



MARCO TULIO VENEGAS
Von Wobeser y Sierra
Partner
+52 (55) 5258 1034
mtvenegas@vwys.com.mx

Marco Tulio Venegas is a partner with 21 years of international experience, on both a professional and educational level. He is the youngest partner ever promoted by the firm. He has saved his clients billions of dollars and has protected and resolved several of the most complex and consequential litigation and arbitration matters for both multinational clients and governments around the world. His expertise includes two of the largest commercial arbitrations in Mexican history.



Mexico

■ Q. Could you outline some of the current market challenges at the centre of commercial disputes in Mexico?

VENEGAS: In the Mexican market, the main challenge existing in commercial disputes is to overcome the cultural inertia that has plagued the way in which conflicts are seen and perceived by companies, the government and the judiciary. Commercial disputes are seen, in general, as a long, costly and unpredictable malaise. In the past few years, a new culture to expedite the resolution of disputes, putting aside the extremely formal procedural challenges and promoting alternative dispute resolution (ADR), has been slowly implemented. However, judges and attorneys are still in the process of adopting and accepting this new paradigm. It may take a few more years until this shift in litigation culture is fully implemented. However, it appears that the resolution of commercial disputes will become more friendly and cost-efficient.

■ **Q. What general advice can you offer to companies on implementing an effective dispute resolution strategy to deal with conflict, taking in the pros and cons of mediation, arbitration, litigation and other methods?**

VENEGAS: There is no absolute or definitive formula to implement the best dispute resolution strategy. Depending on the nature and financial characteristics of the contractual or business relationship, different solutions may come to hand. The best general advice would be to first analyse the scope, nature, complexity and financial characteristics of the contractual or business relationship, which may potentially become the cause of the dispute. Once this analysis is made, then it is extremely important to define in the respective agreement the best dispute resolution clause, under the general assumption that at least a first attempt to mediate or negotiate any potential dispute must be established as a mandatory requisite before filing any judicial or arbitral action.

■ **Q. To what extent are companies in Mexico likely to explore alternative dispute resolution (ADR) options before engaging in litigation?**

VENEGAS: On average, larger companies are keener to explore ADR and more willing to enter into mediation, arbitration and explore other resolution methods. Normally, and although it is not necessarily a fair and correct assumption, medium sized and small companies see ADR as expensive proceedings only available and useful for large disputes.

■ **Q. How would you describe arbitration facilities and processes in Mexico? Are local courts supportive of the process?**

VENEGAS: Arbitration in Mexico is an ever-expanding ADR. Generally, in the major cities of Mexico, Guadalajara and Monterrey, the facilities and process supporting arbitration are great. We have developed a strong set of facilities, logistical services and experience to become an important seat for arbitration in Latin America. In connection with the role of the courts, although courts at a federal level are more experienced and aware of arbitration and, thus, have given



more support to said ADR, state courts have started to be friendlier and more supportive of it. It remains a work in progress, but I anticipate that in the next 10 years an important boom in the use of ADR will impact the dispute resolution market in Mexico.

■ **Q. What kinds of situations or circumstances might lead companies to pursue litigation instead of arbitration?**

VENEGAS: There are certain cases in which existing contractual guarantees make litigation much more accessible and cost-effective than arbitration. When a company has a bank guarantee or even a promissory note that could be easily enforceable before a court, it makes much more sense to pursue litigation than arbitration. In summary, the key to preferring litigation instead of arbitration is the existence of rights immediately enforceable before courts that would put one of the parties in an advantageous situation.

■ **Q. What practical challenges need to be dealt with when undertaking complex international, multijurisdictional disputes in Mexico?**

VENEGAS: There are several aspects to be considered for multijurisdictional disputes in Mexico. First, the potential enforcement of foreign decisions and the level of deference shown by local courts to foreign proceedings must be considered. If a dispute involves common law and civil law countries, the differences in understanding, proving and awarding damages may be irreconcilable and could lead to problems in the enforcement of foreign rulings. Other aspects that may cause

problems are how each jurisdiction defines due process for the purposes of proper judicial notifications. Mexico and Latin American in general give substantial weight to compliance with several strict and formal requirements while serving a party, with common law proceedings far more flexible. Thus, in order to avoid or minimise the risks of enforceability of foreign decisions, it is recommended to always bear in mind the different legal standards that exist in each of the jurisdictions involved in the dispute.

■ **Q. What considerations should companies make when drafting a dispute resolution clause in their commercial contracts to address the possibility of future disputes?**

VENEGAS: The time and cost involved in proceedings, as well the value of the dispute is, in my opinion, the essence of evaluating the best dispute resolution clause. Although it is not an exact formula, if a potential dispute is complex, and its value important, it would be better to use arbitration or even a dispute board, especially if it is a construction dispute. If the case is not complex but the value is high, and there are no guarantees immediately enforceable, then arbitration may be a viable option if local courts are untrustworthy due to corruption or inefficiency issues. On the contrary, having good local courts may incline parties to choose them.

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