Chambers AND PARTNERS

CHAMBERS GLOBAL PRACTICE GUIDES

Insurance Litigation 2022

Definitive global law guides offering comparative analysis from top-ranked lawyers

Mexico
Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes
Ramírez Ornelas Abogados

practiceguides.chambers.com

Trends and Developments

Contributed by:
Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes
Ramírez Ornelas Abogados see p.6

Changing the Balance of Power in Insurance Underwriting

Insurance as a financial service

Following the Constitutional amendments of 2013, Mexico recognises, among other rights, the human right to access to financial services, a change that resulted in the adoption of diverse regulation around the provision, organisation and operation of providers of financial services, and the imposition of robust protection measures for the benefit of the users of financial services.

The financial services regulated under Mexican Laws are:

- banking;
- insurance;
- securities;
- financial factoring;
- financial leasing;
- finances; and
- any other service related or supplemental to any of the services mentioned above.

As part of the recognition of the above-mentioned human right, the Supreme Court, in case No 434/2018, highlighted that within the producer-consumer relationship, two opposing interests collide. Whilst the provider/producer seeks to maximise its revenue by minimizing costs, consumers seek to obtain the product/service of interest at the lowest possible price.

It is the Mexican Supreme Court's view that this creates an unbalanced and lopsided relationship, considering that the provider/producer has an organised structure and developed skills to conduct its operations, whilst the consumer is usually advised only by its own experience and judgement. Accordingly, the resolution determined that the provider/producer has an advantage in successfully pursuing and achieving its interests – maximising revenue and minimising costs. Under the Supreme Court's view, this disparity is further enhanced in financial services due to their specialised/technical nature and due to the lack of knowledge and financial education in Mexico, where only around 32% of adults have basic financial education (according to the George Washington University).

Due to the above, the Supreme Court has ruled that one of the state's duties is to regulate financial services, reducing and/or eliminating the asymmetries within the producer-consumer relationship. The Court has thus resolved that it is for the state to act as a counterweight.

When addressing the potential asymmetries existing within the provision of insurance services, the state has identified in administrative regulations and resolutions, as well as within judiciary rulings, that the insured holds a very limited or even complete lack of bargaining power, because it is insurance companies who delineate most, if not all, the terms and conditions applicable to the insurance policy. Such asymmetry is easily perceived when dealing with standard form contracts, adherence agreements and (at times) compulsory insurance.

Contributed by: Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes, **Ramírez Ornelas Abogados**

Standard form contracts

In Mexico, as in other jurisdictions, insurance companies develop and offer their standard form contracts, including set-forth terms and conditions that the insured cannot modify or eliminate. The insured would then hold only two options: to purchase the policy or refuse to do so.

Standard form contracts can be offered in multiple ways. While some do not provide any room for negotiation, nor a bargaining opportunity to the insured for redacting, modifying, or eliminating certain terms and conditions, others enable the insured to do so.

Evidently, most, if not all, insurance policies have standard terms and conditions that insurers are not willing to revise or negotiate with the insured. These are usually set forth within the general conditions.

In Mexico, beginning in 2018, it was very easy to resolve which was a standard form contract and which was not, as all standard form insurance contracts had to be revised and authorised by the Insurance and Bond National Commission. Therefore, the standard form insurance contracts were those which had been registered at the commission and offered within a standardised layout.

However, in 2022, Mexico's Supreme Court issued a binding jurisprudence broadening the concept of the standard form contract. Under the new interpretation, to resolve whether an insurance policy follows a standard form contract or not, one must resolve whether the purchaser had any real possibility and power to change the terms and conditions of the policy. If the answer to this question is "yes", then one should also exhaust a review of the terms and conditions of the policy, to identify whether any of these is abusive or unreasonable, to the detriment of the purchaser.

As anyone may anticipate, it becomes very hard to identify and/or demonstrate whether the purchaser of an insurance policy had "a real possibility and power" to affect the terms and conditions of an insurance contract. Even assuming that the insured did have bargaining power, it must also be ascertained what is to be considered as abusive or unreasonable under the courts' criteria.

Compulsory insurance

Lawmakers in Mexico, like in other jurisdictions, tend to issue regulations seeking to minimise collateral damages around specific risks. Therefore, they issue laws and regulations demanding the existence of an insurance policy (usually with a liability cover), for performing certain activities (compulsory insurance).

Among the activities that currently require the existence of compulsory insurance are the following:

- liability insurance for all drivers;
- general liability insurance for all commercial establishment that could affect its neighbours when conducting its business; and
- environmental and liability policies for conducting certain hazardous activities, as per the provisions of the energy legal framework.

Article 150 bis of the Mexican Insurance Agreement Law even provides that compulsory liability insurance cannot cease its effects, be cancelled or be terminated prior to their original period; this indicates that compulsory liability insurance must be deemed to fall within a special category.

Contributed by: Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes, **Ramírez Ornelas Abogados**

Under the reasoning depicted so far, standard form contracts' terms and conditions become very vulnerable when the insurance policy happens to be for compulsory insurance. This is because, not only would the state be in the position to decide that certain terms and conditions are abusive or unreasonable, but it could also resolve that said terms or conditions prevent the insurance from fulfilling the purpose for which it was originally mandated by the lawmakers. Under this view, there is much room for certain coverage conditions or exclusions to be subject to interpretation, modification and even annulment, for the benefit of the insured or the beneficiaries of the cover.

Courts have even ruled that insureds who are mandated to purchase an insurance policy do not necessarily have "free will" to enter the terms and conditions of the agreement, especially when these are sold under a standard form and where the policy is being purchased to fulfil a legal requisite. Therefore, the consumer's power to modify the terms and conditions is weaker or non-existent in these circumstances.

Supreme Court case 1324/2021

In early 2022, Mexico's Supreme Court issued a very important judgment that will probably change insureds' litigation strategy for good.

The case dealt with a vehicle driver (who was insured under a compulsory liability motor policy) who ran over a person causing his death. The driver was found criminally liable and was subject to criminal proceedings. The survivors of the deceased (his wife and children) filed a civil lawsuit against the driver seeking damages and losses, including those for pain and suffering. The insurer was summoned to the proceedings, as the resolution triggered the coverage afforded under the policy. It is relevant to highlight that the policy clearly excluded coverage around "pain and suffering" resulting from and/or claimed in relation to a covered loss.

Following the trial, unsurprisingly, the survivors were awarded an indemnity over the claimed damages and losses, including the claimed damages for pain and suffering, as the driver was found strictly liable. Surprisingly, the Mexico's Supreme Court resolved that the liability policy, which was limited to damages and losses claimed for the insured sum, could not limit the scope of coverage over the pain and suffering claimed, which was excluded in the policy.

The Supreme Court's decision was based on the following:

- insurance is a financial service recognised as a human right by the Constitution, which creates a special protection to its users (the insured);
- liability insurance is compulsory for every car owner;
- the drivers' policy was a standard form contract; and
- the obligation on all drivers to hold a valid liability insurance, as the objective of the lawmaker to resolve the compulsory nature of a liability motor policy was to assure that damages caused were fully indemnified, especially for third parties.

Based on the above, Mexico's Supreme Court annulled the "pain and suffering" exclusion included within the driver's liability and required the insurance company to cover all damages and losses claimed, including those for pain and suffering, up to the policy's limit.

Contributed by: Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes, **Ramírez Ornelas Abogados**

Implications of the resolution

This resolution has many implications for cases in which the policy in question is a standard form contract and involves compulsory insurance. Nevertheless, the resolution could very easily become applicable to almost every kind of insurance policy, as long as there are enough arguments to establish that the policy is a standard form contract, or that these terms and conditions are unlawful, for insureds to invalidate terms and conditions, especially exclusions, seeking an indemnity.

Obviously, this new case will be a turning point in insurance litigation for the insureds, and probably for insurers, in drafting and offering insurance policies. The insured's strategy, when issuing proceedings, will be to argue and evidence their lack of negotiation power against the insurance company, so their policy is deemed a standard form contract to receive a special and broader protection before the Mexico's Supreme Court, permitting them to nullify terms and conditions of insurers which, they claim, sought to avoid payment of compulsory obligations.

A similar reasoning and logic could be applied by courts when resolving coverage afforded under all risk insurance policies purchased by government institutions. This is because, despite these usually being subject to the terms and conditions determined by the governmental entity within the associated public tender and the terms of the Law of Acquisitions and Leasing of the Public Sector, the purpose of the policy is to make sure that the state's assets are preserved and replaced if damaged. Accordingly, any provision included by insurers or reinsurers seeking to waive the obligations set forth within the public tender could be found to be abusive and unreasonable conditions, subject to interpretation and eventual annulment.

Obviously, this strategy is not new, but the stakes of the risk have never been higher, as this new line of argumentation could result in the annulment of certain terms, conditions or exclusions of policies, which could eventually affect the mutuality of certain insurance products.

As the Supreme Court judgment is used more and more by insureds as a legal precedent for resolving insurance disputes, insurers will most likely react by:

- increasing premiums;
- reducing liability limits;
- reducing capacity;
- avoiding litigation, but increasing arbitration and ADR proceedings; and/or
- reducing their appetite for issuing compulsory insurance.

In conclusion, not only must insurers make sure that compulsory policies fulfil the purpose for which they were originally mandated, but they must also make sure that the terms and conditions are not to be deemed abusive or unreasonable, especially in standard form policies. They must do so to the extent that these could be challenged; something which will lead to the adoption by the insurer of a position as a patron of the insureds.

Contributed by: Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes, **Ramírez Ornelas Abogados**

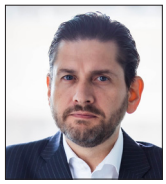
Ramírez Ornelas Abogados is a specialised firm in all types of litigation set in Mexico City with the ability and network to represent cases throughout Mexico. It has a team of 30 people, which includes 16 lawyers, 10 interns and four legal secretaries. The main expertise of the firm is civil and commercial litigation, recognised as one of the top litigation firms in Mexico. In insurance litigation, the firm has stood out by representing clients, mainly insureds, regarding civil liability, all risk, bankers blanket insurance and property policies in many sectors such as construction, mining, oil, communications, commerce and banking. Some recent clients that have been represented by the firm are Grupo Mexico and Grupo Financiero Banorte. Other primary practices areas that are related to insurance are civil, administrative and constitutional litigation as well as bankruptcy proceedings.

Authors

Gerardo Ramírez Ornelas is the founding partner of Ramirez Ornelas Abogados. Since 19080, he has been one of the most recognised litigation and bankruptcy lawyers in Mexico. In insurance, he led the way for one of the largest indemnifications covered by an insurance company in Mexico City. He currently teaches bankruptcy law for the Master's in Private Law programme taught at Escuela Libre de Derecho.

Gerardo Ramírez Blumenkron is a partner at Ramirez Ornelas Abogados and is head of the insurance litigation area. Initiated as a criminal lawyer, he moved to insurance litigation, working for three years as the right hand of Francisco Fernandez Guerra Fletes, who is one of the leading insurance lawyers in Mexico. He is an expert in D&O, civil liability, commercial casualty and bankers blanket insurance. Right now, he is in the process of obtaining his Master's degree in Private Law at the Escuela Libre de Derecho.

Contributed by: Gerardo Ramírez Ornelas, Gerardo Ramírez Blumenkron and Francisco Fernández Guerra Fletes, **Ramírez Ornelas Abogados**



Francisco Fernández Guerra Fletes is a partner at Colin Vega Fletes, he has been managing partner of Davis, Arnold Cooper in Mexico, which later merged with DAC Beachcroft. He is one of the leading insurance lawyers in Mexico for his experience and knowledge in commercial casualty, D&O, civil liability, environmental, engineering and construction, bankers blanket insurance, to name a few. He has acted as president of the Mexican Association of Insurance and Bonds Law (AMEDESEF) and the International Insurance Law Association Mexican Chapter.

Ramírez Ornelas, Abogados

Andrés Bello No 45, 12° floor,
Col. Polanco Chapultepec,
Del. Miguel Hidalgo, C.P. 11560,
Mexico City,
Mexico

Tel: +52 (55) 52 79 44 00
Email: contacto@rorve.com
Web: www.ramirezornelas.com

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com