at the opening of the period for offering proofs.

Each side has three days to nominate experts.⁸⁶ If the parties are not able to reach a mutual agreement regarding the selection of one expert, each side will designate its own expert. To settle the almost predictable battle of the experts, the court can name a "*Tercero en Discordia*." Any judicially named expert must be impartial and of Mexican citizenship. Judicially appointed experts who have a relationship with one of the parties or an interest in the outcome of the litigation, can be recused within forty-eight hours from the time the litigations were notified of their selection.⁸⁷ There is no recourse available to the parties in response to a recusal decision deemed to be unfavorable by one of the parties.

Expert testimony is developed in the judge's chamber through a combination of written ("*Dictamen Escrito*") and oral means.⁸⁸ The expert can be questioned by the judge, the parties, or a third

85. See TEX. R. CIV. EVID. 507.

86. See CPCDF art. 347.

87. See *id.* art. 351.

88. See *id.* art. 391.

party expert, and at the conclusion of his or her testimony must sign the "Acta" prepared by the secretary.

Parties are themselves responsible for the fees of any experts they intend to call, unless the expert was judicially appointed, in which case the parties may be ordered to split the cost.

In Mexico, both experts and lay witnesses can give an opinion that goes to the ultimate issue. This is basically the same rule as in Texas, with the one caveat that lay witnesses in Texas can only give an opinion on the ultimate issue where: 1) that opinion is rationally based on the perception of the witness, and 2) it is helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.⁸⁹ U.S. counsel should also note that Mexico has no articulated means or standard for assessing the validity or reliability of scientific reasoning and methodology advanced during expert testimony similar to the *Daubert*⁹⁰ standard applicable in U.S. matters.

f. Non-Party Witnesses

All parties with knowledge of the controverted facts are obligated to be witnesses, regardless of whether they are private citizens or public officials.⁹¹ Witnesses that are over the age of seventy or are sick can testify from their homes. Each party is obligated to present his or her own witnesses, having first properly advised them by way of "*Cedula de Notificacion*," although a judge is also free to order the presence of a witness. The judge also has the power to limit the number of witnesses, either in advance or at the time of hearing. Article 357 of the CPCDF additionally authorizes the judge to fine or incarcerate a witness that fails to cooperate with such an order.

While Mexican judges have full discretion to rule on a party's competence to testify, a witness must under oath state whether he or she: 1) is related by marriage or affinity to one of the parties; 2) is employed by one of the parties; 3) has any direct or indirect interest in the outcome of the matter; and 4) is a friend or enemy of one of the parties.⁹² Failure of a witness to disclose truthfully

89. See TEX. R. CIV. EVID. 901.

90. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

91. See CPCDF arts. 356 & 359.

92. See *id.* art. 363.

at this point is a violation of Article 247 of the *Código Penal para el Distrito Federal*. In comparison, Texas courts hold that for the purposes of testifying, insane persons are incompetent while children are subject to a judicially administered competency examination.⁹³

Witnesses are questioned directly by the attorneys, first by the party which offers the proof and then on cross exam by the opposing counsel. There are no written questions for witnesses, as everything is oral. During cross exam, opposing counsel will try to establish contradictions in the witness's testimony for the purpose of later diminishing its probatory value. A witness is always obligated to give the reasons for his or her testimony if asked. When a witness does not speak Spanish, the judge will provide a translator. To the extent that the questioning of witnesses is adversarial rather than inquisitorial in nature, this Mexican legal procedure has much in common with U.S. trial practice.

If opposing counsel succeeds in uncovering deception or inconsistencies in a witness's testimony, counsel has two options. First, the attorney can immediately bring the deception to the judge's attention, thereby increasing the opportunity that the judge will recall the event at the time for valuing the proofs.⁹⁴ This is likely to be done if there are few witnesses or proofs involved. Alternatively, the attorney can file a "*Peticion de Tachas*" within three days of the hearing, formally challenging the veracity of the witness' statements and seeking to diminish the value of the testimony. This procedure is rarely used, however, unless there have been substantial deceptions in a case involving many proofs.

Attorneys in Mexico are not able to impeach the credibility of a testifying witness simply because that person may have been convicted of a felony or crime of moral turpitude within the preceding ten years, as is the case in Texas.⁹⁵ Similarly, the credibility of a witness may not be attacked in Mexico by opinion or reputation evidence regarding that person's character for truthfulness, as is the case in Texas.⁹⁶

93. See TEX. R. CIV. EVID. 601.

94. See CPCDF art. 356.

95. See TEX. R. CIV. EVID. 609.

96. See TEX. R. CIV. EVID. 608.

Articles 360 and 362 of the CPCDF govern requests for witness testimony from Mexico for use in a foreign proceeding. Pursuant to a properly issued request from a foreign authority, the Mexican judge can conduct a hearing for the purpose of gathering witness testimony. At said hearing, the questions must be asked in oral form directly to the witness, and cannot encompass issues unrelated to the material facts of the foreign case.

Several differences are evident between the ways Mexican and U.S. courts manage witness testimony. In the United States, the form of the question asked to the witness is a function of the nature of his or her relationship to the inquiring attorney and as such may be leading or non-leading. In Mexico, however, leading questions are never permitted. Another fairly significant departure involves hearsay. In Mexico, "*Testigos de Oidos*" (hearsay witnesses) are not permitted to testify—period. Rather, only witnesses with personal knowledge are qualified to testify. There is no multitude of hearsay exceptions as is the case in the United States. Last, as was the case with confessions, Mexican attorneys have no express duty to supplement information previously rendered to the court, as do U.S. attorneys.

g. Judicial Inspection

Mexican judges can, either *sua sponte* or on the motion of the parties, carry out inspections of matters related to the litigation.⁹⁷ The *Acta* issued in this connection must designate the time, date, and place of the inspection, as well as the items to be observed. At the time of the inspection, the judge is free to take notes or panoramic photographs of the place or object inspected. At the conclusion of the inspection, the judge may dictate sentence, provided he or she makes reference to the observations that were persuasive.⁹⁸ This rarely, if ever, happens.

18. International Taking of Evidence

The aforementioned procedures and rules apply for the most part to the process of collecting evidence for trial in Mexico. By virtue of the international treaties Mexico has signed, it is

97. See CPCDF art. 354.

98. See *id.* art. 355.

possible to collect evidence for trials to be conducted outside of Mexico in a number of bilateral circumstances. Specific examples include the Inter-American Convention on the Taking of Evidence Abroad,⁹⁹ and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.¹⁰⁰ With respect to the last convention noted, what constitutes a “civil” or a “commercial” dispute has not been defined. Therefore, problems can arise out of the unique understandings different countries attach to each concept. U.S. counsel should also keep in mind that Mexican courts do not uphold generic discovery or production requests. If a foreign party wants a particular document, the foreign attorney should describe the item sought in specific and clear terms.

19. Concluding Statements (*Alegatos*)

Following the *Pruebas*, parties, pursuant to Article 393 of the CPCDF, are able to make statements which come very close to serving the function of a closing statement in the United States. During this oral statement, parties can synthesize their arguments, tying together previously cited law and various points of testimony, all by way of persuading the judge to decide in their favor. While the CPCDF does indicate that the *Alegatos* should be oral, it also provides that the parties can present their conclusions in writing.¹⁰¹ When making these statements, the plaintiff goes first, followed by the defendant. At the trial court level, each side has fifteen minutes to speak. In reality *Alegatos* are almost never given, thus making the previously cited article dead letter.

20. Acts (*Actas*)

At the conclusion of each evidentiary hearing, the court's secretary will make an *Acta* memorializing everything that occurred. These *Actas* will include, as appropriate: all dates and places; the names of all parties, their representatives, experts, witnesses, and interpreters; the judicial authority which managed the proceeding; judicial decisions pertaining to procedure, competence, and *res judicata*; pertinent declarations of the

99. Jan. 30 1975, 14 I.L.M. 328. The United States is not a party to this Convention.

100. May 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231. The United States is a party to this Convention.

101. See CPCDF art. 394.

parties; extracts of the declarations of experts and witnesses; the results of any inspections realized; and any documents offered, if not indicated in the *Auto de Admision*. After signing the corresponding *Acta*, the experts and witnesses are free to go. Where a hearing included conclusions of the parties reached in oral debate (*Alegatos*), these will also be included in an *Acta*.

With the close of the period for *Pruebas* and *Alegatos*, the judge can not admit any other proofs, and has an affirmative duty to turn away those offered.¹⁰²

E. Sentencing Phase (Resolutiva)

1. Notice of Sentencing Hearing (*Citacion para Sentencia*)

The beginning of the sentencing phase is marked by the "*Citacion para Sentencia*." From this procedural point the judge has fifteen days to rule on the matter and issue a sentence.¹⁰³ During this time the judge's *proyectista* secretary will largely be responsible for valuing the proofs and writing up the analysis which will later serve as the basis for the judge's opinion. An exception to the foregoing time period exists where the court is required to review voluminous material in reaching a decision, in which case an extra eight days may be taken for issuing a sentence.

2. Sentencing (*Sentencia*)

The pronouncement of a written sentence concludes the first instance of a Mexican legal proceeding. Generally, a sentence is organized into the following parts:

Preambulo (preamble)

Los Resultandos (history, facts, positions)

Los Considerandos (reasoned application of law to facts)

Puntos Resolutivos (determination of legal right and award)

102. *See id.* art. 99.

103. *See id.* art. 87.

Of course, a party can challenge a sentence on appeal. On the other hand, a sentence becomes *res judicata* (*cosa juzgada*) in one of two ways:

Ministerio de Ley: In this situation, a sentence becomes *res judicata* by operation of law. Examples of where this is possible include, inter alia, when the amount of the award is less than 182 times the daily minimum wage for Mexico City, or where the only other recourse available to a party is that of "*Responsibilidad*."¹⁰⁴

Declaracion Judicial: If a sentence remains unchallenged for the duration of the applicable term within which parties must bring their appeals, then the matter can be found to be *cosa juzgada*.¹⁰⁵

Mexican sentences have a presumption that they were reached in accordance with the requirements of the law.¹⁰⁶ They should not be modified or varied once signed, although clerical errors can be corrected in a way that recalls a *nunc pro tunc* order.¹⁰⁷

Mexican attorneys are not in the habit of drafting and submitting "Proposed Judgments," as are U.S. attorneys. In this sense, judgments in Mexico are very much the sole creation of the judge and his or her secretaries.

Additionally, "Findings of Fact and Conclusions of Law" (which constitute a writing separate from the judgment) are not used in Mexico principally because the structure of a Mexican sentence already incorporates such a discussion.¹⁰⁸ As a matter of practice, Mexican judges are required to carefully indicate the reasoning they used in reaching their decision.¹⁰⁹

F. Appeal (*Impugnativa*)

This is the phase in which appeals are raised. The timing of this phase is laid out in Appendix B.

104. See *id.* art. 426.

105. See *id.* art. 427.

106. See *id.* art. 91.

107. See *id.* art. 84.

¹⁰⁸ In this connection, U.S. Counsel will note that very light emphasis is given to recanting the facts of the case in the judge's opinion.

109. See CPCDF art. 402.

G. *Execution (Ejecucion)*

This is the phase where the prevailing party executes on the judge's award. The judge will indicate in the sentence which litigant is to pay costs, insofar as they have been previously substantiated in writing by the parties. As a general rule, each side is responsible for his or her own costs. However, a judge can use the "*Condenacion en Costas*" (usually a nominal amount) as a punitive tool against the party that is deemed to have brought bad faith litigation.¹¹⁰ At the time of execution such awards are given effect.

Foreign lawyers are prohibited from charging costs unless they have been legally authorized to exercise their profession.¹¹¹ Also, attorney's fees are neither contemplated by Mexican statutes nor awarded by Mexican judges. Therefore, they are never prayed for in a petition or answer. In most cases, each side is responsible for his or her own fees, unless an informal arrangement is worked out on the side. In the latter case, enforcement of an arrangement is a matter between the parties.

IV. CONCLUDING OBSERVATIONS

A. *Improvements*

Mexico's legal system is currently going through an extended period of reform and improvement. Many of the changes evident are to be expected of a nation undergoing rapid democratization, technological advancement and economic growth. All have a bearing on the issue of litigation in Mexico. Salient trends include:

1. *Foreigner Friendly Legislation*

As recently as 1988, foreigners interested in investing in Mexico had to contend with the *Calvo* doctrine, which entailed the application of Mexican law to all matters pertaining to Mexico, regardless of the substance of international treaties or foreign

110. See *id.* arts. 138-42.

111. See *id.* art. 139.

law. Legislative reforms in 1988 created an entire new body of law dedicated to international procedural cooperation,¹¹² thereby providing greater legal certainty for the foreign investment community. In addition to being less *Calvista*, Mexico has realized other significant legislative innovations over the last fifteen years the net effect of which has been positive for the foreign investor. Obvious examples include the Foreign Investment Law of 1993, the North American Free Trade Agreement, and revamped intellectual property and bankruptcy laws. Because of these reforms, foreigners have a greater sense of security regarding their rights and the legal relief available to them as investors in Mexico.

2. Expanded Role for Administrative Justice

Concomitant with the introduction of investment-friendly laws has been an increase in the number of administrative bodies dedicated to specific areas of commerce (for example, anti-trust, intellectual property, and consumer protection). Commonly, such administrative bodies are empowered to resolve disputes utilizing their own personnel (which tend to be specialists within that field) and adjudicatory procedures. To the extent that this trend permits a faster, simplified alternative to Mexico's ordinary justice system, it is beneficial to all.

3. Increased Use of Jurisprudence

As Mexico's judicial community has improved its capabilities for reporting and disseminating information, there has been a growing awareness and utilization of jurisprudence in Mexican proceedings. This trend is positive in that an increased body of jurisprudence will produce a greater degree of certainty with regard to the interpretation of Mexico's codes.

4. Increased Use of Technology

Slowly but surely, technology is coming to the Mexican legal community. On the public side, there are more computers in

¹¹² See *id.* arts. 604-608.

courtrooms,¹¹³ more published decisions available in a diverse range of media, and more judicially oriented web sites containing basic statutes and administrative regulations. Private practice has also been transformed as a result of technology. For example, legal document assembly programs (for *machotes*) are finally available, and the *Boletín Judicial* can now be navigated electronically. The obvious effect of these technological developments has been to *increase* the overall efficiency of Mexico's legal system.

5. Reform of the Judicial Power

In what represents one of the most important acts of the present administration, President Zedillo changed the size of the Supreme Court, reformed the procedures to be used in the nomination of ministers, reduced the term of Supreme Court service from life to fifteen years, and empowered the Supreme Court to conduct judicial review with universal application under certain presentation and time conditions. At the lower level, the Zedillo reforms created a *Consejo* to select magistrates and judges in accordance with their performance on competitive exams.

As a result of these changes, the executive branch has less control over the appointment of judges, the Supreme Court is a more manageable size, and the court has greater leave to define the constitutionality of laws. Regarding the caliber of sitting judges, the Zedillo administration's reforms have cut down on the practice of political springboarding which used to regularly occur at the expense of justice. To this end, no individual can be nominated to be a Supreme Court minister if within the preceding year that person served in certain enumerated high-level government positions.¹¹⁴ Similarly, Article 101 of Mexico's Constitution places limits on a former high-ranking judge's right to conduct certain professional activities for a period of two years following that person's departure from the bench.

113. The courthouse in Guadalajara, Jalisco, even has a fully computerized docket.

114. See MEX. CONST. art. 95.

6. Better Training for Lawyers

As is the case in the United States, lawyers are becoming increasingly specialized in their practices, thereby assuring greater degrees of individual competency in a narrower range of areas. Although Mexico does not have mandatory continuing legal education requirements as does Texas, many Mexican lawyers are nonetheless aware of the need to continue developing one's level of professional preparedness. Accordingly, many lawyers (particularly the younger ones) elect to pursue a *Diplomado*¹¹⁵ or an LL.M. either in Mexico or abroad.¹¹⁶ Notwithstanding the aforementioned trend toward specialization, Mexican attorneys do not have the opportunity to become "board certified" in a particular area of law as do their U.S. counterparts, principally because bar associations in Mexico do not have the same power and significance as state and national level bar associations in the United States. In this regard, U.S. counsel should note that the use of the term "specialist" is not expressly regulated in Mexico as is it in the United States.

7. Greater Cross-Border Interaction

As the United States and Mexico become more unified through commerce and other matters, the professional classes on each side of the border are interacting with increasing frequency. International law conferences regularly involve both the attendance and participation of U.S. and Mexican lawyers. Universities on both sides of the border are moving to establish joint law degree programs, and distance learning technology is now a common feature at conferences and in the classroom. In the work place, U.S. and Mexican professionals are serving as foreign legal consultants, while law students on both sides of the border are expressing more interest in obtaining summer associate positions with foreign firms which will enable them to become acquainted with the laws, procedures and legal vocabulary of the foreign jurisdiction. Even a cross-border bar association has been formed (the Texas-Mexico Bar Association).

115. This is the equivalent of half an LL.M degree in the United States.

116. The United States, Canada, and Europe are popular choices for obtaining an LL.M. degree.

As a result of these activities and programs, we are now in the process of creating a field of better informed, cross-trained practitioners. To the extent that these professionals speak each other's languages, understand each other's laws, and are well versed in the nuances of each other's business cultures, it will be easier to resolve problems through litigation or other means in the future.

B. Continuing Problems

Notwithstanding the significant improvements and innovations which have been realized with regards to Mexico's legal system, there continue to be many problems which bear on litigation. For the reasons briefly noted below, many parties seek to settle disputes outside of court room, principally through arbitration.

1. Corruption

Corruption and inefficiency are "commonplace" in Mexican courts according to a 1996 report by the U.S. Department of State.¹¹⁷ A 1997 survey by the Association of American Chambers of Commerce showed "significant" distrust in the Mexican judiciary's ability to render swift and impartial decisions.¹¹⁸ In another survey, seventy-five percent of Mexican citizens surveyed felt that their system of justice was "riddled" with corruption.¹¹⁹ Such tendencies, insofar as they are accurate, undermine Mexico's economic and political progress and generate an impermissible element of legal uncertainty. In this connection, the World Bank has quite accurately pointed out that "unreliable judiciaries hinder development, discourage and distort trade, raise transaction costs, and foster corruption."¹²⁰ To the extent that corruption in Mexico (and elsewhere) has historically been a function of exceedingly low judicial salaries, perhaps the recent raises will help improve the situation. If not, it is hoped that the

117. U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES FOR 1996: MEXICO 500 (Comm. Print 1997).

118. John Otis, *The Clamor to Clean Up Latin America's Judiciary is Growing*, LATIN TRADE, June 1997. Mexico scored a "3" on a scale of 1-10, with "10" indicating a very fair and impartial system. See *id.*

119. U.S. DEP'T OF STATE, *supra* note 117.

120. Otis, *supra* note 118.

pay raise (together with the introduction of the competitive exams) will at least stem the brain-drain that has in the past operated to pull top law graduates away from the bench and into the more lucrative private sector.

This is not to say that Texas or U.S. courts are models of fairness and impartiality. Barriers to justice exist on both sides of the border. Elected judges (such as there are in Texas) are notorious for their favoritism toward reliable campaign contributors. Also, a recent survey of Texans did indicate that almost half of the respondents felt that there is gender, racial, and socio-economic bias in Texas courts.¹²¹ Suffice it to say, however, that the essential comparative issue between Mexico and Texas is not a question of kind, but rather a question of degree.

Until the problem is fixed, U.S. counsel must be cautious in how he or she manages litigation in Mexico and advises his or her U.S. clients. U.S. counsel should always recall that he or she is bound by the Foreign Corrupt Practices Act¹²² which prohibits transactions conducted with foreign government officials for the purpose of gaining some benefit. Texas counsel will also do well to remember that the Texas Rules of Professional Conduct have been found to have an extra-territorial reach, thus making it irrelevant whether the rules were violated in Mexico City as opposed to Houston or San Antonio.¹²³

2. Courts are Slow and Expensive

The litigation process in Mexico continues to be extremely slow, irrespective of the trend away from the rigidly formalistic ordinary courts and towards specialized administrative tribunals. Even with legislative reforms which mandate faster proceedings, litigation can drag on for years in Mexico. As of yet there is no "speedy trial" statute such as is used in Texas. To compound matters, Mexico's dockets continue to grow faster than underlying judicial administrative capabilities.¹²⁴ With international

121. See Joseph Shields & Cynthia L. Spanhel, *Public Trust and Confidence in the Texas Courts and Legal Profession*, 62 TEX. B.J. 289 (Mar. 1999).

122. Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in scattered sections of 15 U.S.C.).

123. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 8.05 (1999).

124. See Consejo de la Judicatura Federal, *Informe Annual*, (visited Feb. 9, 2000)

commerce increasing as it is, one can only expect the lines for the elevators at the courthouse to get even longer.

Justice in Mexico is as expensive as it is slow. Exacerbating the high fees charged by attorneys are the facts that 1) lawyers never ask for, and courts do not award, attorneys fees in Mexico; and 2) large, windfall awards for punitive damages are not made by Mexican judges.¹²⁵

The typical billing practice followed in Mexico is a flat percentage of the amount in controversy. Hourly billing is not as common in Mexico as it is in the United States, particularly for medium and small sized firms. U.S. counsel should be mindful of these practices before entering into any billing arrangements with their Mexican counterparts.

3. Judiciary Still Not Independent

In spite of the reforms undertaken by the Zedillo administration, the Mexican judiciary is still nominally independent. Judges continue to be intimidated or pressured into politically motivated resolutions. Judges who stood up against this kind of pressure have been killed. The judiciary's inability to count on official security forces to do their jobs and protect people has not facilitated the development of any independent tendencies on the part of the former.

Perhaps as the effects of the new nominating procedures contained within the Zedillo reforms begin to take root we will see more judicial independence. In the meantime, it is generally recognized that the judiciary and the executive have reached a implied "holding pattern" regarding appropriate expressions of independence. According to this analysis, Mexico's judiciary generally declines to assert its independence in cases involving freedom of religion, deportation of undesirables, electoral challenges, dismissals of public officials, and large agrarian expropriations. Alternatively, the judicial branch will exhibit independence with respect to the military, government

<<http://www.cjf.gob.mx/cap01consejo/estadistica/estadistica.html>>. For example, between 1995 and 1997, the docket of the *Tribunales Colegiados de Circuito* increased from 99,821 to 215,499 matters. The docket of the *Tribunales Unitarios de Circuito* rose from 27,564 to 30,512 matters. The docket of the *Juzgados* increased from 195,052 to 215,499 matters.

125. A formula based approach is used by the courts instead.

confiscations of small farmers' property, treaty interpretation, income and property taxation, and issues of criminal due process. How well these quantitatively derived inferences will hold up going forward is almost impossible to tell given the rate and degree of change sweeping the country.

4. Judicial Review Still Limited

In spite of the promise that the *Accion de Inconstitucionalidad* gave to the idea of judicial review with universally applicable consequences, the restrictions which apply to the action's practice render it almost useless. Thus, it would appear that interested parties will need to continue the inefficient and burdensome process of waiting for five consecutive decisions on a point before being able to establish a jurisprudence.

C. General Advice

The best service U.S. counsel can provide to his or her client is to keep the client out of Mexican courts in the first place. To this end, U.S. counsel should know and appreciate the party with whom he or she is dealing. More importantly, however, U.S. counsel should ensure that obligations are properly secured, alternative dispute resolution mechanisms (including arbitration) are utilized, and both choice of law and forum clauses are valid in relation to Mexican law.

U.S. Counsel should develop a network of foreign counsel with which to work and confer. Texas Rules of Professional Conduct give additional impetus to this idea by requiring that Texas lawyers handle legal requirements directly and competently or become associated with another lawyer who is competent to handle a matter (i.e. foreign counsel).¹²⁶ In developing this network, U.S. counsel should ensure that there are no conflicts of interest, language barriers, unaddressed billing issues, or ambiguities regarding the nature of the legal responsibility foreign counsel is assuming.

If one must go to court, be sure to retain competent *local* counsel. Foreigners should be careful about thinking that just

126. See TEXAS RULES OF PROFESSIONAL CONDUCT Rule 1.01 (1999).

because their trusted Mexico City counselor's *cedula* permits him or her to practice throughout the Republic at both the state and federal level, this is the person best qualified to represent them in a dispute in Tabasco. Historically, state codes have mirrored those of the federal district. However, as politics and lawmaking become more and more competitive, state legislatures are becoming increasingly independent of Mexico City. In turn, we are starting to see more and more local deviations from the Capital's codes. Working with truly local counsel will help ensure your side is on top of both the law and local custom.

V. APPENDIX

A. Overview of Mexico's Courts

*Suprema Corte de Justicia de la Nacion*FEDERAL LEVEL*Tribunales Colgados de Circuito**Tribunales Unitarios de Circuito**Juzgados de Distrito*STATE LEVEL*Tribunal Superior de Justicia**Tribunales de Justicia del Fuero Comun*ADMINISTRATIVETribunalsPara-Judicial Commissions*Juntas Federales de
Conciliacion y Arbitraje¹²⁷**Comision Federal de Competencia**Tribunal Fiscal de
la Federaci3n**Procuraduria Federal del
Proteccion al Consumidor**Tribunal de Justicia
Agraria**Instituto Mexicano de
Propiedad Industrial**Tribunal de Justicia
Militar**Instituto Nacional del
Derecho de Autor**Tribunal de Jurisdiccion de
Proceso Electoral¹²⁸**Comision Nacional
Bancaria y de Valores**Comision Nacional
de Seguros y Fianzas*

¹²⁷ This is technically an independent tribunal. Such matters can be heard either at the federal or state level, depending on the industry from which the claim arose.

¹²⁸ This court's decisions are not reviewable by any other court, including the Supreme Court.

B. Key Time Periods for an Ordinary Civil Trial

I. PRELIMINARY PHASE (*FASE PREVIA*)

Citation to Opponent Advising of Intent to Pursue Some Preparatory Measure (MEX. CONST. art. 198) 3 days

II. *FASE EXPOSITIVA*

Service by *Notificadores* (CPCDF art. 110) 3 days from receipt of pleading

Defendant's original Answer 9 days from time of notification

Plaintiff's Answer to Defendant's Counterclaim (*Recenpcion*) Within 6 days after answer

Hearing on Defendant's Defensive Exceptions (CPCDF art. 272-A) Within 3 days after answer

Objections to Document Translations (CPCDF art. 330) Within 3 days after the translations were prepared

Response to an Edict Involving Non-Real Property (CPCDF art. 122) No less than 15 and no more than 60 days from time of publication

Request to Recuse a Judge or Secretary (CPCDF art. 179) From time of the Answer until 10 days before the first hearing

Pre-Trial conciliation Conference (CPCDF art. 272-A) Within 10 days after either Defendant's Answer or Plaintiff's Answer to Defendants Cross Claim

III. PROBATORY PHASE (*FASE PROBATORIA*)

Period for Offering Proofs (CPCDF art. 299)

Within 10 days from either the conclusion of the Pre-trial Conciliation Conference, or the hearing which opens the period of proofs, and concludes with *Auto de Admision*

Objections to Documentary Proofs (CPCDF art. 340)

Within 3 days of the issuance of the *Auto* ordering their reception

Challenges to Documents presented after the period for offering proof (CPCDF art. 100)

Within 3 days of the presentation of the document

Recusal of a judicially appointed expert (CPCDF art. 351)

Within 48 hours of notification of the expert's appointment

Hearing on Proofs (CPCDF arts. 299-300)

Within 30 days from the *Auto de Admision*

Within 60 days if a party lives outside Mexico City (subject to judicial discretion)

Within 90 days if a party lives in a foreign country (subject to judicial discretion)

IV. SENTENCING PHASE (*FASE RESOLUTIVA*)

Sentencing (CPCDF art. 87)

Within 15 days of *Citacion Para Sentencia*

Within 23 days of *Citacion Para Sentencia* in complex cases involving large quantities of proof (subject to judicial discretion)

V. APPEAL (*APELACION*)

Submission of written appeal (CPCDF art. 691)	Within 5 days of the final judgment
	Within 3 days of an interlocutory decision
Submission of <i>Escritos de Expresion de Agravios</i> (CPCDF art. 704)	Appealing party has 6 days to submit written <i>Agravios</i>
	Opponent has 6 days to respond to <i>Agravios</i> in writing
Bringing <i>Ampara Directo</i>	Within 15 days from final sentence

VI. MISCELLANEOUS TIME PERIOD PROVISIONS

Default time period for Decrees and <i>Amparos</i> (CPCDF art. 89)	Dictated within 3 days of the last filing
Default Time Periods (CPCDF art. 137)	5 days to invoke the right to appeal from a definitive sentence
	3 days to appeal an <i>Auto</i>
	3 days to celebrate hearings, exhibitions of documents, and expert testimony (subject to lengthening by judicial discretion)
	3 days in all other circumstances
Citation of people outside the location of the court (CPCDF art. 134)	1 extra day for each 200 kilometers from the court
	For citation of foreigners, the judge has the discretion to set the necessary time

VII. NOTES ON CALCULATING TIME PERIODS

Counting, generally (CPCDF art. 131)	Count only those days on which a judicial proceeding could occur
<i>Dias Habiles</i> (CPCDF art. 64)	All days except weekend or declared holidays
<i>Horas Habiles</i> (CPCDF art. 64)	From 7:00 A.M. to 7:00 P.M.

