

# Mexico

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### 1 Setting the Scene - Sources and Overview

#### 1.1 What are the main corporate entities to be discussed?

The General Corporations Law (“LGSM”) acknowledges six kinds of companies. The differences between these companies stand basically: (i) in the degree of partner liability with respect to corporate debts, (ii) the freedom for the transfer of interests, (iii) the degree of participation in the company's management and surveillance. Due to the limitation to the partners' liability (corporate veil) with respect to corporate debt, the companies that are mostly used in Mexico are:

- (a) Business Corporation (“S.A.”) Its main characteristics are: (i) its capital stock is divided into shares, (ii) each shareholder's liability is limited to the amount of its contributions; and (iii) shares have free movement.

The incorporation of a Business Corporation requires a minimum of two shareholders. There is no minimum amount of capital established in the Law. After one year following the company's incorporation, the capital stock must be fully subscribed.

- (b) Limited Liability Company (“S. de R.L.”) Its main characteristics are: (i) it is formed by partners which obligations are limited to the payment of their contributions into the company's capital stock, without the partnership interests being able to be represented by negotiable instruments, either payable to the bearer or to the party named therein and, (ii) there are limitations to partnership interest transfer. A Limited Liability Company may not have more than 50 partners. The company's capital is divided into "partnership interests" that may have different values and be of different categories, but always in multiples of one thousand pesos. There is no minimum amount of capital established in the law.

The other four kinds of companies used less frequently in Mexico are the General Partnership, Limited Liability Partnership, Limited Liability Stock Partnership and Cooperative Corporation.

Any of these kinds of companies may be incorporated with a variable capital, which allows the company to modify its capital (in its variable part) with minimum formalities, specially, without need to amend the company's by-laws.

On the other hand, the Securities Law (“LMV”) governs three sub-kinds of business corporations:

- (i) Investment Promotion Corporation (“SAPI”), which has a more flexible corporate system. Contrary to the corporations established in the General Corporations' Law, SAPIs provide more protection to minority shareholders and contemplate corporate governance standards;

- (ii) Stock Market Investment Promotion Corporation (“SAPIB”), which allows the company to place shares or issue negotiable instruments and offer them to the investing public, through the fulfillment of less registration requirements than a Stock Market Company (“SAB”), with the condition of adopting the SAB legal system aforementioned within a period of ten years; and
- (iii) Stock Market Company, which has the purpose of quoting its shares in the stock exchange, provided that it meets the requirement established by the corresponding law.

#### 1.2 What are the main legislative, regulatory and other corporate governance sources?

The following are the laws that govern the companies described in question 1.1 above and in which corporate governance obligations are established:

- a) General Corporations Law.
- b) Securities Law.
- c) Commerce Code.

The provisions established in such laws are mandatory. However, there is also another piece of legislation that, without being a legislative source, is an important framework law in the area of corporate governance, which is the “Corporate Governance Best Practice Code” (“CMPC”), created as a private rule and its implementation is suggested to companies in order to have a healthy and efficient corporate discipline in all corporations. There are cases in which this “CMPC” becomes a legislatively mandatory law “by reference” as it happens to companies and corporations related with the gaming and lotteries industry in our country.

#### 1.3 What are the current topical issues, developments, trends and challenges in corporate governance?

The biggest challenge of corporate governance in Mexico is in its integration into private or traditional corporations. The General Corporations Law (in effect since 1934), does not develop corporate governance practices. Only corporations governed by the LMV have been incorporating modern corporate governance practices.

The LMV became effective in 2006 and includes corporate governance principles such as: confer more rights to minority shareholders, shareholders' covenants, limitation or restriction of the right to vote, improvements to the company's liquidity, and a stricter regulation regarding the revelation of privileged information.

LMV establishes the duties of the Board of Directors, which include: (i) defining the company's strategy, (ii) establishing a code of ethics,

taking into consideration loyalty and diligence duties, (iii) the formulation of policies that the company must follow, (iv) supervising and approving the management team's work, and (v) prevent conflicts of interest and ensure an equal treatment of shareholders.

## 2 Shareholders

### 2.1 What rights and powers do shareholders have in the operation and management of the corporate entity/entities?

Rights vary depending on the type of corporation, but in Mexico's most common corporations (Business Corporation and Limited Liability Corporation), shareholders have no direct rights or powers regarding the entity's management or operation. Indirectly, they may, however, have control of the operation and management by exercising their right to vote at the partners' or shareholders' meetings through (i) the appointment of the control and surveillance bodies, and (ii) the periodic review of the entity's business and financial policies, among others.

Likewise, for the case of companies governed by the LMV, it establishes a catalogue of additional shareholders' rights such as: (i) to appoint one member of the board of directors for each 10% of the voting shares individually or collectively held, (ii) to appoint one statutory auditor for each 10% of the voting shares individually or collectively held, (iii) to request the calling of a general shareholders' meeting at any time, or, the one-time suspension of the voting regarding any matter of which they do not consider themselves sufficiently informed, provided that they hold, individually or collectively, at least 15% of the voting shares. Such action may be also exercised with respect to statutory auditors, and (v) judicially challenge the resolutions adopted at general shareholders' meetings, provided that they have voting rights regarding the corresponding matter, whenever they hold, individually or collectively, at least 20% of the company's capital stock.

On the other hand, the SAB's shareholders will be entitled to: (i) appoint one member of the board of directors, (ii) request the chairman of the board of directors or of the committees to carry out the corresponding corporate governance duties, (iii) request the one-time suspension, during three calendar days, and with no need for a new call, of the voting regarding any matter with respect to which they do not consider themselves sufficiently informed, and (iv) judicially challenge the resolutions adopted at general shareholders' meetings with respect to which they have voting rights, whenever they hold, individually, or collectively, at least 20% of the capital stock.

### 2.2 What responsibilities, if any, do shareholders have as regards the corporate governance of their corporate entity/entities?

Their responsibilities are limited to (i) create the control, management and surveillance bodies of each one of the entities, and (ii) periodically review the actions of such bodies and, in any case, approve their management. This is because most of the burden of the fulfillment of obligations regarding corporate governance is on the management body and, as the case may be on the surveillance body. Thus, the activities of the shareholders' meeting are not permanent contrary to what happens with the management board.

### 2.3 What shareholder meetings are commonly held and what rights do shareholders have as regards them?

General Shareholders' Meetings are ordinary and extraordinary.

In the Business Corporation, the Ordinary Shareholders' Meeting will meet, at least, once a year, within the first four months following the end of the fiscal year, and it shall be in charge of the following matters:

- I. Discuss, approve or modify the directors' report regarding the company's activities, taking the statutory auditor's report into account, and take the measures it deems convenient.
- II. In any case, appoint the Sole Administrator or Board of Directors and Statutory Auditors.
- III. Establish the Directors' and Statutory Auditor's remuneration, whenever such remuneration is not established in the by-laws.

On the other hand, extraordinary shareholders' meetings shall meet to discuss any of the following matters:

- I. extension of the company's duration;
- II. early dissolution of the company;
- III. capital stock increase or reduction;
- IV.- change of the company's corporate purpose;
- V.- change of the company's nationality;
- VI.- company transformation;
- I. merger with other companies;
- II. issuance of preferential stock;
- IX.-company's redemption of its own shares and issuance of participating shares;
- X.- bond issuance;
- XI.- any other amendment to the shareholders' agreement; and
- XII.- the other matters for which the Law or shareholders' agreement require a special quorum.

These meetings may be held at any time.

With respect to the Limited Liability Companies, the LGSM makes no distinction between ordinary and extraordinary meetings, therefore, meetings shall be held regarding the following points:

- I. Discuss, approve, modify or reject the balance sheet corresponding to the fiscal year ended and to take the measures they deem pertinent.
- II. Proceed to profit sharing.
- III. Appoint and remove managers.
- IV.- Appoint, in any case the Surveillance Board.
- IV. Resolve on partnership interest division and redemption.
- V. Demand, in any case, any supplementary contributions and accessory benefits.
- VI. File the corresponding actions for damages and losses against corporate bodies or against the partners.
- VII. Amend the partnership agreement.

The call for the meetings shall be made by the Sole Administrator or by the Board of Directors (or Managing Board), or by the Statutory Auditor.

#### Voting Rights

In Business Corporations, each share shall only have one voting right. In Limited Liability Companies, each partner will have one vote for every thousand pesos of its contribution or for any multiple thereof, unless the partnership agreement has any provisions regarding preferential partnership interests. With respect to companies governed by the LMV, the restriction of voting rights with respect to some matters or the issuance of shares with no voting rights is allowed.

### 2.4 Can shareholders be liable for acts or omissions of the corporate entity/entities?

As a general rule, Shareholders shall only be responsible to the

company up to the amount of their contributions. Notwithstanding the foregoing, Shareholders may incur in liability, if they occupy any position in the Company's Board of Directors/Managing Board, or perform any duties in the company (v.gr. General Manager, etc.).

**It is important to mention that, during the year 2013, Mexican courts rendered some very important court precedents, in view of which, for the first time in Mexico's corporate governance history, the possibility of lifting the corporate veil in companies in order to extend the partners' or shareholders' liability, is acknowledged, thus incorporating, for the first time, the corporate veil theory in our country, which may be lifted upon fulfillment of certain extremes established in the court precedents themselves and which are: (i) effective control by the holding company; (ii) intention to evade the fulfillment of a law; and (iii) causing of any damage.**

## 2.5 Can shareholders be disenfranchised?

The LGSM establishes no causes for exclusion or limitation of the partners'/shareholders' rights.

Notwithstanding the foregoing, the LMV allows to establish causes for partner exclusion or causes for the exercise of separation, withdrawal or share redemption rights in the company's by-laws, even though a list of causes is not established.

## 2.6 Can shareholders seek enforcement action against members of the management body?

According to the LGSM, shareholders representing, at least 33% of the capital stock, may directly file the civil liability action against Directors or Managers, provided that the following requirements are met:

- a) that the claim includes the total amount of liabilities in favour of the company and not only the petitioners' personal interest, and
- b) that, as the case may be, the plaintiffs have not approved the resolution adopted by the General Shareholders' Meeting regarding the lack of admissibility of filing any claims against the sued Directors or Managers.

With respect to the SAPI, the LMV allows for filing the civil liability action against directors and statutory auditors in benefit of the company, whenever they individually or collectively hold, at least 15% of the voting shares.

Shares with the purpose of demanding liability in terms of the LMV shall be subject to a five year statute of limitations counted as of the day in which the act or event that caused the corresponding damage to patrimony occurred.

## 2.7 Are there any limitations on, and disclosures required, in relation to interests in securities held by shareholders in the corporate entity/entities?

In accordance with the Foreign Investment Law, any Mexican company with foreign capital can be engaged in any business, open and operate establishments, and extend or relocate already existing establishments. The foregoing, provided that the company does not become involved in businesses with activities reserved to the State or to Mexicans (v.gr. Oil and hydrocarbons, basic petro-chemistry, electricity, nuclear energy generation, etc.), either individuals or legal entities, or subject to any other specific restrictions

(development cooperatives, domestic air transportation, shipping companies, etc.).

On the other hand, it is important not to fall into any of the provisions established by the Mexico's Federal Anti-Trust Law ("LFCE") upon carrying out a merger with, or an acquisition of a Mexican company, mainly with respect to concentrations (mergers and acquisitions) and absolute and relative monopoly practices.

## 3 Management Body and Management

### 3.1 Who manages the corporate entity/entities and how?

Traditionally, companies may be managed by a unipersonal body ("Sole Administrator") or by a Plural Body ("Board of Directors"). "CMPC" guidelines recommend, however, to always use the "Board of Directors" figure in order to ensure that decisions are made democratically, objectively and impartially.

Such bodies shall be appointed for the period established by the Shareholders' Meeting. Unless otherwise agreed, the company will be entitled to revoke its directors at any time.

In the case of companies governed by the LMV, there is a need to create intermediate bodies subject to the board of directors which, in a specialised way, deal with issues that are specific and essential to each one of the entities, such as the Audit Committee, Evaluation and Remuneration Committee, Planning and Finance Committee, Corporate Practices Committee, Regulatory Controller and General Manager, among others.

### 3.2 How are members of the management body appointed and removed?

The General Partners' or Shareholders' Meeting will be the one in charge of appointing the Board of Directors or Managing Board.

The persons who according to the law are prevented from carrying out acts of commerce cannot be Directors or Managers.

In the case of Business Companies and Limited Liability Companies, Directors shall continue performing their duties even though their term has expired, until new appointments are made and the persons appointed take office. In the case of SABs, Directors shall continue performing their duties up to 30 calendar days more, even though the term for which they were appointed has expired.

Directors shall have the responsibilities that are inherent to their position and the ones derived from the obligations imposed by law and by the by-laws.

With respect to the SAPIs, shareholders will be entitled to appoint and revoke, at a general shareholders' meeting, one member of the Board of Directors for each 10% of the voting stock individually or collectively held thereby, even when such voting rights are limited or restricted. Such appointment can only be revoked by the rest of the shareholders, upon revocation of the appointments of the rest of the directors, in which case, the substituted persons may not be appointed in such capacity during the twelve months following the date of revocation.

In the case of the SAB, each shareholder will be entitled to appoint and revoke in a general shareholders' meeting, one member of the Board of Directors. Such appointment may only be revoked by the other shareholders upon revocation of the appointments of the rest of the shareholders, in which case, the substituted persons may not

be appointed in such capacity during the twelve months following the date of revocation.

### 3.3 What are the main legislative, regulatory and other sources impacting on contracts and remuneration of members of the management body?

There is no mandatory parameter to set the remuneration of the members of the Entity's Board of Directors or the Senior Executives. According to the provisions in the LGSM, the General Shareholders' Meeting will be the one in charge of freely establishing the Directors' and Statutory Auditor's remuneration, whenever they are not established in the by-laws.

In the case of the SAB, the Corporate Practices' Committee is obligated to annually inform the general shareholders' meeting about employee full remuneration or payment packages.

### 3.4 What are the limitations on, and what disclosure is required in relation to, interests in securities held by members of the management body in the corporate entity/entities?

According to the provisions in the LGSM, there is no prohibition whatsoever in order for the Company's shareholders to become members of the Board of Directors thereof.

The LGSM provides that, whenever the same person is a shareholder and a member of the board of directors, he/she shall refrain from voting at any shareholders' meeting in which he/she had any conflict of interest, or in which the board's management or the respective financial statements are to be approved.

### 3.5 What is the process for meetings of members of the management body?

In order for the Board of Directors to function legally, at least one half of its members have to attend its meetings and its resolutions shall be valid whenever adopted by the majority of the directors present.

In the event of a tie, the Chairman of the Board shall have a casting vote.

Whenever there are three or more directors, the shareholders' agreement shall establish the rights corresponding to the minority as to the appointment, but, in any case, the minority representing 25% of the capital stock shall appoint, at least, one director. This percentage will be 10% in the case of companies with shares listed in the Stock Exchange.

### 3.6 What are the principal general legal duties and liabilities of members of the management body?

Directors or Managers are jointly liable before the company:

- a) For the contributions made by the partners.
- b) For the fulfillment of any legal and statutory requirements regarding dividends.
- c) For the existence and maintenance of accounting, control, record, filing, or information systems provided by the law.
- d) For the exact fulfillment of the resolutions adopted by the Shareholders' Meetings.

In that same sense, Directors or Managers shall be jointly responsible with former directors or managers for the irregularities incurred in thereby.

Also, the Director or Manager with any interest contrary to the

company's in any transaction, shall inform the other Directors of this and shall refrain from any deliberation and resolution. The Director who contravenes this provision shall be liable for any damages and losses caused to the company.

On the other hand, according to the Federal Tax Code, the parties, whatever designation is given thereto, who are conferred with the general direction or management, or with the sole administration of the legal entities, shall be jointly liable for the contributions caused and not withheld by such legal entities during his/her management, as well as for the ones that should have been paid or submitted during such time.

### 3.7 What are the main specific corporate governance responsibilities/functions of members of the management body and what are perceived to be the key, current challenges for the management body?

According to the LGSM the Board of Directors will have the powers expressly conferred thereto; and shall have, within the scope of their authorities, the most ample representation and enforcement powers. In general, the board of directors is authorised to carry out all actions and activities that are necessary for the Company's management and operation.

The LMV provides that the board of directors shall be in charge of the following matters: (i) establish the general strategies for the direction of the company's business, (ii) monitor the company's management and direction, and (iii) approve, with the competent committee's opinion: a) the policies and guidelines for the use or enjoyment of the assets that are part of the company's patrimony, and b) the transactions of each one of them individually.

### 3.8 What public disclosures concerning management body practices are required?

Business Corporations, under their directors' liability, shall present the Shareholders' Meeting with an annual report including, at least:

- a) A report issued by the directors regarding the company's operation during the fiscal year, as well as regarding the policies followed by the directors and, in any case, about the main existing projects.
- b) A report in which they express and explain the main accounting policies and criteria and regarding the information used for the preparation of the financial information.
- c) A statement showing the company's financial position as of the end of the fiscal year.
- d) A statement showing the company's profits and losses during the fiscal year, duly explained.
- e) A statement showing the changes in the financial position during the fiscal year.
- f) A statement showing the changes in the items that form the corporate patrimony, that occurred during the fiscal year.
- g) The notes that are necessary to complete or clarify the information provided by the previous statements.

On the other hand, the SAB's Board of Directors shall present the general shareholders' meeting held as a result of the end of the fiscal year with:

- a) The corporate practices and audit reports.
- b) The General Manager's report regarding the company's financial information, together with the external auditor's report.
- c) The Board of Directors' Opinion regarding the content of the General Manager's report referred to in the preceding subsection.

- d) The financial report, as well as the report containing the main accounting and information policies and criteria used for the preparation of the financial information.
- e) The report regarding the operations and activities in which it participated in terms of the provisions of the LMV.

### 3.9 Are indemnities, or insurance, permitted in relation to members of the management body and others?

According to the provisions of the LMV, SABs may agree on any indemnities and purchase insurances, bonds or security, in favour of the members of the Board of Directors, that cover the amount of the indemnity resulting from the damages caused to the company or to any legal entities controlled thereby or over which it has any significant influence, by their actions, except in the event of fraud or bad faith, or any illegal actions in terms of this or other laws.

## 4 Transparency and Reporting

### 4.1 Who is responsible for disclosure and transparency?

Directors, Managers or the Board of Directors and, as the case may be, General Managers, shall be responsible of disseminating the company's relevant information, whenever admissible.

In Business Corporations governed by the LMV, the General Manager figure becomes the person responsible for, among other things (i) signing the company's relevant information, together with the relevant directors in charge of the preparation thereof, within the scope of their competence, and (ii) disseminate the relevant information and events that must be revealed to the public, abiding by the provisions of the LMV, being responsible for the content and timeliness of such information, even when the dissemination thereof is delegated to third parties, with the exception of any fraud or inexcusable negligence of such third parties.

### 4.2 What corporate governance related disclosures are required?

According to the LGSM, financial statements shall be published together with any notes thereto and the statutory auditor's report, in the official gazette of the entity in which the company has its corporate domicile, or, in the case of companies with offices or agencies in several entities, in the Federal Official Gazette, fifteen days following the date in which the general shareholders' meeting has approved the report.

On the other hand, the LMV provides that business companies which shares representatives of the capital stock or negotiable instruments representative thereof are recorded in the National Registry of Securities, shall be exempted from the requirement to publish their financial statements, in terms of the preceding paragraph.

### 4.3 What is the role of audit and auditors in such disclosures?

The LMV intends to give a new image to the external auditor, which limits the Statutory Auditor's participation in the company in the advisory regarding financial statements and the external auditors expressly established therein. The auditor may not have any relationship with the company, beyond its reviewing duty.

The LMV creates Committees with the purpose of redistributing the duties of the Board of Directors. A strictly advisory role is conferred thereto, in order to increase the efficiency and transparency of the company's management. The main duties of the supervision committees are accounting and internal controls, as well as the follow up of good corporate governance practices.

On the other hand, it is important to mention that, according to the Federal Tax Code, individuals with business activities and legal entities which obtained cumulative income of more than \$100,000,000.00 Mx.Cy., with assets with a value of more than \$79,000,000.00 Mx.Cy. established in terms of the general rules issued for such purposes by the Tax Administration Service, exceeds, or that at least three hundred of its employees have rendered services thereto in each one of the months of the preceding fiscal year, may opt to have their financial statements audited by an authorised public accountant.

### 4.4 What corporate governance information should be published on websites?

It is only necessary for SABs to publish this kind of information, this publication shall be carried out through the Mexican Stock Exchange. For the rest of the companies, it is not mandatory for Mexican corporate entities to publish any corporate governance information on websites.

All Mexican Companies, however, must record all corporate actions in the Public Registry of Commerce.

## 5 Corporate Social Responsibility

### 5.1 What, if any, is the law, regulation and practice concerning corporate social responsibility?

There is no law that obligates Mexican Companies to establish policies regarding corporate social responsibility, notwithstanding the foregoing, companies voluntarily and discretionally establish sustainability, social project participation policies, among others.

### 5.2 What, if any, is the role of employees in corporate governance?

Employees shall abide, in any case, by the corporate governance policies internally indicated by their respective management bodies.



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The firm offers services in various areas of the law including: administrative; bindings and privatisations; arbitration; civil and commercial litigation; consumer protection; corporate and contracts; intellectual property; criminal litigation; franchising; health; immigration; labour; mergers and acquisitions; real estate; environmental; social security; customs; and tax and trusts.

Our firm currently has 7 partners, and 15 associates, and a supporting staff including paralegals, translators, technical specialists and administrative staff, with offices in Mexico City, Queretaro and Los Cabos.

The specialisation and development of each practice area of the firm, the support provided among different areas, and the deep knowledge which we have of Mexico, its legal system, markets and industry, enables the firm to offer clients innovative, timely, and complete solutions to their needs at very good and competitive prices. In order to avoid problems before they develop, we take a preventive, coordinated, and strategic approach to advise our clients.

The firm and its lawyers actively participate in various public and private organisations at an international level, which keeps us attuned to what is happening in the community and the world at large. It enables us to not only understand better and be closer to our clients' needs, but also to participate in and have an influence upon the changes affecting them.

In 2013 the firm was granted with the following awards: (i) M&A International Global 2013 "Mexico Company Formations Law Firm of the Year", and (ii) 2013 Acquisition International M&A Awards "Incorporation Law Firm of the Year - Mexico".

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