

LEGAL FRAMEWORK FOR THE SALE OF GOODS INTO MEXICO

Eduardo Siqueiros T.†

I. PREFACE

Despite the economic crisis Mexico suffered during the 1980s, Mexico's foreign trade underwent tremendous growth. During 1987 imports were valued at 12.2 billion dollars. In 1988 this figure grew to 18.9 billion dollars, and in 1989 it exceeded 35.0 billion dollars. The United States is the largest supplier of goods to Mexico. In 1989 imports from the United States alone were valued at 24.7 billion dollars. Total United States-Mexican trade for 1989 surpassed 52 billion dollars. Mexico is the third largest trading partner of the United States, trailing only Canada and Japan.

This article covers Mexican law regarding the sale of goods by an external seller into Mexico.¹ My discussion will include an overview of the liberalization of rules governing such trade, laws invoked upon the sale of goods to Mexico, types of offices a seller can set up, import and customs considerations, currency issues, standard contract provisions, and dispute resolution procedures.²

† Licenciado en Derecho, Escuela Libre de Derecho (Abogado), Harvard Law School (L.L.M.), Partner, Barrera, Siqueiros y Torres Landa, Mexico, D.F., Professor, Commercial Contracts, Corporate Law, Instituto Tecnológico Autónomo de México (ITAM).

1. Both Mexico and the United States are parties to the United Nations Convention on Contracts for the International Sale of Goods (CISG). U.N. Doc. A/CONF. 97/18, Annex 1, reprinted in 52 Fed. Reg. 6264 (1987), and in 19 I.L.M. 668 (1980). CISG's provisions govern the buyer's and seller's rights and duties when the parties fail to make a valid choice of law in an international sales contract. If one of the parties to such a contract is a U.S. citizen, and if the other party resides or has its principal place of business in a country which has adopted CISG, CISG governs the transaction. The United States has made a reservation by declaring that it will not be bound by Article 1(1)(b) of CISG. Senate Treaty Doc. No. 98-9, 98th Cong., 1st Sess., Appendix I(B) (1983) (provides explanation of this reservation).

The United States ratified CISG in 1986, and on January 1, 1988, it became effective. Mexico ratified CISG in 1987, and enacted it in 1988. *Decreto de Promulgación de la Convención de las Naciones Unidas Sobre los Contratos de Compraventa Internacional de Mercaderías*, Diario Oficial [D.O.], March 17, 1988; United Nations Convention on Contracts for the International Sale of Goods, April 11, 1980, 52 Fed. Reg. 6262-6280 (Mar. 26, 1987). The Convention applying to Agents and Representatives was also enacted into law by Mexico in 1988. *Decreto de Promulgación de la Convención Sobre Representación en la Compraventa Internacional de Mercaderías*, D.O., Feb. 22, 1988.

2. For a comparative analysis of Mexican law and the CISG, see J. BARRERA GRAF, LA CONVENCIÓN DE VIENA SOBRE LOS CONTRATOS DE COMPRAVENTA INTERNACIONAL DE MERCADERÍAS Y EL DERECHO MEXICANO, 925 (1982).

II. TRADE LIBERALIZATION

A. Mexico's Membership in the GATT

In 1985, President Miguel de la Madrid decided that Mexico should apply for membership in the General Agreement on Tariffs and Trade (GATT) as part of his strategy to modernize the Mexican economy.³ An unsuccessful attempt to gain political and business support for Mexico's application to the GATT was made in 1979.⁴ Many local manufacturers protested Mexico's application, arguing that GATT would put the Mexican economy into the hands of foreign suppliers who would deluge the market with poorly-crafted merchandise.

Despite this opposition, the government realized that new rules of trade were needed in order to promote the export of manufactured goods needed to offset Mexico's loss of oil export income. Furthermore, President de la Madrid hoped to penetrate international markets by acquiring "most favored nation" (MFN) status.⁵ Mexico signed and adopted the GATT treaty on July 25, 1986. Later that same year, it was ratified by the Mexican Senate⁶ and the Mexican Adhesion Protocol was published on November 26, 1986.⁷

Since 1986, the Mexican federal legislative and executive branches have adopted a number of internal laws and regulations incorporating the principles of GATT. The more important of these laws include:

1. The Foreign Trade Law and its Regulations⁸;

3. The Ministry of Commerce prepared an internal document dated November 14, 1979, a copy of which is in the possession of the author, outlining advantages and disadvantages of adhesion.

4. *Oficio por el que el C. Lic. Miguel de la Madrid H., Presidente Constitucional de los Estados Unidos Mexicanos, Encomienda al C. Secretario de Comercio y Fomento Industrial, la Conducción de las Negociaciones Internacionales para la Adhesión de México al Acuerdo General Sobre Aranceles Aduaneros y Comercio*, D.O., Nov. 25, 1985.

5. Lacking GATT membership, Mexico could not demand MFN treatment on a multilateral basis. Despite this, Mexico received MFN treatment from the United States as a result of the Understanding Concerning Trade and Investment Relations, Nov. 6, 1987, United States-Mexico, 27 I.L.M. 438 (1988).

6. *Decreto por el que se Aprueba el Protocolo de Adhesión de México al Acuerdo General Sobre Aranceles Aduaneros y Comercio, Firmado en Ginebra, Suiza*, D.O., Sept. 11, 1986; D.O., Oct. 29, 1986 (published Senate approval).

7. *Decreto de Promulgación del Acuerdo Relativo a la Aplicación del Artículo VI del Acuerdo General Sobre Aranceles Aduaneros y Comercio, Adoptado en la Ciudad de Ginebra, Suiza el 12 de Abril de 1979*, D.O., Nov. 26, 1986. Since Mexico was not an initial signatory to the GATT treaty, it executed the Protocol to signify its commitment to GATT principles and obligations. As part of the obligations, it was acknowledged that Mexico retained the policy of promoting local production of agricultural products. Mexico would also continue to apply certain import permits and maintain certain restrictions on exports of natural resources, particularly oil. Attached to the Protocol was a list of goods in the tariff classification concession by Mexico.

8. *Decreto por el que se Crea la Ley Reglamentaria del Artículo 131 de la Constitución Política de los Estados Unidos Mexicanos en Materia de Comercio Exterior*, D.O., Jan. 13, 1986.

2. Regulations Against Unfair Trade Practices,⁹
3. The Antidumping Code of 1979,¹⁰
4. The Code on Import Licenses of 1979,¹¹
5. The Code on Customs Valuation of 1979.¹²

B. Elimination of Import Restrictions

Through its change in policy and legislation, Mexico eliminated most restrictions on the import of components, raw materials, capital goods, intermediate goods, and most consumer goods. Only very few imports are still rigorously restricted (less than three percent of total imports) and subject to exclusive import permits. Protected goods include automobiles, chemicals, pharmaceuticals, paper, firearms, few luxury goods, and to a lesser extent computers.¹³

The automotive industry is still heavily protected. This is primarily due to the extensive investments made by major car and truck manufacturers, such as General Motors, Ford, Chrysler, Nissan, and Volkswagen. Total automobile sales for 1990 are not expected to exceed 400,000 units. Although imports are still restricted, a new Decree for the Promotion and Modernization of the Automotive Industry, issued late in 1989, allows for importation of automobiles and trucks.¹⁴

The computer industry, which had been subject to a licensing scheme, has also recently been exempted from regulation. The Ministry of Commerce and Industrial Promotion has exempted importation of *new* computers from certain licensing requirements. The Ministry has supported current manufacturers who assemble equipment or parts by reducing duties on parts and components. It has also exempted from

9. *Reglamento Contra Prácticas Desleales de Comercio Internacional*, D.O., Nov. 25, 1986, amended by *Decreto por el cual se Reforma y Adiciona el Reglamento Contra Prácticas Desleales de Comercio Internacional*, D.O., May 19, 1988.

10. *Decreto de Promulgación del Acuerdo Relativo a la Aplicación del Artículo VI del Acuerdo General Sobre Aranceles Aduaneros y Comercio*, D.O., April 21, 1988 (executed on July 24, 1989).

11. *Decreto de Promulgación del Acuerdo Sobre Prodedimientos para el Trámite de Licencias de Importación, Adoptado en la Ciudad de Ginebra, Suiza, el 12 Abril de 1979*, D.O., April 25, 1988 (executed on July 24, 1979).

12. *Decreto de Promulgación del Acuerdo Relativo a la Aplicación del Artículo VII del Acuerdo General Sobre Aranceles Aduaneros y Comercio, Adoptado en la Ciudad de Ginebra, Suiza, el 12 de Abril de 1979*, D.O., April 21, 1988.

13. There is a tendency to further open the market for paper and pharmaceuticals in the short term. Paper utilized in the printing of newspaper, for example, has recently been allowed to be imported freely, contrary to past policy of exclusive importation by a government owned entity.

14. *Decreto para el Fomento y Modernización de la Industria Automotriz*, D.O., Dec. 11, 1989. The name of this Decree (*see text*) evidences a change in government policy. The prior rules of 1980 were called "Decree for the Rationalization of the Automotive Industry." Initially, only automobile and truck manufacturers will be permitted to import vehicles and will be required to maintain a positive balance of payments. *See Camil* (this issue).

payment of duties importers who meet requirements of local content and export programs.¹⁵

Duties on all imports have been greatly reduced. The average duty has been reduced from a maximum of 100 percent in 1986 to approximately eleven percent in early 1990. Maximum duties are now set at twenty percent.¹⁶

C. *Complementary Policies*

To complement economic reform strategies, restrictions and red tape have been eliminated, streamlining the flow of goods in and out of Mexico. New regulations allow railroads and trucks temporary entry into Mexico to make deliveries. In exchange, Mexican trains are now allowed to deliver merchandise in United States border states. Previously, a very inefficient system of exchanging rail and truck cars at the border was the only available option.

III. LEGAL STRUCTURE FOR SELLING GOODS IN MEXICO

A. *Introduction*

Trade with other countries has permitted many United States companies to gain extensive experience in transnational business. Nonetheless, since sales of different commodities are guided by different rules, and since different markets have unique practices, sellers should be aware of the applicable Mexican trade regulations. Specialized knowledge helps avoid the risks of being driven out of the Mexican market or of becoming involved in prolonged litigation.

B. *Identifying the Buyer*

Different laws and regulations apply to sales to Mexican governmental agencies, to state-owned enterprises, and to the Mexican private sector. There are a few laws which all sellers should know.

1. Sales to the Public Sector

Sales to the "public sector" include not only direct sales to ministries, departments, and agencies, but also sales to state enterprises (*organismos descentralizados*) such as *Petróleos Mexicanos* (Pemex) and *Comisión Federal de Electricidad* (CFE). Public sector sales also include sales made to entities in which the state has a majority interest.

15. *Decreto que Establece Estímulos Fiscales a la Promoción de la Modernización de la Industria de Computación* [Decree Establishing Tax Incentives for the Promotion of Modernizing the Computer Industry], D.O., Apr. 3, 1990.

16. See *infra* notes 73-76 and accompanying text.

The past and current administrations in the Mexican government have reduced the amount of state intervention in the Mexican economy. Approximately 1,200 state-owned businesses existed in 1983, while the current total is less than 400. Notably, however, important companies are still controlled by the government. These include the telephone company, *Télefonos de México, S.A.* (to be privatized in the fall of 1990), the steel industry, *Sidèrmex, S.A.*, the mining concerns such as *Compañía Minera de Cananea, S.A.*, and numerous others.

As a matter of policy, government purchases from domestic suppliers are encouraged. But governmental agencies are permitted international sources when local firms cannot adequately supply certain goods.¹⁷ Every sale of goods or services in the public sector is governed by specific legislation, such as the Acquisitions, Leases and Services Related to Movable Goods Law (Acquisitions Law).¹⁸ This law provides procedural rules for arranging a transaction. Public bids usually must be solicited. Supervision of the bidding process is entrusted to the Ministry of the General Comptrollership of the Federation. Contracts may be terminated by the government at any time "for any reasons of public interest."¹⁹ Other laws also govern purchases, such as the Mexican Commercial²⁰ or Civil Codes.²¹

The Acquisitions Law also provides rules that define the obligations of suppliers under the sales contract. The law requires any seller to be registered with the Ministry of Programming and Budget of Mexico (*Padrón de Proveedores de la Administración Pública Federal*). Registration is neither complex nor expensive. A seller must file a form which provides information on the seller, its main products, and prior sales to

17. Mexico has not subscribed to the GATT Code of Conduct on Government Procurement. The Ministry of the Comptroller issued rules for the inspection of imported purchases. *Normas Administrativas Aplicables a las Adquisiciones por la Vía de Importación Directa*, D.O., May 2, 1985.

18. *Ley de Adquisiciones, Arrendamientos y Prestación de Servicios Relacionados con Bienes Muebles*, [Acquisitions Law], D.O., Feb. 18, 1985.

19. *Id.*, art. 48.

20. CÓDIGO DE COMERCIO [hereinafter, COM. C.], 1889. Commercial legislation in Mexico is of a federal nature and derives its authority from constitutional powers granted to the federal Congress.

21. CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [hereinafter, C.C.D.F.] (applicable on federal matters and supplementary to the COM. C.).

public sector entities.²² Updated information is required only when certain circumstances change. Since 1989 all registered companies or individuals have been required to pay an annual registration fee.²³ Agency officials claim these fees will enable them to maintain better information on suppliers because the annual charges will cause many suppliers who are no longer interested in selling to the government to drop their registration. Certain other agencies or state enterprises, such as Pemex, require their own registry of suppliers.²⁴

A "procurement committee" is normally required to make government purchases through a public bidding process. Each governmental entity has its own procurement committee. The lowest bidder is awarded the contract, unless other factors such as delivery or quality terms persuade the committee to decide otherwise.

2. Sales to the Private Sector

Executing an agreement with a person or entity in the private sector does not involve any government intervention. A foreign seller and a Mexican buyer may freely agree on the terms of their relationship. Likewise, their contract may contain any freely agreed upon provisions, with limits only on provisions which are contrary to public law of order.²⁵

C. Structuring Sales to the Mexican Market

A manufacturer or seller of goods wishing to penetrate the Mexican market may select a wide range of alternatives for selling its goods to customers. Depending on its desire to penetrate or maintain a presence in Mexico, a foreign seller may choose from the following contractual arrangements.

1. Direct Sales by the Foreign Supplier

The seller can make direct contact with a Mexican customer. This usually occurs when either the customer seeks specific goods from a foreign supplier or the supplier advertises in Mexico. Publicity outlets include the newspapers, special interest periodicals, and the mails. There are normally no restrictions on foreign manufacturers advertising in

22. This form may be obtained from the Ministry of Programming and Budget. Documents pertaining to incorporation, applicable powers, and agency appointment must be submitted in Spanish, notarized, and filed with the appropriate consulate for signature authentication, as per official policy not reflected in the law.

23. *Aviso a los Contratistas de Obras Públicas y Proveedores de la Administración Pública Federal*, D.O., Feb. 6, 1989 (Decree published by the Ministry of Programming and Budget).

24. *Acquisitions Law*, art. 20 (no other registration is required or valid).

25. *COM. C.*, art. 78.

Mexico, and many manufacturers and sellers routinely advertise.²⁶

2. Representative Office

The supplier may establish a representative office, to facilitate sales to buyers in Mexico. These offices are recognized under Mexican legislation. Samples may be exhibited without import duties or restrictions.²⁷ The office's activity must be limited to the promotion of the supplier's goods. Representative offices may not make direct sales to Mexican buyers or receive income directly from Mexican buyers. Previously, opening a representative office required the specific approval of the Foreign Investment Commission of Mexico (FIC).²⁸ Today, the new Regulations to the Foreign Investment Law (FIL Regulations)²⁹ and General Resolution Number 2 of the FIC³⁰ mandate only that a simple notice be given to the Executive Secretary. This notice suffices as registration with the Foreign Investment Registry. The Mexican Income Tax Law (ITL)³¹ exempts the activities by these offices from local taxes; these activities will not create a "permanent establishment," a taxable entity, for the non-Mexican seller.³² The opening of a representative office subjects the seller to Mexican commercial leasing legislation, and labor laws. Labor laws include Social Security, the Housing Fund (*Infonavit*), and other regulations depending on the particular nature of the activity.³³

3. Branch Office

For a seller who wishes to maintain direct contact with the Mexican market, the natural step following opening of a representative office is to

26. Suppliers should take care to meet requirements that may be imposed by specific legislation on registering with health authorities to advertise foodstuffs, medicines, and alcoholic beverages, and requirements imposed by consumer protection laws such as the required conditions for "warranty."

27. See *infra* notes 73-76 and accompanying text.

28. GOMEZ PALACIO, *INVERSIÓN EXTRANJERA DIRECTA* (1985).

29. *Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., May 16, 1989 [hereinafter, *F.I.L. Regulations*]; see Camil, *Mexico's 1989 Foreign Investment Regulations: The Cornerstone of a New Economic Model*, 12 HOUS. J. INT'L L. 1 (1989).

30. *Resolución General Número 2 que Establece Criterios para la Aplicación de Diversas Disposiciones del Reglamento de la Ley para Promover la Inversión Mexicana y Regular la Inversión Extranjera*, D.O., June 21, 1989; see rule 6, § A.

31. *Ley del Impuesto Sobre la Renta*, D.O., Dec. 30, 1980 [hereinafter, *ITL*], art. 3, § IV.

32. *ITL*, art. 3. See *infra* notes 88-89 and accompanying text. A recent publication discusses in detail taxation by Mexican law of non-residents. M. TRON, *RÉGIMEN FISCAL DE LOS EXTRANJEROS EN MÉXICO* (1990).

33. *Ley Federal de Trabajo* [Federal Labor Law], D.O., Apr. 1, 1970; *Ley del Instituto Mexicano del Seguro Social*, D.O., Mar. 12, 1973 [hereinafter, *Social Security Institute Law*]; *Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores*, D.O., Apr. 24, 1972 [hereinafter, *National Fund for Workmen's Housing Institute Law*]. A brief analysis of Mexican labor laws can be found in J. Steta, *Labor Relations*, *DOING BUSINESS IN MEXICO* (1988).

establish a branch office.³⁴ Prior approval of the FIC is required, and the branch must be formally recognized in the Public Registry of Commerce in the city where it is established. Additionally, the applicant must acquire the "blessing" of the Ministry of Foreign Affairs (MFA) before setting up the branch office.³⁵ Furthermore, the company must submit information on its legal incorporation and on the validity of the corporate resolution authorizing the branch to the MFA and the FIC.³⁶

4. Broker

A variation on making direct contacts between the seller and the buyer in Mexico is the use of a broker or intermediary (*corredor/mediador*).³⁷ The broker's purpose is to put a potential buyer in touch with the seller. The broker will receive a fee for this service. *Corredores* or *mediadores* do not act as legal representatives or employees nor do they have any power to bind the buyer or seller.³⁸ They merely serve as a bridge between the seller and buyer. The broker relationship may be permanent or on a case-by-case basis.

5. Sales Agent

Broker's services may not be sufficient for a seller with inadequate knowledge of Mexican language, customs, and commercial practices; or the seller may simply not have the time and resources to pursue the Mexican market. In either case, the seller may seek assistance from an agent in Mexico.³⁹ Agents (*comisionistas*) are subject to the rules of attorneys-in-fact (*mandatarios*).⁴⁰ Although the agent may have flexibility in performing its duties, it may not act beyond the scope of authority granted by the principal.⁴¹ Any actions undertaken in excess of its authority are non-binding on the principal. However, for the protection of third parties, such actions will bind the agent.⁴²

Mexican commercial law allows the agent to act in its own name or in the name of the principal. In either case, however, any action is for

34. *Ley General de Sociedades Mercantiles*, D.O., Aug. 4, 1934 and Aug. 28, 1934 [hereinafter, GLCC], art. 251.

35. The Ministry will require the applicant to execute the "Calvo Clause." This clause will require the applicant to deem itself to be Mexican with regard to its activities and not seek the protection of its own government. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 522 (1976).

36. C.C.D.F., arts. 2736-2738.

37. A. GARGOLLO, *CONTRATOS MERCANTILES ATIPICOS*, 132 (1985).

38. COM. C., arts. 51-74.

39. A. DIAZ BRAVO, *CONTRATOS MERCANTILES*, 217 (1983).

40. See *supra* note 38, ch. 1, tit. III (regulates the *comisionistas* activities and principal-agent relationships).

41. COM. C., art. 286.

42. *Id.*, art. 289.

the benefit or detriment of the principal, with the exception of acts beyond the agent's authority. When acting within the scope of its authority, an agent may contract for the buyer.⁴³ The agent has a direct action against and personal liability to the buyer. Actions include those for payment of the price, and actions for liability under warranties.

The commercial agency contract is not required to contain a minimum duration; agencies may be structured for an open term or a specified period. Expiration of the term will free both parties and release them from any further liability, unless specific contract provisions direct otherwise. Options may extend the contract's term, or terms may provide that the contract expires if one of the parties is in default. As a general rule, an agency agreement for an open term allows the parties to terminate the agreement with sixty days prior notice.⁴⁴ However, the Mexican Supreme Court has established that a principal may terminate the contract at any time. But, the principal must indemnify the agent for any damages caused by the premature termination. These damages may include unreimbursed expenses incurred by the agent in pursuing the business, or its provable lost profits such as those from business deals scheduled to close in the near future.⁴⁵

An agency contract does not have to be registered with any government office in Mexico. The United Nations Convention on Representation in the International Sale of Goods of 1983⁴⁶ sets out rules governing authority of appointment for contracts where both the principal and buyer are domiciled in different countries, and where the agent is domiciled in a country that is a party to this Convention.

6. Consignment

Under a consignment arrangement, a seller ships goods to a Mexican consignee.⁴⁷ The seller requests that the consignee sell the goods on agreed upon terms. Terms may include an obligation on the consignee to return the goods to the consignor if the sale is not accomplished within a specified time. Title to goods under consignment does not pass to the consignee and in the case of bankruptcy, the goods will be withdrawn from the consignee's assets.⁴⁸

43. *Id.*, art. 285.

44. C.C.D.F., art. 2478 (this is applied in a supplementary manner for *tracto sucesivo* contracts).

45. Informe 1979, *Tercera Sala*, no. 15, p. 14.

46. *See supra* note 1.

47. GARGOLLO, *supra* note 37, at 61.

48. *Ley de Quiebras y Suspensión de Pagos*, D.O., Apr. 20, 1943 [hereinafter, *Bankruptcy Law*], art. 159, § VI(a).

7. Distribution

A foreign manufacturer or seller may not want to sell goods directly to the Mexican consumer because of the inherent risks in this type of sale. Instead, it may wish to do business only with an individual who will bear the risks of sale, service, and payment.

In this case, the manufacturer should act through a distributor.⁴⁹ The distributor purchases directly from the seller for resale in the Mexican market. The distributor is normally the only contact that the seller has in Mexico. Once the sale is perfected between the seller and the distributor, the distributor sells the goods. A buyer that purchases from a distributor has recourse only against the distributor and not the foreign manufacturer or supplier.

Contracted terms on the distributorship agreement may include warranty requirements, service requirements, maximum or minimum price discounts, and other terms of trade. Distributors, like agents, may be appointed with geographical limitations. Furthermore, exclusive distributorship arrangements are valid under Mexican law.⁵⁰

Distribution contracts usually require the distributor to make a minimum number of sales within the territory. Contracts usually must provide guidelines on prices, delivery, and transfer of title. Although rare, contracts occasionally provide that the final consumer, purchasing from a distributor in Mexico, will take title and delivery of the goods at the manufacturing or warehousing facilities of the non-Mexican manufacturer-seller.

8. Franchise

If a franchise operation is desired for the Mexican market, it is best established through a distribution contract, complimented by other contracts involving the licensing of trademarks and trade names, and involving provision of technical expertise.⁵¹ Unless the contract contains a

49. GARGOLLO, *supra* note 37, at 169. See also Saltoun & Spudis, *International Distribution and Sales Agency Agreements: Practical Guidelines for U.S. Exporters*, 38 BUS. LAW. 883 (1983).

50. See *infra* notes 120-122 and accompanying text.

51. *Ley Sobre el Control y Registro de la Transferencia de Tecnología y el Uso de Explotación de Patentes y Marcas*, D.O., Jan. 9, 1990 [hereinafter, *Newly Enacted Regulations to the Transfer of Technology Law*]. These regulations for the first time introduce in a structured manner the concept of a "franchise" under Mexican law. The initial agreement requires approval and recording; subsequent agreements with additional franchisees or sub-franchisees require only semi-annual reporting on new franchisees. Although such specific legislation only contains provisions governing franchise contracts from a transfer of intellectual property point of view, other rules applying to the purchase-sale contract and other commercial practices are admitted by reference.

license or transfer of technology, it will not require registration in Mexico; if it does, then it will need to be recorded with the National Registry of Transfer of Technology under the penalty of unenforceability.⁵²

9. Toll Manufacturing (*Maquila*)

A foreign business may have a Mexican entity assemble or fabricate goods not intended for sale in Mexico. Any materials or components utilized in the process of manufacture or assembly will be either supplied directly by the foreign supplier or purchased by the local manufacturer on behalf of the foreign business. This agreement constitutes a *maquila* operation.⁵³

A *maquila* operation is one in which the manufacture or assembly of goods in Mexico is accomplished by using components and materials imported temporarily into Mexico. The finished goods are subsequently re-exported. Unbeknownst to many United States businesspersons, regulations do allow domestic sales in an amount not to exceed 150 percent of the value of exports generated if a positive balance of payments results from the *maquiladora*.⁵⁴ When a *maquila* operation sells goods into the Mexican market, the seller is required to pay import duties on the foreign components integrated into the finished product before it is sold to the local consumer.⁵⁵

10. Partnership Ventures

If the seller wants a permanent operation in Mexico, it can enter into a partnership agreement with a domestic manufacturer or seller who will manufacture or sell the foreign product in the Mexican market. Through a partnership agreement (*asociación en participación*)⁵⁶ a domestic company or individual becomes an *asociante*, who acts in its own name and need not disclose the participation of the other silent partner (*asociado*). *Asociados* transfer title to contributed goods to the *asociante*.⁵⁷ Any liability involving the goods falls on the Mexican *asociante*. Profits and losses from this transaction are shared by the

52. Transfer of Technology Law, art. 11.

53. For a description of rules governing the *maquiladora* industry, see Fuentes Moreno, *Mexican Law on In-Bond Processing Plants*, DOING BUSINESS IN MEXICO, 33-1 (1988).

54. *Decreto para el Fomento y Operación de la Industria Maquiladora de Exportación*, art. 20, D.O., Dec. 22, 1989.

55. *Id.*, art. 12.

56. GLCC, arts. 252-259. This business organization is analogous to a limited partnership under United States law.

57. If title is not actually transferred, but instead only certain benefits are transferred, this fact must be recorded in the Public Registry of Commerce of the *asociante's* domicile; otherwise, the goods may be deemed as owned by the *asociante*. GLCC, art. 257.

asociante and *asociado(s)*.⁵⁸ The ITL imposes a duty on the *asociante* to withhold income taxes payable by the *asociado*.⁵⁹ Normally, the *asociado* is not responsible for losses exceeding its contributions.⁶⁰

11. Mexican Sales Corporation

If acting as a silent partner in a Mexican business is not satisfactory to the foreign seller, it can establish a sales company. This company is formed under Mexican law to act exclusively for sales in the Mexican market. In this scenario, a company is formed under Mexican law, and probably separates the owners from liability exceeding their capital contribution. This can be done through a *sociedad de responsabilidad limitada* (SRL),⁶¹ which is a limited liability company, or a *sociedad anónima* (SA).⁶²

Different rules apply to formation and operations depending on the selected type of company. In the SA, stock is issued and is transferable by a simple endorsement. Corporate resolutions are governed by the principle of a simple majority vote. In contrast, the SRL does not issue stock. Instead, partners have a participation in proportion to their capital contributions. Decisions in an SRL are normally adopted by qualified majorities. Participation in this sales entity may be in either a minority or majority position.⁶³

(a) *Minority Shareholding*

Under current foreign investment regulations, a non-Mexican may own up to forty-nine percent of the capital stock of most Mexican corporations without seeking any specific approval from the FIC. Although the FIL requires approval when a non-Mexican purchases more than twenty-five percent of the capital of an existing company, FIC General Resolution Number 2⁶⁴ automatically grants approval for foreign participation up to forty-nine percent. Approval is required from the FIC in order to incorporate a company with majority or wholly-owned foreign participation, or to purchase the majority of stock from an existing

58. Absent agreement to the contrary, sharing is on a *pro rata* basis in proportion to each party's contributions.

59. ITL, art. 9.

60. GLCC, art. 258.

61. See GLCC, ch. V. This organization is intended mainly for close-ended corporations.

62. A *sociedad anónima* is regulated under ch. V of the GLCC. Its structure allows for public trading. Traditionally, SA's were preferred over all other companies (including SRL's) not only due to limited liability, but mainly because they could issue bearer shares. However, since 1983, SA's may only issue nominative shares.

63. Any foreign investment above 49% is legally deemed to be a majority interest and is subject to establishment and growth limitations and controls. FIL Regulations, D.O., May 16, 1989.

64. See *supra* note 30.

corporation.⁶⁵

Mexican law recognizes the possibility of including minority protection rights in the governing statutes of local companies. These rights constitute quasi-veto rights for the minority shareholders. Therefore, where company bylaws require a qualifying vote for a decision, the participation of the non-Mexican investor is required in order for the decision to be adopted.⁶⁶

(b) Majority Shareholding

In order to control decisions or ensure distribution of profits, a foreign seller may attempt to hold a majority or all of the shares of a Mexican company. Minority shareholders can assure themselves of return by pyramiding the investment,⁶⁷ providing different series of stock with different distribution rights, or engaging in transfer pricing.⁶⁸ Majority non-Mexican participation is available subject to commitments extracted or a favorable ruling by the FIC. Any company with non-Mexican shareholders must register with the National Registry of Foreign Investment.⁶⁹

To integrate a sales organization which meets the desired standards of the foreign supplier, a Mexican sales company can be combined with a distributorship, an agency, a license for trademarks, or a *maquila*. The final decision regarding establishing a Mexican company with the seller's participation in the capital must be analyzed under the tax regulations of Mexico and the seller's country. This is necessary because any profit

65. The FIL Regulations allow automatic incorporation to companies without a Mexican majority interest, and allow "demexicanization" of existing companies, provided: (i) new investment in fixed assets is made (new investment must equal at least 30% of existing net fixed assets); (ii) 20% of new investment is capitalized; (iii) the company maintains an aggregate positive balance of payments during the three year period after operations commence; (iv) employment is created and training is provided (no minimum guidelines are set); (v) "adequate" technology is used (as evaluated by the investor); (vi) industrial facilities are located outside the metropolitan areas of Mexico City, Guadalajara and Monterrey; and (vii) environmental laws are obeyed. FIL, arts. 5-7 and Transitory art. 6.

66. For an excellent analysis of the FIL before the new regulations were promulgated, see *I. Gomez Palacio, INVERSIÓN EXTRANJERA DIRECTA* (1985). The same author has recently published a new book on the FIL and Regulations, *LEY DE INVERSIÓN EXTRANJERA Y SU REGLAMENTO COMENTADOS* (1990), and an article on the subject in this issue. For an analysis of protection of minority rights, see E. SIQUEROS, *EL LLAMADO VETO DE LAS MINORÍAS EN LA SOCIEDAD ANÓNIMA* (1979).

67. "Pyramiding" is accomplished by a holding company owning "Mexican" shares representing 51% of the ownership. The foreign shareholder has 49% of the capital stock in this holding company. Therefore, the net foreign participation is effectively 73.99%. Additional holding companies can be established and tiers of ownership can be formed.

68. On transfer pricing, see *infra* notes 88-89 and accompanying text. If such a structure is intended to evade taxes, parties could be subject to criminal penalties under the *Código Fiscal de la Federación*, D.O., Dec. 31, 1981, art. 108 [hereinafter, Federal Fiscal Code].

69. FIL Regulations, § II, title VIII, arts. 42-79. Annual reports are also required.

transferred from the seller to the Mexican sales company will inevitably be taxed under the Mexican ITL.

IV. IMPORT CUSTOMS AND OTHER CONSIDERATIONS

A. Introduction

Like any sales transaction inside or outside the borders of a country, sales to Mexico may be made with provisions for delivery *ex works* at the manufacturer's facilities, free on board (FOB) at a port of the seller's territory, or FOB at either the manufacturer's facilities, the seller's facilities, or those of a transportation agent. Sales may be made cost, insurance and freight (CIF) invoiced by a seller within its borders, or as free along-side (FAS) for transportation by vessel to a Mexican port or other ports.⁷⁰ In the case of delivery of goods within its own borders, the seller will not be confronted with any customs requirements. However, it may need to obtain an authorization for the export of goods from its government if any restrictions are in effect.⁷¹

B. Delivery of Goods

When delivery is to be made within Mexico, the seller has two options.

1. Sales with Delivery inside Mexico

A seller may agree with the buyer or its local agent or representative to deliver goods inside Mexico. This may involve delivering them at a port of entry without clearing customs. Examples of such deliveries include delivering goods at a Mexican seaport, airport, or a Mexican border station. In these cases, the seller will be exempted from complying with any customs requirements under Mexican law. If the seller delivers goods elsewhere inside Mexico, the seller will face all of the legal requirements for importation of goods and payment of duties.

2. Sales with Delivery at Bonded Warehouses

Goods can be delivered closer to the facilities of the customer by delivering goods to one of many bonded warehouses. These warehouses,

70. For a precise description of these and other standard terms for delivery of goods, see International Chamber of Commerce, *International Rules for the Interpretation of Trade Terms: Incoterms (1980)* (I.C.C. Publication No. 350).

71. See Export Administration Act, 50 App. U.S.C. §§ 2401-2420 (1988); Trading with the Enemy Act, 50 U.S.C. §§ 1-44 (1988); Arms Export Control Act, 22 U.S.C. §§ 2751-2796d (1988); International Emergency Economic Powers Act, 50 App. U.S.C. § 2405 (1988).

referred to as *Almacenes Generales de Depósito*,⁷² are found in most Mexican cities. The warehouses will take delivery without requiring payment of import duties and taxes until the buyer actually withdraws the delivered products from the warehouse. A customer may withdraw the shipment of goods in whole or in part. This allows the customer to avoid paying his duties in a single payment which could strain its cash flow. Goods may remain in the warehouse for a one year period, with a one year renewal option.

C. Imports

1. Definite Imports

As previously mentioned, import duties have been lowered substantially since Mexico joined the GATT. In addition to import duties specified by the Import Duties Law,⁷³ other taxes must also be paid.

The value added tax⁷⁴ (VAT) is imposed on certain goods at a normal rate of fifteen percent. Luxury goods are subject to a VAT of twenty percent, while medicines and processed food are taxed at a rate of six percent. Basic foodstuffs are taxed at a "zero percent rate." Sales with the Mexican border areas are taxed at a flat rate of six percent.

If a seller agrees to deliver goods CIF at a Mexican customer's facilities in Mexico City, the seller must consider payment of the value added tax in addition to the costs of the product, insurance, and transportation. In addition to the VAT, a customs processing duty of eight-tenths of one percent is also assessed.⁷⁵ The importation of samples does not incur import duties.⁷⁶

2. Temporary Imports

A Mexican buyer may wish to import the products temporarily in order to integrate them into a final product. Companies with a *maquila* program are allowed to import into Mexico the materials, components, and equipment needed to manufacture their products without paying import duties. Mexican companies without a *maquila* program that only temporarily import such goods on a case by case basis may receive authorization for the importation of such products for up to two years.

72. *Ley General de Organizaciones y Actividades Auxiliares de Crédito*, D.O., Jan. 14, 1985, arts. 11-23.

73. *Ley del Impuesto General de Importación*, D.O., Feb. 12, 1988 [hereinafter, Import Duties Law].

74. *Ley del Impuesto al Valor Agregado*, ch. V, D.O., Dec. 29, 1978 (deals with value added tax on imported goods).

75. *Ley Federal de Derechos*, D.O., Dec. 31, 1981, as amended Dec. 28, 1989, art. 49 (assesses fee for customs processing).

76. Import Duties Law, *supra* note 73, art. II, rule 7(d).

This authorization depends on whether the imports are classified as components as opposed to machinery and equipment.

Under another program, a company may obtain registration for the temporary importation of goods for further export. These programs are also known as PITEX⁷⁷ or ALTEX.⁷⁸ Each program requires the importer to submit a performance bond granted by a local authorized company. The bond guarantees payment of import duties and penalties if the goods are not withdrawn from the country prior to the duration specified in the temporary import permit.

A reduced import duty may be imposed on temporary imports that are not subject to these special programs. This duty will be two percent of the otherwise applicable duty per month for the period the goods are in the country.⁷⁹ Additionally, a reduced VAT may be assessed when goods are imported temporarily, are to be returned in the same condition, and will be used for business purposes.⁸⁰

D. Import Restrictions

In the past three years, the Mexican government has eliminated most of the prior import restrictions that were a part of the very protectionist policies relating to the Mexican manufacturing industry base. Despite Mexico's membership in the GATT, a few restrictions still apply. Some of these restrictions include registration requirements. For example, constant traders must be registered with an "Importers and Exporters Registry" operated by the Ministry of Commerce.⁸¹

1. Bans

Some products are absolutely banned from entering Mexico. These products include certain automobiles, firearms, and ivory. Restrictions in this category tend to protect local industry and are now being reduced

77. *Decreto que Establece Programas de Importación Temporal para Producir Artículos de Exportación*, D.O., May 9, 1985, amended by *Decreto que Modifica el que Establece Programas de Importación Temporal para Producir Artículos de Exportación el 9 de Mayo de 1985*, D.O., Sept. 23, 1988.

78. This Program requires exports of at least \$3,000,000 or 40% of annual sales. *Oficio por el que se Hace del Conocimiento de las Dependencias y Entidades de la Administración Pública Federal, la Relación de Empresas Altamente Exportadoras*, D.O., Dec. 4, 1987, amended by *Oficio por el que se Actualiza la Relación de Empresas Altamente Exportadoras Publicada el 4 de Diciembre de 1987*, D.O., July 15, 1988.

79. *Ley Aduanera* [Customs Law], D.O., Dec. 30, 1981, art. 59.

80. Changes to the *VAT Law* for 1990, art. 28-A, require payment of a 5% tax per semester for the duration of the stay. *Maquila*, PITEX or other approved programs are exempted from this tax.

81. This registry is the *Registro Nacional de Importadores y Exportadores* and was established by the new Customs Law, art. 42.

or eliminated.⁸²

Another category of imports, such as paper and chemicals, merely require securing a prior import license from the Ministry of Commerce and Industrial Promotion.

2. Quotas

Quotas exist because of Mexico's internal policy or international agreements. For example, in the area of textiles, Mexico is authorized to import only textiles from countries participating in the Multifiber International Agreement.⁸³ In prior years, permits were granted to import a particular product under a specified quota. Goods under the quota were allocated among traditional importers and manufacturers by the Chambers of Industry or Commerce.

E. Harmonized Import Classification

A great step towards advancing Mexico's international trade was Mexico's adoption of the Harmonized Import Classification on July 1, 1988.⁸⁴ Under this program, imports are covered under the same classification number code that is in force in the exporter's country. Previously, products subject to classification for export purposes did not necessarily correspond to the same classification for import purposes under Mexican law. Disparities frequently arose among customs officials and importers over import classifications and the import duty.

F. Exchange Controls

The extremely rigid exchange control regulations which were enacted in 1982 are almost inapplicable today.⁸⁵ The remaining restrictions apply to *maquiladoras*, importation, exportation, and repayment of bank loans.

82. See *supra* note 14.

83. Mexico executed the MIA prior to participating in GATT on March 4, 1982. The current extension expires in 1991. Additionally, Mexico and the United States have a bilateral relationship under the Framework Agreement.

84. *Ley del Impuesto General de Importación* [General Import Tax Law], D.O., Feb. 12, 1988; *Reglas Generales y Complementarias para la Aplicación e Interpretación de la Tarifa del Impuesto General de Importación* [General and Complementary Rules for the Application and Construction of the General Import Tax Tariff], D.O., May 20-31, 1988 (explanatory notes).

85. Two publications are useful in understanding the system: S. Zamora, *Foreign Exchange Controls in Mexico*, DOING BUSINESS IN MEXICO (1984), and I. Gomez Palacio, *Mexico's Foreign Exchange Controls: Two Administrations-Two Solutions, Thorough and Benign*, 16 U. MIAMI INT'L AM. L. REV. 267 (1984).

A local importer of goods into Mexico may want to purchase foreign currency at the nominally lower "controlled" rate of exchange⁸⁶ on all imports of products into the country. To do this, the importer must register a *Compromiso de Uso o Devolución de Divisas* or Commitment of Use or Refund of Foreign Currency (CUDD). This registration sets forth the importer's obligation to prove that any currency it purchases will be applied to the price of the imported goods.⁸⁷

G. *Transfer Pricing and Degree of Linkage*

In 1978, the Mexican government enacted a law⁸⁸ which levied a tax on purchases made by Mexican companies from a seller where both the buyer and seller were related or under some degree of common control. The control could arise from a seller's participation in the capital stock of the buyer or otherwise. Although the law was repealed, its provisions were re-enacted by the Customs Law of 1981.⁸⁹ Therefore, all sales among parents and subsidiaries or among affiliates were, and continue to be, subject to this tax.

The Customs Law of 1981 requires a determination of the degree of control, calculated as a percentage. This percentage is used to determine the increase in taxes payable on the import of products. For example, a company that has an eight percent degree of linkage with the seller will be required to adjust the price of any products purchased from that seller by eight percent before determining the applicable import duties. Through this requirement, the Mexican government intends to counter transfer pricing practices in international trade.

H. *Export and Trade Balance Requirements*

Under a Program for Compensated Trade (*Programa de Intercambio Compensado*), certain products must be set-off by exports of equal or approximate value before they can be imported into Mexico. This program exists between Mexico and other countries, especially South American nations, in order to avoid actual transfers of foreign currency, and maintain Mexico's balance of payments.

86. After the passage of exchange controls in 1982, the differential between the "free market" and the "controlled" exchange rates were as high as 50%. Today, they approximate one and one-half percent.

87. See *Decreto de Control de Cambios*, D.O., Dec. 13, 1982; *Disposiciones Complementarias de Control de Cambios*, D.O., May 11, 1987.

88. *Ley de Valoración Aduanera de las Mercancías de Importación*, D.O., Dec. 27, 1978.

89. Customs Law, arts. 48-51.

I. Sanitary Registration

Food products, medicines, personal care products, or alcoholic beverages must be registered with the Mexican Ministry of Health prior to their commercial importation into Mexico.⁹⁰ Additionally, these products will be required to have a "counter-label" (*contraetiqueta*) attached before they are sold. This counter-label must provide information about the product, the seller, and the Mexican importer.⁹¹

After Mexico joined the GATT and opened its economy to foreign manufactured products without requiring import licenses, many abuses occurred with products bearing Mexican trademarks which were purchased abroad.⁹² The abuses arose when sellers marketed these products in Mexico without obtaining authorization from the trademark holder.⁹³ To prevent this situation, the Ministry of Finance and Public Credit, through the Customs Bureau, now requires any product bearing a trademark registered in Mexico to be authorized by the trademark holder before it can be imported.⁹⁴ Policing this situation is extremely difficult, and in practice, customs officials usually act only after a complaint is filed by a trademark holder.

K. Unfair Trade Practices

The GATT restricts "dumping" goods into the markets of a member country.⁹⁵ Dumping occurs when a seller sells goods on a commercial basis at a price lower than its normal domestic market price with the intention of eliminating competition in the market. To constitute dumping in Mexico, injury to at least twenty-five percent of the production must occur in the Mexican manufacturing sector. Over the last two years, Mexico has been acting swiftly on claims alleging unfair trade practices by foreign suppliers, and has been imposing countervailing duties for sellers found to be performing such practices. In some cases,

90. *Ley General de Salud*, D.O., Feb. 7, 1984 [hereinafter, Health Law], art. 204 (dealing with the importation of goods).

91. The counter-label requirement has been extended to all imported goods except those to be consumed by the importer, i.e., those that will not be traded. *Decree of the Ministry of Commerce and Industrial Promotion*, D.O., July 12, 1988. See also *infra* notes 107-108 and accompanying text.

92. On the question of intellectual property and the license of trademarks in Mexico, see H. Rangel Ortiz, *La Licencia de Uso de Marca como Sustitución del Propietario de la Marca*, UNAM (1986).

93. Most of the products bear labels belonging to multinational companies.

94. *Acuerdo que Prohíbe la Importación de Mercancías que Ostenten Ilícitamente Marcas Registradas en México* [Decree Prohibiting the Importation of Goods Illegitimately Bearing Trademarks Registered in Mexico], D.O., March 17, 1987. A licensee of the trademark in Mexico may also grant the authorization.

95. See Antidumping Code, *supra* note 10, and Regulations against Unfair International Trade Practices, *supra* note 9, and accompanying texts.

even though there have been instances of "dumping," no injury to the local producer has been found, and no duty was levied.⁹⁶

Investigations of dumping activities commence in accordance with the Foreign Trade Law⁹⁷ and its Regulations. While the investigation is proceeding, a temporary countervailing duty may be imposed. Thereafter, if dumping is found to exist, the duty is confirmed or adjusted. If no unfair practice or injury is found, the duty will be dropped. Contrary to the practices of other GATT members, Mexico does not impose duties in a retroactive manner since this would violate constitutional prohibitions on the retroactivity of legislation in administrative actions.⁹⁸

L. Tax

A seller of goods domiciled outside of Mexico will rarely need to be concerned with the assessment of income taxes by Mexican authorities.⁹⁹ But, in the following cases, provisions of the ITL will subject the foreign seller to Mexican income taxes.

1. Source of Income Concept

The Mexican ITL is based primarily on the concept of the source of income: When the source of profit is found within Mexico, it is taxed. A non-resident seller is subject to income taxes only where goods are sold on consignment or delivered to a bonded warehouse in Mexico. This tax is withheld at a rate of three percent of the value of the goods.¹⁰⁰

2. Permanent Establishment

A non-resident seller has a "permanent establishment" for purposes of the ITL when it has a representative in Mexico who is empowered to conduct business on its behalf, and the representative either (i) acts on behalf of the seller in executing sales contracts or (ii) has inventories of goods for delivery within Mexico. The effect will be to tax any income arising from these transactions as income received by a Mexican corporation; such income is subject to a tax of thirty-five percent on realized

96. One example of this is a claim submitted by a local subsidiary of a United States alkaline battery manufacturer against another United States competitor for dumping. The decision rendered indicated that the claimant did not foresee a decline in sales but rather an increase in sales in a growing market.

97. See *supra* note 8 and accompanying text.

98. *Constitución Política de los Estados Unidos Mexicanos* [CONST.], art. 14 (the first paragraph states that "No law shall be given retroactive effects in detriment of any person.").

99. See Tron, *supra* note 32, at 165.

100. ITL, art. 150-A. To determine the "value of the goods," use the higher value between the invoiced price and value for import duty purposes ("normal value"). This tax is payable jointly with import duties. In cases where there is no import duty, payment is made directly by the seller at the corresponding customs office.

profits.¹⁰¹

3. Branch or Domestic Sales Company

A seller acting through a branch or a Mexican company will pay income taxes on profit, which is calculated from income less allowable deductions. The tax rate will be thirty-five percent.

M. Currency Issues

1. Currency of Payment

If a seller receives payment outside of Mexico (normally at its main offices abroad), it usually will not encounter any exchange control restrictions on non-Mexican currency. In these cases, Mexican law allows such payments precisely as required under the contract.¹⁰²

2. Controlled Rate of Exchange

Under the terms of the Exchange Controls Regulations,¹⁰³ payments made within Mexico, including those denominated in a foreign currency, may be made by the Mexican buyer at the controlled rate of exchange. Although "controlled" and "free market" rates differ today only by 1.5 percent, these rates have been separated by a spread as much as fifty percent in 1982. Since the risk is still inherent in the transaction, many sellers require contracts which establish payment outside of Mexico in a foreign currency. Even in this case, the Mexican buyer will not be denied access to foreign currency. The buyer will be permitted to purchase such currency at the "controlled" rate from local banks by executing a CUDD, or agreement for application of currency, and thereafter demonstrating the importation of the merchandise in question.

N. Consumer Protection

A seller will be subject to any warranties, implied and express, granted to a distributor or sales representative in Mexico when its products are defective or unfit for a particular purpose. The Consumers' Protection Law¹⁰⁴ applies to foreign sellers that deliver in Mexico. If the product is found defective or unfit, this law requires that the product be replaced, repaired, or its price refunded. It also requires payment for any actual damages caused by the product. A consumer may seek relief

101. ITL, arts. 2 & 3. For 1990, as part of the "phasing-in" process of a new income tax system, the tax rate amounts to 36%.

102. See *infra* note 134 and accompanying text.

103. See *supra* note 87 and accompanying text.

104. *Ley Federal de Protección al Consumidor* [CPL], D.O., Dec. 22, 1975.

within sixty days after receiving the product from the local agent, distributor, or the foreign seller.¹⁰⁵ Furthermore, the mere use of the word "warranty" or "warranties" must be in accordance with certain guidelines.¹⁰⁶

Labeling must not be misleading as to the origin or qualities of the product. In addition, products imported into Mexico will require an attached counter-label disclosing information about the manufacturer and importer.¹⁰⁷ Various administrative decrees require legends disclosing additional information if textiles, electrical products, or leather articles are imported.¹⁰⁸

Imported products subject to official technical standards (*norma oficial*) under the law on Metrology and Normalization¹⁰⁹ must comply with the guidelines in order to be sold in Mexico. Noncompliance will subject the seller to fines and a prohibition on the sale of the product in question.

O. Immigration

The non-Mexican seller need not concern itself with immigration requirements unless it has a foreign representative travel to Mexico to promote its goods, staff a representative office, or manage a Mexican sales company. If such visits are intended, the seller should be aware of a strict Immigration Law¹¹⁰ which governs entry with business intentions into Mexico.¹¹¹

105. CPL, arts. 33 & 34.

106. A minimum two-month warranty is required. *Acuerdo por el que se Establecen las Bases Mínimas de Carácter General que Deberán Contener las Pólizas de los Productos y Servicios que se Otorgan con Determinada Garantía, a fin de Asegurar su Cumplimiento y Evitar Prácticas Engañosas a los Consumidores* [Decree Establishing Minimum General Terms that Warranties of Products and Services must Contain to Ensure Compliance and Avoid Misrepresentations to Consumers], D.O., May 4, 1976.

107. *Secretaría de Comercio y Fomento Industrial*, D.O., July 12, 1988. (This decree of the Ministry of Commerce and Industrial Promotion establishes the required contents of each product label. These requirements include information on the manufacturer, net contents, warnings on usage, instructions for handling of the product, and conservation and use of the product).

108. *Acuerdo por el que se Establece la Obligación de Acompañar Instructivos a los Productos Eléctricos* [Decree Establishing the Obligation to Attach Instruction Manuals to Electrical Products], D.O., July 1, 1977; *Acuerdo que Establece la Información que Deben Ostentar las Prendas de Vestir, las Telas y Demás Productos Textiles* [Decree Establishing Information Which must be Included in Garments, Cloth and Other Textiles], D.O., Nov. 22, 1982; *Acuerdo que Ratifica la Obligación de Indicar en las Pieles y Cueros Curtidos Naturales los Elementos que los Constituyen* [Decree Ratifying the Obligation of Indicating Elements in Furs and Natural Leather], D.O., June 19, 1972, amended by D.O., Dec. 1989.

109. *Ley Federal de Metrología y Normalización*, D.O., Jan. 26, 1988.

110. *Ley General de Población* [Immigration Law], D.O., Jan. 7, 1974.

111. See J. Castillo, *The Immigration Policy of Mexico and How it Applies in Actual Practice*, DOING BUSINESS IN MEXICO (1988).

1. Sporadic Visits

When a non-Mexican citizen travels to Mexico for a business purpose, he will need to obtain an authorization from immigration authorities prior to entry. This is a slow process. Most Mexican Consular offices abroad will often have a restricted policy for issuing business visas. On the other hand, other consulates have a more open policy and issue visas without much difficulty. Most representatives of foreign sellers elect to travel into Mexico as tourists.

United States citizens are rarely troubled at immigration points. When United States and Canadian citizens want to enter Mexico to conduct preliminary business negotiations in anticipation of executing a contract,¹¹² the General Immigration Services Bureau of the Ministry of the Interior allows entry with a tourist visa. However, any contract executed in Mexico requires the foreign seller's representative, if he is a non-Mexican citizen or resident, to be duly authorized to execute the contract. If he is not authorized to execute the contract, the contract is deemed unenforceable in Mexico.¹¹³

2. Permanent and Semi-Permanent Residents

A salesman or representative may staff an office in Mexico on a permanent basis or may anticipate frequent travel into Mexico. In both cases, special visas are necessary. These visas are required for non-residents¹¹⁴ and residents.¹¹⁵ The visa issued for non-residents is known as FM-3 and the visa issued for residents is known as FM-2. Restrictions will be imposed in the FM-2 visa for absences during one's residence.¹¹⁶

P. Corrupt Practices

Mexican law contains provisions similar to the United States' Foreign Corrupt Practices Act (FCPA).¹¹⁷ The FCPA restricts payments to

112. Internal Memorandum 7-M/82, April 5, 1982 (issued by the General Immigration Services Bureau of the Ministry of the Interior).

113. Immigration Law, arts. 66 & 67.

114. These non-residents fall under the category of "visitors" (*no-inmigrante visitante*). Authorization is valid for six months and renewable for an additional three periods. *Reglamento de la Ley General de Población*, D.O., Nov. 17, 1976 [hereinafter, *Regulations to the Immigration Law*], art. 99.

115. "Residents" are defined as those who intend to reside in Mexico for more than two years. As immigrants, these residents can occupy a "trusted" position (known as *cargo de confianza*). Their visas are granted for a one-year period and will be extended for five years. *Id.*, art. 117.

116. During the initial two years, residents may not leave the country for more than ninety consecutive days or a total of eighteen months. *Id.*, art. 47.

117. The text of the Federal Corrupt Practices Act can be found in 15 U.S.C.A. §§ 78a note, 78m, 78dd-1, 78dd-2, 78ff (1988).

government officials, political parties, or candidates when those payments are made to influence any act or decision, to obtain or retain business, or are made to third parties when it is known or should be known that the payment would be passed on to officials. The Mexican Criminal Code also outlaws payments to officials for the purposes of retaining or procuring business. Under some interpretations, the FCPA allows for "facilitating" or "grease" payments to government officials in order to accelerate performance of their duties. A traditional example of this is paying a customs official in order to allow for swift processing of documents. Mexican law *does not recognize such an exemption*, and therefore, even facilitating payments will be penalized.¹¹⁸

Q. Antitrust

A seller residing abroad will not encounter problems with antitrust legislation when selling goods to Mexico. This is true even when exclusive agents or distributors are appointed for certain areas of the country.

The seller is subject to the antitrust laws if it enters into agreements with other suppliers of goods, within or outside of Mexico, to restrict the access of products or to gain any other unfair advantage to the detriment of the Mexican consumer.¹¹⁹ Although the Mexican Supreme Court has not ruled on the subject, most authors believe exclusivity arrangements will be recognized if they are specific and apply to a certain territory.¹²⁰ Some authors also believe that a specified term of the exclusive appointment is required.¹²¹

V. STANDARD PROVISIONS OF A SALES CONTRACT

The structure and specifics of sales contracts will naturally differ with the practices of each seller. However, certain provisions will, by the nature of a sales contract, be included in all contracts in order to clearly define the intentions and obligations of the parties. Mexican law merely requires the identification of the material object of the contract (the goods to be sold), the determination of the price or basis for its determination, and an agreement between the parties.¹²² Other aspects of the relationship between the seller and the buyer, such as time for transfer of

118. Criminal Code for the Federal District [hereinafter, C.P.D.F.], art. 22. This provides for a maximum of fourteen years imprisonment in addition to a fine of a maximum of 500 times the salary for the Federal District (currently this is approximately \$4.00 per day), depending on the amount involved. *Id.*

119. *Ley Orgánica del Artículo 28 Constitucional en Materia de Monopolios*, D.O., Aug. 31, 1934.

120. See GARGOLLO, *supra* note 37, at 182.

121. *Id.* at 186.

122. C.C.D.F., art. 2249. The use of foreign currency will be considered a sale and not a

title, delivery of goods, or payment of the price, are governed in a supplementary manner by the commercial and civil regulations.¹²³

A. Obligations of the Seller

Under a sales contract, a seller has two basic obligations. These are the obligations to transfer title and to deliver the goods.

1. Transfer of Title

Determination of the time when title to the goods passes from seller to buyer is of key importance in both Mexican and United States law. Title determines who suffers the risk of loss during transportation prior to the purchaser's receipt of physical or legal possession of the goods. Mexican law provides that if the seller and buyer have failed to agree on the particular time when the property will be transferred, ownership will pass upon execution of the contract where the goods are identified.¹²⁴

When goods are unidentifiable (such as bales of cotton or grain), title does not transfer until the quantities or types of goods are specifically designated. For goods that are deposited at a bonded warehouse (*almacén general de depósito*), title passes by mere endorsement of the certificate of deposit issued by the warehouse.¹²⁵

Where the price of the goods is not paid immediately, the seller and buyer may agree that the goods will be delivered to the buyer, but, the buyer will not obtain title until final payment is made. Mexican law recognizes these transactions as sales with a reservation of ownership (*ventas con reserva de dominio*).¹²⁶ However, in order for the ownership provision to be enforceable, the contract must be recorded in the Public Registry of Commerce in the domicile of the buyer.¹²⁷ Furthermore, as part of

barter (*permuta*). This is true even though standard practice and the Exchange Controls Regulations do not deem it to be currency *per se* in the terms of the Currency Law. *Ley Monetaria*, D.O., July 27, 1931, art. 8; *see supra* note 91 and accompanying text.

123. For rules on Mexican contractual law, see A. Gargollo, *supra* note 37, Diaz Bravo, *supra* note 39. *See also* ROJINA VILLEGAS, *DERECHO CIVIL MEXICANO*, vols. VI & VII (1986), and R. SANCHEZ MEDAL, *DE LOS CONTRATOS CIVILES* (1986). For a more international perspective, see Sanders, *Trade Agreements: Selected Issues for Negotiating Terms: Including Issues of Payment, Countertrade, and the Use and Application of the International Sales of Goods Convention*, *NEGOTIATING AND DRAFTING INTERNATIONAL COMMERCIAL AGREEMENTS* (1986).

124. *See supra*, note 122, arts. 2014 & 2015.

125. Rules on transfer of *certificados de depósito* are the same as those applicable to other negotiable instruments. *Ley General de Títulos y Operaciones de Crédito* [General Law on Negotiable Instruments and Credit Operations], D.O., Aug. 27, 1932 [hereinafter, LGTOC], arts. 229-251. Bearer endorsements are not permitted. *Id.*

126. C.C.D.F., art. 2312.

127. The transfer is accomplished for income and value-added tax purposes from the date of execution, and taxes are payable as of such date. Federal Fiscal Code, *supra* note 68 at art. 14.

this duty to record the contract, the seller must issue to the buyer an invoice or other documentation evidencing the transfer.

2. Delivery of Goods

The delivery of the goods sold includes four delivery requirements or obligations on behalf of the seller. These are obligations to deliver at the correct time, at the correct place, in the correct quantity, and in the correct quality.

Failure of the parties to agree on the time of delivery will impose an obligation on the seller to place the goods at the disposal of the buyer within twenty-four hours after execution of the contract.¹²⁸ Failure to agree on a place of delivery allows the seller to deliver the goods at the place they are located at the time of the sale or the seller's domicile.¹²⁹ Failure to deliver the goods in full quantity allows the buyer to object to partial delivery; however, if the goods are accepted, the price is reduced *pro rata*.¹³⁰ If the agreement does not specify the quality of the product, the seller should consider the purpose for which the goods are intended. If the purpose is not known, the seller can provide goods of average quality.¹³¹

Failure by the seller to meet the delivery requirements allows the buyer to rescind the contract, reject the goods, return them to the seller, and demand payment of damages and lost profits.¹³²

B. Obligations of the Buyer

The buyer has two obligations: To pay the price and take delivery of the purchased goods.

1. Payment of the Price

Customarily, the price for foreign goods sold into Mexico is denominated in a foreign currency. Usually, the price is stated in United States dollars or in the seller's own currency. As indicated above,¹³³ it is of the utmost importance, from the seller's point of view, that the contract clearly state that the price is to be paid precisely in the agreed upon currency. If this is a non-Mexican currency, the contract should state that the payment will be made outside of Mexico.

128. COM. C., art. 379.

129. C.C.D.F., arts. 2082, 2291.

130. COM. C., art. 375.

131. *Id.*, art. 87.

132. *Id.*, art. 376; C.C.D.F., art. 1949. The parties may stipulate at the time the contract is made to the liquidated damages (*pena convencional*) in lieu of any other compensation. *Id.*, art. 1840.

133. See *supra* note 90 and accompanying text.

Methods for payment include cash, letters of credit, or an open account.¹³⁴ If there is no agreement regarding payment, Mexican law provides for payment in cash with immediately available funds.¹³⁵

(a) *Cash in Advance or Against Delivery*

Payment in cash includes payment by means of a check, money order, cashier's check, and any other method of providing the seller with immediately available funds. If an instrument is not honored due to a lack of funds, the General Law on Negotiable Instruments and Credit Operations stipulates that payment is made *subject to collection* of the instrument.¹³⁶

(b) *Letter of Credit*

When payment is made under a letter of credit, the payor bank makes the funds available to the seller upon the seller's presentation of certain documents. These documents will usually include a bill of lading, an invoice, and other documents chosen by the parties such as an insurance policy or export permit. These documents will prove shipment of the goods at the stipulated time, to the specified place of delivery, and in the requested quantity. Unless required documentation attests to the quality of the product delivered, the payor bank will not verify, nor will it be obligated to verify, the quality of the products shipped or delivered.

Mexican laws contain a few provisions governing letters of credit. For international trade, most commercial letters of credit incorporate the International Chamber of Commerce's Uniform Customs and Practices for Documentary Credits.¹³⁷ A letter of credit might be irrevocable if payor banks may not cancel credit for a stated term. It may be confirmed by a financial institution in the domicile of the seller. Of course, the most secure method of payment for the seller is an irrevocable letter of credit confirmed by a domestic institution. Mexican banks can provide letters of credit and certain Mexican banking institutions have representative offices or agencies in the United States.

(c) *Credit to the Buyer*

When the buyer is unable to pay in cash and has no credit available, or when a seller is promoting its goods, the vendor may grant the buyer

134. For an excellent and clear discussion, see CLASEN, FOREIGN TRADE AND INVESTMENT: A LEGAL GUIDE (1987).

135. COM. C., art. 380.

136. LGTOC, art. 7, *Salvo buen cobro*.

137. I.C.C. No. 400 (1983).

an open account for payment of the price. In this case, the seller undertakes the risk that the buyer cannot pay for the goods. Although this risk may be minimized, it cannot be eliminated.

Methods of evidencing the debt, aside from drawing the invoice issued by the seller, include execution of a contract providing for deferred payment (*venta con reserva de dominio*).¹³⁸ However, the simplest document that can prove acknowledgement and obligation to pay is a negotiable instrument such as a *letra de cambio* or a promissory note (*pagaré*). Whereas a *letra de cambio* may not provide for interest,¹³⁹ a promissory note permits both ordinary and penalty interest.¹⁴⁰ Failure to provide interest allows for penalty interest at a rate of only six percent.¹⁴¹

The seller may also find a more secure means of securing the buyer's obligation to pay the price in addition to selling with *reserva de dominio*. Common ways of guarantying obligations which are recognized in Mexican law include mortgages, chattel mortgages on movable goods, performance bonds, joint obligations with a third party, or pledges on stock. A mortgage and chattel mortgage will require registration at the Public Registry of Commerce for the region where the goods are located or the domicile of the grantor.¹⁴² A pledge on stock issued to a non-Mexican by a Mexican corporation previously required, under the penalty of unenforceability, registration with the National Registry of Foreign Investment. This is no longer required under the new Regulations to the Foreign Investment Law.

Unsecured credit subjects the seller to the normal risks of collection.¹⁴³ A simple invoice serves as a method of evidencing the debt. However, a negotiable instrument allows swift collection and simple transferability of the debt by means of an endorsement.¹⁴⁴

2. Take Delivery of Goods

Just as it is important for the buyer to have the seller deliver the goods, it is equally important to the seller for the buyer to take delivery

138. See *supra* notes 111-112 and accompanying text.

139. LGTOC, art. 78.

140. *Id.*, art. 174.

141. COM. C., art. 362.

142. C.C.D.F., arts. 2312 & 3069 (contains regulations to the Public Registry of Property). See D. Furnish, *Mexican Law on Secured Transactions*, DOING BUSINESS IN MEXICO (1988).

143. Under the Bankruptcy Laws, unsecured creditors for commercial trade will take priority over unsecured civil creditors, but will be subordinate to secured creditors and tax and labor obligations. *Ley de Quiebras y Suspensión de Pagos*, D.O., April 20, 1943, art. 261.

144. A negotiable instrument will be subject to an executive judgment (*acción ejecutiva*). This presumes the *prima facie* validity of the debt and allows goods to be secured through attachment at time process is served.

of the goods. In a contract for delivery of goods *ex works*¹⁴⁵ the seller's plant, the seller is burdened if the buyer does not clear the goods within a certain time. Not only do undelivered goods take up space needed for other goods, they may subject the seller to certain costs of conservation and risks of destruction, loss, or spoilage. Failure of the buyer to take delivery of the goods releases the seller from its obligation to indemnify the buyer in case the goods are lost at the seller's facilities. However, the seller's obligation is not released if the loss is due to the seller's negligence, in which case the seller is considered a simple depository.¹⁴⁶

C. Termination and Rescission of the Contract

1. Expiration

A requirements contract will terminate upon expiration of the stipulated term unless it provides for automatic extensions. Extensions may result from action or inaction of one of the parties.

2. Unilateral Termination

Even if a contract has a certain fixed duration, Mexican law allows the seller to terminate the contract at any time by paying the actual damages suffered by the agent. These damages provide protection for both parties, such as in agency contracts, where the agent does not have an action for strict performance but may recover his damages.¹⁴⁷

3. Rescission by Default

A breach of contract allows the innocent party to rescind the agreement in certain cases, regardless of whether it is a distribution, agency, or a simple sales contract. Mexican law and courts recognize the right of the innocent party to rescind a contract without prior court action if this right is explicitly provided for in the contract.¹⁴⁸ In cases where the contract is silent on the subject, Mexican courts have not accepted the right of the aggrieved party to unilaterally terminate the contract. Instead, they have required that the party demand, through the courts, the termination of the contract and payment of damages and lost profits.

Mexican law only recognizes actual provable damages suffered and

145. For this and other terms of international trade, see GUIDE TO INCOTERMS, International Chamber of Commerce Publication No. 354 (1980).

146. COM. C., art. 377.

147. See *supra* note 45 and accompanying text. The principle also applies to other contracts involving similar fiduciary relationships.

148. C.C.D.F., art. 1949. This clause is known as *pacto comisorio expreso*.

actual lost profits as grounds for compensation claims.¹⁴⁹ "Moral" damage to a victim's reputation or his standing in the community may also be compensated.¹⁵⁰ Penalty damages are not recognized or accepted. However, in the contract, the parties may freely stipulate an amount of liquidated damages in the event of default.¹⁵¹ The only limitation on a liquidated damages provision is that it may not exceed the value of the principal obligation.

D. Substantive Law Applying to the Contract

Mexican law provides principles of conflict of laws dealing with contracts.¹⁵² In a contract for the sale of goods, Mexican law recognizes a valid choice of law made by the parties, provided the selected forum has a nexus with the seller, the buyer, or another term of the contract such as the place of delivery or manufacture.¹⁵³

Failure to specify a choice of law in the agreement will probably create a conflict. If both parties reside and carry on business in countries which have adopted the Convention on Contracts for the International Sale of Goods, its rules will apply. If the Convention is inapplicable, Mexican law will be applied to substantive issues if the obligation contemplated in the contract is to be performed in Mexico.¹⁵⁴

E. Settlement of Disputes

If a conflict arises between the parties under a contract, a Mexican court may hear the dispute. However, the parties can clearly specify in advance their desire for jurisdiction in case of a dispute. Although the applicable rules depend on the particulars of the contract and its applicable law,¹⁵⁵ it is always advisable for the parties to state in the contract the jurisdiction upon which they have agreed. Settlement of the disputes may involve litigation or arbitration.

1. Adjudication of Disputes

If Mexican courts adjudicate the dispute, a judgment is binding on the parties despite the seller's residence abroad. However, if the parties

149. *Id.*, arts. 2108-2110. Damages and lost profits are recognized only when they are a direct and immediate consequence of the default.

150. *Id.*, art. 1916.

151. *Id.*, art. 1840.

152. See BAYITCH & SIQUEIROS, *CONFLICTS OF LAWS: MEXICO AND THE UNITED STATES* (1968).

153. See *supra* note 146, arts. 12 & 13.

154. *Id.* The laws of the domicile apply to the issue of legal capacity to execute a contract. The form of the contract depends on the state where the contract was executed.

155. See Vazquez Pando, *Mexican Law on Judicial Competence in International Sphere*, 12 HOUS. J. INT'L L. 337 (1990).

specify that a court outside of Mexico has jurisdiction over the case, Mexican law still governs the enforcement of a judgment rendered by foreign courts. This foreign judgment is enforceable as long as the request for enforcement meets the following requirements:¹⁵⁶

- (a) A letter rogatory from the foreign court requesting the enforcement of the judgment is provided.
- (b) The judgment was not rendered as a consequence of a claim based on a "real" right (such as ownership of real estate).
- (c) The court issuing the judgment is competent to take cognizance of and adjudicate the matter.
- (d) The defendant was duly notified in person in order to assure it the right to appear before the court and exercise its rights. This can be accomplished through personal service of process.
- (e) The judgment is a final judgment without a right to appeal.
- (f) The action giving rise to the judgment is not the subject of another lawsuit pending before the same parties in Mexican courts.
- (g) The obligation on which the claim was based is not contrary to the public order of Mexico.
- (h) A certified copy of the judgment is issued by the foreign court.
- (i) Documentation or certificates evidencing that the conditions mentioned under subsections (d) and (e) above are provided.
- (j) The documents are translated into Spanish by a duly authorized local translator. And,
- (k) The person requesting the execution has indicated a domicile in Mexico for the receipt of notices.

2. Arbitration

The parties may use arbitration to settle disputes if they desire (1) to appoint an impartial individual or panel of experts in the field, (2) to appoint an impartial individual or panel to decide the conflict in a short period of time, or (3) to avoid the high cost and exposures of litigation. Naturally, selection of arbitration may be made at the time the contract is executed by an arbitration clause (*cláusula compromisoria*) or thereafter by means of an arbitration agreement.

The arbitrator may be appointed to act in accordance with recently

156. Code of Civil Procedure for the Federal District, ch. 7, Title VII, arts. 604-608. This Code was recently amended in order to clearly set forth requirements for enforcement. See Siqueiros, *Enforcement of Foreign Civil and Commercial Judgments in the Mexican Republic*, 2 HOUS. J. OF INT'L L 375 (1980). See also, Siqueiros, *La Cooperación Procesal Internacional*, 19 JURÍDICA 3 (1988-89).

updated Mexican arbitration legislation.¹⁵⁷ Alternatively, the rules of procedure for the arbitration may be those of an international body, such as the International Chamber of Commerce, or the Inter-American Arbitration Commission. The rules of the American Arbitration Association may also be used.

The arbitration award is enforceable in Mexico under the terms of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Mexico adhered to this Convention in April 1971 and enacted it shortly thereafter.¹⁵⁸ Mexico is also a party to the Inter-American Convention on International Commercial Arbitration of 1975.¹⁵⁹ Requirements for enforcement are similar to those for the enforcement of judgments rendered by foreign courts.¹⁶⁰

V. CONCLUSION

An excellent opportunity exists for trade with Mexico. This is evident not only from encouraging trade figures, but also from liberalized rules on imports. The Mexican government is aware of the importance of encouraging such international trade through international rules and cooperation. A knowledge of the aforementioned Mexican laws and regulations, created in light of this awareness, will allow sellers to proceed with greater confidence in the Mexican market.

157. The arbitration process and enforcement of commercial awards is regulated by COM. C., arts. 1415-1437, as amended, *Decreto por el que se Reforma, Adiciona y Deroga Diversas Disposiciones del Código de Comercio*, D.O., Jan. 4, 1989.

158. *Decreto por el que se Promulga la Convención Sobre el Reconocimiento y la Ejecución de Sentencias Arbitrales Extranjeras* [Publication Decree of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards], D.O., June 22, 1971.

159. *Decreto de Promulgación de la Convención Interamericana Sobre Arbitraje Comercial Internacional* [Publication Decree of the Inter-American Convention on International Commercial Arbitration], D.O., April 27, 1978.

160. Mexican federal courts allow personal service to be made according to the terms of an arbitration clause, by agreement, or by the rules of the selected arbitration body. Therefore, formal process through the Mexican court system may be unnecessary. See *Presse Office S.A. v. Centro Editorial Hoy, S.A.*, extract in *DOING BUSINESS IN MEXICO*, F-4. J. Siqueiros, *Resolution of Commercial Disputes: Enforcement of Foreign Arbitral Awards in Mexico*, *DOING BUSINESS IN MEXICO* (1988).