

THE LEGAL FRAMEWORK OF COMMERCIAL BUSINESS TRANSACTIONS IN MEXICO: A GENERAL OVERVIEW

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I. INTRODUCTION

During the last six years, Mexico's economic and legal environment has changed rapidly and profoundly. Among other important developments, the Mexican government has adopted a new industrial and commercial policy that is designed to create balanced industrial development, an increasing numbers of jobs for Mexican citizens, and a strong export sector. The government hopes to attain these goals by deregulating the economy, actively promoting exports, and encouraging growth in the domestic market.

Although some parts of this program affect the economy as a whole, deregulation efforts have been aimed primarily at the fundamental prerequisites of industrial growth, such as communications, transportation, oil, manufacturing, electricity, and industrial property.¹ Many "deregulation" programs, however, actually impose increased regulation. These programs have been enacted in sectors of the economy where conflict would likely retard economic growth, in the absence of a regulatory scheme.

Within this context, a brief discussion of the current state of Mexican law

1. Deborah Riner, *What the Numbers Tell Us: Growing Confidence in the Mexican Economy*, BUS. MEX., Sp. Ed. 1992, at 63.

and governmental policy may prove useful to the U.S. entrepreneurs and attorneys who will attempt to conduct business in Mexico. The purpose of this article is therefore to highlight and explain aspects of Mexican business law that may be surprising or alarming to foreign entrepreneurs in Mexico.

II. COMMERCIAL TRANSACTIONS

A. Background

The Mexican economy expanded dynamically during the 1950's and 1960's, at a rate that far outstripped the growth of the other Latin American nations.² Beginning in 1968, however, the rate of Mexican economic expansion slowed dramatically as populism became the guide for government decision-making.³ President Luis Echeverría (1970 - 1976) identified a few key governmental problems (legitimacy, consensus, injustice) and attempted to solve them.⁴ The economy's performance was secondary in Echeverría's priorities, and Mexico's economic slowdown continued as a result.⁵

In 1977, President José Lopez Portillo (1976 - 1982) implemented a financial recovery program that initially appeared to stimulate the economy.⁶ After the discovery of vast oil reserves in Mexico during the late 1970's, however, the economy became dependent on the volatile petroleum market, and the capital flight and decline in revenues that accompanied the 1981 collapse of oil prices destroyed the modest recovery that had been achieved.⁷

In 1982, Mexico requested a moratorium on payment of its foreign debt, and nationalized its banks when this request was refused.⁸ The disastrous results of the ensuing financial crisis led President Miguel de la Madrid (1982 - 1988)

2. See ROBERTO NEWELL & LUIS RUBIO, MEXICO'S DILEMMA: THE POLITICAL ORIGINS OF ECONOMIC CRISIS 94-115 (1984).

3. With the inauguration of Echeverría as President in December of 1970, Mexico's politics moved to the left in both "rhetoric and fact." *Id.* at 197.

4. *See id.* at 107-115.

5. *Id.* at 197.

6. *See id.* at 211-214.

7. *Id.* at 223.

8. *Id.* at 225.

to attempt to create a foundation for stable economic growth.⁹ De la Madrid began to shift Mexico's export profile from petroleum toward manufactured goods, and from protectionism towards free trade, thereby laying the groundwork for Mexico's participation in the North American Free Trade Agreement (NAFTA).¹⁰

Under President Carlos Salinas de Gortari (1988-1994), the Mexican economy has again begun to grow steadily, and experts predict that this growth will last beyond Salinas' term of office.¹¹ In the realm of international trade, the Salinas Administration went far beyond tariff cuts by proposing that Mexico join the U.S. and Canada to create a free trade zone, and by agreeing to change Mexican economic policy radically in order to do so.¹²

Mexico is currently America's third-largest trading partner.¹³ Since 1985, Mexico has reduced its average tariff level to nine percent, which is only double that of the U.S. and only moderately higher than that of Canada.¹⁴ Mexico has also drastically reduced its import licensing requirements, thereby enabling trade between the two countries to continue to increase.¹⁵

9. Rosemary Williams, *Has Mexico Kept the Promise of 1984?: A Look at Foreign Investment Under Mexico's Recent Guidelines*, 23 TEX. INT'L L.J. 417, 422 (1988).

10. See generally *North American Free Trade and the Non-economic Agenda: Hearings Before the Comm. on Foreign Affairs Subcomm. on Int'l Econ. Policy and Trade Subcomm. on W. Hemisphere Affairs of the Committee on Foreign Affairs, U.S. House of Representatives*, 102nd Cong. 1st Session 30 (1991) (statement of M. Delal Baer, Ph.D., Senior Fellow and Director, Mex. Project Center for Strategic and Int'l Studies); Lindajoy Fenley, *NAFTA Talks Advance in Mexico*, BUS. MEX., Dec. 1991, at 30.

11. See Nancy J. Perry, *What's Powering Mexico's Success*, FORTUNE, Feb. 10, 1992. See generally PETER MORICI, *TRADE TALKS WITH MEXICO: A TIME FOR REALISM* 15-32 (1991); SIDNEY WEINTRAUB, *TRANSFORMING THE MEXICAN ECONOMY: THE SALINAS SEXENIO* (1990).

12. MORICI, *supra* note 11, at 1.

13. Hope H. Camp, Jr., *Binding Arbitration: A Preferred Alternative for Resolving Commercial Disputes Between Mexican and U.S. Businessmen*, 22 ST. MARY'S L.J. 717, 719 (1991).

14. *Id.*

15. *Id.* See also Riser, *supra* note 1, at 62.

B. *The International Setting*

1. Mexican Accession to the General Agreement on Tariffs and Trade

As one of its first steps toward more active participation in the world marketplace, Mexico signed and adopted the General Agreement on Tariffs and Trade (GATT) on July 25, 1986.¹⁶ The Mexican Senate ratified the GATT later that year, and the Mexican Adhesion Protocol was published on November 26, 1986 in the *Diario Oficial*, the journal in which Mexico publishes its official statutes and decrees.¹⁷ As a result, the countries with which Mexico trades now have the benefits of the uniform rules, procedures, and other trade regulation mechanisms provided in the GATT.

2. Regional Trade Pacts: The North American Free Trade Agreement

In April 1985, the Mexican Minister of Trade, Héctor Hernandez, announced Mexico's intention to negotiate a trade agreement with the United States.¹⁸ After a series of meetings with U.S. Trade Representative William Brock, Mexico and the U.S. signed a Framework Agreement in 1987, in which the two nations agreed on: (1) the need to eliminate non-tariff barriers to trade; (2) the role that the GATT should play in the countries' trade relationship; and (3) the need for commerce in the development of the U.S.-Mexico border region.¹⁹

An Understanding on Trade and Investment (Understanding), signed in 1989, superseded the 1987 Framework Agreement.²⁰ This Understanding

16. Eduardo Siqueiros, *Legal Framework for the Sale of Goods into Mexico*, 12 Hous. J. INT'L L. 291, 292 (1990), citing General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. [hereinafter GATT].

17. *Información Básica Sobre el GATT y el Desarrollo Industrial y Comercial de México*, DEL SENADO, No. 55 (1985) (explaining the advantages of participation in the GATT).

18. See generally R. Sandoval, *Mexico's Path Towards the Free Trade Agreement with the U.S.*, 23 INTER-AMERICAN L. REV. 133 (1991).

19. *Id.* at 137-139, citing Understanding Between the Government of the United States of America and the Government of the United Mexican States Concerning a Framework of Principles and Procedures for Consultations Regarding Trade and Investment Relations, Nov. 6, 1987, U.S.-Mex., 27 I.L.M. 439 (1988).

20. Alejandro Ogazrio R.E. and Leonel Perzanieto Castro, *Mexico-United States Relations: Economic Integration and Foreign Investment*, 12 Hous. J. INT'L L. 223, 226-27 (1990).

furthered the gradual process toward free trade between the two countries. While the 1987 Agreement provided only general directives, the 1989 Understanding obligated both countries to take concrete steps toward reducing barriers to importation.²¹

The 1989 Understanding also prompted Mexico and the U.S. to begin negotiations for a comprehensive trade agreement. Shortly thereafter, Canada expressed its willingness to join these negotiations.²² The talks resulted in the proposed North American Free Trade Agreement (NAFTA), which must still be ratified by the Mexican, Canadian, and Mexican legislatures.²³ NAFTA is a major step toward eliminating all trade barriers among the North American nations, and Mexico has substantially amended much of its international trade law in order to comply with NAFTA's requirements.

C. *The Public Legal Structure for Selling Goods in Mexico*

An entrepreneur deciding whether to sell goods in Mexico should bear in mind that sales of different commodities are governed by different rules.²⁴ "Specialized knowledge helps to avoid the risks of being driven out of the Mexican market or of becoming involved in prolonged litigation . . . different laws and regulations apply to sales to Mexican governmental agencies, to state-owned enterprises,²⁵ and to the Mexican private sector."²⁶

21. *Id.*

22. *Id.*

23. See OFFICE OF THE U.S. TRADE REPRESENTATIVE, OVERVIEW: THE NORTH AMERICAN FREE TRADE AGREEMENT (Aug. 1992) [hereinafter OVERVIEW].

24. For example, with respect to products subject to sanitary regulation, *i.e.*, pesticides, tobacco, food commodities, special rules apply regardless of the nationality of the seller. There has been some deregulation of the health sector, however, as well as of enterprises concerned with food processing, beverages, beauty and cleaning products, and tobacco. These enterprises are no longer required to obtain a sanitary license. Reforms to the General Health Law, *Diario Oficial de la Federacion* (D.O.), June 6, 1991.

25. The Mexican Government is still privatizing a wide range of previously state-run enterprises. By promoting competition and a stronger role for the private sector, privatization has injected new aggressiveness into the domestic economy. To date, over seventy-five percent of the more than 1,150 enterprises owned by the government in 1982 have been or are in the process of being disposed of by the government. Even more impressive than the number of entities sold is their net worth. Outstanding examples of previously state-owned enterprises that are now in private hands are the banks, the two large commercial airlines, Aeroméxico and Mexicana, and the telephone monopoly, Telmex. See Laura Carlsen, *Changing Hands: Mexico's Privatization Program Proceeds in the*

1. Basic Governmental Organization of Public Entities

Under Mexican law, the Executive branch is in charge of the federal public administration, and is composed of two types of agencies: centralized and parastatal.²⁷ The centralized entities are the agencies charged with the actual administration of the government. Parastatal entities, on the other hand, are decentralized organs, public enterprises, trust funds, and other legal entities owned or controlled by the Mexican government.²⁸ Parastatal bodies perform several of the federal government's basic functions and are the instruments whereby the Mexican state participates in the economy.²⁹ Mexican law therefore requires parastatal entities to have separate legal personality in order to own assets, and to achieve a *sui generis* status.³⁰ Examples of parastatal entities include Petróleos Mexicanos (PEMEX) and the Comisión Federal de Electricidad (CFE).³¹

2. Specific Legislation Over Public Entities

In addition to the law organizing the public entities dealing with international trade (LOAPF), specific legislation such as the Federal Law of Parastatal Entities,³² the Law on Public Works,³³ and the Law on Acquisitions, Leases and Services Related to Movable Goods (Acquisitions Law)³⁴ may also affect international transactions. The Mexican Commercial Code may also apply. These laws are currently being revised to make them compatible with the

Transfer of State-owned Enterprises to Private Hands, BUS. MEX., June 1991, at 30.

26. Siqueiros, *supra* note 16, at 294.

27. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS [CONSTITUTION], art. 90 (Mex.).

28. Identification of public entities as centralized or parastatal is governed by the Organic Law of the Federal Public Administration (LOAPF), which sets forth the administrative and general guidelines that control these entities. Organic Law of the Federal Public Administration, D.O., Dec. 29, 1976 amended by Decree, D.O., May 25, 1992.

29. Law on Public Works, §§ 19-37, D.O., Dec. 30, 1990.

30. Federal Law of Parastatal Entities, D.O., May 14, 1986.

31. WEINTRAUB, *supra* note 11, at 6.

32. Federal Law of Parastatal Entities, *supra* note 30.

33. Law on Public Works, §§ 19-37, D.O., Dec. 30, 1980.

34. Law on Acquisitions, Leases, and Services Related to Movable Goods, D.O., Feb. 8, 1985.

Government Procurement Clauses contained in NAFTA.³⁵D. *Private Transactions*

1. Overview

An entrepreneur's legal capacity, regardless of whether he is a national or an alien, affects his legal ability to engage in a business or transaction. Under Mexican law, a person of legal age (eighteen) has the right to dispose of his property freely, subject only to limitations provided by law.³⁶ Such a person is called a "natural" or "physical" person.³⁷

Collective, artificial, or "moral" persons, on the other hand, are:

- (1) the Nation, States, and Municipalities;
- (2) other corporations of a public character, recognized as such by law;
- (3) civil and mercantile companies;
- (4) unions and other associations referred to in Article 123 of the Mexican Constitution;
- (5) cooperatives and mutual associations; and
- (6) other associations, with political, scientific, artistic, recreational, or other objects not prohibited by law.³⁸

Collective persons may exercise all rights necessary to perform the object of their establishment, provided that the object is not prohibited by law.³⁹ The consequences of entering into an agreement depend on whether the relevant person is a natural or a collective person.

The Mexican legal system also differentiates between civil and commercial contracts, and maintains different rules for each.⁴⁰ As a threshold matter, therefore, a foreign entrepreneur must correctly classify the transaction

35. See OVERVIEW, *supra* note 23.

36. See CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] arts. 22-24 (Mex.).

37. This is the literal, but somewhat vague, translation from the Spanish *persona física*.

38. C.C.D.F., art. 25.

39. *Id.* art. 26.

40. CÓDIGO DE COMERCIO [Cód. Com.] art. 75 (Mex.).

in question. Commercial contracts are governed by the Mexican Commercial Code, which specifies the acts and activities considered to be of a commercial nature. Such acts and activities are:

- (1) purchase, sale, or lease of personal property for commercial purposes;
- (2) purchase or sale of real estate for commercial purposes;
- (3) purchase or sale of debentures or other negotiable instruments;
- (4) corporations dedicated to sales, construction, manufacturing, or tourism; and
- (5) banking and insurance companies.⁴¹

To the extent that no specific provision of the Mexican Commercial Code or other commercial laws applies, a contract is considered to be a civil matter and therefore governed by the Civil Code.

In addition to the codes, specific provisions defining the scope of the transaction may exist. For example, the Law on the Development and Protection of Industrial Property would apply to a franchising agreement.⁴²

2. Options for the Entrepreneur

A foreign entrepreneur can market a product in Mexico by any one of several methods: selling directly to Mexican suppliers; opening a representative office in Mexico; hiring a broker or sales agent; or opening a commercial company in Mexico. The legal status of the transaction, and therefore its legal ramifications, depend upon the option chosen by the entrepreneur. Each option, however, entails different combinations of benefits and responsibilities, and the entrepreneur must choose among them according to the combination that best utilizes his resources and capabilities.

An entrepreneur's decision whether to sell directly in Mexico depends on his experience, language abilities, and willingness to adapt to the Mexican culture

41. *Id.*

42. Law on the Development and Protection of Industrial Property, D.O., June 28, 1991 [hereinafter *Industrial Property*].

and legal system.⁴³ Direct sale is simple, but it may not be a viable option for an entrepreneur who is lacking in any of the above-mentioned areas.

Opening a representative office in Mexico is a second method of marketing a product in Mexico. A representative is permitted only to promote the suppliers' goods; he may not engage in any other transaction, and this option is therefore of limited usefulness to foreign entrepreneurs.⁴⁴

A foreign entrepreneur may also hire a broker or a sales agent to enter the Mexican market. However, a broker has no legal capacity to bind parties to a contract, so an entrepreneur should therefore hire a broker only as an intermediary between himself and another party.⁴⁵

Foreign entrepreneurs may open a commercial company in Mexico to market a product in Mexico. Commercial companies fall generally into two categories: the *Sociedad Anónima*, which is similar to the American corporation, and the *Sociedad de Responsabilidad Limitada*. While they are different in many respects, a member's liability in either type of company is limited to the amount of the capital he has contributed.⁴⁶

A *Sociedad Anónima*, or corporation, is an entity owned exclusively by shareholders, whose liability is limited to the amount they paid for their shares of stock.⁴⁷ Under Mexican law, the requirements to form a corporation are:

- (1) a minimum of two incorporators, each of whom must own at least one share;
- (2) capital stock worth at least N \$50,000 (approximately U.S. \$17,000);
- (3) payment of twenty percent or more of the value of

43. There are many differences between American and Mexican business practices. For example, social amenities are important in Mexico, whereas Americans place far less emphasis on such matters. The practice of being "direct," for example, is sometimes considered rude in Mexico, and Mexicans rarely "get down to business" right away. There is usually a preliminary period to permit the parties to exchange pleasantries. See J. Bruton, *A Different Culture: Cultural Considerations*, *DOING BUSINESS IN MEXICO: AN INFORMATION GUIDE* (1983).

44. *Id.*

45. *Id.*

46. The General Law on Commercial Companies, amended by Decree, D.O., June 11, 1992 [hereinafter *Commercial Companies*]. The amendment abrogated the requirements of five or more partners to form a corporation, and of obtaining court authorization to register a corporation in the Public Register of Trade. The amendment also authorized informal meetings of corporate boards and shareholders when unanimous resolutions are adopted.

47. *Id.* §§ 87-89.

- shares exchanged for cash; and
- (4) full payment for shares payable in whole or in part with property other than cash.⁴⁸

The incorporators must also appear before a Notary Public or an authorized broker to complete the formalities required to create a corporation.⁴⁹ The shareholders are free to draft the company's articles of incorporation as they wish, subject to the inclusion of a few formalities.⁵⁰

In the *Sociedad de Responsabilidad Limitada*, the ownership interests of the members are not represented by negotiable certificates, as are the interests of the owners of a corporation.⁵¹ The company must maintain at least N\$3,000 (approximately U.S.\$1,000) in capital, which must be divided into interests that are proportionate to ownership.⁵² Although different classes of interests may be established, and different values may be established for each class, the stated value of each member's interests must remain N\$1.00 (U.S. 30 cents) or a whole multiple thereof.⁵³

A foreign entrepreneur may also enter into a joint venture agreement. A joint venture agreement (*asociación en participación*)⁵⁴ creates a sort of partnership in which an active partner (either a natural or a collective person) transfers title to contributed goods to a silent partner.⁵⁵ Profits and losses are shared by all partners, but only the active partners bear liability.⁵⁶

A final option for the foreign entrepreneur is the in-bond, or *maquila* industry. In the "maquiladora" industry, goods are assembled in Mexico using components and materials imported temporarily into Mexico, duty free, and the

48. *Id.*

49. The notary exists in both the U.S. and Mexico legal systems, although it is regulated very differently in each. Under Mexican law, the Notary Public plays an important role in many different areas of the law. Many private acts are valid only if they are notarized.

50. See *Commercial Companies*, *supra* note 46, §§ 87-89.

51. *Id.* § 61.

52. *Id.*

53. *Id.* The decree allows the formation of limited liability companies with up to 50 partners.

54. Translation of this concept is difficult because the *asociación en participación* also presents features of an American partnership.

55. *Commercial Companies*, *supra* note 46, §§ 252-259. See Siqueiros, *supra* note 16, at 301.

56. *Commercial Companies*, *supra* note 46, §§ 252-259.

finished goods are then exported back to the country of origin.⁵⁷ The seller is required to pay import taxes on the goods produced by maquila operations only if the goods are sold in Mexico.⁵⁸

E. *Specific Transactions and Arrangements under Particular Legislation*

1. Franchising Agreements

Section 142 of the Law on the Development and Protection of Industrial Property sets forth the obligations of parties to franchising agreements.⁵⁹ The franchisor must provide certain specified information to the intended franchisee, subject to final execution of the agreement.⁶⁰ The information required depends on the type of business involved.⁶¹ The franchisee, in return, is required to maintain the quality, prestige, and image of the products or services that the franchise represents.⁶²

2. Trusts

Trusts are governed by the Law on Credit Institutions,⁶³ the Foreign Investment Law Regulations,⁶⁴ and the Law on Negotiable Instruments and

57. Siqueiros, *supra* note 16, at 301. The maquiladora industry has surpassed tourism as the second greatest generator of foreign exchange (after oil exports), at over three billion dollars per year. The industry has also mushroomed as a source of employment, from 120 plants employing 20,000 workers in 1970, to 600 plants with 120,000 workers in 1980, to over 1,800 plants (1,500 in the border region) with nearly 500,000 workers by 1990. See Michael Barr, et al., *Labor and Environmental Rights in the Proposed Mexico-United States Free Trade Agreement*, 14 HOUS. J. INT'L LAW 1, 7-8 (1991).

58. Siqueiros, *supra* note 16, at 301.

59. *Industrial Property*, *supra* note 42, § 142.

60. *Id.*

61. *Id.*

62. *Id.*

63. Law on Credit Institutions, §§ 79, 80, 82, 83, and 84, D.O. July 18, 1990, as amended by D.O., June 9, 1993.

64. Law to Promote Mexican Investment and to Regulate Foreign Investment, D.O., May 9, 1973 [hereinafter *FIL*].

Credit Transactions.⁶⁵ A trust enables a settlor to transfer certain goods for an established legal purpose by entrusting the fulfillment of that purpose to a trustee (always a bank).⁶⁶ Any individual or legal entity possessing the capacity to transfer property in trust can be a settlor.⁶⁷ One of the many advantages of trusts is that aliens may thereby acquire renewable rights in real estate located in the "restricted zone"⁶⁸ for periods of up to thirty years.⁶⁹

III. ECONOMIC COMPETITION AND MARKET ACCESS

A. *The Mexican Federal Law of Competition*

The new Mexican Federal Law of Economic Competition (Competition Law), effective June 22, 1993,⁷⁰ abrogates several previous laws that restrained competition and trade. The stated purpose of the Competition Law is to preserve competition and free market access by proscribing monopolies, monopolistic practices, and other restraints on the efficient operation of the market for goods and services.⁷¹ It expressly prohibits monopolies, as well as any other practices that may diminish, harm or impede competition and free access to production, processing, and marketing of goods and services.⁷² The Competition Law also forbids any action by the government, the purpose or effect of which is to prevent the entry into or removal from Mexico of national or international goods or services.⁷³

65. General Law on Negotiable Instruments and Credit Transactions, §§ 346-359, D.O., Aug. 27, 1932, [hereinafter *Negotiable Instruments*].

66. *Id.*

67. CONST., *supra* note 27, art. 27.

68. The restricted zone is the land located within a zone of one hundred kilometers along the sea coasts. For historical reasons, the restricted (but no longer prohibited) zone was designed to insure the territorial integrity of Mexico at a time when that integrity was under challenge. See generally *Negotiable Instruments*, *supra* note 65.

69. *Id.* §§ 346-359.

70. Federal Law on Economic Competition, D.O., Dec. 24, 1992 [hereinafter *Competition Law*].

71. *Id.*

72. *Id.*

73. *Id.* The Competition Law goes on to cover in detail:

- a) *Per se* violations of the Law;
- b) Practices that, under certain circumstances, may be violations of the Law;

All "economic agents" are subject to the Competition Law.⁷⁴ The Competition Law expressly designates the following as economic agents, although the list is not inclusive:

- (1) individuals and legal entities;
- (2) federal, state, and municipal public administration entities and dependencies;
- (3) associations and professional groups;
- (4) trusts; and
- (5) any other natural or collective person that participates in economic activity.⁷⁵

Exempt from the Competition law are certain other activities explicitly stated not to be monopolies:

- (1) strategic government functions;
- (2) workers' unions;
- (3) temporary exclusive privileges granted to authors, inventors, and artists with respect to their work;
- (4) associations and cooperatives selling their products abroad directly, subject to certain requirements.⁷⁶

The Government retains the power to set maximum prices for certain goods and services.⁷⁷ Enforcement of price control regulations is entrusted to the Consumer Protection Agency (CPA) and the actions of the CPA are therefore excluded from the operation of the Competition Law.⁷⁸ Similarly, agreements and understandings between the Secretariat of Commerce and Industrial

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- c) Transactions requiring prior government review that may be subject to government adjustment or reversal;
 - d) The Federal Competition Commission, which is charged with the enforcement and administration of the Law;
 - e) Regulatory review and procedures contemplated by the Law; and
 - f) Sanctions and penalties.

74. *Id.* §§ 1-7.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

Development and producers or distributors that relate to pricing do not violate the Competition Law.⁷⁹

B. Other Recently-Enacted Provisions

On December 24, 1992, Mexico enacted a new Consumer Protection Law⁸⁰ to complement the Competition Law's goal of enhanced competition. The Consumer Protection Law regulates warranties and credit payments on purchase agreements, and applies to aliens and citizens alike.⁸¹ This law must be applied in accordance with the new Law on Metrology and Standardization (Standardization Law).⁸²

The Federal Law on Metrology and Standardization is to be applied by all federal ministries in Mexico, and changes several aspects of the Mexican regulatory process.⁸³ The Standardization Law establishes a uniform procedure for the issuance of regulations by federal ministries. First, regulations must be created in National Consulting Committees, where representatives of producers, consumers, and scientific institutions are permitted to participate in discussion of the proposal. All proposed regulations presented to the Committees must be justified with cost-benefit analysis. All regulations must be published after they are drafted by the committees, and public comment must be received for 90 days afterwards. Ministries must publish answers to public comments regarding a regulation before they may issue the regulation. In emergency situations, however, ministries may issue regulations without employing this procedure. Emergency regulations may be in effect for no longer than six months.⁸⁴

The Standardization Law also privatizes the standard-writing function, which had previously been performed exclusively by the Ministry of Trade and Industry.⁸⁵ Private organizations are now responsible for developing standards, although they are monitored by the Government to ensure that standards do not

79. *Id.*

80. Federal Law of Consumer Protection, D.O., Dec. 24, 1992 [hereinafter *Consumer Protection*].

81. *Id.*

82. Federal Law on Metrology and Standardization, D.O., July 1, 1992 [hereinafter *Standardization Law*].

83. *Id.*

84. *Id.* §§ 2-4.

85. *Id.*

create monopolies or barriers to the entry of new competitors into the market.⁸⁶

Before engaging in a business enterprise in Mexico, a foreign entrepreneur should also consult other specific legislation, such as laws dealing with bottling and packaging, and administrative rules concerning subjects such as net contents, tolerance, and consumer information.⁸⁷

C. Customs Procedures

NAFTA preempts existing laws relating to customs procedures.⁸⁸ For example, NAFTA's section on Customs Administration provides for uniform regulations to ensure consistent administration of the rules of origin.⁸⁹ The impact of NAFTA's uniform regulations on Mexican customs practices with respect to the U.S. and Canada is reflected in the following statistics: the top Mexican tariff has been cut to twenty percent, far below the fifty percent level in effect when Mexico joined the GATT; the average trade-weighted tariff has fallen from over twenty-five percent in the mid-1980's to less than nine percent today; and import licenses have been nearly eliminated, so that by 1990, they covered only seven percent of the value of U.S. exports to Mexico.⁹⁰

The openness resulting from the lowered trade barriers requires some practical changes in customs procedures. For instance, in 1991, there were 23 customs "ports" operating between Mexico and the U.S., serving more than 3 million trucks each year.⁹¹ These ports must be modernized to accommodate the increased flow of goods that has resulted from the ratification of NAFTA and Mexico's new policy of decreasing tariffs. There is less concern over service for air and sea transport, relative to ground transport, because these carriers account for only a small portion of Mexican-U.S. trade, but airports and seaports must

86. *Id.*

87. All instructions, guidelines, and administrative measures must be carefully reviewed in light of the new Competition Law.

88. See generally OVERVIEW, *supra* note 23.

89. See *id.* Rules for traders and custom authorities with respect to verifying the origin of the goods, common record-keeping requirements, and a uniform certificate of origin are also contemplated.

90. *Hearings Before the Subcommittee on Trade of the Committee on Ways & Means, U.S. House of Representatives*, 101st Cong., 2d Sess. 49 (June 14, 1990) (Testimony of Carla Hills, United States Trade Representative).

91. Stanley Holt, *Clearing Customs: U.S. and Mexican Customs Services Struggle to Meet the Challenges of Increasing Trade*, BUS. MEX., May 1991, at 46.

also be modernized.⁹² Customs procedures must also be modernized, to ensure that the increased trade can be handled efficiently.

IV. TAXATION IN MEXICO

Mexico has significantly changed its tax laws annually since 1980. This steady rhythm of change, combined with the complexity of Mexico's system of taxation, makes analysis of this area complex. This section will therefore only illustrate some of the most significant aspects of taxation in Mexico.

Mexico does not necessarily tax joint international operations executed by non-resident aliens together with Mexican residents, because the business' headquarters, merchandise, and sellers are usually located abroad.⁹³ Tax will be due, however, if the source of the revenue is transferred to Mexico, regardless of whether the seller is a foreign resident.⁹⁴

A. *Principal Taxes*

The principal taxes payable for commercial transactions conducted in Mexico by companies operating in Mexico, and in some cases by foreign companies or individuals, are those levied by the federal government: (1) income taxes; (2) taxes on assets; (3) value-added taxes; (4) import and export taxes; and (5) payroll taxes, such as social security taxes.

The federal income tax is payable on all income, although certain types of interest and dividends received by individuals are taxed at a flat rate and may be excluded from taxable income.⁹⁵ Individuals and entities residing abroad but obtaining revenue from a source of income located in Mexico must pay income

92. *Id.*

93. See Calvo Nicolau, *Mexican Taxes on Foreign Investment and Trade*, 12 Hous. J. INT'L L. 265, 265-266 (1990). According to the author, the Mexican Constitution does not directly require aliens to pay taxes in Mexico. However, the Mexican Supreme Court interprets the Constitution to require aliens to pay taxes on revenue that they receive from sources located in Mexico. To the extent that aliens benefit from public expenditures, they must contribute their share of the cost. Otherwise, Mexican residents would be at a disadvantage vis-a-vis aliens. *Id.* See also Appendix to the *Semario Judicial de la Federación 1917-1985*, First Part, 110 Mexican Suprema Corte de Justicia (1986).

94. Nicolau, *supra* note 93, at 266.

95. See generally DOING BUSINESS IN MEXICO: AN INFORMATION GUIDE (1983). This determination involves issues such as direct and indirect tax burden, tax guarantees, and also tax administration. See also Income Tax Law (*Ley de Impuesto Sobre la Renta*), D.O. Dec. 30, 1980 [hereinafter *ITL*].

tax on proceeds from those sources.⁹⁶

The Mexican Government enacted the tax on assets as a "gap filling" measure to ensure broader tax revenue.⁹⁷ The tax on assets is two percent of the tax base, which consists of the taxpayer's financial assets (other than shares), inventories, fixed assets, and deferred charges located in Mexico.⁹⁸

The Value-Added Tax (VAT) is a one-time tax paid by the consumer of a good or service. The VAT operates by requiring each business entity involved in the process of production, from the sale of raw materials to the distribution of finished products to the consumer, to bill its customers for the tax payable on products they purchase. Each of these entities must also pay the tax on its purchases of goods and services. The amount so paid is then credited against the tax payable by the seller.⁹⁹ The VAT is payable on all "sales of goods," which are defined as any transmission of tangible or intangible goods, including those made on a conditional basis or through trusts.¹⁰⁰ The VAT imposed on most goods is fifteen percent, but luxury goods are taxed at twenty percent, while medicines are taxed at six percent and basic foodstuffs escape the VAT entirely.¹⁰¹

Mexico adopted the "Harmonized System for Merchandise Classification and Codification" in 1988, which aligns Mexico's import/export classification system with those of the countries with which it trades most. To determine the import or export tax due, merchandise is valued according to the commercial invoice price of the merchandise.

A two percent tax is also levied on an enterprise's payroll to provide for social security and retirement funds.¹⁰²

Local governments levy taxes annually against the value of real estate located in their jurisdictions, according to a fixed percentage of the property's

96. See *ITL*, *supra* note 95.

97. Nicolau, *supra* note 93, at 272.

98. *Id.* at 273.

99. *Id.* at 267.

100. The specified taxed acts or activities are: disposition of assets; rendering independent services; granting temporary use or advantage of assets; and importing goods or services. *Id.* at 267. See also *Ley del Impuesto al Valor Agregado*, D.O., Dec. 29, 1978, for the general administration of the tax.

101. Siqueiros, *supra* note 16, at 305.

102. See *Auerdo por el que se Establecen Reglas Generales Sobre el Sistema de Ahorro para el Retiro*, D.O., Apr. 30, 1992 (regulation setting forth the rules of employees' retirement plans). The employer must also pay cuotas to the National Workers' Housing Fund (INFONAVIT). The Mexican Social Security Institute regulates INFONAVIT.

value as shown on their tax rolls.¹⁰³ This valuation may be based upon rental income from land or buildings that are leased to third parties.¹⁰⁴

B. *International Trade Operations and Taxation*

As mentioned earlier, income tax is not due on direct sales of merchandise by foreign residents to persons established in Mexico, because the source of revenue itself is not located in Mexico.¹⁰⁵ However, importers must pay the VAT on their imports.¹⁰⁶ This tax places imported assets on the same footing with assets produced in Mexico.¹⁰⁷ The VAT is therefore assessed against the total amount of value added to or incorporated into assets traded in Mexico, rather than against the value of components added to the goods in Mexico alone.¹⁰⁸ Whoever imports goods or services into Mexico is obligated to pay the VAT on those goods or services, although goods that would not be taxed if sold domestically are exempt from the VAT.¹⁰⁹ This exemption places the importer of goods into Mexico in a situation identical to that of a producer of goods in Mexico for subsequent domestic sale.¹¹⁰

V. THE LEGAL FRAMEWORK OF FOREIGN DIRECT INVESTMENT IN MEXICO

A. *Background*

The Mexican Constitution grants Congress the power to issue laws for the purposes of promoting Mexican investment and regulating foreign investment.¹¹¹ Pursuant to this authority, the Mexican government enacted the Foreign Investment Law (FIL) in 1973.¹¹² While the FIL is not likely to

103. *DOING BUSINESS IN MEXICO*, *supra* note 95, at 222.

104. *Id.*

105. Nicolau, *supra* note 93, at 266.

106. *Id.* at 268.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. MEX. CONST., art. 73, § XXIX-F.

112. FIL, *supra* note 64.

remain in force for very long, because of NAFTA's ratification, it still governs foreign direct investment (FDI) in the ownership and control of Mexican enterprises, the acquisition of assets, and other transactions.¹¹³ The FIL defines foreign investment broadly, to include nearly every investment activity controlled by non-Mexicans.¹¹⁴

The FIL is administered by the Foreign Investment Commission (FIC), which consists of seven Cabinet members and an Executive Secretary appointed by the President.¹¹⁵ The FIC has discretion to:

- (1) determine the permissible level of foreign participation in economic activities, and to establish the terms and conditions under which foreign investment will be received;
- (2) promote individualized rules for projects that deserve special treatment;
- (3) determine whether to permit foreign investment in Mexican companies;
- (4) determine whether current foreign investors may engage in additional economic activities in Mexico; and
- (5) establish requirements and criteria for the application of foreign investment laws.¹¹⁶

These powers may be exercised only in accordance with certain enumerated economic criteria, which include the requirements that the foreign investment complement national investment, and that the foreign investment not displace national business enterprises.¹¹⁷ Pursuant to the FIL, the FIC issues General Resolutions that contain the standards and requirements for applying the law;

113. Ignacio Gómez-Palacio, *The New Regulation on Foreign Investment in Mexico: A Difficult Task*, 12 *Hous. J. INT'L L.* 253, 259 (1990).

114. *FIL*, *supra* note 64, art. 2.

115. *Id.*

116. *Id.* art. 8.

117. *Id.* art. 13.

they are not "regulations" in the traditional sense.¹¹⁸

The FIL contains many defensive and regulatory measures with regard to FDI in Mexico. Article five requires that at least fifty-one percent of joint Mexican-foreign capital ventures be owned by Mexican residents at the time of incorporation.¹¹⁹ Article four reserves certain objects exclusively to the Mexican Government and domestic investors, such as petroleum, basic petrochemicals, electricity, railways, and telegraphic and radio communications.¹²⁰ Article eight requires FIC approval of foreign acquisition of Mexican going concerns.¹²¹ Finally, article 12 grants the Commission discretionary authority to decide whether to permit expansion of existing FDI.¹²²

In addition to the FIL and the Constitution, many other statutes also regulated FDI,¹²³ including the Regulations of the National Registry of Foreign Investments,¹²⁴ the General Resolutions of the National Commission on Foreign Investment,¹²⁵ and the Law on Transfer of Technology.¹²⁶ Other federal laws further regulate foreign investment in specific areas such as mining,¹²⁷ and patents and trademarks.¹²⁸

In sum, the legal framework controlling FDI, prior to the Salinas reforms, was contained in many different laws, and it was difficult for a non-expert to

118. MEX. CONST., art 89, § 1 grants to the President the capacity to regulate laws "providing in the administrative sphere its exact observance." The regulatory capacity is restricted to fulfillment of certain requirements. See F. PRAGA, *DERECHO ADMINISTRATIVO* (1987).

119. *FIL*, *supra* note 64, art. 5.

120. *Id.* arts. 4, 6. The General Constitution reserves the following activities entirely to the Mexican government: coining of money, mail service, issuance of bank notes, and communications via satellite. MEX. CONST., art. 28.

121. *FIL*, *supra* note 64, art. 8.

122. *Id.* art. 12.

123. See Julie C. Treviño, *Mexico: The Present Status of Legislation and Governmental Policies on Direct Foreign Investments*, 18 INT'L LAW. 297, 302-303 (1984). This article was written two years after the 1982 crisis. Differences are evident between the FDI regime described by the author and the current situation.

124. Regulations of the National Registry of Foreign Investments, D.O., Dec. 11, 1973.

125. Nineteen resolutions were issued between 1975 and 1983. See LEGISLATION ON INDUSTRIAL PROPERTY, TRANSFER OF TECHNOLOGY, AND FOREIGN INVESTMENTS (Poma ed., 7th ed., 1982).

126. Law on Transfer of Technology, D.O., Jan. 11, 1982.

127. Regulatory Law of Constitutional Article 27 with Regard to Mining, D.O., Nov. 25, 1982.

128. Law on Inventions and Trademarks, D.O., Feb. 10, 1976.

determine the laws by which a given FDI transaction was governed.¹²⁹

B. *The New Climate for FDI*

President Salinas believes that accumulation of private capital, both domestic and foreign, is crucial to Mexico's economic health and stability, and that the ability to attract capital is a prerequisite to Mexico's economic development.¹³⁰ To attract more foreign capital, technology, and trade, the Salinas Administration has sought to modernize the laws regarding foreign investment.¹³¹ The Foreign Investment Law of 1973, as mentioned earlier, limited foreign investment through extensive regulation. Mexico's House of Representatives was deeply divided on the issue of whether to amend the foreign investment rules, however, and this division precluded any legislative attempts to amend the FIL.¹³² To surmount these difficulties, President Salinas exercised his executive powers by issuing the 1989 FIL Regulation.¹³³ This regulation opened operations accounting for well over two-thirds of Mexico's total GDP to foreign investment.¹³⁴

The Mexican Constitution grants the President authority to issue regulations "that provide for the exact observance of the law passed by the Legislative Power."¹³⁵ Salinas used the FIL Regulation to open Mexico to FDI, however, in direct conflict with the Law under which it was issued.

The 1989 Regulation affords broad investment opportunities to foreigners

129. Treviño, *supra* note 123, at 302-303.

130. Gómez-Palacio, *supra* note 113, at 255.

131. Foreign investors can invest in a wide range of operations and hold 100% ownership without the need for authorization, as will be detailed further. Included in this group are sectors such as cement, pharmaceutical, most manufacturing electronics, computers, and tourism, among others. A smaller group of activities including agriculture, livestock, farming, publishing, construction services, etc. require FIC's approval. With 72.5% of the 754 economic activities into which the Mexican economy has been classified now open to 100% foreign ownership, opportunities for investors have multiplied. See MEXICAN INVESTMENT BOARD, MEXICO: ECONOMIC AND BUSINESS OVERVIEW (1991).

132. See Jorge Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1, 13 (1989).

133. Regulation of the Law to Promote Mexican Investment and to Regulate Foreign Investment, D.O., Mar. 15, 1989 [hereinafter *FIL Regulation*].

134. *Id.*

135. See MEX. CONST., art. 89.

by eliminating the need for prior authorization by the FIC, as was previously required under the 1973 FIL. Article five of the Regulation grants foreign investors the right to establish, control, and own 100 percent of an enterprise in Mexico without first obtaining the FIC's approval, provided the investor's project meets the following requirements:

- (1) investment in fixed assets for the corporation in its pre-operational period must not exceed the limit established by the Ministry (currently U.S.\$100,000,000);
- (2) the investment must be made with financial resources obtained from abroad or through financing granted by foreign entities with resources obtained abroad, unless the investors are already established in Mexico;
- (3) the amount of paid-in capital stock must be equivalent to twenty percent of the total investment of fixed assets at the end of the pre-operations period;
- (4) the industrial establishments required by the company must not be located in the geographical zones that are subject to controlled growth, as defined by the relevant administrative provisions (currently the metropolitan areas of Mexico City, Monterrey, and Guadalajara);
- (5) the company must maintain equilibrium in its balance of foreign currency during its first three years of operation;
- (6) the company must generate permanent jobs and establish sustained programs of training, capitalization, and personal development for its workers; and
- (7) the company must employ adequate technology and observe laws relating to the environment.¹³⁶

A foreign investor is deemed to have agreed to abide by these requirements upon acquiring shares of a company incorporated in accordance with the FIL Regulation.¹³⁷

136. *FIL Regulation*, *supra* note 133, art. 5.

137. *Id.*

C. *The Investor's Response to the Opening Market*

The criteria of the 1989 FIL Regulation appear to be designed to encourage FDI, in order to complement and bolster the Mexican economy. This policy promotes investment that will bring significant capital into the economy, develop geographical areas outside of the currently highly-industrialized zones in the metropolitan areas, produce a positive balance of payments, promote employment, and expand personnel training and the use of beneficial technology.

The rule permitting 100 percent foreign ownership of Mexican enterprises deviates dramatically from the earlier rules limiting foreign ownership to forty-nine percent, and should significantly improve prospects of foreign investment in Mexico. Indeed, many companies that were frustrated by the old laws precluding foreign control are already considering investment in Mexico.¹³⁸

Projects that do not meet the above criteria, as well as those that fall within restricted areas, must still be submitted to the FIC for approval. Approval is granted automatically, however, if the FIC does not return a formal response within forty-five business days.¹³⁹ By limiting its response time with an automatic approval provision, the government greatly encourages potential investors who were previously discouraged by the lengthy and uncertain approval process. Automatic approval should go a long way towards fulfilling the Salinas Administration's goal of promoting FDI.

While the Regulation enhances FDI opportunities and eliminates the FIC approval requirement, however, section five of the FIL Regulation directly contravenes article five of FIL and one of FIL's main goals of protecting Mexican investment.¹⁴⁰ The 100 percent foreign ownership clause, among other provisions in the Regulation, also contradicts the FIL and other laws enacted by Congress. The FIL and all other laws were approved and enacted by the legislature, and therefore take precedence over the FIL Regulation.¹⁴¹ The provisions of the FIL Regulation that contradict the FIL and other laws enacted by Congress appear to be technically illegal and unconstitutional.¹⁴²

138. See Camil, *supra* note 132, at 14; D. Hoggins, *Mexico's 1989 Foreign Investment Regulations: A Significant Step Forward, But Is It Enough?*, 12 HOUS. J. INT'L L. 50 (1990). See also Matt Moffett, *Pressure Building Inside, Outside Mexico To Liberalize Its Investment Regulations*, WALL ST. J., Dec. 23, 1988, at A8; Williams, *supra* note 9, at 427.

139. Camil, *supra* note 132, at 4, n.20.

140. Gómez-Palacio, *supra* note 113, at 259.

141. *Id.* at 262.

142. *Id.* at 259.

The Regulation does not seem to have caused legal insecurity among foreign investors, however. According to the Foreign Investment authorities, the Regulation provisions have yet not been challenged, and no Mexican tribunal has ruled the Regulation to be unconstitutional.¹⁴³ In Mexico, only aggrieved parties have standing to challenge the constitutionality of laws and regulations, and because the FIL Regulation opens new fields to Mexican investors as well as to foreigners, Mexican investors will probably not be considered to be aggrieved.¹⁴⁴ In addition, judicial decisions affect only the rights of the aggrieved parties, and are controlling only with respect to the judicial branch of government.¹⁴⁵ For these reasons, it is safe to assume that the constitutionality of the FIL Regulation will remain of interest solely to academics.¹⁴⁶

VI. DISPUTE RESOLUTION: THE MEXICAN APPROACH

A. *Differences Between the Legal Systems of Mexico and the U.S.*

The Mexican and American legal systems are based on fundamentally different conceptions of law. The U.S. legal system emphasizes case law precedent, while the Mexican legal system is based upon codes that set forth broad principles of law, which are applied to specific disputes through the use of deductive reasoning. In the case of a dispute over the proper interpretation of a term contained in a contract, the Mexican lawyer will look to the civil codes for his answer, rather than to the decisions of courts.

There are also many specific substantive and procedural differences between the two legal systems. For example, the Mexican Civil Code limits the amount of damages that may be recovered in a civil action, whereas U.S. law often permits unlimited damages, as well as punitive damages.¹⁴⁷ Injunctions are not available in commercial lawsuits, even when damages would be

143. *Id.*

144. Tomas A. Clayton, et al., *Foreign Investment in Mexico: Mexico Welcomes Foreign Investors*, 12 CHICANO-LATINO L. REV. 13, 28 (1992).

145. *Id.*

146. *Id.* at 29.

147. C.C.D.F., arts. 1915-1916.

irreparable or immeasurable in monetary terms.¹⁴⁸ In the U.S., on the other hand, an injunction is often the preferred remedy for resolving such disputes. Also, trial by jury is unavailable in Mexico, which often surprises U.S. entrepreneurs in Mexico. The foreign entrepreneur in Mexico should be aware of these types of differences, so that he does not mistakenly assume that matters will proceed as they would in the U.S.

B. *The Mexican Judicial System*

Under Mexican procedural law,¹⁴⁹ a court's competence to try a dispute depends on four factors:

- (1) territory;
- (2) the subject matter of the dispute;
- (3) the amount of the lawsuit; and
- (4) the level of the suit.¹⁵⁰

The territoriality factor limits a court's competence to the physical area over which the judge or tribunal has jurisdiction.¹⁵¹ The subject matter factor conditions a court's competence upon the branch of government that regulates

148. See *Hernández v. Burger*, 162 Cal. Rptr. 564, 566 (1980) (applying the "government interest analysis" in an automobile accident case to select Mexico's law of limited damages instead of California's unlimited damage rules); *Victor v. Sperry*, 329 P.2d 728, 723-33 (1958) (holding that Mexico's limited strict liability law violated California public policy). See generally Edith Friedler, *Moral Damages in Mexican Law: A Comparative Approach*, 8 LOY. INT'L & COMP. L.J. 235 (1986).

149. See generally *Código Federal de Procedimientos Civiles* (Federal Code of Civil Procedure) [C.F.P.C.].

150. *Common law scholars analyze international jurisdictional issues in terms of whether or not a court has jurisdiction over a case with international elements. In contrast, civil law systems differentiate between concepts of jurisdiction and competence.

In civil law systems, courts have jurisdiction because they have the authority to declare the law (i.e., power to exercise judicial functions), but not all courts are competent to determine a specific case. For example, a court lacks jurisdiction when the person or matter involved is beyond the scope of the court's authority, as in the case of a foreign state entitled to sovereign immunity, because a foreign state is not subject to the jurisdiction of another state's courts. The difference in terminology seems to be because the English word "jurisdiction" refers to all competencies of the state and each one of its organs, while the Spanish word "jurisdicción," and its equivalents in other European languages, have a meaning restricted to the exercise of the judicial function. Fernando Alejandro Vázquez Pando, *Mexican Law of Judicial Competence*, 12 HOUS. J. INT'L L. 337 (1990).

151. *Id.* at 338.

the subject matter of the lawsuit.¹⁵² The quantitative factor is self-explanatory. And, the level of the court is a factor because some courts are empowered to revoke, confirm, or amend decisions issued by other courts.¹⁵³

In Mexico, there are federal (national) and local (state) courts. Mexican federal courts are competent in two fields: federal law and the *amparo* procedure.¹⁵⁴ State civil courts are similarly competent in two fields: local law (usually cases arising under state civil codes) and federal civil law cases, excluding maritime law, when only private persons are affected.¹⁵⁵

C. *Basic Rules Governing Dispute Resolution*

Competence in cases involving commercial matters is governed by the Mexican Commerce Code, and in all other cases by the Federal Code of Civil Procedure.¹⁵⁶ Under Mexican law, both federal and local judges have jurisdiction to render decisions with regard to acts or contracts of a commercial nature, and usually the competent judge is the one to whom the parties expressly submit themselves.¹⁵⁷ The plaintiff is required to designate the domicile of the defendant where service of process is to be made in the petition or the first claim filed with the judge.¹⁵⁸ Service of process must be made personally. If the domicile is unknown, then service of process may and should be made by publication of the order in the Official Bulletin.¹⁵⁹

If the defendant is domiciled abroad, service of process must be made by letters rogatory, issued by the judge before whom the petition was filed, and addressed to the court having jurisdiction over the defendant's domicile.¹⁶⁰

152. *Id.*

153. *Id.*

154. *Id.* The *amparo* procedure (which literally means protection) is similar to U.S. concepts of habeas corpus, due process, or equal protection. Through an *amparo* claim, a citizen can attack a law or regulation on the grounds that it infringes upon the citizen's rights under the Mexican Constitution. Jesus Silva and Richard K. Durn, *A Free Trade Agreement Between the United States and Mexico: The Right Choice?*, 27 SAN DIEGO L. REV. 937, 976-977 (1990).

155. Vázquez Pando, *supra* note 150, at 338-339.

156. *Id.* at 351.

157. *Id.* at 349.

158. *Id.* at 340.

159. See *Contractual and Procedural Formalities*, DOING BUSINESS IN MEXICO (1983).

160. *Id.*

Letters rogatory should be sent through the Ministry of Foreign Relations.¹⁶¹

D. *Enforcement of Foreign Judgments*

1. The Federal Code of Civil Procedure

The Federal Code of Civil Procedure (CFCP) has two special provisions dealing with submission clauses in international cases: (1) Article 566 grants Mexican courts authority to recognize submission clauses as a valid basis for a foreign court to assume jurisdiction, in light of the parties' relationship and the interests of justice; (2) Article 567 invalidates submission clauses that preclude the parties from choosing the court to which they will submit their disputes.¹⁶² Federal courts are competent to enforce a foreign judgment if specified requirements are fulfilled. For example, the judgment must have been rendered by a foreign court that is competent to hear the case.¹⁶³

Mexican federal courts will recognize the competence of a foreign court to render a judgment, the enforcement of which is sought in the Mexican court, if the foreign court assumed competence pursuant to treaties to which Mexico and the corresponding country are parties.¹⁶⁴ In the absence of a treaty, a Mexican court must recognize the competence of a foreign court under the following circumstances:

- (1) if the court assumed competence pursuant to treaties to which Mexico and the corresponding country are parties;
- (2) in the absence of a treaty, if the following requirements are met:
 - (a) the foreign court assumed competence "pursuant to rules recognized in the international sphere" that are compatible with or the criteria pursuant to which a Mexican court is competent;
 - (b) Mexican courts do not have exclusive competence to try the case;
 - (c) the assumption is based upon a clause or agreement permitting a choice of jurisdictions and:

161. *Id.*

162. Vázquez Pando, *supra* note 150, at 341.

163. *Id.* at 343.

164. C.F.P.C., *supra* note 149, §§ 543, 571, and 573.

- (i) the court, taking all circumstances into account, determines that such a choice actually exists;
- (ii) the court determines that the authority to choose does not operate to the exclusive benefit of one party.¹⁶⁸

2. Commercial Cases

Mexico and the U.S. are both signatories to the Convention for the International Sale of Goods (CISG).¹⁶⁶ Resolution of disputes regarding transactions between citizens of these states therefore requires determination of whether the CISG applies. If the CISG does not apply, sections 1092 and 1104 of the Mexican Code of Commerce govern competence to determine a commercial dispute. Regarding recognition of the competence assumed by a foreign court, the Code of Commerce has only one relevant provision: judgments, awards, and decisions rendered abroad may be enforced if the judge or court rendering the decision is competent to hear and decide the case pursuant to rules recognized in international law that are compatible with those adopted in the Code of Commerce.¹⁶⁷ This provision, although similar to its companion provision in the C.F.P.C., differs from it because the C.F.P.C. refers to "rules recognized in the international sphere," rather than to "rules recognized in international law."¹⁶⁸

The parties may also incorporate a submission clause into a commercial transaction.¹⁶⁹ Mexico recognizes these clauses, provided that jurisdiction is not established in an abusive manner, and provided that the jurisdiction in which

165. C.C.D.F., arts. 564, 566, 571-III.

166. Senate Treaty Doc. No. 98-9, 98th Cong., 1st Sess., at app. I(B) (1983) (provides an explanation of this reservation); *Decreto de Promulgación de la Convención de las Naciones Unidas Sobre los Contratos de Compraventa Internacional de Mercaderías*, D.O., Mar. 17, 1988; United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf. 97/18 (concluded at Vienna on Apr. 11, 1980) (the Convention entered into force Jan. 1, 1988, in accordance with art. 99(1), in United Nations Conference on Contracts for the International Sale of Goods: Documents of the Conference and Summary Records of the Plenary Meetings and of the Meetings of the Main Committee, Official Records, U.N. Doc. A/Conf. 97/19, U.N. Sales No. E. 81 N.3 (1981)).

167. COD. COM., art. 1347-A.

168. Vázquez Pando, *supra* note 150, at 351.

169. *Id.*

the dispute is to be tried has a reasonable connection with the subject matter of the action.¹⁷⁰ The assumption of competence must be consistent with the principles of the Code of Commerce, and Mexico will recognize assumption of jurisdiction based on a submission clause only if the rendering court possessed competence over the domicile of any of the parties, the performance of the contractual obligations, or the location of the goods.¹⁷¹

E. *Binding Arbitration in Commercial Dispute Resolution*

The legal framework for binding arbitration is established through multilateral treaties. Mexico and the U.S. are signatories to two such treaties. The oldest and most important such treaty is the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, usually referred to as the New York Convention.¹⁷² Under the New York Convention, parties who have agreed to arbitrate may be ordered to comply with such an agreement. Any award resulting from the arbitration may be enforced against either party to the agreement, by a court of any signatory country that has jurisdiction over the parties.¹⁷³

Mexico and the U.S. are also signatories of the Inter-American Convention on International Commercial Arbitration of 1975, also referred to as the Panama Convention.¹⁷⁴ This Convention is similar to the New York Convention, except that arbitration ordered by a court must be conducted in accordance with the rules of the Inter-American Commercial Arbitration Commission (IACAC), unless the parties have otherwise agreed.¹⁷⁵ The IACAC does not permit court enforcement of an arbitration agreement where a national court has already asserted jurisdiction of the same matter.¹⁷⁶ If a

170. *Id.*

171. *Id.* at 351-352.

172. Convention on the Recognition and Performance of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2515, T.I.A.S. No. 6997, 330 U.N.T.S. 38, reprinted in 4 Y.B. Comm. Arb. 226 (1979) (ratified by the U.S. on July 31, 1970 and by Mexico on June 1, 1973).

173. *Id.* art II(3).

174. Inter-American Convention of International and Commercial Arbitration, opened for signature Jan. 30, 1975, OAS Ser. A20 (SEPEF), reprinted in 14 I.L.M. 336 (1975). See also Camp, *supra* note 13; A. REDFERN & M. HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 8 (1986).

175. Camp, *supra* note 13.

176. *Id.*

national court has not asserted jurisdiction over the matter, the IACAC can administer arbitration, and it has facilities for conducting arbitration.¹⁷⁷

According to some commentators:

Ad hoc institutional arbitrations are the two principle procedural options for binding arbitration of international commercial disputes. Ad hoc arbitration in its purest sense is a complete agreement between the parties with respect to all aspects of the arbitration, including the law to be applied, the rules under which the arbitration will be carried out, the method for the selection of the arbitrator, the place where the arbitration will be held, the language, and finally and most importantly, the scope and issues to be resolved by means of arbitration. An ad hoc arbitration may rely upon rules adopted by one of the arbitration institutions such as the International Chamber of Commerce (ICC), the Inter-American Commercial Arbitration Commission (IACAC), or the American Arbitration Association (AAA), without the parties having agreed to submit the arbitration to the administration of any one of the institution.¹⁷⁸

Several types of disputes are typically cited as preferable for resolution by arbitration: contracts for the sale of goods; distribution agreements; joint venture agreements involving FDI; technology licensing; and *maquiladora* contracts, especially those involving subcontractors or shelter contracts.¹⁷⁹

VII. CONCLUSION

The pursuit of NAFTA has become an integral part of Mexico's race to consolidate economic reform while coping with the uncertainties of political liberalization. Continuity in the Mexican Government will reassure international investors seeking stability and safety. However, with or without NAFTA, Mexico will continue to transform and evolve. Already, the opening of the

177. *Id.*

178. *Id.* at 729.

179. Some awards have been rendered pursuant to the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 172. See e.g. *Malden Mills, Inc. v. Hilaturas Lourdes, S.A.*, reprinted in *DOING BUSINESS IN MEXICO* App. F (1983), 1975 LL.M. 336 (showing arbitral award enforcement in Mexico by the Federal District Court of Appeals).

markets has transformed the character of the nation. It is impossible to reverse the course of events, and the course on which Mexico has embarked under Presidents Salinas and de la Madrid. Despite the attention it attracts through aggressive and misleading political statements and demonstrations, the opposition to economic reform remains weak. Debate now focuses on the degree and pace of change, rather than on its direction, and foreign investment in Mexico will only continue to increase in quantity and pervasiveness.