803 An Introduction to Business Practices in Mexico & Latin & South America

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A. Patricia Marcucci is senior operations counsel for BellSouth Advertising & Publishing Corporation in Tucker, Georgia, where she provides legal advice on matters related to BellSouth's print and internet directories, including issues involving intellectual property, litigation, marketing, sales, IT, and environmental.

Prior to joining BAPCO, Ms. Marcucci was senior operations counsel for BellSouth International, with responsibility for legal matters in Peru, Ecuador, Panama, Guatemala, and Nicaragua. Before joining BellSouth International in 2000, she was vice president and associate international counsel for Equifax Inc. in Atlanta. In this position, she was responsible for Equifax's legal matters in Latin America, including Brazil, Argentina, Chile, Mexico, and Peru, as well as in Spain and Portugal. Prior to Equifax, she worked on international matters for law firms in Atlanta and Madrid.

Ms. Marcucci is on the ACC's International Legal Affairs Committee. She also serves on the State Bar of Georgia's international law section executive committee. She is the chair of the BellSouth legal department's diversity and inclusion committee and serves on the board of the Atlanta Legal Diversity Consortium.

Ms. Marcucci has a bachelor's degree from the University of Georgia. She also holds a law degree from Georgia State University and a master's (LL.M.) in international law from the University of the Pacific.

Adolfo Millan

Adolfo Millan is the legal counsel of Alimentos Heinz, based in Venezuela. His responsibilities include providing legal counsel to the organization not only in Venezuela but he is responsible for the whole region of Latin America and the Caribbean. He has completed some joint ventures and acquisitions in the region.

Prior to joining Alimentos Heinz, Mr. Millan served four year as in-house counsel for CORIMON in Caracas, Venezuela. While at CORIMON, he provided counsel in a variety of substantive areas, including commercial law, and other corporate issues including international business. Previously he was in-house counsel of INTERVEN, affiliate of PDVSA (Venezuelan Oil Company) as well as secretary of the board of directors. Mr. Millan was also attache for petroleum affairs at the Embassy of Venezuela in USA.

Currently he is member of the Venezuelan Bar Association, chairman of the legal directors committee of Venezuelan American Chamber of Commerce and has been a professor of commercial law in Venezuela.

Mr. Millan received a law degree from Universidad Catolica Andres Bello, in Caracas, Venezuela and a MBA with a concentration in International Business from American University, in Washington, DC.

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Francisco J. Velazquez-Osuna is a senior partner of the Mexican full-service law firm Goodrich, Riquelme y Asociados in Mexico City, Mexico.

He has extensive experience in the international corporate and business transactions and international trade areas, advising clients including large and medium-sized multinational companies. Mr. Velazquez-Osuna has been lecturer in the U.S., Canada, and Mexico on doing business in Mexico, strategic alliances, foreign investment, competition law, product liability, cross border legal issues, and North American Free Trade Agreement (NAFTA) issues and has written several articles on such areas. He taught on legal aspects of NAFTA at the Universidad Iberoamericana in Mexico City and family and estates, obligations civil procedure, economic law, and consular law at the Universidad Nacional Autónoma de México, Acatlán Campus.

He was the national chairman of the National Association of Corporate Attorneys in Mexico in Spanish (ANADE) and the coordinator of the NAFTA dispute-settlement committee of the Mexican Business Coordinating Council during NAFTA negotiations. He is currently chair of the ANADE's international law committee. Mr. Velazquez-Osuna has been board member of ANADE and is a member of the Mexican Importers and Exporters Association, the Mexican Bar Association, the Mexican law committee of the American Chamber of Commerce of Mexico, and of the ABA.

He graduated from the Universidad Nacional Autónoma de México and received a Master of Laws degree from the American University in Washington, DC.

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SECTION I

EFFECTIVE CORPORATE COMPLIACE

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I. Establishing and Maintaining a Corporate Compliance Program

A. Support of Upper Management – Setting the Tone

1. The success of a global compliance program hinges upon the full engagement and support of upper management. The elements of the compliance requirements as well as management's complete commitment to the principals and enforcement of the compliance program should be communicated from the top echelons of the corporate office and cascade down through the various levels of the organization worldwide.

2. It is particularly important for multinational organizations to involve the general managers of all local operations in the communication and enforcement process to make them part of program and get their buy-in. Commitment by local management to the global compliance program is essential to ensure that the corporate culture at the local level mirrors that of the home office. This is particularly important in cultures which tend to adhere to a top-down management model.

B. Establishing and Globalizing the Code of Conduct

1. The company should have a written code of conduct setting forth the legal and ethical guidelines which employees are required to follow.

2. Worldwide application The Code of Conduct should be drafted and presented in a manner that makes it clear that it is not just a U.S. compliance code being imposed on local employees but rather a blueprint for ethical behavior that has relevance for employees on a global basis. The document should emphasize concepts rather than references to U.S. law when possible. For example, rather than reference to specific laws, the code can refer to fair treatment of employees, a harassment-free workplace, fair competition, etc. The exceptions would be those U.S. laws which have worldwide applicability to subsidiaries of U.S. companies such as export compliance laws and the FCPA.

3. Language Although many multinational employees speak English and may receive communications from the home office in English, given the importance of the subject matter the Code of Conduct should be translated into the language in which business is conducted in each of the organization's offices. This will improve understanding and avoid misinterpretation, especially with regard to the finer nuances of the requirements.

4. Vetting by Local Counsel – To ensure that the Code of Conduct is in compliance with local law and enforceable, it should be reviewed by local counsel. In addition to identifying potential conflicts, they can advise as to local requirements such as filings, notices or approvals with local ministries. They can also advise as to whether the certification process is in line with local privacy laws.

5. Labor issues – The Code of Conduct should be an official company document of the legal entity to ensure the legal application of its contents to local employees which should be distributed by the local Human Resources Department. Furthermore, note that in some jurisdictions, labor laws require that any sanctions that may be taken be specifically set forth in the Code of Conduct that is provided to employees; in other jurisdictions, general language regarding disciplinary actions up to termination is sufficient.

6. Local Partners – In those instances in which local operations are conducted in conjunction with a local partner, joint venture or agency, getting the partner or agent's buy-in to the compliance program at the outset of the relationship is essential. This is true for a couple of reasons. First, where the local operations is highly dependent on the agent or partner, the commitment from said partner or agent to the requirements of the Code of Conduct will be important to set the tone of compliance within the local organization. Second, and most significant, misfeasance by the partner or agent can create liability for the company, particularly in areas such as the anti-bribery provisions of the FCPA and similar. More will be said on the vetting process for such agents and partners in Section IV below regarding evaluating partners and agents.

C. Establish a Robust Reporting System

1. It is necessary to establish procedures for the receipt, retention and treatment of complaints.

2. The reporting mechanisms should be confidential with the option of anonymity.

   a. There may be some push back from those outside the U.S. on the issue of anonymity; however, anonymous reporting is permitted in most jurisdictions and should be included as an element of the program, tailoring to local laws where necessary.

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b. Employees should be made aware that the confidential nature of the reporting will be subject to certain exceptions:

   i. When revelation is required relative to an investigation or government proceeding
   ii. When necessary to defend the legal interests of the company
   iii. When necessary to achieve the ultimate goal of ethics set forth in the governing Code of Conduct

3. It is essential that there is commitment to the concept that there will be no reprisal against the reporting employee as a result of a complaint or report made in good faith. This must be clearly communicated to all employees and management must be vigilant in ensuring that such reprisals do not occur.

4. Complaint channels - Hotlines or email considerations

   a. International access – Collect call system or toll free 800 numbers from other countries to ensure access with no or minimal cost to the employee to make anonymous contact
   b. Internal or outside third party to receive complaints
   c. Language issues

5. Document procedures, review and adjust periodically and present to Audit Committee for approval

D. Effective Communication and Training

1. Communication

   a. The program should be communicated on a worldwide basis with attention to communicating in the local language to ensure in-depth understanding.

   b. The communication should come from both upper management in the home office as well as local management to demonstrate management commitment at all levels.

   c. Forms of communication include e-mails, intranet postings, posters, town hall meetings and contests, as well as ongoing dialogue on both informal and formal basis as a means of reinforcement.

2. Training

   a. Training can be in the form of live training or on-line training, each of which has its advantages and disadvantages.

      i. Live training

         1) Advantages
            a) Possibility of interaction
            b) Clarification of questions
            c) Demonstrates strong level of commitment by the organization

         2) Disadvantages
            a) Travel required can be expensive and time consuming
            b) Susceptible to delivery of inconsistent message unless training package is uniform

      ii. On-line training

         1) Advantages
            a) Modules can be prepared specifically for your company.
            b) Training may be interactive
            c) Uniform messages and themes
            d) Can automatically track employee participation and measure comprehension
            e) Can be implemented in various languages

         2) Disadvantages
            a) Is less personal
            b) Does not allow for interaction and questions that Live training can provide

      iii. The most comprehensive training program includes both live and on-line training to ensure comprehensive application and in-depth coverage.

   b. Other elements of effective training programs include:

      i. Provide focused training to certain key functional areas including Finance, Internal Audit, Regulatory and Procurement
      ii. Use job specific guidance and hypotheticals
      iii. Provide refresher (supplemental) web-based training to drive comprehension and compliance
      iv. Promote regular interaction with and training of Legal Departments to ensure vigilant and uniform management of client matters
      v. Consider external training for third parties: partners, consultants, vendors
      vi. Periodically issue additional tools for augmentation of internal and external awareness

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II. Monitoring - Compliance Review

A. The company should establish procedures for the periodic review of its compliance program.

1. Review by the Compliance Department

   a. Set up local compliance committees -- generally include legal, human resources and compliance representatives
   b. Report to compliance director and home office
   c. Define which matters will need to be handled by home office
   d. Establish process for review by compliance department in company documents or directives provided to local management

B. Audit Committee

1. Establish reporting process

2. Establish internal audit processes and procedures for follow-up to ensure corrective action is taken to address all audit findings and avoid repeat findings worldwide

3. Increase emphasis on internal audit findings and corrective action procedures

   a. Include in senior management annual reviews/bonus/push down throughout organization
   b. Address at senior leadership conferences
   c. Provide monthly reporting of internal audit results to senior leadership
   d. Track findings and corrective actions for review by home office
   e. Consider adding home office resource dedicated to this function

C. Internal Investigations

1. Who conducts investigations outside U.S.

   a. Local counsel vs. U.S. counsel
   b. Inside counsel vs. outside counsel
   c. Corporate Security Department

2. Maintaining Attorney-Client Privilege

III. Anti-bribery and Other Anti-Corruption Statutes and Global Conventions

A. U.S. Foreign Corrupt Practices Act (FCPA)

1. Anti-bribery – It is prohibited to directly or indirectly offer or give anything of value to a foreign government official in exchange for assistance with business or to obtain an advantage.

   a. This includes payments made by third party intermediaries, including joint venture partners and agents.

2. Books and records – The company's books must fairly and accurately reflect the transactions of the company. Accordingly, an accounting issue/irregularity may also expose the company to FCPA violations which also carry severe penalties including imprisonment.

B. Organization for Economic Cooperation and Development's (OECD) Bribery Convention

1. Obligates parties to criminalize the bribery of foreign public officials in the course of international business
2. Requires parties to apply criminal penalties to those who participate in bribery
3. Requires parties to establish liability via civil sanctions or other means to "legal persons" such as corporations and partnerships
4. Requires parties to establish accounting regulations to further the goals of the convention, such as the prohibition of off-the-books accounts
5. Requires parties to provide legal assistance and extradition

C. Organization of American States (OAS) Inter-American Convention Against Corruption

1. Adopted March 29, 1996 – Presently all members of OAS have ratified or acceded to the Convention.
2. Obligates parties to criminalize "acts of corruption", including the bribery of government officials of party countries
3. Requires parties to prohibit transnational bribery of foreign officials
4. Requires parties to take steps to establish illicit enrichment as an offence, defining same as the 'significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions"
5. Requires parties to consider establishing as an offence

   a. the improper use of classified or confidential information obtained as a result of office
   b. improper use of government property or diversion of such property to and independent agency or individual
   c. seeking to obtain a decision from a public official to illicitly obtain gain or benefit

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6. Requires parties to provide extradition and other assistance in connection with offenses contemplated by the Convention
7. Requires parties to provide assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses
8. Requires parties to consider establishing various preventive measures to further the goals of the convention, including:

    a. Standards of conduct and reporting and enforcement mechanisms
    b. Education of public officials in ethical obligations
    c. Systems for registering the income of public officials
    d. Laws denying favorable tax treatment for expenditures made in violation of anticorruption laws
    e. Accounting regulations to further goals of the convention

IV. Evaluating Joint Venture Partners and Agents

Due to potential liability for payments made by partners, consultants, agents or other third parties in a position to act on behalf of the company, these relationships require particular scrutiny. It is recommended that companies establish a policy which prohibits entering into relationships with such parties without meaningful inquiry into their background and reputation. This inquiry should determine (a) that the third party is not a "foreign official" or a company in which a foreign official has a significant interest; and (b) that the third party is not likely to engage in improper practices.

Any issues raised by the investigation should be resolved to the company's satisfaction before entering into the relationship. There is a basic three-step process for entering into relationships with third parties: (a) due diligence review and approval; (b) execution of a written agreement; and (c) documentation of the process.

A. Due Diligence: Know Thy Partners and Business Associates

1. Questionnaire and Data Sheet -- In order to complete the due diligence process, the company should develop a due diligence questionnaire and data sheet. This can either be completed by the third party or by the person or department within the company promoting the establishment of the relationship. In either case, the company should use a reliable means to assess the validity of the information collected through this process. In some cases a background investigation may be conducted by an outside investigative firm, if necessary and appropriate. The company should prepare the report and recommendation and determine who will make the final decision regarding how to proceed. The Legal Department must be a part of this process. The following considerations should be taken into account:

    a. The forms used in the process should be designed so that they can be completed quickly with as little administrative burden as possible without compromising the reliability of the process.
    b. The forms and supporting documentation should be forwarded to the Legal Department for vetting as to legal issues.
    c. Permissibility regarding background checks and requirements of consents or notices under local law should be verified.

2. Pertinent Information

    a. Relationships with current or former government officials, including those in:
        i. the legislative body
        ii. government ministry or agency
        iii. government-owned or controlled enterprise
        political party

    b. Legal Proceedings, including:
        i. Any judgments, claims or lawsuits pending
        ii. Whether the individual/company has been a party to any lawsuits or liens, criminal or civil
        iii. Criminal convictions

    c. Business ownerships or financial interests

    d. Reputation in the business community

    e. Personal and professional references which have no familial relationship to the party under consideration

    f. Rate of compensation contemplated
    independent verification should be made that compensation is reasonable given the industry and location

3. Red Flags – In evaluating information gathered during the due diligence process, particular attention should be given to the following points which could be indicators of a prospective agent or partner's likelihood to participate in prohibited activity.

    a. Refusal to provide a certification of willingness to comply with company's code of conduct, FCPA, etc.
    b. Recommendation of partner or agent by an official of the potential governmental customer
    c. Unusual payment patterns or financial arrangements
    d. Unusually high commissions
    e. Lack of transparency in accounting records, expenses, etc.
    f. Seeming lack of qualification or resources relative to the services offered
    g. History of corruption in the country

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4. Report

a. The due diligence process should include the designation of a person or department to verify all information in the Questionnaire and Data Sheet and perform all reference checks. This person/department should also document the basis for compensation and economic terms and verify that they are reasonable and commensurate with the work and value provided by the third party.

b. The report should include:

i. A brief description of the proposed relationship
ii. Selection process used
iii. Ownership, relationship and reputation of party under consideration
iv. Geographic location or limits

c. Approvals -- All such relationships should require the review and approval of the Legal, Tax, Finance Departments as well as Management. The precise levels of approval required will vary depending on the size of the organization; however, care should be taken that approval levels are at a sufficiently high level to afford an unbiased view toward protecting the overall interests of the company as opposed to furthering the business interests of a particular regional operation.

B. Written Agreements

All third-party relationships should be reduced to a written agreement prepared by the Legal Department that includes the appropriate language required by and in compliance with the company's Code of Conduct, the FCPA and other pertinent laws.

C. Documentation of the Process

The process undertaken by the company in the undertaking due diligence should be documented and, if possible, the information along with the attendant written agreement entered into a database.

APPENDIX A

DUE DILIGENCE CHECK LIST

- Type of business relationship under consideration
  - i.e. – agency, sales representative, distributor, consultant, joint venture partner
- Company entity which will enter into agreement
- Name and address of party under consideration
- Legal structure of party under consideration
- Services and/or products to be covered in agreement
- List of countries or geographical are to be covered by agreement
- Whether or not relationship will be exclusive, with description of coverage of exclusivity by geographic location and product/service if applicable
- Proposed duration as well as early termination provisions contemplated
- All owners of party under consideration
- Names and titles of key personnel
- Statement as to whether owners or key personnel
  - are officials or have familial connection to officials of the government, government-controlled entities or political parties of the contemplated country or countries
  - have business associations or have family members who have business associations with officials of the government, government-controlled entities or political parties of the contemplated country or countries
- Number of employees of party under consideration
- Number of offices of party under consideration and their addresses
- Description of services to be performed by party under consideration
  - i.e – sales/stocking/installation/repair of products; preparation of bids/proposals; liaison with government or customers; etc.
- List market sectors in which party under consideration solicits business
- General reputation of party under consideration is business community, with substantiation of conclusions – identify sources
- Companies which the party under consideration currently represents or has represented in recent years
- Length of time the party under consideration has been in the particular business contemplated
- Whether representation will be for indefinite period or in connection with a specific transaction
- Commission or other compensation contemplated and whether such is commensurate with other compensation paid in the geographic area – include substantiation
- Whether commission will be paid in local currency and within the country in question and if not, circumstances of proposed payment
- Reasons for choosing party under consideration
- Verification of registration with appropriate government agencies, if applicable
- Whether Company has had dealings with the party under consideration in the past and if so, under what circumstances

Relative to the laws of the country or countries in which the business will be conducted:

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- Whether any requirements, restriction or prohibitions exist relative to the contemplated form of business relationship, exclusivity arrangements, levels of commissions, etc.
- Registrations required
- Requirements of disclosures or inclusion of certain contractual terms with respect to the proposed form of business relationship
- Nationality, residence or ownership requirements relative to the proposed form of business relationship
- Requirement that under proposed business relationship, party deal directly with foreign contractors or manufacturers without intermediary brokers or suppliers
- Restrictions on Company's right to terminate agreement or special compensation requirements related to termination or non-renewal
- Restrictions on contractual provision relative to arbitration and governing law
- Restriction as to the form of compensation into or out of the country, including currency control issues

SECTION II

CONTRACTUAL PITFALLS IN LATIN AMERICA NEGOTIATIONS

Veronica Pastor, Assistant General Counsel, Intelsat

The majority of the difficulties encountered in international negotiations between US-trained and Latin America-trained lawyers harkens back to a very simple fact: while US legal training and legal documents hail from the common law tradition of English law, Latin American training and legal documents go back to an ancient, very codified system of law known as "*civil law*". A country's civil law (as opposed to Criminal Law and Administrative Law) is embodied in its civil code, which is a comprehensive body of statutory (not judicial) law that regulates all relations between private parties, be it individuals or companies. Each type of civil relationship is regulated in a separate chapter, thus there are chapters on family law, real estate, property, administrative law, and, of special interest to us, a chapter on commercial relations know sometimes as the "commercial code" or "mercantile code" (*código comercial o código mercantil*). Naturally, there are also separate codes for criminal law and administrative law.
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The civil law system traces its roots all the way back to the twelve tables of Roman law in the year 450 B.C. and it comes to us via various later codifications, perhaps the most important of which are the Bavarian Code of 1756 and the Napoleonic Code of 1804. "Common law" versus "Civil law" is not mere semantics, rather, it betrays a whole underlying philosophy about various issues that surround contracts such as how much weight to accord the will of the parties (versus the role of the State or government in dictating their terms in the interest of uniformity), what is the appropriate content of a legal document, who are the persons who may bind a company and how, and last but by no means least, the role of lawyers in conceiving, drafting, and ultimately enforcing contracts.

Back, for a minute, to the twelve tables and where they came from. The twelve tables are widely credited for the introduction of secular society, hence the term "civil" law. Before them, there was a law based on custom, administered by high priests of "pontiffs", to which commoners (or "plebeians") had no access. The twelve tables were thus the first attempt to codify existing law in a form that was accessible to all – patricians and plebeians alike, because it was, for the first time, a public document that anybody could read. So the introduction of the twelve tables was nothing short of a social revolution in its time.

Fast forward to the French Revolution and the Napoleonic Code. Before the Revolution, France did not have a unified code of laws. Rather, local laws based on custom, interpretation of royal decrees and special privileges for the nobility and the church were administered by magistrates in *Parlements*, and these magistrates saw their role as quasi-legislative (that's where the word "parliament" comes from). In fact, the magistrates often ruled in ways that defended and enhanced the privileges of their own class – the nobility. As a result of that bias, the Revolution took a negative view of judges making law. At the behest of Napoleon, a new code of laws was developed, to embody the revolutionary ideals of one law for all citizens (no privileges or exemptions based on birth), applicable throughout the nation (no local laws), no secret laws or *ex post facto laws* … and no legislative powers for judges, or *stare decisis*. The post-revolutionary

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era was deeply distrustful of judges as quasi-legislators and limited their powers to narrowly deciding a case based on the very specific facts before them, with the judgment being applicable only to the parties who sought it. By way of example, the Mexican Supreme Court struck down a special tax on cars. The case was brought by a private party, and the tax was duly refunded to him. Rather than the tax inapplicable to everybody and issuing refunds, however, this ruling simply means that each citizen who wants to recover the tax may do so by filing a special type of lawsuit known as a *recurso de amparo*.

Napoleonic France was an exceptionally expansive nation. With conquest by Napoleonic forces came imposition of the Napoleonic Code in countries as varied as Italy, the Netherlands, Belgium, Portugal, and Spain, from where it migrated to their various colonies. This two-step colonial expansion is why contractual relations in practically all of Latin America are governed by variations of the Napoleonic Code, each know as the "Civil Code" (*código Civil*) in its own country.

Let's talk now about some of the major stumbling blocks that I have encountered in negotiations with my Latin American counterparts. Each has been a valuable lesson, because I have found that what unites the two legal systems is by far greater than what sets them apart, but that there are important traps for the unwary that can slow down or at worst completely derail negotiations.

Choice of Law Issues

The issue of choice of law arises in every international negotiation. Often our counterparts object to the use of New York or other US-based law (and courts) on the basis that it confers an unfair advantage to the US party. The perceived advantage is two-fold: that we are operating under a legal system that is familiar to the US party, but not to the foreign party, so that the foreign party may be agreeing to conditions they are not aware of because of their lack of deep knowledge of our body of law, and that a US court will be more favorable to a US party than to a foreign one. I will address jurisdiction separately.

This dilemma is in fact wider than it would appear at first, because it exposes one of the fundamental philosophical differences between civil law and common law jurisdictions. Under US (and English) law the contract as agreed is the law between the parties, and its provisions will generally be enforced by a judge accordingly unless they run counter to the public interest. Thus certain clauses, such as limitations on damages for death or personal injury due to the negligence or willful misconduct of a party, or non-compete clauses in employment agreement of too wide a scope and duration are non-enforceable as against public policy. Beyond the bare dictates of public policy, the parties have full contractual freedom to arrange their affairs and decide on the proper allocation of risk as between them, and on any caps on liability. Not so in civil law jurisdictions. By and large, the contents of contracts are codified in the commercial code, and any variation from its dictates runs the risk of being struck down as unenforceable. As an extension of that, be mindful that certain terms that you would normally see in a US contract may be absent in a foreign contract. That may be because the term in question is already regulated by an article of the commercial code. It is not wise to assume that terms and conditions that do not appear in the contract are not in fact an enforceable part of it, or that elements that appear in the document will be enforced by a judge.

A More Formalistic Approach

At the outset, do not be surprised if your counterparts appear attached to formalities and require notarized evidence of the powers of the person who will sign the document. It is standard for Latin American parties to require and provide very formal documents showing that the signatory of a contract is in fact duly empowered to bind the company. In most civil law jurisdictions, the mere fact of being a member of the board of directors of a company, or a vice president with "apparent authority" to bind the company will not be sufficient to in fact make the contract valid. The person who may bind a company is know as its "legal representative" (*representante legal*), and may or may not be a member of the board of directors, or even a senior employee. Only contracts signed by this individual are binding obligations of the company. His or her powers will be evidenced by an appointment made before a notary. Unlike in a common law contract, a representation and warranty that the signatory has the appropriate powers will not suffice. Neither will an opinion of counsel carry any legal weight. Only statements by government officials, notaries or the legal representative of a company are considered valid and trustworthy.

Limitations On Liability And The Issue Of Indirect Damages

Common law contracts often contain limitations on liability, whereby one or both parties agree that the amount they will be entitled to collect from the other as damages in case of breach is capped at a certain level. US and other common law courts will, in most cases, enforce those provisions without hesitation, and the burden of proving that they should be struck down as against public policy rests heavily – almost unsurmountably – on the party seeking to strike down the provision. This is not the case in civil law jurisdictions such as Mexico, Argentina and Colombia, where such limitations on liability are *per se* unenforceable and will be struck down by any judge.

Another puzzling issue related to limitation on liability is that of indirect or consequential damages. The common law is (fairly) clear on the issue. Consequential damages are those that arise from the intervention or existence of special circumstances not known to the parties and that are not ordinarily predictable, and they are not generally recoverable in an action for breach. However, since the issue of what damages were reasonably foreseeable by the parties at the time the contract was made can be somewhat fuzzy and open to interpretation, US contracts often include lengthy exclusions on consequential or indirect damages that specify exactly what sorts of damages the parties had in mind to exclude. Common law courts generally hold those exclusions as enforceable. Civil law on the other hand, does not differentiate between direct and consequential damages. Both are encompassed by the notion of "*daños y perjuicios*". These damages are defined as the diminution in the value of the property, benefits of a moral or physical person. They are comprised of three elements, each of which is theoretically recoverable: emergent damage (*daño emergente*), or the amount that the non-breaching party expended in reliance of the contract, lost profits (*lucro cesante*), and moral damage (*daño moral*) or emotional injury such as damage to one's feelings, honor or image. Whether or not any specific element of *daños y perjuicios* will be awarded in an action for breach will be up to the judge, but any attempt by the parties to limit the scope of damages recoverable will be struck as unenforceable.

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Fortunately, there is a related area where the two legal systems converge enough to make a solution possible: both generally recognize the enforceability of liquidated damages provisions, provided they are drafted correctly.

Liquidated Damages

One obvious solution to the problem of enforceability of limitations of liability and indirect damages is the introduction into a contract of a liquidated damages clause. In the US, liquidated damages clauses are gaining popularity, especially in large construction contracts. Liquidated damages are an attempt by the parties to negotiate amongst themselves the remedies available to them in advance of a breach. US courts will enforce the will of the parties when not against public policy. Thus, liquidated damages clauses will generally be enforced as long as they are not against public policy, i.e., they are meant to compensate the non-breaching party for loss, and not as a penalty or punishment, the threat of which is designed to prevent breach. In common law, a liquidated damages clause will stand as long as the damages it seeks to represent are not readily ascertainable at the time the contract is made and not easily susceptible of proof, and as long as they are reasonably related to what the parties anticipated would be the result of the breach and are not so high as to be punitive in intent or effect.

A liquidated damages clause is known as a "*pena convencional*", and it also sometimes enforceable in civil law jurisdictions, but enforcement can include a few twists. It is not possible to recover for both general damages and liquidated damages, of course. To attempt to do so would be to try to recover twice for the same debt, and it would amount to fraud, which is a criminal offense. So this presents the practitioner with another dilemma that I will address in the next section, as he or she must choose a procedural course of action.

The Issue of Procedure

In a common law context, where the facts are generally uncontroverted, the non-defaulting party can ask that the case be heard on an expedited track know in the United States as summary judgment. When one keeps in mind that it can take anywhere from 18 to 20 months for a case to be heard in most Latin American jurisdictions, summary judgment is a particularly attractive concept. Unfortunately, however, most jurisdictions do not have an equivalent to our summary judgment procedure for general commercial disputes. So, even in cases where the facts are not in question and all that is due is a payment obligation, it can take up to 2 years before the case will be heard, much less decided. In order to avoid this very serious problem, it is sometimes suggested that the parties prepare and execute a first-demand IOU or letter of credit. In Mexico, for example, there is a summary procedure to enforce an IOU. The risk of course, is that the other party will run to court with the IOU claiming a breach where none has occurred, or before the issue is quite ripe, because the parties could still work out a more amicable solution. Thus, at the outset, one must balance the risk of delayed justice against the potential risk of being at the virtual mercy of your contractual partner who is holding an immediately enforceable IOU.

It is also very important to keep in mind the issue of judicial objectivity. While we take for granted the fact that cases are assigned to judges on a random basis, and that judges who are close to one of the parties must and will recuse themselves, this is not necessarily the case in other jurisdictions. The system for allocating cases to judges can vary even within a country. In Mexico, for example, some local jurisdictions still permit judges to pick which cases they will hear.

What's "Commercially Reasonable" About Your "Best Efforts"?

No concept of common law is more puzzling to a civil law trained lawyer than our "reasonable efforts", "commercially reasonable efforts" and "best efforts". Civil law does not recognize any of these concepts, and I have spent many hours explaining to incredulous counterparts that each has a well-defined meaning and represents a clear obligation in our legal system. For example, civil lawyers may have difficulty with a clause stating that a cable company shall use "reasonable efforts" to restore service within 24 hours of a service failure. This clause is interpreted as a commitment to a mere attempt at restoring the service, not, as is understood in common law jurisdictions, to oblige a party to act as a diligent cable provider who desires to restore the service within that time frame would under the circumstances – but not to expend an unreasonable amount of resources in doing so. This obligation is also difficult to distinguish, even for a common law practitioner, from "commercially reasonable efforts", which are sometimes defined as the efforts somebody with his or her own commercial gain in mind would expend under the circumstances. And even the idea of "best efforts", which carriers with it the obligation to spend money and resources without regard to whether doing so will result in commercial or other gain to the point of "leaving no stone unturned" is perceived as less clear and stringent than a definite "shall restore".

Civil law contains a distinction that at first blush would seem to bridge this gap: it distinguishes between "obligations of result" (*obligaciones de resultado*), and "obligations of means" (*obligaciones de medios*). Unfortunately for all of us, these two categories do not correspond to "reasonable efforts" vs. "best efforts." A party that is under an "obligation of result" is in breach of contract is the result is not in fact achieved. In other words, this goes well beyond even a "best efforts" obligation and turns the obligor into a guarantor of the result. An obligation of means obliges the promissor to engage his efforts as humanly possible given the circumstances. Thus, it is quite close to our "best efforts". There is simply nothing in civil law that corresponds to our "reasonable efforts" and "commercially reasonable efforts".

Even after the differences are explained and the point somewhat driven home, civil lawyers are often still uncomfortable with the fact that in our system so much of those definitions are ultimately up to a judge, and that the real definitions of these concepts reside in judicial opinions that can be overturned with scant notice.

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SECTION III

DISTRIBUTION AGREEMENTS

Adolfo Millan, Legal Counsel, Alimentos Heinz C.A.

We may start by defining Distributor Agreement as those "by means of which the manufacturer undertakes to sell, on a continuous basis, products it manufactures to the distributor, which, on its turn, undertakes to purchase, with special advantages, such products for further resale in a determined area."

This kind of agreement is not regulated in all countries in Latin America and the Caribbean (hereinafter referred to as “the region”) and we do not pretend to analyze the legislation of each country in the region but to comment on some of them and give you some recommendations based on our experience. You will realize that there are countries whose legislation offers protection to the local distributor while on the other end, there are countries which simply do not consider this kind of agreement in their legislation; therefore, the relationship between producer and distributor will depend entirely on the will of the parties.

BRAZIL

To understand the treatment of the distribution agreement in Brazil it is imperative to know the difference between sales representation vis-à-vis distributions. In Brazil, the legal framework as regards sales representation agreements is laid out by Law No. 4,886, enacted on 12/09/65, which has been altered by Law No. 8,420, dated 05/08/92. Sales representation agreements are, in view of the aforementioned laws, "typical agreements". Thus, the legal framework concerning this type of agreement is expressly established by law, there being legal requirements to be observed and complied with by the parties involved in the agreement.

The sales representation is based on the relation between the sales representative and the principal, in which the sales representatives do not acquire products in their own name, but merely act as mediators in the sale of products, against a commission for the products sold which were acquired from, and paid to, the principal. The sales representative is entitled to a commission calculated based on the total value of the goods sold, which shall be paid by the principal following the effective payment of the goods sold. A delay on said payment may imply the monetary readjustment of the amounts due. In order to secure the payment, the sales representative may issue bills relating to outstanding debts deriving from commissions, which may be judicially enforced against the principal.

According to the Brazilian case law, unless otherwise provided for in the agreement, the sales representative is entitled to exclusivity rights. Therefore, prior to entering into a sales representative agreement, the parties should negotiate the exclusion of exclusivity rights altogether or, to the possible extent, limit the sales representative rights so as to safeguard the principal’s control over current and future distribution activities.

The determination of the indemnity, due as a result of termination of a sales representative agreement, depends on whether said termination occurred with or without just cause. Thus, in spite of the fact that the agreement was entered into for a definite or indefinite term, termination is possible at any time by the principal, as long as there is a cause to justify it. In such cases, no indemnity whatsoever shall be due.

The applicable law lists the "due causes" the principal may claim to effect early termination:

- negligence on the sales representative's part as regards the performance of activities which result from the contractual provisions;
- performance of acts which harm the principal’s commercial reputation;
- non-compliance with any of the contractual obligations inherent to sales representation agreement;
- final ruling on infamous crime performed by the sales representative, and
- "force majeure".

The "due causes" sales representatives may avail of with a view to terminating the agreement are equally laid out by the law:

- reduction or restriction of the area in which the sales representative is to perform its activities;
- direct or indirect breach of exclusivity, in case of agreements providing for exclusive sales representation relations;
- determination of abusive prices in relation to the area in which the sales representative operates, with a view to hampering its performance;
- non-payment of compensation on due dates;
- "force majeure".

If, on the other hand, termination takes place regardless of a due cause, the law provides that the sales representative shall be entitled to an indemnity which may not be less than 1/12 of the total compensation received while the agreement was in full force.

With respect to termination of a sales representative agreement entered into for an indefinite term, in force for over six (6) months, and regardless of the indemnity referred to above (due whenever a party terminates an agreement without due cause), either party shall be entitled to a 30-day prior written notice. Should said notice not be given, the aggrieved party shall be entitled to an additional indemnity, corresponding to 1/3 of the commissions received by the sales representative during the three (3) months prior to termination.

If the agreement is terminated on the first six (6) months of its execution, no advance notice is required and, consequently, indemnity amounts are not to be considered.

On the other hand, there is no specific legislation regulating distribution agreements.

The general aspects which should be provided for in the agreement include:

- the definition of the area in which the distributor is to operate;
- the monthly amount to be purchased;
- the specifications of the products to be distributed.

As a rule, distribution agreements may be terminated upon the occurrence of the following events:

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- mutual consent;
- "force majeure";
- end of the term;
- breach of contractual obligations.

Please note, however, that no indemnity shall be due, in principle, by virtue of the termination of a distribution agreement, unless otherwise provided for in the agreement, or in the event the distributor evidences in court that damages arose from the unmotivated termination of the agreement by the manufacturer. Should the distributor evidence that major investments were effected with a view to distributing the manufacturer's products, indemnification on the part of the manufacturer may also apply.

Pursuant to Brazilian law, the main difference between sales representation and distribution agreements is with regard to the title to the products, which, in case of distribution, is transferred to the distributor, who then resells the products to third parties. The sales representative, on the other hand, promotes the sale of the products to third parties, who purchase the products directly from the principal, being the sales representative entitled to commissions.

The sales representation agreement is regulated by a specific law, which expressly lists the elements which should be included in it, whereas distribution agreements are construed under the parameters of Brazilian Commercial and Civil Law.

The right to the commission due to the sale representative is established by law. On the other hand, the distributor undertakes to purchase the products furnished by the manufacturer under special terms, but shall not be entitled to any commission.

Unless otherwise provided for in the sales representation agreement, the sales representative is entitled to the exclusivity rights, which are not granted to the distributor.

The obligations and liabilities of the sales representatives and distributors are quite different. The sales representative acts as a mediator while the distributor simply resells the product directly to the consumers.

The termination of the sales representation agreement on the principal's part is always possible. Nevertheless, when the termination is not based on a due cause, the law sets forth a minimum termination indemnity of one-twelfth (1/12) of all commissions paid or owed through the termination of the agreement to be paid to the sales representative.

DISTRIBUTION AGREEMENT	AGENCY AGREEMENT
Agreement governed by the general civil laws ruling on all agreements in Brazil	Agreement governed by Law no. 4,886/65, as amended by Law no. 8.420/92
Distributor acquires the goods from the manufacturer and resells it with profit	The agent acts as an intermediary in the sale, which is made directly from manufacturer to the client. agent receives a commission.
The sale from manufacturer to distributor is subject to a 3.65% PIS/Cofins tax (other taxes are also assessable, but may be credited); the sale from distributor to client is again subject to a 3.65% PIS/Cofins tax.	The sale from manufacturer to client is subject to a 3.65% PIS/Cofins tax. The commission paid to the agent does not generate any tax to be paid by the principal
The agreement may be for a determinate period and subject to unlimited renewals for limited periods or one renewal for an indeterminate period.	The agreement may be for a determinate period, but once renewed will be for an indeterminate period by force of law.
The causes for termination will be in the agreement as agreed by the parties	The causes for termination are the ones provided for in the law.
In case of termination by either party for no cause, the other party may file a claim for losses and damages actually incurred and duly proven.	In case of termination for no cause by the principal, indemnification is always due. If the agreement is for a determinate term: the average of the commissions received by the agent up to the date of termination multiplied by half of the remaining months of the agreement. If the agreement if for an indeterminate term: at least (the agreement may provide for a higher amount) 1/12 of all the commissions received by the agent during all the term of the agreement.
Termination notice is required as provided in the agreement.	A 30-day previous notice is mandatory.
The parties may agree on the court that will have jurisdiction to hear the case.	The court of the city where the agent is headquartered is the one having jurisdiction to hear the any claim related to the agreement.
Manufacturer may not impose sales conditions for the goods such as price and payment terms.	Principal may freely establish sales conditions for the goods such price and payment terms. Non compliance of the terms is considered a breach by the agent.
Agreement terms may be freely established by the parties.	Various contractual terms (such as date of the payment of the commission, indemnification terms, etc.) have to follow legal rules.

VENEZUELA

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In Venezuela there is not a particular legislation for distribution agreements, likewise in other countries of the region like Peru and Argentina. However, the distribution agreements are subject to the Competition Law; in Mexico the treatment is very similar.

In Venezuela the Competition Law does not allow the agreements that share the markets, territories, supply sectors or sources of supply among competitors. The distribution agreements would be affected by this law, but the Superintendence for the Promotion and Protection of Free Competition, considering that distribution agreement on an exclusive basis usually generates economic efficiency, are advantageous for the consumers and help improve production, commercialization and distribution of goods, made an exception through a resolution and allowed the exclusive distribution agreement. An exclusive distribution agreement is defined as those "by means of which a producer undertakes to supply or sell to the distributor on an exclusive basis determined products to be resold in a determined territory". The distributor has the right to demand from the producer that does not supply or sell the products that are subject to the contract, directly to the customers in the assigned territory. There is not any provision about termination; therefore it must be resolved based on the terms and conditions of any oral or written agreement between the parties.

COLOMBIA

Under Colombia Law there is a difference between Commercial Agent and Distributor. According to article 1317 of the Commercial Code, an agency agreement is one under which a merchant commits, in a fixed and independent manner, to promote and carry on business in a specific field of commerce and within a previously designated geographical area, as the agent or representative of a domestic or foreign principal, or as manufacturer or distributor of one or more of the principal's products. Commercial Agency is regulated by articles 1317-1331 of the Commercial Code and the aspects of agency relationship not regulated by said articles are regulated by articles 1262-1286.

Unless otherwise agreed the principal may not appoint other agents in the same areas or for the same activities.

On the other hand, when a principal delivers products to another party, at a certain price and that party undertakes the sale of the products at its own risk, its compensation being the difference between the price paid for the products and the price at which they are sold, a supply agreement is considered to exist, but it does not have the implications and consequences of an agency agreement. Consequently there can be an obligation to promote the products but there will not be any obligation on the part of the principal to pay compensation (as there would be in an agency agreement) at the termination of the supply agreement. Nevertheless, if the supply agreement is terminated without just cause by either of the parties, the other party can claim indemnification for any damages which may have been caused.

The Supreme Court has declared that the supply of products to be resold is not an agency agreement. It has pointed out that *"…the purchase of products made by a merchant from a principal which supplies the product and then the merchant distributes and resale such products, even though that activity is continuous and permanent, and it gets help of ordinary publicity, it is not by itself an agency agreement."*

If the principal terminates the agency agreement, the agent has the right to claim compensation from the principal for each year that the agreement has been in effect in an amount equal to one-twelfth (1/12) of the average commission or remuneration for each of the past three years, or the yearly average of everything received, if the agreement is for a shorter period than three years. The agent has the right to this compensation no matter what the reason for the termination of the agreement.

If the principal terminates the agency relationship without just cause, the agent may also claim indemnification for his success in building up the business for the principal. The amount of such compensation will be determined by experts appointed by the courts, taking into account the volume and importance of the business and the length for which the representation has been in effect. The same rule will apply when the agent terminates the agreement for just cause due to non-compliance by the principal of its obligations. However, if the agreement is terminated by the principal for just cause, the agent will have no right to this indemnification. The agent has the right to retain those goods that are in his possession until payment has been made by the principal of the indemnification described above and up to the amount of the indemnification.

PANAMA

The relationship between a foreign or local manufacturer or provider of goods and services and a local or foreign agent or distributor doing business in Panama, is private and governed exclusively by the terms of any oral or written agreement, if any, between them. There is no enforceable law or provision that currently regulates the relationship between foreign or local manufacturers with foreign or local distributors or agents that operate in Panama.

Cabinet Decree N° 344 of October 31, 1969 regulated for over 20 years the representation, agency and/or distribution of products and services of foreign and local manufacturers in the Republic of Panama. The purpose of Cabinet Decree N° 344 was to protect the local agent, representative or distributor from foreign manufacturers. Such legislation also contemplated a compensation table, favorable to the local company, applicable in cases of unjustified termination, annulment, modification or reluctance on the manufacturer's part to renew the contract.

On August 2, 1989, the Supreme Court declared said Decree unconstitutional. The Supreme Court's ruling was based, among other reasons, on the fact that the exclusive nature of the contracts or agency, representation and distribution relationships constituted "a restraint to the free trade with negative monopolistic effects or implications, detrimental to the public".

The main consequence of this decision is that as of that date, the relationships between manufacturers, agents, representatives and distributors, whether local or foreigners, are subject to the free will of the parties involved and to the general terms of the contract. Any controversy arising from such relationships shall be resolved by the competent courts or through alternative dispute resolution methods which the parties might have agreed upon.

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Another consequence arising from this Supreme Court's unconstitutionality ruling is that foreign manufacturers are allowed to maintain multiple business relations with local representatives, agents and/or distributors.

The current legal situation regarding new contractual relationships is indicative of the importance of clearly defining the exclusive or non-exclusive nature of such relationship, as well as the rights and obligations of both parties (including the severity and type of penalties and damages) in the event of termination of the contract. If there are no agreed terms of termination or at least none can be proven, including those involving the manner in which issues such as compensation, repurchase of inventory and the like will be handled, then parties are not bound by anything, and the foreign or local manufacturer is free to terminate the agency or distribution relationship at will.

COSTA RICA

The relationship between a foreign or local manufacturer or provider of goods and services and a local or foreign distributor doing business in Costa Rica, is private and governed exclusively by the terms of any oral or written agreement, if any, between them. There is no enforceable law or provision that currently regulates the relationship between foreign or local manufacturers with foreign or local distributors that operate in Costa Rica.

According to the Supreme Court of Justice the Distribution Agreement has some characteristics: 1) The distributor is a merchant with his own customers even though it may be connected to the fame and prestige of the products made by the producer; 2) The distributor buys the products to resell to its customers to get a benefit from reselling but it is not a commission; and 3) usually there is exclusivity. However, the Law to Promote the Competition and Effective Protection of the Consumer (Competition Law) considers the exclusive distribution as a relative monopolistic practice. On the other hand it is necessary to meet several elements to be considered that behavior is illegal; therefore, an exclusive distribution agreement is not necessary an illegal practice.

As a preamble to considerations about termination, it is important to know that the Supreme Court made a distinction between Supply Agreements and Distribution Agreements, even though they are very similar: 1) with the Supply Agreement it is not necessary to purchase products to be resold while reselling is intrinsic to the Distribution Agreement; 2) the principle of exclusivity is indispensable in the Distribution Agreement while the Supply Agreement does not have such condition. Notwithstanding those differences, the Supreme Court concluded that the rules regarding the indefinite term of the Supply Agreement must be applied to the Distribution Agreement. In the case of the Supply Agreement of indefinite term any of the party may terminate it by giving previous notice to the other parties with reasonable time, the same rule is applied to the Distribution Agreement. We consider that a previous notice of ninety (90) days before the termination of the agreement would be reasonable.

HONDURAS

In Honduras it is considered a concessionary, regardless of its denomination, any natural person or legal entity, that either with an agreement or that effectively is a representative, distributor or agent of the products or services in that country of a domestic or foreign principal.

To hold the condition of distributor it is necessary that the concessionary register and get a license from the Secretary of Industry and Commerce. According to the rules of the Law of Representatives, Distributors and Agents of National and Foreign Companies, the representatives, distributors or agents must be registered in order to get protection. In order to be registered it is necessary to have a written agreement. However, it is possible for a distributor to try to seek indemnification under the Commercial and Civil Law.

It is recommended to avoid having a written agreement to eliminate the possibility of a claim for indemnification. Distribution on an exclusive basis is not advisable.

NICARAGUA

There was a Law of Agents, Representatives and Distributors of Foreign Companies that protected the domestic distributors but it was revoked as of July 1, 1988; therefore, currently domestic distributors do not have any special protection. However the executed agreements, verbal or written, remain in force and they cannot be modified or annulled without the mutual agreement between the parties.

In this country, like in other countries in Central America, the registration as a distributor has been a requirement to claim any kind of indemnification after termination as distributor, and it is possible only with a written agreement.

HAITI

Pursuant to the October 22, 1986 Haitian Decree on commercial agents, it is defined as *"a representative who…negotiates and eventually obtain, purchase or sale contracts on behalf of producers, manufacturer or merchants…"* In the event that the agent proves that the relationship was terminated without just cause it could claim payment of indemnification. If the distributor purchases the products from the supplier with its own money, then it will not be considered a commercial agent. Furthermore, the law calls specifically for a written contract between the parties, in which the status of both parties, the term of the contract and certain important clauses such as exclusivity, commissions as wells all other terms of the contract entered into by the parties have to be specified and precise.

CONCLUSION

Review the legislation with your local counsel in each particular country but as a general rule, avoid having a written agreement for distribution and never give exclusivity at least expressly.

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P R O G R A M 8 0 3
AN INTRODUCTION TO BUSINESS PRACTICES IN MEXICO, LATIN & SOUTH AMERICA

By Francisco Velázquez
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Mexico City

"Satélites Mexicanos, S.A. de C.V." (SATMEX)

1. Introduction, Telecommunications in Mexico

For the first time in Mexico, in 1968 the Olympic games were transmitted by a receiving satellite station in Mexico. The use of telecommunications started to grow and by 1982 the Mexican government bought from Hughes the first satellite system called Morelos I and Morelos II. After several years of exploiting the satellites, the Mexican government substituted the Morelos I and launched the Solidaridad I and Solidaridad II in 1994.

In 1998, Satélites de México, S.A. de C.V. (SATMEX) announced the successful launch of high-powered broadcast satellite for western hemisphere, named Satmex-5, considered at that time the most powerful telecommunications satellite in the western hemisphere. It was launched from Kourou (French Guiana), aboard an Ariane-42L launch vehicle.

Satmex-5, the fifth telecommunications satellite for Mexico, offers direct television broadcasting, rural telephony, distance learning and telemedicine to Mexico and Spanish-speaking communities in North America and Latin America.

Regulations are regulated throughout Mexican law, basically in the Political Constitution of the United Mexican States, the Federal Law on Telecommunications and other related regulations mentioned herein regulate the telecommunications area in Mexico. The agencies in charge of regulating this area is the "Secretaría de Comunicaciones y Transportes, Subsecretaría de Comunicaciones" (SCT), "Comisión Federal de Telecomunicaciones" (COFETEL) and the "Dirección General de Políticas de Comunicaciones".

Company history

As a historical event, and following the privatization politics of President Zedillo, SATMEX was formed, by the Mexican government in the late 1990´s, it was incorporated it in order to sell off the satellite business through a public bidding process.

When private investors acquired SATMEX; the company had three satellites in orbit called the Solidaridad I, Solidaridad II and Morelos II. As of the date of this writing, SATMEX has a concession to operate the satellites called Solidaridad II, Morelos II and Satmex 5.

One of the major investments of the company in the past years has been the construction of Satmex 6. This satellite is capable of serving the United States, Mexico and Continental Regions, with a hot spot over the major cities in South America. However, this satellite has not been launched in light of the financial problems faced by SATMEX.

On August 2000, Solidaridad I presented a serious of errors, which affected radio, television and telephone services. At that time the COFETEL, (Federal Telecommunications Commission) announced the loss of the satellite with 14 years of being in the orbit. After Solidaridad I failed, SATMEX was the first private company in Mexico to launch a satellite to orbit called the Satmex 5.

SATMEX further on initiated the construction of Satmex 6, which will substitute the Morelos II satellite in lieu, which has been in orbit since 1982. Despite that Satmex 6 has been finished, it has been stored in the French Guiana since 2003, this satellite has not been deployed for financial difficulties that the company has been facing these past years.

The company renders services through its satellites in the telecommunications area in 39 countries in the Americas, covering from Canada to Argentina in C[1] and Ku[2] bands. Among their services, they offer: radio broadcasting, distance learning, rural telephony, Fixed satellite services, high speed connectivity to Internet Service Provides (ISPs) and Dialing Broadcasting Services (DBS). It renders all its services as a member of the Loral Global Alliance.

a. Company privatization

As mentioned earlier, on November 1997 while President Ernesto Zedillo was still on office, the Mexican government decided privatize the wholly state owned company named Telecomunicaciones de Mexico, S.A. de C.V., and published in the Official Federal Gazette a public bidding process in order to sell the company.

Since the satellite business was handled through a government owned enterprise called "Telecomunicaciones de México", and only part of the company was dedicated to the satellite business, the Mexican government created another company called Satélites Mexicanos, S.A. de C.V., in order not to sell completely the existing company named "Telecomunicaciones de México", the Mexican government afterwards issued a concession to SATMEX for the use and operation of three satellites, Solidaridad I, Solidaridad II and Morelos III.

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[1] C Band – Frequency range from 3.7 to 6.4 Ghz used for the transmission / reception of satellite fixed services and microwave signals.
[2] Ku Band – Frequency range from 11 to 18 Ghz used for the transmission / reception of satellite fixed services and microwave signals.

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The offer made by Firmamento was accepted by the SCT through the Intersecretarial Commission on Decompression of the Telecommunications area in Mexico. Further on, the bidders won the public bidding for the acquisition for 75% of SATMEX. The Mexican government maintained the remaining 25% of the shares issued by the company, in order to have a satellite reserve use of 7% of the total national satellite capacity for national security reasons and in order to offer social benefits to the country.

"Firmanento Mexicano", which is a company incorporated as a result of the joint venture agreement between "Principia" (previously Telefónica Autrey) and Loral Space Communications, Ltd.

Firmamento is the controlling owner of Servicios Corporativos Satelitales (SCS), who after the public bidding is the controlling shareholder of SATMEX.

In order to finance the acquisition, Frmamento issued to the Mexican Government a $125 million dollar note, and left it's stock as collateral.

Shares issued by SATMEX are held as follows: 75% by the company named SCS, while the remaining 25% of the stock is held by the Mexican Government.

The company since its privatization, has been facing financial difficulties in light of certain malfunctions of the satellites, which caused certain contract cancellations, e.g. INNOVA that represented a good amount of business for SATMEX, and as a consequence it was obligated to reduce the capacity use of the one of its satellites to 71%.

Further on in 2003, one of its major shareholders Loral Communications, Ltd. filed bankruptcy proceeding in the United States of America under Chapter 11 in the Southern District of New York and is now in the restructuring process. As part of the restructuring process of Loral Space & Communications, Ltd. sold to Intelsat six North American telecommunications satellites, said transaction took place on March 2004.

In the most recent disclosure statement filed on June 3, 2005, while explaining the structure of the New Loral, in its Plan of Reorganization, it states that all equity in SATMEX shall be transferred to the new entity to be formed. Consequently, this new entity will be a shareholder of Firmamento.

Financial History of SATMEX

SATMEX since it was acquired has been facing financial difficulties. First, SCS in order to acquire shares in SATMEX, issued a promissory note in favor of the Mexican Government for the amount of $125 million dollars (now worth $188 million dollars).

Further on, financial results for the period ended on July 2002 indicated a decrease in the revenue of the company mainly because of lower use of satellite Solidaridad II, this was in light of the cancellation made by one of SATMEX´s major consumers INNOVA, who cancelled their services contract on March 31, 2002.

Despite contract cancellations, in 2003 SATMEX reduced the score range of the Standard & Poor's Corporation rate for credits, with said achievement SATMEX was able to apply for bonds and credit instruments with financial institutions.

The Standard & Poor's rating is defined as the classification of stocks and bonds according to the risks issued by the S&P´s top four debt investment grades, which indicate a minimal risk that a corporate or municipal bond issue will default in its timely payment of interest and principal.

On April 17, 2003, the Export and Import Bank of the United States approved a credit to SATMEX in order to finish the construction of Satmex 6, in the amount of $149,799,409.00 dollars, with a repayment term of eight years and two months. Further on, SATMEX borrowed from a French bank named COFACE approximately US $72 million dollars.

As indicated in a recent publication made in the "Reforma", debts are around $600 million dollars allocated among 36 bondholders.

As of this date, there has been intention to invest in this company by PanAmSat, Intelsat and SES Americom, however the deal has not taken place yet.

Since financial difficulties and lack of investment by other companies in the Mexican satellite business, maturity on 2/3 of the credits took place, and on May 25, 2005, SATMEX creditors´ filed a petition of involuntary bankruptcy petition otherwise known as a Chapter 11 proceeding in the Southern District of New York Court, in order to pursue the financial reorganization of SATMEX, a company incorporated and operating business in Mexico. Judge Robert Drain of the southern district of New York is handling the procedure.

Under United States law, the famous Chapter 11 proceeding is designated for companies seeking the reorganization of the company. The main objective is to develop and carry out a fair, equitable and feasible plan of reorganization.

On the other hand, the shareholders of the Mexican based company, filed in late June a "concurso mercantil" in a Mexican court filed and Second District Judge Refugio Ortega Marín is handling the procedure.

Reporters have widely published that the Mexican government has pressured SATMEX to initiate a "concurso mercantil". However, in a recent publication in a major newspaper in Mexico called "REFORMA", whereby the in the interview made to Mr. Sergio Autrey, General Director of the Company, he states that the government may want to ask for the company in lieu for the 188 million dollar debt. However, this course of action would not benefit the United States Creditors who filed an involuntary bankruptcy proceeding in the Southern District of New York this past May.

Reporters speculate that the Mexican government has forced the shareholders of the company to file a concurso in Mexico, because Mexican officials are afraid that the 188 million dollar bond due could be diluted in United States Courts. However, one should ask why the government would submit to United States Court as a sovereign state.

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On July 11, 2005, "Reforma" published an article on the July 11th edition, which made public that the Mexican government had filed suit in order to collect the $188 million dollar debt owed by SATMEX. Said suit was filed to the First District Judge Irma Rodriguez Franco.

"Concurso Mercantil" (Type of US Chapter 11)

Mexico published in the Official Federal Gazette on May 12, 2000 the "Ley de Concursos Mercantiles" (LCM), which abolished the "Ley de Quiebras y Suspensión de Pagos". The "concurso mercantil" procedure basically consists of two phases; the first one is called conciliation while the second phase is the bankruptcy proceeding.

The conciliation procedure is the period where the debtor's main interest is to reach an agreement, through an appointed conciliator, with his creditors. If no agreement can be reached among them, the next phase within the LCM procedure is the called Bankruptcy proceeding, which consists of selling off the company's assets in order to payoff the debts owed by the company to its creditors.

In order to file a "concurso" proceeding, original jurisdiction is given to a Federal District Judge within the company's domicile. This procedure may be filed by creditors, the company or by the office of the Government Attorney. Law requires that there be two or more different creditors, that the notes have more then 30 days of maturity, the debts represent a 35% of the company's liabilities and that the company shall not have more then 80% of liquid assets.

A typical petition of a "concurso mercantil" proceeding is filed in the domicile of the company. Once filed, the judge gives notice to the IFECOM "Institute Federal de Especialistas de Concursos Mercantiles" (Institute), which is the Institute created by a board of specialists who are involved in the concurso proceeding, the notification made to the Institute is in order for said body to appoint a Visitor.

The visitor has the right and obligation to access the corporate bookkeeping, financial statements and any other documents to determine the financial status of the company.

The Judge, at his discretion may issue stay orders at this stage if they are adequate for the case. The visitor is obligated to render a reasoned opinion in regards to the financial status of the company within a 15-day time frame. After the Visitor renders the financial status and opinion, the Judge shall issue his judgment and order the Institute to designate a Conciliator.

The judgment may contain a stay order as well or an order of suspension of payments during the conciliation period of the execution of any judgment against the company. The Chief Executive Officer or the members of the Board of Directors are named as trustees of the company. The conciliation period, pursuant to law should not exceed 180 calendar days.

Creditors who represent at least 10% of the debts may file a motion to the judge in order for him to designate an Intervener, in order to protect the creditors interests. The Intervener has the obligation to supervise the company's operations and protect the creditors interests.

- Bankruptcy

If no agreement has been made among the company and the creditors, the Judge replaces the Conciliator by an Administrator appointed by the Institute. The debtor is dispossessed and separated from the management of the company as well as its assets. The total process shall not exceed 360 days after the filing of the concurso petition.

As mentioned earlier, the purpose of a bankruptcy proceeding is to sell as soon as possible the company's assets and pay off the recognized debts. A very important aspect of this procedure is that legislators intend to preserve the commercial and business concerns.

- Creditors´ credits are protected by computing them as "Unidades de Inversión" (Investment Units)

This concurso procedure, orders that the credits stop generating interests if unsecured creditors, and are converted into "Unidades de Inversión" (UDIS) (Investment Units). UDIS where created by the Mexican government in April 1995, with the purpose of indexing some commercial debts and paralleling their value with the official recognized rate of the Mexican Peso inflation. The UDIS value as of today is around $3.566546 Mexican Pesos.

However, debts issued in foreign currency and as unsecured credits, independently where the place of payment was designated, they will stop bearing interest and will be converted into Mexican Pesos, and further on converted into UDIS.

2. Concession

Under Mexican law, the Federal Law on Telecommunications (LFT) set forth the rules that regulate the issuance of permits and concessions for the use and operation of satellites.

Further on, the LFT foresees certain circumstances under article 37, which establishes that any concession terminates if the company is in bankruptcy. However, one should consider that the concession may be terminated if the company is in bankruptcy, not in a procedure of "concurso mercatil", which can be distinguished from the latter.

That is the LCM, establishes the distinction between a "concurso mercantil" and a bankruptcy proceeding. As mentioned earlier, the first phase of the "concurso mercatil" is the conciliation, and if there is no conciliation, bankruptcy is declared. Therefore, it is for us to see whether the concession will be terminated if the company goes through with the bankruptcy proceeding. Perhaps it is a possibility that the shareholders decide not to go through all the bankruptcy process and obtain further financing in order to operate their satellite concessions.

3. Venue effects

Creditors have decided to file in a New York Court. However, "Reforma" published in the July 30, 2005 edition that SATMEX and SATMEX's creditors had agreed to retrieve their Chapter 11 involuntary petition in the United States, so far as that SATMEX presents

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to the Bankruptcy court a special motion whereby SATMEX guarantees with certain assets in the United States, until the "concurso mercantil" has finished. Creditors´ reserved their right to file any other suit or motion in case there are inappropriate actions taken.

The LCM provides that creditors' actions or enforcement procedures shall stay until rendering the final decision, meaning that all creditors pursuing to recover their credits issued in favor of the debtor shall stay until bankruptcy is declared.

Additionally, subject matter jurisdiction of a bankruptcy proceeding of a Mexican company, organized under said laws, under the applicable provisions grant jurisdiction to a Mexican Federal District Judge in the domicile of the company. Therefore, this tribunal shall is the indicated under Mexican law to adjudicate the case.

Pursuant to the LCM the court that is given jurisdiction is the Mexican District Court, although the United States Judge did not declare that the New York based Court did not have jurisdiction.

As of this date, there are three legal actions in regards to the SATMEX company. The first procedure is the bankruptcy filing in New York by SATEMX creditors´. The second is the "concurso mercantil" filed by the shareholders of SATMEX in Mexico. As for the third procedure, consists of the suit filed by the Mexican Government against SATMEX, demanding payment of the $188 million dollar note issued by SCS, which is SATMEX's major shareholder.

Conclusion

As mentioned earlier, on May 2005 creditors submitted in the Southern District of New York, New York, an involuntary petition to pursue a Chapter 11 bankruptcy case against SATMEX, on grounds that the Mexican enterprise agreed that the proper venue in case of a dispute be New York. Further on, shareholders of SATMEX decided to file a "concurso" proceeding in Mexico on June 30, 2005.

However, we need to distinguish that SATMEX agreed on the enforcement and as a forum clause that proper jurisdiction is New York, on those bonds or credits. Nonetheless, creditors have petitioned the court to declare the bankruptcy of the company under Chapter 11. Said procedure is exclusively afforded to a Mexican Court.

Although, the United States creditors represent at least two thirds of the total debts owed by SATMEX, they allege that the proper venue for the reorganization procedure of the Mexican company is New York, considering that both the debt and the creditors are in the United States. Additionally, for the fact that SATMEX in the bonds issued, agreed that the proper venue be a New York Court. Although there is an agreement among the creditors and SATMEX of retrieving the bankruptcy filing in the United States, they have reserved their right to file any legal actions in case there are inappropriate actions taken.

Under Mexican legislation, a company incorporated under the laws of Mexico, in order to file a bankruptcy proceeding jurisdiction is granted to a Federal District Judge. Although the United States Court could have found jurisdiction under the available common law theories, a Mexican Court should be considered the proper venue in light that the company has been incorporated in Mexico and by that sole reason it has submitted itself and accepted the Mexican Law as the governing law for the incorporation.

The LCM permits a stay provision as explained herein. Perhaps, the filing of the concurso mercantil can serve as a anti-suit injunction in the United States Court. That is, as Prof. David Epstein explains in his book "International Civil Dispute" on page 162, "An anti-suit injunction refers to the order of a domestic court purporting to stay or enjoin an action in foreign forum. As an anti-suit injunction necessarily involves a direct intrusion on the judicial process of another sovereign nation, it is proper in only extraordinary circumstances." This author further on signals out "the U.S. Supreme Court has not yet articulated the standard of for determining whether to stay or dismiss an action in deference to a foreign proceeding. U.S. Courts which have addressed the issue have considered a number of factors, including: (1) adequacy of relief available in the alternative forum; (2) issue of fairness to and convenience of parties; and (3) the possibility of prejudice to any of the parties; and (4) the temporal sequence of filing the actions."

The LCM does not differentiates between a foreign or national creditor, the "concurso mercantil" is ideal to provide restructuring of credits. Additionally, the LCM has adopted the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law.

Creditors fear that since the LCM has been in force for 5 years, Mexican authorities do not have the experience to take the matters in hands and have an appropriate restructuring plan for SATMEX, however one must add that there have been several "concurso mercantil" filings under said procedure. Among them is the "concurso mercantil" proceeding of a paper company from Durango (Mexican State) named CYDSA with bondholders up to the amount of $159 million dollars, Grupo Triba, with creditors with more then $300 million dollars in debt, among others.

Since the creation of the IFECOM, there have been 197 "concursos mercantiles", of approximately 237 businesses, which have at least 70 thousand creditors, in approximately 250 billion Mexican Pesos in debt. From said 197 proceedings, 73 of them have been concluded.

Therefore, the LCM, with these new themes it offers creditors and businessman the opportunity, to: first, preserve the business and reach an agreement; second, it creates a special Institute for the proceedings to be well administered, third, it establishes a strict time table for the proceedings; forth, it has adopted the UNCITRAL Model Law on Transborder Insolvency, for parallel foreign insolvency proceedings may be recognized, either as principal or secondary ones.

Although chapter 11 proceedings may not be recognized by the UNCITRAL Model Law on Transborder Insolvency, in light that article 1 of said law states: " [t]he present [l]aw does not apply to a proceeding concerning [designate any types of entities, such as banks, or insurance companies, that are subject top a special insolvency regime in this State and that this State wishes to exclude from the present Law]."

Now in order to construe the wording of said article, discussions of the adopted texts, point out the fact that if there are special procedures set up for companies subject to a transborder insolvency proceeding, the law excludes the application of this model law, since the insolvency of special regime entities are specially regulated by the enacting States who have adopted these UNCITRAL Model Law. SATEMEX´s "concusros

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mercantil" can be among those special regulated, that is as a company which operates its satellite business trough a concession.

Mexico is among those states which have adopted the text of the UNCITRAL Model Law on Transborder Insolvency. Specifically under title XII of the LCM, the text of this law is adopted.

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