Message from the Co-Chairs

2016 has been an exciting year thus far for the Mexico Committee. We started off with a big bang at the ABA Midyear Meeting in San Diego to celebrate the launching of the San Diego-Tijuana City Chapter, the first of its kind spanning two different countries. More than 130 attendees witnessed a thought-provoking conversation between distinguished jurists seasoned in the role of international law in domestic courts. Judge Margaret McKeown of the US Court of Appeals for the Ninth Circuit served as Chair of the ABA Rule of Law Initiative Board, which included participation from Magistrate Manuel González Oropesa, a member of the Sala Superior of Mexico’s Federal Electoral Court. The conversation was moderated by Patrick del Duca and was followed by a vibrant reception overlooking the San Diego Bay. I, along with Vice-Chair Antonio Maldonado also played a key role in making the event a success, and we thank our Section’s leaders, the organizing staff and the event sponsors, for making it possible. From February 28-March 1, the Mexico Committee again played an important role in making the Section’s Americas Forum in Miami a great success with almost 180 attendees from all over the Americas. The Forum featured ten sessions including a panel on “Cross-Border Real Estate and Resort Transactions in Costa Rica, Mexico, Dominican Republic and...ahem...Cuba.” Other panels focused on topics including cross-border real estate and resort transactions, complex cross-border litigation, and a variety of other important issues. We next took the "road show” to the Spring Meeting in the Big Apple, where Co-Chair Rene Alva led a panel entitled, “Employers Abroad: How to avoid an Ex-Pat Nightmare in Mexico and Latin America – Trends in Cross Border Employment, Tax and Immigration Law”, featuring panelists from Mexico, Canada, the US and Virgin Islands. Our committee continues to support efforts to foster the rule of law in Mexico, evidenced by our participation in the recent “Promoting the Rule of Law in Mexico International Conference” held at the University of San Diego this month, which featured an array of panels on reforms to Mexico’s criminal justice system, anti-corruption efforts in Mexico, and improving the administration of justice. Speakers included judges from Chihuahua, Los Angeles and Baja California, as well as anti-corruption experts from the Department of Justice, Mexico Public Function Secretariat and a member of Mexico’s Judicial Council, who is responsible for the oversight and administration of the Mexico’s federal judicial branch. We thank Dr. David Shirk, Director of the Justice in Mexico program for inviting our committee to participate, as well as committee member, Alonso Gonzalez Villalobos, ex-ROLI Mexico Country Head for his continued leadership in this field. As summer approaches, we hope you are making plans to attend the 2016 Section Retreat August 3 – 5, 2016 in Half Moon Bay, California, and the 2016 Fall Meeting in Tokyo, Japan, where past Co-Chair Juan Carlos Velazquez de Leon will be leading a panel presentation on behalf of the committee. We hope to see you soon.

Ben Rosen and Rene Alva, Committee Co-Chairs

A Note from the Editors

Our current sampler of insights on topics attracting the attention of Mexican lawyers includes essays addressing good practices relative to corporate programs for antitrust compliance, the relevance of Mexican federalism to the emerging acceptance of same sex marriage, contributions of women to trade in agriculture, the new form of Mexican corporate entity, Jalisco’s pioneering position in certification requirements for the practice of law, challenges of cross-border real estate investing, and the importance of an international moot court program on arbitration held in Guadalajara.

Join us as a contributor or editor! And, enjoy the contributions, informative and provocative.

Mexico Update Editors, Matthew Hansen, Yurixhi Gallardo, Patrick Del Duca
About the Mexico Committee
The Mexico Committee grows its membership through attraction, rather than promotion. It is a vibrant committee that actively sponsors programs, interactive discussion, and sound policy on developments in Mexican, US, and other foreign law relevant to its members and the country. The comprehensive primary practice areas of our members include: foreign investment, corporate, M&A, dispute resolution, energy and natural resources, real estate, antitrust, criminal, rule of law, immigration, human rights, tourism, international trade, tax, data privacy and many others. The Committee, anchored by eight City Coordinators located across Mexico and the US and the recently incorporated San Diego-Tijuana City Chapter, contributes to the annual year in review publication and publishes a quarterly newsletter in partnership with leading Mexican law faculty.

Upcoming Events – Save the Date
Section Leadership Retreat
August 3-5
Half Moon Bay, California

ABA Annual Meeting
August 5-7
San Francisco, California

Section Fall Meeting
October 18-22
Tokyo, Japan

Section Spring Meeting
April 25-29
Washington, DC

Mexico Committee Leadership 2016-2017
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Implementing an Antitrust Compliance Program in Mexico

Azucena Marín Díaz

Mexico’s antitrust framework has evolved significantly in recent years. 2013 Constitutional amendments provide for two autonomous antitrust authorities:

a) the Federal Institute of Telecommunications (“IFETEL”), which has primary authority over telecommunications and radio broadcasting, and

b) COFECE, the new Mexican competition authority, which has become more functional, gaining financial and operative independence, and whose mission is based on principles of transparency and increased governmental oversight of competition, with jurisdiction over large areas of the economy, excluding those attributed to the IFETEL.

The Federal Economic Competition Act (“FECA”), effective July 2014, was adopted to implement these constitutional changes. Based on overarching principles of transparency, COFECE has issued and published several regulations, guidelines, technical criteria and documents as part of its role as the country's antitrust agency.

In August 2015, COFECE published practical recommendations for effective implementation of antitrust compliance programs within companies and private entities. COFECE recommended inclusion of topics related to antitrust and economic competition in company checklists of ethical and legal compliance policies. This article reviews the recommendations as they relate to corporate compliance with FECA.

Anticompetitive conduct and practices contemplated by FECA

FECA regulates or prohibits the following:

a) Absolute monopolistic practices, also known as cartels or horizontal agreements, are arrangements between competitors illegal per se, meaning COFECE has merely to prove their existence to impose applicable penalties, without need to assess their restrictive or negative effects;

b) Relative monopolistic practices, internationally known as abuse of dominance, are restrictions imposed by agents with substantial market power. These are subject to “rule of reason” analysis under certain conditions and considerations provided by FECA, for COFECE to determine if they are to be penalized;

c) Illegal concentrations of power that obstruct, lessen, impair or hamper competition. As a preventive measure, mergers, acquisitions and other types of arrangements producing a concentration of market power as defined under Mexican law are subject to pre-merger filings, and when certain thresholds are met, for analysis and clearance by COFECE. Illegal concentrations of market power, or those requiring a pre-merger filing, that did not comply with COFECE’s notification requirements, are subject to imposition of penalties, including divesture of assets in case of recidivism, and,

d) Entry barriers that negatively affect competition. FECA introduces a
special procedure to determine the existence of entry barriers or essential facilities. COFECE may order imposition of measures to eliminate entry barriers or regulate the access to essential facilities, or even the divestiture of assets, rights or shares in certain cases, as well as make recommendations to governmental authorities.

Companies and individuals, including corporate representatives and consultants, participating in proscribed anticompetitive practices are subject to substantial fines and penalties, including criminal responsibility in case of absolute monopolistic practices.

COFECE’s recommendations for implementation of an effective antitrust compliance program:

International compliance standards and the ICC antitrust compliance toolkit (prepared by the International Chamber of Commerce’s Commission of Competition) inspired the recommendations. They are as follows:

1. Create a corporate culture of FECA compliance
   Each organization is required to create a culture of antitrust compliance. COFECE has remarked that an isolated training session, chat or e-mail does not suffice. The organization must show real commitment with its compliance values, acknowledging the importance and benefits of complying with FECA.
   Accordingly, an antitrust compliance program should be congruent with other codes of conduct and policies, such as those involving anti-corruption, government relations, social responsibility, money-laundering, employee relations, communication and security. All of these corporate policies should display consistent ethical principles and organizational values.

2. Appoint a person responsible for antitrust compliance and allocate adequate resources
   Depending on the organization’s level of complexity and size, a specialized antitrust compliance department or officer may implement and oversee the program. In smaller organizations, a director performing internal auditing or managerial functions may be appointed. The responsible person must have direct contact and reporting access to the high-level bodies or directors of the organization.
   As part of the real commitment element indicated above, each company must allocate appropriate resources (human and monetary) effectively to perform, supervise, monitor and update the compliance program.

3. Risk assessment for appropriate design of the compliance program
   Not all companies are subject to the same level of risk pertaining to antitrust compliance. COFECE considers market concentration, type of industry, size of the company, vertical integration structure, and level of contact with competitors as topics to be considered when making a risk assessment and designing control measures.
   Also, some directors, officers and employees will be exposed to more risks than others, depending on the functions they perform within the organization, such as those that have contact with competitors or participate in chambers and industry associations, members of sales or purchasing departments and other strategic areas of the organization.
   COFECE notes that the conditions of a company will change from time to time; therefore, a risk assessment must be made periodically to identify potential risk control measures to be added to the program.

4. Drafting and implementation of guidelines, manuals and policies
   First, all documents drafted as part of corporate compliance with FECA must be drafted in language easy to understand. Antitrust regulations are not easy to understand by persons not professionals specialized or well-acquainted with these topics; hence, FECA principles must be “translated” to easily understandable terms, lest the policies be useless or ineffective.
   Second, compliance documents must be designed based on the types of activities performed by the company, as well as the risks identified. Based on these, special protocols for those activities or risks may also be developed, such as the case of bidding participation.
   Third, training programs must be implemented. COFECE suggests that these be led by antitrust experts or officers already trained. Training sessions must be accomplished first with those officers and employees exposed to higher levels of risk.
Employees change within the organization, and those that have already been trained, may need further training from time to time, along with further updates to training modules.

Delivering guidelines or presentations to employees prior to a training session makes the meeting more productive, as it allows for a Q&A session with inquiries identified in advance and based on former experience or real concerns.

5. Tracking, auditing, whistleblowing

As with any internal control program, the organization must implement monitoring and auditing measures to identify level of knowledge and compliance, as well as any red flags in order to analyze data and apply corrective measures as needed. Internal monitoring and auditing activities have preventive and corrective purposes.

FATCA serves as an example of compliance programs. Certainly, having a “hot-line” or e-mail appointed for internal complaints, protecting the employee against retaliation, has proven useful. Additionally, a point of contact should be appointed not only for internal complaints but also for potential questions and inquiries that arise during daily operations of different departments.

6. Disciplinary measures

Disciplinary penalties and measures should be implemented to give the message that the organization is serious about the program. These measures should be implemented against any defaulting member of the organization, irrespective of hierarchy. COFECE recommends also to create incentives that motivate compliance as a positive aspect of employee-performance evaluations.

7. Periodic Evaluation

COFECE requires periodic evaluations to assure that objectives are met, and to identify areas of opportunity to update, improve or strengthen the program. Surveys, knowledge tests, follow up training and interviews with key members are also valuable.

Legal regulations evolve, due to amendments to existing law, regulatory changes, case experience, governmental guidelines and technical criterion, as well as administrative and judicial resolutions. Corporate antitrust programs must be updated and adjusted accordingly.

Conclusions/Benefits

Antitrust compliance programs represent important benefits for organizations. Avoidance of substantial fines and penalties, as well as civil and criminal liability, should not be the sole reason for implementation.

The legal risk prevention associated with compliance programs provokes other benefits, such as aggregated value within the company, business reputation, safeguards, and avoidance of costly litigation, as well as social benefits. Although not binding authority under Mexican law, the evidence of real, sincere, consistent and proactive compliance programs may be considered by COFECE for imposition of lesser fines.

[…] compliance documents must be designed based on the types of activities performed by the company, as well as the risks identified.

A culture of competition also produces positive effects for the success and growth of business. In all aspects of life (not only in markets and economy) it has been proven that competition compels companies do better. As Jerry Flint, a Forbes journalist, once said: “competition is a painful thing, but it produces great results”.

1 Professor of Competition Law at the Universidad Panamericana, Guadalajara campus, Vice Chair of the Board of Directors of the National Association of Corporate Counsel, Jalisco Section (ANADE JALISCO) and partner of Cuesta Campos y Asociados, S.C.
3 Price fixing, output restrictions, market allocation, bid-rigging and a fifth practice consisting of exchange of information with any of the purposes or effect previously referred.
4 FECA lists 13 conducts that may be subject to abuse of dominance investigation and prosecution.
5 FECA defines a concentration as any merger, control acquisition, or any other act involving the consolidation of corporations, companies, associations, stock, partnership interest, trusts or assets. COFECE shall not authorize or, if the case may be, shall investigate and punish those concentrations whose purpose or effect is to hinder, harm or impede competition and free market access.
6 Any structural characteristic of a market, act or fact impeding access to competitors or limiting their ability to compete in the markets, as well as any legal provision that unduly impedes or distorts the process of competition and free market access.
7 See NatGeo “American Genius” episodes, which provide good and entertaining examples of the benefits of competition and, in some cases, struggles against anti-competitive conducts. “Jobs vs Gates”, “Colt vs Wesson”, “Edison vs Tesla” are only a few examples of this interesting series.
8 Chris Myers in Forbes: “If your business doesn’t have competition, you have a problem”. http://www.forbes.com/sites/chrismyers/2016/03/01/competition/#6a5a444c2e8.

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Five years ago, Mexico’s Constitution was reformed to incorporate and expand key human rights protections into Mexican law. This created tension between the federal and state governments over fundamental issues. It comes as no surprise that many legal practitioners are contesting federal court rulings, believing that the federal courts have overstepped their powers by issuing rulings that overturn long standing state legislation. Mexico now faces the challenge of how to balance the rights granted to every State under Mexico’s Constitution, with the legislative rights of the federal government. Recent rulings by Mexico’s Supreme Court have also placed the issue of separation of powers at forefront as they relate to social issues such as gay marriage.

Historically, Mexico has been a federal system in which the federal courts have granted great deference to the various state legislatures to create and regulate their own laws. At its inception in 1824 when Mexico became a “federal representative republic” that established the foundations for the 1917 Political Constitution of the United Mexican States, the framers of the new constitution asserted that: “only the tyranny of Spanish rulers could govern an immense territory by the same laws, despite the huge difference of climates, temperaments and their consequent influence. What relationship of coexistence and uniformity may exist between the parched soil of Veracruz and the icy mountains of New Mexico? How can you govern the people of California and Sonora, by the same institutions as those of Yucatan and Tamaulipas?”

Given Mexico’s vast size and diverse population, it is ironic that in recent years the Supreme Court has attempted to impose a universal set of norms over the various Mexican states based on its Constitutional authority to create, modify, abrogate and repel state laws.

Historically, the various state legislatures pursued legislation that was meant to suit their local social and territorial needs. In contrast, through rulings like 28/2015, 1127/2015 and 1/2013, the Supreme Court has overturned state laws related to traditional family relationships, including marriage. Indeed, 28/2015, 1127/2015 and 1/2013 require the State of Jalisco to modify articles 258, 260 and 268 of its Civil Code to authorize same sex marriage, notwithstanding that more than half of Jalisco’s population did not approve of same sex marriage. The Supreme Court ruled that existing state law banning same sex marriage was breached the Constitutional prohibition of discrimination based on sexual orientation.

Supporters of traditional marriage in Jalisco argued that Jalisco’s laws restricting marriage to traditional male female couples were not discriminatory since the state laws did not prohibit any person from marrying in general, so long as the marriage was to a person of the opposite gender. These supporters argued that there was no gender discrimination or prohibition against sexual orientation in the laws, arguing the Supreme Court’s argument fell into the ignoratio elenchi fallacy as Jalisco’s laws merely required that civil marriage be between people of the opposite gender.

In view of the Supreme Court’s decision to overturn long standing state laws governing of domestic relationships, it is critical to understand the Supreme Court’s reasoning that it possesses such authority. Article 105 expressly grants the Supreme Court permission to determine the constitutionality of state laws as they relate to the rights provided to every Mexican citizen under the Constitution. The Supreme Court has understood this prerogative to take on cases of public interest where there is no direct constitutional article challenged. For example, the Constitution does not address marriage, yet the Supreme Court has made various rulings declaring a large number of state laws regarding this institution unconstitutional. This has created tremendous opposition from proponents of states’ rights, as Article 124 of the Constitution states that “the powers not expressly vested in the federal officers by this Constitution shall be implicitly vested in...
the States”). Additionally, Article 40 declares that “[t]he Mexican people willingly constitutes itself as a representative, democratic and federal Republic integrated by States which are free and sovereign in order to organize their internal regimes, but which are also united as a Federation established under this Constitution’s principles.” Proponents of states’ rights argue that the Supreme Court is now guilty of judicial activism as various articles of the Constitution, such as 46, 76, and 110, were meant to protect states from federal overreach.

Altogether, Mexico’s legal system is evolving more quickly now than it has since the country’s inception. Mexico faces the difficult task of defining the limits of federal jurisprudence, while balancing states’ rights to legislate their own affairs. This is nowhere more apparent when issues related to human rights are at stake. Mexican leaders, including its federal judges must issue rulings that maximize the common good through protecting the entire nation’s constitutional rights, while balancing the rights of the States to make laws in best interest of their local citizens.

1June 10, 2011 there were two important reforms of Mexico’s Constitution, modifying 11 articles on human rights, that directly impact the administration of federal justice. Numerous jurists acknowledge these reforms as the most transcendent since the Constitution’s 1917 adoption.  
2Treaty that allowed Great Britain to openly trade with Spanish possessions in the Americas.  
3United States foreign policy with respect to its domination of the American Continent.  
4Belief that the United States had a God-given right to expand its civilization influence to the West.  
5Constitución de Apatzingán (1814) formally known as the Constitutional Decree for the Liberty of the Mexican America.  
6Manifiesto del Congreso General a los Mexicanos (General Congress Manifest to the Mexican People).  
7Article 49 of the Political Constitution of the United Mexican States and Article 9 of the Charter of the Federation (“the supreme power of the Mexican Federation is divided for its exercise into three powers: legislative, executive and judicial; no two or more of these can meet in a single corporation or person, nor shall the legislative be in a single individual.”)  
8Encuestadores de Gabinete de Comunicación Estrategica (Cabinet Pollsters of Strategic Communication).  
9Translation by Carlos Pérez Vázquez.  
10Translation by Carlos Pérez Vázquez.

**Minnesota, Mexico and Women in Agriculture: A Unique Winning Combination**

*Susan Burns*

In August 2015, I accompanied the Governor of Minnesota, Mark Dayton, on a trade mission to Mexico. It was particularly exciting because this was the Governor’s first trip to Mexico. Before the trade mission, Governor Dayton stated: “[t]he goal of this trade mission will be to establish and build relationships that will help Minnesota companies and producers increase their exports to Mexico, and in doing so, create more jobs here at home.” The focus of the mission was education, manufacturing and agriculture.

As we began the Spring season, and start focusing our attention on planting again, it seemed an appropriate time to highlight one of the unique benefits of that trip related to the role of women in agriculture. During the Governor’s trade mission, a Memorandum of Understanding was signed by Dave Frederickson, Commissioner of the Minnesota Department of Agriculture, and Enrique Martinez, Minister of Agriculture of Mexico. This Memorandum acknowledged the differences between men and women in agriculture, and how such differences affect productivity and food security.

The purpose of the Memorandum of Understanding is to find and encourage ways for women in agriculture to work together to overcome the obstacles[…].

Even though women play big roles in agriculture in Minnesota and Mexico, they face unique challenges that affect their professional development. According to the U.S. Department of Agriculture’s 2012 Census of Agriculture, 6,370 Minnesota farms are operated mainly by women. Most of those farms (5,298) are fully owned by women. The product of their labor has a market value of $400 million a year.

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On the other hand, the importance of Mexico as Minnesota’s second largest export market is key to the development of Minnesota agriculture. In 2014, 10 percent of Minnesota’s total exports were attributed to sales to Mexico.

**More and more women are leading food and agriculture-related companies [...]**

The purpose of the Memorandum of Understanding is to find and encourage ways for women in agriculture to work together to overcome the obstacles that prevent their full development and career growth, i.e. not only women in agriculture working on their own farms, but also in their career development in agribusiness, providing services to farmers, products such as fertilizers, agri-feeds, doing research, or helping farmers manage their farms through financial or insurance services.

Historically, women have been a critical part of the global food chain. In rural communities, women have been responsible not only for maintaining the household, but they have also been in charge of growing vegetables in their home gardens, raising chickens, and other small livestock. These activities enrich the nutrition of their families and supplement the field crops mainly produced by men.

Today, women have a wider participation in crop production and organic and sustainable agriculture. In some countries, their contributions, involvement, and responsibilities are actually expanding to outpace that of men in the industry.

More and more women are leading food and agriculture-related companies, such as Mondelez, Campbell Soup Company, and Pepsi. There are even several female Deans of Agriculture in universities. However, women still do not have the same access men have to education, healthcare, credit options, land, technology, and training programs that could help them secure and improve their participation in agriculture.

The Memorandum of Understanding signed last August is a significant step toward the development of new opportunities for women in the business of agriculture and to further develop the economies of Minnesota and Mexico, and their close and important commercial relationship.

One of the delegates for the trade mission was Lori Stevermer, President of Minnesota Pork Producers Association. Ms. Stevermer noted that women have become more visible in the agricultural field during the last 10 to 15 years, taking leadership roles, whether on the farm, in sales, or in agribusiness. That said, she saw a need to have more women as leaders in their own companies. She also sees the same tendency in Mexico, and recognizes the importance to provide support and knowledge to Mexican women in agriculture. “Mexico will continue to be an important trade partner for us,” she said. “One-quarter of the pigs go to the export market, and it will be a higher percentage in the future [...] There’s already a lot of trade between Minnesota and Mexico; the pathway is open, and that’s good.”

After the trade mission, Governor Dayton committed to return to lead another trade mission to Mexico in the near future, commenting: “Our trade mission to Mexico was the most productive trade mission that I have been involved with. As our second-largest export market, and the world's 15th-largest economy, Mexico is a ripe opportunity for Minnesota businesses and farmers. “

This sentiment is also supported at the Federal level as trade mission participant, Minnesota Congressman Tom Emmer stated: “As our state’s second largest export market, Mexico's investments in their infrastructure and manufacturing base provide tremendous opportunities for Minnesota. By expanding ties and improving coordination [...], we can strengthen our state by creating mutual growth and commercial success as partners.”

The Memorandum of Understanding can be a critical factor in the development of a great partnership between women in agriculture in Minnesota and Mexico.
New Form of Business Entity Created in Mexico
Gil Anav and Jorge García Peralta

On March 14, 2016, the Diario Oficial de la Federación published amendments to the General Law on Business Entities (Ley General de Sociedades Mercantiles, LGSM). These amendments, effective September 15, 2016, recognize a new type of business entity in Mexico, in addition to the six already recognized in the LGSM: the Sociedad por Acciones Simplificada (SAS, Company by Simplified Shares).

The SAS encourages formal creation of new companies, as an efficient mechanism to reduce the high cost of company formation in Mexico. The amendments were adopted against a backdrop of rampant informality in Mexico, where more than half of all workers are outside the economy's formal sector.

The SAS is conceived as a transitional entity to serve small and start-up companies. Once an SAS grows beyond a certain size, it will be expected to transform itself into a different kind of entity.

**Characteristics of the SAS:**

The SAS has various features that break from current Mexican corporate practices:

- One or more shareholders may create it, as opposed to other Mexican business entities, which require at least two;
- The SAS may be formed without participation of a notary public or corredor público (commercial broker), thus significantly lowering cost, as fees charged by notaries and commercial brokers often constitute the largest part of the cost of forming a company in Mexico;
- It will be possible to create an SAS in just one day, since individuals will be able to create the company directly by utilizing an on-line system to be run by the Ministry of the Economy. This system will provide individuals with a selection of approved clauses for their governing documents;
- The Ministry of the Economy will file the approved governing documents electronically with the Public Registry of Commerce;
- The shareholders of an SAS will be personally liable for criminal actions carried out by the company, thus opening the door to piercing the corporate veil if an SAS is used to carry out crimes;
- The administration of the SAS may be performed by electronic means, if agreed by the shareholders;
- The SAS will be required to file annual reports electronically with the Ministry of the Economy which disclose the financial situation of the company. The failure to file these reports during two consecutive years will lead to the company’s dissolution; and
- The SAS will not have to separate five percent of its annual net profit in a reserve fund, unlike other types of entities.

As with other types of entities, the SAS will be governed by its shareholder or shareholders through physical or electronic meetings.

**Limitations on the SAS**

The SAS will have a number of limitations designed to prevent its use by mid-size or large companies. To begin with, all shareholders must be natural persons who have an electronic signature issued by tax authorities. Moreover, none of those natural persons may also be controlling shareholders of another type of company, effectively eliminating the use of the SAS as a subsidiary of an existing company. Third, the SAS may not have a total annual income greater than five million pesos, or approximately 280 000 USD (as of mid-March 2016). If it exceeds that figure, it must be transformed into a different kind of entity. Fourth, all shares of an SAS must have the same value and must confer the same rights on their holders, thus eliminating the possibility of creating different classes of shares. Finally, the SAS will be represented by an administrator, who must also be a shareholder, thus eliminating the possibility of creating an administration independent of the shareholders.

The result of all of these restrictions is to ensure that the SAS is only used as a vehicle to operate small businesses, including start-ups. Even so, the amendments to the LGSM are noteworthy in that they represent a revolutionary break from the past in quite a few areas of Mexican corporate jurisprudence. If these legal concepts in what it means to form and manage a small business work out in practice, they may eventually spread to a simplification of the more long-established entities in the Mexican corporate world.

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Mandatory Certification in Jalisco:
a first step in a long road

Yurixhi Gallardo

The State of Jalisco is the first State in the Mexico to establish mandatory certification for specific professions, and the legal profession is one of them. Other professions so regulated are accountants, engineers, architects and health services.

The new requirements flow from the Law for the Exercise of Professional Activities of the State of Jalisco (Ley para el ejercicio de las Actividades Profesionales del Estado de Jalisco, LEAPEJ), effective since January 1, 2016. This law differs in many aspects from the federal proposal for a General Law of Professional Practice Subject to Mandatory Certification and Compulsory Licensing (Ley General del Ejercicio Profesional Sujeto a Colegiación y Certificación Obligatoria), introduced in the Federal Congress in 2014, that has not subsequently advanced. One difference between the Law in Jalisco and the federal initiative is that LEAPEJ establishes only the mandatory certification, and not the mandatory membership in bar associations. But, LEAPEJ could be the first step to mandate in the future the obligation of bar membership.

Although this is a law that regulates mandatory certification, the law recognizes that bar associations take an important role in the exercise of professional activity. Accordingly, the law provides rules in relation to the organization and supervision of bar associations. Under the law, professionals may pursue their process of certification directly in the Office of Professions of the State, according to article sixty-two LEAPEJ, or with the bar associations which may provide the certificate of professional competence and also provide mandatory continuing legal education.

The bar associations must be registered in the Office of Professions of the State, and they need to comply with specific requirements, one of which is the Code of Ethics. Also, bar associations are afforded the power to sanction their members in cases of violation of the Code.

The LEAPEJ establishes some requirements for certification. The law provides that mandatory certification will begin in 2022, but the law affords benefits to those who start the process of obtaining the state license during the first two years. The most important benefit is that the process of certification will require only the showing of evidence of mandatory continuing legal education for those who possess their license before 2018. The process of certification should be repeated every five years. In contrast, any one who does not have a license before the end of 2018, will have to follow the complete process that includes an examination.

There are many expectations about specific regulations that the Regulation of the LEAPEJ should consider in respect of the implementation of the LEAPEJ, and who will be involved in the specific Commissions that are contemplated by the LEAPEJ. In general, the new law has been well received among lawyers, who have started the process to obtain the local license.

Before this regulation, it is important to remember that in Mexico to offer legal services it is only necessary to study in one of the more than one thousand schools that operate in the country and after which, the government grants a federal license. But, there is neither mandatory continuing legal education, nor mandatory membership, nor mandatory certification. This is the first step in a long road to be traveled in order to professionalize legal services in the country.

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At a well-attended session at the Section of International Law’s Americas Forum in Miami in February 2016, four speakers (including Mexico Committee Co-Chair, Ben Rosen) from Mexico, Costa Rica, the Dominican Republic and the US discussed challenges and rewards of cross-border real estate transactions.

Led by moderator Bruce Greenberg, of Duff & Phelps, the ninety-minute program covered a broad range of topics including real estate investment funds and vehicles, equity structures, debt financing and security, tax implications and exit strategies, restrictions on ownership by foreigners, and mergers and acquisitions of hotels, resorts and master-planned communities.

The panelists explored differences between real estate and resort transactions and development in countries (such as Mexico, Dominican Republic and Costa Rica) with functioning legal systems, as compared to others (such as Cuba) only recently returning to semi-private ownership. Each country has its nuances, such as Mexico, which limits direct property ownership by foreigners within a certain distance of the beach and/or border and Cuba, which allows a foreign investor or operator to joint venture with the Cuban government to lease and operate the asset.

The speakers—including Lisa Morel from the Dominican Republic, Luis Castro from Costa Rica, Jose Davila, of Starwood, Mr. Rosen, and special guest Aymee Valdivia from Cuba—agreed on the importance of retaining experienced international counsel for cross-border real estate and resort transactions in their respective jurisdictions, particularly while navigating intricate legislation governing foreign investment, tax, environmental, employment and other aspects of doing business abroad. International practitioners also add value to their clients’ transactions by negotiating tax incentives and infrastructure improvements from government agencies. Two such examples include the Dominican Republic’s Tourism Incentive Act and Mexico’s FONATUR tourism promotion program.

Panelists covered the sensitive topic of corruption. While corruption varies, the advent of social media has generated reform across all sectors. One example in Mexico is the million-dollar home of Mexico’s First Lady, Angelica Rivera, allegedly purchased by a well-connected company with lucrative contracts from the Mexican government. After significant media coverage and pressure on social media outlets, Rivera listed the house for sale.

Challenges in Cross-Border Real Estate Transactions
Zel Saccani

At a well-attended session at the Section of International Law’s Fall 2015 Meeting in Montreal, six panelists (including Mexico Committee members Patrick Del Duca and Adriana Reyes) discussed challenges arising from differences in legal practices, language and culture faced by legal practitioners when conducting cross-border real estate transactions.

Examples of differences in legal practices include the need to operate within evolving legal systems (such as in China, where real property rights are still being adapted and formulated) and to adopt and adhere to different procedures (for example, working with notaries in Mexico, Quebec and other civil law jurisdictions upon consummating real estate transactions).

Panelists discussed the difficulties often posed by language differences, particularly in contracts and agreements. Even if the parties stipulate to an official language for arbitration purposes, foreign governments frequently mandate that documents submitted for enforcement and/or recording first be translated into that jurisdiction’s official language.

The role of culture in international real estate transactions was covered, including the pace of negotiations in formal (also described as emotionally reserved) versus informal (also described as emotionally expressive) countries. The panelists agreed that cultural differences must not be overlooked in international real estate (among other) transactions.

The panelists agreed that a global mindset is needed to navigate through challenges arising from differences in legal systems, language and culture.

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Guadalajara hosted for the first time in February 2016, a Willem C. Vis pre-moot as practice for one of the most important student arbitration competitions worldwide. The event took place in the facilities of Universidad Panamericana Guadalajara campus. Several Mexican and American universities participated, including Loyola University Chicago, Northwestern University, Instituto Tecnológico de Estudios Superiores de Monterrey and Universidad Nacional Autónoma de México.

All of this flow of knowledge made every minute worthy and unique.

The event began February 5, 2016 with a conference on International Commercial Arbitration & the UN Convention on Contracts for the Sale of Goods (CISG), in which various lawyers of great importance in the international arena participated, including professors Ingeborg Schwenzer (Switzerland), Florian Mohs (Switzerland), and Louise Barrington (Canada - Hong Kong), as well as professors Cesar Pereira (Brazil), Reynaldo Urtiaga (Mexico), Paolo Marzolini (Italy), Luiz Gustavo Moser (Brazil - France) and Edgardo Muñoz (Mexico), among others.

From 9 a.m. until late in the afternoon, through discussions, hearings and presentations, the varied procedures and norms pertinent to the countries where the speakers came from were laid out. This rich flow of knowledge made every minute worthwhile and unique.

Lastly, the arbitrators challenged the participants with some real cases (that omitted personal identifying data) and gave the opportunity to students and teachers to think about possible solutions and to pose questions. The exercise was so stimulating for all concerned that it ran past the time limits contemplated, because even the arbitrators found new solutions that provoked them to argue among themselves, pointing how it would have worked better with the regime in their countries.

Every year this competition takes place in Vienna and Hong Kong, in which law student teams from all over the world defend their clients in an international business dispute, acting as if they were the lawyers of a real arbitration. It is worth mentioning that participants and arbitrators come from countries with different legal traditions, thus even when they follow the same arbitration rules, the Vis Moot turns out to be not only about learning alternative dispute resolution methods, but also a complete legal cultural interchange.
The Mexico Committee continuously seeks qualified professionals prepared to contribute their time and talents to continue developing a more active Committee. This is a prime opportunity to become involved with a community of lawyers that share an interest in Mexico and Mexican law, who are fellow American Bar Association members.

The Mexico Committee welcomes any suggestions, ideas or contributions to enhance this periodic publication. The current submittal deadline for contributions to the next issue is July 20th, but please do not wait until the deadline. Rather, be in touch now with any member of our Editorial Committee with your offer of help, be it as an editor or a contributor. We can offer topic suggestions and provide translation and editing as needed.

If you are interested in participating actively with the Committee and in joining its steering group, please contact any member of the Committee leadership.

Mexico Committee WEBSITE: http://apps.americanbar.org/dch/committee.cfm?com=IC845000

Members of the MEXICO UPDATE editorial team with Mr. Felipe Oceguera, Head of Professions of the State of Jalisco.

From left to right: Fernanda Ambrosio, Felipe Oceguera, Maite Cadena, Romina Guarneros and Rocío de Orta.

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