THE BANKING LITIGATION LAW REVIEW

Third Edition

Editor
Deborah Finkler

THE LAWREVIEWS

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PREFACE

This year's edition of *The Banking Litigation Law Review* demonstrates that the increase in litigation involving banks shows little sign of slowing.

Although disputes arising from the 2008 financial crises are reaching their end, what might be termed 'normal' banking litigation has resumed, and is in no short supply. This crosses the full spectrum from claims by consumers against banks (relating to losses incurred either to the bank or to third parties) to claims by banks for the recovery of loans and the enforcement of guarantees. In all these cases, cross-border issues frequently arise, and banking litigation remains an important source of developments in the conflicts of laws in international commercial litigation.

The context for much of the consumer litigation is the growing – and increasingly complex – range of consumer protection regulation in the various jurisdictions under review. However, while the courts appear content to apply that legislation in order to hold banks to account, its existence – together with the more extensive rights it affords to consumers – has meant that in many parts of the world the courts are less willing to expand consumer rights beyond the context of that regulation, instead preferring to enforce the contractual rights between banks and customers strictly.

In those circumstances, we have seen a growth in the use of class actions and representative claims, often where consumers can take advantage of friendly regulation. These mechanisms are being adopted in countries where they did not previously exist, in some cases by changes in legislation, and in others by changes to court procedure. At the same time, courts in different jurisdictions are reacting very differently to this new or growing type of litigation. In some cases this is by seeking to restrict the circumstances in which such claims can be made but in others by promoting their use. It therefore remains to be seen whether the growth of class actions and representative claims against banks is really a worldwide phenomenon.

These novel forms of litigation, and other more conventional claims, are also subject to a global trend towards making both the courts and, importantly, alternative forms of dispute resolution more available to litigants. We continue to see parties encouraged to settle their claims out of court, by way of general mechanisms such as mediation or by way of specialised banking ombudsmen. Further, some jurisdictions are promoting the use of class or group settlements, which can resolve major disputes with limited court involvement.

At the same time, the impact of data protection legislation, including the General Data Protection Regulation (GDPR) in the European Union, has opened a further means by which claimants can bring claims against banks, which are inevitably major holders of personal data. The use of the GDPR both as a tool in litigation and as a source of complaint or damages in itself is, therefore, a concern for banks, both in a regulatory and in a litigation context. This concern is only likely to grow.

One bright spot for banks is a general trend in favour of upholding assertions of secrecy, confidentiality and privilege on the part of banks and their advisers against claimants. This is especially important in the context of investigations against banks. In common law jurisdictions in particular, courts now tend to treat such investigations as akin to adversarial litigation and after the concerns raised over the past year or two, now largely accept that many documents created during investigations should be protected by privilege.

Finally, the general political and economic uncertainty around the world remains a probable source of banking litigation, especially where that uncertainty negatively affects investors. Nobody is any closer to being able to say what the political or economic impact of Brexit will be either to the United Kingdom's banking sector or to that of the European Union. It would be dangerous to predict when clarity in this regard will be available.

Deborah Finkler
Slaughter and May
London
November 2019

Chapter 9

MEXICO

Rodrigo Zamora E, Andrés Caro de la F and Santiago Oñate Y[1]

I OVERVIEW

Commerce legislation is a subject matter considered exclusive of the Federal Congress. However, commercial litigation is considered a concurrent subject matter jurisdiction, meaning that, unless a specific rule or statute applies (such as maritime, bankruptcy, aviation laws, etc.), parties may litigate before state or federal courts. The Code of Commerce applies to all merchants and their transactions both from a substantive and procedural standpoint.

No specific rules or statutes exist for banking litigation, except for bankruptcy of banks. That means that banks are subject to the same proceedings as any other merchant. Generally speaking, banks may initiate, or be subject to, the following proceedings: ordinary proceedings, executive proceedings (these two may be both oral or written), enforcement of non-possessory pledges and guarantee trusts, enforcement of traditional pledges (i.e., where the creditor has possession of pledged assets), bankruptcy, tailor-made proceedings and enforcement of foreign judgments.

Ordinary and executive proceedings are, by far, the most common commercial proceedings. There are three main differences between ordinary and executive proceedings: that executive proceedings are faster, the plaintiff may initiate attachment of the debt upon process being served and the defendant may only raise limited defences. To gain access to an executive proceeding, the debt must be documented in an executive title, typically: negotiable instruments, public deeds containing a due and payable amount, final judgments and settlements signed before a court, and some administrative authorities. Additionally, banks can also file executive proceedings relying on the credit (or other financial agreements, such as a master lease or factoring) agreement accompanied by a statement certified by the bank's authorised accountant.

Enforcement of non-possessory pledges and guarantee trusts may be extrajudicial or judicial and the latter does not require prior initiation of the former. As with executive proceedings, these enforcements are fast and focus on granting possession of the collateral to the creditor upon serving of process. Defences for the defendant are limited. If the pledgor refuses to grant possession of the collateral in an extrajudicial proceeding, the creditor will have to resort to judicial enforcement, where the court will issue an order demanding repossession of collateral. These proceedings, when not contested, tend to focus on the appraisal and sale (or acquisition by the creditor) of the collateral.

1 Rodrigo Zamora E is a partner and Andrés Caro de la F and Santiago Oñate Y are senior associates at Galicia Abogados.

Judicial enforcement of traditional pledges consists of requesting the judge's authorisation to sell the collateral upon default, with an opportunity for the pledgor to oppose the sale if he or she alleges the debt is not yet due and payable. A broker will conduct the sale and the creditor will retain the proceeds up to the amount of the debt.

Tailor-made proceedings are judicial proceedings that the parties specifically design in terms of evidence that can be offered, the appeals that are available, what issues can be subject to such a proceeding and what court should rule on them. For parties to have access to a tailor-made proceeding, they must have agreed to it in a public deed or in writing before a court but, in any event, they cannot agree to proceedings which would affect constitutional due process. Due process includes having a way to serve process that sufficiently assures the defendant gets knowledge of the complaint, a reasonable term for answering the complaint and offer evidence, an opportunity to present evidence and argue and an opportunity to appeal.

The Insolvency Law regulates business reorganisation and bankruptcy of merchants as two successive stages of the same proceeding called *concurso mercantil*: conciliation and liquidation. Banks cannot be subject to a *concurso mercantil* as debtors (see next paragraph) but they can (and usually do) participate as creditors. The purpose of the conciliation stage is to preserve companies through a restructuring plan with its debtors. The purpose of liquidation is the sale of the business, as a going concern, in productive units or by piecemeal. The conciliation stage (where a restructuring plan is negotiated) can last up to one year; if no agreement is reached, the court will open the liquidation stage. Generally speaking, the law recognises secured claims as being paid after some super priority employment and administrative claims, but before other labour and employment claims, tax, unsecured and subordinated claims.

As for judicial bank liquidation, the current proceeding can only be petitioned by the Institute for Banking Savings Protection, only upon revocation of the authorisation granted by the National Banking and Securities Commission (and when the bank is in negative equity. The main characteristic of this proceeding is its speediness, where the judge has to declare liquidation if the financial standards are met, no later than 24 hours of the petition being made. During liquidation, the Institution or the Commission mentioned may request corrective measures such as intervention, suspension of some activities and capital injection. There is no reorganisation stage and the liquidator, which shall be the above-smentioned Institute, shall liquidate all pending transactions and pay creditors in an order generally similar to that of the regular insolvency.

Finally, regarding enforcement of final commercial foreign judgments (that do not decide *in rem* actions or corporate governance issues), Mexico will allow such enforcement without revisiting the merits if, among other things, the judgment was rendered in compliance with legal formalities of the foreign jurisdiction and of treaties relating to international communications, if the ruling court was competent, if process was served personally or on an appropriate process agent and if it does not contravene Mexican public policy or if the issues decided have already been decided or are being tried by a Mexican court.

II SIGNIFICANT RECENT CASES

In the past few years, banking litigation in Mexico has witnessed several judicial precedents that point towards a re-imagining of the way in which usurious interests are conceived, the way in which trust funds are treated in bankruptcy cases and to unprecedented consequences in civil liability cases.

i Usurious interests

In 2011, Mexico witnessed a Constitutional Reform of great substantive and practical breadth. It essentially rearranged the way in which human rights adjudication was perceived and it repurposed the role of ordinary and constitutional judges to upkeep said reform.[2] It was not long before the results of this reform started to appear and one of the matters in which it had a transformative result was in the way interest rates were analysed by courts in promissory notes, contracts and credits. In a series of rulings, the Supreme Court, using the legal framework of the American Convention on Human Rights, considered that usury and any other forms of exploitation of man by man was prohibited.[3] In this regard, the Court established that all judges, both state and federal, had the obligation to advert usurious interests, even if the parties did not raise the issue in their motions, and establish a fairer interest rate. Furthermore, the Court stated that this standard applies both to delinquent interests as well as ordinary ones.[4] However, the Court has also upheld that banks and other financial institutions enjoy the *prima facie* presumption that their interest rates are not usurious.[5]

Another characteristic of these precedents is that the determination of usury has not been dogmatic, but rather context-dependent. For example, in a case of auto financing, a Federal Appellate Court held that in determining if the interest rate was usurious, it had to refer to the industry practice and the interest rates in other similar loans.[6]

ii Trust funds in bankruptcy cases and in rem guarantees

In 2018, a Federal Appellate Court issued a judgment that would prove to have significant effects in the protection of funds transferred by a debtor to a trust. First, the Appellate Court ruled in favour of a detachment standard that would imply the isolation of the trust funds from any liabilities that arise out of insolvency of the debtor (the settlor) who transferred

2 This constitutional reform that essentially introduced the following: (1) that all individuals shall have the human rights recognised in the Constitution and in international treaties and therefore that all interpretation must be made in conformity with both bodies of norms; (2) all human right norms shall be interpreted in the most beneficial manner for the people, and (3) the obligation for all governmental authorities to protect and guarantee human rights in accordance with its core principals.

3 Supreme Court of Justice, First Chamber, *Amparo* Directo en Revisión 2534/2014; *Tesis aislada* 1a. CXCIII/2015 (10a.): '*Explotación del hombre por el hombre. Concepto*.' Found in in the *Semanario Judicial de la Federación y su Gaceta, Libro 19, junio de 2015, tomo I*, pg. 586.

4 Supreme Court of Justice, First Chamber, *Tesis de jurisprudencia* 1a./J. 54/2016 (10a.): '*Usura. Su prohibición aplica tanto para los intereses ordinarios como para los moratorios pactados en un pagaré*.' Found in in the Semanario Judicial de la Federación y su Gaceta, Libro 50, noviembre de 2016, tomo II, pg. 883.

5 *Amparo* directo en revisión 777/2016, Supreme Court of Justice, First Chamber; *Tesis aislada* 1a. CCLII/2016 (10a.): '*Usura. Las tasas de interés de las instituciones bancarias que conforman el sistema financiero mexicano, gozan de la presunción de no ser usurarias*.' Found in in the *Semanario Judicial de la Federación y su Gaceta, Libro 36, noviembre de 2016, tomo II*, pg. 916.

6 *Amparo* Directo 736/2017 Eighth Federal Appellate Court of the First Circuit; *Tesis aislada* I.8o.C.47 C (10a.): '*Usura. Para determinar si el interés moratorio pactado en un pagaré suscrito como garantía en un financiamiento automotriz es excesivo, es válido acudir a la tasa publicada por empresas dedicadas a ese ramo en específico*.' Found in the *Semanario Judicial de la Federación y su Gaceta, Libro 50, enero de 2018, tomo IV*, pg. 2348.

assets to a trust. In other words, the placement of assets in a trust fund removes them from the debtor's liabilities subject to the rules of insolvency proceedings, because the assets are not part of the debtor's estate.[7]

Second, the Federal Appellate Court considered that even when the trust was created as a 'guarantee trust', said trust should not be considered as an *in rem* collateral (such as a pledge or a mortgage). The underlining logic was that an *in rem* collateral is still part of the debtor's estate, with the creditor having a higher priority interest in the assets than other unsecured creditors, whereas the guarantee trust assets belong to the trustee, instead of the debtor and no other creditor has interest in the assets.

Although this precedent is not binding, it reaffirms the principle of bankruptcy remoteness of trust funds that had been called into question by another non-binding precedent issued in 2016, where a court stated that the rules governing trusts should defer to insolvency rules and, thus, the trust assets should be considered as part of the settlor's estate.

iii Civil liabilities and punitive damages

Extra compensatory damages had not been part of judicial adjudication in Mexico, until 2013 when the Supreme Court ruled on the civil liabilities of a hospital that did not practise due care in preventing an accident.[8] While the facts of the case exceed the scope of this chapter, the introduction of this common law concept to a civil law tradition system has brought with it new litigious scenarios. While the Court acknowledged that punitive damages had two facets, as a retributory mechanism and as deterrent, there is yet to be an academic or judicial consensus on the scope and adjudication guidelines for punitive damages. However, the driving force behind the deterrent criteria is usually to prevent egregiously illicit acts. This driving force, in turn, can have potential effects on all types of companies, including banks, if a court considers the banks' activities cause egregious civil liabilities, for instance, if a court considers that interest rates are so egregious that not only should the court reduce them (see subsection i), but it should also impose punitive damages to deter this practice. Although a scenario of punitive damages against banks seems unlikely, it is important to raise awareness to prevent such a scenario.

III RECENT LEGISLATIVE DEVELOPMENTS

Before 2012, all types of commercial proceedings were written, with the exception of the evidence hearing, which was orally conducted but, in any event, was transcribed and analysed in its written form. Because what mattered for issuing the ruling was the written form of the hearing, it was commonplace for judges not to be present at the hearings, but for clerks of the court to conduct them. Logically, oral arguments were almost non-existent and interrogations and depositions were very mechanical, without the natural flow of an open-court interrogatory.

In 2012, Congress reformed the Code of Commerce to include oral ordinary proceedings for otherwise written ordinary proceedings where the disputed amount is lower than the equivalent of approximately US$35,000.

7 Eight Federal Appellate Court of the First Circuit, *Amparo* en Revisión 70/2018; *tesis aislada* I.8o.C.57 C (10a.): '*Fideicomiso de garantía. Sus efectos en caso de quiebra del deudor.*' Found in the *Semanario Judicial de la Federación y su Gaceta, Libro 50, agosto de 2018, tomo IV*, pg. 2847.

8 Supreme Court of Justice, First Chamber, *Amparo* Directo 30/2013.

In 2014, Congress passed the Financial Reform, which produced major changes for banking transactions, bringing Mexican financial rules closer to the best practices worldwide. This improved the already existing forms for securing transactions, better and more flexible rules for blanket liens and floating liens, money pledges, more flexible guarantee trusts, etc. The Financial Reform also improved the rules of the electronic public registry for personal property granted as collateral, which makes the creation, enforcement and collection of collateral easier, while it also creates new temporary restraining orders to bind defendants to trial and prevent them from concealing assets. The Financial Reform also encompassed several other regulatory changes, many of them discussed in Section X.

In sum, the Financial Reform intended to make credit transactions more accessible to small and medium-sized companies and enforcement upon defaulting easier for banks, thus reducing the cost of credit.

In 2017, Congress passed a new reform to the Code of Commerce, creating a new oral executive proceeding available for claims that are above the threshold indicated before but below the equivalent of approximately US$200,000 and making oral ordinary trials the norm for any ordinary procedure, removing any quantitative threshold for these proceedings. This reform is still being gradually introduced in courts.

IV CHANGES TO COURT PROCEDURE

As discussed in Section III, court proceedings are now mainly oral. This speeds up the proceeding, because all or almost all evidence and arguments are offered in a single hearing. The judge, who is present at the hearing, can now issue a faster judgment, based on what he or she sees and hears from the parties. Open-court interrogation helps the judge to better perceive the facts and makes judgments more accurate. Legislative changes now also restrict access to appeals to more limited issues, preventing parties from using them for delaying purposes.

V INTERIM MEASURES

Legislation and court precedents have been developing and expanding the application of interim measures in recent years. For instance, the defendant's intent to conceal fungible assets, such as money, is now presumed, thus relieving the petitioner from demonstrating so before obtaining a freezing order.[9] This makes asset-freezing orders significantly easier to obtain.

Additionally, in the past, the petitioner had to identify, for instance, the exact bank and bank account to freeze, while a recent binding precedent states that providing this data is not required for obtaining the freeze.[10] Therefore, provided the other requirements are met (including the existence of a due and payable debt, the absence of other goods to collect from and posting a bond), the judge may grant the asset-freezing order addressed to any

9 See Article 1168, fraction II of the Code of Commerce.

10 First Circuit Civil Court *en banc, Tesis de Jurisprudencia* PC I C J/85 C (10a.): '*Medida de aseguramiento en materia mercantil. La identificación del número de cuenta y de la institución bancaria no constituye un requisito para la procedencia del embargo de cuentas bancarias como providencia precautoria, y puede solicitarse de forma genérica al juez mercantil para que la otorgue*.' Found in the *Gaceta del Semanario Judicial de la Federación, Libro 62, enero de 2019, tomo II*, pg.s 1220.

bank. Moreover, courts have stated that the very limited previous regime, that subjected the petitioner to showing the necessity of the interim measure with appropriate documents or at least three witnesses (which is still generally applicable to proceedings initiated before 2014) violates the fundamental right of full access to justice.[11]

Nevertheless, courts have also issued precedents preventing creditors from using the interim measures abusively. For instance, a non-binding precedent states that an interim measure shall be denied if the debt is already secured, even when the creditor argues that the collateral is insufficient.[12]

VI PRIVILEGE AND PROFESSIONAL SECRECY

The Law of Credit Institutions provides that, generally, information and documents related to banking transactions and documents the banks handle are confidential.[13] In this regard, banks are forbidden from giving information to third parties about the deposits, transactions and services it provides to its clients. This rule, however, has several exceptions. Credit institutions must give information when a judge orders it because the account holder, trustee, settlor, principal or agent, etc., is a party to a judicial proceeding.[14] The judicial warrant can be made directly to the credit institution or it can be made through the National Banking and Securities Commission. Furthermore, banks are also required to provide information upon request from the state or federal Attorney Generals, the Secretary of the Treasury and other designated authorities.

However, these exceptions have been subject to judicial interpretation by the Supreme Court. In 2017, the Supreme Court ruled that that the exception to the general rule regarding the obligation to provide information about clients when required by a state or federal Attorney General was unconstitutional because it violates the privacy of the clients. It specifically states that the only way by which banks could provide information about their clients in an ongoing criminal investigation was through a judicial warrant.[15]

New Federal Congress majorities (as well as a new administration) have entailed a series of proposals and readjustments that may have repercussions for the financial regime as well as more particular issues like bank secrecy. This year, a political party belonging to the

11 Supreme Court of Justice, First Chamber, *Amparo en revisión* 710/2017; *Tesis Aislada* 1a. CCXLI/2018 (10a.): '*Medidas precautorias. El artículo 1173 del código de comercio, en su texto vigente en 2012, vulnera el derecho a la tutela jurisdiccional efectiva en su vertiente de derecho a la ejecución de las sentencias*.' Found in the *Gaceta del Semanario Judicial de la Federación, Libro 61, diciembre de 2018, tomo I*, pg. 350.

12 15th Federal Appellate Court of Civil Matters of the First Circuit, *Amparo en revisión* 70/2019; *Tesis Aislada* I.15o.C.19 C (10a.): '*Medidas cautelares o providencias precautorias en materia mercantil. la solicitud de que se dicten para asegurar el reclamo de una cantidad determinada es improcedente, cuando el juzgador advierta la existencia de una garantía real que pudiera respaldar lo demandado*.' Found in the *Gaceta del Semanario Judicial de la Federación, Libro 67, junio de 2019, tomo VI*, pg. 5206.

13 *Ley de Instituciones de Crédito*, Article 142.

14 idem.

15 Supreme Court of Justice, First Chamber, *Amparo Directo en Revisión* 502/2017; *tesis aislada* 1a. LXXI/2018 (10a.): '*Secreto bancario. El artículo 117, fracción ii, de la ley de instituciones de crédito, en su texto anterior a la reforma publicada en el diario oficial de la federación el 10 de enero de 2014, viola el derecho a la vida privada*.' Found in the *Semanario Judicial de la Federación y su Gaceta, Libro 55, junio de 2018, tomo II*, pg. 977.

majority submitted a proposal to the Senate, which purported the objective of weakening bank secrecy, with the idea of helping combat corruption, money laundering and organised crime.[16]

VII JURISDICTION AND CONFLICTS OF LAW

Conflict of laws is an area of the law that has been left mostly unexplored by Mexican courts. Thus, precedents are hard to find. The applicable laws explain that Mexican laws apply to (1) persons that are in Mexico, (2) transactions executed in Mexico and (3) transactions in which the parties agree to abide by them, excepting when Mexican conflictual laws state that foreign laws shall govern. A court will recognise transactions executed in accordance with foreign laws. Transactions regarding real and personal property will be governed by the laws where the property is located. Formalities of foreign transactions shall be governed by foreign laws, although parties may choose to comply with formalities of Mexican laws if the transaction is to produce effects or be enforced in Mexico. Other than that, a court will apply the foreign laws the parties choose, excepting when the foreign law is inconsistent with Mexican public policy.

In regards to forum choice, parties may freely choose among the courts located (1) where one of the parties reside, (2) where the contract shall be performed, (3) or where the goods related to the transaction are located.

A recent nonbinding precedent stated that when subrogation occurs, the jurisdiction agreements will not apply to the incoming party.[17] Subrogation, generally, occurs when a third party becomes the new creditor of a debtor in an already existing obligation by virtue of paying in place of the original debtor; the third party subrogates the original creditor. The precedent states that the jurisdiction clause should not apply to the payer because he or she did not agree to it. However, applicable laws to negotiable instruments consider that assignment or transfer of said instruments produces subrogation. Although the precedent was issued in connection with subrogation by payment, it is not clear whether it will also apply to subrogation by transfer of negotiable instruments. This may impact the assignment of credits that are guaranteed by promissory notes or other negotiable instruments.

A recent binding precedent states that forum choice shall be set aside if it is part of an adhesion contract and the choice impairs the party's full access to justice.[18] The holding of the case is that the forum is supposed to be freely chosen, which does not occur in adhesion

16 See, *Senado de la República, Presentan iniciativas para eliminar 'secreto bancario y fiscal'*, 12 February 2019. http://comunicacion.senado.gob.mx/index.php/informacion/boletines/43645-presentan-iniciativas-para-eliminar-secreto-bancario-y-fiscal.html.

17 12th Federal Appellate Court of Civil Matters of the First Circuit, *Amparo en revisión* 389/2018; *Tesis Aislada* I.12o.C.149 C (10a.): '*Sumisión expresa. El pacto previsto en el artículo 1093 del código de comercio no se transfiere por medio de la subrogación, por tanto, para el caso de controversia, no obliga a quien se subroga en los derechos y acciones de uno de los contratantes originales, atento al derecho fundamental de acceso a la justicia*.' Found in the *Gaceta del Semanario Judicial de la Federación, Libro 68, julio de 2019, tomo III*, pg. 2159.

18 Supreme Court of Justice, First Chamber, *Tesis de jurisprudencia* 1a./J. 1/2019 (10a.); '*Competencia por sumisión expresa. La regla establecida en el artículo 1093 del código de comercio, no resulta aplicable a las cláusulas estipuladas en contratos bancarios de adhesión cuando se advierta vulneración a la garantía de acceso a la impartición de justicia*.' Found in the *Gaceta del Semanario Judicial de la Federación, Libro 65, abril de 2019, tomo I*, pg. 689.

contracts. What constitutes sufficient burden as to impair full access to justice remains unclear, but the precedent explicitly refers to standard form contracts executed by financial institutions. Thus, choosing a forum where the debtor resides (or close by) is, at least, advisable.

VIII SOURCES OF LITIGATION

Commercial litigation in Mexico is usually characterised by summary proceedings involving the collection of debt under a negotiable instrument.[19] Furthermore, as explained in Section I, there are essentially two types of commercial proceedings: ordinary and executive. While the first includes summary proceedings, the latter are generally concluded within 25 months[20] and the action consists of claims of negotiable instruments to creditors like promissory notes and bills of exchange. In these cases, the debtor's ability to contest the execution is quite limited since the negotiable instrument is thought to be pre-constituted evidence of the plaintiff's right to collect.

Moreover, litigation in Mexico consists of multi-instance procedures, including appeals and in some cases, the writ of *amparo*.[21] This can distort the measurement of how long it will take a plaintiff to enforce a judgment.

In cases where the banks' clients are the plaintiffs, probably the most recurrent procedures refer to unauthorised credit card charges. For said cases, Mexican legislation has enabled financial service users to opt between submitting claims to the National Commission for the Protection and Defence of Financial Services Users, to the courts or both.[22] Other cases involve the annullment of abusive clauses in contracts and, in recent years, there has been an increase in cases concerning fiduciary responsibility of brokerage firms. On the other hand, when banks are the plaintiffs, the most common sources of litigation are debt collections.

IX EXCLUSION OF LIABILITY

The Code of Commerce states that, in commercial transactions, parties will be liable in the terms they agreed to in the transaction (absent any breach of commercial laws). This has usually been interpreted as limiting the court to ruling in the exact terms parties agreed to, excluding civil law exclusion of liability principles, such as extreme ignorance or excessive benefit for one of the parties.

19 Stephen Zamora, José Ramón Cossio, Leonel Pereznieto, Jose Roldan Xopa and David Lopez. *Mexican Law*, Oxford University Press, 2004. pg. 559-560.

20 M and A López Ugalde, *Administración de Justicia en México, Indicadores en materia Mercantil e Hipotecaria*, cited by ibid pg. 561.

21 The writ of *amparo* has its own procedural nature and a complicated set of rules and procedures. However, its study exceeds the limits of this article and it is sufficient to state that it is a procedural mechanism by means of which citizens can protect their rights against acts of government (judicial and administrative) and in judicial procedures it is independent and autonomous from the original trial and appeal process.

22 See, Supreme Court of Justice, First Chamber, *tesis de jurisprudencia* 1a./J. 69/2012 (10a.): '*Nulidad de pagaré (voucher) emitido por el uso de tarjeta de crédito. La procedencia de la acción no está sujeta a que, previamente a su ejercicio, el tarjetahabiente objete los cargos ante el banco emisor del plástico o ante la condusef, si tal pretensión se sustenta en la falsedad de la firma estampada*.' Found in the *Semanario Judicial de la Federación y su Gaceta, Libro XI, agosto de 2012, tomo I*, pg. 444.

However, as explained in Section II, courts have been reducing *ex officio* the interest rates when they consider them to be abusive. Thus, there appears to be a trend in not letting parties (especially, lenders) exclude any liability and agreeing to terms in any way they want.

X REGULATORY IMPACT

In modern history, the first historical stage of banking regulation can be identified from 1941 to 1982 and it consisted of protectionist and substitution industrialisation policies. Between 1982 and 1990 all private banks in Mexico were nationalised and a bureaucratic financial system was established. From 1990 to 1994, banking was privatised and an increase in commercial banks ensued. Mexico endured an economic crisis between 1994 and 2004, referred to as the 'tequila effect', which had lasting effects on local and regional finance. Between 2001 and 2006 there was a period of stabilisation and orderly regulation of banks in which foreign banks started to gain access to the Mexican financial market. Finally, from 2007 to the present day, the Mexican financial system has undergone a trend of transnational banking, economic synchronisation and global regulation.[23]

Regarding global regulation, Mexico has been an active country in implementing the new approach to macro prudential regulation. In 2012, the National Banking and Securities Commission announced that Mexico was the first country to integrally adopt Basel III. This entailed a modification in the integration of capital, early warning systems and criteria for the inclusion of subordinated obligations in capital. The entry into force of Basel III in Mexico and the adoption of all its characteristics was structured through a seven-year plan.[24] Specialists have considered that these new regulations are only effective insofar as suitable risk management and supervision mechanisms are put in place to prevent dangerous and excessive risk taking by banks.[25]

Mexico has not been the exception and regulation has pointed towards policies of reinforced prudence and contention. While this has been considered as a disincentive for some transnational banks that are accustomed to regulation in other jurisdictions, this will provide local banks with an opportunity to grow.[26] Furthermore, the Financial Reform in Mexico strengthened the National Commission for the Protection and Defence of Financial Services Users.

However difficult the empirical identification of the effects of specific regulations and policies is, we can point to certain statistics that exemplify it. For example, in 2018 the total balance of loan portfolios was 4,713 billion pesos with an annual growth of 2.7 per cent in comparison with 2017; while the total customer funds was 5,184 billion pesos, 1.7 per cent higher than the previous year. In the same year, banks concentrated 89 per cent of the total assets of financial groups; brokerage firms held 4.5 per cent and insurance companies 3.1 per cent.[27]

23 See, L Carlos Felipe Dávalos, *Banca y Derecho*, Oxford University Press, 2006. Chapter 8.

24 ibid. pg. 504.

25 idem.

26 See footnote 23. pp. 505-506.

27 *Comisión Nacional Bancaria de Valores*, 27/2019 *Información Estadística y Financiera a diciembre de* 2018, *correspondiente a 21 grupos financieros en operación*. https://www.gob.mx/cnbv/prensa/27-2019-information-estadistica-y-financiera-a-diciembre-de-2018-correspondiente-a-21-grupos-financieros-en-operacion?idiom=es.

XI OUTLOOK AND CONCLUSIONS

The regulation of financial institutions and the litigation surrounding their activity are interdependent components of a very complex global phenomenon. Therefore, the outlook of a country's financial system is rarely only subject to local circumstances. As explained above, in recent years Mexico has taken several steps towards making access to credit easier, that includes making banking litigation more efficient. However, the still 'sluggish global growth' and 'mixed policy cues and shifts in risk appetite'[28] paint a bleak picture for some sectors and could inevitably have repercussions in Mexico's financial institutions. Moreover, the recent presidential elections, the shift in the way political majorities are arranged in both the House and the Senate, as well as the promise of more stringent public policies that combat corruption and inequality will change the landscape for financial institutions. How big or small those changes prove to bes remains to be seen.

28 International Monetary Fund World, Economic Outlook, July 2019, World Economic Outlook Reports. https://www.imf.org/en/Publications/WEO/Issues/2019/07/18/WEOupdateJuly2019.

Appendix 1

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