

Strengthening Local Legal Institutions for Inclusive Growth and Sound Investment in Mexico

Policy Highlights



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Foreword

In OECD countries, effective justice and legal institutions are increasingly seen as crucial determinants of inclusive growth and sustainable development. In this context, the OECD work on access to justice aims to support member and partner countries in their efforts to design and deliver responsive justice and legal services, and thus improve access to justice for citizens and businesses. This work also facilitates the implementation of country commitments under the 2030 Agenda for Sustainable Development.

As underlined by the latest OECD Economic Surveys on Mexico, the security, quality and responsiveness of justice systems are key to fostering inclusive economic growth, social development and a sound business environment. Tailoring capacities and services of legal and justice institutions -- including public bodies, dispute resolution channels, higher and local courts -- to the specific needs of businesses and citizens is essential for achieving these objectives. and to continue expanding financial services under better terms and conditions.

Since 1997, the *Asociación de Bancos de México* (ABM) and its partners from the *Instituto Tecnológico Autónomo de México* (ITAM) and Gaxiola Calvo S.C. (GC) have undertaken biannual studies on “Commercial and Mortgage Contract Enforcement in Mexican States: Reliability and Local Institutions Development Indicators” (“Study”)¹. Using original data on judicial procedures and the structures and resources of the judiciary in the 32 federal entities of Mexico, the Study provides a set of indicators on the “reliability and development of local institutions” in the enforcement of commercial and mortgage contracts. The Study has a dual objective: first, to assess performance of the Mexican states according to the performance of their judicial sectors in contract enforcement as a measure of the risk incurred by lenders, to be used by the financial institutions to inform their credit policy; and, second, to evaluate various facets of the quality of justice decisions, identify the causes of poor performance, and advocate for appropriate policy responses.

This Policy Highlights contributes to the development of the Study by presenting an overview of access to justice for businesses in Mexico. The first chapter provides an overview of the Mexican socio-economic context. The second chapter highlights the role of legal and justice institutions in promoting inclusive growth and development and underlines the importance of accessibility and responsiveness of justice. The final chapter

¹ The Study was initiated in the aftermath of the 1994 peso (or “tequila”) crisis, during which the Mexican currency lost half of its value vis-à-vis the US dollar. The steep increase in interest rates and in the value of US dollar-denominated debt caused by the fall led one third of all Mexican debtors to default. A high number of indebted farmers, small entrepreneurs and households then joined the Barzón, a movement of organised resistance against foreclosures and repossession seizures consecutive to defaults. As it grew into a nationwide movement and extended its political influence, the Barzón was seen as creating an impact on the stability and the sustainability of the financial system. The concern about the ability of banks to recover their loans led the government to reform the legal framework concerning commercial and, to a lesser extent, mortgage-collateralised loans. This was also one of the reasons for ABM to assess which state courts were better able to execute commercial and mortgage contracts

makes recommendations for strengthening the methodological foundations of the Study² and identifies broad directions for potential policy reforms in this area

² The following analysis primarily builds on the information collected during an OECD fact-finding mission held in March 2017 in La Paz (Baja California Sur), Toluca (Estado de México) and Mexico City. Baja California Sur and Estado de México were visited to offer a perspective on the different approaches found in Mexican states as regards their performance in commercial contract and mortgage enforcement

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Executive Summary

The rule of law, security and effective justice are essential elements of good governance. They also have a major impact on countries' economic performance and the business climate by supporting contract enforcement, reducing transaction costs (which increase with theft, corruption, weak property rights, etc.) and by enabling economic actors to make longer-term investments and engage in trade.

In Mexico, the legal and institutional framework for addressing commercial disputes and accessing justice for business in Mexico is undergoing a profound reform to strengthen its effectiveness and efficiency. Measures include reforming the Attorney General's office, prioritising public investment and guaranteeing property rights (e.g. creating a Public Property Registry and the Cadastre Modernisation Programme). Mexico is also taking steps to improve legislation and ease contract enforcement, notably by creating small claims courts. Some states stress the need for judicial specialisation in commercial or property matters or alternative dispute resolution (ADR). An important part of this reform is recognising the links between the justice system's capacity to enforce mortgage contracts and economic growth. Some of the initiatives, such as oral proceedings in commercial cases in the first instance, were already found to reduce the workload of the courts.

Yet, many challenges remain, including significant economic disparities across regions, declining trust in public institutions, breaches in the rule of law, corruption, high crime rates and opaque legal institutions. Businesses identify contract execution and debt collection as core challenges in Mexico, given a combination of long proceedings, procedural complexity and the high cost of contract enforcement. Unresolved legal problems can have negative effects on businesses, such as loss of income, disruption to business activities, additional costs, damage to business relationships, loss of reputation and damage to employee relations.

Given the complexity and heterogeneity of its justice system, Mexico would greatly benefit from a deep and comprehensive reform of all mechanisms and institutions supporting the rule of law, including the justice sector, alternative dispute resolution mechanisms, prosecutorial services and the police. Such reforms would bring the greatest benefits if placed within a broader policy of strengthening democratic values and the role of the law in solving economic, social and political conflicts. A comprehensive justice sector policy could provide a framework for various legal reform efforts, help align priorities across levels of government, and enhance legal certainty and predictability.

Strengthening co-ordination and communication channels vertically (across levels of government) and horizontally (among various justice, legal and security stakeholders) would support governance and policy continuity and enable alignment in justice reforms and services between the Federal government and the states. The creation of a separate federal public structure for justice in Mexico, in line with good international practice and with clearly delimited responsibilities, would be a significant step forward.

Importantly, there appears to be scope for reviewing justice and legal services provided at the state level through a user-centric lens (e.g. through enhanced use of technology and e-services in courts), as well as for implementing robust evaluation and monitoring frameworks to measure the quality of the full continuum of services (including various ADRs) from the perspective of users as well as of citizens and businesses.

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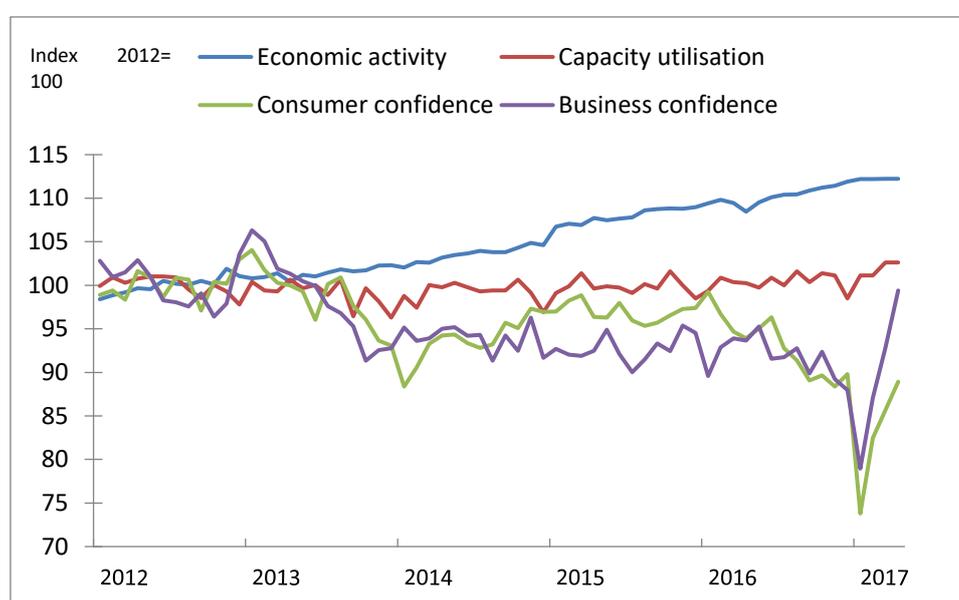
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Chapter 1. Towards inclusive growth in Mexico

1.1. General socio-economic context

Since 2011 and the fall in commodity prices, most countries in the LAC region experienced an economic slowdown. Against this backdrop the Mexican economy proved resilient and maintained relatively stable growth (2.62% annual growth rate on average³), notably supported by private consumption, a strong labour market, credit expansion and private investment (Figure 1.1). Disparities across the regions nonetheless increased⁴.

Figure 1.1. A resilient economy



Note: Banco de Mexico's inflation target band is 3±1%.

Source: OECD Economic Outlook 101 database; and Banco de Mexico.

In addition to the numerous reforms that have been approved since 2009 to improve the business regulatory environment (including the establishment of autonomous regulatory institutions and the implementation of oral proceedings for commercial disputes), the federal government launched a 2013-2018 National Development Plan containing an ambitious regulatory reform agenda aimed at “democratising productivity”. Several structural reforms that were already implemented concern the financial sector, telecommunications and the energy industry.

At the same time, the lives of many Mexican families did not significantly improve⁵. Mexico scores low on a wide range of well-being dimensions, as compared to OECD countries (e.g. income, wealth, social connections, education and skills, safety and work-

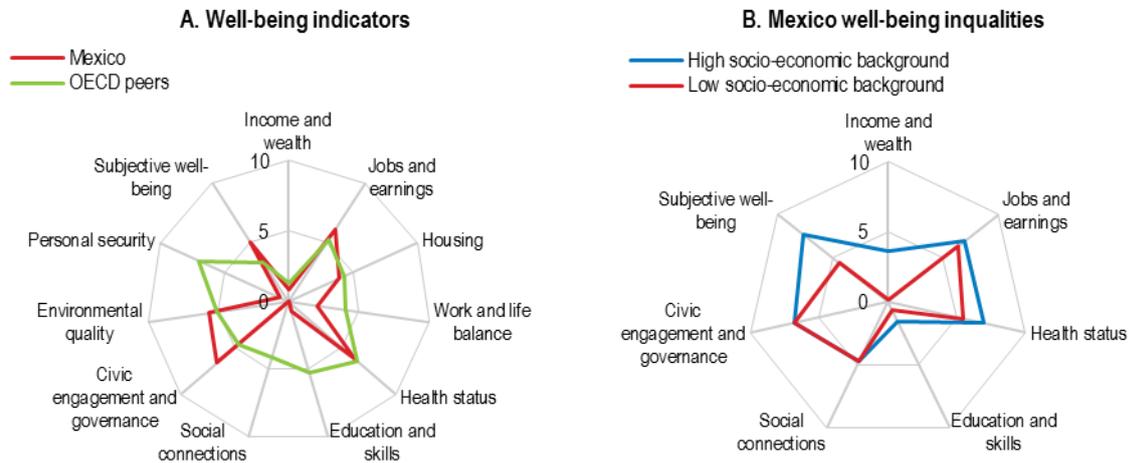
³ OECD data

⁴ OECD (2017a)

⁵ *Ibid.*

life balance), with inequalities growing across the country and socio-economic backgrounds (Figure 1.2).

Figure 1.2. Well-being indicators in Mexico are low compared to OECD peers



Note: Outcomes are shown as normalised scores on a scale from 0 (worst condition) to 10 (best condition) computed over OECD countries. Panel A: Shows well-being outcomes in various dimensions for Mexican people compared to OECD peers: Chile, Czech Republic, Estonia, Greece, Hungary, Poland, Portugal, Slovak Republic, Slovenia and Turkey. Panel B: Shows well-being outcomes in various dimensions for people in Mexico with different socio-economic background.

Source: OECD (2016c).

1.2. A tale of two countries: regional disparities in economy, business environment and rule of law

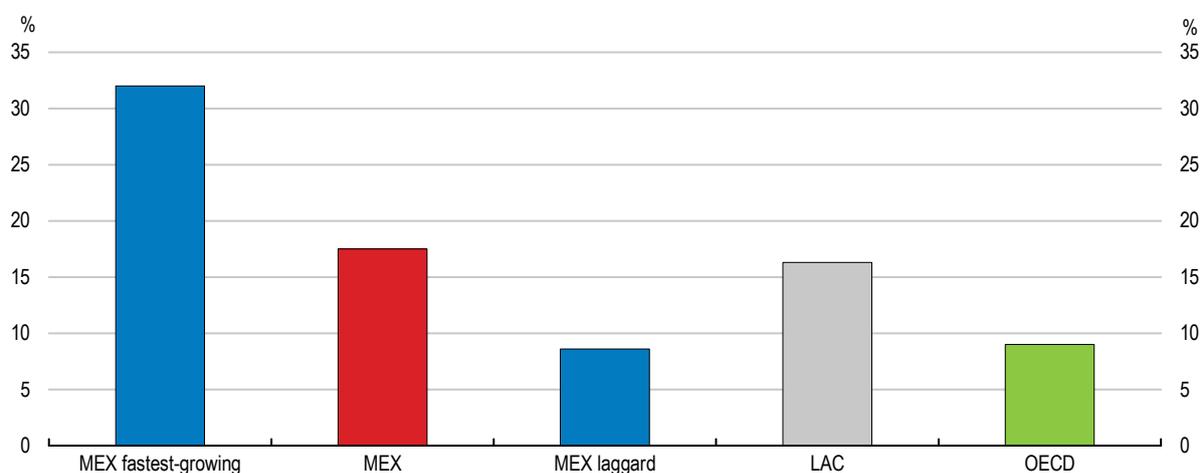
Mexico consists of 32 federal entities: 31 states and Mexico City, which has its own constitution since 31 January 2017. Due to the highly decentralised structure of the country, each federal entity carries out its own development programme, which often provides for discounted access to land and tax reductions to attract investment. Some states signed regional agreements with foreign territorial entities to facilitate economic integration (e.g. Agreement for Regional Progress signed in 2004 between Nuevo Leon, Coahuila, Chihuahua and Tamaulipas and Texas, United States).

Large economic and geographic disparities prevail. While some states at the northern frontier (such as Nuevo Leon which benefits from export-oriented manufacturing and assembly plants called maquiladoras) and Mexico City's metropolitan area and surrounding states (such as Querétaro or Aguascalientes which host many foreign companies' headquarters) exhibit fast economic growth, many other states lag behind with high informality and poverty rates (Figure 1.3)⁶.

⁶ These regional disparities point to a highly productive economy in the North and a poorer Southern region, although caution is needed in applying this categorisation in view of the presence of outliers in these groups (e.g. Tabasco being among the fastest growing regions in the South)

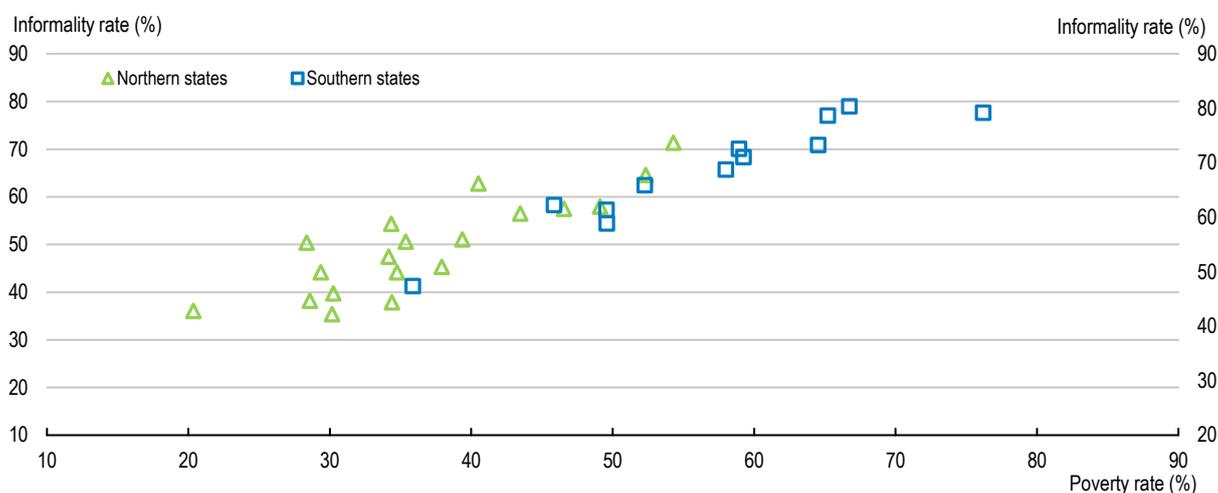
Figure 1.3. Disparities across Mexico

A. Unequal GDP growth across states
(GDP growth over 2007-2016 or latest)



Note: The fastest-growing states are: Mexico City, Queretaro, Nuevo Leon, Tabasco, and Aguascalientes. The slowest-growing states are: Baja California, Baja California Sur, Chiapas, Nayarit, and Tlaxcala. States mostly dependent on the oil sector (Campeche and Tamaulipas) are excluded since they suffered from both a deep recession since the collapse of oil prices and from the trend decline of oil production. GDP growth in Mexican states is for period 2007-2014.

B. Poverty and Informality go hand in hand



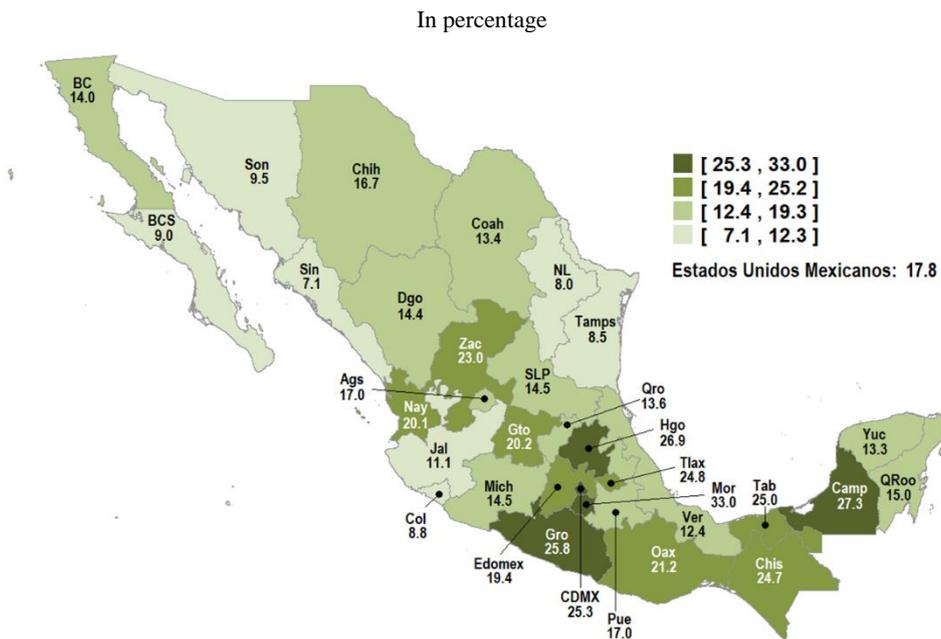
Source: INEGI and CONEVAL in OECD (2017b) (adapted).

In addition, as shown in Figure 1.3 (Panel B), informality is heterogeneous across states and represents a bottleneck for economic development, including firm size growth, in most affected regions⁷. While the informality rate was of 40% in the state of Chihuahua (North) in 2014, it reached 80% in the state of Oaxaca (South) in the same year. Informality proved having a strong positive relationship with unemployment in Mexico. Indeed,

⁷ OECD (2015d); Dougherty S. and Escobar, O. (2016)

unemployment benefits concern only a small share of workers for whom entering the informal sector may be equivalent to becoming unemployed in other OECD countries. The level of informality is thus likely to distort the unemployment rate, what would explain why it tends to be very low in Mexico (4.9% in 2014) as compared to the OECD average (7.3% in the same year). A significant share of enterprises located in Southern states also reports suffering from the informal economy, while this phenomenon seems to be less frequent in most of the North (Figure 1.4).

Figure 1.4. Companies say informal economy impacts activity, 2018



Source: INEGI (2018).

Mexico is also characterised by significant economic disparities among businesses, which led some observers to describe the country as an “economy of two velocities.” While large modern companies are fully integrated in the global economy and increased their productivity by 5.8% per year from 1999 to 2014, medium firms (having between 11 and 500 employees) only progressed by 1% per year during the same period and traditional family businesses even suffered a productivity decline of 6.5% per year⁸. This diverging evolution has significant implications as large companies only employ 20% of the country’s labour force⁹.

1.2.1. Corruption and public integrity

Corruption is identified as one of the main factors hindering doing business and economic performance in Mexico. According to some estimates, this situation may result in losses of up to 9% of GDP¹⁰. According to Transparency International’s Corruption Perceptions

⁸ Bolio, E., *et al.* (2014)

⁹ CIDE (2015)

¹⁰ Data from IMCO in OECD (2017c)

Index 2017, Mexico scored 29 on a scale of 0 (“highly corrupted”) to 100 (“very clean”). This score places Mexico in 135th place out of 180 nations.

Similarly, the World Bank’s Worldwide Governance Indicators rank the Mexican economy below OECD average in all areas and more specifically in the domains of rule of law and corruption, which in turn undermines trust in public institutions by both firms and citizens. The lack of control of corruption and of the implementation of the rule of law is found to contribute to a more fragile business environment, when much of the economy is likely to be done underground, thus reducing investors’ confidence and foreign investments¹¹. Mexico is committed in addressing effectively the issue notably by reforming the Attorney General’s office (Box 1.1).

Box 1.1. The Attorney General’s Office under reform

Mexico’s Federal Attorney General’s Office -AGO (Procuraduría General de la República, PGR) is a Ministry-level entity with the Attorney General being elected by the Senate from three candidates freely selected by the President. In 2018 the nomination procedure of the Attorney General will change, as under the constitutional amendment of 2014, the powers of the Senate in the appointment of the Attorney General are greatly increased and the prerogatives of the President are reduced to shortlisting 3 candidates from a list of at least 10 nominees previously selected by the Senate. The Senate ultimately appoints the Attorney General from the three nominees selected by the President.

The same reform will grant the AGO with the highest level of independence any agency has in the Federal government in Mexico. Similar to a Quango in the United Kingdom, or an *autorité administrative indépendante* in France, the Mexican *organismo constitucional autónomo* as the name suggests derives its powers directly from the Federal Constitution rather than Federal Laws. Among other things, this gives the AGO its own budget, legal personality and technical and administrative autonomy, and hierarchically detaches the Attorney General from the President.

As it stands, the AGO has a central role in justice and security as not only prosecutes federal criminal offences, it also has powers on crime prevention, justice-related policy design, provides guidance to citizens on problem-solving of non-federal offences, and it also has a prerogative to suggest the adherence to international legal instruments within its scope. The role of the AGO in the National System of Public Security (SNSP) through the National Council of Public Security is crucial across all government levels, as the system has powers across the totality of the policy cycle of the national security policy (design, monitoring, evaluation and learning), including prosecution and administration of justice and even recruitment procedures of personnel working for institutions taking part in the SNSP (prosecutors, police officers, etc.).

The perception from enterprise of corruption is heterogeneous across Mexico’s states, although overall very high. Indeed, 82.2% of private companies at the national level consider that acts of corruption from public servants are frequent. This perception is higher in Mexico City (91.5%) or in Estado de México (77.7%), than in Baja California Sur (75.9% or in Nayarit 62.3%) (Table 1.1).

¹¹ OECD (2017d)

Table 1.1. Public sector corruption at the state level according to Mexican companies

A. Perception of companies on the frequency of acts of corruption carried out by public servants, by state

State	Frequent acts of corruption%
National	82.2
Aguascalientes	69.3
Baja California	74.2
Baja California Sur	75.9
Campeche	71.5
Chiapas	80.2
Chihuahua	62.2
Coahuila	88.5
Colima 27	84
Distrito Federal	91.5
Durango	75.9
Estado de Mexico	77.7
Guanajuato	71.6
Guerrero	77.2
Hidalgo	88.6
Jalisco	85.4
Michoacán	72
Morelos	84
Nayarit	62.3
Nuevo Leon	86.7
Oaxaca	83.6
Puebla	74
Queretaro	71.1
Quintana Roo	80.5
San Luis Potosi	72.2
Sinaloa	85.3
Sonora	86.5
Tabasco	92.7
Tamaulipas	81.2
Tlaxcala	84
Veracruz	92.1
Yucatan	72.9
Zacatecas	87.8

B. Perception of companies on the frequency of acts of corruption carried out by public servants, by size

Size	Frequent acts of corruption%
National	82.4
Micro	82.4
Little	79.5
Medium	75.6
Big	73.9

C. Perception of companies on the frequency of acts of corruption carried out by public servants, by sector

Sector	Frequent acts of corruption%
National	82.2
Commercial	82.5
Industry	80.2
Services	82.4

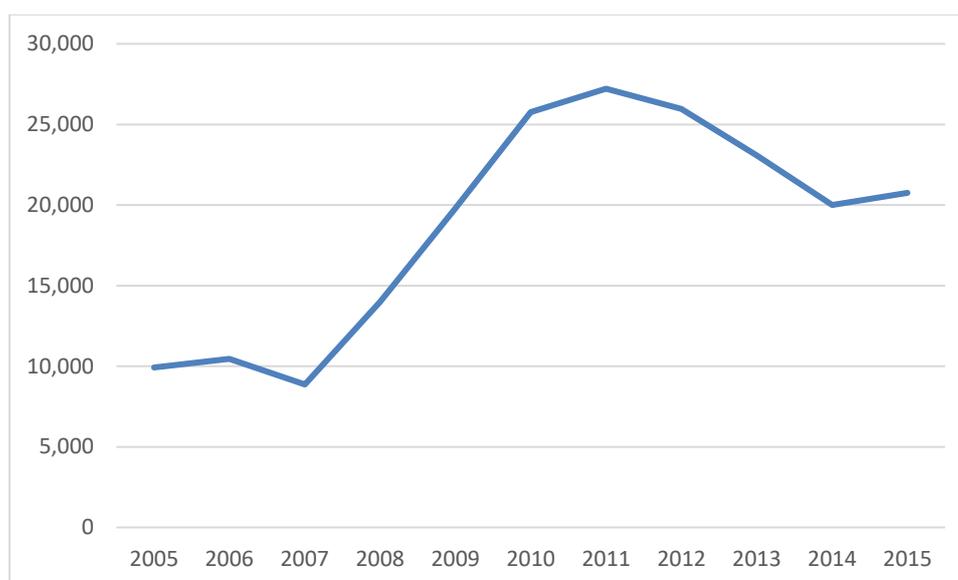
Source: INEGI (2016a).

1.2.1. Security and crime

Personal and property security are important factors in creating a sound business environment. Insecurity tends to reduce trust and social cohesion, reducing incentives to make long-term investments, which are important elements of any development strategy.

High crime rates are reported in many Mexican states, including homicide (Figure 1.5), kidnapping and extortion. According to the OECD report on “Strengthening Evidence-based Policy Making on Security and Justice in Mexico”, the high level of violence also affects trust in institutions (police and court system) and perceptions of safety.

Figure 1.5. Levels of homicides in Mexico, 2005-2015



Source: INEGI (2016), Mortality Statistics.

High levels of criminality also seem to be reinforced by the widespread corruption, including in legal and justice institutions. For example opaque and corrupt legal institutions may allow organised crime groups to gain access to sensitive information (e.g. investigations), obtain immunity for illegal activities and impede the course of justice against their actions¹². The crime economy in turn engenders corruption, diffuses violence in society, weakens the rule of law and public services and crowds out legal economic activities.

¹² OECD, (2017b); Centre for the Study of Democracy (2010).

Several initiatives have been launched at the federal level, including the aborted project *Mando Unico Policial*¹³, to improve co-ordination between police forces (municipal, state and federal levels), further their professionalisation and training, with the objective of making more effective law enforcement.

1.2.2. Impact on debt enforcement

Weak rule of law and levels of corruption and crime across the regions in Mexico appear to have direct consequences in debt enforcement and financial inclusion. When addressing the issues related to debt enforcement across the regions, stakeholders referred to rule of law and justice problems rather than the debt enforcement procedures itself. For instance stakeholders mentioned the secured transactions regime and highlighted the quality of registry for mobile assets as a good practice shared with other countries e.g. Dominican Republic. Moreover according to the meetings held in Mexico and to recent empirical studies¹⁴, the states exhibiting best performances in terms of debt enforcement appear to be mainly in the north and centre, which is consistent with the research performed on socio-economic indicators and cited above. The exactitude of this geographic categorisation should however be nuanced, due to the presence of several outliers in each group of states. While Campeche (southern state) is one of the best national performers in debt enforcement, Chihuahua and Baja California Sur (from the north) and Tlaxcala (from the Centre) indeed rank low.

1.2.3. Rule of law and the regulatory framework for businesses

According to INEGI (2016a), 77.7% of Mexican private companies have confidence in the enforceability of their contracts with other businesses¹⁵. The level of trust however varies depending on companies' size. While 91.9% of large enterprises trust the contract enforcement mechanisms, only 77.2% of micro-enterprises do so (Figure 1.6).

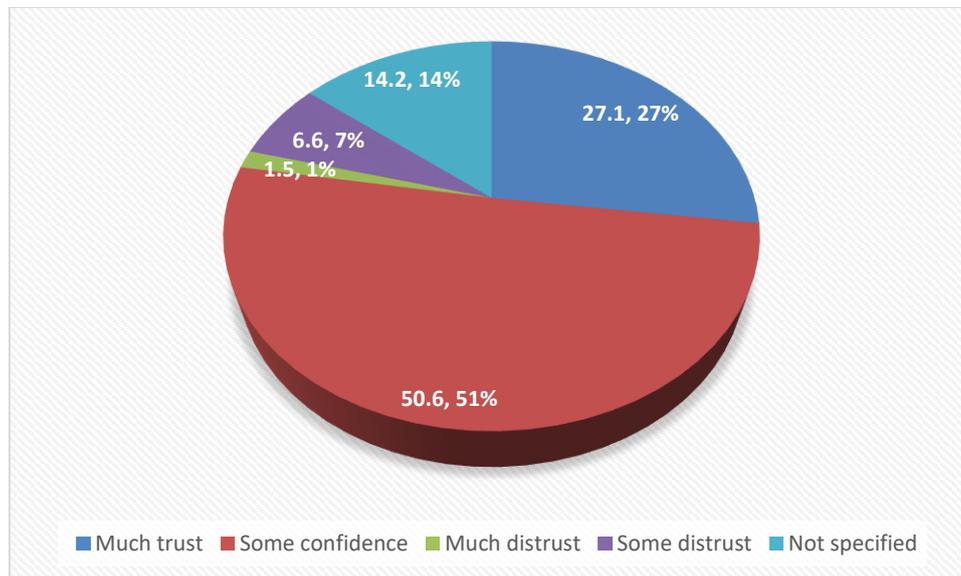
¹³ Creation of unified state police forces (incorporating municipal police), under a single command by state

¹⁴ World Bank (2016); Moody's Investors Service (2015).

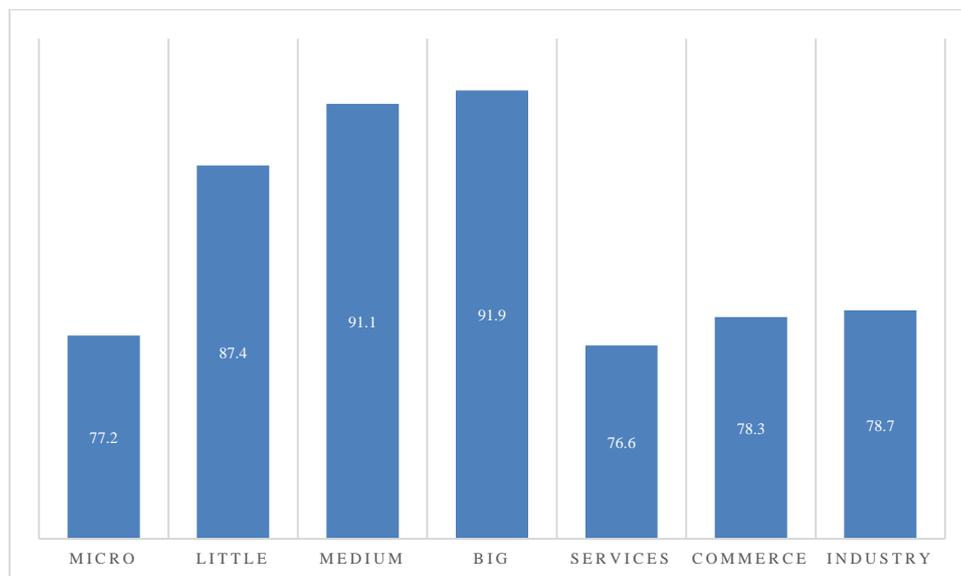
¹⁵ INEGI (2016a).

Figure 1.6. Level of trust in contract enforcement in Mexico

A. Level of trust when entering into contracts or agreements with other companies or businesses



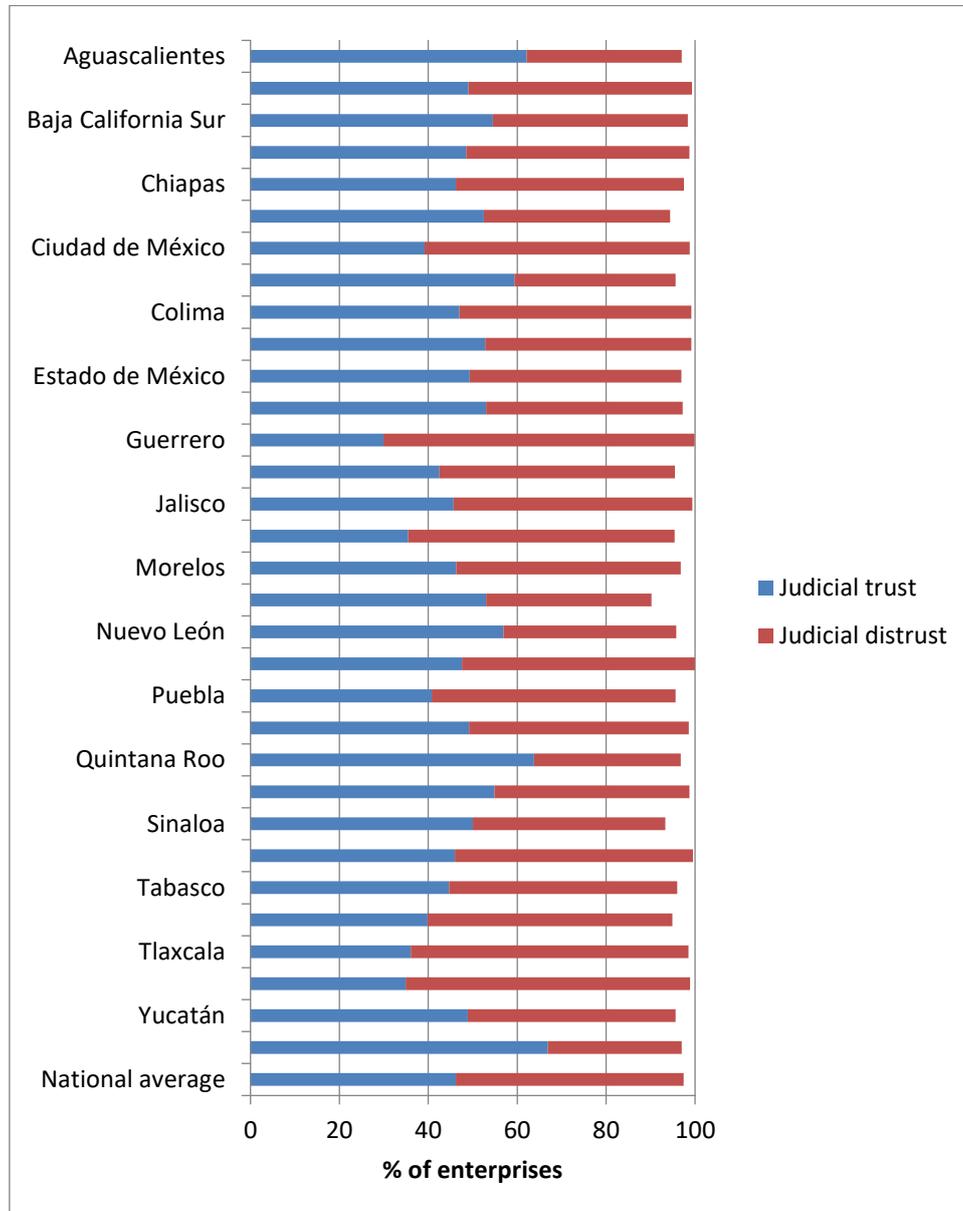
B. Conclusion of contracts or agreements in an atmosphere of trust on the part of economic units, in percentage



Source: INEGI (2016a).

At the same time, enterprises' trust in justice institutions, while overall relatively low, is also very heterogeneous across states (Figure 1.7). While there are no clear geographic trends in this regard, the disparities seem to be correlated with other indicators, such as the perception of corruption or the people's feeling of insecurity previously described.

Figure 1.7. Level of judicial trust in Mexican states



Source: INEGI (2016b).

This situation is not unique to Mexico. Some other Latin-American countries have faced similar challenges during the last decades (e.g. Colombia). In certain regions of Mexico, illegal activities take advantage of the weak institutions of central authority and create a parallel system of rules, impeding the formal justice system. Data collected by the World Justice Project points to a high negative correlation between the perceived ineffectiveness and timeliness of the criminal adjudication system and the extent to which people may not resort to violence to redress disputes and grievances (Figure 1.8). Citizens may view the justice system as a homogenous entity and make trust judgements directed towards the whole set of justice institutions without differentiating among branches of justice (e.g. criminal justice and civil justice), the entities involved (e.g. public prosecutor, court or

prisons) and between the different roles and processes (e.g. investigation and adjudication)¹⁶. Rule of law indicators may however call for caution: good reported indicators may be biased due to high levels of coercion or duress that directly threaten the reliability of the collected data and need to be controlled for (especially at the local level).

Figure 1.8. Effectiveness/timeliness of criminal justice courts adjudication system and the extent of the use of violence to redress personal grievances, 2016



Note: The data apply only to the three major urban areas in each of the countries. The data are perception-based and may be sensitive to specific events that occurred when they were collected. Further analyses and data are needed to better capture empirically the relationship and interactions between the court, police and prison system and their impact on broader societal outcome.

Source: WJP (2016) in OECD (2017c).

Overall the lack of crime control, weak rule of law and corruption are found to contribute to a fragile business environment across the world. The lack of trust in public institutions also proved leading to difficulties setting up formal employment in the country and reinforcement of the underground economy¹⁷. In the long-run, this tends to reduce investors' confidence and foreign investments as well as impede access to loans, to the detriment of sustainable growth¹⁸.

¹⁶ OECD (2017e)

¹⁷ La Porta, R. and Shleifer, A. (2014)

¹⁸ OECD (2017b)

Chapter 2. Legal and justice institutions as cornerstone of growth and development

2.1. An effective justice system for a sound business climate

An increasing body of evidence and literature underlines the importance of enforcement of laws and well-functioning legal systems and justice institutions in supporting long-term economic outcomes, national well-being and social cohesion¹⁹. The rule of law, security and justice are found to have a strong impact on economic performance and the business climate by supporting contract enforcement, reducing transaction costs (which are increased with theft, corruption, weak property rights, *etc.*) and enabling economic actors to make longer-term investments and engage in trade²⁰. Effective legal and justice institutions are found to further enable a level playing field for market stakeholders, by instilling confidence in “the rules of the game,” ensuring fair competition and protecting property rights. They are also critical elements for fostering good governance, legal certainty and predictability, thereby supporting the development of positive climate for “doing business,” attracting investment, and contributing to open trade and inclusive economic growth, as also underlined as part of the OECD Inclusive Growth Initiative (Box 2.1)²¹.

Box 2.1. OECD Inclusive Growth Initiative

OECD Initiative on Inclusive Growth is an organisation-wide effort intended to develop a multidimensional, dynamic, measureable and comparable analytical framework on Inclusive Growth that goes beyond income. It was established following the increasing inequalities almost everywhere in the past 30 years, which hinders economic and productivity growth potential. In this context, the Inclusive Growth Initiative aims at creating opportunities for all segments of the population and fostering more inclusive and sustainable economic and social outcomes.

Indeed, rule of law including effective, timely and efficient justice and legal services for businesses will give them the chance to thrive, taking into consideration elements such as the level of impact on regulatory framework, addressing skill mismatch, R&D, access to finance, more equitable financial markets that channel resources into productive activities, and accompanying restructuring and displacement.

Importantly the effectiveness of justice systems plays an important role in investment decisions and is found to foster competition in the market²². Yet, it can be undermined by ineffective or corrupt justice processes, thus increasing business costs for protecting their investments (*e.g.* through insurance premiums and security systems)²³. Indeed, the OECD work shows that the competitiveness and economic development of a country are

¹⁹ OECD (2013)

²⁰ Acemoglu, D. *et al.* (2005)

²¹ OECD (2015b)

²² European Commission (2014)

²³ OECD (2015b)

dependent, *inter alia*, “on the existence and fulfilment of clear laws and norms, most importantly the legal certainty of firms and contracts guaranteed by trustworthy and objective court systems [...] the idea being that regions that lack such legal systems impose higher transaction costs to market participants”²⁴. Dakolias (1999) also underlines that: “Many developing countries [...] find that their judiciaries advance inconsistent case law and carry a large backlog of cases, thus eroding individual and property rights, stifling private sector growth, and, in some cases, even violating human rights. Delays affect both the fairness and the efficiency of the judicial system; they impede the public's access to the courts, which, in effect, weakens democracy, the rule of law and the ability to enforce human rights”.

2.1.1. Property rights

The security of property rights is found to have a positive impact on development²⁵. Property rights are in particular the cornerstone of the new growth theory emphasising the role of institutions in development²⁶. Posited causal mechanisms were primarily the incentives from having secure rights to the fruits of one's labour, and also the ability to leverage property for credit purposes, although such effects are very difficult to test empirically²⁷.

The role of the justice system in this causal mechanism is both critical and simple: assuming that property rights are well defined, a failure of the justice system to enforce those rights affects the economy by increasing the risk faced by investors. Theoretical contributions focus on two particular aspects of justice performance²⁸: independence from the executive, which ensures that the judiciary can protect investors from government abuses; and efficiency, which makes the settlement of disputes over private contracts predictable and reduces its cost. Several studies aim at measuring the practical benefits of efficient judicial systems, e.g. in increasing foreign direct investment inflows to a country²⁹, or fostering market entry by new entrepreneurial firms and allowing firms to grow larger in size³⁰. Two of these studies rely on the ABM-ITAM data on judicial performance, and both find that differences in the average size of firms among Mexican states are in large part attributable to court efficiency.

The theory linking justice efficiency directly to the rule of law and good governance was however criticised on various grounds, particularly for attributing to property rights what could in fact be the effect of a wide range of rule of law measures³¹. In part of the literature, what is interpreted as an indicator of the protection of property rights is actually a broad indicator of the rule of law³². But even when property right enforcement is estimated more

²⁴ OECD and IMCO (2013)

²⁵ For a review, see Asoni, A. (2008)

²⁶ The two most influential contributions to this literature are Barro, R. (1997) and Acemoglu, D. *et al.* (2001)

²⁷ Firstly, most of the western world, for which data is available, has had fairly well-enforced property rights for quite some time. Secondly, and more importantly, when the initial allocation of property rights is not random, so that many confounding factors can be at play. Some studies exploit exogenous changes in land titling schemes in less developed countries and document substantial improvements in entitled owners' investments and investment in their children's education. Source: Besley, T. (1995); Galiani, S. and Schargrodsky, E. (2010)

²⁸ Messick, R. (1999) ; Botero, J.C. *et al.* (2003)

²⁹ See for instance Bellani, M. (2014)

³⁰ See for instance Fabbri, D. (2010)

³¹ For a review, see Haggard, S. and Tiede L. (2011)

³² This applies in particular to Barro, R. (1997), and Acemoglu, D. *et al.* (2001)

precisely, it appears that its effects can be replicated by other rule of law measures³³. Research on the role of justice institutions in the development process has therefore not yet managed to unbundle the notion of rule of law and determine which combinations of institutions matter, and when. What appears however is that the initial focus on the protection of property rights from government predation probably overshadowed the influence of private sector corruption and even more fundamentally that of the control of violence³⁴.

These findings are consistent with some of the lessons drawn from the experience of justice reforms in the past twenty years. In many cases reforms that focused on the judiciary fell short of delivering the expected strengthening of the rule of law and the associated economic benefits, as the focus on procedural aspects did not help to bring about the more fundamental reforms (e.g. checks and balances on the executive)³⁵. On the contrary it appeared that the broader justice and rule of law context could be a powerful force acting against court-centric approaches, as “judiciaries are the product of localized evolution and persistent differentiation”³⁶.

2.2. Justice institutions and contract and debt enforcement

In terms of specific justice determinants for economic performance, evidence shows that timely enforcement of contracts can strengthen competition by reducing barriers to entry³⁷ and can generate incentives for citizens and businesses to save and invest, by protecting the returns from their activities and reducing the costs of security³⁸. A cross-country variation analysis in several studies shows that better contract enforcement induces credit suppliers to increase loan size, lengthen loan maturity, and reduce loan spreads³⁹. It is also found to promote efficiency of decentralised market activities⁴⁰. In addition, the duration of enforcement may both influence the contracting behaviour of small firms⁴¹, and increase the opportunistic behaviour of borrowers. Creditors might respond to this strategic behaviour by reducing the availability of credit⁴². In the absence of effective and timely contract enforcement, transaction costs are expected to increase, thus curbing competition and trade⁴³. Ineffective contract enforcement also appears to have a negative impact on the

³³ This applies in particular to Acemoglu, D. and Johnson, S. (2005). See the discussion in Haggard, S. and Tiede, L. (2011)

³⁴ Haggard, S. and Tiede, L. (2011)

³⁵ Carrothers, T. (2009)

³⁶ Jensen, E. G. (2003)

³⁷ Johnson S *et al.* (2002)

³⁸ OECD (2015b)

³⁹ Bae, K-H. and Goyal, V. (2009); Qian, J. and Strahan, P. (2007); Fabbri, D. (2010)

⁴⁰ Dougherty, S. (2013)

⁴¹ Chemin, M. (2012)

⁴² Jappelli, T. *et al.* (2005)

⁴³ Dougherty, S. (2013) notes that increasing firm scale or size is the main channel through which the most efficient firms can expand their production, by taking on capital and labour as they grow. This up-scaling may be motivated by competition with less efficient firms, who give up market share, particularly when they exit the market. Such dynamics are thought to be a main driver of aggregate productivity growth in open economies (Melitz, M., 2003; Melitz, M. and Ottaviano, G., 2008), though there is also evidence of substantial within-firm productivity gains induced by domestic and foreign market competition pressures (Harrison, A. *et al.*, 2011; Ben Yahmed, S. and Dougherty S., 2013)

average size of firms in the country and their capital intensity⁴⁴, thus reducing aggregate productivity through reduced scale of economies⁴⁵.

Yet contract enforcement is only be viable if legal systems put in place quality laws and regulations and ensure the effective implementation of such legal frameworks. The latter however can significantly vary depending on state capacities including the quality of the judiciary. For example empirical estimates by the OECD suggest that a low-quality judiciary may convolute contract enforcement and insolvency procedures⁴⁶. Malfunctioning judicial systems may also hamper growth by provoking inefficient use of resources and technology⁴⁷, distorting labour relations⁴⁸, and hindering the proper functioning of the rental housing market⁴⁹.

Indeed the OECD Investment Toolkit suggests that “the ability to make and enforce contracts and resolve disputes is fundamental if markets are to function properly. Good enforcement procedures enhance predictability in commercial relationships and reduce uncertainty by assuring investors that their contractual rights will be upheld promptly by local courts. When procedures for enforcing commercial transactions are bureaucratic and cumbersome or when contractual disputes cannot be resolved in a timely and cost effective manner, economies rely on less efficient commercial practices. Traders depend more heavily on personal and family contacts; banks reduce the amount of lending because they cannot be assured of the ability to collect on debts or obtain control of property pledged as collateral to secure loans; and transactions tend to be conducted on a cash-only basis. This limits the funding available for business expansion and slows down trade, investment, economic growth and development”⁵⁰.

From an economy-wide perspective the issue is not if a contract can be enforced but rather relates to the cost of the various enforcement mechanisms and their efficacy in improving confidence between contracting parties. To be effective the costs of enforcement must not outweigh the gains achieved from the contractual commitment.

Similarly, efficiency of debt enforcement⁵¹ is found to be strongly correlated with per capita income and legal origin and predicts debt market development⁵². The inefficiency is also related to such structural aspects of debt enforcement as ineffective collateral systems, poorly structured appeals, business interruptions during bankruptcy, and inefficient voting among creditors. The inefficiency correlates with underdeveloped debt markets, consistent with the view that failures of debt enforcement discourage lending.

⁴⁴ Palumbo, G. *et al.* (2013)

⁴⁵ OECD (2013); Dougherty, S. (2013)

⁴⁶ OECD (2013)

⁴⁷ Ferguson, S. and Formai, S. (2011)

⁴⁸ Ichino, A. (2003)

⁴⁹ Casas-Arce, P. and Saiz, A. (2010), Mora-Sanguinetti, J.S.(2012)

⁵⁰ OECD (2015e)

⁵¹ Insolvency practitioners from 88 countries describe how debt enforcement will proceed against an identical hotel about to default on its debt. They use the data on time, cost, and the likely disposition of the assets (preservation as a going concern vs. piecemeal sale) to construct a measure of the efficiency of debt enforcement in each country. Several characteristics of debt enforcement procedures, such as the structure of appeals and availability of floating charge finance, influence efficiency.

⁵² Djankov, S. *et al.* (2008)

2.2.1. *The particular case of mortgage contracts*

One particular type of property rights are those related to housing, and a body of evidence sought to assess the effects of dispute settlement between landlords and tenants, or between banks and homeowners, on the housing and credit markets. For instance using micro level data from Spain, Mora-Sanguinetti (2010) finds that low judicial efficiency (e.g. in evicting non-paying tenants) reduces the supply of housing for rental, although only marginally⁵³. Casas-Arce and Saiz (2010) study the same issue in a cross-country setting, and find that the rental market is further developed in countries whose legal systems “are more efficient at enforcing contracts”⁵⁴. Similarly, there are studies that show the positive impact of mediation programmes on the ability of homeowners to keep their homes⁵⁵, as well as for the banking industry to learn the lessons (e.g. lending practices for certain industries, industry knowledge, financial management) future business environments. Turning to the credit market, several studies have concluded that it is influenced by the performance of the judiciary system. In particular, Fabbri (2010) found that banks charge higher interest rates and individuals save less in regions of Spain with longer trial duration⁵⁶.

Housing however is not an ordinary good. Having a home is essential for many of people’s basic needs, such as the need for a shelter, for personal hygiene and health, or for the upbringing of children. In all countries the home also represents the household’s main asset for a large fraction of the population.

As a consequence judicial decisions on housing matters generate numerous externalities. Examining the effects of the “foreclosure crisis” that followed the 2007-2008 subprime mortgage crisis in the United States, researchers found that foreclosures had an impact on suicide rates⁵⁷, on mental and physical health⁵⁸, on crime⁵⁹ and on the value of properties in the neighbourhood⁶⁰. All in all it appears that preventing foreclosures entails substantial benefits for financially distressed homeowners, for communities and for holders of mortgage portfolios, as it has an impact on real estate prices in the neighbourhoods and helps avoid transaction costs.

In the United States the foreclosure crisis spurred numerous policy initiatives at local, state and federal level in order to address these effects. To mention a few, Congress allocated USD 7 billion to the Neighborhood Stabilization Program between 2008 and 2010; the 2010 Dodd-Frank Act⁶¹ created the Consumer Financial Protection Bureau in order to ensure that consumers had adequate information about financial products and to protect them from abusive practices; and the Department of Treasury and the Department of Housing and Urban Development launched the Making Home Affordable program in 2009 in order to prevent foreclosures by modifying loans. These measures were added to existing legal conditions on credit supply, such as usury limits on interest rates, mortgage limits and debt service limits. In other countries too, some lending institutions also introduced a number of programmes that aim to support struggling clients to find ways to keep their homes (Box 2.2).

⁵³ Mora-Sanguinetti, J. S. (2010)

⁵⁴ Casas-Arce, P. and Saiz, A. (2010)

⁵⁵ Shack, J. (2015), Six Programs, Six Models: An Evaluation of the Foreclosure Mediation Programs Funded by the Office of the Illinois Attorney General

⁵⁶ Fabbri, D. (2010)

⁵⁷ See, e.g., Houle, J. N. and Light, M. T. (2014)

⁵⁸ See, respectively, Houle, J. (2014) and Currie, J. and Tekin, E. (2015)

⁵⁹ Ellen, I. G., Laco, J. and Sharygin, C. A. (2013)

⁶⁰ Anenberg, E. and Kung, E. (2014)

⁶¹ Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

A careful assessment of the impact of justice institutions in this area should therefore consider both the benefits of mortgage contract execution on credit supply and investment incentives, and the detrimental socio-economic effects of foreclosures; it should also integrate within its scope the broader rule of law interventions aimed at preventing over-indebtedness, financial abuse, default and foreclosure at various stages of the contractual process.

Box 2.2. Example of a programme instituted by banks to help defaulting clients in Australia

To handle the financial crisis, the National Australia Bank (NAB) has created NAB Care, a program which provides struggling clients with advices to face financial difficulties and with loan repayment options. The bank made it a priority for its employees to manage its customer's financial health by making it an essential element of their evaluation. "As of 2013, NAB Care had helped over 100,000 vulnerable customers, resulting in a 20 percent reduction in loan defaults; 47 percent of hardship cases were cleared within six months. According to interviews with the company, NAB Care has been so successful that 40 percent of the bank's clients voluntarily seek advice before a collections event, saving NAB \$7.2 million in costs".

Source: Bockstette V. et al. (2014).

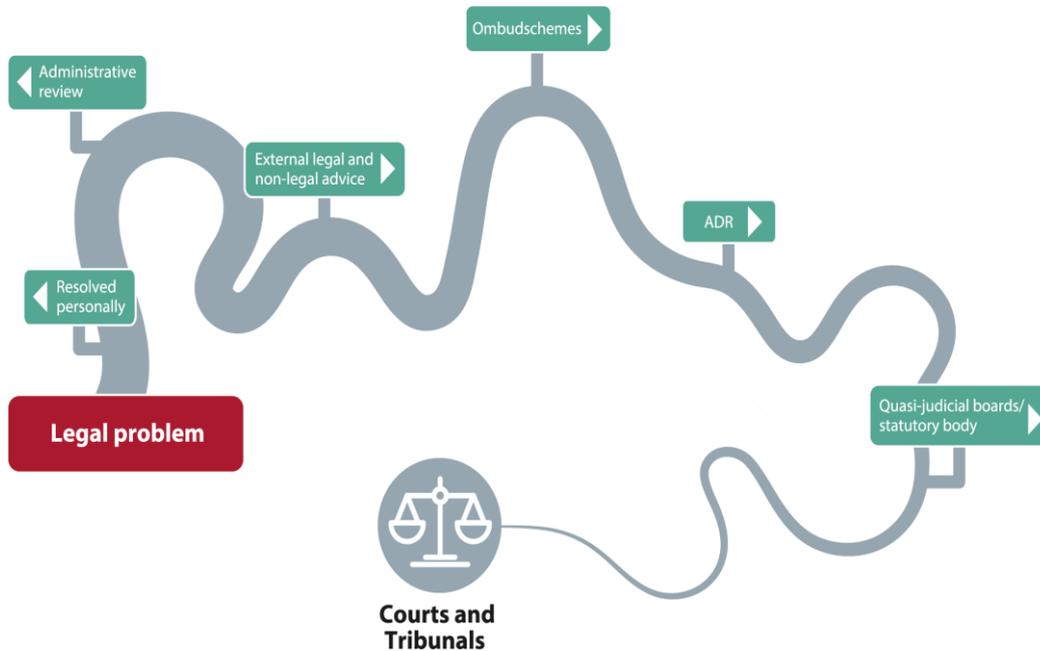
2.3. Centring on citizens and business in legal and justice systems

Economic agents such as businesses and banks may face legal issues related to tax, regulation, employment, debt enforcement or payment of invoices. Indeed, the research shows that for example in a 2013 survey 38% of small businesses in England and Wales experienced "one or more 'significant' legal problem" within the year including 56% for other micro businesses and 77% for other non-single person small businesses⁷¹. In Mexico, the *Justicia Cotidiana* initiative highlighted three areas of issues when it comes to business justice: contract execution and debt collection; labour disputes and disputes with administrative authorities. In the area of commercial law and banking, the types of disputes faced by citizens, banks or businesses may involve slowness and lack of flexibility in dealing with mortgage proceedings or the low judicial enforcement of commercial contracts.

Although the data are limited, some studies show that (unresolved) legal problems may have a negative knock-on effect for businesses. Some of the most common negative impacts include loss of income, upset within the business, the incurring of additional costs, damage to business relationships, loss of reputation and damage to employee relations.

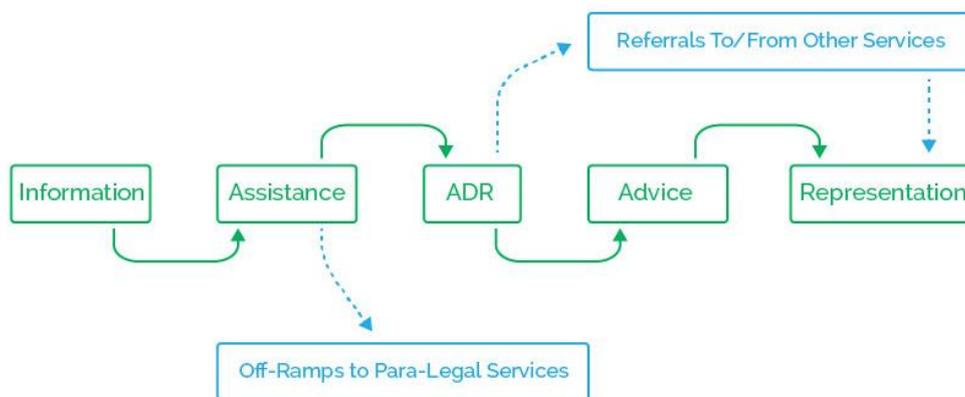
In this context, the OECD work on justice services starts with the person and the business and looks for ways to address their legal needs through a comprehensive continuum of legal and justice service options. Indeed, experience around the world shows that exclusive reliance on litigation through the judiciary system can be costly (both to the state and litigants) and slow. In this context many countries are starting to recognise that effective resolution of disputes can take place through various pathways to justice, which could be arrayed along a continuum of services from access to ADR mechanisms to full litigation (Figure 2.1) and from access to legal information and legal advice to full representation (Figure 2.2).

Figure 2.1. Example of a continuum of legal and justice services



Source: Adapted from Attorney-General's Department of Australia (2009),

Figure 2.2. A continuum of legal aid service models



Source: Adapted from Currie, A. (2009).

More specifically, the continuum of justice and legal services could be envisaged as follows:

- *Justice services* encompass a growing spectrum of processes and procedures, including a range of ADRs such as mediation, online dispute resolution, pre- and post-resolution support, as well as more formal judicial and non-judicial proceedings. The main examples are arbitration, mediation and conciliation hearings, often by industry bodies, specialised agencies or third party evaluators, conducted at the national or international level. ADR processes often complement and sometimes supplement judicial contract enforcement procedures and can strengthen contractual commitment

at lower costs. In some cases, a justice service operates as a standalone service (e.g. a specialised mediation process) and in other cases a range of justice services are provided by one entity (e.g. problem-solving courts, justice access centres)⁶². Electronic communication in justice services are also deemed to offer a higher number of resolutions of consumer disputes. For instance, in many OECD countries, online dispute resolution is increasingly used for commercial disputes, particularly in mediation and arbitration processes⁶³. In this continuum effective judiciaries play a central role in ensuring that the full range of legal and justice services (including early resolution services and ADR mechanisms) is consistent with the rule of law, legal norms and judicial interpretation by establishing the norms that dispute resolution and other access to justice mechanisms should follow⁶⁴. Some studies also highlight that “courts and tribunals could serve as multi-service dispute resolution centres, providing a range of dispute resolution services, such as negotiation, conciliation and mediation, judicial dispute resolution, mini-trials, etc., as well as motions, applications, full trials, hearings and appeals. Some of these services could be offered by trained court staff, duty counsel, dispute resolution officers, court-based mediators and others”⁶⁵.

- *Public legal services*, such as paralegals, public legal education providers, community advocates, collaborative service provision from legally-trained and other professionals, etc. The continuum is generally seen as a graduated scheme from least interventionist such as the passive provision of legal information, to advice, to various forms of limited legal assistance, to partial or limited forms of legal representation (such as ‘limited scope’ or unbundled legal services) to full representation in various ADR processes, non-judicial forums, and judicial forums⁶⁶. For instance, some firms of solicitors provide regular advice to both people and corporate entities on mortgage possession claims, offering a conditional fee agreement if the client is not eligible for public funding in a housing case. Importantly, there is a dynamic between the substantive law, the complexity of procedures and operation of justice services, and the need for legal services. In general terms, the more complex the law and procedure, the greater the need for legal assistance”⁶⁷.

In assessing justice and legal performance, it is important to balance efficiency and justice while assessing the quality of justice and the judicial contract enforcement mechanisms. Justice imperatives of procedural fairness and equality of arms may reduce the enforcement effectiveness of a contract by increasing the cost of enforcement and the risk of unsatisfactory court adjudication.

While the chapter aims to highlight the full range of legal and justice services available to resolve a wide range of commercial disputes, including contract enforcement, mortgage and secure transaction disputes, the main focus lies on the performance of the courts, as the primary justice institutions in Mexico. Specific issues related to understanding both court and broader justice services’ performance are highlighted in the sub-sections below. This involves assessing judicial expertise in dealing with enforcement of banking contracts, the impartiality and independence of the courts and the integrity of the judiciary. Important elements are the cluster of managerial issues affecting the performance of courts, such as the caseload of judges, backlog of cases, level of funding, staff training, court case

⁶² OECD (2017f)

⁶³ Mania, K. (2015)

⁶⁴ OECD (2015b)

⁶⁵ OECD (2015b)

⁶⁶ OECD (2017f)

⁶⁷ OECD (2017f)

management practices, sanctions on delaying tactics, use of information technology for filing and tracking cases, for implementing procedural and jurisdictional rules, and for recording and disseminating reasoned case histories. Equally important is the ability of the courts to contribute to jurisprudence in the area of banking contract enforcement (e.g. through the mandatory publication of decisions); and the track record of the legal system enforcing contractual agreements and settlements (e.g. level of compliance with judicial rulings). Where applicable issues related to enforcement of judicial and extra judicial decisions (such as mechanisms for the oversight of the execution rulings) are highlighted, as they are often considered as impediments for the effective access to justice by all⁶⁸.

2.3.1. Understanding court performance

Attempts at defining performance of justice more precisely seem to have started in earnest in the 1980s. One of the most influential early reflections came from the Trial Court Performance Standards (TCPS) Project, launched in 1987 in the United States by the National Center for State Courts (NCSC) and the Bureau of Justice Assistance of the Department of Justice⁶⁹. There are 22 TCPS under five performance areas: *Access to justice*; *Expedition and timeliness*; *Equality, fairness, and integrity*; *Independence and accountability*; and *Public trust and confidence*. They cover aspects such as the public nature of proceedings, the convenience of use and cost of access to the court, the management of caseloads and schedules, and the representativeness of juries.

Other countries also developed frameworks for assessing court performance. In the Netherlands, for instance, the Council for the Judiciary undertook in 2002 to create an overarching quality system for all courts known as ‘RechtspraakQ’, which comprises a performance measurement system applicable at court and sectoral level. Five areas of judicial performance are considered, each grouping several indicators: *Impartiality and integrity*; *Expertise*; *Treatment of litigants and defendants*; *Legal unity*; *Speed and promptness*.

International initiatives were then taken to compare judicial performance across jurisdictions and to share lessons between countries. For example, the European Commission for the Efficiency of Justice (CEPEJ) was established in 2002 to promote the rule of law and fundamental rights in Europe, and to strengthen its evaluation and assistance functions in 2005 “in order to help member states to deliver justice fairly and rapidly”⁷⁰. CEPEJ toolbox developed to this effect includes a database of judicial statistics enabling the comparison of judicial systems on efficiency, quality and effectiveness grounds, as well as a checklist for promoting the quality of justice and the courts. The CEPEJ rests its work on seven “pillars of quality” of judicial processes and decisions derived from the European Convention on Human Rights (article 6): *Fairness of the proceedings*; *Reasonable duration of the proceedings*; *Publicity of the decision and transparency of the process*; *Protection of minors (and other subjects for whom it is appropriate to provide a form of assistance)*; *Comprehensibility of the prosecution, the course of the procedure, and decisions*; *Right to legal assistance and access to justice in general*; *Legal aid (when all conditions are met)*⁷¹.

⁶⁸ OECD (2017g)

⁶⁹ While standards remained unchanged, some indicators and measurement methods were updated since 1997

⁷⁰ CEPEJ website: http://www.coe.int/t/dghl/cooperation/cepej/presentation/cepej_en.asp, accessed 1 August 2017

⁷¹ CEPEJ (2016)

In addition, the International Consortium for Court Excellence, which brings together bodies from various (mainly common-law) countries as well as the World Bank and the CEPEJ, proposed a Framework for Court Excellence in 2008 for application to all courts, and revised and simplified it in 2013⁷². The Framework lists ten values that are deemed to “guarantee due process and equal protection of the law to all those who have business before the courts, set the court culture and provide direction for all judges and staff for a proper functioning court”: *Equality before the law, Fairness, Impartiality, Independence of decision-making, Competence, Integrity, Transparency, Accessibility, Timeliness and Certainty*. The Framework proposes a questionnaire for courts to self-assess the extent to which these values are guiding their daily operations, and a set of eleven Global Measures of Court Performance with the aim to “establish international standards and common definitions of court performance measurement that would, first, provide [...] good practices for successful performance measurement and performance management and, second, encourage comparative analysis and benchmarking across different jurisdictions”⁷³.

2.3.2. Understanding justice system performance

As noted, the OECD work on access to justice pinpoints the variety of paths to justice⁷⁴. Focusing on less than the entire justice “service continuum”, then, may provide a partial – and possibly biased – picture of the extent to which citizens’ and businesses’ legal needs are satisfied. This approach builds on and is supported by other global actors, such as the World Bank, which proposed a broad definition of “justice systems” encompassing “the formal and informal institutions that address breaches of law and facilitate peaceful contests over rights and obligations”, including prosecutors’ offices, the police, administrative enforcement mechanisms, *etc.*⁷⁵.

These broader perspectives on justice institutions and legal services place their performance at the centre of the notion of rule of law, itself recognised as a key factor of development (see section 1.0 above on the impact of the rule of law on economic development). The Rule of Law index computed since 2012 by the World Justice Project, for instance, has eight components in total – all of which are at least partly related to the performance on justice institutions in a broad sense⁷⁶: Constraints on Government Powers, Absence of Corruption, Open Government (which includes the publicity of laws), Fundamental Rights, Order and Security, Regulatory Enforcement, Civil Justice and Criminal Justice. The factors of civil justice are very similar to those considered in court performance assessments, enlarged to ADR: *Accessibility and affordability of civil justice; Absence of discrimination; Absence of corruption; Absence of improper government influence; Absence of unreasonable delays; Effective enforcement of justice decisions; Accessibility, impartiality and effectiveness of alternative dispute resolution mechanisms.*

2.4. Understanding drivers of performance of justice institutions

Numerous studies sought to identify the factors that influence the performance of justice institutions, in general either by evaluating the impact of particular justice reforms, or through cross-country comparisons. Both identification strategies encounter challenges. The complexity of the notion of justice performance itself, and the fact that some of its

⁷² ICCE (2013)

⁷³ Hall, D. H. and I. Keilitz (2012)

⁷⁴ OECD (2015b)

⁷⁵ World Bank (2012)

⁷⁶ World Justice Project (2015)

aspects are difficult to measure, are obstacles that lead most researchers to focus on the efficiency indicators mentioned above, in particular the length and cost of proceedings. In addition, a host of confounding factors can account for differences of performance between periods or – even more – between countries. Often, these factors are also difficult to isolate and measure, as for instance the civic culture and the institutional setup of a country. As a consequence, available studies are very likely to overlook the determinants of some qualitative aspects of performance (including independence, integrity, fairness, accessibility), and might also overstate the importance of certain factors (particularly cross-country comparisons).

With these caveats in mind, this section provides an overview of some factors identified as determinants of justice sector performance.

2.4.1. Human and material resources

A first finding in the literature is that simply spending more resources is not likely to improve judicial performance: “Differences in trial length appear to be more related to the structure of justice spending and the structure and governance of courts than to the sheer amount of resources devoted to justice”⁷⁷. In particular, additional spending on resources does not translate into more and better court decisions when judges are absorbed by administrative and management tasks that would be more efficiently addressed by other categories of staff, or when higher pays are associated with inadequate reward schemes. Even when it comes to the level of judicial education, the evidence of impact is mixed and primarily based on cross-country studies.

A robust finding, however, seems to be that courts spending more on ICT resources are more efficient⁷⁸, although the existing literature does not unequivocally rule out reverse causation.

2.4.2. Judiciary management

The empirical evidence from single-country studies using court-level data suggests a “positive relation between court size and efficiency”⁷⁹. Potential mechanisms through which these gains are achieved could be economies of scale in court administration and the specialisation of judges. However, both the theoretical predictions and the empirical evidence are mixed regarding how specialisation affects court performance, as more specialised judges “may want to be more precise regarding their area of expertise”⁸⁰, and fail to see the broader similarities between judicial areas. Some experts suggest that an inversely U-shaped relationship between court size and court efficiency may exist, whereby the mid-sized courts are the most efficient ones⁸¹.

Governance reforms providing the chief judges with more autonomous responsibility have been associated with higher judicial performance⁸². Judges and the judiciary also seem to respond positively to competitive pressure, as the mere publication of court performance

⁷⁷ OECD (2013). See also Voigt, S. and El-Bialy, N. (2016)

⁷⁸ Gouveia, A.F., *et al.* (2017)

⁷⁹ *Ibid.*

⁸⁰ *Ibid*

⁸¹ Albers, P. (2007)

⁸² OECD (2013); Gouveia, A.F. *et al* (2017). Both studies are cross-country comparisons, however, and do not control for a broad range of potential confounding factors

statistics has been “reported to reduce delay in several countries, even without enforcement mechanisms”⁸³.

2.4.3. Alternative dispute resolution

ADR mechanisms such as mediation, arbitration and non-binding evaluations aim at enabling the parties to settle their disagreement outside the court room. There is evidence that the use of ADRs can substantially reduce costs and disposition times⁸⁴. It also levies a competitive pressure on the court system to innovate and improve efficiency⁸⁵. The use of ADRs can be affected by multiple factors, such as the availability, quality, ADR policy, presence of safeguards, trust in ADRs and awareness.

At the same time, mandatory ADR schemes seem to be less beneficial than voluntary ones. A closer analysis shows that “much hinges on the nature of the program and the participants”⁸⁶: Many large corporations have developed early dispute resolution programmes, under the influence of which commercial arbitration has become more similar to litigation; replacing the judicial procedure by private mechanisms could be harmful in cases with significant asymmetries of bargaining power, such as employment or consumer contracts (including mortgage contracts). Barendrecht (2011) notes the contradiction in taking “for granted that a government should set up courts” while at the same time telling citizens that “they should solve their own problems, by agreeing on mediation or arbitration, suggesting the market can deal with dispute resolution after all”⁸⁷. While ADRs are certainly part and parcel of an efficient dispute settlement system, they do not reduce the need for accessible courts. In fact, the OECD 2015-2017 Roundtables on Equal Access to Justice reaffirm the central role of courts in ensuring access to justice and guaranteeing the rule of law, also by putting in place safeguards for equal treatment and fairness during the use of ADR mechanisms.

2.4.4. Legal framework and services

The demand for litigation varies considerably from country to country, depending in particular on the litigious culture the society⁸⁸, the quality of the regulatory framework, the level of integrity in the public sector and the control of corruption⁸⁹.

The experience of judicial reform across countries also points towards the weight and rigidity of procedures and the incentives for lawyers as external factors having a decisive influence on the functioning of courts⁹⁰. In other words, it can be misleading to compare the performance of justice institutions across jurisdictions without taking proper account of the influence of the legal framework.

2.4.5. Legal capability

A final array of factors determining the performance of justice institutions and demand for justice services is the level of legal capability of the population, which could be defined, in

⁸³ Botero, J. C. *et al* (2003)

⁸⁴ Gouveia, A.F. *et al*. (2017)

⁸⁵ Botero, J.C. *et al*. (2003)

⁸⁶ Stipanowich, T. J. (2004)

⁸⁷ Barendrecht, J. M. (2011)

⁸⁸ Palumbo, G. *et al*. (2013)

⁸⁹ OECD (2013)

⁹⁰ Messick, R. E. (1999)

the words of the Public Legal Education and Support Task Force set up in the UK in 2006-2007, as: “awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills needed to deal with disputes and gain access to justice”, as well as the capacity to “recognise when [one] may need support, what sort of advice is available, and how to go about getting it”⁹¹. People suffering from this lack of empowerment often do not seek legal advice, or do not have access to a private lawyer due to financial constraints, and are less able to use self-help and unbundled services effectively. In such a context, only few finalise their problems via the formal justice system⁹².

A large-scale representative survey conducted in England and Wales found that a large share of the population, concentrated among the most vulnerable groups, was likely to choose a wrong advice-seeking strategy and not to engage in any action if confronted with a legal issue⁹³. Barendrecht (2011) presents legal aid, court accessibility and legal information (and education) as three alternative strategies to enhance access to justice (given limited resources), and compares their relative merits on efficiency, transaction cost and empowerment grounds. He argues that legal information and education is the most promising solution for better access to justice⁹⁴. This view is supported by the 2015-2017 OECD Roundtables on Equal Access to Justice, which underline the importance of enhancing legal capability as a core aspect that should be taken into account in designing legal and justice services for equal access.

⁹¹ PLEAS Task Force (2007)

⁹² OECD (2017f)

⁹³ Buck, A. *et al.* (2008)

⁹⁴ Barendrecht, J.M. (2011)

Chapter 3. Measuring and modelling performance of justice and legal institutions

3.1. Measuring the performance of justice institutions

The notion of performance inherently entails some form of measurement. Yet, measuring broad-based performance concepts such as those depicted above entails numerous methodological challenges. While certain aspects of relevance can be readily observed (e.g. timeliness of proceedings) or estimated (te.g. cost of proceedings), others are hard to gauge in objective terms (the fairness of decisions or the competence of judges). For aspects such as the judiciary's independence, there can be considerable differences between *de jure* and *de facto* situations. What are the most appropriate indicator(s) for each particular aspect, and the most reliable source for measuring it? Should one measure it in quantitative or qualitative terms? Should one calculate an aggregate of different quantitative measures and if yes, what should be the respective weights of its components? How, finally, should one arbitrate between accuracy and cost when measuring performance? On these questions, the differences of approach are considerable. Three broad strategies emerge from the body of evidence.

3.1.1. Measuring but not comparing

Assessment schemes such as the TCPS, the Dutch RechtspraakQ or the ICCE Framework for Court Excellence typically include a large number of variables and deploy an expansive range of observation methods. The ICCE advocates for a “whole-court approach to achieving court excellence rather than simply presenting a limited range of performance measures directed to limited aspects of court activity”⁹⁵. In the TCPS, the 22 standards are associated with 68 indicators measured through surveys of court users, court personnel and the general public; analyses of administrative documents and reviews of judicial and financial records; inspections of court premises; interviews and even written tests for certain categories of court personnel; etc. The RechtspraakQ system also includes an arsenal of measurement methods: a biennial court position study; a user satisfaction survey covering litigants, their counsels and public prosecutors; a staff satisfaction survey; a visit and review of the court by a team of independent experts once every four years; and an internal audit.

These assessment schemes are usually conceived as internal tools providing the court management with a set of indicators covering every aspect of their organisation's structures and processes. By nature, they do not seek to aggregate their results into higher-level indicators or to compare results between organisations. The TCPS Commission explicitly warns that the use of the standards “as a basis for cross-court comparisons or as part of a national or regional accreditation of State courts is not intended or recommended”⁹⁶, as it would face “a host of technical and practical problems of utility, feasibility, propriety, accuracy”, etc.

Although they follow the same overall logic, the assessment schemes can still differ substantially in the way they address a particular aspect of performance. This is due in part to the fact that in many cases, there is no perfect indicator and measurement method. The

⁹⁵ ICCE (2013)

⁹⁶ Emphasis in the original

quality of court decisions, for instance, is estimated in the TCPS system by asking lawyers, defendants, jurors and other users their opinion on the equality and fairness of the sentence, while the Dutch Rechtspraak system approaches it through the rate of appeals. Both choices have merits and drawbacks. The rate of appeals certainly reflects in part the quality of judgements⁹⁷, but it can also be influenced by a host of distinct considerations, such as the accessibility and independence of the appellate court. On the other hand, the evaluations expressed by court users are subjective, and amalgamate the views of laymen with those of law experts.

Altogether, the assessment schemes rely rather heavily on court user surveys, but place a strong emphasis on ensuring that the surveys produce an unbiased image of court user perceptions. This is done by seeking to include all the relevant groups of stakeholders, addressing a representative sample of each, and elaborating questionnaires that are least conducive to biased answers. For instance, the ICCE recommends a rigorous sampling scheme, which builds on the US National Center for State Courts' CourTools aid package⁹⁸: surveys are conducted at regular intervals (for instance every six months); each round of surveys takes place at one chosen "typical day"; on that day, every non-employee present is surveyed based on a common questionnaire.

3.1.2. Comparing but not ranking

The ICCE adopts a different stance on this issue, considering that its set of 11 Core Performance Measures provide a reliable overview of court performance and enable cross-court comparisons. The ICCE departs in particular from other approaches by shifting from user perception as a source of information to user satisfaction as an indicator of performance: "Excellent courts aim at shifting their data focus from simple inputs and outputs to court user satisfaction, quality of service and quality of justice"⁹⁹. This is justified by the claim that user opinions do not simply reflect satisfaction over the outcome of an individual case, but rather "people's personal perceptions of how they were treated by the court and whether the court makes its decisions fairly including accessibility to the court, procedural fairness, expeditious resolution of cases, no undue influence from outside sources and equal and courteous treatment of all court users"¹⁰⁰ – essentially every value that matters for court performance. Whether such a statement can be made irrespective of the cultural, institutional and political context in which people are interrogated is doubtful, however. Indeed, personal opinions on issues such as the impartiality, integrity and independence of justice institutions appear to be highly dependent on personal and cultural factors¹⁰¹.

Other methods aimed at providing comparisons between courts focus on aspects of performance that are easily quantifiable, namely those related to efficiency or productivity. In most OECD countries, data on court efficiency and productivity is collected automatically by the internal case management system, and is therefore less costly to collect than survey data, in addition to appearing as more objective.

⁹⁷ OECD (2013)

⁹⁸ CourTools is a court performance assessment tool developed by the NCSC in 2005. Drawing on the experience of the TCPS, CourTools are both more focused and simpler to apply. See NCSC (2005)

⁹⁹ ICCE (2013)

¹⁰⁰ ICCE (2012)

¹⁰¹ See for instance Sun, I.Y. and Wu, Y. (2006). Data from INEGI (2016b) also reveals a strong relationship between businesses' perception of public insecurity and mistrust in judges, across Mexican states.

Inputs to a court system include the number of cases filed per year, the available personnel (judges and/or administrative staff, absolute numbers or per capita), and the buildings, equipment and other financial resources available. The output of a court consists of the rulings the judges make in the various cases they oversee. Given a measure of inputs and outputs, suggested measures of efficiency include¹⁰²:

- Labour productivity (case rulings per judge)
- Total productivity (case rulings divided by the total amount of resources spent)
- Length of proceedings/trial lengths
- Cost per case (total amount of resources spent divided by number of case rulings)
- Clearance rates (number of case rulings divided by number of filed cases – indicates whether the backlog of cases is increasing or decreasing)
- Congestion rate (pending and filed cases divided by case rulings)

One of the key limitations of methods focusing primarily on efficiency is that they overlook other aspects of performance. The authors are often cognisant of these limits, and warn against too general interpretations of their findings: “It is to be stressed that this study focuses on one dimension of performance: efficient judicial administration, as measured by quality and time. Given this narrow focus, future studies should expand to address some of the more qualitative issues involved in legal reform”¹⁰³. In the words of the ICCE, a purely quantitative approach to performance might focus on the principle “justice delayed is justice denied”, and fail to acknowledge that “justice hurried” can also be “justice buried”¹⁰⁴.

3.1.3. Justice performance rankings

A third category of measurement tools consists of aggregate indexes aiming to capture all aspects of performance that are deemed relevant from a particular standpoint. The World Justice Project’s Rule of Law index, for instance, is calculated as the simple average of the eight components listed above, which are in turn calculated as averages of lower-level indicators. The Civil Justice component score, for instance, averages sub-scores according to the following seven criteria: *People can access and afford civil justice; Civil justice is free of discrimination; Civil justice is free of corruption; Civil justice is free of improper government influence; Civil justice is not subject to unreasonable delays; Civil justice is effectively enforced; ADRs are accessible, impartial, and effective*. The last sub-score is itself the average of sub-scores on the accessibility, integrity, efficiency and effective enforcement of ADRs.

The World Bank Doing Business index also includes several components relating to justice institutions¹⁰⁵. A component on Contract Enforcement accounts for 10% of the overall index and is itself calculated as the average of three subcomponents: the time necessary to resolve a commercial sale dispute through the courts; the attorney, court and enforcement costs as a share of the claim value; and the quality of judicial processes. The latter is itself a sub-index calculated as the average of four sub-sub-indexes: court structure and proceedings; case management; court automation; and ADRs.

¹⁰² Dakolias, M. (1999); OECD (2013); Albers, P. (2007)

¹⁰³ Dakolias, M. (1999)

¹⁰⁴ ICCE (2013)

¹⁰⁵ World Bank (2017), Doing Business Index Methodology

Aggregate indexes make it possible to compare country performances on aspects that are in principle more meaningful, and potentially more impactful, than simple indicators. For this, they gather, harmonise and synthesise vast amounts of information. They are therefore very commonly used to assess causal linkages upstream (e.g. to identify the determinants of performance or investigate the effects of justice reforms on performance) and downstream (e.g. to test the impact of performance on economic growth).

The main downside of aggregate indexes is that they are based on modelling decisions that involve a degree of arbitrariness, particularly the choice of lowest-level indicators to include in the index, and the choice of the method and parameters of aggregation (e.g. a weighted average). Inadequate modelling choices can generate biases and inconsistencies, such as the redundancy of the information used in different components or the excessive influence of a particular indicator on the aggregate. While statistical verification can help to detect and correct some of these artefacts¹⁰⁶, the key condition for the soundness of modelling choices is that they be consistent with a theoretical representation that is supported by evidence – or at least can be tested.¹⁰⁷ This, in turn, requires explicitly exposing and justifying all modelling choices¹⁰⁸.

3.2. Modelling of justice institution performance

The case of mortgage contracts, which involves additional issues for the reasons just mentioned, will be used as a reference. The case of commercial contracts can be easily deducted by excluding irrelevant considerations.

A central theme of many of the findings of the review is that a narrow focus on a component of the justice system, the aspects of its performance and their determinants, or the range of its social and economic effects, is likely to produce a biased assessment and lead to inefficient or even ineffective recommendations. An appropriate representation of the issue of mortgage (and commercial) contract enforcement therefore needs to consider broader justice and rule of law issues and interventions, insofar as they can influence the need for, context, outcomes and eventual impact of contract enforcement.

In line with this general observation, the justice sector will be defined in the sequel by the services related to legal dispute resolution mechanisms, whether judicial or not, including legal aid, ADR mechanisms, legal education and awareness, but excluding law enforcement services, which do not appear as entirely relevant to the issue of contract enforcement. The performance of the justice sector can be characterised by the eight principles of *Accessibility, Fairness and impartiality, Independence, Integrity, Transparency, Quality of decisions, Efficiency and timeliness, and Enforcement*. These principles concern to varying degrees the different stages of the dispute resolution processes, from the choice of a type of procedure to the final settlement and its enforcement. These principles well correspond to the preliminary OECD criteria used by countries in providing people-focused legal and justice services such as: *availability, empowerment, accessibility, appropriateness, fairness, equality and inclusion, coherence, and effectiveness*.

The action and the performance of justice institutions are determined by a number of inputs: the human and material resources of the judiciary, the management of the judiciary, the justice sector policy of the executive, the legal framework, legal and awareness-raising

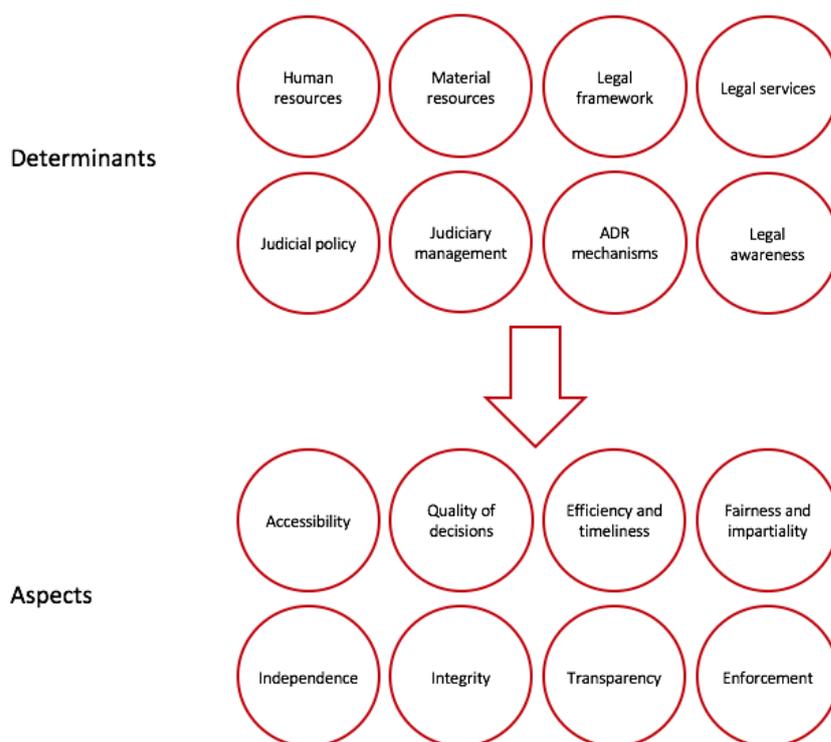
¹⁰⁶ See for instance Saisana, M. and Saltelli, A. (2014)

¹⁰⁷ OECD (2008)

¹⁰⁸ Saltelli, A. and Funtowicz, S. (2014)

services provided to citizens and businesses, and the resources and management of ADR mechanisms (Figure 3.1).

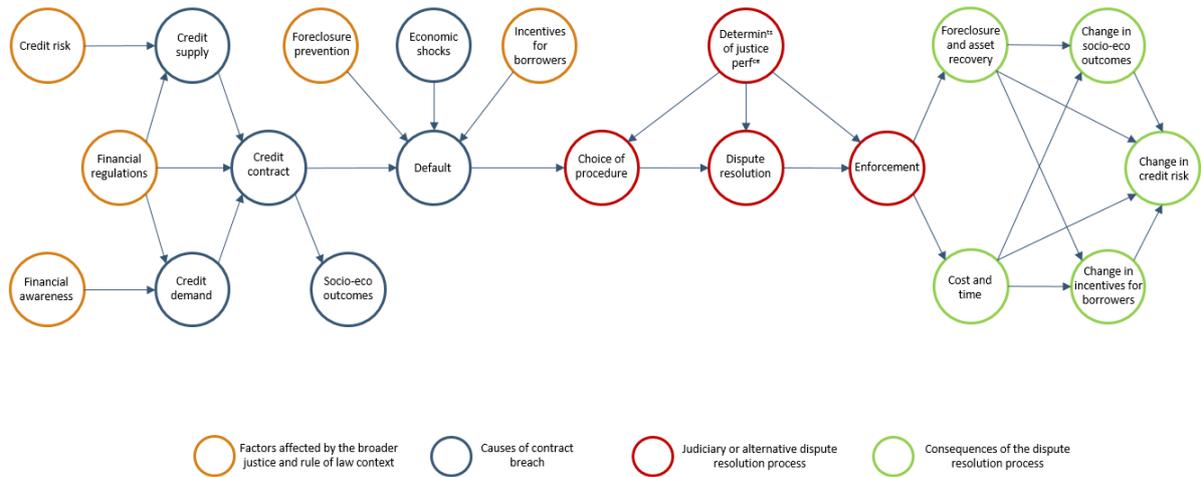
Figure 3.1. Determinants and aspects of the performance of justice institutions



Source: Author.

Building on the empirical evidence and findings from the literature, Figure 3.2 inserts the dispute resolution and contract enforcement process in a chain of cause and effect relations going from the initial factors governing the establishment of a contract and its outcomes to the eventual effects of contract enforcement. The figure is constituted by four blocks.

Figure 3.2. Causes and consequences of mortgage contract breach and enforcement



Source: Author.

The central elements in red depict the dispute resolution procedure and factors that influence it. The procedure itself is initiated by the choice of a dispute resolution mechanism (which includes the decision not to undertake any type of formal procedure)¹⁰⁹. This is followed by two phases: the dispute resolution, during which the case is handled by a court or an ADR mechanism, and a settlement is made; and the enforcement, during which the settlement or ruling is executed. The performance of justice institutions in all three steps (choice of a procedure, dispute resolution and enforcement) is influenced by the determinants identified above, namely the human and material resources of the judiciary, the management of the judiciary, the judicial policy of the executive, the legal framework, legal and awareness-raising services provided to citizens and businesses, and the resources and management of ADR mechanisms.

The elements in blue to the left of the first block describe the causes of contract breaches: the credit contract itself as a potential source of insolvency, possibly aggravated by the impact of economic shocks, and poor incentives to fulfil the terms of the contract are the causes that can trigger a default. The credit contract is the result of credit supply and demand¹¹⁰, and generates economic outcomes (the debtor's use of the credit for investment, trade or consumption purposes, and its further consequences).

The elements in orange to the left of the diagram are influenced by the broader justice and rule of law context, which in turn exert an effect on the contractual conditions and the contract breach. The credit risk, which determines the supply of credit by financial institutions, is in part determined by factors such as the prevalence of corruption, crime and insecurity. Financial regulations, financial awareness raising and foreclosure prevention actions are all preventing at an early stage the negative consequences of over-indebtedness, insolvency, default and foreclosure.

¹⁰⁹ Depending on the type of procedure, this choice has to be coordinated and agreed upon by both parties to the dispute or not.

¹¹⁰ Credit demand, which does not seem to play an active role in the dynamics of credit contract enforcement, has been omitted in the graph.

Finally the elements in green to the right of the graph represent the consequences of contract enforcement. The direct outcome of the enforcement, whether it is carried out by the judiciary or ADR mechanisms, is to establish the costs of the procedure itself (including the loss of time for the parties) and the terms under which the contract is terminated for the lender (the share of assets that are recovered) and the debtor (eviction and foreclosure of the property). In turn, these terms influence the ex post credit risk incurred by the lender, the socio-economic outcomes associated with foreclosure, and perceptions of the justice system – hence future incentives to respect or breach contracts. The influence on the credit risk, economic outcomes and incentives constitute the three feedback loops determining the dynamic effects of contract enforcement.

Chapter 4. The Mexican legal and justice system

4.1. Overview of the Mexican legal and justice system

Mexico's legal system stems from the civil law tradition¹¹¹ with influences from the Castilian legal cultural heritage, namely canon law (for family matters) and the late medieval commercial law. This latter was outgrown from the European "commercial revolution", which had been initiated at the end of the 13th century. In Spanish Mexico, Castilian law was most dominant in the area of private law, in particular in matters of commerce, property, family inheritance, and obligations. An important regulation, the *Ordenanza de Bilbao* in its version of 1737, is still present in many aspects of the Mexican commercial law¹¹². The third constitution following the Mexican independence (1821), the constitution of 1857, introduced the writ of *amparo*, which still exists and is one of the basic features of the legal system in Mexico¹¹³. Following the 1910 Mexican Revolution the current constitution was enacted in 1917 and amended many times in the course of time.

4.1.1. Judicial organisation and management

Two broad categories of courts are established in Mexico, namely the Federal¹¹⁴ and the local (or state) judiciaries:

- The Federal Judiciary is based on a three tier system: 1) The Supreme Court (*Suprema Corte de Justicia de la Nación-SCJN*)¹¹⁵ which has final appellate and cassation jurisdiction over all state and federal courts. It also serves as the constitutional court; 2) Circuit courts (*Tribunales de Circuito*) which are the federal appellate courts. The circuit courts are divided into single judge courts (*Tribunales Unitarios de Circuito*) and collegiate courts (*Tribunales Colegiados de Circuito*); 3) District courts (*Juzgados de Distrito*) are the federal courts of first instance. There are also some additional federal judicial bodies which are not part of the regular federal court structure. The most significant are the Administrative Justice Federal Court (*Tribunal Federal de Justicia Administrativa*), Labour Board Courts (*Juntas de Conciliación y Arbitraje*)

¹¹¹ Ávalos, F.A. (1992)

¹¹² Montilla Martínez, J. (1983)

¹¹³ The writ of *amparo* is a last-stage resort in court actions (the statutory appeal process must be exhausted before initiating *amparo* proceedings), intended to protect individuals' constitutional rights. There are two types of *amparo* proceedings: 1) the direct *amparo* is normally heard by Federal Collegiate Courts (or the Supreme Court of Justice under exceptional circumstances), 2) the indirect *amparo* is normally heard by Federal District Courts. In commercial proceedings, the final judgement is always subject to a direct *amparo* complaint

¹¹⁴ The federal judiciary in Mexico is governed by Articles 94 through 107 of the Constitution and the Organic Law of the Federal Judiciary (*Ley Orgánica del Poder Judicial de la Federación*)

¹¹⁵ The Supreme Court- SCJN is composed of 10 Justices (*ministros*) and 1 Chief Justice. The President of the Republic nominates the candidates for the Supreme Court and the Senate may approve the nomination with a two thirds majority. If the Senate does not act on the nominations within 30 days the approval becomes automatic. Supreme Court justices are appointed for 15 years. The president also has the power to remove a Supreme Court justice with the approval of the Senate and the Chamber of Deputies. The Supreme Court is also the constitutional court. It meets in plenary session for cases involving jurisdictional issues, constitutional issues, and agrarian issues. The Supreme Court also divides and meets in two chambers (*salas*). Circuit judges and district judges are appointed by the Supreme Court to four-year terms. Circuit judges and district judges may be reappointed or promoted to a higher position at the end of the four-year term. They may be dismissed only for bad conduct

and Military courts (*Tribunales Militares*). Federal courts have jurisdiction over: disputes that arise out of laws or acts of state or federal authorities that violate individual guarantees; controversies between states or a state and federal authorities; all matters involving federal laws and treaties; all cases in which the federal government is a party; all matters involving maritime law; and all cases that involve members of the Diplomatic and Consular Corps.

- The Mexican judicial system also includes 32 local court sub-systems (31 states and Mexico City). The local judiciaries are organised into trial (or first instance) courts, specialised by subject matter, and an appellate (Supreme or Superior Court) which is similarly divided into specialised panels or chambers. In general trial or first instance courts are responsible for reviewing the facts of the case and reaching a judgment based on fact and law. This verdict as well as certain interlocutory decisions may be reviewed on appeal by the Superior or Supreme Court of the local district. In practice some state courts may carry out federal judicial proceedings – due to limited federal resources¹¹⁶.

Different models of court administration and governance systems exist in OECD countries reflecting their legal traditions, the balance of powers and the balance between judicial independence and accountability¹¹⁷. OECD countries differ with regard to the delegation of accountability and authority over managerial and administrative tasks, which impact upon the role and responsibilities of the Judicial Council or similar institution where it exists (see below). There appears to be a trend towards granting greater administrative autonomy and control to courts in certain civil and common law countries to ensure greater degree of judicial independence and accountability in court administration.

A number of OECD countries established Judicial Councils or similar institutions in order to balance the role of all branches of power in the administration of their judicial system¹¹⁸ and to safeguard judicial independence¹¹⁹. These institutions tend to differ across OECD countries with regard to the range of their decisional powers on the status of judges, their composition and the ways in which their members are elected or appointed¹²⁰. These differences reflect the various views and approaches on the institutional means needed to protect judicial independence or to promote a better balance between independence and accountability¹²¹. Similar to many OECD countries,¹²² a Federal Judicial Council (*Consejo de la Judicatura Federal*) is the Mexican body governing the judiciary, the professional career of federal judges and protecting their independence. Federal Judicial Council's decisions are final and undisputable¹²³. The Federal Judicial Council proposes to the parliament the budget for the federal judiciary, excluding the budget for the SCJN, which proposes its own budget.

¹¹⁶ OECD Fact-Finding Mission

¹¹⁷ Canadian Judicial Council (2011); See also Canadian Judicial Council (2006); Lord Justice Thomas (2007)

¹¹⁸ Seven types of models of court administration reflecting the different levels of control may be identified: the executive model, the independent commission model, the partnership model, the executive/guardian model, the limited autonomy model, the limited autonomy and commission model, the judicial model, Canadian Judicial Council (2006)

¹¹⁹ However, evidence that such centralised councils are a necessary prerequisite to protect judicial independence is disputed; See for example UNODC (2011) and CEPEJ (2013), Councils for the Judiciary in EU Countries

¹²⁰ ENCJ (2011)

¹²¹ UNODC (2011)

¹²² Garoupa, N., and Ginsburg, T. (2009); Voermans W. and Albers, P. (2003)

¹²³ except for personnel decisions related to appointment, assignment, ratification and dismissal of individual magistrates and judges which can be reviewed by the SCJN under certain circumstances

Besides the establishment of the Judicial Council, as in many other countries, the institutional reforms in Mexico tended to focus on legal reforms with minor attention to the management arrangements of the justice institutions, thus leaving important gaps in the institutional quality of courts, ADR mechanisms and related services. Yet, the accumulated experience in other countries shows that the laws by themselves are insufficient to change social realities. Good management goes hand-in-hand with the professionalisation of the justice institutions. As such, strengthening justice system management and professionalism is essential to support strategy continuity on the mid- and long term.

Increasing administrative workload of judges in Mexico could hamper dedicated time to jurisdictional duties. Indeed, length of proceedings was noted as a challenge in a number of cases. These added responsibilities were noted at times as extraneous to an already heavy workload, especially that they may not be complemented with relevant training.

4.1.2. Legal framework

The legal system in Mexico sees the constitution at the top. Below are five major and general codes, namely the civil, commercial, criminal, civil procedures codes, and the national criminal procedures code (Federal and local jurisdictions)¹²⁴. The Civil Code is at the basis of the Mexican legal system in private legal relationships. There are three jurisdictional levels: 1) the Federal Civil Code that applies to all of Mexico in civil matters regulated by the federation; 2) The civil code of the Federal District of Mexico where Mexico City is located.; and 3) Each of the states has its own civil code which rule in local state matters. In practice, however, the contents of the different codes are similar. The Commercial Code is a single code enacted for the whole country by the Federation. Labour and procedural codes are also federal legislation.

The judicial system in contract enforcement and mortgage is thus marked by the distinction between the federal level and the state (local) level. Civil matters (i.e. mortgages considered in this study) are legislated by the states and fall into the remit of the state courts (i.e. the judicial forum is mandatorily the one in which the immovable, collateral asset is located, except agreed otherwise). In commercial matters (i.e. other banking credit instruments for the purposes of this study) are regulated by the federation and are generally adjudicated by local courts (due to concurrent jurisdiction) in cases that only affect private interests during which the plaintiff can chose between federal or state court¹²⁵.

Nevertheless, the federal courts interprets the fundamental due process rights guaranteed by the Constitution as to give themselves the ability to review most local court decisions, as well as to establish criteria to interpret state laws. In essence, this creates two stages for appealing the decisions of the local trial courts. Certain local judgments may be reviewed by three different bodies in various stages: the local Superior Court, a Federal District Court, and a Federal Collegiate Court, which possibly contributes to procedural complexity, a noted challenge in the Mexican justice system

As in many OECD civil law countries, while the principle of *stare decisis* is not recognised as a source of law, the Mexican judiciary does in practice create case law. The Supreme Court and federal collegiate courts may establish formally binding precedents called

¹²⁴ Other lower ranged codes, laws, and statutes have derived somehow or another from the constitution and the five major codes. Codes in the civil law tradition have been written mostly through a rational scholarly process, whereby rules and laws can be formulated to apply to most situations that may arise. As a result, codes tend to be very detailed and vast in size

¹²⁵ Constitution of Mexico, Article 104

jurisprudencia. *Jurisprudencia* is established by having five consecutive and consistent decisions on a point of law¹²⁶. *Jurisprudencia* is binding on the court that established it and on all lower federal and state courts. They are published in the court gazette *Semanario Judicial de la Federación* (Federation’s Judicial Weekly).

4.1.3. Public policy on justice and security

As in some OECD federal countries, attaining a cohesive public policy on justice and security both across the States and the Federal level (vertically) and across all justice stakeholders at each level of government (vertically) is challenging in Mexico. Some stakeholders mention the lack of a comprehensive judicial reform policy in the country and that the reforms appear to be fragmented, designed ad hoc and often faced with strong resistance in its inception and implementation. They also introduced the need for Ministry of Justice or equivalent to address this issue.

A more holistic justice policy system could bring about more comprehensiveness and coherence to the various disparate reform initiatives that had occurred since 1994 and often were considered patchy¹²⁷.

One of the main challenges in efficient inter-institutional and policy coordination in justice and security in Mexico appears to be linked to multi-level governance gaps, including 1) policy, 2) administrative, 3) fiscal and capacity, 4) information and 5) accountability (Box 4.1)¹²⁸.

Box 4.1. Multi-level governance gaps in justice and security in Mexico

Policy gaps are found in limited mechanisms for coordination between policy sectors (horizontally) as well as levels of government (vertically), which is particularly visible in crime policies (e.g. those targeting organised crime) and case management reforms (e.g. oral proceedings introduced for small claim commercial disputes have been introduced through a federal reform).

Administrative gaps: Administrative gaps occur when there is a mismatch between the “policy problem” at hand and the administrative delineation of responsibilities for addressing such problems. It could be the case that “mergers” of sub-national units should occur in particular policy areas or that – alternatively – there should be further division of responsibilities to improve responsiveness to local specificities. For the chosen policy areas, the diagnostic would assess what could be the appropriate scale for more effective policies.

Fiscal and capacity gaps: To overcome issues of insufficient funding (“unfunded mandates”), the diagnostic would assess, for instance, whether sub-national units may need to consider shared financing mechanisms or joint human resources initiatives (e.g. joint training) in order to meet responsibilities, and provide examples of successful mechanisms from other member countries (e.g. United Kingdom).

¹²⁶ In addition to other cases provided in the Amparo Law that also produce jurisprudence, i.e. contradiction of cases and criteria substitution, article 215

¹²⁷ Some authors suggest that the reluctance of the Mexicans to having an executive ministry dealing with the policies on justice are to be found back in the “*porfiriato*”, i.e. the era of President Porfirio Díaz (1876-1911) in which the justice system was simply an (ill-treated) arm of the president. See Cossio Díaz, J. R. (2014)

¹²⁸ OECD and IMCO (2013)

Information gaps: In the sector of crime, information gaps are key impediments to success. Indeed, criminal activities often exploit these gaps and intelligence sharing between law enforcement agencies has proven, on several occasions, to be necessary. The diagnostic would identify information asymmetries between and across levels of government and law enforcement agencies in order to suggest mechanisms for improvement. Adoption of ICTs and integrated back-office systems can be exploited to facilitate the flow of information; leaders in the OECD in this regard (United States) could be brought in to share experiences and lessons learnt.

Accountability gaps: Better performance on the part of the police and justice institutions can be incentivised if the appropriate accountability mechanisms are in place. Policies from national level governments, for instance, may be vague about monitoring or follow-up mechanisms. Additionally, sufficient information should be made publicly available and opportunities for the participation of civil society in the policy-making process. Indeed, along with audit institutions, civil society organisations can actively monitor performance and improve policy design. The second recommendation, posed in the next section, towards the construction of a suite of indicators, could be one step to help diffuse this common problem of multi-level governance, making key information available to all stakeholders.

Source: Based on OECD and IMCO (2013)

In other federal countries, this coordination is ensured through a variety of techniques. For instance, in the United-States, the National Security Strategy (NSS)¹²⁹ serves as a means of testing the government's commitment to address security and justice issues, the justice system being a crucial link in the criminal justice chain¹³⁰. The NSS provides a valuable framework to address these issues in an efficient manner by guaranteeing the involvement and cooperation of a wide range of government and non-state stakeholders. The strategy typically includes a comprehensive range of reform programmes related to justice and security such as, reforms of criminal justice, law-making and intelligence systems, the dismantling of organised crime organisations and local crime prevention. Another illustration of multi-level governance in the United States is the National Centre of State Courts (NCSC), which encourages inter-institutional dialogue and adopts a holistic approach to better implement the principle of administration of justice (Box 4.2).

Box 4.2. US National Center of State Courts (NCSC)

Founded in 1971, the NCSC is an independent and non-profit organization entrusted with the mission to improve the rule of law and judicial administration in the United States and around the world. It mainly serves as a think-tank, a national forum for discussion and a national leadership agenda to foster a more efficient and effective justice system. In the United-States, the National Center is considered to be a preeminent judicial reform institution.

All of NCSC's services (research, information services, education, consulting) are focused on helping courts make decisions, and implement improvements that save time and money, while ensuring a fair and impartial decision-making in judicial administration. To do so,

¹²⁹ It is a document prepared periodically by the executive branch of the government for the United-States Congress.

¹³⁰ See NSS from February 2015

the NCSC provides expertise to the courts in a variety of forms. Judges and court administrators can register for educational courses or contract with NCSC researchers and consultants for evaluation, assessment, and implementation of court improvement tools and methods.

Amongst important initiatives the NCSC has undertaken, is the promotion of the use of technology to improve court operations through National Court Technology Conferences, direct technical assistance and its work with court associations to improve public trust and confidence in the courts by conducting and building upon the first National Conference on Public Trust and Confidence in the Judiciary.

Source: NCSC's website : <http://www.ncsc.org/About-us.aspx>

4.1.4. Human resources and judicial career

Different recruitment models¹³¹ are found in OECD member and partner countries (at the national and subnational levels reflecting the various views and approaches on the institutional means needed to protect judicial independence or to promote a better balance between independence and accountability (Box 4.3 and Figure 4.1)¹³².

Box 4.3. Selection process, training, measures to foster gender-parity and specialised courts in commercial matters in OECD-CoE countries

Amongst OECD countries, proven experience is considered to be an increasingly determinant factor in the selection process. This is the case in the United-Kingdom (England, Wales and Ireland), where proven experience is the main focus in the selection process. Indeed, there is no formal entrance examination to the judiciary and the professional experience of candidates is fundamental to the evaluation conducted by the competent authority. Moreover, in France, candidates with previous work experience are recruited through an alternative competition. Those with particularly qualifying work experience for the judicial function can be recruited without competition, following a favorable opinion of a committee composed exclusively of judges from the judiciary, the "promotion commission" (commission d'avancement) .

Moreover, in a large majority of States, judges undergo training, which is mandatory in most cases, either before or after the definitive appointment/election of the judge (initial training) and/or during their careers (in-service training). Initial training is compulsory after the appointment, for example in Estonia, France and Slovenia. In Slovenia, the initial training takes place after the election of the judge of first instance and includes seminars, workshops, trial simulations etc. Even when in-service training is optional, like in Austria,

¹³¹ There are three major alternative processes for judicial recruitment: democratic election, merit-based system and executive appointment. Democratic election modalities aside, a large majority of the OECD Member countries have mixed (judges and non-judges) authorities in charge of the selection process. In some Member countries, judges are chosen from among practicing lawyers or experienced jurists ("professional recruitment"). In others, judges are chosen, prevalently or exclusively, from among young law graduates without previous professional experience ("civil service recruitment"). Some countries feature modalities from both selection systems by ensuring that selected young graduates accumulate a solid body of legal experience before wielding judicial power. Professional evaluation and the judicial career have different characteristics depending on the professional or civil approach.

¹³² UNODC (2011)

a considerable proportion of judges are usually interested in taking it. For instance, in Austria, more than 70 % of judges follow the general in-service training each year .

OECD member countries, such as Denmark Germany, Norway and the UK (England and Wales) have implemented specific measures designed to foster gender parity at the stage of recruitment to the profession of judge. In the UK (England and Wales) there is a statutory responsibility of the Lord Chancellor and the Lord Chief Justice to ensure such parity. Furthermore, in some countries, specific action plans were developed from existing rules and general principles to make the judicial profession more accessible to women. For example, the UK’s Judicial Appointment Commission has developed a mentoring scheme to boost diversity in the judiciary by offering insight into the daily life of a judge, inside and outside of court.

In order to increase the speed of proceedings, and for better case management, some OECD countries have introduced specialised courts in commercial matters. This is the case in France (with more than a hundred commercial tribunals (“tribunaux de commerce”) across its territory), Belgium (Commercial Court (Rechtbank van koophandel) and Poland (commercial courts, sądy gospodarcze). In Austria, only Vienna has specialist civil courts for commercial cases, namely the District Court for Commercial Matters (Bezirksgericht für Handelssachen) as well as the Vienna Commercial Court (Handelsgericht Wien), and a specialist civil court for cases involving labour and social security, namely the Vienna Labour and Social Court (Arbeits- und Sozialgericht Wien) .

Source: CEPEJ (2016).

Accumulated evidence points to judicial professionalism including judicial management as a precondition for good judicial performance. In OECD countries, professional evaluation of judges¹³³ varies from country to country with regard to methods (degree of formality)¹³⁴, and assessment of quantitative¹³⁵ and qualitative¹³⁶ criteria, timing (e.g. periodically or at regular intervals)¹³⁷, outcomes for the evaluated judges (e.g. disciplinary measures, promotion)¹³⁸, the rigour with which reviews are conducted, and the agents that conduct the evaluations¹³⁹.

¹³³ The need to conduct periodic and substantial professional evaluations of judges is seen as tied to the civil service model of recruitment (UNODC, 2011)

¹³⁴ CCJE (2014)

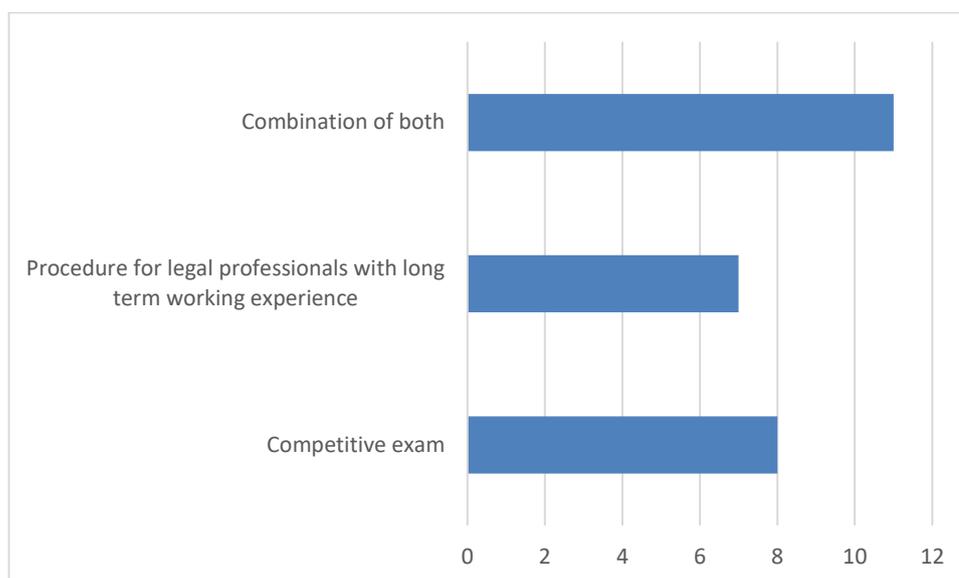
¹³⁵ Some countries consider the number of decisions issued by the evaluated judge and/or the number of cases otherwise concluded (e.g. by settlement or withdrawal) under quantitative factors. Productivity of a judge may also be measured against a fixed quota or against the average number of decisions handed down by other judges (CCJE, 2014)

¹³⁶ The quality of a judge’s analysis, organisational skills, work ethic and the way in which the judge handles complex cases is considered of great importance in some of the countries’ evaluation process. In certain countries, the number or percentage of decisions reversed on appeal are considered factors while, in others, because of the principle of judicial independence, neither the numbers of decisions reversed on appeal nor its reasons are taken into account, unless they reveal grave mistakes Other factors include: ability to mediate between parties, to draft clear and comprehensible judgments, to co-operate with other colleagues, to work in areas of law that are new to the judge and the readiness to take on extra activities within the court’s administration (e.g. mentoring) (CCJE, 2014)

¹³⁷ In European countries, more often than not, assessment takes place on a regular basis, with a specified frequency (every 1 to 5 years) (CEPEJ, 2014)

¹³⁸ CCJE (2014)

¹³⁹ UNODC (2011)

Figure 4.1. Recruitment processes of judges in some CoE countries and entities, 2016

Source: CEPEJ (2018).

At the Mexican federal level, it is customary for judges to start their careers working either as a law clerk or in an administrative position, and although to become a Judge or a Magistrate candidates are required to pass a competence test before being elected by the Federal Judicial Council, the recruitment procedure for entry level positions -namely law clerk and secretary- still have a high level of discretion and are prone to nepotism and patronage¹⁴⁰.

At the local level, the introduction of a generalised merit-based management of staff in judicial offices, including judges throughout the country as a whole appears to be relatively uneven and slow, with the best performing judges deemed to be in Mexico City and in the Estado de México, along with Monterrey (Nuevo León), and Guadalajara (Jalisco) as major economic hubs. It is in this geographical area where most corporate litigation tends to take place.

Based on OECD interviews carried out in March 2017 and on the *Ley Organica del Poder Judicial del Estado de México* (Judicial Organic Law of the State of Mexico), in the Estado de México the recruitment of judges is done through competitive examination and screening of the candidates' CV (*concurso-oposición*) after the induction course (lasting between 8 months and one year) at the Judicial School in which they shall pass the examinations above an average mark of 8 on 10. Judges are recruited for a period of 6 years renewable for another 6-year period. Then they have to be reevaluated in order for them to continue holding their seat.

In the context of a growing number of judges at the federal level (Figure 4.2), magistrates in the Estado de México are recruited through an open competition (*concurso*) and their appointment is ratified by the State legislature through a hearing. According to the law, the State executive does not intervene in the recruitment and appointment of judges and magistrates. Human resource management of judges in the Estado de México is merit-based, a fact which is progressively leading to an improved professionalism of the judiciary

¹⁴⁰ *Catálogo General de Puestos del Consejo de la Judicatura Federal*

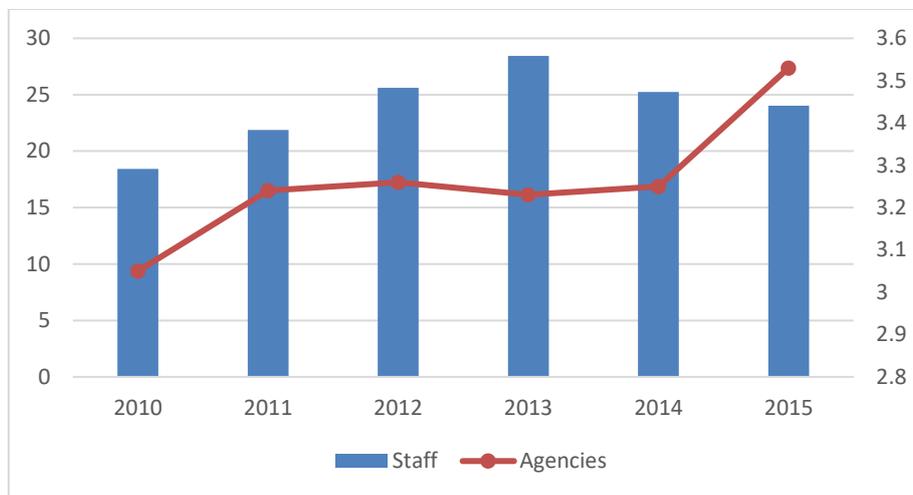
in that state. In addition, various areas of the Judiciary contribute to improvements in the legislation and management of the judiciary including a Commission for Regulatory Reform iworking within the State judiciary, under the leadership of the Judicial Planning Director.

In other states, for example the State of Baja California Sur, the merit-based judicial career is still to be fully introduced, as provided by its Organic Law. For the moment, judges seem to be appointed from among existing judicial offices' employees with a closed competition (although it is planned to open the competition to the public in the future). The state governor proposes a list of three magistrate-candidates (not necessarily judges) and the State parliament appoints them, primarily based on political criteria. A magistrates' career spans over a 15 year period. There appear to be no formalised procedure for performance appraisal, with the assessment based on direct acquaintance of the individual judge's performance by his/her superior (a magistrate), which might jeopardise judicial independence and the rule of law.

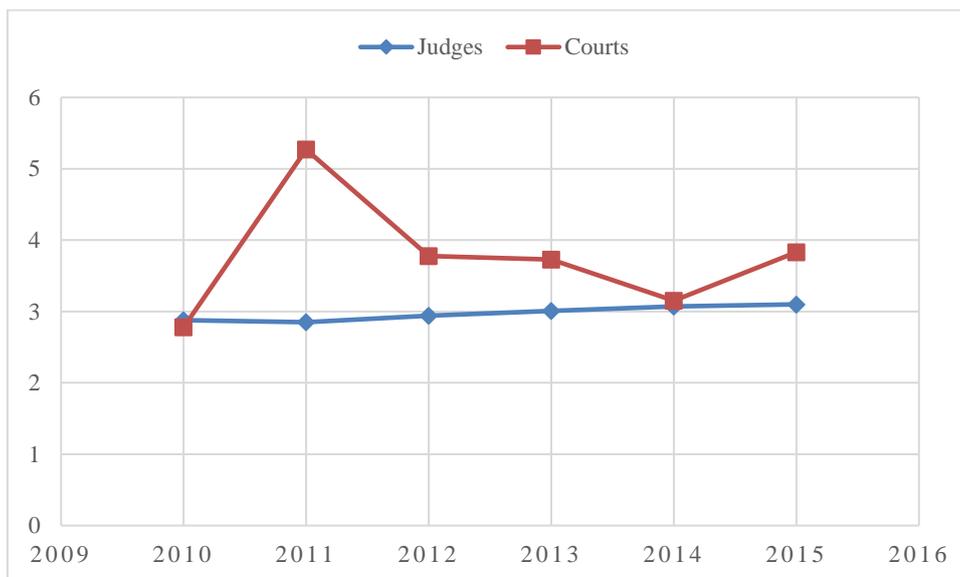
There appears to be no post-employment restrictions in most states.

Figure 4.2. Justice Institutional Capacity in Mexico

A. Rate of agencies and staff of public prosecutor's offices



B. Rate of local courts and judges

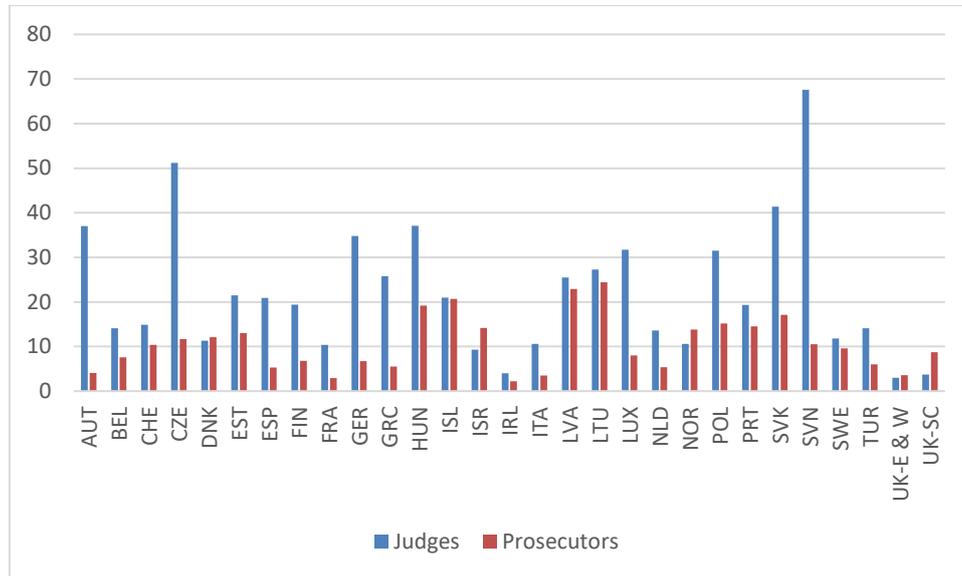


Note: per 100,000 inhabitants.

Source: Adapted from INEGI (2016c).

The distribution of judges between the various levels of courts is not only proportional to the volume of litigation handled, but also to the composition of the courts of each level of jurisdiction (Figure 4.3).

Figure 4.3. Number of professional judges and public prosecutors per 100 000 inhabitants in 2016 in OECD-CoE countries)



Note: As shown by the figure, significant disparities exist in the number of judges, including between countries that are similar in terms of size and income level. This is partly due to the differences in resources allocated to justice and in the scope of the judges' missions. Indeed, from one State to another, professional judges deal with a very variable volume of proceedings, as non-professional judges may be responsible for litigations in certain countries (Belgium, Czech Republic, Denmark, Estonia, Germany Sweden etc.).

Source: CEPEJ (2018).

4.1.5. Material resources

The budget for the judiciary (*Poder Judicial*) is adopted by the Parliament and appears to have increased more than 150 % between 2007 and 2017. Adequate compensation is critical to enable judges to better withstand undue pressure and tackle judicial corruption¹⁴¹. While overall judges are perceived to be well-paid (with the compensation established by the Superior Court)¹⁴², differences are marked between the remuneration of the judges of the Federation and those of the states¹⁴³. The retirement pensions for judges represents 100% during the two first years after retirement and 80% from then on. Further analysis if needed to assess the state of material resources in the justice sector in Mexican states. For information purpose Table 4.1 presents average gross salaries of judges in relation to GDP per capita in OECD-CoE countries.

¹⁴¹ Transparency International (2007)

¹⁴² Salary of judges in relation to GDP

¹⁴³ Arena Pública (2014)

Table 4.1. Average gross salaries of judges in absolute value in relation to GDP per capita in OECD-CoE countries (2016), in US Dollar

Country	Gross Salary of Judges	In relation to GDP per capita
Austria	59,756	51,637
Belgium	79,184	47,373
Estonia	47,438	30,895
Finland	71,300	43,738
France	51,594	41,942
Germany	54,589	49,921
Greece	36,467	27,274
Hungary	19,453	26,852
Latvia	22,729	25,843
Lithuania	27,107	30,300
Luxembourg	96,170	104,702
Netherlands	85,100	51,352
Portugal	41,054	31,042
Slovenia	37,522	33,241
Spain	55,377	36,742
Sweden	81,724	49,084
Turkey	27,718	26,677

Note: “Comparing and analysing salary is a perilous exercise as there are large differences regarding wealth and living standards in the various countries. Different indicators such as GDP per capita, the amount of the global public expenditure (national and regional) and monetary exchange rate between the Euro and other currencies have an important influence on what salaries represent in terms of quality of life of the inhabitants of each state. In this respect, the specific context of each country can be taken into account by keeping in mind the differences in the GDP per capita. This indicator ensures a certain degree of comparability with the standards of living of each country, by highlighting significant disparities between the standards of living of countries.”
Source: CEPEJ (2018) and OECD.Stat (GDP per head US\$ current prices, current PPPs): <http://dotstat.oecd.org/index.aspx?queryid=60706>.

In 2016, Mexico’s *Índice de Accesibilidad a la Información Judicial en Internet*¹⁴⁴ (iAcc) reached 35,50 % and went from being classified in the “*Alto*” (“High”) category of countries to the “*Bajo*” (“Low”) category in terms of electronic accessibility to information related to justice, along with Nicaragua and Bolivia. In comparison, the United States, Canada and Peru are in the “*Medio*” (“Medium”) category, and Chile as well as Guatemala are ranked “*Muy Alto*” (“Very High”), in terms of accessibility to information on internet¹⁴⁵.

Despite this low iAcc, over the past twenty years, Mexico has been actively implementing ICTs to bring efficiency to judicial proceedings. The Mexican Supreme Court has, for instance, benefited from the development of ICT with the implementation of an extensive electronic system called @lex that diffuses, since 2009 and on a monthly basis, statistical information on backlogs, workload, delays or even the number of cases by type of legal action¹⁴⁶. The *Tribunal Federal de Justicia Administrativa* (Mexican Federal

¹⁴⁴ “Index on the accessibility of information related to justice on internet” in English

¹⁴⁵ CEJA (Centro de Estudios de Justicia de las Américas)-JSCA (Justice Studies Center in the Americas) (2017) *Índice de Accesibilidad a la Información Judicial en Internet* (icc). The iAcc measures the level of digital institutionalisation and accessibility regarding information on: the procedure, institutional and judicial management, statistics pertaining to the functioning of the court, the material and human resources, the budget, the officials working in the court, the regime to access the court, the tenderer and competitions (public bid, arrangement of creditors (insolvency, bankruptcy)).

¹⁴⁶ Portal de Estadística Judicial “@lex”, Suprema Corte de Justicia de la Nación, Mexico

Administrative Court) also went through a process of digitalisation with the creation of the electronic trial (*Juicio en Línea*) since August 2011, and of the Online Justice System (e-justice). The Online Justice System was put in place to improve administration of federal justice in Mexico through an online based platform, which allows all parties to access, review and interact with the Court regarding a given administrative proceeding.

It has to be stressed that electronic notification of proceedings is one of the most important ways of making justice accessible to users through computerised means. In 2016, an electronic system was set up within the Mexican Federal Administrative Court, allowing the use of email addresses to notify any act during a given proceeding, in line with the Federal Law of Administrative Procedure which allows for the existence of electronic notifications. Similarly, local judiciaries such as the State of Mexico¹⁴⁷ or Mexico City¹⁴⁸ have an electronic notification system in place.

Over half of the OECD-CoE countries¹⁴⁹ in 2014 used IT to notify summons for hearings and pre-hearing appointments electronically (11 for all branches of law and ten others for individual branches). Eight of these countries (Denmark, Hungary, Italy, Poland, Portugal, Slovenia, Switzerland and the UK (Scotland)) have introduced electronic notifications of summons in civil and commercial matters fully or are on the point of doing so. Regarding criminal cases, Denmark, Italy, Switzerland and UK-Scotland have equipped their courts or are in the process of doing so, while Hungary and Portugal have also introduced this option fully for administrative cases¹⁵⁰. Moreover, this increase use of IT, commonly known as e-justice, is integral to inclusivity (Box 4.4).

Like in the national Mexican courts, there has been an increasingly active use of ICT in local justice. This resulted “in significant improvements to the business and investment environment”. An illustration of successful use of ICT in the State of Nuevo Leon, which ranks very high in the enforcement of contracts¹⁵¹, is the “Virtual Tribunals” thanks to which 90% of all files are authorized online. Not only does the Virtual Tribunal reduce cost, time and security implications associated with transfers to the court, by providing video-conferencing services, but it has also been found to diminish the chances for corruption and accelerating proceedings¹⁵². Efforts to computerise the justice system have also been made in federal courts with the implementation of a dedicated system to carry out a writ of amparo procedure through electronic means.

Box 4.4. e-Justice for Inclusivity

¹⁴⁷ The Sistema de Notificación Electrónica (SINOE) allows parties to carry out a proceeding before court through electronic means.

¹⁴⁸ The Sistema Integral para Consulta de Resoluciones (SICOR) is the first step of Mexico City towards the implementation of an ODR system, and it currently serves exclusively for civil procedures.

¹⁴⁹ Austria, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland and Turkey

¹⁵⁰ CEPEJ Studies No 24, “European Judicial Systems Efficiency and Quality of Justice”, Thematic Report: Use of information in European Courts.

¹⁵¹ United Nations and the Rule of Law (2016), “E-Justice: enhancing transparency, effectiveness and access to justice”, Mr. Juan Pablo Raigosa (member of the Judicial Council of the State of Nuevo Leon in Mexico) [panel discussion in New-York on June 1 2016: https://www.un.org/ruleoflaw/blog/2016/06/e-justice-sharing-national-experiences-in-enhancing-transparency-effectiveness-and-access-to-justice/](https://www.un.org/ruleoflaw/blog/2016/06/e-justice-sharing-national-experiences-in-enhancing-transparency-effectiveness-and-access-to-justice/)

¹⁵² Ibid.

Information and Communications Technology (ICT) is increasingly seen as a key enabler for meeting legal needs and providing citizen-centred services by enhancing access to information, facilitating provision of legal and justice services and enabling integrated access to services in the justice sector. ICT is often being used to automate current processes and make them more efficient and accessible to citizens and businesses including building legal capabilities, create new pathways to justice e.g. online dispute resolution (ODR), smart phones, mobile software applications and mobile computing, and provide direct access to justice services. Today there are many examples of web-based sources designed to further inclusivity goals: legal information and referral websites, online video instruction, interactive information services, and social media.

E--courts in Korea

According to Doing Business, it takes approximately 230 days, 33 procedures and costs 10% of the claim to solve a standard contract enforcement dispute in Seoul. Korea is thus ranked at the top of the list in Doing Business's ease of enforcing contracts. E-filing speeds up contract enforcement proceedings (). Information Technology Centre for Korean Courts This centre is the Korean Supreme Court's IT support centre for the Judiciary. It provides technological and professional support to the courts and the registration offices nationwide. Among other activities, the Centre provides an e-litigation system: the Electronic Case Filing System (ECFS). This system allows litigants and their attorneys to file and manage cases, and allows access to court information and procedures electronically.

As part of the Asia Pacific Economic Cooperation forum, Korea has significantly helped countries as Indonesia, Peru, the Philippines and Thailand improve contract enforcement through the use of judicial reforms, by reviewing relevant systems and procedures based on its own experience.

Sources: OECD (2015c); World Bank (2014).

4.1.6. General ADR policy

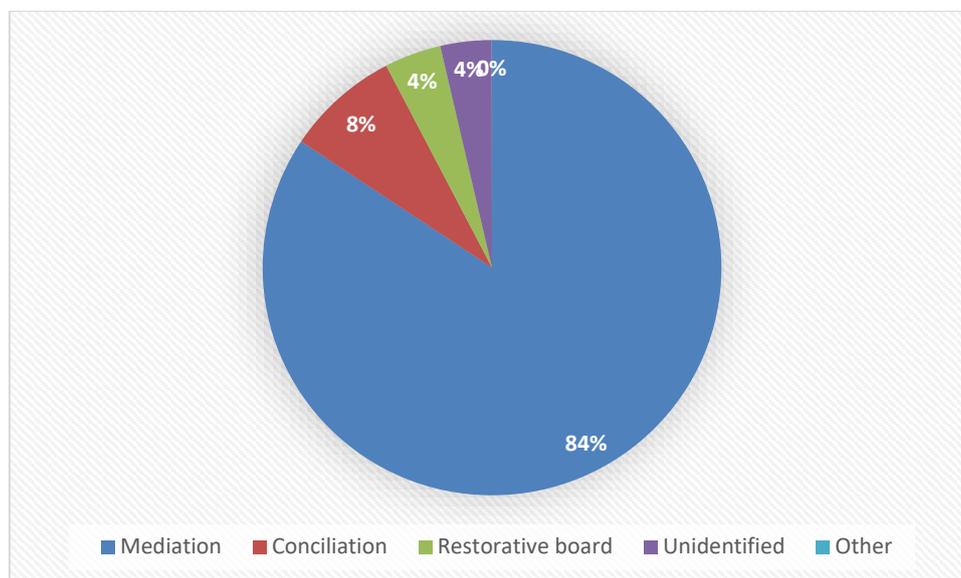
There are diverging different approaches in the way ADR operates between civil and common law countries. It is important to note that common law and civil law countries have a different approach to the need for a legal framework for ADR mechanisms to operate. Since some of the principles governing the ADR process (confidentiality, and the enforceability of settlement contracts) are well established in general law in common law countries, a legislative framework has generally not been considered necessary for mediation to operate. In civil law countries, however, it is in principle necessary to pass a law to allow for the enforcement of settlements reached in ADR processes¹⁵³.

Overall there is a growing trend to establish ADR mechanisms in Mexico, especially with their incorporation at the federal level. Most States created their own alternative justice centre (e.g. in Ciudad de México, created within the Superior Court of Justice of the Federal District) or mediation and conciliation centres. These centres generally include mediation and conciliation services but some others also offer negotiation or restorative proceeding. Some States such as Guanajuato created several centres in different communities. The majority of centres at the State level provide services in civil, commercial, family and

¹⁵³ Frank Carr with Pete Swanson and Bob Randolph, "The Challenge of Establishing a Commercial Mediation Program in Croatia" <http://www.conflict-resolution.org/sitebody/acrobat/Croatia.pdf>

criminal matters¹⁵⁴. Mediation was the most requested ADR mechanism in 2015 (considering all legal areas) (Figure 4.4) .

Figure 4.4. Requests for ADR mechanisms (in percentage) in Mexico, 2015



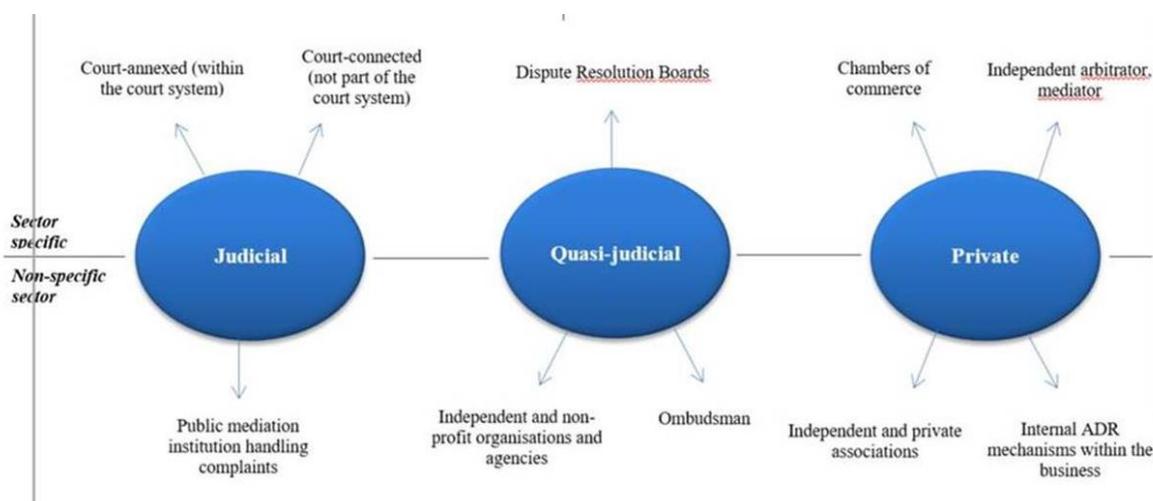
Source: INEGI (2016c).

INEGI reports that among all cases treated through an ADR pathway in 2015, only 11.7% of all cases were commercial disputes (16,110 cases), while 39.5% of cases were family matters and 30% civil cases. According to the CIDE report, the application and use of ADR mechanisms in Mexico are still limited and faces numerous obstacles in their implementation. The development of training programs for mediators and conciliators was highly recommended, along with the expansion and improvement of alternative justice centres' operation¹⁵⁵. Indeed, the experience in OECD countries shows that legal and justice services, including the ADR mechanisms, can build empowerment through strategies that increase legal awareness, legal literacy, legal capability and trust and confidence in the justice system. Additionally, there are many access points to ADR (Figure 4.5).

¹⁵⁴ Marquez Algara, G. and De Villa Cortés, J.C. (2013)

¹⁵⁵ CIDE (2015)

Figure 4.5. Access points for ADR initiative in 3 sectors



Source: Author.

Making legal information easily accessible is key¹⁵⁶. At the same time, as noted, care is needed in putting in place strong safeguards to ensure that the reliance on ADR mechanisms does not lead to abuse of power and that there are sufficient guarantees for equal treatment under the law. Hence accessible courts and the rule of law play an essential role in ensuring that the due interests of all implicated stakeholders are protected. Within this framework ADR reforms would be considered as part of the wider reforms of the justice sector that aim at strengthening the rule of law and access to justice.

According to the World Bank's Economy Profiles, as part of the Doing Business Report Series, Mexico scores 2.5 out of 3 on the ADR index¹⁵⁷, which measures the availability of ADR mechanisms to businesses. This score is similar to the OECD average score and slightly higher than the LAC average of 2.4. Amongst others, Germany, Hungary, Poland and Brazil have a greater availability to ADR mechanisms than Mexico, hitting the maximum score of 3. The reason why Mexico was not assigned the maximum score is the absence of financial incentives for parties to attempt mediation or conciliation (i.e., if

¹⁵⁶ OECD (2017f)

¹⁵⁷ The alternative dispute resolution index has six components:

Whether domestic commercial arbitration is governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all its aspects. A score of 0.5 is assigned if yes; 0 if no.

Whether commercial disputes of all kinds—aside from those dealing with public order, public policy, bankruptcy, consumer rights, employment issues or intellectual property—can be submitted to arbitration. A score of 0.5 is assigned if yes; 0 if no.

Whether valid arbitration clauses or agreements are enforced by local courts in more than 50% of cases. A score of 0.5 is assigned if yes; 0 if no.

Whether voluntary mediation, conciliation or both are a recognized way of resolving commercial disputes. A score of 0.5 is assigned if yes; 0 if no.

Whether voluntary mediation, conciliation or both are governed by a consolidated law or consolidated chapter or section of the applicable code of civil procedure encompassing substantially all their aspects. A score of 0.5 is assigned if yes; 0 if no.

Whether there are any financial incentives for parties to attempt mediation or conciliation (for example, if mediation or conciliation is successful, a refund of court filing fees, an income tax credit or the like). A score of 0.5 is assigned if yes; 0 if no.

mediation or conciliation is successful, a refund of court ling fees, income tax credits or the like)¹⁵⁸.

In Mexico legal assistance is provided through different channels for both civil and criminal cases: legal advice, legal representation and legal aid (before courts). Legal aid can also take the form of lawyers providing with general assistance in navigating the justice system and in dealing with legal documents¹⁵⁹. Other institutions, such as CONDUSEF and ombudsperson (through the National Commission for Human Rights) also provide legal support and assistance (see next sections). Furthermore, both local and federal laws require judges to supplement claims whenever they deem complaints to be deficient, such principle applies only to agrarian law (federal courts), and labour law (both federal and local courts depending on the question at issue).

Like a majority of OECD countries, Mexico's justice system offers legal services with a particular focus on vulnerable populations' needs, including low-income groups and indigenous populations. In this framework, pro bono services are offered nation-wide through different non-governmental stakeholders. On the one hand, specialised associations (e.g. *Centro Mexicano Pro Bono*¹⁶⁰) and universities provide legal advice and counselling to civil society organisations and people that lack the resources to access regular legal service. On the other hand, law firms, notaries and *corredores* (commercial notary and appraiser), seem to be increasingly offering pro bono services, even though some are raising their voices to make pro bono services mandatory for every lawyer and ensure efficient coordination between all lawyers and organisations working in this perspective¹⁶¹.

Based on the Amparo Act (*Ley de Amparo*) of 2016, the Federal Judiciary currently provides an online portal allowing all concerned stakeholders to access their judicial or administrative dispute cases. This was implemented in order to enhance legal information accessibility in the framework of the oral hearing reform in criminal and commercial areas. Moreover, the portal offers the possibility to directly file demand or pleading online¹⁶².

The Public Defence Office (*Asesoría Jurídica Federal*) is the main Federal Authority that provides legal guidance, advice, counselling and representation in both criminal and non-criminal cases at the federal level to citizens that lack the necessary financial resources to access a lawyer. If not competent, the Office provides orientation to another institution that provides legal assistance services¹⁶³. Additionally, each Federal State provides services and programmes through their Public Defence Institute for most vulnerable parts of the population, such as legal counselling in family disputes¹⁶⁴, which are the most recurrent cases in local courts in 2015 (with 34.3% of general cases, compared to 24.8% for civil cases, 18.5% commercial cases and 19.2% criminal cases)¹⁶⁵. In 2015, 31% of the population had received legal assistance when seeking to resolve a conflict with someone who refused to fulfil a contract or pay a debt during the last 3 years¹⁶⁶. Yet, only 46% of

¹⁵⁸ WB (2018), "Economy Profile: Mexico", *Doing Business Report Series*,

¹⁵⁹ UN (2016)

¹⁶⁰ Centro Mexicano Pro Bono website

¹⁶¹ Gasca, L. (2015), *Los 3 pendientes en el trabajo pro bono de abogados en México*, Forbes Mexico

¹⁶² Portal Judicial de la Federación, Poder Judicial, Mexico

¹⁶³ Instituto Federal de Defensoria Publica, Consejo de la Judicatura Federal, Mexico

¹⁶⁴ Sistema para el desarrollo integral de la familia, Ciudad de Mexico, Mexico

¹⁶⁵ INEGI (2016c)

¹⁶⁶ WJP (2015)

the population seemed to trust public attorneys in 2016. Comparatively, 53% declared trusting judges¹⁶⁷.

Although recent measures were taken by the Federal State to raise awareness about legal aid availability and how to access the relevant services, there is still a significant lack of public data (e.g. no data available on the number of cases filed in court with state-funded legal aid). In addition, according to independent national experts, the general population is ‘somewhat knowledgeable’ about legal aid services¹⁶⁸. Cost of accessing justice was also noted as an issue.

Indeed, based on the CIDE report on the *Justicia Cotidiana* initiative, a majority of people facing legal issues tends not to take any action or to find alternative solutions, which leaves the litigation option as a last resort. This tendency seems to have several grounds. The conviction that the justice system will not resolve their issues would stem from a lack of sufficient information. In addition, the unawareness of their rights is deemed to be another important obstacle for people to accessing justice in Mexico¹⁶⁹. Dedicated legal services to businesses are being developed in OECD countries, it aims to address the specific information gap and encourage business activity (Box 4.5).

Box 4.5. Small Business Legal Assistance Program in the United States

The “Small business Legal Assistance Program” is a nonprofit program, created as part of the District of Columbia Bar pro Bono Center, to support entrepreneurs establishing small businesses in economically disadvantaged neighborhoods. By doing so, this initiative aims at fostering economic development in D.C. by creating employment opportunities for residents and by building the owner’s sustainable wealth.

The Small Business Legal Assistance Program provides the following services:

Small Business Brief Advice Legal Clinics. These walk-in clinics are meant to provide legal information to current and prospective entrepreneurs who operate in low-income areas or who have limited financial resources. The clinics gives them the opportunity to speak with volunteer attorneys, that help review legal documents and answer questions about starting a business, taxation, real estate leases, employment law, and other legal issues common to small business owners.

Small Business Trainings. The Program conducts in-person and webinar trainings in conjunction with small business counseling centers, government agencies and law firms in order to educate small businesses on important legal issues. Topics include employment law, government contracts, commercial leases and other legal issues.

Small Business Legal Resources. Finally, the Small Business Legal Assistance Program offers free guides, alerts on law changes, a trainings archive and other useful legal information on an online resource center on the D.C. bar website.

Source: D.C. bar website: <https://www.dcbbar.org/for-the-public/help-for-small-businesses/>

¹⁶⁷ INEGI (2016b)

¹⁶⁸ UN (2016)

¹⁶⁹ CIDE (2015)

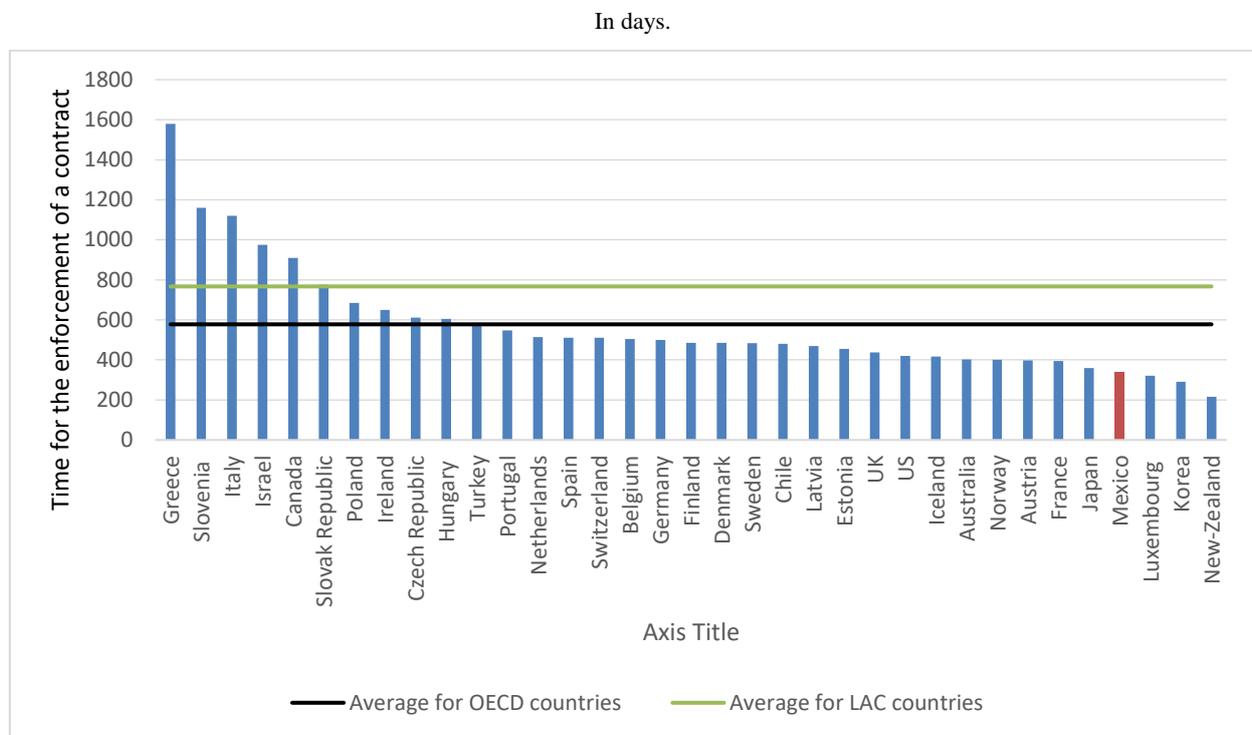
4.2. Justice and legal system performance on executive commercial titles and mortgage contracts

According to the INEGI Survey when private companies having a dispute on contract enforcement do not settle out of court, only 12.1% of them (if we exclude micro-enterprises, for which the coefficients are not statistically significant) decide to start in-court proceedings. Some of the cited challenges may be highlighted below.

4.2.1. Length of proceedings

The length of proceedings is a recurrent issue according stakeholders and subject to competing studies. The World Bank's 2016 Doing Business report on Mexico found that resolving a commercial dispute takes on average 275 days at the national level (Figure 4.6).

Figure 4.6. Time for the enforcements of contracts in OECD countries



Source: WB (2017), "Enforcing contracts", Doing Business : <http://www.doingbusiness.org/Methodology/Enforcing-Contracts>.

Although the length of proceedings is short overall (on average 538 days in OECD countries and 768 in Latin-American countries), there are large disparities across Mexican states (e.g. 191 days in Estado de México and 453 days in Baja California Sur). INEGI (2016a) found that among companies (excluding micro-enterprises) that experienced going to court in 2016, only a minority said that proceedings were fast and easy¹⁷⁰.

The 2017 ITAM study on enforcement of Commercial Contracts and Mortgages in the Federal States of Mexico shows similar findings on disparities. National average on trial

¹⁷⁰ INEGI (2016a)

length (on a scale from 0 to 5) ranks at 3.24 points with 17 States out of 32 achieving a position above this mark. From this perspective, while Guerrero reaches 3.73 points and places at the top of Mexican States, Baja California Sur (BCS) remains at the bottom with 2.30 points. ITAM study also highlights asymmetries amongst the speed of commercial proceedings where the national average is well appreciated with 4.15 points. Yet, whereas that San Luis Potosí (SLP) in first place reaches 4.54 points, BCS places again at the end with only 3.35 points. Something similar happens in regards to mortgages procedural speed where the national average is ranked at 4.14 points. However, whilst SLP ranks as the fastest with 4.47 points, BCS remains as the lowest with 3.44¹⁷¹.

According to empirical evidence, the lack of trust of the financial sector in the judicial system has led to credit crunches and consequently jeopardised the economic development of Mexico¹⁷².

Slowness of contract enforcement proceedings may indeed be attributed to: a) debtors' default or resistance to pay, b) the complexity of the procedure, and c) possible predisposition of judges in favour of the debtors. One consequence of this situation is that many procedures can be abandoned from their onset (i.e. the seizure phase) by the plaintiff (i.e. the creditor), because the insolvency of the debtor and the creditor's incapability to find debtor's assets to be attached are likely to make it unworthy to follow suit. Lodging the contract enforcement suit in court is however required in order to preclude the statute of limitations, even if the plaintiff knows it is going to be inconsequential. Creditors that go beyond the seizure phase are also likely to abandon the procedure during trial and very few actually reach the auction sale phase of seized assets, which can take long time to be executed. On the other side, debtors are likely to not appear in court assisted by legal counsellors due to financial constraints. The resistance of self-represented debtors would thus be minimal, since they would rarely invoke legal intricacies aimed at dragging on the proceedings and delaying the debt payment.

4.2.2. Procedural complexity

Empirical evidence highlighted the procedural complexity due to numerous injunctions (including various *amparos*) and appeals, leading to an excessively entangled judicial proceeding. Generally, *amparo* proceedings allow contesting a judgement separately, potentially dragging the process for years and thus making it more difficult to enforce the judicial decision. Moreover, a party can file an appeal at various stages of the cases. Therefore, alternative ways to litigation are in general chosen by people and companies doing business in Mexico, including for instance arbitration provisions into their contracts or facilitating negotiation provisions.

4.2.3. High costs

The costs (26.2% of the value of the claim at the national level, compared to 21.1% in OECD countries) also vary from one state to another (from 19.7% in Aguascalientes to 34.8% in Oaxaca)¹⁷³. Although court fees are forbidden by the Mexican Constitution, which states that "every person has the right to be administered justice by courts [...] free of

¹⁷¹ Instituto Tecnológico Autónomo de México & Gaxiola Calvo, S.C. (2017). Estudio de Administración de Justicia Loca: Ejecución de Contratos Mercantiles e Hipotecas en las Entidades Federativas. Octava edición. P. 35-36.

¹⁷² Magaloni Kerpel, A.L. (2007)

¹⁷³ World Bank (2016)

charge”, litigation proceedings may include some costs (e.g. attorney fees, translator fees, expert witness fees and day-to-day administrative expenses).

Attorney fees appear to be the main component of these costs (on average 19.7% of the total amount of the debts at the national level). Again, there is heterogeneity from one state to another and these fees range from 14.3% of the total amount (in Zacatecas, Aguascalientes and Colima) to 26.5% (in Oaxaca) (Annex B). In Morelos, where attorney fees cost on average 23.7% of the total amount, an agreement was made in 2014 between the judicial power and the bar association of that state to reduce these costs, but no significant improvement has been observed to this date.

Indeed, the federal law is silent on this matter. Lawyers and their clients are free to agree on the terms of payment, which are regulated by local laws that only apply in the absence of agreement. This situation is likely to be problematic in commercial proceedings, since statutory legal fees are different under every local statute and most of them are outdated (lower than average attorney fees for similar tasks). Exceptions to this legal vacuum only apply in three cases, for which statutory legal fees are mandatory irrespective of parties’ agreement: 1) class actions, 2) when a court orders the unsuccessful party to pay for successful party’s costs and 3) if the case was brought in bad faith or in a notoriously frivolous manner.

Although there is no single methodological approach to measuring the whole costs of access to justice (e.g. not only court and lawyer fees, but also opportunity cost) borne by citizens, the costs of accessing legal and justice services are also linked to different legal and justice needs and hence respective paths to justice. Importantly, in some countries, the cost of legal services and length of proceedings seem to be increasing, although there is no unified trend in this area. Studies also show that among individuals who decide not to seek legal assistance, between 42% and 90% cite (perceived or actual) cost as the reason for not doing so (although there might be differences between actual and perceived costs)¹⁷⁴.

4.2.4. Impartiality, integrity and transparency

Transparency and access to public information in Mexico have progressed over the past two decades either through constitutional amendments or modifications to federal legislation. With the 2007 reforms to article 6 of the Federal Constitution establishing mandatory transparency principles for any type of agency or ministry of the federal, state and municipal governments; the 2014 reform to the same article further enhanced obligations for the public sector by specifically mentioning that all information in custody of “any authority, entity or organ of the executive, Legislative and Judicial Powers, autonomous organisms, political parties, public funds or any person or group, such as unions, entitled with public funds or that can exercise authority at the federal, state or municipal level is public”.

The publicity principle of court proceedings is enshrined in the Federal Constitution, although in practice only the contentious parties may have access to the court dockets and

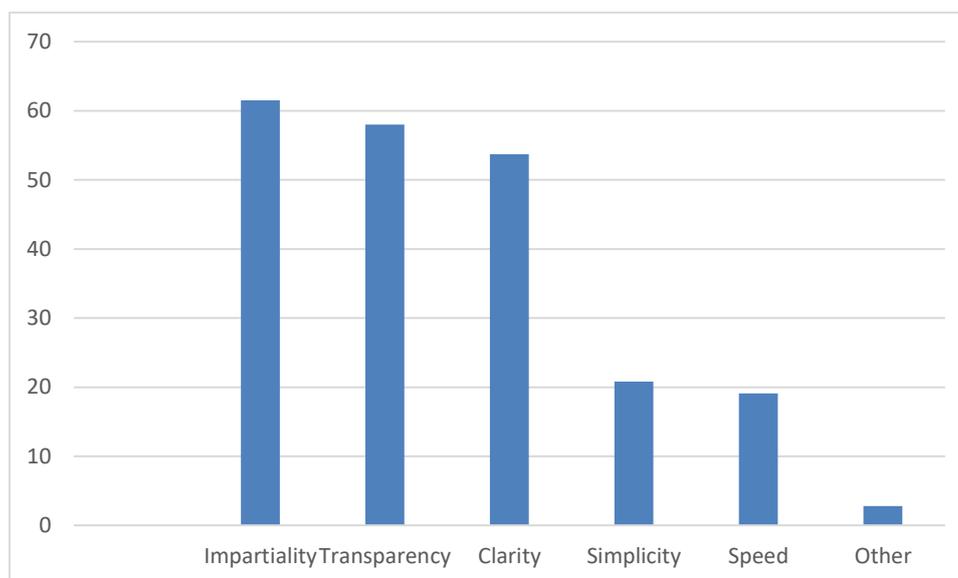
¹⁷⁴ OECD (2015a)

orders. Despite that federal court decisions can be accessed through an administrative procedure, such access may be hindered at the level of local courts¹⁷⁵.

The traditional division of powers in Mexico results in the judiciary having its own mechanisms to police impartiality and ensure its personnel acts honestly. Under such scenario, both the federal and state Judicial Councils have established boards within their structures acting as disciplinary boards, and entitled with powers not only to sanction minor offences, but also to lodge criminal complaints before either federal or local authorities. Such prerogative is exercised in accordance with law applicable to federal or state public servants, that is, the judiciary does not have special law regimes different to those applicable to the executive branches of the government.

Although a larger share of companies seem to rely on the impartiality and transparency of judicial authorities than on the ease or celerity of proceedings, these levels are still relatively low (respectively 61.5% and 58%) (Figure 4.7).

Figure 4.7. Characteristics of the processes according to companies, 2016



Source: INEGI (2016a).

Mexico took steps to introduce impartiality, integrity and transparency in its justice system, in particular in the Mexican Supreme Court. For example, this Court publishes on its website all the information pertaining to budget execution (budget allocations, increases and reductions, the portion of the budget that was executed) over the last five years in accordance with section 7 of the *“Ley Federal de Transparencia y Acceso a la Información*

¹⁷⁵ Article 6.A.I of the Mexican Constitution guarantees the right of information to any data or information in power of any authority of either level of government, with such obligation also applying to federal and state judicial powers, and restrictions being valid only to temporarily restrict data on the grounds of national security and public interest. Although the same article establishes that maximum disclosure prevails when interpreting this right, in practice in local judiciaries access to judicial cases may be limited e.g. by invoking the constitutional protection of information regarding private life and personal data (article 6.A.II), local criteria limiting transparency or bureaucratic obstacles for third parties.

Pública Gubernamental” (Transparency and Access to Government Public Information Law). This law also requires the publication of the jurisprudence rendered by the Court’s various chambers, published on the website (www.scjn.gob.mx/PortalSCJN) as well as in the Judicial Weekly Gazette (*Semanario Judicial*). Another measure taken in 2006 by the Judicial Branch to ensure transparency, was the broadcastings on the Judicial Channel to disseminate the daily workings of the various agencies that make up the Judiciary¹⁷⁶. Finally, in 2008, Mexico’s Supreme Court conducted a series of public hearings in the framework of a case that examined the constitutionality of abortion. The hearings and the sessions of the Court were recorded and are available on internet, allowing for an adequate monitoring of the proceedings by citizens¹⁷⁷.

Related to the principles of transparency, integrity and impartially is the concept of “Open justice” as part of the Open State approach (Box 4.6). In its broadest sense, this principle refers to “the extension of the philosophy and principles of open government applied to the field of justice and therefore adapted to the characteristic contextual framework of justice, using innovation and the benefits of information and communication technologies (ICTs) as everyday tools”¹⁷⁸. Well-established in some OECD countries, the principle of open justice highlights the need for greater transparency, accessibility and trust. Under this concept, the modernisation of justice necessitates the implementation of the principles of open government in everyday functions of the justice service providers (e.g. judiciary). This can be done by putting in place accountability mechanisms, establishing permanent channels of communication with citizens and using open data tools to achieve a more open justice, aligned to citizen’s justice needs and pathways. In a more concrete way, the principle of open judiciary implies “that judicial proceedings should be open to the public, including contents and information from court records and public hearings”¹⁷⁹.

To overcome the gap between citizens and justice practitioners, open judiciary has become the answer to bring citizens closer to the judicial system. Openness in the judicial system can only be achieved through a better use of ICTs and resources that guarantee a more efficient administration of justice based on more open procedures. Some countries have already begun integrating the principles of open government in the daily activities of the judiciary¹⁸⁰.

Box 4.6. Concept of “Open State” as defined by the OECD

¹⁷⁶ The Judicial Channel has diverse programming, including the live broadcast of the plenum of the Supreme Court Justices, some sessions of the Electoral Tribunal and relevant hearings that are held by various lower courts

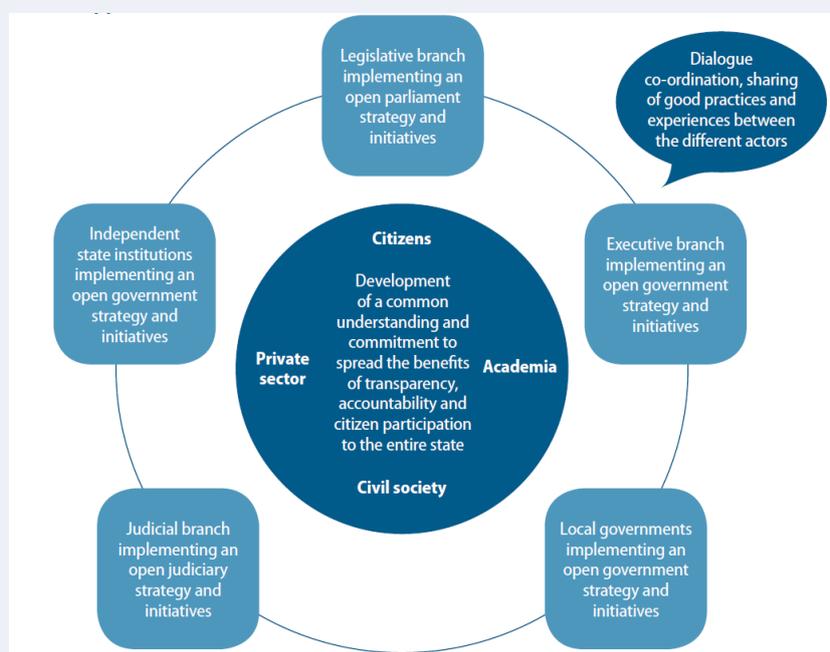
¹⁷⁷ World Bank Institute and Asociación por los Derechos Civiles (ADC) (2010), “Access to Information and Transparency in the Judiciary: a guide to good practices from Latin America”, Access to information program, Governance Working Paper Series

¹⁷⁸ Jiménez, C. (2014), “Justicia abierta: transparencia y proximidad de la justicia dentro del actual contexto de Open Government”, Centro de Estudios Jurídicos y Formación Especializada del Departamento de Justicia. Generalidad de Cataluña, Barcelona : http://justicia.gencat.cat/web/.content/home/ambits/formacio_recerca_i_docum/receca/cataleg_d_investigacions/per_ordre_cronologic/2015/justicia_oberta_2015/justicia_oberta_recerca_jimenez_spa.pdf.

¹⁷⁹ Gob247 (2016), “Filosofía y principios del Open Gov. La Justicia: Open Judiciary”, *Manual de Gobierno Abierto Para América Latina y el Caribe*, www.gob247.org/?p=518.

¹⁸⁰ OECD (2016), “Open government: the global context and the way forward”

The creation of an open state is an aspiration. In this notion, while implementing independent policies to foster transparency, participation and accountability, the three branches of power, local governments and independent state institutions each join forces with citizens, academia, the private sector and the entire society and develop a common understanding and commitment to more openness. In some countries, the move towards an open state may also include a cohesive and co-ordinated approach amongst all actors in order to spread the benefits of the open government principles. This approach may take the form of co-ordination meetings (for instance in a National Open State Committee) and of dialogue or sharing of good practices and experiences. An open state may also reflect the co-creation and implementation of a comprehensive and integrated open government strategy to promote open government principles across the entire country. Eventually, the concept of an open state should reflect the prevailing cultural difference in the state structures and ensuring sufficient room for countries to determine their own approach towards its implementation. While, it is clear that the different branches of the state are and should be independent from each other, the open state is about converting transparency, participation and accountability into the guiding principles of the entire country, making them part for the culture of citizens and all public servants. The representatives of the three branches of the state as well as other key stakeholders could jointly sign some kind of public declaration committing the entire country to move towards an open state, thereby providing the necessary high-level impetus and a long-term strategic vision for the entire country. While such a declaration does not have to include concrete commitments, it would build the basis for an approach in which all actors share forces (respecting the limits provided by the separation of powers) and move in the same direction. The declaration might be based on the constitution or even included in it to give it high-level legal importance.

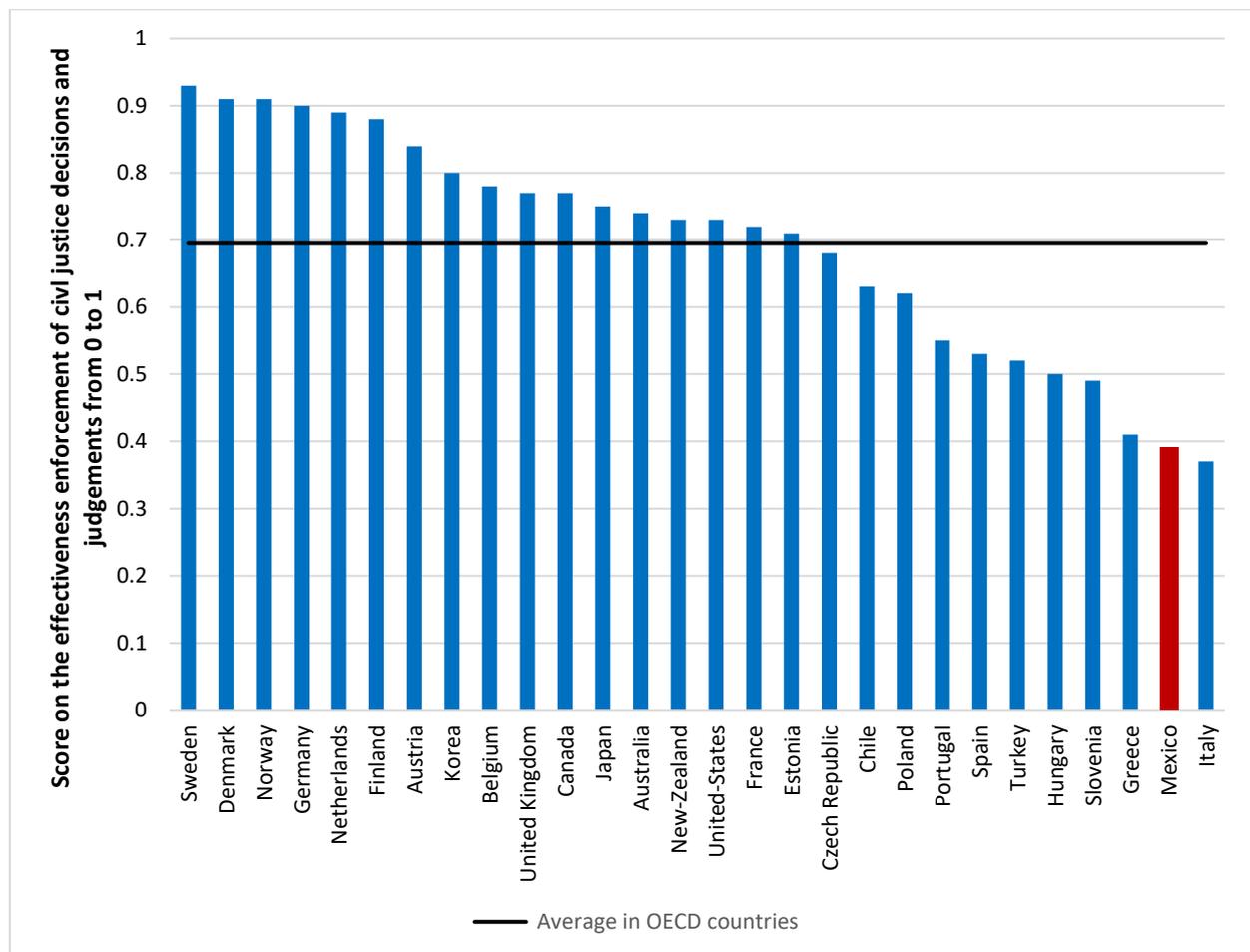


Source: OECD (2016)

4.2.5. Enforcement of judicial rulings

According to the WJP (2017-2018), the rate of enforcement of civil court decisions is below regional indicators and is effective at 39%¹⁸¹ (Figure 4.8). In Mexico court decision are deemed difficult to enforce notwithstanding the solvency of the defeated party¹⁸². Arbitral awards and mediation agreements would also need to be recognised in court. In some states, court decisions have no executory force: successful parties would need to petition the court to enforce its decision. Stakeholders also reports that they may take time to start the proceedings.

Figure 4.8. Effectiveness of enforcement of civil justice decisions and judgements in certain OECD countries



Source: WJP (2017-2018), Rule of Law Index.

¹⁸¹ LAC countries rate of enforcement of civil courts decisions: Brazil: 40, Chile: 64, Columbia: 43, Costa-Rica: 42, El Salvador: 51, Guatemala: 22, Honduras: 51, Nicaragua: 35, Peru: 45, Venezuela: 25. Effective enforcement in other countries: France: 70, Germany: 89, Sweden: 91, UK: 76, US: 66 (WJP, 2017-2018).

¹⁸² When the unsuccessful party is solvent, the successful party may either attach or foreclose the assets. In case of insolvency, a bankruptcy procedure may be filed by the successful party to recover some assets from the other party

According to the ITAM study cited previously, the enforcement of judicial decisions in Mexico is assessed at 2.27 points with 17 States above the average. Sonora places at the top with 2.89 points and Hidalgo at the bottom with 1.60 points. In a similar vein, ITAM study also shows that judicial decisions could be affected with regard to the enforcement speed. For instance, the average speed of enforcement proceedings in Mexico ranks 2.21 points (out of 5) with only 15 States (less than the half) above the national average. This last dimension also shows the existing disparities amongst Mexican States where Guerrero ranks at the top with 3.07 points, but BCS performance remains at the bottom with 1.44¹⁸³.

In Estado de México, the Commission of Regulatory Improvement within the Courts was created and first piloted in commercial matters. Enforcement, the end of the justice process cycle, were further improved in some municipalities where the burden shifted from litigants, who had to petition the court to enforce the court decision, to the Notice system, whereby any decision is enforceable once the notice has been issued.

To this end, the Management System for Enforcement officers and Notifiers – SIGEN, was implemented in the Estado de Mexico in 2015. SIGEN allows to capture the necessary data to carry out the personal notifications and enforcement proceedings, generating a file and sending all relative information to a main centre with all necessary documents to carry out those judicial actions. The system allows to check that the information, records to be filled out and annexes, actually comply with the legal requirements for the enforcement, and if not being so, it allows to see the errors or omissions in order to be amended¹⁸⁴.

In this regard, lessons could be learned from other countries' experiences. With the support of the IMF and the EU, Portugal started implementing reforms in the area of civil and commercial claims enforcement in 2011. In contrast with a traditional legal approach, which tends to focus first on the inadequacies in the statutory framework to explain slow enforcement process, Portugal's approach has been to target inefficiencies in the framework's implementation and in the organisation and management of institutions and professions. The idea was thus to concentrate the efforts to correct bad incentives that underpinned the behaviour of key actors, such as the litigants, the institutions, and the enforcement agents, in order to increase the efficiency and effectiveness of claims enforcement and tackle court backlogs. Time incentives to reduce delays (for both parties and courts), administrative incentives to destitute debtors, specialisation of courts, resource allocation and performance accountability mechanisms, are some of the tools implemented by Portugal that proved efficient¹⁸⁵.

4.3. Recent reforms in commercial dispute resolution in Mexico

The social turmoil originated by the “peso crisis” and the political context of the *Barzón* movement subsequently triggered the reforms in the legal framework for the commercial debt recovery and also, even if to a lesser extent, for the mortgage-collateralised debts as the justice system needed to get abreast with a surge of commercial cases.¹⁸⁶ To improve

¹⁸³ Instituto Tecnológico Autónomo de México & Gaxiola Calvo, S.C. (2017). *Estudio de Administración de Justicia Loca: Ejecución de Contratos Mercantiles e Hipotecas en las Entidades Federativas*. Octava edición.

¹⁸⁴ Circular No. 28/2015. Poder Judicial del Estado de México. 29 June 2015. P. 10.

¹⁸⁵ Pompe, S. and Bergthaler, W. (2015)

¹⁸⁶ Caffentzis, G. (2013)

the effectiveness and efficiency of commercial dispute resolution, the Mexican justice system is going through deep transformations.

The implementation of “*oralidad mercantil en primera instancia*” (i.e. oral proceedings in commercial cases in the first instance) is notably expected to improve courts’ efficiency, as well as the disputes’ outcomes, including for contract enforcement cases¹⁸⁷. Under this procedural track the litigation could be completed during a single session, where all evidences are presented orally before a judge, and foster procedural transparency of proceedings¹⁸⁸. Orality was gradually introduced and entered into force throughout the states by January 2017, e.g. in Mexico City, the last phase occurred in January 2011.

According to some estimates, the *oralidad mercantil en primera instancia* reform has reduced the courts’ workload by 50% in some states (e.g. as reported by COFEMER in Mexico City and by judges in Baja California Sur). Yet they still consider their judicial workload high. According to the diagnosis of the Federal Commission for Regulatory Improvement (COFEMER) on contract enforcement in Mexico City, the implementation of oral proceedings already reduced the number of proceedings (from 38 to 21) and coincided with a drop in the length of proceedings (from 400 to 270 days), while costs remained stable (from 31% to 32% of the value of the demand)(Figure 4.9)¹⁸⁹.

At the same time, the implementation and performance of this new system also varies from state to state. As of 2016, in Campeche and Estado de México, where one and fifteen specialised courts are operating respectively, contract enforcement proceedings take on average 2.5 months for SMEs¹⁹⁰, while the same procedure takes 10 months in Tlaxcala, where courts concurrently hear both civil and commercial cases¹⁹¹. Some states such as Baja California Sur experience slow claim service of process; although the performance variation between states appears to mainly lie in court infrastructure and case management (best practices include advanced IT systems to support case management by both judges and litigants).

¹⁸⁷ OECD (2017b)

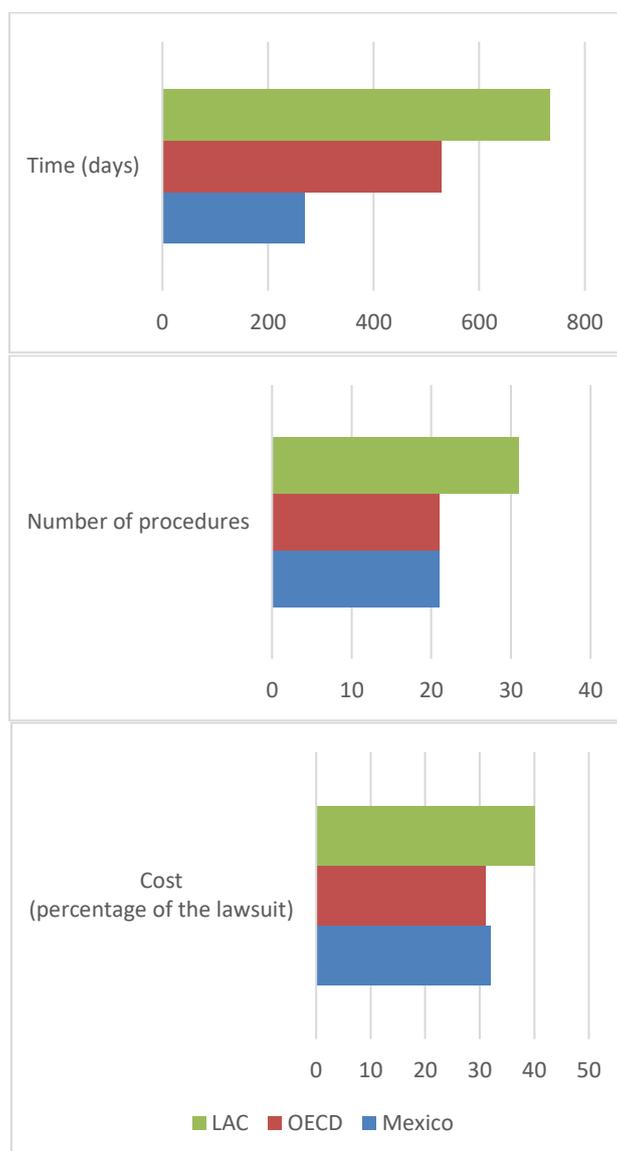
¹⁸⁸ CIDE (2015)

¹⁸⁹ COFEMER (2014), Diagnostico de Cumplimiento de Contratos, Distrito Federal, report

¹⁹⁰ Note: Doing Business studies regulations from the perspective of small and medium-size firms

¹⁹¹ World Bank (2016)

Figure 4.9. Costs, time and number of procedures in Mexico, LAC and OECD countries



Source: COFEMER (2014).

A number of OECD countries are improving their legislation, with respect to the enforcement of guarantees and collaterals, winding-up proceedings, and the creation of specialised tribunals, so as to foster more expedient commercial dispute resolution (Box 4.7).

Box 4.7. Specialised approaches for commercial dispute resolutions

Parties to disputes are interested in fast, low-cost and high-quality resolution of the conflict, so it is important to provide them with other methods as an alternative to the commercial court. International practice suggests several alternatives such as specialised courts to resolve corporate disputes.

Delaware Court of Chancery

All corporate disputes of Delaware-registered companies are referred to the Delaware Court of Chancery. The indisputable benefit of this Court is the speed of hearing the cases - even the most complex case can be resolved within 7-10 days from the moment it is filed (Jacobs, 2006), and the judge, at his or her discretion, can put on the exigent list an urgent matter that requires immediate attention. This speed of case consideration is provided by narrowing the court's jurisdiction -the Delaware Court of Chancery does not consider criminal cases, family disputes, general civil disputes, etc.- as well as by having a single judge review all cases, without forming a jury (exceptions to this rule are extremely rare).

Commercial Court of the Netherlands

The Commercial Court of the Netherlands is a division of the Amsterdam Court of Appeal, which specialises in corporate and commercial disputes arising between companies registered in the Netherlands. Within its jurisdiction fall disputes challenging the decisions of a company's management, financial reporting, liability of management, etc. As with the Delaware Court of Chancery, the Commercial Court of the Netherlands is able to speedily make decisions on interim measures and promptly review the disputes submitted to it for consideration. A distinctive feature of the Commercial Court of the Netherlands is its ability to conduct "investigation of the company activities". If a shareholder or group of shareholders holding more than 10% of the company or a large holder of its bonds doubts the correctness of management decisions taken by the company, they can ask the court to conduct an "investigation" of its activities. In cases where the Commercial Court of the Netherlands sees such a need, it can engage auditors who will have full access to all the documents of the company and must check its activities. A progress report is provided to the court which, should any breaches be ascertained, holds the company's management liable for improper management .

Specialised commercial case process

In France, the partially specialised commercial courts system had significant impact in this field. On one hand, the French Competition Authority ("Autorité de la Concurrence") is the only administrative authority entitled to penalise anti-competitive practices by imposing monetary sanctions. On the other hand, eight specialised commercial courts are competent to declare the anti-competitiveness of commercial practices and order their cessation by nullifying contract clauses and awarding compensation. Victims of anti-competitive practices can thus engage actions either in a complementary manner with both judicial authorities or only with a commercial court in order to obtain compensation. The appeals against these authorities are handled by a specialised chamber within the Court of Appeal of Paris, which is competent for public and private antitrust enforcement actions. This concentration of cases in one single chamber has enhanced a more effective ruling in this area due to a better understand of economic issues by its judges. Finally, the French Court of Cassation can hear cases about the decisions issued by the Court of Appeal, based on whether the law has been correctly applied.

Similarly, Mexico is taking steps to improve its legislation and ease contract enforcement, notably by creating small claims courts that can hear both civil and commercial cases through oral proceedings. Some states emphasise specialisation to commercial or property matters or ADR e.g. Alternative justice centres (Box 4.8).

Box 4.8. Addressing legal certainty and judicial quality in Estado de México

In Estado de México, where, according to the Tribunal Superior de Justicia (TSJ) the judiciary addresses almost 25% of the overall caseload of the country – other 25% addressed by the TSJ of Mexico City – 15 specialised commercial courts were created in 5 municipalities (Toluca, Tlanepantla, Naucalpan, Ecatepec and Nezahualcóyotl). Specialised courts for usucaption proceedings are also established to enhance procedural quality and deal with issues related to property certificates or discrepancies between the cadastre (Instituto de Información e Investigación Geográfica, Estadística y Catastral del Estado de México – IGCEM) and the registry (Instituto de la Función Registral del Estado de México – IFREM), which are both managed at the state level. Simplified usucaption procedures are under consideration. Those specialised courts or processes aims at simplifying the proceedings and raise legal certainty. Adjudication decreased, also due to orality in commercial cases and settlements through conciliations and mediations. ICT Case management measures and ICT tools were further introduced for a better control of judicial timelines. The management system for commercial cases will be extended to other areas including mortgages and foreclosures. Emphasis is also given to raise the quality of justice services through continuous training on commercial matters for all judges across different jurisdictions and mediation training in commercial matters. The Commission of regulatory improvement within the courts was created and first piloted in commercial matters. Enforcement, the end of the justice process cycle, were further improved in some municipalities where the burden shifted from litigants, who had to petition the court to enforce the court decision, to the Notice system, whereby an decision is enforceable once the notice has been issued. According to the TSJ, the average length for commercial trial is 191 days, which represents a decrease of about 40% since the implementation of these initiatives.

Since the implementation of the reform and up to 2016, 24% of courts in Mexico heard commercial cases orally and 1% of courts were specialised in commercial orality¹⁹². In order to enable the effective implementation of the reforms on oral proceedings, essentially that of 25 January 2017, several initiatives have been launched. The National Training Programme for Judges regarding Oral Proceedings in Commercial matters (*Programa Nacional de Capacitación para Jueces del Proceso Oral Mercantil*) was initiated in 2017 by the Secretary of Economy, in coordination with the Comisión Federal de Mejora Regulatoria (COFEMER), the CIDE and the Comisión Nacional de Tribunales Superiores de Justicia de los Estados Unidos Mexicanos (CONATRIJ)¹⁹³, giving judges the trainings and tools to guarantee a better and more effective use of oral proceedings¹⁹³. Furthermore, to assist the courts of Mexico in ensuring that oral trials are efficient and compliant with the latest reform, the National Programme on Oral Proceedings (*Programa Nacional de*

¹⁹² “Acuerdo de Servicios Reembolsable – Estándares para la implementación de los Juicios Orales en Materia Mercantil”, XXXVII Conferencia Nacional de Mejora Regulatoria: [http://cofemer.gob.mx/Conf_Tabasco_2016/Panel_1/Jorge_Luis_Silva_Mendez/RAS_Tabasco\(PLANTILLA_TABASCO\).pdf](http://cofemer.gob.mx/Conf_Tabasco_2016/Panel_1/Jorge_Luis_Silva_Mendez/RAS_Tabasco(PLANTILLA_TABASCO).pdf)

¹⁹³ Comisión Federal de Mejora Regulatoria (2017), “Arranca Programa Nacional de Capacitación para Jueces en materia de Oralidad Mercantil”, Public release: <https://www.gob.mx/cofemer/prensa/arranca-programa-nacional-de-capacitacion-para-jueces-en-materia-de-oralidad-mercantil>

Juicios Orales) was created in coordination with CONATrib, CIDE, the World Bank and INEGI¹⁹⁴.

4.3.1. ADR mechanisms in commercial cases

As in many OECD countries, states in Mexico exploring ADR options, in commercial matters, to address these justice service need and also improve timeliness (Box 4.9).

Box 4.9. Mediation for commercial disputes in Germany

Mediation in Germany is regulated by law which provides that the mediator may be either chosen and appointed by the parties themselves or appointed by an institution. During the mediation process, it is common to follow a five steps procedure: (i) a mediation agreement is concluded in which the procedural outline for the mediation is set out, as well as issues such as confidentiality, timing, payment etc.; (ii) the parties present a brief history of the dispute from their point of view and the issues which, in their opinion, need to be resolved; (iii) the mediator starts to explore each party's "real interests". In contrast to mediations in other countries, the mediator does not usually shuttle between the parties. In fact it is common for all participants (mediator and parties) to be present for all the negotiations. In Germany, mediation for commercial disputes has proven to be highly effective as the settlement rate after mediation is approximately 80%.

Source: Linklaters (2013).

According to INEGI (2016a), the preferred resolution pathway for disputes concerning the enforcement of contracts between two private companies is to settle with the counterpart (83.1% of businesses surveyed) out of court and privately (Figure 4.10)¹⁹⁵.

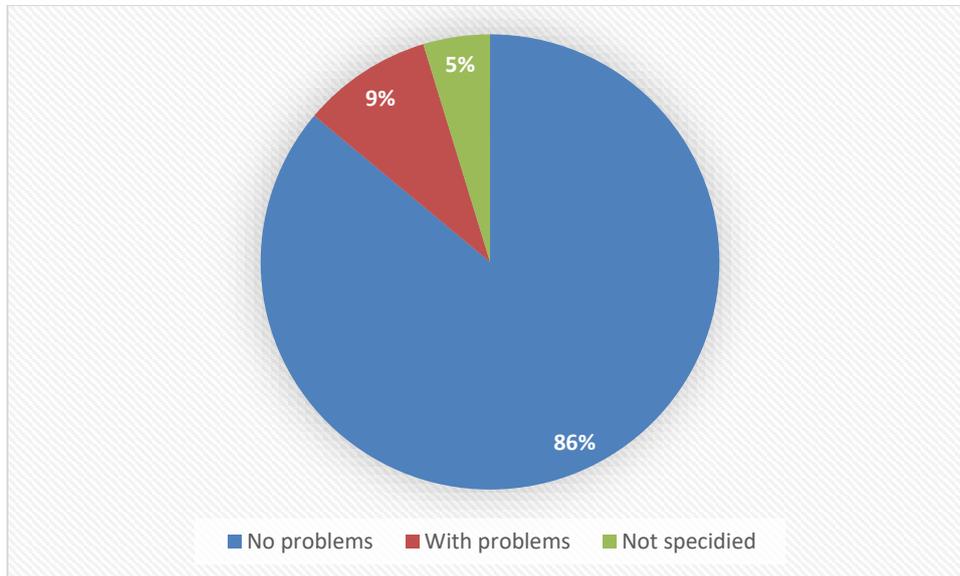
¹⁹⁴ "Justicia Cotidiana: Implementación de Juicios Orales Mercantiles", XXXVII Conferencia Nacional de Mejora Regulatoria

http://cofemer.gob.mx/Conf_Tabasco_2016/taller_viernes_25/JUICIOS_ORALES_37CNMR.pdf

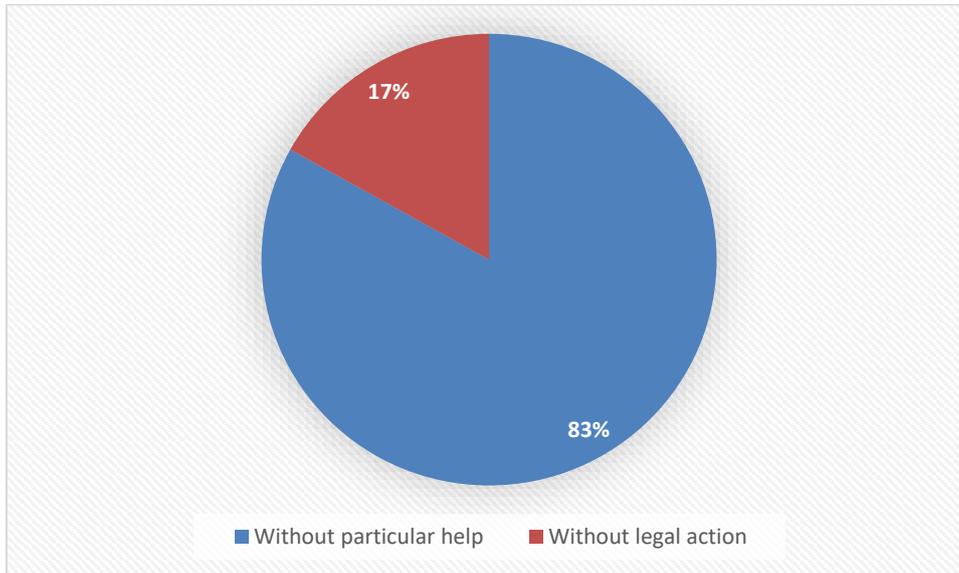
¹⁹⁵ INEGI (2016a)

Figure 4.10. Companies that faced problems and their experience, 2016

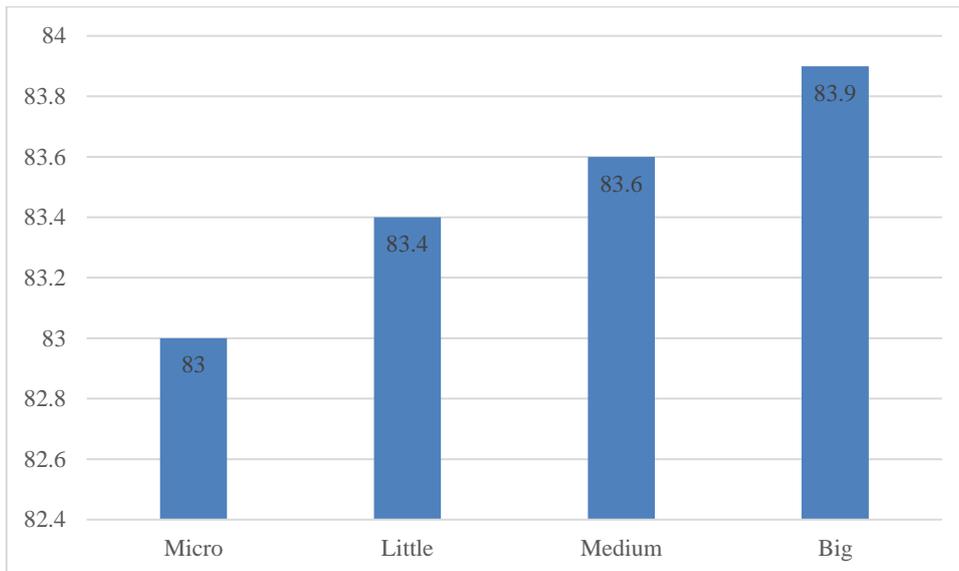
A. How did companies enforced their contract?



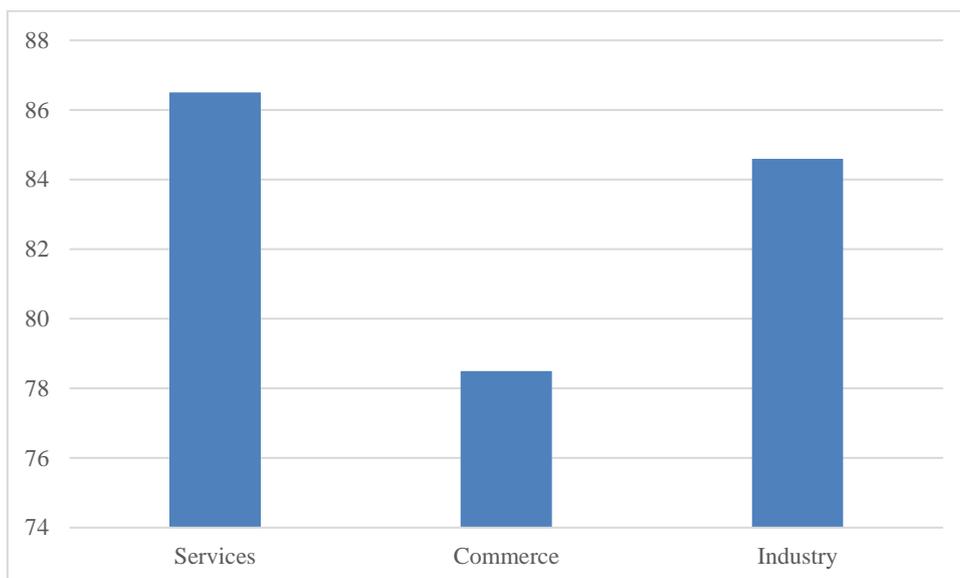
B. Companies that resolved problems directly with their counterparts



C. Companies that resolved problems directly with their counterparts – by size



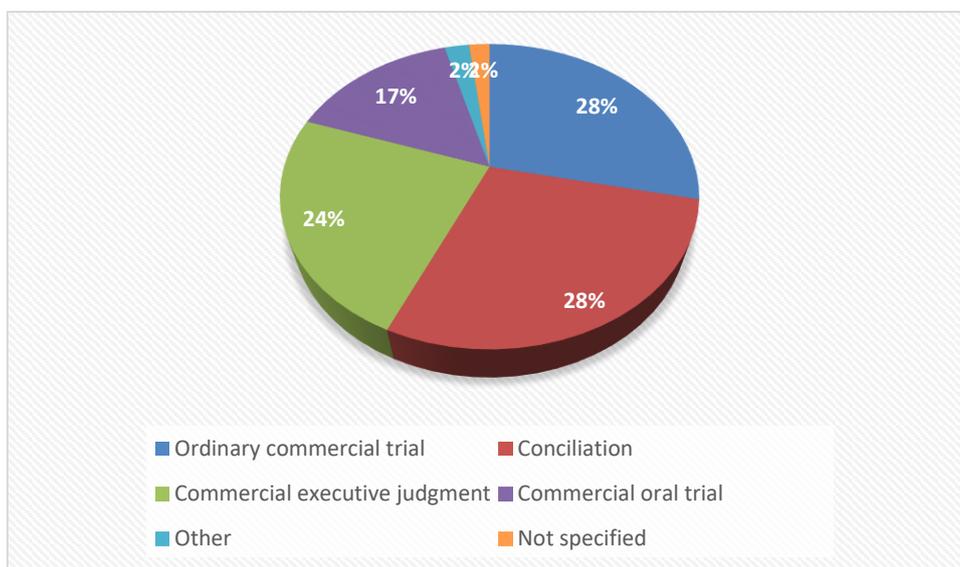
D. Companies that resolved problems directly with their counterparts – by sector



Source: INEGI (2016a)

Prior conciliation before the judge is being introduced. Among companies (excluding micro-enterprises) that went to court in 2016 for commercial dispute in Mexico, 15.5% experienced the oral proceedings pathway and 28.3% resolved it through conciliation (Figure 4.11). Lawyers consider that judges could be more active in seeking agreement through conciliation. Raising awareness and training would serve this purpose.

Figure 4.11. Business demand for justice processes, 2016



Source: INEGI (2016a).

Yet experience with ADR mechanisms diverge in Mexico. First in terms of procedural framework: for instance, in BSC, judicial conciliation is mandatory for all cases, including commercial law. In the Estado de México, a deadline to reach an agreement or to set a trial date is foreseen in order to nudge parties to enter such settlement prior to the court

proceedings. In other states, conciliation and arbitration are not mandatory for mortgage and commercial procedures. Second in terms of practice: Without incentives to undertake ADR proceedings, financial services providers favour courts proceedings. A user will also avoid going to court given the direct and indirect costs (time and money)¹⁹⁶, lack of information or the paper work - detrimental to self-representation. Conversely, those alternative processes may be used by both parties to prolong the dispute and proceedings. Mexico worked to strengthen its consumer protection in financial services over the years to respond to the crisis including by establishing ADR solutions.

In some OECD countries, like the United States and Australia, diversity and choice are offered to users of mediation thanks to the use of soft and hard law to develop a sector-specific¹⁹⁷ regulation and to the absence of a comprehensive national mediation regulatory approach¹⁹⁸. The case of Australia provides an illustration of a jurisdiction that features access to mediation in a variety of ways and essentially through: community justice initiatives (which relies on government support and local initiatives such as volunteer and free-lance mediators from shelters for refugees and women, from legal centres that are government sponsored etc.), formalized state court mediation schemes, private mediation schemes outsourced by the court (in this model the mediators are not judges but full-time court employees who are trained in interest-based mediation and specialize in mediating in the court, been private sector mediation), and private mediation provided by private sector organizations and free-lance mediators¹⁹⁹.

4.3.2. Mortgage execution

Recent evidence highlights the links between justice system's capacity to enforce mortgage contracts and economic growth (cf. Chapter 2). Public institutions that are not able to secure property rights not only create a strong disincentive to secure transactions in real property, but also have a negative effect on credit supply and investment incentives.

After their independence, many Latin American countries regulated the public property and cadastral system at the sub-national level. In Mexico, public property registries are generally under the purview of state governments, while cadastres may either operate under the responsibility of state or municipal governments. This situation has resulted in a complex system which has heterogeneous performances across the country²⁰⁰. Indeed, securing property rights proved to be particularly challenging in municipalities that suffer from weak institutions and influence of illegal actors.

To address the situation, Mexico's federal government has taken a number of steps to try to prioritise public investment and guarantee property rights by launching a Public Property Registry and Cadastre Modernisation Programme (*Programa de Modernización de Registros Públicos de la Propiedad y Catastros*). This programme aims at providing with technical and financial support to the states so they could meet the new standards as regards open data, management of registries and introduction of ICT tools (as defined by the *Modelo Integral del Registro Público de la Propiedad* and the *Modelo Óptimo de Catastro*), as well as measure their progress²⁰¹. While good practices and success stories

¹⁹⁶ G20/OECD (2013)

¹⁹⁷ Sector-specific regulation refers to laws dedicated to mediation in a specific industry, court, mediation program, area of law, or other defined context.

A national mediation approach refers to the General mediation laws that extend to all mediation or mediators in a given jurisdiction.

¹⁹⁹ The World Bank Group (2017), "Making Mediation Law", Mediation series, Working Paper

²⁰⁰ OECD (2012)

²⁰¹ OECD (2012)

have been observed in several states, major efforts remain to be done in others to improve the integration between Public Property Registers and Cadastres and to effectively guarantee property rights.

In Mexico, the main supplier of credits collateralised through mortgage is the INFONAVIT (*Instituto del Fondo Nacional de la Vivienda para los Trabajadores*), a public body (Box 4.10), although the banks are increasingly involved in lending activities. According to its own data, the INFONAVIT holds 73% of the mortgage marked in Mexico. Consequently it is the main user of the judicial system at the local or state level in terms of mortgage execution and evictions. The mortgage execution falls under the jurisdiction of local (state) courts, as it is legally considered to be a civil matter and cannot be heard by a judge under the commercial executive trial (JEM), but has to follow the civil mortgage execution procedure. There are currently plans to introduce oral proceedings in mortgage execution.

Box 4.10. Evolution of INFONAVIT

The National Workers' Housing Fund Institute (Instituto del Fondo Nacional de la Vivienda para los Trabajadores, INFONAVIT) is a housing provident fund. It was established in 1972, when amendments to the Constitution were adopted establishing a right to adequate housing (Article 5), and employers' obligation to contribute to a national housing fund enabling workers to purchase affordable housing (Article 123). Subsequently, the Labour Law was amended to set mandatory payments by employers at 5% of workers' wages.

INFONAVIT's current mission is twofold: provide housing finance and pensions to salaried, formal-sector workers who contribute a 5% payroll tax to an individual account managed by INFONAVIT. As it accounts for 70% of the Mexican mortgage market, INFONAVIT has become one of the most important actors in housing development in Mexico: one in four Mexicans lives in a house financed by the institute. INFONAVIT also manages the assets of approximately 18.1 million currently active affiliates and the accounts of 31.3 million workers who do not actively contribute, in general because they are not formally employed at the moment .

INFONAVIT's lending was further expanded from the early 2000s, due to a strong public commitment from the federal government to increase investment in housing (Malkin, 2001; CONAVI, 2005). Overall, although these years were characterised by a rapid expansion of housing lending, some weaknesses of the model were becoming evident: INFONAVIT-financed homes were not well suited to the needs of INFONAVIT affiliates, and abandoned housing started to raise attention (see Fuentes López and Campos, 2007; Herbert et al., 2012; INFONAVIT, 2013b).

The 2008 global financial crisis then relaunched a contraction of housing finance in Mexico, dragged by a significant drop in both housing demand and offer. Despite marked improvements since the peak of the crisis, the market has yet to recover. INFONAVIT has taken important steps to improve its lending activities in recent years and has shifted its focus towards a more sustainable housing model. The range of credit products available to affiliates has for instance been expanded beyond the acquisition of a new home. New products include financing to purchase a "used" (existing) home; build, expand or improve a home; or, most recently, to rent. In addition, there is a broader objective on developing

appropriate solutions throughout workers' life cycle – for both housing and retirement – and including efforts to improve returns.

Source: Adapted from OECD (2015a)

One of the defence mechanisms available to the debtor in front of a possible eviction in case of a mortgage execution is to use all possible procedural trickeries to delay the eviction. Delay tactics by the debtor may lead the debt recovery process by the mortgage creditor to a duration of five years or more. As a debtor's lawyer said in 2013: "the only thing I can do to defend my client is stretching the proceedings as much as I can so to buy time for my client to find another roof for his family, with the hope that some factual, substantive or formal mistake in the procedure may oblige the creditor to reinitiate the whole procedure again. If I manage that this happens, I can have more chances that the creditor is ready to negotiate an arrangement focused on the recovery of his capital and that he leaves aside the interest due as well as the expenses incurred"²⁰². This type of behaviour could be avoided by increasing the use of mediation and by developing "safety nets" for resourceless debtors under threat of eviction (e.g. "Preventing Homelessness in Peel Program" in Ontario, Canada²⁰³). Evidence from some OECD countries suggests that increased use of mediation and other ADRs in mortgage execution cases (including those established by banks) can help identify solutions to for struggling clients to keep their housing and for banks to avoid losses.

A number of stakeholders noted opacity in the execution of mortgages, which risks undermining integrity of deals. One source of opaqueness is that the bailiff word makes the fact (attestation) when it comes to notify the debtor that the creditor is initiating the mortgage execution procedure. According to some observers, there are cases whereby the debtor was not notified of the opening of the proceedings and the procedure was brought forward without his or her hearing and defence. At the same time, in some cases, such as in Estado de México, bailiffs have recently been professionalised through training and merit-based management and their staff enlarged, which is contributing to the improvement of the legal certainty and efficacy in the notification mechanisms.

There were also reports of opacity in the transmission (sale) of mortgage credits among financial entities or lenders without the debtor's awareness. This was reported in states such as Baja California Sur and Jalisco. This situation leads the debtor to negotiate, when s/he learns about it, with a third party which is likely to multiply the amount due by piling up default interests (*intereses moratorios*), additional back up credits (*créditos accesorios*) and other procedural expenses (*costas*).

Judges in Baja California Sur also corroborated that in many cases of mortgage execution, the debtor does not appear in court proceedings to defend him/herself, which may effectively lead to end the trial very quickly. As noted, costs of the proceedings may act as a disincentive when giving up the house may more cost efficient. This is compounded by the limited availability of legal assistance and legal aid, as well as low legal capability of borrowers. Importantly, according to a number of observers, the legal and financial literacy of the borrowers when it comes to signing mortgage contracts, as well as relaxed lending policy by banks (with limited assessment of client's solvability) were cited among the

²⁰² See Rebolledo, A., (2013)

²⁰³ Preventing Homelessness in Peel Program, Region of Peel, Ontario, Canada

issues contributing to a high mortgage debt default rate. It would be important to reflect these factors in the evaluation of the legal systems at the state level.

There are several mechanisms in Mexico, which aim to fill the gap in legal assistance to users of financial services. Thus, CONDUSEF (*Comisión Nacional para la Protección y Defensa de los Usuarios de Servicios Financieros*), the consumer protection body under the purview the Secretariat of Finance and Public Credit, has the mandate to protect and defend the interests of users of financial services in Mexico, including by addressing and solving their complaints or representing the users before administrative or judicial authorities. Advice and legal representation from CONDUSEF is free of charge under certain circumstances.

Besides a network of 36 offices distributed nationally, CONDUSEF entertains mobile and virtual offices as well as an Electronic Complaints Management System (ECMS) and an advisory call centre that provided technical advices to 58,2150 users in 2016. According to the Law for the Protection and Defence of Financial Services Users a Special unit to address users' queries and complaints is established in each financial institution. As of 2013, 130 financial institutions incorporated specialised units. In March 2016, those were 3,506²⁰⁴. Users can present their complaint directly to the Specialised Unit or CONDUSEF²⁰⁵. The Specialised Unit have to reply in writing to the complaint within 30 working days. Through the ECMS, CONDUSEF notifies the relevant specialised units in real time of any complaints received. This system helped decrease the time taken to resolve complaints from 53 to 20 days between 2005 and 2012. CONDUSEF publishes the number of complaints by financial service or product and by financial service institutions²⁰⁶ (Table 4.2).

Table 4.2. Number of complaints received and conciliation procedures handled by CONDUSEF, 2016

Type of financial institution	Number of complaints received	Number of conciliation procedures handled
Credit institutions	112,034	28,420
Financial institutions with multiple scopes	6,852	2,453

Source: CONDUSEF (2016).

Following the 2014 financial reform, CONDUSEF further upgraded its protection and defence measures; for instance, CONDUSEF revamped its arbitration mechanism. The Arbitration System in Financial Matters is a voluntary mechanism includes:

- The Public Offer Registry (*Registro de Ofertas Publicas*), whereby financial institutions register at least three financial products or services and consenting to arbitration with respect to these products or services, in the event of a dispute
- The Specialised Arbitration Committee, the collegiate body whose function is to approve the award or resolution proposed by CONDUSEF. It is constituted by officers

²⁰⁴ Data can be downloaded here: CONDUSEF, Directorio de Unidades Especializadas de Atención, Unidades Especializadas, ckan, Mexico

²⁰⁵ ABM further disseminates this information on its website.

²⁰⁶ G20/OECD Task Force (2013)

of the CONDUSEF and the Ministry of Finance and Public Credit, by independent arbitrators or both,

- The Registry of Independent Arbitrators. Under this system, should the conciliation be unsuccessful, the financial institution commits to undertake arbitration in the event of dispute related to a service or product included in Registry of Public Offer. It established the type of Specialised Arbitration Committee, in accordance with CONDUSEF guidelines. This mechanism is free of charge for the user save for the experts' fees. The award may be contested by an *amparo*. When an issue is not submitted to arbitration, the user may request a writing opinion from CONDUSEF. That can be used as evidence during judicial proceedings. CONDUSEF may represent users in class action against financial institutions. It can further order financial institutions to remove abusive provisions under adhesion contracts.

Recommendations and looking ahead

The performance of the justice sector has drawn considerable attention in the past twenty years from policy-makers and researchers, with a view of strengthening the rule of law and the institutional foundations of economic development. Increasingly and importantly there is a recognition that a well-functioning justice sector also depends on other elements and cannot be easily modified in isolation from other rule of law institutions.

In Mexico, the performance of the judiciary affects the economic environment on many levels, with a particular incidence on the credit market. With labour and administrative disputes, **contract execution and debt collection is indeed identified as a core issue of Mexican justice**, notably due to a combination of factor including the length of proceedings, procedure complexity and high cost of contract enforcement. In addition, structural fragilities such as the absence of formalised procedure for judicial performance appraisal and the insufficient guarantees for impartiality and independence of judges significantly contribute to undermine trust of businesses in Mexican justice institutions. These weaknesses in the functioning of judicial and non-judicial dispute resolution mechanisms seems to be a significant factor of business productivity inhibition, impacting medium and small enterprises more heavily than larger ones.

However many countries now consider that the **performance of the justice sector requires more than the efficient enforcement of contracts and property rights**: a high level of awareness of legal rights and obligations among citizens and businesses; effective and responsive legal support services; a strong control of corruption, whether in the public or in the private sector; and as a prerequisite, the assurance of security and protection by the law for all.

Given the complexity and heterogeneity of its justice system and building on the previous OECD recommendations (Annex A), Mexico would benefit from a deep and comprehensive reform of all mechanisms and institutions supporting the rule of law, including the justice sector, the alternative dispute resolution mechanisms, the prosecutorial services and the police. These reform efforts would bring the greatest benefits if placed within a larger policy geared towards strengthening democratic values and the role of the law in solving economic, social and political conflicts. In particular, a **comprehensive justice sector policy, which would encompass both horizontal actors and multi-level governance dimensions**, could help create a framework for various reform efforts and overcome resistance in their inception and implementation. Such a policy **could help align priorities across levels of government and provide a comprehensive framework** for legal reforms thus enhancing legal certainty and predictability.

In the absence of a comprehensive and coherent set of reforms addressing the quality, responsiveness, accessibility, efficiency and integrity of the justice system and broader rule of law, many citizens and businesses are likely to continue structuring their “personal and business affairs around informal... networks of familial or personal contacts, thereby precluding the formation of the arm’s length credit and transactional relationships that lie at the heart of dynamic markets”²⁰⁷. **Strengthening coordination and communication channels** vertically (across levels of government) and horizontally (between various

²⁰⁷ Kossick, R. (2004)

justice, legal and security stakeholders) could in this sense support governance and policy continuity and enable alignment in justice reforms and services between Federal State and the states. In this perspective, the creation of a separate federal public structure for justice in Mexico, aligning with outstanding international practice and with clearly delimited responsibilities, would be key.

Importantly, there appears a **scope to review justice and legal services provided at the state level** through the user-centric lens (e.g., through enhanced use of technology and e-services in courts), as well as to implement robust evaluation and monitoring frameworks to measure the quality of the full continuum of services (including various ADRs), also from the perspective of service users, and broader citizen and economic agents' perspective.

Reinforcing efforts to strengthen justice sector management and capacity also appears an important direction for modernisation efforts, as professional career for judges (especially subnational ones) seems to be missing. In particular, professionalisation of judicial and ADR management could involve steps to enhance merit-based appointment and performance frameworks, as well as mechanisms to ensure integrity, transparency and accountability of the justice system, strengthen judicial capacity to handle oral proceedings (along with the possible extension of the oral hearing system to all cases and all jurisdictions), as well as to balance the administrative and jurisdictional workload possibly by strengthening the presence of legal clerks and judicial assistants. A managerial structure unloading judges from administrative responsibilities and thus facilitating their efforts on case management can have strong impact on justice delivery. Data on judicial management should also be available and clear in order to build a solid systemic accountability framework. Judicial professionalism and independence not only for judges but for the whole spectrum of judicial stakeholders (including prosecutors, police, lawyers) are indispensable to promote trust in the judicial system.

In this perspective, **open justice** strategies and initiatives can be key to **prevent corrupt practices in the judiciary**, building on a clear open access to information tradition such as the Transparency and Access to Government Public Information Law (*Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental*) adopted in 2015. Taking further measures to open court proceedings and similar transparency measures would be determinant to prevent mismanagement of courts and would therefore reduce corruption risks. Legislation and managerial capabilities would thus need to be revised and tailored according to the development of new ICT-supported justice processes and judicial information systems such as online dispute resolution mechanisms (ODR), e-justice systems (based on the model developed for the Mexican Federal Administrative Court) or Virtual Tribunals (i.e. system in place in the State of Nuevo Leon). The recently adopted "Open Court Accreditation" for national and local electoral courts could also provide a baseline for broader application to commercial justice.

The introduction of **oral proceedings in commercial cases** could also become crucial in preventing corruption risks, particularly when it comes to contracts of high amounts. Efforts should thus be made in extending this new procedural system to all commercial cases, with a specific emphasis on the enforcement of large-amount contracts that tend to be more exposed to corrupt behaviour in the judiciary.

Furthermore, the **use of ADRs** in Mexico's justice system proved to have substantial incidence on reduction of dispute resolution costs and disposition times. Their application could thus be significantly reinforced and their implementation facilitated. Possible policy directions in this sense could include strengthening presence, training and capacitation for

ADR service providers, especially those provided by the state (mediation and arbitration mostly), as well as ensuring the presence of appropriate safeguards in using private ADR and other settlement mechanisms to guarantee equality under the law.

With regard to the **execution of commercial and mortgage contracts**, despite good practices and innovative models that were implemented in several states, further efforts are needed, notably regarding integration between Public Property Registers and Cadastres. Moreover, Mexican states could explore deepening specialisation for considering commercial and economic cases, either through enhanced judicial specialisation or through the creation of specialised courts and jurisdictions. Programmes to assist struggling clients and enhanced use of mediation in mortgage and commercial contract execution cases could prove to become an asset to individuals, businesses, communities and the banking industry affected by loans that are mediated. In addition, in some states, increasing transparency in the initiation of the mortgage execution procedure and the transmission of mortgage credits among financial entities or lenders (by ensuring mandatory notification of debtors) would be beneficial.

Lack of sufficient information and the unawareness of rights are deemed to be important obstacles for people to accessing justice in Mexico. As such, Mexico's legal system would benefit from **strengthening legal assistance services**, including those aiming to enhance legal capability of people (including disadvantaged groups) and economic agents (such as small and medium enterprises and those located in remote communities). Efforts to enhance the quality and professionalism of the legal profession and to strengthen legal capability and empowerment of citizens and various economic actors would help enabling access to justice and litigants' engagement in participatory governance and thus trust in the justice system. These efforts, which need to be applied to the entire national territory, can take many forms: creation of legal education and information programs, development of a single national information system on business-related processes and services, establishment of early assistance mechanisms (e.g. call centers, online platforms), regulation of legal services delivery through professional accountability system, reinforcement of conflict resolution-oriented training for justice stakeholders or creation of small claim commercial courts²⁰⁸.

Effective reform of the Mexican justice sector would need to **take in consideration legal needs of citizens and businesses** along with their right to fair, impartial and timely justice. These directions, along with the specific recommendations at the state level, could be further elaborated upon during the next phase of the ABM and OECD collaboration, as part of the subsequent rounds of the Study.

²⁰⁸ CIDE (2015)

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Annex A. 2013 – 2017 OECD Recommendations Making Growth more Inclusive in Mexico

Recommendations	Action taken
Extend oral trials to all civil and commercial cases (2017)	<i>On-going</i>
Boost training, resources and technology for the judiciary (2017)	<i>On-going</i>
Reform justice institutions, strengthen the rule of law, address security issues and reduce widespread corruption with reforms centred on the efficiency of judicial resolution of civil, commercial and criminal matters, and a strengthening of the transparency of public procurement (2015).	In addition to actions taken on judicial reform noted below, action was taken to strengthen the anti-corruption system, with the adoption of the <i>Sistema Nacional Anticorrupción</i> , strengthening institutions that investigate and prosecute cases of public corruption, including a new specialised court. However, some states have yet to fully ratify the new system. In states, local legislation will be modified to replicate the system at the sub-national level.
Complete the judicial reforms at the state level that move towards oral adversarial trials in criminal cases. Empower an executive agency to promote the analogous transition for civil cases (2013).	<p>Actions taken to accelerate the adoption of oral adversarial trials, and prepare states for their full implementation. A government agency (SETEC) has helped states implement the new system with grants, co-ordination and consultation; all states have now begun to implement the new justice system, although half of local districts have just begun. Extension of the judicial reforms to civil and commercial domains is beginning.</p> <p>Now 26 states use oral trials for larger commercial cases, while four states use them in civil cases. However, most civil and commercial cases are still handled using the unreformed justice system.</p>
Harmonise the criminal code and procedure across states. Strengthen the coordination, integration and training of police forces (2013).	Action taken to adopt the new unified National Code of Criminal Procedure, in all states and the federation in 2014, while further amendments to the Code were made in mid-2016. Efforts to strengthen co-ordination of police forces are ongoing.
Set up specialised economic courts with qualified judges to address economic regulation issues and support the effectiveness of the Competition Commission (2013).	Progress has been made in the set-up of specialised economic courts. In 2013, two new courts specialised on competition and telecommunications cases, as well as two tribunals in such matters, were

established. These are based in Mexico City but have nation-wide jurisdiction. The current judges were elected by the Federal Judiciary Council (FJC) based on their expertise on such matters.

Further efforts are currently underway, in a joint work with the Competition Regulator (COFECE), to train specialised judges in telecommunication and competition analysis.

Two District Courts and two Collegiate Circuit Courts have been created to handle Broadcasting and Telecommunications issues. In the first half of 2014, these District Courts have handled more than 30 trials directly related to anticompetitive conduct.

Annex B.

Table A B.1. Cost as a percentage of the value of demand

State	Attorney's fees	Cost of justice	Cost of execution	Cost as a percentage of the value of demand
Aguascalientes	14.3%	1.4%	3.9%	19.7%
Baja California	19.1%	1.3%	5.8%	26.1%
Baja California Sur	23.9%	2.6%	5.3%	31.8%
Campeche	18.1%	1.0%	2.7%	21.8%
Chiapas	19.1%	1.4%	2.7%	23.2%
Chihuahua	15.8%	1.7%	4.4%	21.8%
Mexico City	22.5%	5.0%	6.0%	33.5%
Coahuila	21.5%	1.7%	3.5%	26.6%
Colima 27	14.3%	2.4%	4.0%	20.7%
Durango	21.4%	2.5%	3.4%	27.4%
Estado De Mexico	19.1%	2.0%	3.0%	24.0%
Guanajuato	18.6%	3.1%	3.7%	25.4%
Guerrero	21.0%	3.3%	3.7%	28.1%
Hidalgo	20.0%	1.2%	1.7%	23.0%
Jalisco	15.8%	2.6%	7.1%	25.4%
Michoacan	15.3%	2.5%	2.3%	20.1%
Morelos	23.7%	23.7%	4.9%	33.9%
Nayarit	17.7%	2.6%	7.6%	27.9%
Nuevo Leon	20.4%	5.0%	5.0%	30.4%
Oaxaca	26.5%	4.2%	4.0%	34.8%
Puebla	21.0%	3.5%	4.3%	28.8%
Queretaro	20.0%	3.3%	3.5%	26.9%
Quintana Roo	20.5%	2.7%	3.7%	26.9%
San Luis Potosi	16.7%	3.3%	2.1%	22.2%
Sinaloa	15.3%	1.6%	3.8%	20.7%
Sonora	22.0%	3.8%	3.0%	28.8%
Tabasco	19.1%	2.9%	4.4%	26.4%
Tamaulipas	23.9%	1.7%	4.8%	30.1%
Tlaxcala	23.9%	2.0%	4.7%	30.5%
Veracruz	17.9%	3.4%	2.9%	24.2%
Yucatan	19.3%	2.4%	2.5%	24.2%
Zacatecas	14.3%	4.1%	3.2%	21.6%

Source: World Bank (2016)