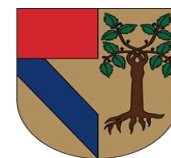




MEXICO UPDATE



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Message from the Co-Chairs

We are pleased to present this issue of the Mexico Update, with some hope that we will see one another in-person in 2022. Just a month ago, in November 2021, the Section of International Law hosted its first live meeting in nearly two years in Denver, Colorado—focusing on the legal and business framework for cannabis in the Americas. Building off the themes of that conference, in this Update, we include articles with expert analyses of the legal cannabis regime in Mexico and the creation of a new Mexican Customs Agency. And although we are beginning to enjoy in-person meetings, the pandemic is not out of our consciousness; as such, this Update features important articles that examine COVID-19 vaccination policies and novel pandemic-related business considerations. And, as is the spirit of this Update, we remain focused on the important lessons that can be drawn from comparative law—including, this month, by examining the global arenas of private equity and corporate governance. We do hope that during 2022 many of us will meet (again, or for the first time!), and we will be able to discuss these and other fascinating topics. Feliz Año Nuevo, hope to see you all soon!

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Message from the Editors

This issue of MEXICO UPDATE addresses a sampling of key issues of Mexican law. We welcome contributions from our readers for the next issue. Although we publish in English, contributions may be submitted in Spanish or English. Our editorial team works to assure that everything is published in well-polished legal English. We can also suggest topics focused on specific judicial decisions or legislative and regulatory developments. Happy reading!

Karla Ruíz, Andres Nieto, Kelsey Quigley, editors



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About the Mexico Committee

Anchored by coordinators in cities in Mexico and the United States, the Mexico Committee has a diverse membership through attraction, rather than promotion. Among the committee's signature activities are: active sponsorship of programs on legal developments in Mexico, the U.S. and other jurisdictions. It includes arbitration, antitrust law, criminal procedure reform, data privacy, environmental law, legal education, secured lending, and trade law. The Committee contributes to the annual *Year In Review* publication. Through a partnership with a leading Mexican law faculty this Committee develops its newsletter, it also maintains a website, and actively organizes programs at the spring and fall meetings in the Section of International Law.

The Mexico Committee's membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely their suggestions and ideas.

Do you know?

An international lawyer (not licensed by a US bar) can join the ABA for US\$150, plus the Section of International Law for US\$65, for a total of US\$ 215? The application is available at:

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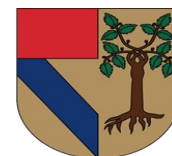
Juarez, Melina
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Contributors to this issue

Canizzo, Carlo— Partner
García, Enrique— Partner
Canizzo, Ortiz y Asociados, S.C.

CANNIZZO

Lizárraga, José Luis— Associate
Canizzo, Ortiz y Asociados, S.C.

Díaz Gavito, Eduardo— Partner
Hernández, Raúl— Lawyer
Grajales, Eduardo— Lawyer
Chevez, Ruiz, Zamarripa Y Cía, S.C.

Chevez
Ruiz
Zamarripa

Ornelas, Paulina— Lawyer

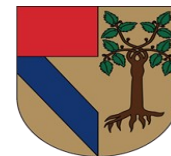
Figueroa, Esteban— Associate
González Luna Abogados



Bishel, Daniela—Lawyer



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MEXICO AND THE REGULATION OF CANNABIS: BEFORE AND AFTER THE GENERAL UNCONSTITUTIONALITY DECLARATION.

Canizzo, Carlo & García, Enrique

On July 15, 2021, the General Unconstitutionality Declaration (*Declaratoria General de Inconstitucionalidad*) (DGI) 1/2018 issued by the Mexican Supreme Court of Justice (*Suprema Corte de Justicia de la Nación*) (SCJN) was published in the Official Federal Gazette. Through this DGI, the highest Mexican court dismissed two articles of the General Health Law (*Ley General de Salud*) that set forth the prohibition of recreational consumption of Cannabis in Mexico.

This article will summarize Mexico's path to this point in Cannabis regulation and discuss where this regulation seems to be headed next.

Cannabis in Mexico: Legal History Since 2015

The latest round of development began in 2014, when Mexico's COFEPRIS (Federal Commission for the Protection against Health Risks (*Comisión Federal para la Protección contra Riesgo Sanitario*))—a health authority under the Ministry of Health—refused to grant authorization to four people for personal, recreational consumption of marijuana and associated non-commercial activities. In response, the four individuals filed an indirect injunction (*amparo indirecto*) that—after first being denied by a district judge in Mexico City—was resolved by the First Chamber of the SCJN on November 4, 2015. This ruling (*amparo* in review 237/2014) resolved that the articles of the General Health Law, on which COFEPRIS had based its refusal, violated the human right to the free development of personality (*libre Desarrollo de la personalidad*). As a result, the marijuana prohibitions in the law were declared unconstitutional, which forced COFEPRIS to grant the recreational use authorization requested by the parties. This gave the SCJN legal basis to grant other *amparos* for the recreational use of marijuana, such as that granted through *amparo* in review 1115/2017.

The right to free development of personality¹, on which the SCJN based its decision overturning the rejection, has been examined by the First Chamber of Mexico's constitutional court. That court explained that the right has two dimensions: one external and one internal. The external aspect protects action that allows individuals to perform any act they deem necessary to develop their personality, while the internal dimension protects individuals' sphere of privacy from external invasions that limit their ability to make certain decisions that serve as a vehicle for the exercise of their personal autonomy.

After the SCJN's revolutionary resolution—which has served as a spearhead for other resolutions and attempts at regulation—both the Senate and the Federal Executive presented initiatives that sought, in one way or another, to regulate the Cannabis market at a national level.

By April 28, 2017, Congress had already approved the medicinal and scientific use of Cannabis in Mexico by approving reforms to the General Health Law and the Federal Criminal Code (*Código Penal Federal*).

During 2018, Mexican courts handed down additional decisions that affected the country's Cannabis industry. On June 13, 2018, the First Chamber of the SCJN resolved the *amparo* in review 623/2017 which addressed whether COFEPRIS could prohibit the acquisition of seeds. The Mexican court ruled that the prohibition on acquiring Cannabis seed, like obtaining Cannabis for recreational use, violates the right to the free development personality. Less than a month later, on July 4, 2018, the SCJN another *amparo* (1163/2017), authorizing three individuals to import Cannabis seeds or to acquire seeds from parties authorized to do so. And on October 31, 2018, the First Chamber of the Court approved the grant of two additional *amparos* (254/2018 and 548/2018), resolving for the fifth time that the absolute prohibition of recreational marijuana use is unconstitutional. These decisions—along with the fact that there were no contradictory decisions—gave way to integrated and clear jurisprudence throughout the country.

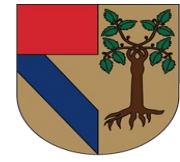
The decisions also triggered the process of a declaration of general unconstitutionality, a new mechanism for the review of the constitutionality of general regulations provided for in the Mexican Constitution.² The SCJN ordered that the Mexican Congress modify or repeal the unconstitutional provisions of the General Health Law. Initially, the deadline for compliance with this order was October 31, 2019. This deadline was extended by the SCJN on three occasions: the first extension would expire on April 30, 2020, the second on December 15, 2020, and the third on April 30, 2021. During this time, Congress received and discussed countless initiatives that did not succeed. To date, Congress has not complied with the jurisdictional mandate issued by the Court, i.e., it has not modified or repealed the unconstitutional provisions or regulated the Cannabis market in the country. In fact, the Senate has stated that it will not make any changes to the new ruling, approved in general by the United Commissions of Health, Justice and Legislative Studies (*Comisiones Unidas de Salud, Justicia y de Estudios Legislativos*) and by the Chamber of Deputies, until September of this year.

² Article 107, section II, paragraph 3.

¹ Laid out in thesis 1a. CCLXI/206 (10a.) with registry number 2013140.



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However, in the meantime, the Mexican federal government issued a regulation on non-recreational Cannabis use. On January 12, 2021, the Mexican government issued the Regulation of the General Health Control for the Production, Research and Medicinal Use of Cannabis and its Pharmacological Derivatives (*Reglamento de la Ley General de Salud en Materia de Control Sanitario para la Producción, Investigación y Uso Medicinal de la Cannabis y sus Derivados Farmacológicos*). This law seeks to regulate, control, promote and monitor the health aspects of the raw material and pharmacological derivatives and medicines of Cannabis, for production, research, manufacturing and medical purposes. Today, the medicinal and scientific market of Cannabis in Mexico is legally open and regulated.

2021: General Health Law Declared Unconstitutional

On July 15, 2021, the SCJN published in the Official Federal Gazette the General Unconstitutionality Declaration 1/2018, eliminating the General Health Law's absolute prohibition on the recreational consumption of the Cannabis and THC.

In practice, this DGI removes COFEPRIS as an obstacle to personal consumption of the Cannabis and THC, as well as planting, harvesting, preparing, possessing, and transporting the plant, even for recreational purposes. Adults may use Cannabis and THC recreationally, but may not carry out acts of commerce (purchase, commercialization, distribution, etc.) and may not consume in front of minors or in public places without prior authorization. The DGI also laid out other rules, prohibiting the operation of vehicles or dangerous machinery while under the influence of Cannabis and generally prohibiting any activity under the influence that may put third parties at risk.

The DGI does not exempt the Congress from its obligation to legislate in matters of recreational consumption of Cannabis and THC. Therefore, the country is waiting for the respective legal provisions to be issued during the next months.

The last opinion approved by the Chamber of Deputies on March 10, 2021 regarding the Federal Law of the Regulation of Cannabis (*Ley Federal para la Regulación del Cannabis*) and the modification of the General Health Law and the Federal Criminal Code, which has been widely criticized for not decriminalizing the use or possession by continuing to penalize certain possession, advertising, cultivation, and administration, among other things, approves the creation of a legal cannabis market for

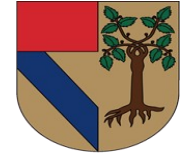
industrial, research and recreational use. The latter may be carried out through cannabis associations, public sale or self-cultivation. Thus, the legislation will apparently foresee —if approved in such terms by the Senate— five types of licenses; for cultivation, transformation, commercialization, exportation, importation and research, which will be regulated by CONADIC (National Commission against Addictions (*Comisión Nacional contra las Adicciones*)).

All that remains is to wait, both for entrepreneurs, consumers, as well as their advisor, for the terms in which the legislation on the matter will finally be approved to achieve the regularization and finally activate the market —primary and secondary— of Cannabis in the country.

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PRIVATE EQUITY: A TOOL FOR SMALL AND MEDIUM COMPANIES FINANCING

Lizárraga, José Luis

When Small and Medium Companies (SMCs) make investment decisions, they have to decide how to fund these decisions. Sustainable growth—which is using funds from operations to finance investment—is complicated, especially for SMCs that are struggling to survive. So, if SMCs don't generate enough funds internally, they almost always turn to capital markets to finance investment decisions.

Where in the equity market is best for SMCs to secure funds for go-forward operations? Obtaining public equity in the stock exchange is often not viable because it is expensive and provides funding only to companies that meet specific criteria for public trading. Debt options are expensive too because usually financial institutions offer high interest rates, and the issuance of bonds in the stock market is expensive.

Who fills this market gap, especially for SMCs? Private Equity (PE). With PE, funds and investors directly invest in private companies, usually securing equity or quasi-equity for their investment over a fixed maximum term. The PE investor (s) bear specific risks and generate hopefully high returns on behalf of qualified investors.¹

This article will provide an overview of PE implementation structures in Mexico and point out where these structures differ from those in the United States. Specifically, the article will cover: (i) capital contributions to Target Unlisted Companies (Investment Vehicles); (ii) common PE investment structures in the US and in Mexico; and (iii) core conclusions, including that Mexico should take steps to foster growth in the Mexican PE industry.

Capital Contributions to Investment Vehicle

In Mexico, the legal structure for attracting and receiving capital contributions to Investment Vehicles in the *Sociedad Anónima Promotora de Inversión* (SAPI). SAPI entered into force in June 2006 with the goal of promoting investment and competition in Mexican business.

SAPI allows investors and Investment Vehicles additional flexibility in financing through unique provisions relating to operational control, corporate governance, minority shareholder protection, and exit strategies, among other unique provisions.²

In terms of corporate governance, SAPI provisions allow foster better—and more flexible—decision-making at the Investment Vehicle. SAPI also permits stock purchases, meaning that when Investment Vehicles mature, investors may sell their shares and obtain capital gains in the disinvestment period.

Given all of these advantages, SAPI remains the appropriate framework for capital contributions of PE funds to Investment Vehicles in Mexico.

Common Investment Structures in PE

USA

For those use to structuring PE investment in the US, Mexican legal structure might be unfamiliar or surprising. In the US, PE is typically invested through three entities; (i) Private Equity Firms (PE Firms); (ii) Private Equity Funds (PE Funds); and (iii) Investment Vehicles.³

PE Firms manage several PE Funds. PE Firms are typically organized as either Limited Partnerships (LPs) or Limited Liability Companies (LLCs). These structures provide for pass-through taxation in the US, meaning that these LP and LLC entities do not pay income tax, only the managing partners do so on their individual income.

The PE Funds managed by the PE Firms are usually wither LPs or General Partnerships (GPs). LPs invest is a specific portfolio of companies and do not have influence on day-to-day operations or decision-making of the PE Fund. By contrast, GPs manage the PE Fund by cultivating relationships with investors⁴ and allocating resources in the Investment Vehicles, in exchange for management fees.

¹ Cyril Demaria, "Introduction to Private Equity", Wiley Finance, United Kingdom, 2010, eISBN 978-0-470-71188-0, Part I– What is Private Equity? Chapter 1.

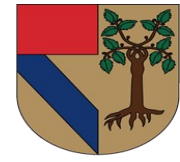
² Declaration of Purpose of the Securities Law (*Ley del Mercado de Valores*) enacted on December 30, 2005 and published in the Federal Official Gazette.

³ Cendrowski Harry, Martin James P., et al, "Private Equity: History, Governance and Operations", Wiley Finance, New Jersey, USA, ISBN 978-0-470-17846-1, Chapter 1– The Private Equity Process, General Terms and Overview.

⁴ Sometimes, GPs also have relationship with "gatekeepers"



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Mexico

Like in the US, in Mexico PE Firms manage PE Funds—but through different structures. In Mexico, PE Firms are often structured through a *Sociedad de Responsabilidad Limitada* (S. de R.L.),⁵ *Sociedad Anónima* (SA), or SAPI, according to legal, financial, and tax preferences. Occasionally, PE Firms might form an LLP in a non-Mexico jurisdiction to limit liability. PE Funds are usually trusts or special purpose vehicles, which allocate investments to the Investment Vehicles. PE Funds might sometimes also be formed as LPs or LLCs—

Investors typically follow two methods of financing an Investment Vehicle:

- Investing money in a PE Firm, which then invests the money in an PE Fund; the PE Firm will then make capital calls and transfer resources to the Investment Vehicles with the aim of maximizing profits; or
- Purchasing Development Trust Certificates (*Certificados Bursátiles Fiduciarios de Capital de Desarrollo*) or Investment Trust Certificates (*Certificados Bursátiles Fiduciarios de Proyectos de Inversión*) on the Mexican Securities Exchange (*Bolsa Mexicana de Valores*) or the Institutional Stock Exchange (*Bolsa Institucional de Valores*); these trust certificates transfer resources to an Investment Vehicle through the public stock exchange.

Regardless of the method chosen, Mexican lawyers should advise their clients proactively, with an eye towards ensuring optimal corporate governance and financial outcomes.

In Mexico, the financial systems are changing. Entrepreneurs need not only financing, but also a distribution channel of financial advice.⁶ PE Firms and PE Funds will fill this gap in the industry.

Conclusions

Mexico needs to take advantage and foster the PE industry. According to the Mexican Association of Private Equity and Venture Capital (*Asociación Mexicana de Capital Privado*), investments through PE amounted to roughly \$669 million dollars in 2019⁷. And this figure has the potential to grow rapidly in the coming years—especially in Fintech, Mobility and Technology.

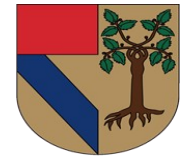
⁷ Mexico PE Overview 2019 published by Asociación Mexicana de Capital Privado (www.amexcap.com)

⁵ Akin to the German “*Gesellschaft mit beschränkter Haftung, GmbH*” or the Limited Liability Company.

⁶ “*FinTech Innovation. From Robo-Advisor to Goal Based Investing and Gamification*”, Paolo Sironi, Wiley Finance, United Kingdom, 2016, eISBN: 9781119227182, Chapter 1. The Theory of Innovation: From Robo-Advisors to Goal Based Investing and Gamification, 1.7. What Incumbents should Consider when thinking about FinTech Innovation.



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THE MEXICAN CUSTOMS AGENCY

Díaz, Eduardo; Hernández, Raúl & Grajales, Eduardo

Abstract:

On July 14, 2021, the “Decree that creates the National Customs Agency” was published in the Mexican Official Gazette. Per the terms of that Decree, the Mexican Customs Agency will be in charge of all customs operations in Mexico, a function that has been held by the Mexican Tax Administration Service for over 25 years.

This article contains a general analysis of the reasons that this Agency was created and its responsibilities.

Background

Under current Mexican law, the General Customs Administration is responsible for controlling the entry and exit of goods into and from Mexico, as well as the tax derived therefrom. The General Customs Administration operates under the Tax Administrative Service, the country’s tax authority, which is itself part of the Mexican Ministry of Finance and Public Credit.

Since the beginning of President Lopez Obrador’s administration, his stated central goal has been to fight corruption and impunity within government. And the President’s political discourse asserts that corruption and impunity have especially permeated Mexican customs activities.

The National Customs Agency’s Responsibilities

With this in mind, on July 14, 2021, the Lopez Obrador Administration announced the creation of the National Customs Agency. The new agency will have technical and operational autonomy, specialize in customs operations, and govern border taxes and trade.

The new agency will operate at the same hierarchical level as the Tax Administration Service within in the Ministry of Finance and Public Credit— rather than as a subdivision of the Tax Administration Service. This removes certain responsibilities from the purview of the Mexican Tax Administration Service, particularly those related to customs procedures and foreign trade operations, like monitoring imports and exports and calculating tariffs and other border taxes, such as VAT and excise.

Under this new system, all customs-related administrative decisions will be centralized in the single agency. This agency will be managed and led by an individual selected by the President; this individual will be the final decisionmaker for customs policies.

Some of the Agency’s powers were outlined in the Decree. Among these powers are the following: determination and collection of import duties; administration of import and export registers; participation in negotiations of international treaties on customs matters; and management of all issues related to trade procedures prior to customs clearance. While this new agency will be in charge of customs review and clearance at Mexican borders, it is not clear if post-customs-clearing audit procedures will continue to be carried out by the Tax Administration Service, or if this will also be the responsibility of the new Mexican Customs Agency.

The Decree creating the National Customs Agency also reflects the Mexican government’s attempts to strengthen national security by using current and former members of the Mexican Armed Forces to monitor border points. This is, at least in part, reflective of an effort to fight the smuggling of drugs and other illegal goods that flood the national territory. President Lopez Obrador has repeatedly cited supposedly increased efficiency in customs operations after the deployment of armed forces at the border customs of Nuevo Leon and Tamaulipas. And as of September 2021, approximately 20 customs offices (out of 49 in total) are directed by retired military personnel.¹

Entry into Force

Although the Decree was published on July 14, 2021, its entry into force depends on the publication of a legal framework that will grant the New Mexican Customs Agency authority in customs matters. Therefore, interested parties should pay close attention to forthcoming reforms from the Tax Administration Service, as well as to the promulgation of any new regulatory provisions that may set the institutional framework for this new government entity. Although some sources indicated that these changes could have been ready by November 2021, to-date there has been no update. Others set early 2022 as a more realistic date of entry into force for this new framework and agency.

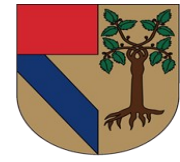
The creation of the Mexican Customs Agency likely signals the tightening of government control— and the recognized importance— of border operations in Mexico. Consequently, it is advisable that companies continue to carry out their operations according to the best regulatory practices provided in the current legal framework, with an eye towards more changes to come.

¹ <https://www.animalpolitico.com/2021/09/soldados-sedena-control-aduanas-fronterizas/>; 20/29/2021.

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CORPORATE GOVERNANCE CODES, A COMPARISON BETWEEN MEXICO AND THE UNITED KINGDOM

Ornelas, Paulina

Corporate governance (CG) is “the system by which companies are directed and controlled”¹ CG is “an essential mechanism for helping [a] company to attain corporate objectives and monitoring performance”.² Several countries have published model CG codes as models for best practices in an effort to boost economic development, social and political cohesion, and access to international capital.³ This article will briefly compare the CG Codes from the United Kingdom (UK) and Mexico

Common Ownership and CG Structures: “Insider” vs. “Outsider”

Currently, Mexico has an “insider” governance system. This means that there are few institutional investors, companies are closely owned (most often family-owned)⁴, and shares are rarely actively traded.⁵ Typically, companies are governed by “insiders”.

By contrast, the UK has an “outsider” governance system.⁶ This means that there are diverse and sophisticated owners and managers, and financing is often comprised of primarily international investors. There are often no “controlling” shareholders in UK companies.

Different ownership structures present different CG considerations. In Mexico, where ownership is concentrated to “insiders”, challenges might emerge regarding the relationship between minority shareholders and controlling shareholders, along with potential disputes relating to management succession.⁷ On the other hand, in the UK, challenges are often based on conflicts of interest between managers and shareholders.⁸ In both Mexico and the UK, the key is balance. In Mexico, CG often seeks to balance between minority shareholder interests and majority shareholder interests; in the UK, a balance must be struck between managers and shareholders.

Perhaps not surprisingly, patterns of company ownership structures in each country influence in the principles and rules contained in the model CG codes of each country. For example, the Mexican model code of CG (Mexican Code) focuses on conflicts of interests between shareholders, while the UK model code of CG (UK Code) emphasizes the evaluation of the board of directors. And while both the Mexican Code and the UK Code state that the company’s board should encourage participation and engagement of all shareholders,⁹ the countries offer different perspectives. The Mexican Code is more protective of minority shareholders because it obliges the board to ensure that all shareholders receive equitable treatment— regardless amount of stake in the company. By contrast, the UK Code favors large shareholders, as it addresses explicitly the ‘engagement of major shareholders’¹⁰

Board of Directors Composition and Duties

Both countries’ model codes require that the company’s board of directors be structured in a simple tier, meaning that the board has executive and supervisory functions. Both countries’ CG Codes also clearly delineate between management and supervision functions, in order to improve the company’s performance. However, unlike the UK Code, the Mexican Code assigns specific duties to the board, with the express purpose of complying with certain applicable laws and avoiding misinterpretations. The UK Code also provides that the role of the board is to “promote the long-term sustainable success of the company”¹¹ but does not state specific duties to achieve this end.

The UK Code does not establish in a minimum or maximum number of directors on the board, but it does require a minimum membership of three people on Audit Committees and Remuneration Committees (two people in smaller companies)¹²

¹ Cadbury A. (1992) *Report of the Committee on the Financial Aspects of Corporate Governance*. Gee & Co. Ltd 14

² Mallin C.A. (2019) *Corporate Governance*. OUP 10

³ O’Brien J. (2005) *Governing the Corporation Regulation and Corporate Governance in an Age of Scandal and Global Markets*. John Wiley & Sons, Ltd. 1

⁴ The World Bank, ‘Report on the Observance of Standards and Codes (ROSC)- corporate governance country assessment’ (The World Bank, 2003)

⁵ Husted B. W. and Serrano C. (2002) *Corporate Governance in Mexico*” 37 *Journal of Business Ethics* 339

⁶ Magdi R. Iskander and Naderech Chamlou (2000) *Corporate Governance. A Framework for Implementation*. World Bank Group 21

⁷ Mike Bukart, Fausto Panunzi and Andrei Shleifer (2003). *Family Firms* 5 *The Journal of Finance* 2167

⁸ Iskander M.R. and Chamlou N. (2000) *Corporate Governance. A Framework for Implementation*. World Bank Group 31

⁹ The UK Corporate Governance Code, 2018 (UK Code) Principle D and Código de Principios y Mejores Prácticas de Gobierno Corporativo de México 2018 (Mexican Code) Better Practices (1)

¹⁰ UK Code Provision 3

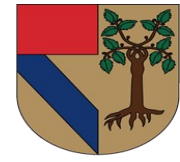
¹¹ UK Code Principle A.

¹² UK Code Provision 24 and 32

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By contrast, the Mexican Code establishes that a board should be composed of at least three members to provide plurality of opinion and no more than fifteen members to avoid inefficiency.¹³ Both model CG Codes recommend real involvement of the directors .

Both CG Codes also discuss the identity of the directors. The UK Code states that the board should be composed of executives (“ED”) and non-executive directors (“NED”),¹⁴ but at least half should be independent NEDs.¹⁵ The Mexican Code¹⁶ recommends that at least sixty percent of the board be comprised of NEDs,¹⁷ whether or not independent.¹⁸ In the UK, NEDs have the essential role of appointing, removing, and evaluating executives; in Mexico, the board appoints the CEO and the main EDs.¹⁹ In the UK, the chair of the board should also hold meetings with NEDs without EDs present,²⁰ but there is no similar provision in the Mexican Code.

The requirements for a director to be considered independent have some similarities and some differences across both countries’ CG codes. To be considered independent, a former employee of the company cannot be part of the board for a period of five years after employment according to the UK Code and one year according to the Mexican Code. Per the UK Code, a director cannot have had a business relationship with the company in the past three years, while according to the Mexican Code, an independent director can have an active business connection with the company if the income provided from this relationship is less than 10% of the total sales as client or provider of the company. The Mexican Code does not address whether independent directors can receive any income additional to the directors’ fees from the company. Both codes recommended to avoid conflict of interests with consultants, especially with lawyers and accountants.

For all directors and board committees the UK Code also promotes “diversity of gender, social and ethnic backgrounds, [and] cognitive and personal strengths”.²¹ The Mexican Code suggest the inclusion of women on the board to increase knowledge and experiences,²² but it does not mention other director characteristics.

Overall, the UK Code seeks to avoid domination by any group or individual over the board’s decisions through a balance in Eds and NEDs and an emphasis on diversity; by contrast, the Mexican Code focuses on ensuring that the company is receiving an external opinion.

Both the UK and the Mexican Codes cover engagement of the board with stakeholders.²³ The UK Code suggests mechanisms to ensure that the board meets its commitments towards stakeholders, including a requirement that the board issue an annual report outlining their responsibilities to employees, suppliers, customers, the environment,²⁴ the community, and members of the company.²⁵ The Mexican Code recommends slightly different mechanisms, primarily encouraging communication to inform stakeholders about the company’s performance,²⁶ consideration of the stakeholders and employment creation in strategic planning²⁷ and mechanisms to avoid risks affecting stakeholders.²⁸

Conclusion

In sum, the differences between the Mexican Code and the UK Code stem from the different ownership-structures prevalent in each country—which lead to different type of problems that need to be remedied differently. Each code achieves its purpose by implementing provisions to manage companies and to achieve success.

²³ UK Code Principle D

²⁴ Environment is established under the Companies Act 2006 but not under the UK Code

²⁵ UK Code Provisions 2 and 5 and UK Companies Act section 172

²⁶ Mexican Code Better Practice 6

²⁷ *ibid* Better Practice 49 (3)

²⁸ *ibid* Better Practice 57

¹³ Mexican Code 10

¹⁴ UK Code Principle G

¹⁵ *ibid* Provision 11

¹⁶ It is important to mention that the Mexican Code refers to NED’s as patrimonial independent directors and to independent NEDs as independent directors

¹⁷ Mexican Code Better Practice 14

¹⁸ *ibid* Chapter 4

¹⁹ *ibid* Better Practice 8 (12)

²⁰ UK Code Provision 13

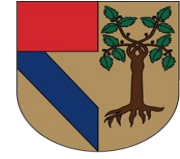
²¹ *ibid* Principle J, K. and L.

²² Mexican Code Better Practice 15

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GESTIÓN DE NEGOCIOS AN UNDERESTIMATED INSTITUTION

Figueroa, Esteban

Introduction of a supportive institution.

“*Gestión de Negocios*” roughly translated as “management of affairs” is a Mexican legal institution whereby a person called a “management agent”, takes care of the affairs of another (the owner) without a mandate and without expecting any remuneration.¹

The institution can prove especially helpful between absents and during international crises, like the current global pandemic. The *Gestión de Negocios* supports people who cannot immediately grant their consent, especially during such crisis, so that they are not left defenseless. Third parties can step in and help in good faith, without having legal obligations, proxies or mandates involved.

A fundamental principle in the *Gestión de Negocios* is that the management agent must act without personal interest and without expecting payment from the owner. (However, as a rule, the owner will be obliged to reimburse all expenses reasonably disbursed by the management agent during the *Gestión de Negocios*.)

Article 1906 of the Mexican Federal Civil Code and similar state civil codes establishes that the simple ratification of the *Gestión de Negocios* made by the owner, can produce retroactive effects to the day it begins.

Background and History.

The *Gestión de Negocios* dates back centuries, and was designed for extraordinary situations, such as those in which the business owner is absent or unable to act. Back then, a third party, typically with ties to the owner, would act in the owner’s interest. The definition of *Gestión de Negocios* from the Civil Code of 1884 was very clear in that sense², because it compared the *Gestión de Negocios* with an officious mandate, recognizing as officially valid to the acts executed by the management agent, without having a specific mandate or proxy.

The *Gestión de Negocios* is not based in contract law. Its creation is not the product of a contractual relationship, but rather arises from the duty of solidarity between people, promoting mutual aid and good faith acting.

For *Gestión de Negocios* to exist, there cannot be a representative or appointed administrator by the owner. Considering that, if there is a representative or known administrator of the business owner, this figure would be considered the interference of one person in the affairs of another, which is contrary to the principles of freedom that govern the manifestations of the private life of a man³

According to the French legal experts Henri, Leon and Jean Mazeaud, the only limit for the acts that can be the subject of management of affairs is that if they are acts of administration, not of domain:

“The main purpose of the management of affairs of someone else’s business is to incite one person to provide a service to another by dealing with a matter that is neglected. Managing your assets is providing that service; but providing them, beyond the needs of a good administration, that is to fulfill the measure! Hence, an act that exceeds the limits of the administration would not be an act of managing other people’s businesses.”⁴

Necessary Elements.

According to the Chapter IV of Fourth Section of the Mexican Federal Civil Code, and even though the legal agent acted without a mandate and in good faith, the law foresees that the legal agent must: 1. To act in accordance with the interests of the business owner; 2. Perform with all the diligence that applies to individual businesses; 3. Bear with their patrimony, the necessary expenses for the execution of the management, (without expecting a payment or a prize); 4. Indemnify the damages and losses caused by their fault or negligence to the goods or business of the owner; 5. Give notice of its management to the owner, as soon as possible; 6. To report back the accounts of the management; and 7. Respond to third parties for the obligations they have contracted, as long as the business owner does not ratify the management.

³ Tesis Aislada issued by the Tercera Sala de la Suprema Corte de Justicia de la Nación; Quinta Época, Materia (s): Civil Fuente; Seminario Judicial de la Federación. Tomo XCVIII. Page 1472

⁴ Mazeaud, Henri, Leon and Jean, “*Lecciones de Derecho Civil*” Second Part Volume II. Page 479, Edition Jurídicas Europa-América, Buenos Aires, 1978.

¹ Robles Fariás, Diego “*Teoría General de las Obligaciones*” Editorial Oxford University Press, México, 2011, p. 563

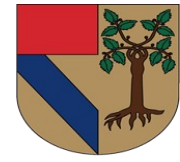
² Taken from Borja Soriano, Manuel, “*Teoría de las Obligaciones*” p. 334. 21 edition, Porrúa, México 2014

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Diversely and apart from the obligation to reimburse the legal agent expenses, the business owner's obligations, such as responding to the obligations contracted by the legal agent, are subject to the ratification of the management made by the owner and if the owner decides not ratifying the management, the legal agent will be liable to the third party.

It is important to specify that Mexican law superficially regulates the relationship between the legal agent and the business owner, since no pronouncement is issued regarding whether the third party that acquires rights or assumes obligations facing the legal agent. This situation can generate a conflict related to the fact that the third party is forced or not to celebrate the legal act with the legal agent, in its representative capacity.

For this type of scenario, it is necessary to resort to the purposes of social solidarity that characterize this legal institution, since the legal agent cannot require the third party to recognize its capacity of the "legal agent" of the business owner, which is why, the legal agent must respond to the third party, if the business owner does not ratify the management and therefore, the person who is bound by a certain legal act is him, since the legal agent, not having an express mandate, will be at the will of the good of the third.

Finally, the word ratification is defined by the Spanish Royal Academy as approving or confirming acts, words or writings, considering them valid and true. Ratification consists in confirming a previous act and recognizing its validity, so this occurs after the celebration of the act to be ratified and must be carried out by a person invested with powers.

The management of affairs seems to be in disuse and with little practical utility, however, in the face of international circumstances caused by the pandemic, this legal institution can be used by Mexicans or foreigners, so that their heritage does not remain defenseless as a result of its owner being absent or temporarily prevented from defending it and that it does not have an administrator or attorney-in-fact to come to its defense.

Examples of Potential Use During COVID-19

Ultimately, and as practical examples, the following are established:

I. Sale of Land. For 10 years, Franz has wanted to buy the land of his neighbor José in Guadalajara. At the beginning of the COVID-19, José informed Franz of his decision to sell his land, but Franz is in Germany and due to restrictions owing to the pandemic, it is difficult for him to travel and go to the corresponding authorities to grant a power-of-attorney and that a third party can buy José's house in Mexico. In order for not to miss the long-awaited opportunity, Franz asked his friend Jack (who lives in Mexico) to appear before in a Notary Public and as Franz's legal agent, and purchase José's land in his name.

Jack appears as Franz's legal agent and enter into the purchase agreement, thus acquiring the land from José. Once the restrictions due to the pandemic are lifted, Franz's ratifies the management made by Jack and reimburses all the expenses that were incurred and acquires the much-desired land of José.

II. Accept the donation on behalf of a third party. Don Javier is very ill with lung cancer and before he passes away, he wants to enter into a donation contract to transmit to Alejandro a building with 50 luxury apartments, however, Alejandro finds himself incommunicado since he is hunting in Africa, therefore, Don Javier asks Jorge, Alejandro's best friend, to appear before in a Notary Public as Alejandro's legal agent and accept the pure and simple donation on behalf of his son, him assuming all the notarial expenses to accept the donation made by Don Javier. Don Javier dies and upon his return from Africa, Alejandro appears before in a Notary Public, ratifies the management of affairs and reimburses all the expenses incurred by Jorge, thus acquiring, via donation, the property of the Apartment Building.

From the examples specified, we can conclude that the management of affairs is a practical legal institution that can be used to prevent the owner of a certain business from suffering damage or harm to their heritage, being essential that the legal agent acts in good faith and based on the principle of solidarity so that the business owner can enjoy the benefits.

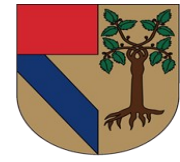
Conclusion

Finally, we can conclude that the management of affairs arises from the duty of solidarity between people and benefits those who are absent and prevents people who do not have administrators or legal representatives from being defenseless in extraordinary situations, but it is essential that legal agents act in good faith and promotions mutual aid, without expecting any remuneration, seeking benefits solely in favor of the business owner.

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VACCINATION AGAINST COVID-19 AS A POSSIBLE FACTOR OF DISCRIMINATION

Hernández, Daniela

The COVID-19 pandemic has caused social, political, and economic changes around the world. Among new challenges is how to legally and fairly distinguish between those who are vaccinated against COVID-19 and those who are not. Receiving the vaccine is an individual choice, as vaccination campaigns in Mexico emphasize that the vaccine is *not mandatory*¹. This stands in contrast to the position taken by the United States of America, which in some instances has required vaccination. For example, the U.S. federal government has required vaccination for all executive branch employees and federal contractors². Moreover, cities like New York, New Orleans, Los Angeles, and San Francisco are urging that enclosed spaces require proof of vaccination or a negative diagnostic COVID test prior to entering.³ And even beyond its borders, the United States has demanded that tourists coming from certain countries be fully vaccinated in order to enter the country⁴. In the United States, these restrictions have started a clash between the promoters of public health and those who hold a utilitarian vision of individual human rights.

On March 11, 2020, the World Health Organization⁵ characterized the disease caused by the SARS-CoV-2 virus (COVID-19, as we have come to know it) as a pandemic.⁶ Consequently, the World Health Organization urged all countries to apply public health and social measures to contain transmission and to reduce death due to COVID-19. Such measures included: (i) personal protection through physical distancing, avoiding crowded environments, hand washing, cough and sneeze guards, and mask use; (ii) environmental measures such as cleaning, disinfection, and ventilation; (iii) surveillance and response measures like screening, contact tracing, isolation, and quarantine; and (iv) measures related to international travel. However, to date, the World Health Organization has not considered medical countermeasures such as the administration of drugs or mandatory vaccination.⁷

According to Article 12 (2) of the International Covenant on Economic, Social and Cultural Rights, States Parties must recognize the right “to the enjoyment of the highest attainable standard of physical and mental health,” and thus, must take the necessary steps to prevent, treat and control epidemic, endemic, occupational and other diseases in their territory.⁸ (Mexico ratified this treaty in 1981⁹. The United States signed the treaty in 1977, but has never ratified—so is not a State Party.¹⁰) In addition, Articles 13 (1), 17 and 42 of the International Health Regulations establish that each State Party shall develop, strengthen and maintain the capacity to respond promptly and effectively to public health risks and emergencies of international concern, *as long as the public health measures are “initiated and completed without delay, and applied in a transparent and non-discriminatory manner.”*¹¹ Both Mexico and the United States are State Parties to these regulations.¹²

In this sense, countries are free to introduce, adjust or abolish public health and social measures, considering the intensity of disease transmission, the responsiveness of the healthcare system, and the effects any measures may have on the general welfare of society and individuals. Countries must also engage in ethical considerations, such as the limited availability of vaccines worldwide and the inequalities in vaccine availability between countries and population groups.

Indeed, countries around the world appear to have widely varying access to the vaccine. On December 14, 2020, the United States started its vaccination plan¹⁴, and in Mexico, vaccinations began on December 24, 2020.¹⁵

⁸ <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> on September 26, 2021.

⁹ <https://indicators.ohchr.org/> on November 08, 2021.

¹⁰ <https://indicators.ohchr.org/> on November 08, 2021.

¹¹ <https://www.who.int/publications/i/item/9789241580496> on September 26, 2021.

¹² <https://www.who.int/publications/i/item/9789241580496> on November 08, 2021.

¹³ <https://espanol.cdc.gov/coronavirus/2019-ncov/vaccines/reporting-vaccinations.html> on September 26, 2021.

¹⁴ <http://vacunacovid.gob.mx/wordpress/calendario-vacunacion/> on September 26, 2021.

¹⁵ <https://www.statista.com/statistics/1194931/covid-vaccine-doses-administered-by-state-us/> on November 08, 2021.

¹ <https://www.facebook.com/SecretariadeSaludMX/videos/571123934036316/> on November 08, 2021.

² <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/> on November 08, 2021.

³ <https://www.usnews.com/news/health-news/articles/2021-08-13/more-us-cities-requiring-proof-of-vaccination-to-go-to-places> on November 08, 2021.

⁴ <https://www.cdc.gov/coronavirus/2019-ncov/travelers/noncitizens-US-air-travel.html> on November 08, 2021.

⁵ The World Health Organization is the United Nations specialized agency responsible for protecting and safeguarding the health of all peoples at the international level. Thus, the recommendations put out by this organization are emitted with the purpose of getting all peoples to the highest possible level of health.

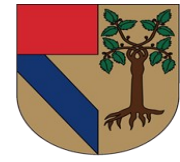
⁶ <https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> on September 26, 2021.

⁷ <https://apps.who.int/iris/bitstream/handle/10665/343055/WHO-2019-nCoV-Adjusting-PH-measures-2021.1-spa.pdf> on September 26, 2021.

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As of November 8, 2021, 430,927,624 doses of the vaccine had been delivered to patients in the United States,¹⁵ and 57.21% of people in the US are fully vaccinated against COVID-19. In Mexico 128,241,025 doses of the vaccine has been delivered¹⁶ and 47.74% of people in Mexico have been fully vaccinated against COVID-19.¹⁷ Statistics also largely differ around the world. Only 4.2% of people in low-income countries have received at least one dose of the vaccine.¹⁸ For example, 90% of people living in African nations are still awaiting their first dose,¹⁹ and Caribbean countries have also not received many vaccines: Venezuela has fully vaccinated 32.30% of its population²⁰, Dominica 35.08%²¹ and St. Lucia 23.11%²².

With this in mind, there are three populations who may not be vaccinated: (i) those who medically cannot, (ii) those who do not want to, and (iii) those who do not have access to the vaccine. Therefore, the international community must join efforts to find appropriate and proportionate solutions to maximize global health while respecting fundamental human rights.

Society is currently polarized between the vaccinated and the unvaccinated. In some cases, with this classification, human rights like the right to life, work, health, and freedom of movement are curtailed for those who are not vaccinated. For example, in the US state of Colorado, hospitals use vaccination status to prioritize transplant recipients and organ donors—prioritizing those who have received the vaccine²³. These kinds of policies seem difficult to square with widely accepted rights of equality, non-discrimination and access to healthcare. Hence, measures adopted by countries to combat this pandemic must be reasonable and proportionate to ensure balance with all human rights.

Governments should, to the extent possible, and before applying public health and social measures, (i) reduce barriers to vaccination; and (ii) consider public health measures that are less restrictive of the rights and freedoms of unvaccinated persons, such as free COVID-19 testing and certain access permitted after test results, and certificates of immunity for persons recovered from infection. These measures might help remove or reduce barriers that prevent unvaccinated people from enjoying their civil, political, economic, social, and cultural rights, without jeopardizing the health of others.

¹⁶ <https://datosmacro.expansion.com/otros/coronavirus-vacuna/mexico> on November 08, 2021.

¹⁷ https://ourworldindata.org/covid-vaccinations?country=OWID_WRL on November 08, 2021.

¹⁸ <https://ourworldindata.org/covid-vaccinations?country=USA> on November 08, 2021.

¹⁹ <https://www.elfinanciero.com.mx/mundo/2021/09/21/reprobado-el-mundo-se-saca-un-5-por-distribucion-desigual-de-vacunas-covid-onu/> on September 26, 2021 and, https://ourworldindata.org/covid-vaccinations?country=OWID_WRL on November 08, 2021.

²⁰ <https://ourworldindata.org/covid-vaccinations?country=USA> on November 08, 2021.

²¹ <https://ourworldindata.org/covid-vaccinations?country=USA> on November 08, 2021.

²² <https://ourworldindata.org/covid-vaccinations?country=USA> on November 08, 2021.

²³ <https://www.washingtonpost.com/health/2021/10/05/uchealth-transplant-unvaccinated/> on October 6, 2021.

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Mexico Committee Email Address:

americanbar-intmexicanlaw@ConnectedCommunity.org

Editorial Committee:

Mexico Committee

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