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# Doing Business in...

Mexico  
Gonzalez Calvillo, S.C.

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# 2019

## Law and Practice

Contributed by Gonzalez Calvillo, S.C.

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**Gonzalez Calvillo, S.C.** has taken a solution-oriented approach to the full-service firm model for over 30 years, helping to evolve the practice of law in Mexico. The firm is driven by a commitment to doing things differently and has deep knowledge of the Mexican legal ecosystem and its behaviour and interaction with today's globalised business environment. One of Mexico's leading law firms, it has a staff

of over 200 people offering diverse skills and experience, together with detailed knowledge of the different sectors and their challenges. The team aims to help clients solve the toughest and most complex legal issues while finding the best solution for each case.

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## 1. Legal System

### 1.1 Legal System and Judicial Order

Mexico follows a civil law legal system. The legal system consists of a federal government and 32 individual state governments, each divided into executive, legislative and judicial branches.

Mexican judicial power is organised by federal and local courts. The federal judicial power consists of the:

- Supreme Court of Justice as the Final Constitutional Appeal Court;
- collegiate and single circuit courts; and
- district courts.

At the local level, the judicial power of each state is organised as set forth in their own constitution. It is usually composed of the State Superior Court of Justice divided by matter (eg, family courts, civil/commercial courts) and by first instance courts and second instance appeal courts.

## 2. Restrictions to Foreign Investments

### 2.1 Approval of Foreign Investments

Generally, Mexico is open to foreign investment and most of the industrial sectors are fully liberalised. However, as provided by the Foreign Investment Law, certain restrictions are applicable to strategic activities and sectors. In essence, there are four restricted tiers:

- strategic activities reserved for the Mexican state such as, inter alia, certain activities related to oil and hydrocarbons extraction and exploration; planning and control of the national electric system, nuclear energy, radioactive minerals, the postal service, and the mint and currency; and control and supervision of the ports and airports. Private entities, including those with foreign investment, may execute agreements with the relevant government agencies to carry out certain activities in the abovementioned sectors;
- activities reserved for Mexican individuals or entities which do not accept foreign investment (such as development banking institutions and land transportation of freight);
- activities with a limited authorised percentage of foreign investment participation; and
- activities which need prior authorisation from the National Foreign Investments Commission (CNIE), an agency of the Ministry of Economy, to have foreign investment participation over 49%.

Additionally, the Foreign Investment Law provides that prior authorisation from the CNIE is required for foreign investors to have over 49% participation, directly or indirectly, in

an existing Mexican company, if the total value of the company's assets, at the time of requesting authorisation, is above the economic threshold that the CNIE sets on a yearly basis (the threshold for 2019 is set at MXN19,558,790,064.21, approximately USD1 billion).

Regarding real estate, there are limitations for foreigners to acquire real estate located in the restricted zone (which covers an area creating a belt around the country, 100 km wide in the border regions and 50 km wide along the coast). For non-residential real estate acquisition, specific clauses need to be included in the company's by-laws and authorisation must be granted by the Ministry of Foreign Affairs, whereas other legal structures apply for residential real estate acquisition.

### 2.2 Procedure and Sanctions in Case of Non-Compliance

As a general rule, foreign investors do not need special approval to carry on commercial activities in Mexico, although authorisation is required for certain activities in which foreign investment participation is over 49%. In such cases, authorisation must be obtained from the CNIE prior to carrying out the investment.

The filing to request authorisation must include:

- a written request, describing the characteristics of the project and information of the applicant;
- a completed form with data describing the benefits that the project will have for Mexico's economy;
- an annual report or description of the applicant's activities in the previous fiscal year;
- an incorporation deed and the previous fiscal year's audited financial statements for the existing Mexican entity; and
- payment of administrative fees.

The CNIE has a maximum term of 45 business days to issue a resolution.

Economic sanctions are applicable if approval is required and it has not previously been obtained, as set forth in applicable laws. Agreements, acts and by-laws which are contrary to the provisions of the Foreign Investment Law may be declared null and void by the Ministry of Economy. In this case, those agreements, acts or by-laws will have no legal effect between the parties that execute them and will not be enforced towards third parties.

### 2.3 Commitments Required from Foreign Investors

Specific commitments are not required from the foreign investor by the CNIE.

## 2.4 Right to Appeal

Where an investment is not authorised, there is no formal process established in the Foreign Investment Law by which an investor may challenge such a decision. However, according to the Federal Administrative Procedures Law, the investor may initiate an appeals process before the federal courts.

## 3. Corporate Vehicles

### 3.1 Most Common Forms of Legal Entities

The most common types of corporate vehicles in Mexico for commercial purposes are the:

- limited liability stock corporation (*Sociedad Anónima* or SA); and
- limited liability commercial partnership (*Sociedad de Responsabilidad Limitada* or SRL).

These are types of commercial companies regulated by the General Law on Business Organisations (GLBO).

An SA is the most usual form of company in Mexico, while an SRL is an ideal vehicle for foreign investors wanting to start a business in Mexico where such business is closely held or is a wholly-owned subsidiary of the investor and restrictions on equity transfers are desired.

Both types of entities offer general advantages, such as:

- limited liability for investors – generally speaking, no piercing of the corporate veil is available (except in certain cases for specific tax and criminal situations);
- fewer limitations on foreign investment;
- long-term presence and the ability to expand and create Mexican corporate structures; and
- clear rules under Mexican law.

The main similarities between an SA and an SRL are:

- both are commercial companies with limited liability of shareholders (for an SA) for up to the amount of par value of the shares of capital stock; and limited liability of partners (for an SRL) for up to the amount of par value of their equity stake;
- there is no statutory minimum amount of capital stock required for either entity; both must have a minimum fixed capital and may have variable capital, which allows increases and decreases of capital stock without major formalities; the capital integration may be determined by agreement of the shareholders or partners; and
- both require a minimum of two individuals or entities as shareholders/partners.

The main differences between an SA and an SRL are:

- an SA has shareholders whereas an SRL has partners; an SA may have any number of shareholders, whereas the number of partners of an SRL is limited to 50;
- the capital stock of an SA is represented by shares (with or without par value), evidenced through the issuance of stock certificates, which are negotiable instruments. The corporate capital of an SRL is represented by partnership interests, which do not need to be physically issued and are represented with provisional certificates. Shareholders may hold one or more shares issued by a company, while a partner, in principle, may only hold one partnership interest, unless there are partnership interests which grant different rights to their holders, in which case, a partner may have more than one partnership interest;
- an SRL might offer special tax treatment that enables its partners to be subject to specific foreign tax benefits (similar to ‘check the box’ provisions in the US);
- SA shares are freely transferable, unless otherwise determined by the shareholders in the by-laws; SRL partnership interests are not freely transferable, and their transfer is subject to approval by the partners; and
- an SA allows the issuance of shares with special or preferential corporate and/or economic rights.

### 3.2 Incorporation Process

The standard incorporation process of a Mexican commercial entity (SA or SRL) takes approximately one to three weeks. Although certain registration procedures before Mexican authorities may take an additional two to six weeks, from the date of incorporation.

The incorporation process consists of the following steps:

- obtaining the corporate name ‘authorisation’ from the Ministry of Economy (which takes from two to five business days);
- selecting the investors or investor vehicles and issuance of powers of attorney (POAs). It is necessary to determine the two (or more) shareholders or partners who will hold the shares or partnership interests of the company. Such individuals may grant special POAs to authorised third parties to carry out the incorporation acts on their behalf. If shareholders or partners are foreign residents, the POAs must be granted abroad and be notarised and apostilled in the place where they are granted, to be valid in Mexico. Those POAs must then be formalised before a Mexican notary public;
- preparing the charter of incorporation and by-laws; and
- formalising the process of incorporation before a Mexican notary public.

Once incorporated, the company must carry out the following:

- registration of the incorporation deed before the Public Registry of Commerce;

- obtaining a Taxpayer's Registry before the Tax Authority (SAT), required to issue invoices (usually takes approximately 15 days);
- if the company has foreign investment, registration before the National Registry of Foreign Investments (NRFI) within the 40 days following the date of incorporation; and
- registration of employees before the Mexican Social Security Institute (IMSS) once they are hired. This is not needed for the company to be considered as existent or incorporated, but is required for the company to fulfil its social security and employer obligations.

### 3.3 Ongoing Reporting and Disclosure Obligations

Companies in Mexico are subject to the following reporting and disclosure obligations:

- annual online registration of shareholders before the tax authority, filed within the first three months of each tax year (which runs from 1 January to 31 December);
- annual report filing before the NRFI to update the company's registration with certain economic information, when the annual results for several financial concepts and accounts are above the amount determined by the CNIE (currently MXN110,000,000). Subject to the fulfilment of other financial thresholds, the company might also be required to file quarterly reports before the NRFI;
- registration of resolutions and acts carried out by the company before the Public Registry of Commerce. The main matters that require such registration are:
  - (a) amendment of articles of incorporation or by-laws;
  - (b) change of corporate name;
  - (c) transformation of the company;
  - (d) variation of the fixed part of the corporate capital stock;
  - (e) mergers and spin-offs;
  - (f) dissolution and liquidation; and
  - (g) granting of certain POAs, such as powers for issuing credit and negotiable instruments; and
- an SA and SRL must keep corporate books for the registry of shareholders or partners, respectively. A notice of each entry on those books must be submitted to the Ministry of Economy through the electronic system for publications of commercial companies.

### 3.4 Management Structures

Commercial companies may be managed by:

- a sole director or sole manager; or
- a board of directors or board of managers, as applicable.

The board or sole manager or director may establish a second-tier management entity, such as an executive committee (or other committees) which will carry out the matters delegated to them by the board or sole manager or director.

The company may also appoint corporate officers to perform certain management positions, who may or may not be members of the board.

### 3.5 Directors', Officers' and Shareholders' Liability

Directors have a fiduciary duty towards shareholders and the company; therefore, they are expected to act with the prudence and care that they would have in their own business. Consequently, directors who act against the company's interests, and not under the specific directions of the equity holders, are personally liable for their actions towards shareholders and third parties.

Likewise, directors are jointly and severally liable to the company with respect to:

- the truthfulness of the contributions made by shareholders;
- compliance with legal and statutory requirements for the payment of dividends to the shareholders;
- the existence and maintenance of accounting and other books and records required by the applicable law; and
- the fulfilment of the resolutions adopted by the shareholders' meeting.

Pursuant to the GLBO, a director who, in a certain transaction, has an interest which is opposed to that of the company, shall inform the other directors of this and shall refrain from participating in any deliberation and decision-making regarding such matter. Any director who acts against this provision will be liable for damages and losses caused to the company.

It is also important to mention that directors may be held criminally liable for damages and losses caused to the company or third parties through their negligence or wilful misconduct, or by acting in bad faith.

However, a director will not be deemed liable for any specific decision resolved by the board, or action taken by the company, to the extent that said director has expressly stated their disagreement with such actions at the time of analysis and voting on the corresponding resolution.

The corporate veil provided by the GLBO is applicable to shareholders and partners, and not to directors, who are personally liable to the company and shareholders or partners in the terms described above.

## 4. Employment Law

### 4.1 Nature of Applicable Regulations

Employment relationships in Mexico are governed by the Mexican constitution, the Federal Labour Law (FLL), the

Social Security Law and the Law for the National Fund for Employees' Housing (LEH).

The Mexican constitution, and more specifically its Article 123, establishes guidelines for employment relationships and sets forth minimum standards benefits and conditions that must be honoured by employers and are not validly waivable by employees.

The FLL regulates the principles set forth in the constitution, covering in detail all aspects related to individual and collective employment issues within the whole of Mexico.

Both the constitution and the FLL divide matters into two different jurisdictions, federal and local, depending on the industry and activities in which the employer is involved.

In addition to the constitution and the FLL, the Social Security Law governs security, nursery, medical and retirement mandatory benefits granted by the social security system to all employees. The Social Security Law establishes that employers must register themselves and their employees with the IMSS, and both parties must make the applicable social security contributions for the employees' protection. This law also outlines the entitlement of registered employees and employers to access the social security system and its afferent benefits, such as occupational risk, health and maternity, retirement pensions and day care.

Finally, the LEH and the Law for the Retirement Savings System are other pieces of social security legislation governing different and more specific aspects of additional social security and welfare benefits in Mexico.

At present, the authorities in charge of solving any employment-related conflict are the labour boards, both federal and local, depending on the industry branch. However, derived from the publication of the Labour Reform Law on 1 May 2019, the labour boards, which depend on executive power, are to be replaced by labour courts, based on judicial power.

#### 4.2 Characteristics of Employment Contracts

The FLL establishes that entering into an employment agreement contract is mandatory, as it allows both parties to set in writing the terms and conditions of the employment relationship. However, the FLL provides that rendering personal and subordinated services in favour of another person or corporate entity without entering into an employment contract has the same effect as if the parties had executed an employment agreement and the omission of execution of the agreement is the direct responsibility of the employer.

The FLL contemplates four main types of employment agreements:

- standard agreements are entered into for an indefinite term, based on the principle of employment stability that prohibits employers from laying off their work force without sufficient grounds, as strictly enumerated in the FLL;
- contracts for a fixed term or for a specific task may be entered into when the needs of the employer are in accordance with such an engagement and fit within the limited cases enumerated in the FLL which validly justify the execution of a fixed-term contract;
- a seasonal contract, which allows employers to hire personnel when the workload increases during a certain time of the year; and
- a Special Task Contract, which can only be executed when required by the nature of the work or services, and which terminates once such defined task is over. If the work or activities for which the employee was originally hired for a fixed term or specific task continue after the end of the contract, then the employment relationship will automatically be extended and will consequently be deemed to be for an indefinite term.

The FLL also contemplates the possibility to implement in both cases a trial period or an initial training modality. On one hand, initial training allows employers to train their employees for up to six months, depending on the tasks and level, and if, at the end of the period, the employer considers that the employee does not meet the requirements, the contract terminates naturally without any liability for the employer, other than paying the corresponding salary and accrued benefits. On the other hand, the trial period allows companies to assess their new personnel for up to 180 days and if, at the end of the term, the employer determines that the employee does not have the abilities or skill required, the contract may be terminated without any liability for the employer. In this regard, employers must include objective elements in contracts in order to assess the abilities of the employee.

In addition, the FLL specifically provides the statutory content required to appear in every employment contract, such as the employee's information (name, gender, address and so forth), the type of employment contract entered into, the services to be provided and the place of work, among others.

Finally, although not mandatory, it is also advisable to detail any benefit paid to employees as part of their compensation package, a work-for-hire provision and any provision regarding information privacy and personal data protection, as well as confidentiality of information provided to, or generated by, employees.

#### 4.3 Working Time

In Mexico, the FLL states that for every six working days, employees are entitled to one day of rest. There are three different work shifts, each of which has a limited time length:

- eight hours a day for daytime work (48 hours a week);
- seven hours for night work (42 hours a week); and
- seven-and-a-half hours for a mixed-work shift (45 hours a week).

Each shift must include at least a 30-minute meal break.

Any time worked in excess of the weekly statutory limit – which depends, as mentioned above, on the shift – is deemed to be overtime and, as such, employees are entitled to overtime pay, which corresponds to double their usual rate. It is also provided that an employee may not work more than three extra hours daily for more than three days per week, a total of nine extra hours per week.

Overtime compensation is paid for a specific period of time, along with salary and other benefits to which the employee is entitled.

#### 4.4 Termination of Employment Contracts

In Mexico, terminating an employment relationship is not easy, due to the principle of employment stability that governs all employment relations. This principle is understood to mean that no employment relationship can be terminated at an employer's will unless it is for one of the causes for termination foreseen in the FLL. When lawfully terminating an employee's contract under a statutory cause, the employer must provide the employee with written notice stating the causes for termination and the dates on which the actions were carried out. In this case, the employer has the burden of proof regarding the causes for termination stated in the notice. In the event that the employer fails to deliver such notice, the termination will be presumed unjustified.

When terminating an employment relationship with sufficient cause, the employer must pay the accrued benefits only. If the employer fails to prove the causes for termination, the termination will be deemed unjustified as a matter of law regardless of the cause, and the employer must reinstate the employee in their role or tender severance pay, consisting of: three months' integrated salary, 20 days of integrated salary for each year of service, seniority bonus, and accrued benefits owed to the employee.

Since proving the causes for termination and the delivery of the termination notice is difficult, it has become common practice for employers to negotiate settlements with their employees, which can be done through the execution of a termination agreement or voluntary resignation on the part of the employee.

#### Redundancies

In Mexico, whenever an employer wishes to make an employee redundant, the employer must follow the same process of termination without cause described above. There is no need to notify the government or the employee's union

about redundancy (unless otherwise provided for in the bargaining agreement), and there is no need for a social plan or offers of alternative employment. In redundancy, the common practice in Mexico is to offer the employee full statutory severance pay in exchange for execution by the employee of corresponding termination documents.

Collective redundancies are also limited by the FLL, which only foresees such a possibility in a limited number of cases, such as force majeure or bankruptcy. If the collective redundancy follows the special proceeding set out in the FLL, the severance payment will be limited to three months of integrated salary, leaving out the 20 days of integrated salary payment per year of work. However, it is important to note that a collective redundancy can be carried out without following the special proceeding set out in the FLL, in which case, full severance payment must be paid to the employees.

#### 4.5 Employee Representations

Mexican legislation does not foresee the formation of work councils. Nevertheless, the FLL imposes the obligation on both employers and employees to form different commissions to deal with several issues at work, such as training, health and safety, drafting the internal work regulations, and profit-sharing payments.

Additionally, employees have the right to voluntarily form or join a union to represent and defend their interests before the employer, and to execute a collective bargaining agreement with the employer for the purpose of setting up the terms and conditions of the employment of unionised employees. The most important right, and leverage, for unions forcing employers to negotiate collective bargaining agreements and to comply with their terms, is the right to call a strike and to stop activities until their demands are resolved.

Notwithstanding the above, the recently enacted Labour Law Reform impacts collective relationships, its main purpose being to pursue and achieve accurate representation of the employees and enhance their freedom of organisation and affiliation.

## 5. Tax Law

### 5.1 Taxes Applicable to Employees/Employers

The following taxes must be paid in the context of an employment relationship:

#### Income Tax

Employees, directors, managers and statutory examiners are taxed for income tax purposes on any income received for the performance of subordinated personal services. Taxable income includes profit share, severance payments and allowances of all types, including housing, living expenses, utilities, education, overseas services and tax reimbursements.



Tax is withheld and paid on a monthly basis by the employer, and also on an annual basis when the employee does not claim any personal deductions and does not fall within the specific assumptions established by the law under which such employee would be obliged to file his/her own tax return; such assumptions include, among others, having income from a source other than salary, when the employee stopped working for the employer before 31 December of the corresponding fiscal year, when the employee received income from salary for an amount exceeding the threshold established by law, etc.

Income tax withholding is calculated by applying a progressive rate (with a maximum rate of 35%) to the payments made. The amount withheld is offset against the final yearly tax.

### **Tax on Employee Profit Sharing**

In accordance with the Mexican Labour Law, employees are entitled to participate in 10% of the profits of their employer. However, Mexican Labour Law provides for a one-year profit-sharing holiday for newly incorporated entities.

### **Social Security Contributions**

According to Mexican social security legislation, employers must determine and pay the social security contributions due to the IMSS. In general terms, the employee-employer contributions are between approximately 15% and 20% of salary.

In addition, the LEH provides that contributions to the fund will be determined and paid by the employer, applying a 5% rate over an employee's 'adjusted salary'. For these purposes, the adjusted salary is determined under the terms of the Social Security Law.

### **Local Payroll Tax**

Payroll taxes in Mexico are imposed by local government, therefore individuals and legal entities that made payments as consideration to employees within the applicable State of Mexico, may be subject to this tax. The payroll tax is determined by applying a rate that may vary between 2% and 4%, depending on the state, to the total amount paid as consideration to employees.

## **5.2 Taxes Applicable to Businesses**

A company doing business in Mexico pays the following taxes:

### **Income Tax**

Mexican resident entities are taxed on their worldwide income at the 30% corporate income tax rate. The rate is applicable on their tax result, which is computed by subtracting the following items from the taxpayer's aggregate taxable revenue:

- authorised deductions;
- the employees' profit share paid in the corresponding tax year; and
- net operating losses.

Mexican resident corporations are required to file their tax returns within the first three months following the end of the tax year (ie, by 31 March). Also, they must make monthly advance income tax payments.

The Mexican Income Tax Law (MITL) establishes the specific terms under which a foreign resident is liable to pay tax for any income obtained from a Mexican source of wealth, as well as the applicable tax rate over that income.

In general terms, tax should be withheld by a Mexican resident on the date it becomes due and payable, or when payment is made, and the party withholding the tax shall remit the same to the Mexican tax authorities.

The MITL establishes that non-residents are also liable to pay this tax when they receive income in cash, in property, in services or in debt claims derived from a source of wealth located in Mexico when they do not have a permanent establishment therein, or when the related income is not attributable to the latter.

### **Value Added Tax**

Value added tax is payable on the sale of property, the rendering of independent services and the granting of the temporary use or enjoyment of property in Mexico, as well as on the import of goods or services. This tax is levied at the general rate of 16%.

No value added tax is applicable in the case of the exportation of goods and services, among other activities, subject to certain requirements.

Under the terms of the Value Added Tax Law, the tax will be triggered on the collection of compensation and on the amount of each activity (ie, on a cash flow basis). Additionally, the taxpayer shall shift said tax, expressly and separately, to the persons that acquire or temporarily use or enjoy the goods or receive the services. Tax shifting is understood to be the collection or charge that the taxpayer makes from said individuals or entities, in an amount equivalent to the tax established under such law.

Under the terms of the law, value added tax is determined on a monthly basis; thus, taxpayers must file monthly tax returns and pay the value added tax due no later than the 17th day of the following month to which the tax corresponds.

### Tax on Interest Payments

The MITL provides that it shall be considered that, among others, the source of wealth is in Mexico when capital is placed or invested therein, or when interest is paid by a Mexican resident or a non-resident with a permanent establishment in Mexico.

In view of this, when a resident of Mexico pays interest (understood, among other things, as yields from debt claims of every kind; yields from public debt, bonds or obligations; premiums paid on securities loans; discounts on the placement of securities, bonds or obligations; and gains on the sale of securities placed with the investing public at large) to a non-resident, the source of wealth is considered to be in Mexico. Thus, the non-resident will be required to pay income tax in Mexico on such interest. The tax is paid through a withholding made by the payer and is computed by applying the rate indicated to gross interest paid, ranging from 4.9% to 35% depending on the characteristics of the person who receives the interest.

### Tax on Dividend Payments

The MITL provides that when a resident of Mexico pays dividends to a non-resident, tax will be paid through a withholding made by the payer and will be computed by applying a 10% withholding rate over the dividend.

It is important to mention that Mexico has a wide tax treaty network to avoid double taxation in international transactions in which Mexican residents participate.

### 5.3 Available Tax Credits/Incentives

The main tax credits and incentives offered in Mexico are as follows:

#### Tax Incentives for Northern Border Region of Mexico

The decree of tax incentives for the northern border region of Mexico provides a reduction in income tax and value added tax rates for taxpayers that derive income from business activities carried out within this region. These tax incentives are applicable from 1 January 2019 and will remain in force until 31 December 2020.

#### Withholding on Corporate Bonds and Sale of Shares through IPOs

A decree published in the Mexican Official Gazette grants two tax incentives for certain taxpayers. The first incentive is a reduction in the withholding tax applicable to interest earned by non-residents from Mexican corporate bonds. The second incentive allows a 10% income tax rate to be applicable to the sale of shares in Mexican stock markets through initial public offerings (IPOs) of Mexican companies. These tax incentives have been applicable since 9 January 2019.

### 5.4 Tax Consolidation

Tax consolidation regimes are no longer applicable in Mexico.

### 5.5 Thin Capitalisation Rules and Other Limitations

Certain thin capitalisation rules are applicable in Mexico. The MITL provides that interest arising from taxpayers' debts that exceed a 3:1 ratio vis-à-vis the net worth of such taxpayers, and which derive from debts contracted with non-resident related parties, shall not be deductible. For this purpose, net worth is defined as total assets minus total liabilities, as shown under the balance sheet for book purposes.

### 5.6 Transfer Pricing

The MITL includes transfer pricing provisions and rules applicable to intercompany transactions. Under these rules, taxpayers that undertake transactions with related parties are required to determine their revenues and deductions allowing for prices and amounts of consideration that would have been used with or between independent parties in comparable transactions, applying the transfer pricing methods described in the MITL.

Additionally, two or more persons are deemed as related parties when one of them participates, directly or indirectly, in the administration, control or equity of the other, or when a person or group of persons participates, directly or indirectly, in the administration, control or equity of said persons. Members of joint venture agreements are considered to be related, as are the persons who are considered related parties of said members, in accordance with the provisions of the MITL.

### 5.7 Anti-evasion & Anti-avoidance Rules

The MITL provides anti-evasion rules in connection with interest and royalty payments made to foreign entities that qualify as tax havens in terms of such law.

#### Decree Repealing Tax Amnesties

On 20 May 2019, a presidential decree was published repealing several decrees and general tax provisions related to tax amnesty programmes issued by previous Mexican presidents. Such decree came into force on 21 May and will remain in effect until 2024.

## 6. Competition Law

### 6.1 Merger Control Notification

In Mexico, transactions subject to merger control (known as concentrations) are governed by the Antitrust Statute (*Ley Federal de Competencia Económica* or LFCE). The statute defines a concentration as any merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interests, trusts or assets in general are

consolidated, and which is carried out among competitors, suppliers, customers or any other 'economic agents.' Any individual or company, state-owned or private, for-profit or non-profit, domestic or foreign, actually or potentially participating in any economic activity in Mexico, is deemed to be an economic agent for the above purposes.

Certain concentrations are subject to pre-merger approval, if they meet any of the thresholds in the LFCE. Although the LFCE refers to 'concentration notification' it is actually a request for prior approval, since reportable transactions are not to be closed until a final decision issued by the Antitrust Commission (Cofece) has been served to the parties, granting unconditional approval, or until the remedies imposed therein have been fully complied with.

The thresholds below are adjusted on an annual basis for inflation and are expressed in units known as UMAs (1 UMA = MXN84.49 for 2019, and USD1 = MXN19):

- test based on the transaction size in Mexico: when the act(s) involved, regardless of the place of execution, are worth in Mexico, directly or indirectly, more than 18 million UMAs = MXN1,520.8 million, or approximately USD80 million;
- test based on the target: when the act(s) involved result in the accumulation of 35% or more of the assets or capital stock of an economic agent with annual turnover originating in Mexico, or assets located in Mexico, worth over 18 million UMAs = MXN1,520.8 million, or approximately USD80 million; and
- test for control of smaller transactions by larger economic agents: when the act(s) involved result in the accumulation in Mexico of assets or capital stock worth over 8.4 million UMAs = MXN710 million, or approximately USD37.5 million, and the transaction involves two or more economic agents with joint or separate annual sales originating in Mexico, or assets in Mexico, worth over 48 million UMAs = MXN4,055.5 million, or approximately USD214 million.

Non-reportable transactions may also be voluntarily submitted for pre-merger approval, but once a filing has been made, they may not be closed until clearance has been obtained, just like mandatory concentrations.

Cofece has the power to object, deny authorisation for, and investigate or penalise, as the case may be, any concentration that has the purpose or effect of diminishing, harming or impeding competition with respect to similar, equivalent or related goods.

## 6.2 Merger Control Procedure

Concentrations subject to approval may be analysed under:

- ordinary procedure, further described below and typically used for transactions involving horizontal overlaps or vertical integration of the parties; or
- 'fast-track' procedure, available when it is evident that the transaction will not have anti-competitive effects (such as a purchaser's first entry into the Mexican market).

The ordinary procedure begins with the filing of a Concentration Notice. Cofece's mergers staff typically sends a Request for Basic Information (RFBI) regarding the parties and the transaction within the next ten business days (BDs). Parties must respond within ten BDs which may be extended once for an additional ten BDs upon request.

Cofece has thereafter 15 BDs to issue an additional Request for Information (RFI) that customarily focuses on market information in transactions involving horizontal overlaps or vertical integration issues. Parties have 15 BDs to respond, with an available extension of another 15 BDs.

When all the responses have been submitted to Cofece's satisfaction, a preliminary report is sent to the Board of Commissioners, which identifies any competitive risks or recommends unconditional approval and then takes a vote, issuing a decision approving, conditioning or blocking the concentration. The vote must take place within the 60 BDs following the date on which the parties responded to the RFBI or RFI, as applicable.

If the parties' own assessment results in competitive concerns (such as the transaction conferring or increasing market power, or resulting in barriers to entry, or facilitating horizontal unlawful behaviour), or if Cofece notifies them of competitive concerns, remedies may be offered. Remedy offers re-start the clock.

Therefore, should a transaction be subject to pre-merger review, the parties must convincingly argue before Cofece that the merger does not have any anti-competitive effects, or offer remedies to counter them.

## 6.3 Cartels

The LFCE defines cartel behaviour as any agreement among competitors with the purpose or effect of:

- fixing prices;
- restricting output;
- segmenting markets by territory, clients, products, or suppliers;
- rig bidding; or
- exchanging information for any of the abovementioned purposes.

Cartel behaviour is prohibited per se and is subject to hefty administrative fines (up to 10% of the economic agent's

annual income), criminal sanctions (five to ten years of prison time) and civil damages recoverable by affected parties.

### 6.4 Abuse of Dominant Position

Articles 54–55 of the LFCE, which regulate the abuse of a dominant position or single-firm conduct, stipulate that conduct that would otherwise be lawful may be construed to be anti-competitive and thus in breach of the antitrust laws, provided that certain conditions are met (in other words, for antitrust purposes, it is conduct that is analysed under the Rule of Reason):

- it is conduct listed in Article 56 of the LFCE;
- it is carried out by a firm or group of firms that hold market power (ie, the ability to exert power over price or to restrict output without competitors being able to successfully counter it); and
- it has the purpose or effect of unduly displacing other economic agents.

Conduct listed in Article 56 of the LFCE includes vertical restrictions on price or otherwise, resale price maintenance, tied or bundled sales, exclusive supply or purchase agreements, refusals to deal, boycotts, predatory or below-cost pricing, certain loyalty discounts, cross-subsidies, price discrimination, and margin squeeze.

Cofece may issue an order instructing liable economic agents to cease the conduct and may impose fines of up to 8% of their annual income. Both economic agents and individuals can also face civil action for recovery of damages from affected parties.

## 7. Intellectual Property

### 7.1 Patents

Intellectual property rights in Mexico are regulated in general by the Industrial Property Law (IPL) and the Federal Copyright Law (FCL), their regulations and all related international treaties of which Mexico is a signatory. According to the IPL, a patent is an exclusive right granted to an inventor or its assignee by the Mexican State in order to protect a certain invention, with the inherent exclusive right to commercially exploit such invention for a limited period of time, in exchange for disclosure of the invention.

An invention is defined as any human creation that allows the transformation of matter or energy that exists in nature, for its use and to meet mankind's needs. In consequence, an invention will be subject to patentability if it:

- embraces novelty (anything not found in all the technical knowledge that has been made public by oral or written means, by use or by any other means of dissemination of information, either in Mexico or abroad);

- has inventive results (obvious to a person skilled in the art); and
- has industrial application (practical utility, or can be made or used in any branch of economic activity).

Notwithstanding this, there are certain exceptions to patentability, and things that are not allowed to be registered as patents, as set forth in the IPL.

A patent's length of protection is a non-renewable term of 20 years, starting from the filing date or, if it has one, the international filing date, which protection is subject to the payment of maintenance fees every five years. During such term, the exclusive right of use of the patented invention confers on the respective owner the right to prevent others from manufacturing, using, selling, offering for sale or importing the patented product or process without the owner's consent.

To obtain a patent, an application must be filed before the Mexican Institute of Industrial Property (MIIP), including the details of the invention and the applicant. All information contained in the dossier (application file) will be kept confidential until its publication. If the applicant is not the inventor, then assignment of the invention is required.

Once the application is filed, the MIIP conducts an examination of the documents to verify the invention fulfils all the requirements prior to the thorough examination. In this process, the applicant may be required to clarify or provide information. If the application passes the examination, the MIIP publishes the application with the description of the patent in its Official Gazette, so that any third party can, within a period of two months, let it be known if they consider that the invention is not patentable.

Once the patent application has been published, the MIIP will conduct a thorough examination of the invention's application in order to determine whether the invention can be subject to protection in compliance with the IPL. If it can, the MIIP will issue an official communication requiring the applicant to proceed with the payment of the patent granting fees and the first five-year period of maintenance fees. Once the fees are covered, the MIIP will issue the corresponding patent title.

A patent's registration usually takes from three to four years.

According to the IPL, a patent's title allows the owner to prevent third parties from infringing on the owner's rights and the owner can initiate an administrative infringement action before the MIIP if a third party:

- manufactures or develops goods protected by a patent without the consent of the owner thereof or without the appropriate licence;

- offers for sale or distributes goods protected by a patent in the knowledge that they have been manufactured or developed without the consent of the owner of the patent;
- uses patented processes without the consent of the owner of the patent or without the appropriate licence; or
- offers for sale or distributes goods that are the result of the use of patented processes, in the knowledge that they have been used without the consent of the owner of the patent or of the person who holds the licence of use thereof.

During relevant proceedings the owner can request the MIIP to order precautionary measures or injunctions.

Where the infringement action is declared, the MIIP can impose economic sanctions on the infringer, without prejudice of seeking the award of damages and lost profits that may be claimed in a separate judicial procedure by initiating a separate civil action, as well as temporary or permanent closure of the infringer's business, and administrative detention for up to 36 hours.

## 7.2 Trade Marks

According to the IPL, a trade mark is any sign that is perceptible by the senses and is likely to be represented in a way that allows it to determine the object of protection, which distinguishes goods or services from others of the same type or category in the market.

Relevant law states that the following signs are eligible for registration:

- denominations, letters, numbers, figurative elements and combinations of colours, as well as holographic signs;
- three-dimensional shapes;
- trade names and company or business names;
- the name of an individual, provided that it cannot potentially be confused with a registered trade mark or published trade name;
- sounds;
- scents; and
- a plurality of operative elements – image elements including, among others, size, design, colour, shape layout, label, packaging, decoration or any others that, combined, distinguish goods or services in the market, most commonly known as 'trade dress.'

The abovementioned type of trade marks may be declared as famous or well-known trade marks, if they comply with the requirements set forth in the law.

Nevertheless, there are several prohibitions or limitations that establish when a trade mark cannot be the subject of registration. In the past, descriptive terms were not eligible for registration; however, the new amendments provide that a descriptive trade mark is eligible to be registered as long as

it acquires distinctiveness through its use (secondary meaning). However, the rules for such secondary meaning are currently unclear since the regulations for the new amendments have not yet been published.

Moreover, the IPL also foresees the possibility to register the following distinctive signs:

- collective trade marks;
- certification trade marks, which are trade marks that distinguish goods and services the quality and characteristics of which have been certified;
- taglines, which are sentences or statements that promote premises or commercial or industrial establishments, as well as goods and services, in order to distinguish them from others in the same type of category in the market; and
- trade names.

A trade mark will be valid for ten years, starting from the application filing date, renewable for successive periods of the same length. During such period the owner is entitled to the exclusive use of the trade mark for the goods and services protected under the registration.

To obtain a trade-mark registration, an application must be filed before the MIIP with the distinctive sign characteristics indicating which are the specific goods or services it will protect. Prior to filing a trade-mark application, clearance background searches are strongly recommended.

Upon receiving the application, the MIIP will publish the same in its Official Gazette, and within the following month third parties are entitled to file an opposition.

After performing a thorough examination, if there is no legal impediment and the trade mark is not similar and will not mislead an average consumer to confuse it with an already existing trade mark or previously filed application, the MIIP will grant the trade-mark registration. Trade-mark registration usually takes from four to six months.

Once a trade-mark registration has been granted, to maintain it in force, within three months of the third year following the registration date, and on every subsequent renewal (ie, every ten years), a declaration of effective and real use must be submitted before the MIIP, otherwise the registration will automatically be cancelled.

According to the IPL, a trade-mark registration allows the owner to prevent third parties from infringing its rights. Therefore, the owner can initiate an administrative trade-mark infringement action before the MIIP under the cases foreseen in the IPL, which basically consist of a third party carrying out activities that lead to unfair competition, including the use of identical or similar distinctive signs,

which are likely to cause confusion, for goods or services similar to those protected by the trade-mark registration; selling and distributing trade-marked goods that have been altered; or denigrating such goods and services or commercial activity; among others.

During the infringement action proceeding the MIIP may order precautionary measures or injunctions, including seizure of goods, banning the distribution of merchandise that infringes intellectual property rights, ordering suspension of the service or the closure of the premises, among others.

If the infringement action is declared, the MIIP could impose economic sanctions on the infringer, without prejudice of seeking the award of damages and lost profits that may be claimed in a separate judicial procedure by initiating a separate civil action, as well as temporary or permanent closure of the infringer's business, and administrative detention for up to 36 hours.

In addition to the above, criminal actions are also available, if the following criminal offences have taken place:

- counterfeiting trade marks on a commercial scale with intent; and
- producing, storing, transporting, introducing into the country, distributing or selling, on a commercial scale and with intent, items which display counterfeit trade marks.

### 7.3 Industrial Design

Mexican law protects industrial designs, including under such category:

- industrial drawings or blueprints; and
- industrial models.

An industrial drawing or blueprint is any combination of shapes, lines or colours incorporated in an industrial product for ornamentation purposes and which provides a specific appearance of its own, whereas an industrial model is constituted by three-dimensional shapes and serves as a model or pattern for the manufacture of an industrial product, giving it a special appearance that does not involve any technical effects.

According to the IPL, industrially applicable and novel (created independently of known designs or combinations of known features and that differs significantly from such) industrial designs are eligible for registration.

The registration of industrial designs is valid for a term of five years, starting from the application filing date, renewable for successive periods of the same duration up to a maximum of 25 years, subject to the payment of the corresponding fees. During such term, the owner will have the exclusive right to

use the registered industrial design, and may therefore prevent others from manufacturing, using, selling, offering for sale, or importing the registered industrial design without the owner's consent.

To obtain an industrial design registration an application must be filed before the MIIP, including information about the designer as well as:

- a graphic or photographic reproduction of the industrial design;
- an indication of the product for which the industrial design will be used; and
- a description of the industrial design, which should make a brief reference to the graphic or photographic reproduction subject to be protected.

After performing a thorough examination, and if the industrial design has all the characteristics needed to obtain a registration, the MIIP will grant the registration.

According to the IPL, an industrial design registration allows the owner to prevent third parties from infringing its rights. Therefore, they can initiate an administrative infringement action before the MIIP under the cases foreseen in the IPL, which basically consist of a third party carrying out activities that lead to unfair competition, including the manufacture or development of goods protected by an industrial design without the consent of the owner thereof, or without the appropriate licence; offering for sale or distributing goods protected by a registered industrial design in the knowledge that they have been manufactured or developed without the consent of the owner of the patent; and reproducing or imitating industrial designs protected by registration without the consent of the owner thereof or without an appropriate licence.

During the infringement action proceeding the MIIP may order precautionary measures or injunctions, including seizure of goods, banning the distribution of merchandise that infringes the intellectual property rights, ordering the suspension of the service or the closure of the premises, among others.

If the infringement action is declared, the MIIP could impose economic sanctions on the infringer, without prejudice of seeking the award of damages and lost profits that may be claimed in a separate judicial procedure by initiating a separate civil action, as well as temporary or permanent closure, and administrative detention for up to 36 hours.

### 7.4 Copyright

A copyright is the recognition given by the Mexican government to a creator of any of the literary and artistic works specified in the FCL, its regulations and all related international treaties of which Mexico is a signatory. The FCL grants

the author exclusive prerogatives and privileges of a personal and economic nature. The personal prerogatives are known as moral rights and the other as patrimonial rights.

According to the FCL, an author is the person who has created the work out of his/her intellect, therefore moral rights are exclusively granted to individuals.

Works protected by the FCL fall into the following categories:

- literary works;
- musical works with or without lyrics;
- dramatic works;
- dances;
- pictorial works or drawings;
- sculptures and three-dimensional works of art;
- cartoons and short stories;
- architectural works;
- cinematographic and other audio-visual works;
- radio and television programmes;
- computer programs;
- photographic works;
- works of applied art, including graphic and textile design;
- compilations consisting of collections of works, such as encyclopaedias, anthologies or other elements like databases.

In order to understand the length of protection of a work, as well as the scope of rights, it is necessary to divide the moral and economic rights inherent to copyrights.

Moral rights belong to the author (individual) of a work, and such rights are inalienable, imprescriptible, unwaivable and unattachable. Moral rights entitle the author to:

- decide whether the work is to be disclosed and if so in what form, or whether it is to remain unpublished;
- demand recognition of authorship in relation to the work, or decide that it is to be disclosed as an anonymous or pseudonymous work;
- demand respect for the work and object to any distortion, mutilation or other modification thereof, or any act or action in relation to the work that might detract from its merit or prejudice the author's reputation;
- amend the work; and
- withdraw the work from the market.

On the other hand, economic rights belong to the author (individual) of the work or the holder of economic rights. Such rights entitle the holder to authorise or prohibit:

- reproduction, publication, editing or material fixation of a work, in the form of copies or originals, carried out in whichever means, whether printed, phonographic,

- graphic, three-dimensional, audio-visual, electronic, photographic or other;
- communication of the work to the public;
- public transmission or broadcasting of the work by any process;
- distribution of the work, including sale or other forms of transfer of ownership of the physical material in which it is embodied, and also any form of transfer of the use or exploitation thereof;
- importation into the national territory of copies of the work made without authorisation;
- disclosure of derivative works, in any of the forms that such works may take, including translations, adaptations, paraphrased versions, arrangements and transformation; and
- in general, any public use of the work.

According to the FCL the duration of the economic rights shall remain in force during the life of the author and 100 years after the author's death or publication of the work.

Unlike industrial property rights (eg, trade marks, patents), in copyrights the registration of a work does not constitute any rights. Protection is granted to works from the time in which they are fixed in a tangible means of expression, regardless of their merit, intended purpose or form of expression.

The recognition of copyright and neighbouring rights does not require registration or documentation of any kind or for the subject to be compliant with any formality; however, to enforce the rights that the FCL confers, it is preferred that the work be registered.

To obtain the registration of copyrights an application is submitted before the National Copyright Institute (NCI), including information about the author and the holder of economic rights, as well as the respective original examples of the works to be protected.

According to the FCL, the following activities in general will be considered as a trade-related infringement and the owner of a copyright is entitled to start such action if a third party:

- communicates to the public or publicly performs a protected work by any means and in any form without the express prior authorisation of the author, or the author's lawful heirs, or the owner of the author's economic rights;
- fixes, produces, manufactures, stocks, distributes, transports or commercialises copies of works, cinematographic and other related audio-visual material, phonograms, videograms or books protected by copyright or by neighbouring rights, without the authorisation of the respective holders;

- offers for sale, or stocks, transports or distributes works that have been distorted, altered or mutilated without the permission of the owner of the copyright;
- imports, sells, rents or performs any act that affords possession of a device or system the purpose of which is to deactivate electronic devices protecting a computer program;
- retransmits, fixes, reproduces and disseminates to the public, without due authorisation, broadcasts of broadcasting organisations.

The abovementioned actions are processed by the MIIP. During the relevant infringement action proceeding the MIIP may order precautionary measures or injunctions, including seizure of goods, banning the distribution of merchandise that infringes intellectual property rights, and ordering the suspension of the service or the closure of the premises, among others.

If the infringement action prevails, the MIIP could impose stronger sanctions than those already mentioned in this publication without prejudice to the award of damages and losses that may be claimed in a separate judicial procedure by exercising a separate civil action.

Additionally, a copyright holder is entitled to pursue a criminal action against any third party that fraudulently reproduces, imports, stores, transports, distributes, sells or leases, without the corresponding authorisation, works protected by the FCL.

### 7.5 Others

In addition to the abovementioned Intellectual Property Rights, Mexican law protects:

- trade secrets;
- utility models;
- appellation of origin;
- geographical indication;
- plant varieties; and
- reservation of exclusive use rights.

### Trade Secrets

These are regarded as any industrially or commercially applicable information which an individual or company keeps and which is confidential in nature and associated with securing or retaining a competitive or economic advantage over third parties in the conduct of economic activities, and regarding which, said individual or company has adopted sufficient means or systems to preserve its confidentiality and restrict access thereto.

A trade secret is not eligible for registration, instead, the owner of such trade secret must follow several processes to limit access to the trade secret and keep it as confidential as possible.

### Utility Models

These are objects, items, appliances or tools which, as a result of modification in their arrangement, configuration, structure or form, offer a different function with respect to their component parts or offer advantages by being useful.

### Appellation of Origin

This is a name that refers to a geographical region, or that contains such reference or any other known name that makes reference to such geographical region, which is used to designate a product that originates therein and which has qualities or characteristics exclusive to the geographical environment, including both natural and human factors which have contributed to the reputation of the products.

### Geographical Indication

This either names a geographical region, or features its name or any other known name that refers to the geographical region, which identifies a product that originates therein where certain qualities, reputation or other characteristics of the product are primarily attributable to its geographical origin.

The MIIP must issue a declaration of appellation of origin or geographical indication, since in both cases the Mexican government is the owner thereof, and use by third parties must be granted by means of an authorisation issued by said authority.

### Plant Varieties

This refers to subdivision of a species that includes a group of individuals with similar characteristics and that is considered stable and homogeneous.

### Reservation of Exclusive Use Rights

This allows the exclusive use and exploitation of titles, names, designations, distinctive physical and psychological characteristics or original operational characteristics, for periodical publications, periodical transmissions, real-life human characters, or fictional or symbolic persons or groups devoted to artistic activities and promotional advertising. This is a unique right in Mexico that is regulated mainly by the FCL and its protection must be requested before the NCI.

## 8. Data Protection

### 8.1 Applicable Regulations

The Mexican constitution safeguards the individual's right to privacy and the protection of their personal data.

The main framework in Mexico applicable to personal data processed by private parties (Mexican Private Parties Data Protection Legislation) is:



- the Federal Law on the Protection of Personal Data Held by Private Parties;
- the regulations to the law (Regulations); and
- Privacy Notice Guidelines.

Whereas the main framework applicable to personal data processed by federal governmental entities is:

- the Federal Law on the Protection of Personal Data Held by Obligated Parties; and
- the General Guidelines for the Protection of Personal Data in the Public Sector.

The abovementioned federal legislation regulates, among others:

- the processing of personal data by data controllers (individuals or private entities that decide on the processing of personal data) and their data processors (individuals or private entities that, alone or jointly with others, process personal data on behalf of the data controller), which includes (without limitation) the access, management, exploitation, transfer or disposal of personal data;
- the rights of the data subjects (individuals to whom personal data relates) in connection with the protection of their personal data; and
- the obligations of the data controllers in connection with their processing activities.

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**8.2 Geographical Scope**

The Mexican Private Parties Data Protection Legislation does not have extraterritorial applicability, which means that it is not applicable to data controllers that process personal data outside Mexican territory, even if their services or products are targeted to Mexican people and/or they are monitoring Mexican people. However, exceptions to this are set forth in Article 4 of the Regulations, which states that the Mexican Private Parties Data Protection Legislation applies to personal data processing when:

- it is carried out in an establishment of the data controller located in Mexican territory;
- it is carried out by a data processor, regardless of the processor's location, which is processing the data on behalf of a Mexican data controller;
- Mexican legislation is applicable as a consequence of Mexico's adherence to an international convention or for the execution of a contract (even where the data controller is not located in Mexico); or
- the data controller is not located in Mexican territory, but uses means located in Mexico to process personal data, unless such means are used only for transit purposes.

**8.3 Role and Authority of the Data Protection Agency**

The National Institute of Transparency, Information Access and Data Protection (INAI) is the main agency in charge of enforcing data protection legislation in Mexico and has the authority to supervise compliance with such laws and to sanction private parties in the event of any infraction thereof. Additionally, it has the authority and power to, among others:

- conduct verification procedures; and
- conduct penalty application proceedings and impose sanctions for infringements of the Mexican Private Parties Data Protection Legislation.