



Understanding Mexico's Judicial Reform: Implications and Strategies for Foreign Investors

Commercial and Contracts

Litigation and Dispute Resolution



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On September 15, 2024, the *Diario Oficial de la Federación* (Official Gazette of the Federation) published a decree providing for an extensive reform of Mexico's judicial branch. The reform reduces Supreme Court justices from 11 to 9, imposes popular elections for all judges, dissolves the Federal Judiciary Council, and introduces faceless judges for organized crime cases.

The most significant provision of the reform calls for the removal of all sitting judges. Prior to the reform, judges were appointed through a merit-based system. Lawyers entered the judiciary fresh out of law school and worked their way up. This process may erode judicial independence, and judges could be subject to the political influence of the masses.

US investments account for the largest share of foreign direct investment (FDI) in Mexico, which is one of the largest recipients of FDI inflows in Latin America. Naturally, companies that are investing in Mexico — or considering investments in that jurisdiction — are concerned about the reform's potential impact on the Mexican judiciary's willingness to enforce contracts and uphold property rights. This article briefly summarizes the key aspects and criticisms of Mexico's judicial reforms. The authors then analyze different alternatives for mitigating the potential risks stemming from the judicial reform.

Mexico's Judicial Reform

Because there have been many articles written over the past few months summarizing the various aspects of the [Mexican judicial reform](#), here is a brief recap of the reform's key provisions:

- The number of Supreme Court justices will be reduced from 11 to 9. Additionally, the tenure of the judges will be 12 years rather than the current 15-year term.
- All federal and local judges will now be elected by popular vote in a general election pursuant to ballots prepared by the Congress, the executive, and the judiciary. In 2025, all justices will be elected, together with half of the federal magistrates and judges, with the remaining half being elected in 2027.
- All judges who are currently in office will be removed upon the election of their replacements.
- The Federal Judiciary Council will be dissolved, and its powers will be divided between an administrative office that will sit within the judicial branch and a newly created Judicial Disciplinary Tribunal.
- Faceless judges will be designated for specific cases involving organized crime. The identity of these judges will be concealed.

The sweeping judicial reform in Mexico has also elicited diverse political reactions both domestically and internationally. While the judicial reform is not without its supporters, there are significant criticisms against the reform:

- [Commentators](#) have argued that the reform could [politicize the judiciary](#), allow interference by criminal and economic groups, and reduce judicial quality.
- Commentators have expressed concern that the creation of the Court of Judicial Discipline could [weaken judicial independence](#) by overturning rulings unfavorable to the government.
- The **United Nations** has rejected the reform, noting that the election of judges and the possibility of anonymous judges in organized crime cases could affect transparency and impartiality. In July 2024, Maragaret Satterthwaite, the [UN Special Rapporteur on the independence of judges and lawyers](#), formally communicated these concerns to the Mexican government.
- The **Mexican Bar Association** and the **International Bar Association** warn that the reform could [violate international commitments](#) and damage Mexico's reputation in arbitration and foreign investment.

Mechanisms for protecting investments

There is still considerable uncertainty about the potential implications of Mexico's judicial reform and

whether the critics will be proven right. Nonetheless, US companies operating in Mexico should consider implementing strategies to mitigate risk. Strategies will differ based on whether the dispute needs to be heard in Mexico or if it can be routed to a foreign jurisdiction.

Companies that need or want to litigate in Mexico

Arbitration taking place in Mexico

Commercial arbitration has been widely touted as an alternative to the Mexican judicial system especially for those disputes that cannot be taken out of Mexico for one reason or another (i.e., excessive cost, lack of bargaining power, etc.). In that respect, Mexico's Arbitration Law follows the UNCITRAL Model Law and international treaties like the New York Convention. Both local and federal courts handle enforcement, giving recognized awards the same effect as final judgments. While recognition may be denied for procedural issues, courts cannot — as a theoretical matter — review the award's merits. The importance of selecting legal counsel is essential given potential concerns about the judiciary in Mexico.



While commercial arbitration may certainly help to mitigate concerns about the judiciary, it bears emphasis that any arbitration seated in Mexico would not be immune from potential judicial intervention and/or overreach. Moreover, judicial intervention is necessary for enforcement, annulment, and provisional measures. As further discussed below, companies can also incorporate arbitration provisions into future or existing commercial agreements providing for arbitration outside of Mexico. This would ensure that not only the substance of any dispute is resolved through arbitration, but also that any judicial oversight of potential disputes takes place outside of Mexico. This would permit a party to get an award. Of course, this does not guarantee that a Mexican court would then proceed to enforce that award.

Structure investments to secure protection under investor state treaties

For companies that do not have the flexibility to seat disputes about their investments outside of Mexico, they may wish to structure future investments through entities eligible for bilateral investment treaty (BIT) protection. This would provide access to international dispute resolution mechanisms and provide a mechanism to challenge problematic judicial determinations. [*Lion Mexico Consolidated v. United Mexican States*](#), a recent case against the Mexican state, offers an example of how this

approach can be used successfully by a foreign investor. In that case, an international arbitration tribunal found Mexico internationally liable for “denial of justice” — i.e., a situation where a state, through its judicial system, fails to provide a fair and accessible legal process to an individual, effectively preventing them from obtaining their rightful remedy.

For US investors who are “part[ies] to a covered government contract” and belong to five “covered sectors” — i.e.,

1. Oil and gas;
2. Power generation;
3. Telecommunications;
4. Transportation; and
5. Infrastructure

they may be able to rely on the United States-Mexico-Canada Agreement (the USMCA) which entered into force on July 1, 2020, replacing the North American Free Trade Agreement.

With respect to investors in other sectors, they are eligible for protection under a less favorable regime through the USCMA. Such investors may wish to consider creating a foreign entity in a different jurisdiction which has a BIT with Mexico and channel such investments through entities in that third jurisdiction. This enables them to benefit from the rights and protections granted under those treaties, even if their actual business activities are conducted within Mexico. Currently, Mexico has [BITs in force](#) with countries such as Hong Kong, Brazil, the United Arab Emirates, China, Spain, the United Kingdom, among others, and is party to treaties with investment provisions like the USMCA, CPTPP, Pacific Alliance, and various FTAs with Latin American, European, and Asia-Pacific countries.

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Disputes litigated outside Mexico

Arbitration taking place internationally

Foreign investors facing legal uncertainty in Mexico and who would have an ability to execute on an award outside of Mexico may want to consider seating their international arbitration outside of Mexico to reduce the power of the Mexican judiciary to interfere with their proceedings. For US investors in Mexico, they typically select Houston, Miami, and New York as the place where their arbitration will be heard pursuant to the rules of one of a number of reputable institutions (e.g., AAA/ICDR, ICC, JAMS, etc.). Selecting the right seat is crucial, as it determines the competent court overseeing the arbitration process.

Forum selection clauses favoring US jurisdiction

While not as common for the resolution of international disputes, a potential option for US companies wishing to avoid litigation in Mexico is to include forum selection clauses that favor US jurisdiction in their contracts, particularly New York for commercial matters.

Even where the parties have no connection to New York, General Obligations Law 5-1402 provides that clauses would be [enforceable in commercial contracts](#) worth at least US\$1 million that are governed pursuant to New York. By choosing the New York jurisdiction, companies can benefit from a stable and predictable judicial system with a long tradition of handling complex commercial cases, which could provide greater legal certainty compared to the recently reformed Mexican judicial system. Anti-suit injunctions may complement forum selection clauses that privilege jurisdictions such as New York by allowing a party to use a US court to potentially compel its adversary to withdraw proceedings abroad.

More uncertainty means more risk

Mexico's judicial reform has generated uncertainty for foreign investors. Investors should analyze the risk carefully and consider implementing the strategies discussed above as well as following any additional legislation and judicial developments.

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[Michael A. Fernández](#)



Member

Cozen O'Connor LLP

Michael A. Fernández is a Member in the New York office of Cozen O'Connor LLP and an Adjunct Professor of Law at Fordham University School of Law.

Fernández has is a litigation and arbitration practitioner whose practice is focused on complex and cross-border commercial litigation, international commercial and investor-state arbitration, and corporate internal investigations.

Fluent in Spanish and Portuguese, he has experience representing foreign and domestic companies and individuals in matters covering a broad range of industries, such as Bitcoin and related technologies; commodities; construction and real estate; food and beverage; gaming; financial services; moving and storage; and oil and gas.

Fernández has published articles and spoken on various topics pertaining to international commercial and investment arbitration.

He is also a Fellow of the Chartered Institute of Arbitrators, and is admitted to the arbitrator rosters for the American Arbitration Association (AAA), the Costa Rica Center of Conciliation and Arbitration (CICA), the Arbitration Center of Mexico (CAM), and the Conflict Resolution Commission of the Chamber of Industry of Guatemala (CRECIG).

Fernández received his B.A. from Yale University in 2007, where he was awarded the Albert Bildner Yale Class of 1937 Prize for an outstanding essay on Latin America. He received an M.A. from the Fletcher School of Law and Diplomacy at Tufts University in 2012. Fernández received his J.D. from Columbia Law School in 2012, where he was a Harlan Fiske Stone Scholar and recipient of a Parker School Certificate for Achievement in International and Comparative Law. He was also a managing editor for the Journal of Transnational Law and treasurer of the Latino Law Students Association.

[Alberto Fortún](#)



Partner, International Arbitration, Litigation

Cuatrecasas

Alberto Fortún has represented private investors against public authorities, particularly in Africa and Latin America. He is recognized nationally and internationally as a promoter of arbitration in Spain, and is an expert in resolving commercial disputes relating to energy projects, joint ventures, engineering and construction. He has participated in over 100 arbitrations and alternative dispute resolutions (including mediation, adjudication and dispute resolution boards).

He is a fellow and an approved trainer of the Chartered Institute of Arbitrators. He has acted as arbitrator at

the ICC International Court of Arbitration, the LCIA, the Court of Arbitration of Madrid and the European Arbitration Association. He is a listed arbitrator in the ICDR roster of the AAA, in the Hispanic-Moroccan Court and the Dubai International Arbitration Center. He is a member of the LCIA, AIPN, ABA (International Law Section, international litigation and arbitration committees) and an affiliate member of the Inter-American Affairs Committee of the New York City Bar. He was foreign counsel to the US firm Fulbright & Jaworski in Houston (Texas) from 1999 to 2000.

He is also a member of Georgetown University's European Law Advisory Board. He is an associate lecturer in the Master in International Law and Sports Law at the Instituto Superior de Derecho y Economía (ISDE), and he lectures on international conflicts management in the Corporate Diplomacy & Public Affairs Program at Schiller International University. He also lectures and organizes courses on international construction disputes. He regularly contributes to publications and collective works on arbitration.

[Eve Perez-Torres](#)



Senior Counsel

FedEx Corporation

Eve Perez is a seasoned international attorney with 20 years of professional experience, currently serving as senior counsel at FedEx Corporation. She is barred in both Florida and the Republic of Colombia. Perez's extensive expertise encompasses international disputes, international transactions, complex commercial agreements, international employment law, risk mitigation, and international arbitration.

Throughout her career, Perez has successfully managed outside counsel and provided strategic legal advice on a wide range of matters. Her deep understanding of cross-border legal issues and her ability to navigate complex regulatory environments have been instrumental in supporting FedEx's global operations.

Rodolfo Rivera



Chief International Counsel and Legal Hold Officer

Fidelity National Financial

Rodolfo Rivera is Chief International Counsel for a Fortune 500 insurance company. He managed the company's international expansion in Latin America and Europe. He manages a litigation portfolio with a combined exposure of US\$250 billion in Europe, Latin America, and the United States. He has managed operations in Mexico and Puerto Rico as well as established a network of attorneys in 34 countries to assist the company in the various aspects of its international expansion.

He is a frequent speaker on:

- The cultural aspect of International Business
- Managing international litigation
- Managing conflicts in the work environment
- Effective Communication in the workplace
- Intrapreneurship

Rivera received his law degree from St. Louis University School of Law, BA in Spanish and Political

Science from Ohio Northern University, Certificate in International Law from the Hague Academy of International Law.

He is an approved arbitrator with the American Arbitration Association as well as National Arbitration and Mediation. He is also a LATAM Speakers Association Certified Professional Speaker.

Publications include:

- Special Report on Latin America-Litigating in Latin America
- New York Real Estate Journal - Title Insurance in a Global Economy
- Missouri Bar - Continuing Education Chapter on International Adoption