

Comparative Litigation:

Mexico and The United States

By

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## I. Mexican Court System, Laws and Legal Actors

### Mexican Court System

#### 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. They handle much of the Amparo work at the trial and appellate levels. They are regulated principally by Constitutional Articles 94-97 and the Ley Organica del Poder Judicial de la Federacion. See Annex 1.

#### Mexican Supreme Court (Suprema Corte de Justicia de la Nacion)

Composed of 10 Ministers (justices) and 1 President (chief justice). The President of the nation is authorized to nominate three candidates for ministership. The Senate then has 30 days within which to elect the proposed Minister by a 2/3 vote. If the Senate fails to accomplish this, then the right to choose reverts to the executive. Ministers have a 15 year term, 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) Senator, 4) Federal Deputy, 5) a state governor, or 6) the head of the Federal District.

While in the past the Supreme Court was 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, in which case it formed 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 30 days of a laws operation on the request of either 1/3 of the Congress, 1/3 of a state congress, or the Attorney General. The new law has been criticized for both its short time dimension as well as the logic pertaining to those individuals or bodies with standing to bring the action.

The Supreme Court is broken down into 2 "Salas," each composed of 5 ministers. The President of the Supreme Court presides. The Mexican Supreme Court is self-administering, and as such is not under the administrative authority of the Consejo de la Judicatura Federal.

#### Collegiate Circuit Courts ("Tribunales Colegiados de Circuito")

These courts hear direct Amparos

#### Unitary Circuit Courts ("Tribunales Unitarios de Circuito")

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

## 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

## State Courts

The structure and function of state courts is established by local law (Ley Organica del Poder Judicial del Estado). For the most part state court systems are modeled after the federal model. Some variations do exist, however, so counsel should always be sure to check on a state by state basis. See Annex 1.

## Superior Court of Justice (“Tribunal Superior de Justicia”)

The highest state court is usually located at the state’s capital. State governors nominate candidates for the high court. Said nominations are subsequently taken up and approved by the state congress. The appointment and terms of service, inter alia, are regulated by the Ley Organica del Poder Judicial del Estado. These courts are typically organized into “Salas.”

## Court of First Instance (“Tribunales de Justicia del Fuero Comun / Primera Instancia”)

These judges are customarily designated by the Superior Court of Justice. There are no elected judges in Mexico, unlike the situation in the US. Usually there will be a state court of first instance for civil matters, family matters, and penal matters. Occasionally, there are state level courts with mixed jurisdiction.

## Administrative Justice

There are many administrative tribunals and para-judicial bodies with the capacity for resolving 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 more simple than proceedings in ordinary courts. Said entities may or may not be within the judicial branch. All decisions issued by such entities are reviewable, save those of the electoral tribunal. Conciliation and arbitration often plays an important part of the dispute resolution process followed by these entities. See Annex 1.

## Sources of Law Bearing on Litigation in Mexico

Many different laws have a bearing on litigation in Mexico. The most fundamental of these are presented below:

Constitution Politica de Los Estados Unidos Mexicanos (hereafter “CP”) - The supreme law of the nation (Art. 133). Important litigation related guarantees include:

Art. 13: Provides that nobody shall be judged by private laws or special tribunals

Art. 14: Provides that nobody shall be deprived of their life, liberty, or property, possession and rights except by trial conducted by a legally constituted tribunal, where the essential formalities of procedure operate to the benefit of the litigant

Art. 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

Art. 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.

Codigo de Procedimientos Civiles para el Distrito Federal (hereafter “CPCDF”) - 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 DF very closely.

Codigo Federal de Procedimientos Civiles (hereafter “CFPC”) - Regulates civil litigation on federal matters throughout the Republic. This code contains the laws relating, inter alia, to international procedural cooperation and the application of foreign laws in Mexico.

Codigo Civil (hereafter “CC”) - 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.), this 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 the public servant’s illegal acts, this code establishes the state’s default obligation for the harm.

Codigo Penal del Distrito Federal (hereafter “CPDF”) - Contains the penalties which are applicable when either false documentary evidence or untruthful testimony is presented. This code additionally establishes legal consequences for disclosing professional secrets, assisting one’s opponent, and abandoning one’s client without good cause. While these penal provisions are available to judges, they are rarely applied in real practice.

Codigo de Comercio (hereafter “CdC”) - Federal commercial law. States have not enacted their own versions because they are prohibited by the constitution from legislating commercial affairs. Nonetheless, in matters which pertain to this code, the plaintiff has the opportunity to choose whether he wants to bring the action in either federal or state court. In the event that a plaintiff opts to bring a Codigo de Comercio based action at the state level, the state judge applies the

federal code. In such a situation, the final right of appeal is to the Supreme Court of Justice. Counsel will note that the litigation procedures set forth in the *Codigo de Comercio* 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 *Codigo de Comercio* is silent on a point, it is supplemented by the CPCDF.

*Ley Federal de los Servidores Publicos* (hereafter “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 Federacion*. 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.

*Ley General de Profesiones* (hereafter “LP”) - This is the law which regulates lawyers (as well as other professionals). These regulations may be supplemented by the *Codigo de Etica Profesional* which applies to all members of the Mexican Bar Association (but membership is non-mandatory).

Foreign Law - Arts. 12-15 of the CFPC set forth the terms under which foreign law can be introduced in Mexican courts.

*Ley Organica del Poder Judicial de la Federacion*  
*Ley Organica del Poder Judicial del Estado*  
*Ley Organica de la Administracion Publica Federal*  
*Ley Federal de las Entidades Paraestatales*  
*Ley Organica de los Tribunales del Fuero Comun*

## Legal Players in Mexican Litigation

### Judges

Judges are appointed in accordance with the principles of “excellence, objectivity, impartiality, professionalism, and independence” (Art. 100, CP). As noted, *supra*, the way in which judges are appointed has been changing dramatically. Implicit in this change is 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 Publicos*. In contrast to the US, there are no elected judges in Mexico. All judges must be Mexican citizens.

### Secretaries

Judges in Mexico are supported by “secretaries” which are themselves lawyers. Arts. 61 - 69 of the *Ley Organica de los Tribunales de Justicia del Fuero Comun del Distrito Federal*

establish several secretaries, including “de acuerdos” and “conciliadores.” While they are not mentioned in the CPCDF, most courts also have an “actuário” secretary as well as a secretary “proyectista.” There should be no charge for the services of these professionals. Experience indicates, however, that if a lawyer needs something done immediately, a small contribution will help expedite the process. Secretaries are regulated under the terms of the Ley Federal de los Servidores Públicos.

### 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 (Art. 48, CPCDF).

### Notary Publics

There is no true equivalent to this legal actor in the US. 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.” The work product of notaries is carefully preserved in “protocolos.” Moreover, Art. 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). US counsel will note that many Mexican Consuls are authorized to serve as a notary.

### Mexican Lawyers in Private Practice

Mexican lawyers obtain “cedulas” after successfully completing 5 years of law school. There is no bar exam administered, although there is a thesis and professional service. Unlike a US law license which permits the holder to practice in a specific jurisdiction only, a cedula enables a Mexican lawyer to practice anywhere in the Republic, either at the Federal or State level. This said, it will be noted that a US attorney can petition to practice pro hac vice in another court. Additionally, after the passage of a certain number of years, usually 5, some states admit attorneys from other states to practice where there is reciprocity of the privilege between two states. Licensing requirements are established by the Secretary of Public Education, not the state bar association as is the case in the US.

### Conciliators, Mediators, and Arbitrators

As discussed below, conciliation is mandatory in most Mexican proceedings. Unlike the situation in the US, court conciliators are required to be licensed attorneys (Art. 62, Ley Organica de los Tribunales de Justicia del Fuero Comun del Distrito Federal). Mediation on the other hand has not really taken hold in Mexico. Outside of this fact, there are no mandatory certification requirements imposed on mediator-to-be, as is the case in Texas. Last, arbitration is an essential part of the international dispute resolution process in Mexico. Procedures and regulations for

arbitrations are found in a number of codified (CPCDF, CdC) and private sector (ICC, AAA, AMAC) sources.

### Gestores

While a cedula is required of all people who intend to practice the legal profession, the CPCDF, as well as certain other codes, does 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, present evidence, amongst other things in connection with a certain range of controversies (for example, promissory notes, evictions, etc.). The services of such individuals are attractive principally in light of the lower rate charged. Gestores may be required by the court to post a bond (Art. 51, CPCDF).

### Pasantes

Pasantes are law students who are clerking with licensed attorneys. Pasantes are often designated in the pleadings as being one of several legal representatives for a party, thereby enabling them 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 US, there is no formal student bar card sponsorship procedure, and the unauthorized practice of law is not actively sanctioned in Mexico.

### Foreign Lawyers

Foreign lawyers can currently practice as Foreign Legal Consultants in Mexico, as can Mexican lawyers in the US. If a US lawyer wants to become licensed in Mexico, he or she generally needs to start at ground zero, completing 5 years of law school, the thesis, and social service. This is not the case for Mexican attorneys which wish to become licensed in the US. After completing a one year ABA approved LLM program, Mexican attorneys are eligible to sit for the New York or California bar exam. The same basic opportunity applies in Texas, the only difference being that the Mexican attorney is required to have 3 years of experience in Mexico as a licensed attorney beforehand.

## II. Litigation in Mexico

### Overview of Stages in an “Ordinary” Mexican Proceeding in the First Instance

Medios Preparatorios - Acts intended to clarify an issue or preserve a right in anticipation of a subsequent suit

Expositiva                   - Petition  
                                  - Notification  
                                  - Answer  
                                  - Providencia Precautoria

Previa                        - “Pre-trial” conference and mandatory conciliation

Probotoria y Alegatos - Evidentiary hearings and arguments on the merits

Resolutiva                 - Citacion para Sentencia  
                                  - Sentence awards rights

Impugnacion               - Appeal / Amparo

Ejecucion                  - Incidente de Costas, Incidente de Liquidacion  
                                  - Execution

### Pre-Trial / Previa

#### Informal Discovery

Prior to filing suit in the United States there is much “informal” discovery and fact finding a party can conduct. For example, a potential plaintiff may check with the better business bureau or the attorney general’s office to see if there have been complaints made against the potential defendant. Similarly, the potential plaintiff may want to check courthouse records to learn about the potential defendant’s litigation history, if any. As for documentary information regarding deeds, property taxes, judgments, incorporations, UCC filings, births, marriages, deaths, probate, criminal history, etc., US court houses and on-line electronic data bases contain a wealth of information that is readily available to the general public. On a more sophisticated level, where information sought involves the unpublished federal government material, a party is able to raise, within certain parameters, a Freedom of Information Act (FOIA) request.

In Mexico gathering litigation intelligence can be quite difficult. The files from legal proceedings are not public record, as is generally the case here. Rather, the official file is made available only to the parties, and on special motion, to a victim as well. For parties, obtaining certified copies of anything from the file requires nothing less than a judicial decree (Art. 71, CPCDF). 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. On-line electronic data bases (either state or private sector run), on the other hand, are few in number and rarely, if ever, contain detailed public records (although Infosel, UNAM, and SECOFI do provide a good offering of statutes, articles, newspapers, journals, investment assistance, etc.). As for obtaining previously unpublished information from the government, there is no FOIA type mechanism available in Mexico to the general citizenry.

US counsel's best opportunity for gaining pre-trial insights into one's opponent may come through contracting a company which specializes in doing background checks. In Mexico and Latin America, for example, Kroll Associates is well known and respected for their background checks and other customized intelligence gathering.

#### Preparatory Measures ("Medios Preparatorios")

These are acts accomplished before the formal initiation of a lawsuit. Oftentimes, an interested party will take these measures by way of determining whether to file suit in the first place, and if so, against whom. In the written request to the court, the plaintiff-to-be must express the reason why the proposed action should be taken. The defendant-to-be must receive notice of the request within three days of its 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, the plaintiff-to-be can, inter alia:

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-to-be

Provide for the exhibition of titles, contracts, wills, and accounting information in matters pertaining to evictions, business dealings, and probate

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

Provide for the exhibition of an item of personal property which will be the subject of a real action

Provide for the examination of a witness of advanced age, or who may be in danger of losing their life.

Provide for the examination of a witness who may in the future be unable to testify due to being physically absent from the location of the court

Provide for the examination of a witness for the purpose of proving some exception

Provide for the examination of witnesses or the rendition of other declarations required by a foreign legal proceeding

If the party in possession of a document or a personal property declines to exhibit the item requested, or otherwise destroys or conceals it, the court can order that party to be responsible for any resultant damages suffered by the requesting party. There is also criminal responsibility which may be incurred by the party refusing to cooperate. 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. Conversely, 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.

Pre-trial actions are generally regulated by Articles 193 - 200 of the CPCDF.

Filing Suit / Expositiva

Competence

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

The court which pertains to the place designated for the performance of a contractual obligation  
The court which pertains to the location of real property in an action involving either the same or a rental

The court which pertains to the domicile of the defendant in an action involving personal property

The court which pertains to the last domicile of the decedent or the location of property in an action involving an estate

The court which pertains to the domicile of a debtor in an action involving a creditor

The court which pertains to the residence of minors or incompetents in an action involving same

The court which pertains to the domicile of the marital home in an action involving the nullification of a marriage

The court which pertains to the domicile of the marital home in an action for divorce (in the event that this home had been abandoned, the court which pertains to the domicile of the abandoned party is competent)

Jurisdiction and Mexican Courts:

If a Mexican court expressly recognizes the jurisdiction that another court has over a matter, the former court is later precluded from asserting jurisdiction over the same matter (Art. 147, CPCDF). Moreover, 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 (Art. 147, CPCDF).

Jurisdiction and Foreign Courts:

A Mexican court can recognize the jurisdiction of a foreign court under certain circumstances, including, inter alia: 1) upholding parties' forum selection clauses (Art. 566, CFPC); 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 (Art. 565, CFPC). Mexican law does not, however, permit the filing of an action claiming forum non conveniens, as is possible under US law.

## Exclusive Mexican Jurisdiction:

Under no circumstance can a foreign court exercise jurisdiction over any matter or issue exclusively reserved to the Mexican state as specified in Art. 568 of the CFPC. These include: 1) 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; 2) marine resources within Mexico's 200 nautical mile exclusive economic zone, or the Federal Law of the Sea; 3) acts of authority pertaining to the internal regime of the state, dependencies of the federation, or federate entities, 4) the internal regulation of Mexican embassies and consulates abroad, as well as their official actions; and 5) in all other cases provided for by law.

## 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 the issue of physical presence, Mexican courts require evidence of other connections, for example, doing business, commission of a tort, etc.

## Requisites for a Petition ("Demanda")

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

**Preamble ("Preambulo"):** Identification of plaintiff and plaintiff's domicile for purposes of notification, identification of defendant and defendant's 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.).

**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.

**Applicable Law ("Invocacion de Derecho"):** The class of action is identified, and citations are given to the applicable legal precepts and juridical principles.

**Prayer ("Puntos Petitorios"):** A condensed summary of the type and value of relief sought.

Accompanying the petition, in accordance with Articles 95-98 of the CFPC should be information substantiating:

The power which accredits the personality of any person who will appear in court in the name and on behalf of the petitioner

The power by which a corporation has designated its legal representative (this may be created by the articles of incorporation)

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.

If such documents are not in petitioner's possession, petitioner must designate in the pleading the archive or place where the originals are stored. If the document is public in nature, petitioner can go independently and obtain an authorized copy of same. In the event that a party can not obtain an authorized copy at this point, a simple copy will suffice for the short term, but the document will need to be perfected later at trial or risk being struck.

#### 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 think that the defendant will 1) absent him or her self from the proceeding in bad faith, or 2) conceal property which will serve as the basis for a subsequent action (Art. 235, CPCDF). 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 (Art. 247, CPCDF). As is the case in the US, Mexican courts are very careful in awarding this type of relief.

#### Jury Trials ("Jurado Popular")

US counsel will 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 7 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 Organica de los Tribunales de Justicia del Fuero Comun del Distrito Federal, as well as at Art. 20 of the Mexican Constitution.

#### Briefs

The resulting document is somewhat of a cross between a US petition and brief. On the one hand it is succinct and clear. On the other it lays out in all necessary detail the facts and supporting law. 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 used in practice. In a similar vein, 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 US. Thus, if Mexican counsel needs to be persuasive on an issue, he or she will take advantage of the opportunity presented in the form of the petition and answer.

#### Where to File / Cost of Filing

Petitions are filed with the Oficialia de Partes Comun, where they are in turn randomly assigned to a court. Cases are not assigned out to the courts through an oral docket call held in a presiding chamber as in the US. 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 US lawyers are accustomed.

### Oral Petitions

US counsel should also note that while the dictates of normal practice require written petitions, it is possible in Mexico to make an oral petition under certain conditions including, for example where there is a small amount of money involved in a justice of the peace claim, or where there is an imminent possibility of loss of life or liberty in an Amparo claim (in the latter case, the request can even be made over the 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.

### Potential Judicial Responses to Plaintiff’s Petition

Accept: Pleading complies with the requirements of Arts. 95, 96 and 255 of the CPCDF

Conform: “Prevencion.” Judge has authority and discretion to point out deficiencies or errors in plaintiff’s pleading for correction (Art. 257, CPCDF). Under this article, the judge can require one time by means of verbal instruction that the deficient party clarify the pleading.

Reject: Judge can refuse to accept pleadings if they do not comply with the requirements set forth in Arts. 95, 96, and 255 of the CPCDF described above. The fact that a copy of a document was omitted from a pleading is not sufficient grounds for rejecting a petition which are otherwise presented in a timely fashion. If there is a copy of a document missing, the judge, consistent with his or her Art. 257 prevencion power, will give the filing party three days within which to correct the matter. If it is not corrected within that time the judge will have the court secretary procure the document at cost to the party that filed the incomplete pleading (Art. 103, CPCDF). The exception to the foregoing three day grace period involves petitions that seek liquidations, which will not be admitted without the corresponding copies. Plaintiff can challenge a judges decision to reject a petition via the “Recurso de Queja” established by Art. 723, CPCDF.

### Legal Effects of Presenting a Pleading (Art. 258, CPCDF)

Suspend running of any statutes of limitations

Signal the start of the instance

Determine the value of the controversy

Withdrawal of Petition (“Desisitimiento 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 re-file the suit. The effect of the withdrawal of plaintiff’s suit is to return to the state of affairs which existed prior to the filing of the petition.

#### Service of Process and Other Notifications (“Notificaciones”)

This aspect of litigation is of fundamental importance in Mexico. While there are in Mexico 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 US. Rules governing service of process in Mexico are generally covered in Arts. 110 - 128 of the CPCDF.

#### Forms of Service:

**Personal Notice:** This 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. US counsel will note that neither constables nor private process servers are used for serving process in Mexico. Service of process can be made 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.

**Cedula:** When the defendant can not 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 place of work, without need of prior judicial order (Art 118, CPCDF).

**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. Said form of notice gives the cited party no less than 15 and no more than 60 days to respond. When the edict concerns real property the notification procedure to be followed is that set forth in Art. 122 of the CPCDF. In reality, courts are reluctant to authorize this type of notification.

**Certified Mail:** This form can be used to notify non-party witnesses, experts, and otherwise disinterested third parties. This method of notice is rarely used in practice.

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

#### International Notifications:

The most appropriate mechanism for accomplishing the international service of process is the Inter-American Convention on Letters Rogatory (hereafter "IACLR"). Both Mexico and the United States have signed and are parties to the IACLR. As Art. 10 of the IACLR requires service to be made in accordance with the internal laws of the state of destination, Mexico consistently demands that in-bound international service of process requests are managed in strict conformity with Mexican 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 US, and what may qualify as valid service under US law will be struck down in Mexico. Compounding matters, the US Supreme Court has held that the language of the IACLR is precatory in that it lacks an express statement of preemptive intent. Accordingly, US courts view the procedure outlined in the IACLR for serving process internationally merely as an alternative to those available under US law. In light of these discordant perspectives, US counsel's best approach is to accomplish international service of process in perfect conformity with Mexican law, or risk having it nullified.

#### Exequator ("Incidente de Homologacion")

US counsel should also note that letters rogatory are appropriate in Mexico for accomplishing procedural acts of a merely formal nature - for example, service of process, issuance of subpoenas, notices of intent to take deposition, etc. Letter rogatory are not, by themselves, appropriate for accomplishing the co-active enforcement of specific acts. These types of action are resolved, instead, through a formal procedure known as an "Incidente de Homologacion" (the common law term for same is "Exequator").

#### Presumptions Regarding Service

Regular mail is not used as it is in the US, 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. In this connection it is appropriate to note that Mexican counsel avoids, as a general operating proposition, any procedural action that is not squarely recorded, documented, or otherwise memorialized in the court's file.

#### Cost of Service

Again, consistent with Mexico's official 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 cover the transportation costs of the notificadores. Also, when there is a big 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 no option of using a private process server, as is the case in the US.

#### 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.

Legal Effect of Properly Conducted Service of Process (Art. 259):

Require the defendant to proceed with the action before the instant judge  
Serve as a benchmark point for calculations regarding the accumulation of interest on pecuniary obligations

Correction

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

Challenges to Service of Process

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

Incidente de Nulidad  
Apelacion Extraordinaria  
Amparo Indirecto

Waiver of Imperfect Notice (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.

Subsequent Notifications

Unlike the situation in the US 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. In this connection the secretary will both 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 indicated above. Instead, that attorney will have to assign somebody from his or her office to check both the announcement board and the Boletin on a daily basis.

Answer (“La Contestacion”):



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 (Art. 266, CPCDF). As is the case with defects in plaintiff's petition, Art. 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 (Art. 256, CPCDF). Obviously, 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:

**Allanamiento:** In taking this position, the defendant accepts plaintiff's claims, and commits to taking action 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" (Art. 274, CPCDF). If the conflict involves a debtor-creditor issue Art. 404 of the CPCDF grants a grace period. Moreover, pursuant to Art. 508 of the CPCDF, the judge can sequester goods as an assurance.

**Answer / Exception:** The defendant may respond with an answer which raises certain affirmative defenses or exceptions including:

**Competencia:** That the court is not competent to hear a matter

**Litispendencia:** That 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 (Art. 260, CPCDF).

**Conexidad:** When this defense is raised the plaintiff will be able to put on any necessary proofs (Art. 260, CPCDF).

**Res Judicata:** That 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 (Art. 260, CPCDF). 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 (Art. 272-A, CPCDF) Challenges of a court's competency shall be heard in the way addressed below.

**Answer / Counterclaim ("Reconvencion")**

Defendant's answer may also be in the form of a counterclaim against the plaintiff, a procedural action known as "Reconvencion." If the defendant is to avail him or her self of this right, the counterclaim must be asserted at the time of the answer, and never 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 Art. 266, CPCDF, and then raise his or her counterclaim. If an answer and counterclaim does not follow this order it may not be allowed. The plaintiff must answer defendant's counterclaim within a period of 6 days. The CPCDF does not contemplate a supplemental answer, as is the case in US courts,

permitting defendant to make additional exceptions, denials, and allegations by way of response to that alleged by plaintiff.

### Plea in Abatement

Nothing in the CPCDF expressly addresses a defensive pleading which does not result in the outright dismissal of an action, but does suspend further proceedings until such time as some issue is clarified or some obstacle to trial is removed (a US Plea in Abatement). Dilatory responses are possible in Mexico, but they do not interrupt a proceeding (Art. 262, CPCDF).

### 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.

### 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.

### 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 (Art. 31, CPCDF). With regards to 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, however, in the CPCDF expressly authorizes a judge to independently join a person where that person opposes being joined, even if that person’s absence will impede the obtainment of complete relief for those already parties.

### Intervention

Any interested party can intervene in a judicial proceeding in Mexico, as is the case in the US (Art. 1, CPCDF).

### Class Action

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

### 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 (Art. 260, CPCDF). A Mexican court's competence is determined by - and can thus be challenged in - four different aspects (Art. 144, CPCDF):

Subject Matter - Is the court competent to hear and rule on matters involving the subject matter presented by the controversy?

Amount in Controversy - Is the amount in controversy worth more than the equivalent of 182 times the average daily minimum wage for Mexico City (CPCDF, Titulo Especial, Art. 2) US counsel will quickly note that unlike the situation in domestic courts where there are different threshold amounts required by each court, there is only one sectioning point used for evaluating jurisdiction in relation to amount in controversy. The convenience and simplicity of this approach is self-evident.

The Grade of Court - Is jurisdiction proper at the federal or state level?

Territory - Is jurisdiction conferred on a particular court by virtue of the location of the event or thing giving rise to the action?

Such challenges are raised in one of two ways:

A. 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 9 days from the time of service. The doubtful party will ask the latter court to request the former judge to forward all pleadings already submitted, so that the latter can make a decision on the issue of competence.

B. 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 has competence of the matter.

The raising of such a challenge does not work to interrupt or suspend the overall proceeding (Art. 169, CPCDF). If a challenge to a court's competence is determined to have been raised in bad faith, the promoting party can be sanctioned (Art. 167, CPCDF).

US counsel will note that the Declinatoria proceeding approximates the basic effect of a "special appearance" in Texas for the purpose of objecting to a court's jurisdiction.

## 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 US (assuming, of course, that the US defendant timely made motion and the amount in controversy qualifies). As indicated above, a Mexican state court will properly decline to exercise jurisdiction over a matter which 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 de facto "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 US.

This said, US 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 said election is made, there is no other chance to switch to back to the other jurisdiction. Experience indicates that when this is the case, plaintiff's opt for the state courts. Federal courts do not object to this situation as this enables them 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.

### Forum Non Conveniens

When there is a more appropriate forum and the balance of interests are appropriately distributed, a US defendant may seek to have an action dismissed on the basis of forum non conveniens, arguing that a non-US 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 that can be filed by a Mexican defendant. Counsel will note that Texas does not permit forum non conveniens claims under certain circumstances, for example, wrongful death and personal injury actions arising out of incidents in foreign countries

### Challenging Venue

A party in Mexico can not formally raise the issue of "venue," as is possible in Texas, 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 to this result is raising an argument that the court lack territorial competence. With regard to the last point, there is no need for a similar provision in the CPCDF as judges, judicial secretaries, witnesses, experts, etc. are by law required to be impartial.

### 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 parts (Art. 170, CPCDF). When this is the case, the Mexican judge or secretary is obligated to excuse him or her self from the case (Art. 171, CPCDF).

If the Mexican judge or secretary fails to excuse him or her self, the parties can proceed to with a recusal action (Art. 172, CPCDF). This action can be brought from the time of the answer up until 10 days before the time of the first hearing. If a judge is recused, another will be substituted, and everything done by the recused judge up until the moment of the new judge's substitution will be nullified (Art. 180, CPCDF). 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 efecto devolutivo (Art. 192, CPCDF).

#### Default (“Rebeldia”)

If after the time period permitted by law the defendant has not answered, Mexican courts will apply that procedure applicable to default judgments (“Juicio de Rebeldia”), and the judge will presume all unanswered facts raised by the petition to be confessed. Where the matter pertains to familial relations, the civil status of individuals, and when notification was accomplished by edict, the facts will be considered to have been answered in the negative effect (Art. 271, CPCDF).

#### Other Pleading Related Considerations

#### 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 (Art. 34, CPCDF). The effect of this renunciation is total, and a party cannot re-file the claim. Mexican procedure is slightly different than that of the US on this point. In the US, a plaintiff can dismiss his or her petition at any time until the introduction of plaintiff's rebuttal evidence, without prejudicing the right of an adverse party to be heard on a pending claim. Significantly, the US litigant can dismiss with or without prejudice to re-file the claim, whereas a Mexican litigant only has the ability to dismiss without prejudice where the opponent has not yet been served with process.

#### 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 (Art. 34, CPCDF).

#### Alternative Claims

Alternative claims can be made in a single petition or answer in Mexico, provided they are not contradictory (Art. 31, CPCDF).

## Amending

Parties in Mexico do not have the same freedom to amend pleadings as exists in the US. Part of the reason for this has to do with a 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 Art. 98 of the CPCDF which prohibits the admission of other documents submitted by either side after the filing of the petition and answer. Art. 34 of the CPCDF reiterates this rule by establishing that no admitted petition nor answer can be altered or modified, except in the way provided by law (the exception discussed infra). 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, 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 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.

This is clearly quite unlike the situation in the US where petitions and answers can be amended (even to the point of pleading new matter so as to constitute an additional claim or defense) with relative ease.. 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 (again, provided the change does not operate as a surprise or cause an unfair prejudice to the opposing side).

## Citing Authority

In their initial pleadings, parties will present not only the facts applicable to 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/or state codes (for example, the Code of Commerce, the Federal Telecommunications Law, etc.). Both Mexican and US 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. An example of this occurred when 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 US 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 data base of Mexican laws.

Jurisprudence in support of a party's case is also always cited. As jurisprudence is created only after 5 consecutive decisions made by majority vote with regard to a specific issue, lawyers in

Mexico usually cite to each of the 5 cases constituting the jurisprudence, as well as the jurisprudencia in its own right. Art. 395 of the CPCDF specifies that if this type of authority is presented, the judge can demand the item's presentation. By way of contrast, 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

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

### Translation Requirements

All proceedings must be conducted in Spanish. Documents written in foreign languages must be translated into Spanish (Art. 56, CPCDF)

### Drafting Requirements

Facts recited in a petition or answer should be clearly numbered (Art. 255, CPCDF), all dates and numbers must be written out, and abbreviations shall not be used (Art. 57, CPCDF).

### Pre-Trial Conference and Conciliation ("Audencia Previa y de Conciliacion")

The judge must set a time for this hearing within 10 days from the time of the answer to the petition or counterclaim. At this hearing, where the judge may or may not participate (the court's secretary can give faith to the proceeding in the judge's absence), the parties try to find a solution to the dispute and thereby avoid litigation. Unlike the situation in the US 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 US. 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 (Art. 272-F, CPCDF). One interesting point of distinction concerns the results achieved by Mexican conciliation on the one hand and US mediation on the other. Subjective estimates by Mexican practitioners put the rate of settlement in the vicinity of 1%. In contrast, statistics compiled by US mediation groups put the settlement success rate at anywhere between 50% and 80%, depending on the mediation group or the individual mediator.

Pre-trial conferences in the Texas, by way of contrast, are used for purposes other than just trying to reach a settlement. It is at this moment that the court will consider all pending dilatory pleas, motions and exceptions (and not within three days of having been raised, as is the case in Mexico), set up a discovery schedule for the parties, and seek to establish stipulations as to facts and law.

### Motions in Limine

Pre-trial conferences in the US are frequently the time where a party will try to prevent certain information from entering the trial on the grounds that it was illegally obtained, or is too prejudicial, etc. The vehicle for accomplishing such a restriction is the motion in limine. As there is no real “trial” (rather, a series of conciliation and fact gathering hearings) in Mexico, 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 as judges in Mexico are required to reject proofs which do not conform to the facts alleged in the pleadings previously admitted by the court.

### Summary Judgment

Where the issues in a case are purely legal, as opposed to factual, the court can proceed at this point to set the matter for the Audencia de Alegatos hearing. Said hearing can be accomplished through written means (Art. 276, CPCDF). 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 the Texas, that a motion stating the specific grounds for seeking the summary judgment be filed and served 21 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.

### Declaratory Judgments (“Sentencia Declarativa”)

Both US and Mexican attorneys can ask the court for a declaratory judgment by way of settling some question as to the parties rights or status.

### Ad Litem

Mexican courts do not appoint private sector attorneys to serve as Ad Litem as is the case in the US. As the intended beneficiaries of an Ad Litem appointment are considered in Mexico to ultimately be under the protection of the state (minor children, lunatics, unknown parties, for example), Mexican courts, where circumstances so require, will charge the Ministerio Publico with the responsibility of representing such interests.

### 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, correct, reject, reverse, or recommit the report as it may deem necessary. There is no such parallel proceeding available to litigants in Mexican courts.

### Hearings in Mexico, Generally



Hearings in Mexico are not like those conducted by US courts. To begin with there is no court room, per se. All proceedings take place in what a US attorney would recognize as the judge's chambers. Hearings are technically open to the public in Mexico (Arts. 387 and 398, CPCDF), as is the case in the US, 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 (Art. 59, CPCDF). Considering, again, that there is truly no such thing as trial as US attorneys understand the concept, it should come as no surprise that Mexican counsel does not have recourse to procedural mechanisms such as "The Rule." In this specific connection, however, US counsel will note that Art. 364 of the CPCDF does provide 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.

### 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 court room necessarily forces parties to have most communications in the judge's chamber (or worse, as shall be discussed below, over lunch), thereby opening the door wide open to ex parte correspondence. Compounding this situation is the fact that in Mexico ex parte communications are not expressly prohibited by law, as they are in the US (consider, for example, Texas Disciplinary Rule of Professional Conduct 3.05). Really all parties can do in this situation is hope that the judge will abide by his duty to remain impartial.

### Decision Making

Decisions in the US, particularly at hearings, are often made immediately following the oral and/or written presentations of the lawyers. For the purpose of hearings, US counsel often goes to court with a prepared order in hand. All the judge will have to do having heard and been persuaded by the argument is sign. 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.

### 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 US judges. Sanctions can range, depending on the offense, from a fine to suspension to jail time (Arts. 61 and 73, CPCDF)

### 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 kind of motion or appearance with respect to a pending matter, a Mexican court can de oficio

declare the proceeding extinguished (Art. 137, CPCDF). When this happens, the situation between the parties returns to what it was prior to the filing of the law suit. Said declaration can be challenged by a revocacion proceeding. As a party is subsequently able to re-file on the same issue, the equivalent US action would be a Dismissal for Want of Prosecution.

### Probatory Phase/Fase Probatoria

#### What's 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 (Art. 284, CPCDF).

#### What Does Not Need to be Proved

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

##### Confessed facts

Facts recognized and agreed on by stipulation

Facts linked to legal presumptions

Facts derived from maxims of experience, scientific principles of causation, logic, reasoning, and mathematics

Notorious facts known to all people of a social, cultural or economic group

#### Presumptions

In Mexico, as is the case in the US, certain presumptions apply with regard to evidence. Mexican presumption can be one of two kinds: 1) legal, meaning that the presumption is established by law; and 2) human, which entails the deduction of a fact from one that has already been duly proved. When a party has a presumption in his or her favor, the attorney only then needs prove up the facts underlying the presumption (Art. 381, CPCDF).

#### 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 judge know and understand the truth regarding the controverted points (Art. 278, CPCDF). This standard is slightly narrower than that used by Texas courts, which focus on relevancy. In contrast to Mexican rules, a Texas court will let in a point that may in its own right be irrelevant if, in turn, it is reasonably calculated to lead to the discovery of admissible evidence (and provided it is not needlessly cumulative, unfairly prejudicial, or likely to create confusion and delay). This bootstrapping technique is not available in Mexico.

#### Burden of Proof (“La Carga de la Prueba”)

The party which alleges a fact has a duty to prove it up (Art. 281, CPCDF). Basically that will entail the plaintiff being responsible for all the facts raised in the petition, and the defendant for everything alleged in the answer. While this burden allocation basically tracks that used in the US, 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 "beyond a reasonable doubt."

#### Practice / Judges Authority

During the probatory phase of a Mexican proceeding, the parties offer all the proofs which are in their possession. When an item is not in their possession, the parties must indicate where it is located, if known (Art. 295, CPCDF).

Mexican judges have very 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 independently 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 proofs and thereby know the truth regarding the controverted facts. Similarly, Art 356 of the CPCDF mandates that all people with knowledge of the facts can be required to provide testimony. This power is essentially a US 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 the judges authority to issue such orders, as is the case in the US where subpoenas for compelling attendance are generally only valid within a certain number of miles of the courthouse.

The limits which are placed on the courts power to compel the disclosure of information or the testimony of people are set forth in Art. 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 US, where only spouses have this privilege, and even then it is limited. 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 is the responsibility of 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 (Arts. 73 and 288, CPCDF).

A third party witness in Mexico is always able to argue to the judge that disclosure of a particular item of 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 orders disclosure anyway, it is possible to seek and obtain indemnification either from one or both parties.

Through a variety of techniques, US 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 the parties success at trial is a function of the level of spontaneity and creativity they are able to achieve in open court, litigants have a natural interest in the procedures the law sets 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.

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 be able to subsequently make a decision on the matter. While there are certain prueba related practices which are “discovery like” (for example, the “Confesion”), there is no such thing as “discovery” per se in Mexico. Because parties in Mexico will, between their initial pleadings and these evidentiary hearings, have presented all the arguments they possibly can at the trial court level - and, because after the close of the pruebas period there is effectively nothing left procedurally save the judge’s sentence - there is no practical need to seek 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, for example), have no place in Mexican litigation.

#### Opening Period for Offering Proofs

From the conclusion of the Audencia Previa y de Concilacion, the judge formally opens up a 10 day period during which time the parties must offer their proofs (Art. 291, CPCDF). Where a party indicates that it will call experts or lay witnesses, it must provide the precise name and domicile of same, or risk having the judge reject the offer. In contrast to the practice in the US, it should be noted that the Mexican legal system does not distinguish between testifying and consulting experts. 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 had offered the proof can appeal the decision in efecto devolutivo provided the sentence is appealable in the principal. Otherwise, the only other recourse is that of “Responsibilidad” (Art. 298, CPCDF).

#### Standards of Admissibility (Arts. 291 and 298, CPCDF)

An item offered as proof shall be admitted by a Mexican judge provided:

It is relevant to controverted facts

It produces animo in the conviction of the judge regarding the facts

It is not raised in bad faith, contrary to good morals, or prohibited by law

It does not involve impossible facts

### Period for Proving Up (“Desahogar de Pruebas”)

From the time of the Auto de Admision, the judge opens up a 30 day period during which the parties are to present their proofs. In the event of extraordinary circumstances - for example, where the object of the proof is located outside of Mexico City - the judge can extend this time period to 60 days. Similarly, where the object of proof is located outside the country, a Mexican judge can extend the basic time period to 90 days (Art. 300, CPCDF). In both cases, there are certain other pre-requisites which must be met.

### Types of Proof

There are 5 main types of proof used in Mexican courts: 1) confessions, 2) documentary, 3) experts, 4) non-party witnesses, and 5) judicial inspection. The basic attribute of each of these are discussed below.

### Confession (“Confesion”)

Known as the queen of proofs in Mexico, confessions represent somewhat of a cross between what a US 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 which wishes to question another party will submit a list of questions (the “Pliego de Posiciones”) to the court in a sealed envelope (Art 292, CPCDF). At that point the party which is to answer the questions (the “Absolvente”) is notified of the pending question session (Art 309, CPCDF). 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 same. 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 secretary. The responding party is not permitted to have his lawyer available for help (Art. 315, CPCDF). If the respondent is a foreigner, then 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;” should the Absolvente wish to add more to his or her statement after the categorical response, he or she is free to do so (Art. 314, CPCDF). If the Absolvente refuses to answer, or answers in a way considered to be evasive, the judge will deem the matter confessed (Art. 316, CPCDF). 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 Texas Bill of Exceptions.

In the case of extra-judicial confessions, the interview and questions must comply with the essential formalities required by the law (Arts. 74 and 78, CPCDF). 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 US counsel, to supplement information previously 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.

### Documentary Proof (“Pruebas Instrumentales”)

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

### 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 theCodigo Federal de Procedimientos Civiles (Art. 329, CPCDF). Moreover, if that foreign document was translated, opposing counsel has three days to object to the translation, after which time it is deemed acceptable (Art. 330). Any foreign document which is in some other language besides Spanish must be translated.

For the purpose of an evidentiary hearing, certified copies obtained from the public source should be used. Where the document was prepared by a notary, 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 sufficiently authenticated by either 1) a certified copy, or 2) the testimony of a person who has compared the documents involved.

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

### Private Documents

Examples of what constitute private documents include: vales, pagares (promise notes), check books, letters, and other privately created writings. To be admissible in Mexican court, the

original must be presented and, if applicable, signed (Art. 339, CPCDF). 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 (Art. 341, CPCDF). These rules are substantially the same as those in Texas, which requires an original of a private document, but will admit a duplicate if 1) there is no question raised as to the authenticity of the original, or 2) it is not unfair to admit the duplicate in lieu of the original.

Any objection to a private document must be made within 3 days of the issuance of the auto which orders its reception (Art. 340, CPCDF). As was the case with alleged forgeries regarding public documents, if the authenticity of a private document should ever come into question, the court can have a handwriting 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, pointing 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 (Art. 337, CPCDF).

Texas, on the other hand creates a limited privilege for so called trade secrets, provided the allowance of the privilege will not conceal fraud or be unjust. The matter is left to the discretion of the judge, and his or her perception of the weight of the competing interests. 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, etc.)

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, they must indicate the name and domicile of the individual at the opening of the period for offering proofs, and citation to same must subsequently issue. If a party fails to do this, the offer of proof may be rejected.

Each side has three days to nominate experts (Art. 347, CPCDF). If the parties are not able to reach a mutual agreement regarding the selection of one expert, each side will designate its own experts. 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 can be recused within 48 hours from the time of notification to the litigants where the proposed expert has a specific relation with one of the parties or an interest in the

outcome (Art. 351, CPCDF). 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 judges chamber through a combination of written (“Dictamen Escrito”) and oral means (Art. 391, CPCDF). The expert can be questioned by the judge, the parties, or a third party expert, and 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 (as shall be discussed below) 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 witnesses testimony or the determination of a fact in issue. US counsel should also note that there is in Mexico no articulated means or standard for assessing the validity or reliability of scientific reasoning and methodology advanced during expert testimony similar to the Daubert standard applicable in US matters.

#### 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 (Arts. 356 and 359, CPCDF). Witnesses which are over the age of 70 or 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 a witnesses presence. In this last connection, the judge has full power to limit the number of witnesses, either in advance or at the time of hearing. Art. 357 of the CPCDF additionally authorizes the judge to fine or incarcerate a witness which 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 (Art. 363, CPCDF). Failure of a witness to disclose truthfully at this point is a violation of Art. 247 of theCodigo Penal para el Distrito Federal. Texas courts, in comparison, hold that for the purposes of testifying 1) insane persons are incompetent, and 2) children are possibly incompetent, subject to exam by the judge.

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. Opposing counsel during his or her cross exam will be trying to establish contradictions in the witness’ 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 that does not speak Spanish, the judge will provide a translator. To the extent that this



procedure is adversarial rather than inquisitorial in nature, this Mexican legal procedure has much in common with US trial procedure.

If opposing counsel succeeds in uncovering deception or inconsistencies in a witness' testimony, counsel has two different options. First, the attorney can bring the deception to the judge's attention on the spot, thereby increasing the opportunity that the judge will recall the event at the time for valuing the proofs (Art. 356, CPCDF). This is likely to be done if there were not many witnesses or proofs involved in a matter. Second, 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 10 years, as is the case in Texas. 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.

Requests for witness testimony from Mexico for use in a foreign proceeding are governed by Arts. 360 and 362, CPCDF. Pursuant to a properly issued request from the foreign authority, the Mexican judge can conduct a hearing for the purpose of accomplishing witness testimony. At said hearing, the questions must be asked in oral form directly to the witness, and can not encompass issues unrelated to the material facts of the foreign case.

Several contrasts are evident between the ways Mexican and US courts manage witness testimony. Unlike the US where 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, leading questions are never permitted in Mexican courts. 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 US. Last, as was the case with confessions, Mexican attorneys have no express duty to supplement information previously rendered to the court, as do US attorneys.

### Judicial Inspection

As is the case in the US, a judge in Mexico, either independently or on the motion of parties, can carry out inspections of matters related to the litigation (art. 354, CPCDF). 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 which were persuasive (Art. 355, CPCDF). This rarely, if ever, happens.

### 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 it has signed, it is possible to collect evidence for trials to be conducted outside of Mexico in a number of bilateral circumstances. Specific examples include 1) the Inter-American Convention on the Taking of Evidence Abroad (to which the US is not a party); 2) the Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (to which the US is not a party); and 3) the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (to which the US is a party). With respect to the last convention noted, what constitutes a “civil” or a “commercial” dispute has not been defined. This being the case, problems can arise out of the unique understandings different countries attach to each concept. US counsel should also keep in mind that generic discovery or production requests are not upheld by Mexican courts. If a foreign party wants a particular document, the foreign attorney should describe the item sought in very specific and clear terms.

### Concluding Statements (“Alegatos”)

Following the Pruebas, parties, according to Art. 393 of the CPCDF, are able to make statements which come very close to serving the function of a closing statement in the US. 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 (Art. 394, CPCDF). For the purposes of making these statements, the plaintiff goes first, and is followed by the defendant. At the trial court level, each side has 15 minutes to speak. In reality Alegatos are almost never given, thus making the previously cited articles dead letter.

### Acts (“Actas”)

At the conclusion of each evidentiary hearing, the court’s secretary will make an Acta memorializing everything that occurred. Said 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 parties; extracts of the declarations of experts and witnesses; the results of any inspections realized; 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 (Art. 99, CPCDF).

### Sentencing Phase / Resolutiva

### 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 15 days within which to rule on the matter and issue a sentence (Art. 87, CPCDF). 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 8 days may be taken for issuing a sentence.

### 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)

Of course, a party can challenge a sentence on appeal. This said, however, a sentence becomes *res judicata* (“Cosa Juzgada”) in one of two ways:

**Ministerio de Ley:** That is, by automatic 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 “Responsabilidad” (Art. 426, CPCDF).

**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* (Art. 427, CPCDF).

Mexican sentences have a presumption that they were reached in accordance with the requirements of the law (Art. 91, CPCDF). 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 (Art. 84, CPCDF).

Mexican attorneys are not in the habit of drafting and submitting “Proposed Judgments,” as are US 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” (where a Texas case was not heard before a jury), which constitute a writing separate from the judgment a Texas judge otherwise renders and signs off on, are not used in Mexico, principally because the structure of a Mexican

sentence already incorporates such a discussion. As a matter of practice, Mexican judges are required to carefully indicate the reasoning they used in reaching their decision (Art. 402, CPCDF)

#### Appeal / Impugnativa

This is the phase in which appeals are raised. See Annex 2.

#### Execution / Ejecucion

This is the phase where the prevailing party executes on the judge's award. In the sentence the judge will indicate which litigant may have 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 (Art. 138-142, CPCDF). 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 (Art. 139, CPCDF). Also of interest to US counsel is the fact that attorney's fees are neither contemplated by Mexican statute nor awarded by Mexican judges. This being the case, they are also 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 strictly between the parties.

### III. Concluding Remarks

#### 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 are:

#### 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 law. Legislative reforms in 1988 created an entire new body of law dedicated to international procedural cooperation, 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 15 years, the net effect of which has been positive for the foreign investor. Obvious examples include the Foreign Investment Law of 1993, the NAFTA, and the re-vamped intellectual property 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.

#### Expanded Role for Administrative Justice

Concomitant with the introduction of foreigner-friendly investment laws has been an increase in the number of administrative bodies dedicated to specific areas of commerce (for example, anti-trust, intellectual property, consumer protection, etc.). Commonly, such administrative bodies are empowered to resolve disputes utilizing their own personnel (which tend to be specialist within that field in the first place) 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.

#### 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.

#### Increased Use of Technology

Slowly but surely, technology is coming to the Mexican legal community. On the public side, there are more computers in courtrooms (the courthouse in Guadalajara, Jalisco even has a

fully computerized docket), more published decisions available in a diverse range of media (CD-ROM, diskette, Internet), 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 level of efficiency in Mexico's legal system.

### 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 15 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 (Art. 95, CP). Similarly, Art. 101 of the CP places limits on a former high ranking judge's right to conduct certain professional activities for a period of 2 years following that person's departure from the bench.

### Better Training for Lawyers

As is the case in the US, 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 CLE 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 (and particularly the younger ones) elect to pursue Diplomados (the equivalent of half a Masters) or LLM's either in Mexico or abroad (the US, Canada, and Europe are popular choices). 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 US counterparts, principally because bar associations in Mexico do not have the same power and significance as state and national level bar associations in the US. In this last connection, US counsel will also note that the use of the term "specialist" is not expressly regulated in Mexico as in the US.

### Greater Cross-Border Interaction

As the US 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 US 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, US 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 law, procedure and legal vocabulary of the foreign jurisdiction. There has even been a cross-border bar association formed (the Texas-Mexico Bar Association). 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, have an advanced understanding of 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 otherwise in the future.

#### 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 continue to settle disputes outside of court room, principally through arbitration.

#### Corruption

Corruption and inefficiency are "commonplace" in Mexican courts according to a 1997 report by the U.S. Department of State. A 1997 survey by the Association of American Chambers of Commerce showed "significant" distrust in the judiciary's ability to render swift and impartial decisions in Mexico (Mexico scored a "3" on a scale of 1-10, with "10" indicating a very fair and impartial system). In another survey (1995) 75% of the Mexican citizens surveyed felt that their system of justice was "riddled" with corruption. Such tendencies, insofar as they are accurate, undermine Mexico's economic and political progress at the same time they 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." 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 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 US courts are models of fairness and impartiality, because 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. Suffice it to say, however, that the essential comparative issue between Mexico and Texas is not a question of kind, but rather of degree.

Until the problem is fixed, US counsel needs to be cautious in how he or she manages litigation in Mexico and, at the same time, how to best advise his or her US clients. Of course, US counsel will recall that he or she is bound by the Foreign Corrupt Practices Act 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 that a violation of the rules of professional conduct was committed in Mexico City as opposed to Houston or San Antonio.

### 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. For example, between 1995 and 1997, the docket of the Tribunales Colegiados de Circuito has increased from 99,821 to 215,499 matters, that of the Tribunales Unitarios de Circuito has risen from 27, 564 to 30, 512 matters, while that of the Juzgados has increased from 195,052 to 215,499 matters. With international 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 (instead, a formula based approach is used by the courts).

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 US, particularly for medium and small sized firms. US counsel should be mindful of these practices before entering into any billing arrangements.

### Judiciary Still Not Independent

In spite of all 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 in the past. The judiciary’s inability to count on official security forces to do their jobs and protect people has not worked in tandem with 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” as regards appropriate expressions of independence. According to this analysis, Mexico’s judiciary 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, confiscations of small farmers’ property by the government, 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, however, given the rate and degree of change sweeping the country.

### 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.

#### General Advice:

Try to stay out of court in the first place. Make sure arbitration clauses are valid, secure obligations to the fullest extent possible, know who you are dealing with, be conscious of where contracts are created and to be performed, and make wise choice of law selections.

Develop a network of foreign counsel with which to work and confer. Texas Rules 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). In developing this network, US 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 have to go to court, be sure to get competent local counsel. Foreigners should be careful about thinking that just 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 DF. 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.

## Annex 1 - 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

Administrative

Tribunals	Para-Judicial Commissions
Juntas Federales de Conciliacion y Arbitraje*	Comision Federal de Competencia
Tribunal Fiscal de la Federacion	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 Electoral**	Comision Nacional Bancaria y de Valores
	Comision Nacional de Seguros y Fianzas

\* 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

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

## Annex 2 - Key Time Periods (“Plazos”) Within Which To Act

### Ordinary Civil Trial / Juicio Ordinario Civil

#### I. Preliminary Phase / Fase Previa

Citation to Opponent Advising of Intent to Pursue Some Preparatory Measure, Art. 198:

Must be accomplished within three days of petition to court

#### II. Fase Expositiva

Time Within Which Notificadores Must Accomplish Service (Art. 110, CPCDF):

Within three days from time they received the pleading

Defendant’s Original Answer:

Must be made within 9 days from time of notification

Plaintiff’s Answer to Defendant’s Counterclaim (“Recenvencion”):

Must be made within 6 days from time of defendant’s answer

Time Period for Court to Hold a Hearing on Defensive Exceptions Raised by Defendant (Art. 272-A, CPCDF):

Must be heard within 3 days of answer

Time Period Within Which to Object to Document Translations (Art. 330, CPCDF):

3 days from time translations are prepared

Time Period Within Which a Cited Party has to Respond to an Edict Involving Non-Real Property (Art. 122, CPCDF):

No less than 15 and no more than 60 days from time of publication

Time Period for Requesting the Recusal of a Judge or Secretary (Art. 179, CPCDF):

From the time of the answer until 10 days before the time of the first hearing

Pre-Trial Conciliation Conference (Art. 272-A, CPCDF):

Must be conducted within 10 days from the time of

- a) defendant's answer
- b) plaintiff's answer to defendant's cross claim

### III. Probatory Phase / Fase Probatoria

Period for Offering Proofs (Art. 299, CPCDF):

Runs for 10 days starting from the

conclusion of the pre-trial conciliation conference  
time of the hearing which opens the period of proofs  
concludes with Auto de Admision

Time Period for Objecting to Documents Submitted as Proof (Art. 340, CPCDF):

Within three days of the issuance of the auto ordering their reception

Time for Challenging Documents Presented After the Period for Offering Proof (Art. 100, CPCDF):

Any such challenge must be made within 3 days of the document's having been presented

Time Period for Recusing Judicially Appointed Expert (Art. 351, CPCDF):

Within 48 hours of the litigant's having been notified of the experts appointment

Time for Hearing on Proofs (Arts. 299 and 300, CPCDF):

Within 30 days from time of the Auto de Admision

Within 60 or 90 days, respectively, if matter involves a party which lives outside of Mexico City or lives in a foreign country, in accordance with the judge's discretion, and provided other prerequisites are met

#### IV. Sentencing Phase / Fase Resolutiva

Citacion Para Sentencia (Art. 87, CPCDF):

Sentence must be made within 15 days of this point

In complex cases involving large quantities of proof, it is within the judges discretion to take an additional 8 days

#### V. Appeal / Apelacion

Time Period Within Which to Submit Written Appeal (Art. 691, CPCDF):

Within 5 days of a final judgments, and within 3 days of an interlocutory decision

Time Period Within Which to Submit Escritos de Expresion de Agravios (Art. 704, CPDDF):

Appealing party has 6 days to review file and submit written Agravios

Opponent has 6 days to review and respond in writing to Agravios

Time Period Within Which to Bring Amparo Directo:

15 days from time of final sentence

#### VI. Miscelaneous Time Period Provisions

Default Time Period for Decrees and Autos (Art. 89, CPCDF):

These must be dictated within 3 days of the last filing

Default Time Periods (Art. 137, CPCDF):

5 days to invoke the right to appeal from a definitive sentence

3 days to appeal an Auto

3 days to celebrate hearings, exhibitions of documents, expert testimony, although judge always has discretion to order more time

3 days in any other circumstance

Citation of People Outside the Location of the Court (Art. 134, CPCDF):

One day extra for each 200 kilometers of space from the court

For citation of foreigners, whatever time the judge thinks necessary

## VII. Notes on Calculating Time Periods

Counting, Generally (Art. 131, CPCDF):

For the purposes of counting only those days on which a judicial proceeding could occur are included.

Dias Habiles (Art. 64, CPCDF):

Any day of the year provided it is not a weekend or a declared holiday

Horas Habiles (Art. 64, CPCDF):

From 7:00 A.M. to 7:00 P.M.