

legal memo

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Mexico's Supreme Court recognizes the mercantile route for real estate lease claims

In its ruling on amparo direct review 172/2023, the First Chamber of the Supreme Court of Justice of Mexico determined that, based on the nature of the business, claims for performance or rescission of a real estate lease agreement can be made through commercial channels.

I. Context and background

On August 30, 2023, Mexico's First Chamber of the Supreme Court of Justice of the Nation ("SCJN") unanimously resolved a case stemming from a special eviction lawsuit. This lawsuit was filed by three individuals against a company, from which they sought several benefits, including the payment of overdue rents and the vacating and return of multiple properties, one being a hotel.

In response, the company challenged the admissibility of the action, asserting that the underlying contract was one of onerous usufruct and not a lease agreement.

The judge presiding over the initial trial deemed the eviction action admissible, a stance that was upheld on appeal. Unhappy with this outcome, the defendant company initiated a direct amparo action. At its core, they argued that the remedy hadn't been properly analyzed, contending that the lease agreement underpinning the action was commercial in nature, and therefore the dispute should be settled through commercial proceedings.

The Collegiate Court chose to deny the company's injunction. In their reasoning, they believed that real estate leasing does not constitute a commercial act as it isn't outlined in the stipulations of Article 75 of the Code of Commerce. Disagreeing with this verdict, the plaintiff pursued an appeal for review, which was subsequently taken up by the First Chamber of the SCJN.

II. Criteria adopted by the First Chamber of the SCJN

In its ruling on the direct amparo proceeding in review 172/2023, the First Chamber of the SCJN determined that, given the nature of the controversy, one can pursue the performance or rescission of a real estate lease agreement through commercial channels. This deviates from the stance taken in case law 1a./J. 63/98, which posited that commercial channels were unsuitable for real estate lease disputes.

The primary reasons the First Chamber of the SCJN adopted this view are as follows:

1. Disputes arising from acts of commerce must be resolved in commercial courts. Acts of commerce are defined as those acts which - regardless of the nature of the contracting



parties - are expressly mentioned in the Code of Commerce or those, even if not mentioned, are undertaken for the purpose of commercial speculation.

2. While the lease of real estate isn't directly recognized as an act of commerce in Article 75 of the Code of Commerce, it is essential that the judge determines whether such a contract can be analogously considered an act of commerce, as per Section XXV of Article 75 of the Code of Commerce.
3. Adhering to this interpretation ensures the right to effective judicial protection, permitting individuals to access the appropriate judicial channel to resolve disputes stemming from the real estate lease agreement in question.
4. Embracing this perspective also upholds the principles of equality and non-discrimination. Even if certain acts are not explicitly listed in the aforementioned Article 75 of the Code of Commerce, those that possess the necessary attributes to be classified as acts of commerce will be subjected to the same legal standards. This ensures no differential treatment that might contradict the aforementioned principles.

III. Considerations

Undoubtedly, the decision in amparo in review 172/2023 reaffirms what was established in jurisprudence 1a./J. 72/2012 (10a.), approved by the First Chamber of the SCJN in its session on June 20, 2012.

In that jurisprudence, the First Chamber of the SCJN concluded that it's appropriate to litigate in commercial proceedings when disputes arise from leases of real estate (commercial premises) located in public service civil airfields. From that point on, the First Chamber of the SCJN emphasized that the acts of commerce mentioned in Article 75 of the Code of Commerce aren't to be seen as an exhaustive or limiting list.

We agree with the criterion adopted by the First Chamber of the SCJN, positing that the judge must conduct an analysis to ascertain if, according to section XXV of Article 75 of the Code of Commerce, a real estate lease can be categorized as an act of commerce.

Consequently, given the decision of the First Chamber of the SCJN and in line with our commercial legislation, a judge, when faced with a dispute involving the termination or execution of a real estate lease, should proactively assess the commercial essence of the act. This is to determine whether the legal avenue chosen by the plaintiff is suitable. During this analysis by the authority, the following factors should be considered:

1. The procedure, being a procedural requirement and a matter of public order, must be studied prior to the decision on the merits; moreover, said requirement must be studied by the judge *ex officio* in order not to violate the guarantees of legality and legal certainty established in Article 14 of the Constitution.
2. The commercial nature of an act may be determined by the parties involved, i.e., by the intervention of merchants in its execution -*subjective criterion*-; or by the commercial nature of the act itself -*objective criterion*-.

3. As regards the subjective criterion, it is sufficient that one of the parties is considered a merchant by law for it to be considered an act of commerce, in terms of the provisions of Article 1050 of the Code of Commerce.
 - 3.1 Our commercial legislation considers as merchants, among others, the following persons: (i) persons who, having the legal capacity to engage in commerce, make it their ordinary occupation, (ii) companies incorporated under the commercial laws, (iii) foreign companies or their agencies and branches, which within the national territory engage in acts of commerce, (iv) supply and supply companies, (v) construction companies, and public and private works. (vi) manufacturing and manufacturing companies, (vii) companies engaged in the transportation of persons or goods, by land or water; (viii) tourism companies, (ix) bookstores, publishing and printing companies, (x) commission companies, agencies, commercial business offices, pawnshops, as well as public auction sales establishments, and (xi) public entertainment companies.
 - 3.2 Likewise, they are considered merchant by law, and therefore, they are subject to the mercantile laws, the persons that, although they are not merchants in law, accidentally, with or without fixed establishment, carry out some operation of commerce. In this sense, farmers and manufacturers, and in general all those who have a store or store in any town for the sale of the fruits of their farm, or of the products of their industry or work, without altering them when selling them, will be considered merchants as far as their stores or stores are concerned.
4. As regards the objective criterion, this is based on the acts qualified as mercantile, regardless of the quality of the parties performing them. Some of the acts that are considered by the law as mercantile are (i) all acquisitions, alienations and rentals verified for the purpose of commercial speculation, of maintenance, articles, furniture or merchandise, either in their natural state or after being worked or worked, (ii) purchases and sales of real estate, when made for the purpose of commercial speculation; (iii) purchases and sales of portions, shares and obligations of commercial companies; (iv) bank operations, and (v) operations contained in the General Law of Credit Instruments and Operations.
5. The list of acts of commerce established in Article 75 of the Code of Commerce is not an exhaustive or limiting catalog; therefore, any other act of a similar nature to those set forth in the Code of Commerce must be considered as an act of commerce, in terms of the provisions of Section XXV of the aforementioned Article 75 of the Code of Commerce.
6. If the law considers as an act of commerce (i) the alienations and rentals verified with the purpose of commercial speculation, of maintenance, articles, furniture or merchandise, and (ii) the purchases and sales of real estate when these are made with the said purpose of commercial speculation, it is possible to conclude that leases of real estate, considering their nature, purpose and intention, may be considered acts of commerce; from a systematic and teleological interpretation of the applicable legislation, it is possible to conclude that real estate lease agreements, due to their nature, purpose and intention of the parties, may be considered acts of commerce; and therefore, it is feasible to sue for the performance or rescission of such agreement through commercial channels.

In conclusion, the ruling in amparo direct review 172/2023 departs from the traditional viewpoint held by our judges. Previously, they believed that claims for the performance or rescission of a real estate lease contract needed to be pursued through civil proceedings. This earlier stance was



based on the contract's civil nature, overlooking its overarching purpose and the intentions of the parties when they entered into it.

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