

ADR IN NO-JUDGE LAND – AN INDUSTRY INSIGHT ON MEXICO

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I. THE CRISIS IN MEXICO

The United Mexican States (commonly known as Mexico) are living a constitutional, political and legal crisis. On the first day of October 2024, a new president was sworn into office. This new president's term started with several changes to the constitution (initiated by the former President). Probably the most important modification was a profound change to the legal framework of the judicial power. Even though analyzing the details of the said constitutional change are not the objective of this comment, it is worth mentioning that, pursuant to the new legislation, among others:

- (i) the judges (at federal, state and local level) will be elected by popular vote,
- (ii) the judicial power will not be able to review the constitutionality of laws approved by the senate (to declare them unconstitutional), and
- (iii) a new 'discipline committee' will review the performance of all judges henceforth.

A. Constitutional Crisis

This constitutional amendment generated a crisis, as we stated above, on several levels. It is a constitutional crisis as the fundamental system of checks and balances was severely damaged. The legislative power with, of course, the support of the executive power (i.e. the former and newly sworn in President) modified the entire structure of the judicial branch of the three-power government and, in a single blow, replaced all its members.¹ As per the new text of the Constitution, starting in 2025, the judges will be elected in public general elections. Concordantly, the running candidates for judges will be selected by the representatives of the 3 branches of government. Two of these branches (the executive and legislative) rest in the hands of the same political party that orchestrated this opera. It is unclear who will act in representation of the judicial power (to, among others, nominate candidates) as almost all supreme court justices (the head of the structure) have filled their resignation letters to the senate. Only 3 justices (which are favorable to the ruling party) have made public their intention to continue serving their term (which will, anyway, finish mid-2025 when the results of the popular elections are revealed).

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¹ Federal judges will be replaced in two moments. The first wave (almost 50% of the federal judges) in 2025 and the second wave in 2027. State and local judges will have to be replaced by state authorities pursuant to their own standards on or before 2027.

B. Political Crisis

As we stated before, these changes also generated a political crisis. The faculties of the legislative power to modify the constitution came at a price: the political balance. The members of the ruling political coalition (the political party in office and its allies) achieved what has been called a ‘supermajority’ through perseverance. The party in office started eroding the federal political institutions years ago. The former president and members of congress (all affiliated with the coalition) also sought to control the members of all institutions and, consequently, their rulings. The aforementioned political movement achieved said control step by step. When said control needed to be exercised, they did. Thus, even though the ruling coalition got just under 50% of the votes across the board in the last election, by way of a ‘clever’ interpretation by (no less) the controlled political institutions, the coalition was granted far more political representation in congress, totaling over 70% of the seats (in the senate and in the chamber of representatives). The coalition was still a few votes short as constitutional changes require 75% of the votes. So, to get the last few votes, the party in office allegedly coerced their opposition. Many members of the opposing parties suddenly changed their political orientation, others were visibly pressured and, some, simply bought. Whatever the case, the political system in Mexico became undone as the ruling party now has enough votes in the chambers to change the constitution as they see fit. They also have a militant in the presidency and control most of the state and local governments. So, political balance in Mexico is now only theoretical. Great success for the coalition, great failure for the Mexican political system.

C. Legal Crisis

Finally, a legal crisis. The rule of law has always been an issue in Mexico. In a corruption riddled country, ensuring that laws will apply is no small feat. However, the last months of 2024 have brought a swift answer to all preoccupations related to the enforcement of laws and, to an extent, judge rulings. The new federal executive (sworn in October 2024) and the new members of congress (sworn in September 2024) will only comply with court orders when they wish. For instance, back in October 2024, when the senate first voted the changes to the judicial power as they were contained in the constitution, many judges issued rulings (i) suspending the legislative procedures, (ii) limiting the faculties of certain institutions in connection with the modification process and (iii) ordering certain government officials and offices to cease their efforts to continue with the modifications. Both the newly incumbent federal president and the presiding senator publicly stated that they would not follow the ruling of the judges. More than 100 federal rulings were not followed. This was public... the most important news of the day... for weeks. The president and the presiding senator have not been prosecuted, have not faced any consequences whatsoever and no enforcement has

been sought by any entity. The rule of law in Mexico was incredibly damaged. The heads of both the executive and legislative power publicly recognized that they do not afford value to the decisions of the judiciary.

D. Results

What are the results of these crisis? For the time being, it is too early to tell. Most of the federal judges whose positions were selected for election have already submitted their resignation (a silent protest). The rest will continue to sit as judges but already know their time will come in the next few years. What incentive do judges and other court officials have now to do their job? They were all terminated arbitrarily. Furthermore, the judicial appointment and career system they grew up in and were used to has been destroyed and substituted for elections. Mexico, the only visionary country where all judges are elected publicly.

This situation has created a new appetite for alternative dispute resolution. It makes sense. Whatever the political orientation of each person or personal point of view one may have on the changes to the constitution, what is clear is that the judicial power will be in shambles for years. The learning curve alone will eat up most of the next six years.² There is no way to predict what changes the president may propose or what changes the senate will vote. This affects legal certainty and legal security. This is, certainty of what rules and statutes will be used by judges to rule over legal issues and trusting that rulings will be enforced. How will a newly appointed judge supported by all new court officials decide cases? Quick reference to background and qualifications. To participate in the election to be a judge, a recently admitted lawyer must present its university certificate and five letters of recommendation from neighbors. For practicing attorneys, good standing is the most important element. No experience requirements. So, how will these newly elected judges rule? With no experience and a substantial backlog, the feat seems complicated even for the most experienced of judges.

II. ADR IN THE JUNCTION

Many have turned to ADR. For alternative dispute resolution experts, the last few months have been inundated with unprecedented interest in ADR. Many Mexican and international institutions, firms, universities, bar associations, etc. are now scrambling to tend to the

² The judicial reform was an initiative first presented by the former president of Mexico at the end of its term. The incumbent president chose to continue supporting this initiative. Mexico's presidents are limited to one six-year term in office.

change in orientation of the legal market. Of course, those who only dealt with court litigation face serious issues and, unless they pivot, will lose their client's trust.

The issue that this commentary addresses now surfaces. What lessons can we learn from a jurisdiction where access to the judicial system has been greatly compromised? This commentary bases its results on the interests that stakeholders have expressed in the last few months.

A. Awareness

Even though Mexico is a member of the New York Convention, the standards of the UNCITRAL Model Law were adopted in 1993 and the jurisdiction is considered pro-arbitration, almost no stakeholder has a sufficiently well-defined idea of arbitration. The same can be said of mediation or any kind of alternative adjudication.

In general, the lower income sector of society simply is unaware of the practice. No reference at all. Attorneys that generally serve this sector find no incentive in said practices. The mid and high sectors of society act similarly to each other. They both believe ADR is a very selective procedure and that it works only for 'special' cases. And, in any case, it is very expensive: only multi-million-dollar cases are fit for arbitration. These opinions are shared by those in charge of risk assessment or executive decisions regarding the day-to-day disputes faced by companies. The surprising element in said chain is, once again, the consulting attorney. Most high-level decision makers have a close relationship with a firm or an attorney. Rarely do those attorneys recommend ADR practices over litigation.

B. Negotiation

Probably the most underrated practice in the field of ADR is sophisticated and learned negotiation. Generally, stakeholders (CEOs, General Counsels, litigation experts, etc.) consider that negotiation is something everyone does on a regular basis all the time. This is true. However, sophisticated negotiation takes serious study and practice. It is not naturally inserted in our psyche. Professionals generally discount this ability as a given. This is not correct. Sophisticated negotiation is almost an art form. This practice, if done correctly may save an incredible amount of resources in the context of handling a dispute. In any given case, having an expert intervention in a negotiation will, no doubt, produce satisfactory results. Even when no agreement is reached, an expert in negotiation will try to 'fix' the relationship between the disputing parties. As every step is a new opportunity to resolve the dispute, having a better relationship will prove to be beneficial. Without a doubt, there are cases where parties simply refuse to agree and will fight every single step of the way but that

is not the rule, that is the exception. Generally, negotiations help ‘untwist’ issues and set the ground for future agreements. This may be known by litigators, but it is rarely applied. In other words, why consult with a litigator if you mean to agree to put an end to a dispute. This is similar to consulting with a bulldozer when intending to refit a wall.

C. Enforceability.

Stakeholders hold close to no interest in procedures or processes attorneys employ for dispute resolution. Court trial and arbitration procedure sound almost the same to the client who must pay an attorney to handle an issue that represented a commercial failure over which they hold no interest. The interest is, generally, in enforceability. The question always comes back to whether the results are coercive and enforceable. The answer most ADR practitioners offer when asked about this issue is not satisfactory (for arbitration, for instance, the award is coercive, but it requires a judge to become enforceable). In this way, the interested parties find it academic and boring when a ruling (award) is coercive but not directly enforceable. Why consult an arbitrator or a mediator (or any other ADR expert) if you finally need to go back to court to enforce the decision. The clients are not interested in legal criteria, it’s a business decision. What to do about this? Good judgement would indicate that it is imperative to find a path that stands clear from judges and foresees enforcement. However, there is no clear answer. What will satisfy the stakeholder?

D. Prevision.

For years now, the ADR practice has focused on the fact that court is rarely the adequate forum to decide a dispute. This is, of course, debatable and sane minds may disagree. Notwithstanding, this point of view is incredibly important when there are no judges. Literally, what is the alternative. Attorneys specializing in dispute resolution must now build much more efficient arguments: what procedure is adequate for each dispute? A one-stop solution is not enough. This is a hard sell. General Counsel and company attorneys want easy one-way model solutions. Nobody wants an artisanal response for each potential dispute (which represents higher payable fees). There is an easy answer... every cent spent in legal prevision will imply greater savings in the long run. The answer is easy, selling it... not so much. However, every ADR specialist knows that it is much more efficient to set adequate dispute resolution procedures in each contract than to scramble to fix the problems once litigation (or conflict) has started.

III. CONCLUSION.

Mexico is living a complicated situation. It is unlikely that other jurisdictions will face similar conundrums. However, the lessons learned in Mexico are applicable elsewhere.

FIRST. ADR practitioners must raise far more awareness about ADR. Until we may count equal shares (or almost equal shares) of cases inside and outside of courts, balance is nowhere near.

SECOND. ADR practitioners must show others the infinite value of a sophisticated negotiation. Not everyone is professional in negotiation just because they are human. In all cases, the first response should be a soft negotiation, not a hard punch.

THIRD. Enforceability is a complicated issue. ADR practitioners must develop ways to cope with such complications and understand that stakeholders do not understand the relationship between judiciary and ADR as a practitioner does.

FOURTH. Invest in prevention. It works. A few hours reviewing a dispute resolution clause may save up years of conflict and litigation.