

Subrogating South Of The Border - Increasing Recovery Opportunities In Mexico

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Introduction

Twenty years ago, subrogating in a foreign country was almost unheard of. However, in the last ten years, increases in international trade, outsourcing of American businesses, and an increased emphasis on international trade, have resulted in American firms conducting increased business abroad. No single event in history, however, has affected Americans' ability to conduct business across its borders, like the January 1, 1994 signing of the comprehensive trade agreement known as the North American Free Trade Agreement, or "NAFTA." This agreement, linking Canada, United States, and Mexico in a "free trade" sphere, was actually an expansion of the earlier Canada-U.S. Free Trade Agreement of 1989. Unlike the European union, NAFTA does not create a set of supra national governmental bodies, nor does it create a body of law that is superior to national law. It is, rather, an international agreement very similar to a treaty. NAFTA has been controversial since it was first proposed, and its effects have been heavily and hotly debated. However, one thing is clear - NAFTA has increased the amount of trade and business that American companies and insureds conduct south of our border in Mexico. This has translated directly into an exponential increase in subrogation opportunities in a country whose legal system is quite foreign to all but the most accomplished of international American lawyers. Each year, millions of dollars of property, workers' compensation and health insurance subrogation opportunities are intentionally or unknowingly abandoned because they involve the daunting and intimidating spectra of litigation in Mexico. The brief overview of Mexican civil law and its ramifications for subrogating carriers which follows, is intended to educate and make subrogation professionals aware of subrogation rights, remedies, and opportunities available in *Estados Unidos Mexicanos*.

The Mexican Legal System

The legal system in Mexico, especially the civil justice system, has for years had a reputation in America of being costly, time-consuming and, in some cases, corrupt. Things are changing. The Mexican government is aware of this perception both domestically and abroad. As a consequence, they have joined with Mexican businesses and have made productive efforts to give investors a better perspective on both the commercial and legal aspects of civil justice in Mexico and give assurances of the sound operation of their legal system.

A major difference between the American and the Mexican legal system is that America has followed the Common Law System whereas Mexico has adopted the Civil Law System. Along these lines it is fair to say that both countries have structured their laws based upon sets of provisions organized in a systematic manner and referred to as "codes" or "laws," designated as municipal, state, or federal; the difference being that for Mexican courts the codes precede judgments and under Common Law, case law precedes judgments.

Mexican laws can be divided into two main categories:

(a) *Substantive Laws*. Laws which establish rights and obligations of individuals who engage in certain activity, such as the Civil Code, the Commercial Code, the Law of Insurance Contracts, the Law of Navigation, etc.

(b) *Procedural Laws*. Laws which establish the rules to follow in

order to file suit and litigate a matter, the Code of Civil Procedure, the Rules for Mercantile Procedure, Rules for Administrative Proceedings, etc. Mexican procedural law is extremely formal, and special attention must always be given to drafting writs, Powers of Attorney, evidence and allegations, in the specific form required in the applicable procedural code. Failure to do so may result in delays and frustrations.

As the American system of civil justice, there are cases in situations for which there are no applicable provisions in either substantive or procedural law, and there are portions of codified law that are not easily interpreted or applied. In order to solve this problem, the Mexican legal system relies on court decisions in order to interpret and resolve these issues. If codified law and jurisprudence both fail to bring a solution to a specific legal problem or issue, then the General Principles of Law and Doctrine written by prestigious legal authors from Mexico and abroad may be used in court to help resolve the problem or issue.

The improvement in the justice and legality of the judgments delivered by Mexican Federal Courts in recent years is notorious, which proves the fascinating evolution of the system. Proof of this evolution is that for many years the courts ranked local laws equal to international treaties but that criteria was amended by the Mexican Supreme Court of Justice in 1999 in order to place international treaties above domestic law. Therefore, whenever there is a contradiction between the provisions of an international treaty and domestic law, the treaty will prevail. This is a trend for legal harmonization that enables Mexico to improve its commercial relationships.

Mexico is a federation. It is composed of states that are deemed free and sovereign in all matters pertaining to their internal regulation, but united in a federation established under the principles set forth in the Mexican Constitution. Mexico, like America, has three branches of government - the executive, the legislative, and the judicial. Therefore, like America, Mexico has both federal and state courts.



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Subrogation cases, depending on their nature may be dealt with, at the choice of the claimant, in state or federal courts. Due to their level of organization and professional expertise, it is recommendable to opt for the latter. The Mexican federal judiciary consists of four levels, from top to bottom, they are the Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*), Collegial Circuit Courts (*Tribunales Colegiados de Circuito*), Unitary Circuit Courts (*Tribunales Unitarios de Circuito*) and District Courts (*Juzgados de Distrito*). The matters and cases dealt with by each of the levels depend on the type of proceedings. In typical civil proceedings pertaining to a subrogation case, District courts, which are trial courts presided over by a single judge, will hear the matter in first instance; all appeals, save for the final judgment will be heard by Unitary Circuit Courts, which are composed of one Magistrate; then, the final judgment, if appealed, will be heard by Collegial Circuit Courts, which are composed of three Magistrates, who decide unanimously; if their decision is challenged, then the matter will be brought to the Supreme Court of Justice but only to review the constitutionality of the judgment. Similar to the plenary power of the U.S. Supreme Court, the Mexican Supreme Court hears disputes arising between two or more federal courts, or between two powers of the same state, relating to the constitutionality of a law, together with disputes in which the federal government is a party.

The Mexican judiciary system affords the parties with several remedies in the event of a civil wrong. One unique remedy is Amparo proceedings, which are special proceedings filed against second or third instance resolutions and heard by the hierarchical superior of the level delivering the challenged resolution. They are aimed at reviewing, in any stage of the proceedings, whether or not a resolution abides by constitutional principles and, more interestingly, if they are fair. We may refer to them as “mini-appeals,” but they can be utilized by a dilatory defendant wishing to draw out an inevitable negative result. The court hearing the Amparo proceedings must adjust the resolution to comport with constitutional principles and fairness. This is convenient in the sense that a subrogation professional will normally have two or three levels hearing his claim for wrongfulness before the challenged resolution becomes final,

although the downside of it is that the proceedings may sometimes last longer than expected if one of the parties lodges unreasonable Amparo proceedings.

State Trial Courts, on the other hand, include Civil Courts (*Juzgados Civiles*) which hear civil matters, Justices of the Peace (*Juzgados de Paz*), which hear smaller civil matters or criminal misdemeanors, Administrative Courts (*Juzgados de lo Contencioso-Administrativo*), and Bankruptcy Courts (*Juzgados de lo Concursal*), which hear all types of bankruptcy and reorganisation matters. The Superior Court of Justice (*Suprema Corte de Justicia de la Nación*) is the general high appellate court within the state. While the United States and Canada are “common law” countries, both indebted to several centuries of English legal development, Mexico is not. The legal system of Mexico is patterned in many respects on the legal systems of continental European countries, exhibiting a commonality with similar laws in Spain, France, Austria, Germany, Italy, and Switzerland. Mexican legislation and legal thinking have closer ties with the laws of the Roman Empire and its subsequent development in Medieval Europe, than do those of the United States.

While countries such as the United States have divided their laws into two basic areas - criminal and civil, Mexican law exhibits sharp divisions between the several branches of jurisprudence, the primary ones being civil, commercial, criminal, administrative and labor.

When the subrogation professional evaluates a subrogation matter for litigation in America, he or she relies primarily on precedent - that is, how courts and judges have interpreted the liability of parties in litigation involving similar facts. To the contrary, due the restricted application of binding judicial precedent, fewer publications and dissemination of legal reports, and the relatively less or historical role accorded the Mexican judiciary resulting from several factors, Mexican lawyers do not support their opinions with case precedent (of which there may be none), but rather rely upon their reading of the statute itself, supported by their own understanding of the conventional wisdom of the Mexican legal community at large. The conventional wisdom is manufactured in and is obtained through commentaries and an intercollegial network by which information and experience is

exchanged. Also, subrogation professionals considering pursuing matters in Mexico do not have to deal with the typical common-law, civil-law dichotomy. If someone is found criminally liable for an act, the repair of damages may be claimed within the criminal proceedings. As an alternative, since the person found criminally liable will, on the same basis, be civilly liable for damages resulting from the same act, the claimant may choose to pursue the repair of damages in civil proceedings instead. If only it were that simple in America.

Discovery In The Mexican Legal System

As is common to most modern legal systems, under Mexican procedural law evidence can only be submitted during the stage of "Production of Evidence." Despite this general rule, there are exceptions which should be closely followed otherwise the proceedings may bring frustrating results given the formality of Mexican procedural law.

As mentioned lines above, formalities are an important part of Mexican law. This is particularly true when it comes to documentary formalities that should be met by the parties to the proceedings, which in general terms, are as follows:

- (1) The documents in which the claim is founded must be produced in originals together with the complaint writ.
- (2) A Power of Attorney prepared as per a specific wording must be produced to prove proper standing in court. This is rarely required in the United States.
- (3) All documents must be in originals or copies certified by a Notary Public.
- (4) All documents must be in Spanish language or translated by an official translator.
- (5) All documents issued by a foreign authority must be legalized or duly apostilled.

The rules for production and admission of evidence should be used in a strategic fashion during litigation since evidence must be produced only by the party who makes an assertion and not by the party denying a certain fact, save for exceptions where the burden of proof is specifically shifted on to the party denying the fact.

Proceedings in Mexico are written and only in exceptions situations will they will be oral. For instance, Mexican procedural law does not envision interrogatories as in U.S. proceedings. The Mexican rule is that the questions to be made to witnesses must be presented with anticipation and in writing to the Court, who shall rule out those they deem insidious and only then the witness will provide an oral answer to the questions. On the other hand, expert witnesses are usually not orally questioned, they receive the evidence and render a report, which may be challenged by the parties to the proceedings.

Subrogating In The United States Or Mexico?

When attempting to subrogate for damages to cargo transported from Mexico to the United States, or for personal injuries sustained while an American employee is in Mexico, the decision with regard to whether to subrogate in American courts or Mexican courts can be quite complicated. Generally, Mexican courts will hear any matter involving a loss that occurred within its boundaries. Same is true for American courts. But what about litigating in America a subrogation claim involving a loss that occurred in Mexico? Clearly, international arbitration may be sought where previously or subsequently agreed to. However, such matters are beyond the scope of this article. Filing suit in American courts would seem to most often be the logical choice given that American subrogation professionals are more familiar with American law and its predictability, and have access to subrogation counsel more readily within the states. However, American jurisdiction may not allow subrogating within its borders for a cause of action that accrued in Mexico. A person is subject to personal jurisdiction in American courts on any of the following theories:

But what about litigating in America a subrogation claim involving a loss that occurred in Mexico?

(1) *Presence*. The physical presence of defendant in the forum is a sufficient basis for acquiring jurisdiction over him, no matter how brief his state might be.²

(2) *Domicile*. A person will always be sued on all claims, regardless of where they arise, in the defendant's state of permanent residence or in the case of a corporation, the state in which it is incorporated.³

(3) *Consent*. A defendant can consent to jurisdiction or impliedly consent by voluntarily appearing and submitting himself to the jurisdiction of the American court.⁴ For example, many states have long arm statutes that legislate that a non-resident motorist using its highways is deemed to have appointed a local official as his agent to receive service of process in any action growing out of the use of a motor vehicle within that state. The state, however, has been responsible for providing actual notice to the non-resident defendant.

(4) *Minimum Contacts*. If a defendant has sufficient dealings or affiliations with the forum jurisdiction that make it reasonable to require the defendants to appear and defend a lawsuit brought in the American forum, jurisdiction is proper.⁵

Jurisdiction under the "minimum contacts" theory is permissible when the defendant's activity in the forum is continuous and systematic and the cause of action is related to that activity. An example would be business conducted by a foreign corporation in the American forum.

However, even where jurisdiction is proper, American courts can evoke the *Doctrine of Forum Non-Conveniens*, which permits a court to refuse jurisdiction when litigation can more properly be had in another forum that is available and adequate. When Mexican citizens filed suit in Texas against Bridgestone/Firestone, Inc. alleging defects in Ford Explorers and certain models of Firestone tires, which caused injury to them, Firestone filed motions to dismiss the actions based on the grounds of *doctrine of forum non-conveniens*.⁶ The court dismissed the foreign plaintiffs' lawsuits on the grounds of *doctrine of forum non-conveniens*, holding that Mexican courts provided an adequate forum.

Attempting to obtain service against a Mexican national company, however, is a different story. The *Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters* sets forth a process by which American courts work with Mexican courts to effect service. The process works something like this:

- (1) Suit is filed in America against a Mexican company.
- (2) The American court presents the service papers to the Mexican Ministry of the Interior, as provided for in the Convention.
- (3) The Ministry of the Interior, in turn, files the papers with a local court in Mexico with proper jurisdiction.
- (4) The Mexican court then sees to it that the defendant is actually served with the lawsuit.
- (5) If the American court does not receive a response back from the Mexican court within six months, the Convention provides that this is the equivalent of proper service on the defendant.

Unfortunately, step number five, above, has been held in Mexico to be contrary to the Mexican Constitution and invalid. Actual service on the defendant is required, not merely this presumption contained in the Convention.

Subrogation In Mexico

Mexican law recognizes the doctrine of subrogation. In Mexico, as in America, an insurance company is subrogated to the rights of the insured in the event of a loss, which is effected simply by payment of a loss to the insured. The insurer is required only to prove that payment under the terms of the policy have been made, and no further formalities are required. Proof would be as simple as a copy of the release and receipt or subrogation receipt. However, in Mexico, an insurer is only subrogated when a loss paid was specifically covered under the applicable policy. This technicality is more serious in Mexico than it is in the United States. Payment of claims, which may require subrogation in Mexico, should be paid only with a full understanding and correct interpretation of the policy, which makes it worthwhile, in large claims, to bring together the efforts of a specialized insurance lawyer and a claims adjuster in paying the underlying claim. As in America, subrogation in Mexico often involves a situation where the loss paid by the insurance company does not fully "make whole" the insured. The situation may often bring complications and controversies between the underwriter and the insured, especially in cases where there is a limitation of liability of the liable third party, since none of the claimants will be able to make a full recovery. The "*Law of Insurance*

Contracts,” which is the statute which governs the relationship between an insured and an insurer, solves the problem by establishing that the parties shall be entitled to a valid claim against the liable third party in a proportional fashion, as opposed to the harsh effects of the made whole doctrine in America whereby the insurer is often left out in the cold. In the event that this rule is breached by one of the parties, the other will have an action against the party breaching the contract to recover his part of the recoverable amount. This rule, however, does not apply in the case of insolvency of the liable party, in which event it is “first come, first serve.” For non-Mexican underwriters, there may be additional hindrances to recovery, since the “*Law of Insurance and Mutual Institutions*” provides for a specific prohibition for Mexican nationals and non-Mexican underwriters to enter into contracts of insurance for certain coverages. Examples of this are civil liability for risks in Mexico, including P&I Insurance, and Hull and Machinery. The rule is so strict that its violation is penalized with heavy fines and incarceration. For purposes of subrogation, if the rule in question is breached, the insurance contract may be rendered null and void by the court hearing the matter and any subsequent subrogation will not be available.

Summary

The Mexican legal system requires subrogation professionals to do something we are not used to doing - use common sense. Cases that may provide opportunities for recovery in the United States may not so provide in Mexican courts. Heavy attention should be paid to obtaining proper documentary evidence of paid losses and subrogation rights, as the courts are very strict with the formalities with regard to same. Judgments recovered in Mexican Pesos are formally converted into American Dollars in a hearing before the trial court. Subrogation in Mexico may often take longer than its counterpart in the states, but it can be quite lucrative. Subrogation dollars, which would require Mexican recovery efforts, are often overlooked due to confusion, a lack of understanding of the Mexican legal system, and the stereotypical notion that such civil justice is not available in the Mexican courts. These notions are incorrect. There are hundreds of millions of dollars in subrogation recoveries to be had in Mexico, if we take the time and the effort to go after them. *Piense la subrogación!*

ENDNOTES:

¹ Free trade is an economic concept referring to the selling of products between countries without tariffs or other trade barriers. It is the absence of artificial and government-imposed barriers to trade amount individuals and firms in different countries. International trade, historically constricted by different national taxes, tariffs, and other fees imposed on exported and imported goods, as well as non-tariff regulations on imported goods, flourishes in a free trade environment.

² *Pennoy v. Neff*, 95 U.S. 714 (1877).

³ *Milliken v. Meyer*, 311 U.S. 457 (1940).

⁴ *Hess v. Palowski*, 274 U.S. 352 (1927).

⁵ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁶ *In re Bridgestone/Firestone, Inc.*, 305 F. Supp.2d 927 (S.D. Ind., February 27, 2004).