



MEXICO UPDATE



Issue 31, April 2011

Welcome!

Message from the Co-Chairs

We welcome this first issue of MEXICO UPDATE as a partnership of the Mexico Committee of the American Bar Association's Section of International Law and the Law School of the Universidad Panamericana, Guadalajara Campus. We thank our immediate past chair Alejandro Suárez for catalyzing the relationship.

Our committee is flourishing, through (i) sponsorship of two showcase programs at the Section of International Law's fall 2010 meeting in Paris (on Mexico's trade relations with Europe and the United States, and on data privacy) and three programs at the Section's forthcoming meeting in Washington, DC (on cross-border water issues, global warming and secured transactions), (ii) our City Coordinator program that has gathered our members in Los Angeles and Mexico City to gain insight from respectively a member of the Upper Chamber of Mexico's Federal Electoral Court, and a European Ambassador to Mexico and that newly extends to El Paso and New York City, (iii) the efforts of our Antitrust working group under the leadership of member Francisco Fuentes, and (iv) our contribution to the Year in Review publication of THE INTERNATIONAL LAWYER.

Our members share the conviction that issues of law and legal practice pertaining to Mexico and its relations with the rest of the world merit attention. Through our interactions and initiatives we work to create a community of lawyers linked across boundaries to share insights and experiences. Our future is bright, and we renew the invitation to all our members to play an active role in the life of our committee.

Patrick Del Duca (Los Angeles) and Juan Carlos Velázquez de León (Monterrey)
Mexico Committee Co-Chairs

A Note from the Editors

Look in the near future for the our next issue. It will feature short and timely articles by experts in Mexican law in a variety of topics of general interest to practicing lawyers.

We welcome submittals to be considered for publication in our newsletter. We seek short updates on current topics of interest to our membership of American, Mexican and other lawyers whose practices relate to Mexico and Mexican law.

In particular, we are aware of the Mexican lawyers who each year undertake advanced training in the United States in LLM programs offered by leading American law schools. Our Mexico Law Committee members who collaborate on the production of the newsletter welcome the opportunity to collaborate with such lawyers in achieving a short publication in our newsletter in English on a topic or development of Mexican law of current interest. Submittals of current developments on the order of 1000 words can be addressed to Alejandro Suarez, Chief Editor, at asuarez@fredlaw.com.

The Mexico Committee and the Facultad de Derecho, Universidad Panamericana, Guadalajara Campus, look forward to a sustained partnership in this newsletter.

Alejandro Suárez (Minneapolis), Ana Patricia Esquer Machado (Guadalajara), and Rodrigo Soto Morales (Guadalajara)

Contents

Antitrust Update	3
Private Enforcement of Mexican Competition Law	
Foreclosing in Mexico on Cross-border Loans	4
Transnational Ground Freight Transportation	7
Amendments to Mexico's Health & Safety standards	8
Review of June 2009 amendments to Mexico's Code of Commerce and General Law of Commercial Companies	11
Setting aside an Arbitral Award: A broad interpretation of UNCITRAL model law article (34)(2)(a)(iii)	15
Update on Mexico Committee City Program Coordinator Initiative	16
Editorial: About the Rule of Law, Literature and Other Circumstances	17
Editorial: Proposed Labor Reform in Mexico: it cannot wait	19
Mexico City Gathering with Ambassador of Ireland	20
Mayre Rasmussen Award to Mexico Committee Member Carol M. Mates	21



MEXICO UPDATE



About the Mexico Law Committee

The Mexico Law Committee is involved with the full spectrum of U.S.-Mexican legal issues as well as various aspects of internal Mexican law. This year the Committee is planning and sponsoring a series of programs, principally at the spring and fall meetings of the ABA Section of International Law, but also in venues of interest in both the United States and in Mexico. The Committee continues to strengthen its relationships with the *Barra Mexicana de Abogados* and with other Mexican legal institutions and organizations. With this issue of MEXICO UPDATE, the Committee renews its outreach to its membership to keep it abreast of important developments in Mexican law. An ongoing initiative of the Mexico Committee is to monitor developments in Mexico's competition law, and the constitutional reform on criminal procedure.

Upcoming Events — Save the Date

Except as otherwise specifically noted, the following events will take place at the Hyatt Regency Washington DC on Capitol Hill during the 2011 Spring Meeting of the ABA Section of International Law.

Wednesday, April 6, 2011

Program featuring Mexico Committee member Ernesto Velarde Danache: **Investing Across Borders: The World Bank Group Findings & Reactions from Different Countries** (4:30 PM - 6:00 PM)

Mexico Committee Dinner (9:00 PM - 11:00 PM)

Thursday, April 7, 2011

Program organized by Mexico Committee Member Jay Stein: **Is Water the New Oil?**

Tales from the Battle over Transboundary Water Resources in North America (11:00 AM - 12:30 PM)

Program organized by Mexico Committee Members Carol Mates and Patrick Del Duca: **Secured Lending & Lien Registry Systems: Best Practices in the Americas & Europe** (11:00 AM - 12:30 PM)

Lunch w/Formal Judge of the International Court of Justice (ICJ), Judge Buergenthal (12:45 PM - 2:15 PM)

Reception at the U.S. Department of State (7:00 PM - 9:00 PM)

Friday, April 8, 2011 Mexico Committee Business Meeting (9:00 AM - 10:30 AM)

Lunch w/ Distinguished Speaker (12:45 PM - 2:15 PM)

Program organized by Mexico Committee Member John McNeece: **The UN Climate Change Conference in Cancún, Mexico: High-Stakes Poker on the Post- Kyoto Framework for Confronting Global Warming** (4:30 PM - 6:00 PM)

Meeting Closing Reception at the Donald W. Reynolds Center for American Art (8:00 PM - 11:00 PM)

After Hours Reception (11:00 PM - 1:00 AM) sponsored by the Association Internationale des Jeunes Avocats (AIJA) at place to be determined

Committee Leadership 2010-2011

Patrick Del Duca
Co-Chair

Carlos Velázquez de Leon
Co-Chair

Alejandro Suárez
Immediate Past Chair

Francisco J. Cortina
Vice-Chair

Jorge E. Frago
Vice-Chair

Alonso González Villalobos
Vice-Chair

Marco Tulio Montañés-Rumayor
Vice-Chair

Carlos Sugich
Vice-Chair

Eddie J Varon Levy
Vice-Chair

Thomas S. Heather
Senior Advisor

Claus Von Wobeser
Senior Advisor

DISCLAIMER The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication that is made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are responsibility solely of each author/contributor and do not necessarily reflect the view of the ABA, its Section of International Law, the Mexico Law Committee or the Universidad Panamericana.



MEXICO UPDATE

Antitrust Update

Private Enforcement of Mexican Competition Law

Francisco Fuentes Ostos

Mijares, Angoitia, Cortés y Fuentes

In Mexico, an economic agent injured by a violation of Mexican Competition Law (the “Law”) may file a lawsuit in civil court to seek monetary damages. Such action for breach of the Law is based on article 38 of the Law and the general rules for tortious liability of the Mexican Federal Civil Code (“CCF”).

Only the economic agent that is injured and can prove direct harm by the defendant will have standing to bring a damages action. Thus, class or collective actions are not available under the Law. However, a recent addition to the Mexican Federal Constitution has empowered Federal Congress to enact legislation to regulate class or collective actions, and such legislation is pending.

Under article 38 of the Law, the civil court may request the Antitrust Commission (“Cofeco”) to make a declaratory judgment estimating the damages suffered by the plaintiff. The final determination will be made by the civil court. In addition, an economic agent may file a lawsuit requesting the nullity of any arrangement considered as an absolute monopolistic practice (i.e. price fixing, information exchange, market allocation and bid rigging). Such action is based on article 9 of the Law and the general rules of nullity of contracts under the CCF.

There are no specialized courts to hear competition law cases. Litigation for the actions described above is heard by a civil local or federal court, which has to follow procedural rules applicable to any ordinary process. Interim remedies may be available, but only in very limited circumstances.

Damages are awarded if the plaintiff can prove (i) illegality of the conduct at issue, (ii) occurrence of damages, (iii) causal connection between the violation and the damages, and (iv) negligence or wilfulness of the defendant. The ruling by Cofeco will be the basis to prove the illegality of the conduct, and the negligence or wilfulness of the defendant. Damages are compensatory and measured by reference to loss suffered. Loss suffered includes not only the actual loss due to illegal conduct (dammum emergens), but also encompasses the loss of profit (lucrum cessans). No punitive or exemplary damages are available.

An injured party has two years to start a damage action from the day Cofeco’s ruling is deemed to be final. However, another possible interpretation, based on the general rules of the statute of limitation under the CCF, is that the two year period should start from the date when the illegal acts or practices occurred. Under this interpretation, the statute of limitation would not be interrupted or suspended when the action is filed with Cofeco. That will most likely require the injured party to file its damages action before a final resolution is issued by Cofeco. The effect of filing a damages action is to suspend the statute of limitation period. In addition, the damages trial will be suspended until a final ruling is issued by Cofeco. There are no legal precedents resolving which of these two different views is to be preferred.

For a nullification action, the limitation period is ten years from the day the absolute monopolistic practice started. In terms of timing, once a final, indisputable resolution is issued by Cofeco, a claim for damages or nullity would take around three to five years until a final judgment is issued. The actual time that a specific claim would take will vary subject to, among other things, case complexity, work load, capacity of competent courts and the strategy of the parties (i.e. whether they appeal interim resolutions, file constitutional challenges, etc.). Decisions of the court of first instance may be reviewed by a court of appeal. Upon resolution of the appeal, a constitutional trial (amparo) can be filed to challenge the unconstitutionality of a court of appeal’s resolution. In this latter instance a federal Circuit Court acts as a cassation court, and its final resolution may revoke the court of appeal’s decision, providing certain guidelines for the issuance of a new resolution. Most damages recovery claims in Mexico will involve this kind of constitutional challenge before a final judgment can be reached.

Finally, there have been very few private enforcement cases in Mexico. The first one was filed based on a predatory pricing ruling by Cofeco. The court dismissed the case, based on the fact that the ruling of Cofeco, in a separate procedure, was ruled unconstitutional.



Contributors for this edition:

Rodrigo Ramon Baca Bonifaz

Basham, Ringe y Correa, S.C.
San Pedro Garza García N.L., Mexico
+(52 81) 8299 2100
rbaca@basham.com.mx

Ángel Domínguez de Pedro

Barrera, Siqueiros y Torres Landa, S.C.
México, D.F.
+52(55) 5091 0152
adp@bstl.com.mx

Francisco Fuentes-Ostos

Mijares, Angoitia, Cortés y Fuentes,
S.C.
México, D.F.
+(52) 55 52 01 74 00
ffuentes@macf.com.mx

Alonso González-Villalobos

González-Villalobos Abogados
Guadalajara, Jalisco, Mexico
+52 (33) 3630-9670
agonzalez@gonzalez-villalobos.com

Juan Carlos Guerrero Valle

Rendón-Guerrero
México, D.F.
+ 52 (55) 5514-7794
jcguerrero@rgmc.com.mx

Benjamin C. Rosen

San Jose del Cabo, BCS, Mexico
+1 (877) 773-3172
brosen@rosenlaw.com.mx

Ernesto Velarde Danache

Ernesto Velarde-Danache, Inc.
Brownsville, Texas
+1 (956) 548-9098
evd@velardedanache.com

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



FORECLOSING ON CROSS-BORDER LOANS IN MEXICO

Benjamin C. Rosen

Foreclosing on “cross-border loans” in Mexico is the subject of this article. A cross-border loan may be defined as either (a) a loan that originates in one country and is disbursed in another or (b) a loan that is executed under the laws of (or the lender is domiciled in) one country, but secured by collateral located in another.

A) To Foreclose or not to Foreclose, That is the Question

Financial institutions and private lenders who have made cross border loans into Mexico are faced with the following options when confronted with a delinquent borrower: **i) grant the borrower forbearance or deferment;** **ii) restructure** the loan, so that, for example, interest and/or principal payment obligations are reduced, the term is extended, balloon payments are deferred and/or the lender takes an equity interest in the project/property; **iii) threaten foreclosure and/or file for foreclosure, then negotiate a settlement** through which Borrower is given some sort of consideration for voluntarily “handing over the keys”; **iv) foreclose.**

Because of the well-known difficulties in foreclosing on loans and repossessing property in Mexico, and, in general, the perception that the Mexican judicial system is slow, unpredictable and vulnerable to corruption, most lenders are opt for restructuring the loan, deferment, forbearance or settlement.

Nevertheless, when confronted with a defaulting borrower in Mexico, lenders should consider all four options mentioned above, weighing the pros and cons of each based on the specific circumstances. Indeed, the first step might be to grant a temporary forbearance, perhaps as necessary followed by a consensual restructure of the loan. Only if both these attempts fail, might the lender then decide to foreclose; and even then, it may end up settling by, for example, paying the debtor an agreed sum in exchange for voluntarily relinquishing the debtor’s rights to the collateral.

In any case, before deciding on whether or at what point to foreclose, lenders are advised to consult with qualified Mexican legal counsel who can help them better understand (a) the type of Mexican security interest granted and the

lender’s right to foreclose under Mexican law; (b) the likelihood of success; (c) the estimated time to obtain a final binding judgment and to enforce the judgment; and (d) the estimated costs involved.

B) The Foreclosure Process

Once the creditor ultimately decides to pursue foreclosure against a debtor in default, the first step is usually a demand letter.

1. The Demand Letter

Mexican legal requirements for demanding payment under a promissory note or other debt instrument are much more formalistic than those in the US, and to ensure the demand of the lender will hold up in court, it will likely be necessary to grant local counsel a formal power of attorney to serve the demand letter personally and in the presence of a Mexican notary public or officer of the court. This formal demand letter is referred to under Mexican law as an “*interpelación*”. Although a demand letter usually will not be necessary if foreclosure is sought under a guaranty trust, it is often advisable to serve one in any event should the matter eventually reach a court.

2. Mortgage v. Guaranty Trust

If the demand letter does not work, then the next step will depend on what type of security instrument is in place. The two most common ways of securing a loan with real property in Mexico are: (a) a mortgage; and (b) a guaranty trust.

A mortgage is an agreement whereby the debtor or a third party obligor grants the creditor the right to collect an amount due via the real property put up as collateral, which right may be exercised if the debtor breaches its obligations pursuant to the credit agreement or note. Mortgage agreements must be executed before a Mexican Notary Public and recorded in the Public Registry of Real

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



Property. Once recorded, the “world is on notice” that the subject collateral has been encumbered to secure the payment of the debt referenced in the mortgage instrument.

On the other hand, a guaranty trust is an agreement whereby a debtor or third party obligor (trustor/*fideicomitente*) transfers title to collateral to a Mexican trust institution¹ (trustee/*fiduciario*) for the benefit of the creditor (beneficiary/*fideicomisario*). That is, instead of Debtor conserving title to the collateral and encumbering it in favor of Creditor, the Trustee holds the temporary title to the property in order to secure the debtor’s compliance with the debtor’s obligations.

3. Foreclosing under a Guaranty Trust

Guaranty trust agreements contemplate an administrative foreclosure process. This process is carried out by the trustee without the intervention of a judge and therefore is designed to be significantly more streamlined than foreclosing on a mortgage, which requires filing a lawsuit and obtaining a judgment. Every trust institution will have its own administrative foreclosure template to be included in the trust agreement. Nevertheless, lenders can negotiate the specific terms with the borrower, subject to approval of the trustee. For purposes of analysis, included below is an illustrative template, which establishes the following administrative foreclosure process:

The First (Guaranty) Beneficiary/Creditor (“Creditor”) notifies the Trustee in writing, (a) indicating that Trustor/Debtor (“Debtor”) has defaulted on one or more of the obligations guaranteed by the Trust, (b) specifying the events and causes of default and (c) requesting the sale of the properties to satisfy the debt.

The Trustee, upon receipt of the notice, shall within two working days thereafter proceed to notify the Trustor/Borrower that (a) he is in default and (b) he has ten working days to:

- Submit the documents evidencing he has fully paid and/or complied with the guaranteed obligations;
- Present any document evidencing an extension; or
- Pay the total debt due.

If the Borrower/Trustor does not comply with the

foregoing, the Trustee will initiate the foreclosure process by proceeding to sell the properties under the following terms:

The initial sale price of the properties will be the commercial value determined by an expert appraiser selected by the First Beneficiary/Creditor;

b) The Trustee will then, based on instructions from the First Beneficiary, either: (a) hire a realtor selected by the First Beneficiary to broker the sale of the properties at the appraised value; or (b) hold a public auction to sell the properties in the manner described below;

If the First Beneficiary chooses to hire a realtor, the realtor will promote the sale of the collateral for at least 90 days. If the properties are not sold at the appraised value during this time, the First Beneficiary may instruct the Trustee and/or the realtor (as the case may be) to: (i) continue promoting the sale for up to four additional 90 day-periods, in each instance decreasing the appraised amount by 10%; and/or (ii) proceed with the auction;

If the First Beneficiary elects to hold an auction (either from the outset or subsequently if selling through a realtor was unsuccessful) the auction shall stipulate a floor price of 80% of the appraised value;

Should the properties not sell in the first auction, a second auction shall be held, at a price equal to 20% less than the price of the first auction;

Should the properties not sell in the second auction, a third auction shall be held, at a price equal to 20% less than the price of the second auction;

Should the properties not sell in the third auction, the Trustee shall act upon First Beneficiary’s [unilateral] instructions (which instructions could include, e.g., a request to transfer the property definitively to First Beneficiary or its assign in lieu of payment of the debt).

Despite the relatively quick and straight-forward process, “legal maneuvers” of recalcitrant borrowers can result in unforeseen delays and risks in the foreclosure process. One of the tactics most commonly employed by borrowers wishing to stall or avoid administrative foreclosure involves filing a lawsuit to enjoin the trustee from transferring title without a court order. Although in theory this should not be possible because the trust will stipulate that a court order is



MEXICO UPDATE



not necessary, in practice, trustees are very risk averse, so as soon as they are sued, then tend to “freeze up” and refuse to do anything further without a court order, thereby rendering the administrative foreclosure process inoperative. The legal argument of the borrower in these cases is often that the trustee transferring the property to a third party without the judge’s intervention is tantamount to depriving the Borrower of property rights without due process of law and is therefore unconstitutional.

These arguments, however, are not always successful and usually require that (a) the trustee has committed some sort of error in following the administrative foreclosure process outlined in the trust agreement or (b) the trust agreement does not obligate the trustee to notify the borrower of the default and give him an opportunity to respond by showing he is not in default.

Moreover, borrowers considering “crossing the line” and refusing to abide by the agreement can be subject to a claim for damages, attorney’s fees and costs for filing a frivolous lawsuit or acting in bad faith. Indeed, although employing the tactics above (or others) will surely result in prolonging the foreclosure process, in almost all cases it will not change the ultimate outcome (i.e., all the borrower is doing is delaying the inevitable and incurring in expenses in the meantime). In the end, then, borrowers choosing to fight foreclosure are doing so only with the goal of improving their negotiating position with the creditor, often with an eye towards forcing the lender to consider restructuring the debt or granting an extension or forbearance.

Despite the practical risks associated with foreclosing, if the Borrower is willing to proceed in good faith and abide by the terms of the guaranty trust agreement, then indeed the process should be a quick and expeditious one. Accordingly, guaranty trusts have become quite the norm, particularly for cross-border lenders.

Six months to three years is a reasonable time-frame to achieve foreclosure under a guaranty trust, depending on whether and how much the borrower fights and how effectively the process is managed by the trustee and creditor.

4. Foreclosure of a Mortgage

If the creditor has a mortgage and debtor defaults, then to foreclose (assuming the mortgage has been properly granted before a Notary Public and recorded before the Public

Registry of Real Estate Property) creditor must file a Special Mortgage Proceeding (*Juicio Especial Hipotecario*). Once creditor obtains a judgment, the collateral will be sold at a judicial auction pursuant to the procedure established in the applicable civil procedure code.

The special mortgage foreclosure proceeding (from filing until judicial sale is final) may take between one to five years to complete, depending on the actions or legal maneuvers employed by Borrower’s counsel.

B) The Pledge: an Additional Layer of Security

In addition to guarantee trusts and mortgages, many lenders are mandating that borrowers pledge their shares in the borrowing entity and/or the receivables/rents deriving from the collateral. The pledge may be granted to the creditor, a third party, or the same trustee holding the collateral under the guaranty trust. If the later approach is taken, in the event of a default, not only can the creditor proceed to administratively foreclose on the real property collateral, but he can also instruct the trustee to deliver the shares of the debtor company, thereby giving the creditor control over the debtor entity and preventing the previous decision-makers from challenging process.

In theory, the pledge guaranty offers the creditor significant additional security, but in practice, sometimes the creditor is faced with similar enforcement problems as those mentioned above (e.g., the borrower sues to enjoin the trustee from handing over the shares).

C) Eviction and Amparo²

After the collateral has been sold or awarded to the judgment creditor – either pursuant to the terms of the guaranty trust or the mortgage – the party who was awarded title might still have to sue to evict a third party such as a lessee or laborers in possession.

Further, in some instances, a debtor who has lost property will file a federal injunction called an “*amparo indirecto*” to stay the enforcement of the new owner’s title that arose out of the foreclosure process. That is, oftentimes debtors will lose the property either administratively (guaranty trust) or judicially (foreclosure trial, followed by judicial auction), and then still fight the case via an *amparo*, which may be filed to enjoin any State action alleged to violate a party’s civil rights. For example, in the case of the guaranty trust, the debtor may claim that the administrative foreclosure violated his right to due process, thereby



MEXICO UPDATE



forcing the creditor to pursue judicial foreclosure notwithstanding the trust agreement. On the other hand, in the case of a mortgage where a default judgment has been rendered based on defendant's failure to appear, the debtor may allege that he was not properly served, thereby nullifying the trial and requiring the Creditor to begin the process anew. In both instances, the *amparo* is typically filed when the creditor/new owner attempts to take possession.

D) Conclusions

Based on the foregoing, one can conclude that in theory Mexican law affords a relatively clear and expeditious foreclosure process, both under guaranty trust agreements and special mortgage foreclosure proceedings. However, in practice, a significant gap often exists between foreclosing in theory and in reality. Accordingly, the time and expense involved in foreclosure in Mexico will vary significantly from case-to-case and from debtor-to-debtor.

To help minimize the risks and unknowns associated with foreclosure in Mexico it is advisable to:

Retain qualified Mexican legal counsel with experience not only in preparing cross-border loan documents, security instruments and guaranties, but also in enforcing them;

Once the debtor has defaulted, consider all options before proceeding to foreclose, including restructuring the loan, granting Borrower a deferment or forbearance, or negotiating a settlement through which Borrower is given some sort of consideration for voluntarily "handing over the keys";

If foreclosure is inevitable, have a clearly mapped out legal strategy well in advance, taking into consideration possible moves by opposing counsel.

(1): Almost all trustees in Mexico are banks. They must be authorized as such by Mexico's Banking and Securities Commission.

(2): Under the Mexican Constitution and federal *amparo* law, a private party may bring two types of *amparo* suits to enjoin an official state act (or omission): an *amparo* appeal of a decision of a lower court (similar to a habeas corpus proceeding but not limited to cases in which the appellant is incarcerated or otherwise restrained of his liberty), which may be brought only after all other judicial or administrative remedies have been exhausted, called an *amparo directo*; or a claim brought at the federal trial court level to enjoin the activity of an individual or body acting under color of law claimed to have violated the plaintiff's individual rights (akin to a civil rights claim to enjoin state action), called an *amparo indirecto*.

Transnational Ground Freight Transportation Update

Ernesto Velarde Danache

On March 6, 2011, Mexico's government unveiled details of an agreement to be executed between Mexico and the United States to solve the transnational ground freight transportation issues, after 15 years of disputes and negotiations. Mexico's Ministry of Communication and Transportation and Ministry of Economy explained at a press conference that such agreement will be signed in May or June of this year and will allow direct entry of freight trucks to the entire territory of both countries.

The issue remained stalled until 2007 when both governments agreed on a temporary program that allowed with many restrictions a partial opening of the border concerning transnational ground freight transportation, which was cancelled by the United States Congress in 2009, when funds were suspended. Last year the two countries agreed to establish a new program to definitively resolve the issue which was announced on March 6, 2011.

The Mexican government officials stated that this fulfills the commitment announced this week by the presidents of Mexico and the United States to solve the problem of the trans-border freight transportation, based on the reciprocity, security and efficiency of the system.

The Mexican officials stated that the accreditation process for the companies will be divided in three stages.

The first one, "preoperative", which begins as of the application, will continue with the accreditation of vehicles and operators/drivers stage and will conclude with the temporary authorization.

The second "operative" stage will begin with a three month complete inspection period, which will be reduced in the fourth month of operations and will conclude when the companies accumulate 18 months of operations.

The third stage begins with the final/definite authorization after the 18 months of operation which is irrevocable.

The United States transporters must comply with the same procedures in Mexico.



MEXICO UPDATE

Amendments to Mexico's Health & Safety Standards

Rodrigo Baca



This year President Felipe Calderon has made several changes in Mexican health and safety standards. In view of the expected continued growth of the Mexican market, these amendments seek to ensure quality of imported products and to facilitate their import for Mexican consumers. This article addresses advantages and disadvantages that these new measures present for companies abroad, some of who may require significant adjustments in their short-term operations.

In the Competitiveness Report for 2010-2011 published by the World Economic Forum (WEF), Mexico's best score is its market size (ranked 12 out of 139 countries).¹ According to the United Nations Population Division, Mexico is the world's 11th most populated country and almost 55% of Mexicans are 24 years old or younger, a crucial statistic for retail sales. Retail sales are forecast for strong growth between 2009 and 2014 in food and beverage products, up by 71.0%;² over the counter pharmaceuticals, up by 75.2%;³ and consumer electronics, up by 50.8%.⁴ The amendments in safety standards here discussed are directly related to these sectors on the rise.

Since assuming office, Calderon has tackled trade barriers and overregulation in government offices. Looking at the WEF's report, one glaring weakness draws attention: the "inefficiency of public institutions", where Mexico is ranked 106 out of 133 countries.⁵ According to the report, the country suffers from overregulation in government proceedings. A significant milestone in the government's corresponding efforts to deregulate was the March 31, 2008 Executive Order announcing immediate and long term measures to eliminate, simplify, automate and enhance foreign trade and customs procedures.⁶ This served as a catalyst for more recent actions such as those here discussed.

These measures focus on increasing competitiveness by reducing several administrative burdens. According to a public address made by the President, the measures will save the private sector up to US\$2.7 billion in compliance and filing costs, which will translate into more economical products for the consumer. Also, the time and human resources saved by companies can be otherwise employed.

Amendments to Food and Beverage Labels

One of Mexico's leading current health concerns is better nutrition. The latest statistics from the Organization for Economic Cooperation and Development reveal that Mexico is the country with the highest overweight and obesity prevalence in the world, recently topping the United States. A remarkable 69.5% of Mexican adults are overweight.⁷ According to the World Health Organization, Mexico is the country with the most adults with hypercholesterolemia, high levels of cholesterol.⁸

Studies have shown that due to their unique metabolic rates, Mexicans (and Hispanics in general) are more prone to developing cardiovascular diseases caused by overweight and obesity.⁹ Experts agree that policies must be implemented at an institutional level to decrease the consumption of sodium and fats from processed foods.¹⁰

The new health and labeling standards on processed food to be imported or produced locally seek to tackle this problem. As of January 1, 2011, the labels of food and non-alcoholic beverage products must conform to the new standard NOM-051-SCFI/SSA1-2010. This Mexican Official Norm (or NOM, for its Spanish acronym) sets the minimum amount of information products consumed in Mexico must contain. This new NOM supersedes the previous NOM-051-SCFI-1994 issued in 1994 and addresses new additives and substances used in food products today that did not then exist.

Some of the information in the new labels for all packaged food and non-alcoholic beverages includes:

Nutrition Facts: The table of nutrition used to be voluntary for foods and beverages sold in Mexico. Now this important table becomes obligatory, except for smaller sized food products that may display a telephone number or website where this information is available. If a given product contains fat, the label must specify the amount of saturated fats, and if the product contains carbohydrates, the label must specify the amount of sugars. Mentioning

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



the amount of dietary fiber also becomes mandatory. The recommended daily values per nutrient vary in comparison to the previous NOM.

Ingredients: It will be mandatory to state all ingredients within a product and the percentage of each. A total of eight ingredients were added or modified within the NOM's list of generic names. All ingredients and additives that cause hypersensitivity, intolerance, or allergy must also be mentioned in the labels. The scope of the term "additive" was broadened to match today's food innovations.

Lot and Expiration: Lot numbers and expiration dates were already required by the previous NOM, however now this information must be preceded by a phrase or abbreviation (i.e. LOTE or lot in the case of lots and Cad. or Exp. in the case of expiration dates) or a reference in the label showing where this information appears in the package.

Complementary statements: Certain statements allowed to promote healthy products are now regulated. Before any product could contain phrases such as "healthy" or "natural", which could have been deceiving. The new standard contains requirements for a product to display these kinds of statements only when their accuracy has been verified.

Companies responsible for the preparation, packaging, importation, transportation, purchase, and sale of food and non-alcoholic beverages must verify that the labels conform to the new requirements. If customs, health, or consumer protection authorities find products that do not comply, the merchandise *could* be seized and fines could be imposed, among other sanctions.

Some company representatives have publicly stated that these measures will result in significant costs and delays, due to the time provided for the adjustment of their labels.¹¹ Changing a product's label will require developing new designs, reorganizing data, and the research behind the product's characteristics. Distributors also argue that large amounts of products will be unsellable, since they will not have time to clear them from inventory by January 2011.¹²

It is important for producers to comply with these new requirements by January 2011, otherwise there is the risk of not being able to import the products into Mexico, or of seizure from health authorities from stores and warehouses

once inside the country, in addition to imposing fines. **Extensions to comply with the new NOM may be obtained from the Ministry of the Economy granted on a case by case basis for one time only to those companies that can prove they have serious problems in meeting the stipulated deadline.**

Equivalence of Safety Standards for Electronic Goods

Article 906 of the North American Free Trade Agreement (NAFTA) covers compatibility and equivalence of safety standards. It states that the NAFTA Parties shall, to the greatest extent practicable, make compatible their respective standards-related measures, so as to facilitate trade in a good or service between them.¹³ Following on its NAFTA commitment to accept the safety standards of its North American trade partners, on August 17, 2010, the Ministry of Economy published an Executive Order that gives equal value to U.S. and Canadian certificates to comply with some Mexican Official Standards.

The Mexican NOMs that can be satisfied by U.S. and Canadian certificates of compliance are NOM-019-SCFI-1998 (safety of data processing equipment), NOM-016-SCFI-1993 (safety of office electronic devices), and NOM-001-SCFI-1993 (safety of household electronic devices). This measure will expedite the entry of these products into the Mexican market by acknowledging the validity of certificates issued by licensed US and Canadian certification bodies.

These actions will ease the flow of technology into Mexico. For instance, new electronic goods released for sale in the United States, would otherwise need an additional four months prior to their release in the Mexican market, due to the time required for the equivalent NOM authorization.

Sanitary Registries for Pharmaceuticals and Medical Equipment

Also on August 17, 2010, and once again in accordance with Article 906 of NAFTA, the Mexican President published amendments to Regulations for Medical Products (*Reglamento de Insumos para la Salud*) to allow that both pharmaceuticals and medical equipment previously authorized for sale in the U.S. or Canada may use that authorization to help obtain a Sanitary Registry in Mexico.



MEXICO UPDATE



Shortly thereafter, on October 26, 2010, the Ministry of Health published an Executive Order establishing that U.S. and Canadian requirements for the sale of medical equipment are of equal value to Mexican requirements to obtain a Sanitary Registry.

Sanitary Registry implies gathering information and documents from a medical product's producer, distributor, seller, exporter, and importer, as well as a great deal of data regarding the product itself. All pharmaceuticals and medical equipment sold in Mexico must go through this burdensome procedure. Now if the product has been approved for sale by U.S. or Canadian authorities, the authorization procedure in Mexico could be easier. Health authorities have announced that pharmaceuticals will also benefit from expedite Sanitary Registry through this kind of equivalence measures, starting with over-the-counter medication.¹⁴

It is also expected that Sanitary Registry renewals for pharmaceuticals (required every 5 years) could soon be accomplished electronically through the Ministry of Health's website.¹⁵ The Ministry of Health also announced that it will promote the use of third-party certifiers, which are private companies licensed by the government to oversee the Sanitary Registry process.¹⁶

Other deregulation measures not yet official, but addressed in a recent public speech by the President, and that also would promote the easier entry into Mexico of goods include: (a) the electronic sanitary registry of goods for animal consumption; (b) expedite authorizations for the sale of pharmaceuticals; (c) electronic processing of health, zoosanitary, and phytosanitary permits; and (d) Homologation of Eligible Product Registries.¹⁷

CONCLUSIONS

The presidency has stated it plans to continue its efforts of adjusting regulations for both producers and consumers. By pruning government procedures, the Mexican market becomes more accessible to investors. Now that those regulations directly related to these sectors have been streamlined, one could reasonably anticipate a wider window of opportunity to satisfy an expected rising demand.

Implementing these measures, Calderon fulfills an overdue campaign promise towards employing his country's workforce while trying to ensure it remains healthy.

Although complying with the new labeling requirements may be burdensome, companies should bear in mind that Article 906 of NAFTA also states that the Parties shall work jointly to enhance the level of safety and of protection of human, animal and plant life and health, the environment and consumers. The modernization of the nation's regulatory framework is hopefully another step towards improving Mexico's competitiveness and the wellbeing of its population.

(1) Global Competitiveness Report 2010-2011. World Economic Forum. Geneva, Switzerland, 2010.

(2) *Id.*, from US\$56.01 billion to US\$95.78 billion

(3) *Id.*, from US\$1.49 billion to US\$2.60 billion

(4) *Id.*, from US\$10.01 billion to US\$15.09 billion

(5) World Economic Forum, *loc. cit.*

(6) See Baca, Rodrigo, Rocking the Pendulum. ABA Section of International Law, International Trade Committee Newsletter Volume III, No. 2 (2009).

(7) OECD Factbook, Economic, Environmental, and Social Statistics, 2010.

(8) Age-standardized prevalences of overweight (kg/m²) and obesity (kg/m²) by country (2005). WHO Global Infobase.

(9) Barquera S, Durazo R, Luke A, Cooper R. Hypertension in Mexico and among Mexican-Americans: prevalence and treatment patterns. *International J Hypertension*, 2008

(10) Barquera, Simon, Salt-Consumption-Related Chronic Diseases in Latin America. Observatory on Chronic Noncommunicable Disease Policy prevalence and treatment patterns. Instituto Nacional de Salud Pública, 2009.

(11) Martínez, Verónica. Aclararán contenidos de alimentos y bebidas; temen empresas mayores costos para cumplir NOM a partir del 2011, Grupo Reforma, México City, April 6, 2010.

(12) *Id.*

(13) NAFTA, January 1, 1994, Mexico-Canada-U.S., Art. 906: Compatibility and Equivalence.

(14) Press release by COFEPRIS, August 17, 2010, "El Presidente Calderón anuncia simplificación de trámites en COFEPRIS", <http://www.cofepris.gob.mx/work/sites/cfp/resources/LocalContent/1613/28/Presidente170810.pdf>.

(15) Press release by COFEPRIS, October 7, 2010, "Se moderniza la COFEPRIS para apoyar la competitividad de las empresas", http://www.cofepris.gob.mx/work/sites/cfp/resources/LocalContent/846/1/MAT_Morelos.pdf.

(16) Press release by COFEPRIS, August 17, 2010.

(17) Press release Office of the President, August 17, 2010, "El Presidente Calderón en evento Menos trámite y mejor regulación para impulsar la competitividad" <http://www.presidencia.gob.mx/?DNA=85&page=1&Prensa=15154&Contenido=59426>.



MEXICO UPDATE



Review of June 2009 amendments to Mexico's Code of Commerce and General Law of Commercial Companies

Ángel Domínguez de Pedro

The latest amendments to Mexico's Federal Code of Commerce (the "**Code of Commerce**") and the Federal General Law of Commercial Companies ("**GLCC**") were published in the Federal Diario Oficial on June 2, 2009, and became effective the following day.

Useful tools for understanding the amendments are the Statement of Intent of the Parliamentary Group of the political party "*Partido Acción Nacional*" (the "**Statement of Intent**") and the corresponding Resolutions of the Commission of Economy (the "**Resolutions**").

Statement of Intent and Resolutions:

Pursuant to the Statement of Intent and the Resolutions, the purpose of the Amendments is to eliminate the need for registration of several procedures undertaken by commercial companies before the Public Registry of Commerce.¹ The amendments in fact reduce the acts that need to be registered, eliminating certain requirements to register even general and special powers-of-attorney as well as amendments to corporate charter documents.

II. Content and Scope of the Amendments:

II.A. Article 19 of the Code:

Under Article 19 of the Code of Commerce, commercial companies and ships are obliged to register in the Public Registry of Commerce, while merchants (individuals) only register if they choose to do so,² although they in fact become registered upon the registration of any document requiring registration.³

However, Article 21 of the Code of Commerce seems to contradict the discretionary registration of merchants provided under Article 19 by providing that "*There will be one commercial folio for each merchant or company...*"⁴ It would have been helpful to include within the Amendments, an amendment to such Article 21 to provide that there will be one electronic folio for each company and for each merchant who requests registration in the Public Registry of Commerce.⁵

As a result of the Amendments to Articles 19 and 21 sections V and XII, of the Code of Commerce and Article 194 of the GLCC, the latter regarding only stock corporations (*sociedad anónima*), which are specifically addressed below, the mandatory registration for commercial

companies in the Public Registry of Commerce will be limited to the following cases: (a) incorporation; (b) transformation; (c) mergers; (d) spin-offs; (e) dissolution; and (f) liquidation.

As to stock corporations, such as a *sociedad anónima* and a *sociedad en comandita por acciones*, (the latter only by its express regulation under the regime of a *sociedad anonima* as provided by Article 208 of the GLCC), as a result of the amendments, the minutes of extraordinary shareholders' meetings⁶ are no longer subject to registration in the Public Registry of Commerce, unless they adopt any act of transformation, merger, spin-off, dissolution, or liquidation.

For the remaining commercial companies as to which the GLCC does not specify which of its resolutions or partners' meetings must be registered in the Public Registry of Commerce, the general GLCC regulation for the acts of transformation, merger, spin-off, dissolution, or liquidation, and Articles 19 and 21 sections V and XII of the Code of Commerce, remain the criteria to determine which resolutions and meetings of owners must be registered in the Public Registry of Commerce.⁷

Several private commercial law compilations have considered and, wrongly reported in their texts, that Article 19 of the Code of Commerce was abrogated by section III of the Third Provisional Article of the now abolished Navigation Law, however, such provision only abrogated Article 19 of the Code of Commerce as to "... *all that contradicts this law...*". Therefore, Article 19 of the Code of Commerce was only abrogated for purposes of the Navigation Law, which regulates the registration of ships and other marine commercial acts before the National Maritime Public Registry. Although the obligation to record such matters before the Public Registry of Commerce is eliminated in view of the obligation to record them in the specialized sector registry, it is incorrect to consider Article 19 of the Code of Commerce to have been

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



abolished in general terms.⁸

In light of the above, it seems logical to believe that the amendments abrogate the mandatory registration of ships before the Public Registry of Commerce by virtue of the partial abrogation of Article 19 of the Code of Commerce, so that the effect of such article coincides with Article 21 of the Code of Commerce, which did not contemplate the existence of commercial folios for ships, even before the recent amendments.

II.B. Sections V, VII and XII of Article 21 of the Code of Commerce:

As mentioned, in accordance with the Statement of Intent and the Resolutions, the purpose of the amendments is to list clearly the acts that must be registered by merchants and commercial companies before the Public Registry of Commerce, which would appear to result in a specifically and comprehensively enumerated catalog of acts that may be registered.⁹

In such sense, the amendments to sections V, VII and XII of Article 21 of the Code of Commerce, as well as the amendments of article 19 of the Code of Commerce, which have already been analyzed, emphasize the limited nature of the acts that may be registered in the Public Registry of Commerce (with the exception of powers-of-attorney, whose registration, as commented below, is discretionary), having the following content:

For Section V, the concept “public writing” (*escrituras*) is replaced by “public instruments” (*instrumentos públicos*), in order to cover not only one, but all sorts of public instruments.¹⁰ Additionally, based on the Resolutions, the phrase “...regardless of its purpose or name...” was also deleted, based on its interpretation as if it was referring to the public instruments, as if such expression classified the public instruments, while it actually referred or considered the incorporated companies.¹¹ Further, the description of the acts that may be registered was modified to reflect the description of Article 19 of the Code of Commerce, which has been described above (incorporation, transformation, mergers, spin-offs, dissolution and liquidation of commercial companies).

For Section VII, the compulsory registration of general powers-of-attorney and appointments and revocations of managers, factors, clerks and representatives of any other

nature was eliminated, allowing the optional registration of such acts and their resignations in the Public Registry of Commerce.¹² As exposed in the Statement of Intent and the Resolutions, the purpose of the amendments is clearly to equalize the legal regimes of the commercial and civil powers-of-attorney, emphasizing the declarative nature of the registration in the Public Registry of Commerce¹³ and the fact that those individuals appearing as representatives by virtue of a power-of-attorney or appointment guarantee the effectiveness and validity of their representation before the persons that appointed them, their principals and their counterparties in agreements. However, the amendments do not take into consideration: (i) the difference between the powers-of-attorney and the organic representation system of commercial companies (by which the directors have implicit authority for the execution of the corporate purpose of the company by their appointment, being limited only by what is expressly established in law or in the corporate charter) that under Article 153 of the GLCC,¹⁴ was required to be registered in the Public Registry of Commerce;¹⁵ (ii) an amendment to Section I of Article 9 of the General Law of Negotiable Instruments and Credit Operations (*Ley General de Títulos y Operaciones de Crédito*) in order to remove the obligation to register in the Public Registry of Commerce the powers-of-attorney to execute negotiable instruments, as under the current wording of such article, those powers-of-attorney must be registered in the Public Registry of Commerce in order that they become effective; and (iii) the amendment to Article 237 of the GLCC in order to suppress the registration of the appointment of liquidators in the Public Registry of Commerce, as under the current wording of such article, the directors of commercial companies must remain responsible until the appointment of the liquidators is recorded in the Public Registry of Commerce.

Section XII was completely amended in order to include as acts that may be registered in the Public Registry of Commerce those strictly considered as amendments to the a corporate charter (that pursuant to the dominant doctrine are those listed in the first seven sections of article 6 of the GLCC, also identified as the personal elements of a commercial company, in contrast with the other elements there listed, which are identified as operational and functioning rules).¹⁶ Therefore, the following amendments require registration in the Public Registry of Commerce: (a)



MEXICO UPDATE



corporate name; (b) domicile; (c) corporate purpose; and (d) term;¹⁷ as well as the increase or decrease of the fixed portion of the capital stock.¹⁸ By virtue of the Amendments to Section XII of Article 21, and in accordance with the amendments to Article 194 of the GLCC that are addressed below, no other amendment to the corporate charter can be registered in the Public Registry of Commerce.

II.C. Article 177 of the GLCC:

Although the Amendments to Article 177 have no evident connection to the amendments of Article 19 and sections V, VII and XII of Article 21 of the Code of Commerce, they may be understood in terms of the purpose of the amendments provided in the Statement of Intent and in the Resolutions.¹⁹ Therefore, the amendments remove: (i) the obligation to deposit in the Public Registry of Commerce the report referred by Article 172 of the GLCC, the financial statements included in such report, its notes and the statutory auditor's report, but preserving, because it is considered fair publicity, the obligation to publish such documents in the "official gazette of the state in which the company has its corporate domicile or in the event of having offices in different states, in the [national] *Diario Oficial*",²⁰ and (ii) the obligation to publish and deposit in the Public Registry of Commerce such documents with the corresponding entry including the name of the opponents and the number of shares that they represent, if any opposition has been filed within the applicable terms against the approval of such documents by the corresponding general shareholders' meeting, so as to assure the right of opposition of shareholders in terms of articles 201 and 205 of the GLCC.

II.D. Article 194 of the GLCC:

The amendments to Article 194 of the GLCC (exclusive for stock corporations), in accordance with the amendments to sections V and XII of Article 21, remove the obligation to register general extraordinary shareholders' meetings in the Public Registry of Commerce. In this manner, in terms of the Statement of Intent, the legal certainty regarding the effectiveness and date of the general extraordinary shareholder's meetings minutes is left to its further formalization in a public instrument. Therefore, after the amendments, only those minutes of general extraordinary shareholders' meetings referring to the matters listed in

Articles 19 and in Sections V and XII of Article 21 of the Code of Commerce may be registered in the Public Registry of Commerce.

Entry into force of the amendments:

As mentioned above, the amendments entered into force on June 3, 2009 when they were published in the *Diario Oficial*. However, the amendments do not contain any provisional articles to regulate the requests for registration of documents done after such amendments, that are no longer subject to registration, and that were filed before the publication in the *Diario Oficial* and before the date on which the amendments became effective and which remain pending to be qualified for their registration. In such regard, it would be logical to consider that such requests must be accepted (subject to payment of the relevant registration fees and that the application otherwise of the amendments to such request would imply a retroactive application of the same).

(1) As expressed in the Third, Fourth, Sixth and Seventh considerations of the Resolutions, the Amendments respond to the following needs: (i) "... eliminating several procedures concerning the commercial companies' day-to-day activities, which registration does not provide legal certainty"; (ii) "... per the principle of legal economy, the commercial relationships – when executing commercial activities – should not be over-regulated regarding public registration, specially if such activities are already certified by public broker or notary public"; (iii) "... consolidating a modernization program enabling a trustworthy handling of the data bases, personnel's continuous training, the possibility of reducing the acts that may be registered, and the standardization of the registration and consulting procedures"; and (iv) "... that the regulation corresponds to reasonable purposes without resulting in higher costs or limitations to the investment and commerce. This perspective must not only lead to the elimination of bureaucratic procedures, but to analyze and update the legal frame in order to improve the procedures and avoid excesses or inefficiencies of the legal frame."

(2) The term "individuals" is unfortunate as the Supreme Court of Justice has ruled that legal-entities, may also be deemed as individuals regarding individual guaranties (*garantías individuales*).

(3) E.g. fixed asset or working capital loan agreements, floating liens (*prenda sin transmisión de posesión*), as provided by Articles 326 section IV and 366 of the General Law of Negotiable Instruments and Credit Operations.

(4) As amended by decree published in the OFG, May 29, 2000.



MEXICO UPDATE



- (5) Such amendment would be consistent with Article 2 of the GLCC regarding irregular companies.
- (6) As it was mandatory before the Amendments regarding the stock corporations (article 194 of the GLCC)
- (7) Which, except for the stock corporations, as abovementioned, was already happening before the Amendments for the rest of the GLCC's types of commercial companies in terms of the previous content of section V of Article 21 of the Code of Commerce.
- (8) Such regime its replicated by the Third Provisional Article of the Navigation and Maritime Commerce Law in force that reads "*Any provisions against this Law are hereby derogated*" and also regulates the registration of ships and marine commercial acts before the RPMN.
- (9) Which includes the events listed in Article 21 of the Code of Commerce and any others required under special laws, pursuant to Article 25 of the Code of Commerce.
- (10) Including not only notarial instruments (indentures and certifications) but also public instruments of Public Brokers (policies and certifications). However, as Article 21 of the Code of Commerce refers to the acts that may be subject to registration in the Public Registry of Commerce, the mere reference to the incorporation, transformation, mergers, spin-offs, dissolution and liquidation of commercial companies would be enough, as Article 25 of the Code of Commerce already establishes that: "*the acts that in accordance with this Code or other laws must be registered before the Public Registry of Commerce must be formalized in: I. Public instruments granted before notary public or public broker;...*"
- (11) In this regard the text before the Amendments to section V of Article 21 of the Code of Commerce read: "*The public deeds of incorporation of a commercial company, regardless of its purpose or name...*".
- (12) Without considering any difference between general and special powers-of-attorney or between managers, factors, clerks or representatives in general.
- (13) Such declarative effect, although not as clearly established as in civil regulations, may be inferred from Article 22 of the Code of Commerce that provides: "*The lack of registration of the acts requiring such registration, will cause that the legal effects are only produced between the parties executing such act, and will not affect third parties, but third parties may benefit from such acts...*". Notwithstanding, there are several cases for which registration has effectiveness implications, for example, the registration of the incorporation of regular commercial companies to obtain legal personality or for the effectiveness of the powers-of-attorney to execute negotiable instruments.
- (14) That after the Amendments and in accordance with Section VII of Article 21 of the Code of Commerce shall be construed as if registration before the PRC of the appointments were also optional.
- (15) Mexico's regular corporate praxis has rejected the system of implicit authorities provided under Article 10 of the GLCC, which as mentioned in the Resolutions, does not require registration before the PRC, and adopted a system of powers-of-attorney by which only the powers deemed convenient are granted to the directors of commercial companies.
- (16) As recognized in the fourth consideration of the Statement of Intent as follows "*... the publicity of commercial acts does not imply by itself an existence element, nor a requirement for its effectiveness – contrasting with the consent and object, as well as the requirements listed in article 6 of the General Law of Commercial Companies in its first seven sections-...*".
- (17) The Amendments did not include as an act subject to registration before the PRC the change of nationality referred in Section V of Article 182 of the GLCC, which in the author's opinion, results essential to evidence the change of the applicable law for a commercial company originally incorporated under the GLCC, especially after considering that under article 251 of the GLCC, foreign companies must register in order regularly to be able to conduct business within Mexico.
- (18) Which solves endless doctrinal and practical disagreements of whether increases and decreases of the variable portion of the capital stock must be registered.
- (19) The Resolutions establish that the Amendments to GLCC Article 177 result from the understanding that "*all the companies' acts are created outside the registry and their registration before the Commerce Registry may not improve their validity, as the partners and third parties may still claim its nullity in terms of the GLCC, without any restriction*". In this regard, the Resolutions again emphasize the declarative effects of registration before the PRC, opinion that, as a general rule, the author shares (except, as mentioned, for certain acts for which registration implies effectiveness) and, on the other hand, emphasizes the partners' and shareholders' right to claim nullity of the company's acts, on which the author agrees, but remarks that: (i) the fact that under Article 2 of the GLCC when establishing that "*...Except for the case described in the following article, no registered-company may be declared null*", not all of the company's acts are created outside the registry and it is not completely accurate that the registration before the PRC never gives validity to them (since in such event the nullity of the commercial company may not be claimed); and (iii) the difficult endeavor of construing the nullity system contained in the GLCC (not considered by the Resolutions).
- (20) In accordance with the aforementioned, it is reasonable to review this obligation within the scope of the Amendments and the consequences of its breach, since the Mexican corporate praxis has dismissed this practice due to high costs of such publications.



MEXICO UPDATE



Setting aside an Arbitral Award: A broad interpretation of UNCITRAL model law article (34)(2)(a)(iii)

Juan Carlos Guerrero Valle

Mexico adopted the International Commercial Arbitration Model Law (the “**Model Law**”) as of 1993 and introduced it as a special chapter in the Code of Commerce (“**CC**”). Thus, article 34, paragraph 2, subparagraph a), indent iii of the Model Law was translated into article 1457 CC, which establishes the causes for which an arbitral award may be set aside.

Article 1457 CC contemplates a limited list of grounds for setting of arbitral awards aside, taken *verbatim* from the original article 34 of the Model Law, since the Working Group considered that it was the best manner to achieve the efficiency of arbitral awards; that is by limiting the intervention of judges exclusively to the causes contained in the Model Law and then reproduced in the CC.

Among the grounds of Model Law article 34 and the corresponding CC article, the one appearing in paragraph 2, subparagraph a), indent iii, expressly provides that the arbitral award may be set aside if it is demonstrated that “*the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or **contains decisions on matters beyond the scope of the submission to arbitration**, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside* (emphasis added).”

A case heard before Mexican Federal Tribunals, (RC. 23/2009/13th Collegiate Tribunal in Civil Matters in Mexico City) arose from an arbitral procedure conducted under the Rules of Mexico City’s National Chamber of Commerce (the “**Rules**”), where the sole arbitrator issued a definitive award, addressing several claims raised during the arbitration procedure. Subsequently, at the request of a clarification by one of the parties, the sole arbitrator issued an additional award, where he modified the original award, dealing in the latter with other claims raised during the procedure, that annulled several punitive holdings of the original award.

The party contesting the content of the additional award moved to set aside the award, claiming that additional awards can only deal with the claims raised during the procedure but omitted in the final award (correction of an omission), but in no manner can the additional award

correct an excess of the claims contained in the original award (correction by excess).

Thus the controversy was centered on the analysis of the possibility of setting aside an additional award that revoked the original award, on the basis that the additional award cannot revoke a previous award, but rather may only complement it, due to the omission of the study of claims raised in the procedure, but omitted in the final award.

Considering the limited number of grounds for setting an award aside contemplated in the Model Law, the argument to sustain the nullity of the award was centered on deciding whether the additional award issued in the dispute under comment conformed with the concept of an additional award as contemplated in article 33, paragraph 3) of the Model Law, that is article 1451 CC and/or article 44 of the Rules.

If the additional award issued in this dispute was not in conformity with the concept of an additional award as contemplated under the three norms mentioned above, the conclusion ought to be that [the Court] was in the presence of an award that contained decisions that exceeded the terms of the original award, since it does not fit the definition the additional award as contemplated in the Rules, which were chosen by the parties to govern the arbitral procedure.

After following the procedure of the Motion for setting aside an arbitral award, there were two important holdings by the Mexican Court.

First. Determining if under the article that contemplates the possibility of setting an arbitral award aside because it refers to a controversy not foreseen under the submission to arbitrate or contains decisions that exceed the terms of said agreement, it is possible to set the additional award aside if the same does not conform with the regulations of the rules that dictated its formation or exceed the terms of

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



the rules that control its existence, that is to say, the additional award issued outside the parameters of the arbitration rules applicable is a ground for setting it aside, by considering that there is a decision that **exceeds the terms of the agreement to arbitrate**.

Second. Determining that the review of the additional award to verify if the same exceeds the terms of the arbitral award, because it was issued outside the parameters established in the arbitration rules implies a review of the procedural regulations of the Arbitration Rules under which the parties agreed to the issuance of the additional award, since the actions by the arbitrator are subject to the agreed procedure, and thus it is a part of the agreement to arbitrate; not in the substantive part but in procedure.

In this manner, for the judge to be able to verify whether the additional award was issued under the procedural provisions of the Rules, it is necessary for the judge formally to analyze the contents of the additional award, since only in that manner will the judge be in a position to determine if it conforms to the provision of correcting an omission incurred in the definitive award within the terms thereof, as expressly requested by the applicable norms.

Only thus, the Court concluded, would it be possible to determine if the additional award conformed to the provisions of the rules, which does not constitute a study of the substance, since it does not undertake the review of the legality of the substance's decision.

The foregoing conclusions no doubt represent a novelty in the development of arbitration practice in Mexico. They open the possibility for the motion for setting aside arbitral awards under the pretext of analyzing whether the procedural rules were complied with. Therefore it is possible that the judges before whom the execution of the arbitral award is sought may end up setting them aside under a formal analysis, that necessarily reviews indirect matters of substance that affect the final result of the award.

Moreover, these conclusions directly affect the recognition and execution of international arbitral awards, due to the parallelism between the causes for setting aside an award as contemplated in the Model Law and the grounds for denial of recognition and execution of an award contemplated in article V of the New York Convention.

Update on Mexico Committee City Program Coordinator Initiative

Mexico Committee Vice-Chair Carlos A. Sugich coordinates the Mexico Committee's City Program Coordinator Initiative. Recognizing that many Mexico Committee members are concentrated in key cities, that such members benefit from informal opportunities to gather, and that persons of interest from time to time visit those cities, the goal of the initiative is to put together occasional events, seminars, brown bag lunches and/or informal gatherings in different cities in both the U.S. and Mexico to discuss general Mexico related topics and help to promote networking among members and people in the industry and to increase the awareness and membership of the Mexico Committee.

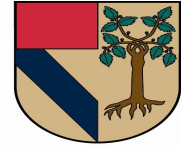
Designated city coordinators include:

- El Paso - Luis Armendariz
- Los Angeles - Javier Gutierrez
- Mexico City - Joaquín Gustavo Rodríguez Zarza
- Monterey - Ernesto Velarde-Danache, Carlos Velazquez
- New York City - John Rogers
- Phoenix & Tucson - Carlos A. Sugich
- San Diego - John McNeece
- Washington - Marco Tulio Montañés-Rumayor, Les Glick, Stuart Shroff

Recent events have included lunch in Los Angeles with a member of the upper chamber of Mexico's Federal Electoral Court, and a gathering in Mexico City with Ireland's ambassador to Mexico. Often such events are convened in cooperation with other bar organizations.



MEXICO UPDATE



UNIVERSIDAD
PANAMERICANA
Campus Guadalajara

Editorial: About the Rule of Law, literature and other circumstances

Alonso González-Villalobos

Some voices before our time—Ortega y Gasset being a leading example—have eloquently affirmed the need to understand *circumstances*, when endeavoring in the fascinating path of unveiling *human behavior*.

According to this line of thought, in order to properly judge the merits of an action, it is necessary to understand the social setting in which it was produced: stealing bread must not be equally punished when theft stems out of famine, for instance. To cite an example extrapolated from Victor Hugo's *Les Misérables*: Instead of committing Valjean, Javert ought to have just given him a warning.

Contextualization of events is indeed part of modern criminal law in most legal systems. And while, with Roxin, we will never support the idea of criminalizing *the person* as opposed to *the fact*, it is undeniable that human actions do not occur in isolation. There are *circumstances* that explain them.

The notion of *circumstances* is often reduced, however, to the aggregate of events that occur in the external world; that in which any given individual, any given society, is not more than a mere spectator – if anything at all.

This is quite a comfortable solution for those who traditionally blame it on the other, on the status quo, on the natural deflection of the social thread. Crime, injustice, want, they all happen because that's how things are, such voices would say.

The creation of a set of rules in which to orderly live together is one circumstance that needs be supported from the inside out, while the decision of each individual to abide by them is clearly an internal act that has consequences in the external reality of any such decision maker.

In other words, living in an environment that respect certain rules is an external circumstance that survives solely because an internal decision was made to that effect by the members of such environment.

Any given society may stall for a moment and then choose to follow a different road, one in which the slow but steady construction of newer social dynamics may occur.

Such an undertaking requires the conjunction of many factors. Public and private actors are equally responsible for its failure or its success. The easy part is to craft the legal network. The hardest part is to transform social conduct so that it adapts to that network.

In this task, education reveals itself as the iconic element. Education at home, education at school, education at work. Technical education just as much as ethical education. Both of them equally important.

Human rights defenders coined the term *affirmative action* to refer to the specific approach that must be used when striving for the enforcement of certain fundamental rights (for example, gender equality). *Mutatis mutandi*, we may very well say that the rule of law, the empire of the norm, cannot be achieved without the affirmative *decision* of the human mind; and it is hard to see where, if not upon an ever stronger internal aspiration for transcendental social values (justice, equality, fairness, transparency), such a decision may be grounded.

To a certain extent—many might argue, myself included—any such aspiration is naturally found in the inner most regions of the human soul, regardless of ethnicity, religion, gender, and other accidental factors. However, it cannot be denied that the environmental elements in which a person is born, grows up and is educated, radically affect such a person's inner structure. Here we find the place where education plays its crucial role.

Our country is currently facing some of its most challenging times. If there is anything that urgently needs to be done, it is to contribute to the creation and consolidation of a true environment in which the rule of law is observed by everyone.

For that to happen, changes in the system as well as in the human operator of that system are equally required.

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



We certainly need a renewed system of Law; one that is proud enough to retain our most valuable institutions and ideas, but is just as wise to reach out, transform itself, and open up to other realities.

The structural reforms that have taken place in the last few years, for example, in the field of criminal justice, are a *huge* step in that direction. True, implementing the new system is no easy task. But building one of the largest water dams in the continent wasn't either. Education; again. Willingness to learn, courage to change.

The poisoned violence of certain places is not helping either. Education, one more time, and over again. Technical education that contributes in the creation of economic conditions that allow for personal and family wellbeing. Ethical education towards the construction of a social structure that rewards honesty and sanctions corruption.

Corruption. The multi-headed monster, rooted in just as many feet. To defeat it, the economy must be strengthened--salaries must be raised, social benefits improved--just as much as its social condemnation must be reinforced dramatically, but, just a importantly, whatever efforts necessary must be taken so that the law really and fully applies to all. By doing so, impunity is also undermined.

As it is clear, no structural change can occur if the human element is not renewed, empowered, encouraged. The versed reader may find this nothing more than a new construction of a common place; but it is never too much, when it comes down to stressing the infinite ability of the human mind to reinvent itself.

And that is exactly what is required if any institutional transformation is to ever work at all: that its operators (judges, teachers, mechanics, farmers, policemen, doctors, students, taxi drivers and every single one else) believe that it is possible to think and live differently, and start acting accordingly.

This is one circumstance that we can and must control.

Mutatis mutandi, again: Javert never thought it possible to act differently, to think differently, to change himself; he thus succumbed to his irreversible fate.

* * *

The *Rule of Law Initiative* of the American Bar Association (ABA ROLI) has recently started operations in Mexico, with the objective of accompanying Law Schools and Bar Associations, amongst others, in their constant efforts to improve educational and collegial standards.

In its task, ABA ROLI has already initiated by contacting a certain group of representatives from the Mexican academic and professional sectors, who have generously accepted the invitation to set up and give life to a standing Working Group, which will guide, advice and accompany ABA ROLI's work in the field.

The first two actions will be the deployment of two ABA ROLI's paramount tools: the Legal Education Reform Index, and the Legal Profession Reform Index. As it may be known, such instruments aim is to provide a qualitative analysis of the situation of any given jurisdiction, as compared to internationally recognized standards. But the work will not stop there. With the results in hand, ABA ROLI will then focus on proposing a Guide of Action, in both sectors (legal education and legal profession), to be presented to the relevant stakeholders.

Along with that, and under the constant advice of the Working Group, ABA ROLI will organize and conduct various training workshops in the field of criminal procedural law, directed to law school professors and members of bar associations, whose aim is to assist in the process of properly implementing the criminal accusatorial system recently adopted at the constitutional level.

Education, key word in the constant improvement of existing realities. We believe that ABA ROLI's work contributes in such an effort in decisive manner, albeit naturally limited in scope. I am proud to be a part of it.

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



Editorial: Proposed Labor Reform in Mexico: It Cannot Wait *Ernesto Velarde Danache*

Lawyers from any country must be permanently open to receive updates and continuing legal education about new developments within their jurisdiction. Mexico is no exception to this rule. Legislative changes in Mexico occur quite frequently. Attorneys not specialized in a particular subject of law may find it quite difficult to stay abreast of the myriad of changes in Mexico's legal framework as legislators, other politicians and government officials have a perennial and voracious appetite for excessive bureaucracy, red tape and regulatory intervention in the economic and social life of the Mexican people.

A universal aphorism asserts that "the exception confirms the rule". When it comes to Mexico, the exception to the rule of constant, churning reform, without regard to frequency, need or purpose, is the Federal Labor Law. The Federal Labor Law came into effect exactly 40 years ago. During its long life, it has not undergone any substantial amendment. When drafted and subsequently adopted, it had the well-being of the Mexican labor force as a priority. However, it imposes unbearable burdens, economic and administrative, on the ability of an employer to hire, discipline or dismiss a Mexican worker, even those not performing according to reasonable expectations or no longer needed as a result of a sudden decrease in production requirements. This, in addition to many other restrictions, makes sound management of a company and its overhead a complicated and, indeed, titanic task. Conscientious Mexican and foreign investors, when performing serious feasibility and due diligence studies to decide where to locate their operations, cannot disregard or neglect the applicable framework for labor and employment matters. To those performing this exercise in Mexico and even to informed observers abroad, it has become obvious that the current labor regime in Mexico must be reformed to modernize it and to update it to meet increasing global competition.

A number of attempts to consider reform of the Federal Labor Law have proven unsuccessful in the past. Generally speaking, federal representatives and most of the Mexican political parties have been reluctant to engage in the serious discussions required to present for legislative consideration a serious, comprehensive reform that would result in the

creation of an acceptable legal framework to regulate employer/employee relations. Most politicians have been unwilling to run the risk and political cost inherently associated with originating or sponsoring a legislative bill that would necessarily limit rights of constituents.

Happening Right Now (Or Soon)

However, the legislative group of the National Action Party, of which President Calderon is a member, has formulated a bill. Although timid and not meeting the expectations of many, it is at least a first step. Asserted to have been discussed and agreed by the leading union and management organizations, non-governmental organizations, political parties and action groups, the current proposal is the first in the subject matter in more than forty years with good prospects of adoption. The bill is said to be set for the legislative agenda and therefore to be discussed in the current legislative session.

Highlights of the contemplated reform include:

- Trial/probationary period from one to six months.
- Training period from three to six months.
- Hourly shifts allowed and paid according to hours worked and not per day.
- Promotion based on productivity and not seniority.
- Limitation on back salaries to six months and no longer indefinite. A 2% interest rate would apply after six months on non-liquidated amounts if an employee/plaintiff prevails.
- No mandatory reinstatement for employees with less than three years on the job.
- Prohibition of employer right to request female employees of proof of no pregnancy as a condition of new or continued employment.

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



MEXICO UPDATE



- Tele-work from home or other places using electronic means would be allowed.
- Sanctions for sexual harassment.
- Hiring of those under 14 years of age would typically be a crime.
- Use of technological equipment and data would be allowed as evidence in labor trials.
- Unions would be obligated to disclose financial data to their members.
- The obligation on employers to deduct union dues from the payroll would be eliminated.

CONCLUSIONS

At times, when feeling less optimistic and often when remembering how in previous occasions political representatives have missed the opportunity to design and implement a real change in the legal system to make it more competitive, or easier for foreign investment to flow, or allow for a better understanding of it, or facilitate compliance or a combination of two or all of these elements, I fear that if the bill becomes law, as Mexico's Secretary of Labor recently anticipated, it will not be without it having been mutilated to the point of rendering it difficult to see the original proposal, notwithstanding the achievement of widespread consensus on the original proposal. Oh well! We may move, although at a snail's pace when others are running

Mexico City Gathering with Ambassador of Ireland to Mexico

The Mexico Committee of the American Bar Association's International Law Section (ABA), in collaboration with the Barra Mexicana, Colegio de Abogados (BMA), invited lawyers with an interest in foreign affairs matters, to attend a breakfast on March 8, 2011 in Mexico City in which His Excellency Eamon Hickey, Ambassador of the Republic of Ireland to Mexico, exchanged points of view among those present, on the topic "International Relations and Ireland".

Luis A. Madrigal Pereyra, President of the BMA; Gerardo Nieto Martínez, President of the Asociación Nacional de Abogados de Empresa (ANADE); Oscar Cruz Barney, President of the Ilustre y Nacional Colegio de Abogados de

México (INCAM); Luis U. Pérez Delgado, Representative of the International Association of Young Lawyers (AIJA) in Mexico; and Alberto Román Palencia, President of the Mexican Committee of the Union International des Avocats (UIA), joined the breakfast.

Mexico Committee members coordinating the event included Joaquín Rodríguez, Ambassador in the ABA's International Law Section Membership Country Representative Program (Mexico), Mexico Committee Vice Chair Francisco Cortina, also Liaison of BMA with ABA, and Mexico committee co-chair Juan Carlos Velázquez de León.

Mayre Rasmussen Award for the Advancement of Women in International Law: Carol M. Mates

The International Law Section presents this award periodically to individuals who have achieved professional excellence in international law, encouraged women to engage in international law careers, enabled women lawyers to attain international job positions from which they were excluded historically, or advanced opportunities for women in international law. The Section has selected Mexico Committee member Carol M. Mates as this year's recipient of the Mayre Rasmussen Award for the Advancement of Women in International Law. Ms. Mates was the Principal Council in the Legal Department of the International Finance Corporation (IFC) and is a recognized expert in international project finance in developed countries. Ms. Mates is active in the Section including the Women's Interest Network and Seasoned Lawyers Interest Network and has mentored a number of current Section leaders. Ms. Mates will accept her award in person at the WIN Reception on Tuesday, April 5 during the 2011 Section Spring Meeting Section at the Hyatt Regency Washington on Capitol Hill.

DISCLAIMER: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication made available solely for informational purposes and should not be considered legal advice. The opinions and comments in MEXICO UPDATE are those of its contributors and do not necessarily reflect any opinion of the ABA, their respective firms or the editors.



ABA Section of
International Law
Your Gateway to International Practice



ABA • Section of International Law • Mexico Law Committee



UNIVERSIDAD
PANAMERICANA
Campus Guadalajara

MEXICO UPDATE

American Bar Association

Section of International Law,

Mexico Committee

WEBSITE:

[http://apps.americanbar.org/
dch/committee.cfm?
com=IC845000](http://apps.americanbar.org/dch/committee.cfm?com=IC845000)

The Mexico Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Mexico and Mexican law, who are fellow ABA members.

The Mexico Committee welcomes any suggestions, ideas or contributions to enhance this occasional publication. The next submittal deadline for contributions is Friday, April 29, 2011.

Mexico Committee's current projects:

- The Mexico Committee maintains its website with current content on its activities, focused links for research on Mexican law, and relevant information on emerging developments of Mexican law
- The Mexico Committee proposes, organizes, and co-sponsors programs at the International Law Section's spring and fall meetings, as well as stand alone programs, brown bag lunches for members in key cities, and teleconferences on topics of Mexican law
- The Mexico Committee contributes to the Year in Review issue of THE INTERNATIONAL LAWYER
- The Mexico Committee has a working group on Mexico's emerging Criminal Procedure Reform
- The Mexico Committee has a working group on Competition Law

Editorial Committee:

Mexico Committee

- Patrick Del Duca
- Alejandro Suárez
- Juan Carlos Velázquez de León Obregón

Facultad de Derecho, Universidad Panamericana, Guadalajara Campus

- Ana Patricia Esquer Machado
- Rodrigo Soto Morales
- Ricardo Valencia