

How a constitutional amendment is transforming litigation in Mexico

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In 2017, Mexico's congress approved a key amendment to its Federal Commercial Code. The amendment is now driving dramatic changes to the country's trial process. One of those changes — a shift from written to oral proceedings and trials — is already accelerating the process of moving cases through the courts. The changes are to be fully implemented by 2020, which means that by 2020 all commercial cases will essentially be oral — a substantial departure from decades of written tradition in commercial litigation.

On the other hand, section 17 of the Mexican Constitution — which guarantees access to courts — had a major amendment in September 2017 to state that merits of a case must prevail over formalities. In other words, formalities must be seen as instruments for justice and not an end itself. Thus, form over substance will eventually be eradicated to have merits heard and decided as part of fundamental justice.

In this hoganlovells.com interview, Omar Guerrero Rodriguez, a partner in the Mexico City office of Hogan Lovells, discusses the essential ways that litigation in Mexico is evolving, including a new emphasis on the merits instead of the procedural formalities of cases, and the effort to increase the efficiency of trials by requiring that all commercial cases be tried orally by 2020. Mexico's commitment to improve its human rights record will also play a part in the way cases are litigated.

As a result of the amendment, what trends are you seeing regarding Mexican litigation?

Guerrero Rodriguez: First, there was the change in the constitution, whereby judges or decision makers will set aside the strict formalities we had in the past and put substance over form. Under the Mexican legal context, judges used to pay a lot of attention to formalities when deciding a case. Please let me give you an example: service of process through a court server with very strict formalities, the issuance of powers of attorney and its assessment by the court, the way that evidence is offered and rendered (i.e., cross examination), the lack of a true examination of witnesses, and the use of excessive legalistic formulas during proceedings sometimes depart the court from the merits of the case.

There is not much flexibility in the things that we can do regarding format. In the cross-examination process, for instance, we adhere to formalities, such as how to raise a question in a very specific format, in a way that does not allow the examiner to assist the court as to the evidence that the court must assess. In addition, it is not unheard-of that the decision-making person (i.e., the judge) is not present at the hearings. Thus, the hearings are carried out by a court clerk who eventually will follow-up in the proceeding and eventually a different court clerk will write a draft decision for the judge to discuss and decide the case. Thus, parties to a case cannot assert that they were truly heard by the judge.

Legal terms are very strict, formalities are set, and we interpret the strict letter of the law. Many cases are lost or won because of the use of those formalities. The fact that, just recently, a huge amendment was made to the constitution, whereby the decision makers are going to pay more attention to substance over form — that's a huge issue under Mexican law. The combination with oral trials in commercial cases by 2020 will assist to that end. It will mean that there will be a change of mindset of practitioners and courts and send a strong message to rely less on formalities — which was the way Mexican litigation used to work — and rely more in the facts of the case. I also believe that such circumstance could bring a new impetus for alternative dispute resolution (ADR) means, such as negotiation and mediation.

When you refer to “decision makers,” do you mean the judges in Mexico?

Guerrero Rodriguez: Judges, agencies, or whoever decides a conflict between individuals or entities in Mexico will need to pay more attention to the substance and merits of the case rather than the formalities. For years, Mexican litigators have abided by the fact that you could have a full trial, but if for some reason the server process was affected, then you need to remand and commence proceedings to the very beginning, even if you had an entire evidentiary period and your day in court. But if there was evidence that was dismissed and it was necessary to admit it before, then everything falls apart and you need to come back and restart it.

Mexican litigators were educated that formalities were so sacrosanct; we needed to be very specific. Now, because of this constitutional change, we need to reinvent ourselves as litigators, because we must enter more into the merits of the case rather than the formality. That's the big change.

Will this change impact the use of alternative dispute resolutions?

Guerrero Rodriguez: I think we are going to see support of alternative dispute resolutions. For instance, in the United States, I'm told that 90 percent of the cases settle before going to trial. And I have always used the opposite statistic: in Mexico, 90 percent of the cases go to trial and 10 percent settle either at the beginning or during the trial. Please recall that Mexico does not have trial by jury, punitive damages, and pretrial discovery in the U.S. style. But because of this

amendment, I believe there will be rationale to try to settle cases, because it doesn't make sense to have a full trial if you know that, on the merits, you can no longer play this specific sacrosanct respect to the format.

I think the constitutional change will increase the use of ADR. Because rational business people will say, I do not want to spend a lot of money to try the case, when, in the past, we had all these formalities, but now the constitution and judiciary will depart from them and seek ways to enter into the merits of the case. That will be a big shift.

You've mentioned another substantial change, involving written versus oral proceedings. What will be involved with that?

Guerrero Rodriguez: In Mexico, we have relied much more on written pleadings rather than on oral appearances in court for trial cases. We have some oral hearings, but not in the same way you have it in the United States, in the UK, or elsewhere. That has caused cases to move slowly, involving a lot of paper and very lengthy proceedings.

Therefore, the big change is that, by 2020, all commercial cases will be oral. This has been an evolving project: now, all commercial cases that are considered minor in amount are tried orally before judges. The number of the cases to be tried orally increased in 2017, and will dramatically increase again in 2018 and 2019, but by 2020, all cases will be tried orally.

That will mean more reliance on court appearances and less on the format and additional paper that provoke a delay of justice. The way it's connected with litigation is that you will be able to go to the court and express your arguments there, with the opposing counsel, and the judge will rule on the subject right away. Before, you had to file a written request, opposing counsel would respond in writing, a couple of weeks would elapse, the court would review and rule those two briefs, and the judge would take whatever time he or she needs — in this example, about a month — to respond. However, when oral proceedings are incorporated, we will have speedier trials and clients will receive speedier responses.

It may sound rudimentary because you've had it for years in the United States. But this trend — I believe — will spread not only to Mexico, but also throughout Latin America. Hogan Lovells has invested substantial effort and is prepared to try those cases. We also have a platform for oral proceedings and can rely on additional input from the successful experiences of our colleagues in the United States, UK, and elsewhere, who are more used to an oral focus.

There is an effort under way in Mexico to improve and protect fundamental human rights. How could this effort impact cases involving liability?

Guerrero Rodriguez: Everything in Mexico is about whether or not there is a protection or deprivation of human rights. Please let me give you an example. A man was electrocuted while swimming in a pool in Acapulco. There was a malfunction in the pool, the hotel did not react quickly enough, and there was an additional lack of safety equipment. The case went to trial and

his family received approximately US\$10,000 for moral damages. After an appeal, the amount was increased to US\$20K. Then they went to what we call federal appeal or amparo — an important word in Mexico, as it's a constitutional protection — and eventually the Supreme Court decided definitively the case and increased the amount to 30 million pesos, which at the time was about US\$2.5 million. The Supreme Court reasoned that there is a fundamental human right for any person to be reimbursed adequately in cases where there is harm caused by another person — in this case, the hotel.

In the United States, you are used to punitive damages. But in Mexico, it's a big issue because we are transitioning from a society that was used to being irresponsible. You could harm someone, knowing that your damage cap was limited, you'd have a lengthy proceeding, mainly written, and there were not oral trials that could speed these proceedings, so a person who could be harmed would spend years in court and would receive very little or nothing.

The trend is the opposite now: we're trying to provide faster oral proceedings and adequate responses on liability items. Clients should be prepared for this shift in the way that cases will be tried. Our international clients are used to international or U.S. standards, but when trying cases in Mexico, some believe that this combination of factors would limit their liability. That won't be the case any longer.

The next step will be to fully overhaul our class-action system because it does not really have support in our legal market. But when we have all those combined, I believe we are going to be much more exposed to litigation, and will become a more litigious society that will require the kind of lawyers we have at Hogan Lovells.

Will the amendment change the way cases are tried in certain jurisdictions?

Guerrero Rodriguez: One of the big clashes may be that clients will want to do things the way they do in their own jurisdictions. The name of the game will be adapting to the jurisdiction you're trying cases in. That's where our firm can help, because we have the support, the platform, the understanding of how it works in other jurisdictions, while we can also adapt it to our specific trial style.

The combination of these ingredients and focus on human rights will make Mexican attorneys say, we must completely change the way we try cases and reinvent ourselves to be prepared to enter into the merits of the case. Eventually I think we will have more discovery rules, because discovery is currently nonexistent under Mexican law. When clients hear that, the first question they raise is, how do you try cases with a lack of those tools? Well, we did. But now, everything about the way litigation happens in Mexico is going to change.

About Omar Guerrero Rodriguez

Whether practicing civil or commercial litigation, arbitration or antitrust, Omar Guerrero Rodriguez is a lawyer that has paid the "10 thousand-hour rule." Based in Mexico City, Omar co-heads the arbitration and litigation practice, as well as the antitrust practice of our Mexico offices.

He knows the importance of being a team player, providing bold solutions for clients, and the merits of being a fierce competitor.

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