

**TRADING UNDER THE  
LAWS OF MEXICO**

**U.S. DEPARTMENT OF COMMERCE  
BUREAU OF FOREIGN AND DOMESTIC COMMERCE**

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Augustus T. Marrenison, *Director*

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# TRADING UNDER THE LAWS OF MEXICO

BY

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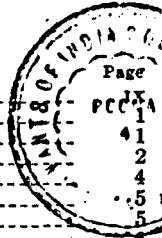
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## FOREWORD

In many respects, the operations of foreign trade are much more complicated than domestic transactions. The problems involved are more than intermediate difficulties arising from national boundary lines, taking the form of differing currencies and trade barriers. There is also the necessity of adapting business methods to different cultures. Among the factors requiring special consideration in dealing with any foreign country is its legal structure. In some instances, the basic law follows the same outlines as our own. However, in those countries whose legal system takes the form of civil law rather than common law, the need for detailed information if trade is to be carried on intelligently and profitably, is particularly marked.

The present study of the legal framework surrounding commercial transactions in Mexico is of special significance, for basic changes have recently been made there. A new Civil Code, in effect in the Federal District and adopted by several States, has introduced material changes in fundamental contract law. It now liberalizes the exceedingly strict regulations governing the execution and use of powers of attorney and encourages the extension of credit by legalizing conditional sales. An income-tax law not only completely changes existing rates but alters the method of assessing the tax. A new law governing bills of exchange and negotiable and other credit instruments facilitates and clarifies the use of these documents which are so necessary to foreign trade. Likewise, a new law of communication, regulating both transportation and communication, more definitely defines the rights and liabilities of carriers and shippers.

Mexico is at present our most important export market to the south. During 1933, Mexico took approximately \$37,500,000 worth of our merchandise, compared with \$36,900,000 shipped to Argentina and \$29,700,000 to Brazil, our next best Latin American markets. However, Mexico in 1933 only ranked fifth among the countries of that area as a source of United States imports, being surpassed by Brazil, Cuba, Colombia, and Argentina. Our imports from Mexico in that year were valued at \$30,716,000.

General business conditions in Mexico have been rather steadily on the upgrade since the middle of 1932. The last crop season was favorable, and agricultural production is being stimulated by the credit policy of the Government. During the last 2 years Mexico has become practically self-sufficient in wheat, flour, and eggs, and has greatly reduced her imports of butter. There has been considerable expansion in manufacturing, which now occupies an important place in the national economy. Reports indicate that the principal manufacturing industries had a prosperous year during 1933 and were still doing well up to the time this bulletin went to press. Mining prospects have been somewhat improved by the higher price of metals.

At the beginning of 1934 the Government launched a 6-year plan of economic reconstruction, which calls for an extensive program of public works, particularly in connection with highways, irrigation, sanitation and water supply, housing, and railway and port construction. Private construction also has been more active than for many years.

This combination of improved business conditions, foreign trade volume and far-reaching changes in basic law makes exceedingly timely the publication of this study. The purpose of this publication is not only to provide a handbook for lawyers, but to provide a legal background upon the basis of which the export executive may intelligently consider his Mexican policy and problems, and note the sign posts which will enable him to skirt legal pitfalls and be forewarned of legal difficulties. The protective measures to be adopted in each instance are for the exporter's counsel, who then may forestall them and not be relegated to the position of endeavoring to extricate the exporter from a legal situation made difficult by the lack of proper precaution.

This study contains not only information which will enable the exporter more intelligently to shape his export policy and design his export machinery, but also information concerning many specific problems that may arise. For the lawyer it is a convenient reference book which will assist him materially in answering many of the problems presented to him, and also a valuable guide in briefing many of the more difficult and less common problems that may arise in the course of his practice.

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*Bureau of Foreign and Domestic Commerce.*

JUNE 1934.

# TRADING UNDER THE LAWS OF MEXICO

## I. INTRODUCTION

The Republic of Mexico is a federation of 28 States, the territories of Northern and Southern Lower California, and the Federal District, in which is included the capital and principal city of the country, Mexico City.

According to the Constitution of 1917 the Federal Government of Mexico is divided into three branches, namely, the executive, the judicial, and the legislative. The first consists of a President elected by popular vote for a term of 6 years and a cabinet of Secretaries appointed by him to head the following departments (see p. 4):

Secretaría de Relaciones Exteriores (Department of Foreign Relations).  
Secretaría de Hacienda y Crédito Público (Department of the Treasury and Public Credit).

Secretaría de Agricultura y Fomento (Department of Agriculture and Fomento).

Secretaría de Guerra y Marina (Department of War and Navy).

Secretaría de Gobernación (Department of Government).

Secretaría de Comunicaciones y Obras Públicas (Department of Communications and Public Works).

Secretaría de Educación Pública (Department of Education).

Secretaría de la Economía Nacional (Department of the National Economy).

Departamento de Salubridad Pública (Department of Public Health).

Departamento del Trabajo (Department of Labor).

Departamento Agrario (Agrarian Department).

The legislative branch consists of a House of Representatives, the members of which are elected, 1 for every 60,000 inhabitants or fraction thereof exceeding 20,000, for 3 years, and a Senate consisting of 2 members from each State elected by popular vote for 6 years. These bodies meet annually on September 1 in regular session which may not extend beyond December 31 of the same year. The President may summon them to meet at any time in special session.

The judicial power is vested in a Supreme Court of 16 "ministros" elected for life by Congress, and circuit and district courts whose judges are appointed by the Supreme Court for a term of 4 years.

## CODES IN FORCE

In order that the codification and operation of Mexican commercial law may be understood more readily it is well to examine briefly certain historical aspects surrounding it. The Ordenanzas de Bilbao, a compilation of commercial rules and regulations enacted by the city of Bilbao, Spain, were in force in Mexico during the Spanish regime and subsequently until 1884. In 1854 a Code of Commerce known as the "Código de Lares" went into operation, but it was annulled shortly thereafter and the previous legislation reenacted.

The Mexican Constitution of 1857 empowered Congress to promulgate mining and commercial codes for the whole nation. Under this authority the Code of Commerce of 1884 was enacted, to be succeeded 5 years later by another which is in effect today. The Constitution of 1917 not only did not revoke the authority to legislate concerning these matters, but increased it to include institutions of credit and the sole bank of issue.

Congress, which is authorized to legislate for the Federal District and territories, enacted the Civil Code of 1884 for these jurisdictions. This constitutes the basic fundamental law in force, applicable even to commercial matters whenever they are not specifically covered by commercial legislation. The code was substantially adopted by all the various States, the power of these jurisdictions to legislate on the matter not having been specifically surrendered to the central Federal Government. Mexican law, therefore, is uniform as regards commercial matters; with respect to the civil, substantial uniformity had been achieved until 1932, when a new Civil Code went into operation in the Federal District and territories. The various States, with the exception of Veracruz, Queretaro, San Luis Potosi, and Coahuila, have not promulgated this code, but the tendency is toward its adoption throughout the nation in due course of time.

Substantial uniformity exists in Mexico insofar as procedure in litigation involving civil matters is concerned. Each State has adopted its own rules, while Congress enacted a new "Code of Civil Procedure for the Courts of the Federal District and Territories," in 1932, and promulgated the "Federal Code of Civil Procedure" for the Federal courts in 1908. Litigation involving commercial acts and contracts is governed by the Code of Commerce; the corresponding procedure, therefore, is uniform throughout Mexico.

In addition to these codes and several others of no immediate concern to the matters herein treated unless expressly mentioned subsequently, several special laws in force in Mexico merit the consideration of traders in general in the formulation of the policy to be followed and manner of conducting their export trade in Mexico. Mention of this legislation and a brief discussion of its nature and effect is made in this bulletin.

### CONFLICTS OF LAWS

Whenever the rights and obligations flowing from commercial or other acts and transactions transcend the border of a single jurisdiction it is often difficult to determine which law is to govern, and, in many cases, it is found that the laws of more than one jurisdiction will apply—such as those of the place of making of the transaction, the place of performance, and the place where redress is sought. The problem is known in the United States generally as one of conflicts of laws, and special so-called "conflicts rules" have been devised in order to assist in arriving at a solution of these problems. In civil law the term more commonly used is private international law.

As a general rule, the court at the place where a commercial controversy is litigated applies the "conflicts rules" of that jurisdiction

whenever the contest is one of conflicts of laws; this is true in Mexico. Since the American exporter will find it necessary, in most cases where resort to litigation becomes necessary, to sue Mexican customers in the courts of their jurisdiction, and since the tendency has been, where the claim is presented by the Mexican resident against an American trader, to file it at the same tribunal, such traders should possess at least a conception of what the Mexican rules on conflicts of laws are. With such information they may be able to ascertain to some extent when the laws of their own jurisdiction and when those of Mexico will apply to transactions to which they are parties.

In Mexico, rules on conflicts of laws are contained in the civil codes except in certain instances, notably under the new law of negotiable instruments; wherever such instances arise, special mention is made hereinafter if considered important to international trade; otherwise the rules that follow will govern problems of conflicts in general.

Under the Civil Code of 1932, Mexican laws, including those on status and capacity of persons, govern the inhabitants of Mexico, whether they are Mexican citizens or foreigners, and whether domiciled in Mexico or temporarily resident there. This means that the ability or capacity to enter into commercial obligations, acts, contracts, or other transactions by American business persons going into Mexico, even for a limited time, is governed by Mexican law (the pertinent rules are discussed on p. 17). The effect of acts and contracts entered into in the United States to be performed in Mexico are also governed by Mexican law; however, as regards the form in which a contract, act, or other transaction is evidenced, the law of the place where it takes place governs. Under these rules the Mexican courts will recognize the form of an act or obligation if it conforms to the requirements of the place of making; however, as to the meaning of the contents and interpretation of its various clauses Mexican law will be applied. Even as to requirements of form, Mexican law, in actual practice, is stricter than this rule would seem to indicate, to the extent that in the preparation of such instruments as powers of attorney it has been considered advisable to conform so far as possible to the form prescribed by Mexican law. Real estate and personal property situated within the jurisdiction where the Civil Code of 1932 is in force is governed by that code even though owned by foreigners. The extent to which this rule will be applied is not indicated by the code but in accordance with well-established principles of private international law, practically every act or transaction affecting such property must conform to the law of their situs.<sup>1</sup>

Under the Civil Code of 1884 there exists a substantial difference in the conflicts rule as to rights and obligations arising out of contracts and wills drawn abroad to be performed in Mexico. In such case the grantor is free to elect the law governing the internal solemnity of the act when the matter involved is personal property. Under this rule it appears that the parties to commercial transactions may stipulate therein the law which is to govern the rights and obliga-

<sup>1</sup> Civil Code, 1932, arts. 12, 13, 14, and 15.



tions flowing from the act, at least as regards its interpretation, nature, and extent, but not when real estate is the subject of the transaction. Under this code, the law of the place of making governs the form and external solemnities of contracts, wills, and any public document, whereas the rule under the code of 1932 omits "external solemnities" and limits the extent of the rule to matters of form.<sup>2</sup>

#### EXECUTIVE POWER: RECENT LEGISLATION

In addition to the Federal offices mentioned on page 1, the law governing "Secretarias" and Administrative Departments includes the Department of Military Manufacturing Establishments and Supplies, the Department of the Federal District, and the "Procuraduría General" (Attorney General's Office). This law defines in detail the jurisdiction and activities of each branch of the Federal Executive power. Each "Secretaria" is headed by a Secretary appointed by the President while the "Departamentos" are separate offices presided over by Chiefs of Departments.<sup>3</sup>

<sup>2</sup> Civil Code, 1884, arts. 12, 13, 14, 16, and 17.

<sup>3</sup> Law of Mar. 22, 1934.

## II. MERCHANTS AND THEIR COMMERCIAL ACTS

The tenth clause of article 73 of the Mexican Constitution of 1917 empowers the Federal Congress to legislate in all matters relating to commerce. This authority existed under the Constitution of 1857, in the exercise of which the Code of Commerce of 1889 was enacted and is in force today throughout Mexico. According to this code merchants are (1) persons who, having legal capacity to engage in commerce, make of it their ordinary occupation, (2) domestic companies organized according to law, and (3) foreign companies, or their agencies or branches, which engage in commerce within the Republic.

### LEGAL CAPACITY TO ENGAGE IN COMMERCE<sup>1</sup>

Article 4 of the Constitution of 1917 guarantees individual liberty to engage in commerce, which liberty cannot be withdrawn except by judicial order when rights of third persons are infringed or by executive order when the rights of society are violated. Article 28 forbids the creation of monopolies (except certain Government functions and rights of inventors) and exemption from taxation.<sup>2</sup>

This freedom to engage in commerce is limited, because of the fact that commerce necessarily implies civil acts and contractual obligations for which juridical capacity is essential. This capacity is defined by the Code of Commerce in articles 5 to 16. It is provided therein that every person who is capable of contracting and binding himself according to the ordinary laws, and who is not expressly prohibited by said laws from following a commercial occupation, has legal capacity to enter into same. Minors over 18 years of age who have been emancipated, declared of age, or who have obtained authority from their parents or guardians may engage in commerce, being considered of full age as regards such activities. A married woman engaged in commerce at the time of her marriage requires her husband's authority to continue it. Such permission is presumed so long as the husband does not publish in his wife's place of business and in a newspaper in the locality the fact that she has ceased to be engaged in business. Such publication is necessary also in case of the revocation of authority to engage in business. The husband's consent is not necessary in cases of separation, interdiction, or deprivation of husband's civil rights.

Brokers, bankrupts who have not been discharged, and those who have been found guilty of offenses against property, including forgery, embezzlement, bribery, and conspiracy, cannot engage in commerce.

<sup>1</sup> For an excellent study of the constitutional limitations upon the exercise of commerce, see Pallares, *Derecho Mercantil Mexicano*, p. 763.

<sup>2</sup> See Organic Law Relative to Monopolies of Aug. 24, 1931, as amended.

## FOREIGNERS

Foreigners are permitted to engage in commerce in Mexico in accordance with the treaties and laws regulating their rights and obligations. As regards their commercial acts, they are subject to the provisions of the code.<sup>3</sup> They enjoy the civil rights and constitutional guarantees of Mexicans and are subject to Mexican law whether domiciled in Mexico or traveling through it. Their rights may be restricted or modified in accordance with international reciprocity so that they will be subject to the same limitations which the laws of their countries impose upon Mexicans. Foreigners are also subject to the judgments of the Mexican courts and may appeal to their own governments for protection only in case of a denial or delay of justice after having exhausted all the recourses provided by law.<sup>4</sup> They may be expelled forthwith by the executive power without judicial process whenever their presence in Mexico is deemed inexpedient.<sup>5</sup>

Perhaps the outstanding limitation upon foreigners in Mexico is the one governing rights in land.<sup>6</sup> Because of the importance of article 27 of the Mexican Constitution in this respect, a translation of its text is set forth herewith as follows:

The ownership of lands and waters comprised within the limits of the national territory is vested originally in the nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.

Private property shall not be expropriated except for reasons of public utility and by means of indemnification.

The nation shall have at all times the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the enjoyment of natural resources, which are susceptible of appropriation, in order to conserve them and equitably to distribute the public wealth. For this purpose necessary measures shall be taken to divide large landed estates; to develop small landed agricultural holdings under development; to establish new centers of rural population with such lands and waters as may be indispensable to them; to encourage agriculture and to prevent the destruction of natural resources, and to protect property from damage detrimental to society. The nuclei of population which lack lands or water or do not possess them in sufficient quantities for their needs shall have the right to be provided with them from adjoining properties, always with due regard for small landed agricultural holdings under development.

In the nation is vested the legal ownership of all minerals or substances which in veins, layers, masses, or beds constitute deposits whose nature is different from the components of the land, such as minerals from which metals and metalloids used for industrial purposes are extracted; beds of precious stones, rock salt, and salt lakes formed directly by marine waters, products derived from the decomposition of rocks, when their exploitation requires underground work; mineral or organic beds of substances which may be used for fertilizers; solid mineral fuels; petroleum and all hydrocarbons—solid, liquid, or gaseous.

In the nation is likewise vested the ownership of the waters of territorial seas to the extent and in the terms fixed by the law of nations; those of lakes and inlets of bays; those of interior lakes of natural formation which are directly connected with permanent waters; those of principal rivers or tributaries from the points at which there is a permanent current of water in their beds to their mouths, whether they flow to the sea or cross two or more States;

<sup>3</sup> Code of Commerce, arts. 13 to 15. Convention on the Status of Aliens, ratified by Mexico on Mar. 28, 1931, and by the United States on May 21, 1930.

<sup>4</sup> Alien Law of 1934, arts. 30 to 35; Civil Code of the Federal District and Territories of 1932, art. 12.

<sup>5</sup> Constitution of 1917, art. 33.

<sup>6</sup> Constitution, art. 27 as amended.

those of intermittent streams which traverse two or more States in their main body; the waters of rivers, streams, or ravines, when they bound the national territory or that of the States; waters extracted from mines; and the beds and banks of the lakes and streams hereinbefore mentioned, to the extent fixed by law. Any other stream of water not comprised within the foregoing enumeration shall be considered as an integral part of the private property through which it flows; but the enjoyment of the waters when they pass from one landed property to another shall be considered of public utility and shall be subject to the provisions prescribed by the States.

In the cases to which the two foregoing paragraphs refer, the ownership of the nation is inalienable and may not be lost by prescription; concessions shall be granted by the Federal Government to private parties or civil or commercial corporations organized under the laws of Mexico, on condition that said resources be regularly developed, and on the further condition that the legal provisions be observed.

Legal capacity to acquire ownership of lands and waters of the nation shall be governed by the following provisions:

I. Only Mexicans by birth or naturalization and Mexican associations have the right to acquire ownership in lands, waters, and their appurtenances, or to obtain concessions to develop mines, waters, or mineral fuels in the Republic of Mexico. The nation may grant the same right to foreigners, provided they agree before the Department of Foreign Affairs to be considered Mexicans in respect to such property, and accordingly not to invoke the protection of their governments in respect to the same, under penalty, in case of breach, of forfeiture to the nation of property so acquired.

Within a zone of 100 kilometers from the frontiers, and of 50 kilometers from the sea coast, no foreigner shall under any conditions acquire direct ownership of lands and waters.

II. The religious institutions known as churches, irrespective of creed, shall in no case have legal capacity to acquire, hold, or administer real property or loans made on such real property; all such real property or loans as may be at present held by the said religious institutions, either on their own behalf or through third parties, shall vest in the nation, and anyone shall have the right to denounce property so held. Presumptive proof shall be sufficient to declare the denunciation well-founded. Places of public worship are the property of the nation, as represented by the Federal Government, which shall determine which of them may continue to be devoted to their present purposes. Episcopal residences, rectories, seminaries, orphan asylums, or collegiate establishments of religious institutions, convents, or any other buildings built or designed for the administration, propaganda, or teaching of any religious creed shall forthwith pass, as of full right, to the legal ownership of the nation, to be used exclusively for the public services of the Federation or of the States, within their respective jurisdictions. All places of public worship which shall later be erected shall be the property of the nation.

III. Public and private charitable institutions for the sick and needy, for scientific research, or for the diffusion of knowledge, mutual-aid societies or organizations formed for any other lawful purpose shall in no case acquire, hold, or administer loans made on real property, unless the mortgage terms do not exceed 10 years. In no case shall institutions of this character be under the patronage, direction, administration, charge, or supervision of religious corporations or institutions, nor of ministers of any religious creed or of their dependents, even though either the former or the latter shall not be in active service.

IV. Commercial stock companies shall not acquire, hold, or administer rural properties. Companies of this nature which may be organized to develop any manufacturing, mining, petroleum, or other industry, excepting only agricultural industries, may acquire, hold, or administer lands only in an area absolutely necessary for their establishments or adequate to serve the purposes indicated, which the executive of the Union or of the respective State in each case shall determine.

V. Banks duly authorized under the laws governing institutions of credit may make mortgage loans on rural and urban property in accordance with the provisions of the said laws, but they may not own in fee nor administer more real property than that absolutely necessary for their direct purposes.

VI. Excepting the corporations to which clauses III, IV, and V hereof refer, as well as the nuclei of population which, in fact or by operation of law, main-

tain the communal state, or the nuclei to which lands have been given either in dotation or restitution, or organized as centers of agricultural population, no other civil corporation may own in fee or administer on its own behalf real estate or mortgage loans derived therefrom, with the single exception of buildings designed directly and immediately for the purposes of the institution. The States, the Federal District, and the territories, as well as the municipalities throughout the Republic, shall enjoy full legal capacity to acquire and hold all real estate necessary for public services.

The Federal and State laws shall determine within their respective jurisdictions those cases in which the occupation of private property shall be considered of public utility; and in accordance with the said laws the administrative authorities shall make the corresponding declaration. The amount fixed as compensation for the expropriated property shall be based on the sum at which the said property shall be valued for fiscal purposes in the cadastral or revenue offices, whether this value be that manifested by the owner or merely impliedly accepted by reason of the payment of his taxes on such a basis. The increased or decreased value which the property in question may have acquired through improvements made or depreciation subsequent to the date of the fixing of the fiscal value shall be the only matter subject to expert opinion and to judicial determination. The same procedure shall be observed in respect to objects whose value is not recorded in the revenue offices.

The exercise of the rights pertaining to the Nation by virtue of this article shall follow judicial process; but as a part of this process and by order of the proper tribunals, which order shall be issued within the maximum period of 1 month, the administrative authorities shall proceed without delay to the occupation, administration, auction, or sale of the lands or waters in question, together with all their appurtenances, and in no case may the acts of the said authorities be set aside until final sentence is handed down.

VII. The nuclei of population which maintain, in fact or by operation of law, a communal state, shall have legal capacity to enjoy the lands, forests, and waters which belong to them or which may have been or may be restored to them.

VIII. There are declared null:

(a) All alienations of lands, waters, and forests belonging to the towns, "rancherías", congregations, or communities made by the "jefes políticos", governors of States, or any other local authority, in contravention of the dispositions of the law of June 25, 1856, and other laws and dispositions relating thereto.

(b) All concessions, compositions, or sales of lands, waters, and forests, made by the secretariats of Fomento, Hacienda, or by any other Federal authority since the first day of December, 1876, to date, whereby "ejidos", lands of communal distribution, or lands of any other class belonging to towns, rancherías, congregations, or communities, and nuclei of population, may have been invaded and illegally occupied.

(c) All operations for surveys or measurements, transactions, alienations, or auctions carried out during the period of time referred to in the preceding section, by companies, judges, or other authorities of the States or of the Federation, whereby the lands, waters, and forests of the "ejidos", lands of communal distribution, or of any other class of lands belonging to nuclei of population may have been invaded or illegally occupied.

Only such lands, title to which may have been acquired in the divisions made in accordance with the law of June 25, 1856, and held in undisputed ownership for more than 10 years, are excepted from the above provision of nullity, provided their area does not exceed 50 hectares (1 hectare=2.47 acres).

IX. The division or distribution which may have been made with appearance of legality among the residents of any nucleus of population, and in which there may have been any error or irregularity, may be nullified, if this be solicited by three-fourths of the citizens in possession of one-fourth of the lands distributed or by one-fourth of the same citizens when they are in possession of three-fourths of the lands.

X. The nuclei of population which may lack "ejidos" or which cannot bring about restitution of them because of faulty titles, because of the impossibility of identifying their "ejidos", or because they may have been alienated legally, shall be endowed with sufficient ground, lands, and waters, to be organized in accordance with the needs of their population; in no case shall the area needed be not granted, to which end there shall be expropriated for the account of the Federal

Government the land required for such purpose, which shall be taken from lands adjoining the towns concerned.

XI. To carry out the provisions contained in this article and in the organic laws that may be enacted, there are hereby created:

(a) An office directly under the Federal executive and charged with the application and execution of the agrarian laws.

(b) An advisory body composed of five persons who shall be designated by the President of the Republic and which shall have the functions which the organic laws may prescribe.

(c) A mixed commission composed of an equal number of representatives of the Federation, of the State governments, and of one representative of the peasants, selected in accordance with the corresponding organic law, which shall function in each State, Territory, and Federal District, in accordance with the provisions of the corresponding organic and regulatory laws.

(d) Special executive committees for each nucleus of population handling agrarian cases.

(e) Ejidal commissariats for every nucleus of population owning "ejidos."

XII. Petitions for restitution or dotation of lands or waters in the States and territories shall be presented directly to the governors.

The governors shall refer the petitions to the mixed commissions, which shall examine the records within fixed time limit and report thereon; the governors of the States shall approve or modify the report of the mixed commissions and shall order immediate possession to be given of the areas which they may deem proper. The records shall then be transmitted to the Federal executive for decision.

When governors do not comply with the provisions of the preceding paragraph within the period fixed by law, the report of the mixed commissions shall be considered as not approved, and the record shall be transmitted without delay to the Federal executive.

Inversely, when mixed commissions do not submit a report within the period fixed by law, governors shall have the right to grant possessions to the extent they deem proper.

XIII. The office under the executive and the agrarian advisory body shall pass, approving, correcting, or amending, the reports submitted by mixed commissions, with the modifications which the State governors may have introduced, and they shall report to the President of the Republic, in order that the latter, as the supreme agrarian authority, may render a decision.

XIV. Property owners affected by resolutions of dotations or restitutions of "ejidos" or waters, which may have been made in favor of townships, or which may be made in the future, shall have no ordinary legal right or recourse, nor may they institute "amparo" proceedings.

Those affected by dotations only shall have the right to apply to the Federal Government so that the corresponding indemnity may be paid to them. This right shall be made use of by the interested parties within the period of 1 year, counting from the date on which the respective resolution is published in the Diario Oficial of the Federation. Upon the expiration of this period, no claim shall be admitted.

XV. Mixed commissions, local governors, and other authorities charged with agrarian matters shall under no circumstances affect small landed agricultural properties under development. They shall incur responsibility for violation of the Constitution if they grant dotations affecting such properties.

XVI. Lands which are to be the object of individual adjudication shall be subdivided at the very time that the presidential resolutions are carried out in accordance with the regulatory laws.

XVII. The Congress and the State legislatures shall enact laws, within their respective jurisdictions, for the purpose of determining the maximum area of the rural property; and for the purpose of carrying out the division of excess lands, subject to the following conditions:

(a) In each State, territory, and Federal District there shall be fixed the maximum area of land which any one individual or legally organized corporation may own.

(b) The excess of the area thus fixed shall be subdivided by the owner within the period set by the laws of the respective locality; and these subdivisions shall be offered for sale on such conditions as the respective governments shall approve, in accordance with the said laws.

(c) If the owner shall oppose the subdivision, this shall be carried out by the local government, by means of expropriation proceedings.

(d) The value of the subdivisions shall be paid in annual amounts sufficient to amortize the principal and interest at a rate of interest which shall not exceed 3 percent per annum.

(e) Owners shall be bound to receive bonds of the local agrarian debt to guarantee the payment of the property expropriated. With this end in view, the Federal Congress shall issue a law authorizing the States to issue bonds to meet their agrarian obligations.

(f) No subdivision shall be authorized without first satisfying the agrarian necessities of the adjacent settlements. When plans for subdivisions are to be carried out, all pertinent agrarian proceedings shall be handled and completed within a fixed period.

(g) Local laws shall govern the extent of the family patrimony, and determine what property shall constitute the same on the basis of its inalienability; it shall not be subject to attachment nor to any charge whatever.

XVIII. All contracts and concessions made by former governments from and after the year 1876 which shall have resulted in the monopoly of lands, waters, and natural resources of the nation by a single individual or corporation, are declared subject to revision, and the executive is authorized to declare null and void those which seriously prejudice the public interest.

#### TRANSITORY

SOLE ARTICLE. The law of January 6, 1915, its amendments and other legal provisions in conflict with the present amendment are hereby repealed.

NOTE.—Attention is also invited to the immigration laws and regulations, which are not commented upon in this bulletin because of their changing nature. Mexican consuls or competent counsel should be consulted on such points.

#### COMMERCIAL ACTS DEFINED

The fact that Mexican law distinguishes between civil and commercial acts and obligations, and provides separate and distinct bodies of law to govern them, requires the definition of the latter in order that the operation of the laws applicable thereto may be understood more clearly and its extent determined more definitely.

This distinction is mainly of historical origin and might have disappeared in Mexico were it not for the fact that its Constitution makes commerce a matter of Federal regulation, leaving civil acts and obligations under State control.<sup>7</sup>

Attempts to evolve a scientific definition of commercial acts have been made by all the outstanding commentators on civil law in general and Mexican law in particular.<sup>8</sup> Pallares' definition is as follows: "A mercantile act is any civil juridic act by means of which goods or values are acquired for a valuable consideration, with the exclusive object or intention of transmitting (reconveying) the use or ownership in order to make a profit by the transaction, as also the act in which the said proposed profit is realized." Tena defines the commercial act as "any contract through which a person acquires, for a valuable consideration, a property of whatsoever character with the intention of making a profit by its transmission (reconveyance), as likewise the contract, for a valuable consideration, by virtue of which the said transmission is effected."

A very good definition is given by Benito, a commentator on the Spanish Code of Commerce, as follows: "Acts of commerce are all those resulting from the direct or indirect intervention of producers

<sup>7</sup> See Barker & Cormack, *The Mercantile Act: A Study in Mexican Legal Approach*, 6 Southern California Law Review 8.

<sup>8</sup> *Opus cit.* 1, pp. 13-15.

and consumers, which, performed with the intent to profit, tend to facilitate the exchange of goods; and all others performed by merchants and their helpers in or by reason of the exercise of their duties."<sup>9</sup>

These definitions do not agree with the texts of articles 75 and 76 of the Code of Commerce, but Pallares states that resulting contradictions should be deemed legal exceptions, created by the lawgiver for special reasons and to be strictly interpreted.<sup>10</sup> Certainly the definitions are of value in considering the last provision of article 75. This article regards as acts of commerce:

1. All acquisitions, alienations, and rentals, effected with the object of commercial speculation, of supplies, articles, movables, or merchandise, whether in a natural state or after being worked or wrought.
2. Purchases and sales of immovables, when effected with the said object of commercial speculation.
3. Purchases and sales of interests and shares in, and of obligations of, mercantile companies.
4. Contracts relative to obligations of the State or other documents of credit current in commerce.
5. Enterprises of provisions and supplies.
6. Enterprises of construction, and public and private works.
7. Enterprises of fabrication and manufacture.
8. Enterprises of transportation of persons or things, by land or by water.
9. Book stores and editorial and typographical enterprises.
10. Enterprises of commissions, of agencies, of commercial business offices, and establishments of sales at public auction.
11. Enterprises of public spectacles.
12. Operations of mercantile commission.
13. Operations of mediation in mercantile business.
14. Operations of banks.
15. All contracts relative to maritime commerce, and to interior and exterior navigation.
16. Contracts of insurance of every kind, provided that they are entered into by enterprises.
17. Deposits by reason of commerce.
18. Deposits in general warehouses and all operations made upon certificates of deposit, and pledge bonds issued by general warehouses.
19. Checks, bills of exchange, or remittances of money from one place to another, among all classes of persons.
20. Vouchers or other documents to order or to bearer, and obligations of merchants, unless it be proved that they originated from a noncommercial transaction.
21. Obligations between merchants and bankers, if not of a nature essentially civil.
22. Contracts and obligations of the employees of merchants concerning the business of the merchant in whose employ they are.
23. The alienation that an owner or a husbandman makes of the products of his land or of his husbandry.
24. Any other acts of a nature analogous to those stated in this code.

Article 76 declares that "Purchases made by a merchant of articles or merchandise for his own use or consumption, or for that of his family, are not acts of commerce; nor are resales made by workmen, when such resales are a natural consequence of the practice of their calling."

Illustrative of the difficulties arising because of the distinction made between civil and commercial acts is the fact that certain transactions may be of a civil character as to one of the contracting

<sup>9</sup> Lorenzo Benito, *Manual de Derecho Mercantil*, vol. 1, p. 561.

<sup>10</sup> Jacinto Pallares, *Derecho Mercantil Mejicano*, p. 1005.



parties and commercial as to the others. Which law governs in such cases? According to article 1050 of the Code of Commerce and Pallares,<sup>11</sup> if the act be mercantile with respect to the defendant the mercantile law both substantive and adjective is necessarily applied; and if it be civil, the civil law. As regards rules of evidence, Pallares states that: "Only the evidence permitted by the civil law may be set up against the party whose act was civil; whereas against the party whose act was mercantile, evidence permitted by either the mercantile or the civil law may be introduced."<sup>12</sup>

### OBLIGATIONS INCIDENT TO DOING BUSINESS

All merchants in Mexico are required by article 16 of the Code of Commerce: (1) to publish in the press the class of business in which they are engaged, with its essential circumstances, and, at the proper time, the modifications which they may adopt; (2) to record in the commercial registry the documents whose tenor and authenticity ought to be made known; (3) to keep accounts in strict order; and (4) to preserve the correspondence concerning their business.

#### PUBLICATION

In order to comply with the requirement of publication a merchant must give notice of the opening of his establishment or office through circulars directed to the merchants at the places where he maintains residence, branches, relations, or correspondents. This circular must set forth the name of the establishment or office; its situation and object; if there is someone in charge of its management, his name and signature; if it is a company, its nature, and the name of its manager or managers, the company's name or denomination, and the person or persons authorized to use it, and the description of the houses, branches, or agencies, if any. Notice must be given also of any modifications in these circumstances and publication made in the official newspaper, and in its absence in any other of these circulars, as well as a statement of the liquidation upon closing of the establishment or office.<sup>13</sup>

#### MERCANTILE REGISTRATION <sup>14</sup>

A mercantile register is kept in the principal town of the division or judicial district of the domicile of the merchant, by the officers charged with the public registry of property; failing these, through the records of mortgages; and in the absence of both by the judges of first instance of the ordinary jurisdiction. The registration therein is optional for individuals engaged in commerce and obligatory for all mercantile companies and ships. Individual merchants are officially registered on entering any document whose registration is necessary. The entry made in the registry of a merchant or company must set forth the following:

1. His name, or the name of the company or partnership.
2. The class of commerce or operations to which he or it is devoted.

<sup>11</sup> Jacinto Pallares, *Derecho Mercantil Mexicano*, pp. 1027-1029.

<sup>12</sup> Pallares, *opus cit.* 1, p. 1030.

<sup>13</sup> Code of Commerce, art. 17.

<sup>14</sup> Code of Commerce, arts. 18-32.

3. The date on which operations should be or may have been commenced.
4. The domicile, specifying the branches which may have been established, without prejudice to entering the branches in the registry of the judicial district in which they may be established.
5. The instruments setting forth the organization of the mercantile company, whatever may be its object or denomination, as also those containing modifications, reclusion, or dissolution of the same companies.
6. The minutes of the first general meeting and the documents annexed to them, in the case of corporations constituted by public subscription.
7. The general powers and appointment, and the revocations (if any) of the same, conferred on the managers, agents, employees, and all others employed.
8. The declaration of age, license, and emancipation of a minor made or given in order that he may be a merchant.
9. The marital license, or in its absence, the requisite which a woman needs in order to engage in commerce, as also the termination of the requisite or the license.
10. The public writings relating to dowry, marriage settlements, and the title, deeds, etc., which prove the ownership of the exclusive property ("parafemales") of the wife of the merchant, as also the public writings affecting the separations of interests between married couples; and, in general, the documents which contain, with reference to the said matters, any change or modification.
11. The evidentiary documents as to the properties or patrimony which may be owned by the child or ward, who may be under the paternal power, or the guardianship of the father or commercial guardian.
12. The increase or decrease in the cash capital of corporations and of share partnerships with limited silent partners.
13. The documents of title to industrial property, patent rights, and trade marks.
14. The issue of shares, bonds, and obligations of railways and all classes of companies, whether they relate to public works, institutions of credit, or others, expressing the series and number of the certificates of each issue, their interest and amortization, the total amount of the issue, and the properties, works, rights, or mortgages, when they may exist, which affect the payment. There shall also be registered, in conformity with these provisions, the issues which private individuals may make.
15. The issues of bank notes expressing the date, classes, quantity, and value of each issue.
16. Ships, expressing the name, kind of rigging, system or power of the machinery (if moved by steam), stating whether the horsepower is nominal or indicated; place where the hull and engines were constructed; year of the same; material of the hull, stating if it be wood, iron, steel, or mixed; principal dimensions from stem to stern, width at widest point, and depth of hold; tonnage, net and total; and finally the names and domiciles of the owners and participants in the ownership.
17. The changes in the ownership of the ships, in their names, or in any of the other conditions enumerated in the preceding paragraph.
18. The imposition, modification, and cancelation of any burdens of whatsoever kind, which may affect ships.
19. The guarantees of brokers.

The documents listed above must be registered in order to bind third parties; otherwise they will have effect between the immediate parties thereto only, although third parties may avail themselves of them to the extent that they are favorable to them. If the documents have been recorded in the registry of property or of mortgages in accordance with the general laws, their entry in the Mercantile Register need not be made provided a notation of the prior registration is made therein. Should the documents originate in foreign countries, they must be protocolized before registration. This implies their filing in the archive ("protocol") of a notary public, who issues a filing certificate ("testimonio") in which the documents are set forth.

Failure to register also raises the presumption that in case of bankruptcy it is fraudulent, in the absence of proof to the contrary.

#### BOOKKEEPING <sup>15</sup>

Merchants are required to keep at least three books; the book of inventories and balances, the general daybook, and the ledger or book of current accounts. Partnerships and companies must also keep a minute book in which to record all resolutions passed by the general meetings and boards of directors concerning the progress and operations of the company. These books must be bound, lined, and paged. Stamps must be affixed to each page whenever the assets of the business amount to 5,000 pesos or more, for which purpose the books must be taken to the corresponding treasury office where the stamps are canceled on the first page. A statement of authorization is written therein and, on the last page of each book, signed by the official making it, who also sets forth the date and number of pages, the number under which the book is inscribed in the registry of his office, the seal of which is stamped on each page.<sup>16</sup>

Books of accounts must be kept in Spanish by the merchant himself or another person authorized by him. A fine of not less than 50 nor exceeding 300 pesos will be imposed for failure to do so, and the transcription of the books into Spanish within a fixed time ordered. Translations of entries to be examined and checked will be ordered at the owner's expense. Entries must be made chronologically and by order of transactions without leaving blank spaces nor making alterations. Errors must be corrected by other entries corresponding to the incorrect ones.

In the book of inventories and balances the merchant must set forth in detail the assets and liabilities at the commencement of his business operations. The difference between the two constitutes his capital. An annual balance must be prepared thereafter and written in this book under the merchant's signature and responsibility. In the daybook the merchant must write in as the first entry the result of the inventory made when his enterprise was started, divided in one or more accounts in accordance with the accounting system adopted. Thereafter all daily operations must be entered in chronological order, indicating their nature and circumstances so that it may appear therein who is debtor and who is creditor in each operation. Cash withdrawals by the merchant must also be entered and carried in a special account in the ledger. The accounts for any object or person must be entered by debit and credit in the ledger, and the entries in the daybook transferred to each account in exact order of dates.

No official inquiry may be made by a tribunal or any authority to ascertain whether or not merchants keep books of accounts. But they must be produced when it is so ordered to determine if they have the proper stamps. Neither may access to, delivery, or general examination of books, letters, accounts, and documents of a merchant, be ordered at the request of any party, except in the case of administration of estates, liquidation of companies, commercial

<sup>15</sup> Code of Commerce, arts. 33-46.

<sup>16</sup> Stamp Tax Law of Dec. 28, 1931.

enterprises for the account of another, or bankruptcy. Only when the owner thereof has an interest or liability in the matter may the production of books of accounts be ordered; the inspection will be made at the merchant's office, in his presence or that of a person appointed by him, and will be confined to the matters having a direct relation to the case in question, including in them points which may even be foreign to the special account whose examination has been solicited. If the books are outside the jurisdiction of the court, the examination will be made where they are located. The books must be preserved until all the merchant's accounts are liquidated and 10 years thereafter. His heirs are under the same obligation.

#### IMPORTANCE OF KEEPING BOOKS

Aside from the inherent necessity of keeping books of accounts in order to determine the progress of a business establishment and to conduct it in an orderly and economical manner, it is particularly desirable in Mexico to follow the bookkeeping requirements prescribed by law. Failure to do so impairs the value of books of accounts as evidence should proof of existing accounts, entries, etc., made therein become necessary in commercial litigation, that is, in suits grounded on acts or contracts of a commercial character as regards the defendant.

In commercial litigation books of accounts are admissible in evidence, merchants not being permitted to present proof contrary thereto. But the opposing party cannot accept the entries which are favorable and reject those unfavorable to him; when such means of proof have been accepted they are subject to the result arrived at from the whole, equal consideration being accorded to all the entries relating to the question at issue.

If there is disagreement between the entries in the books kept by two merchants, and one of them has kept his in accordance with all the formalities prescribed by the code and those of the other have any defect or are wanting in some of the prescribed requirements, the entries in the books kept according to law will prevail against those contained in the defective book unless the contrary is proven by means of other admissible evidence.

If one of the merchants does not present his books or declares that he has none, those of his opponent, kept according to law, will be admissible against him, unless he proves that his lack of such books is due to force majeure; proof against the entries presented by the opponent may be made in other ways permissible by law.

Whenever the books of the contesting parties comply with all legal formalities and are contradictory the judge or court will decide the issue by the other evidence presented, weighing it according to the general rules of law.

#### PRESERVATION OF CORRESPONDENCE<sup>17</sup>

All letters and telegrams received by merchants in connection with their transactions and business must be preserved in good condition. On the back of each must be written a notation of the dates

<sup>17</sup> Code of Commerce, arts. 47-50.

when received and answered, or the fact that no reply was made. All letters and telegrams written and sent by the merchant with regard to his business must be copied in a copy book, by hand or machine, entirely and chronologically. Rules governing the manner of keeping other books govern the copy book, except the requirement that Spanish be used exclusively.

The courts may order on their own motion, or at the request of any proper party, that the letters which have reference to any matter in litigation be produced and also may order that those of the same class written by the litigant be copied, the party requesting it specifying beforehand the letters to be copied.

#### STAMP TAX <sup>28</sup>

Books of accounts are made subject to the following stamp taxes:

Books of accounts of merchants and industrialists whenever the assets of the enterprise exceed 5,000 pesos, 5 centavos per page.

Books of accounts of farmers whenever the assets of the enterprise, after deducting the cadastral value of the real estate, exceed 10,000 pesos, 5 centavos per page.

All auxiliary or subdivisonal books of accounts voluntarily presented by merchants and farmers, and all books of accounts not included above, presented by natural or juristic persons, unless otherwise excepted, 5 centavos per page.

All books kept by virtue of some law, regulation, or circular, unless otherwise exempted, 5 centavos per page.

Books of appraisals, entry and exit of jewels, etc., of pawn shops, 5 centavos per page.

Registry of nominative shares, minute books, and those kept in railroad stations for daily operation, and any others presented by taxpayers, 5 centavos per page.

There are exempted all books of government entities, of charitable institutions, nonprofit associations, and books of receipts and expenses ("ingresos y egresos").

<sup>28</sup> Stamp Tax Law cited, as amended by decree of Aug. 30, 1933.

### III. CONTRACTS

#### FORM

No special forms are required for commercial contracts in order that they be valid. This rule is subject to two exceptions, namely: (1) Contracts which must be evidenced by public instrument (generally one drawn before notary public or other public official), or which require certain forms and solemnities for their effectiveness, as prescribed by the Code of Commerce or other laws; and (2) contracts drawn in a foreign country whose laws require that they be drawn according to certain forms and solemnities. In either case, if the prescribed requirements are not met the contracts will not be binding and enforceable.

Civil contracts in the Federal District and territories require no special form unless specifically provided by law; but if the intention of the parties is formally ("de manera fehaciente") evidenced, any one of them may demand that the contract be drawn in the prescribed form.<sup>1</sup> In the States which substantially adopted the Civil Code of 1884 civil contracts require no special form unless otherwise provided by law, except that contracts to be performed in installments during a period exceeding 6 months and involving over 200 pesos must be in writing.<sup>2</sup> It is advisable, nevertheless, to evidence contracts in writing when trading in Mexico and, whenever the nature and importance of the business permits it, to draw them in the form of notarial instruments or in other authentic manner in order to facilitate their proof and permit certain procedural advantages in case of suit.

#### ESSENTIAL ELEMENTS<sup>3</sup>

The essential elements of a Mexican commercial or civil contract are consent and object matter. The parties thereto must have capacity to contract; their consent may be expressed or implied and must not have been given through error or obtained by force or fraud. Any suggestion or artifice to induce error, or to prevent a party from discovering it, is fraud; bad faith is the concealment of known error. The object matter may be the thing which the obligor must give or the act which he must or must not perform. This is designated in the laws of the United States as "consideration." If it is a thing, it must exist in nature, be determined or determinable, and be the subject of trade ("estar en el comercio"). Future things may constitute valid objects. If it is an act it must be possible and lawful.

<sup>1</sup> Civil Code of 1932, arts. 1832-1834.

<sup>2</sup> Civil Code of 1884, arts. 1322-1323.

<sup>3</sup> Opus cit. 1, arts. 1794-1831; opus cit. 2, arts. 1272-1306.

## OFFER AND ACCEPTANCE

Mexican contracts become binding when a meeting of the contracting parties takes place through the presentation of an offer and its acceptance. If the offer is made to a person present without fixing a term for acceptance, it must be accepted immediately. The same is true if made by telephone. If the offer is made to a person who is not present, the offeror cannot revoke it during three days, not counting the time necessary for the regular delivery of mail or that deemed sufficient if no mail service exists. The offer may be revoked before it is received; the same is true of the acceptance.<sup>4</sup> But when a fixed period of time is given to accept, the offer cannot be revoked until the time expires.

A fundamental difference exists between civil and commercial contracts as regards the determination of the place where they become binding obligations. The former becomes effective as soon as the acceptance is received by the offerer and, therefore, its form and validity are to be determined by the law of the place of the offeror. The latter, if made by correspondence, is perfected when the offer is answered accepting it or when its modifications are accepted.<sup>5</sup>

The acceptance must be unqualified. If it modifies the offer, the offeror is relieved or may in turn accept the modifications as an offer. Offers and acceptances by telegraph are binding if the parties previously stipulated in writing this means of contracting and if the telegrams contain the conditions or signs agreed to.

## INTERPRETATION OF CONTRACTS

If the intention and will of the contracting parties concerning the principal object of the obligation cannot be ascertained from the terms of the contract, it is null and void. If the terms are clear and leave no doubts as to the intent of the parties, the literal meaning of the clauses will govern, but if this seems contrary to the intent of the parties the latter will prevail. The contractual clauses must be interpreted by referring some to others and giving to the doubtful ones the meaning derived from a consideration of all. If words and clauses have different meanings, the one more in conformity with the nature, object, and effect of the contract will be accepted. The use and custom of the country will be considered in interpreting ambiguities.

If it is impossible to resolve, by the rules set forth above, doubts arising in the interpretation of contracts as regards incidental matters, if the contract is gratuitous, the doubts will be resolved in favor of the lesser conveyance of rights and interests; if it is onerous, in favor of greater reciprocity of interests.<sup>6</sup>

Under the Civil Code of 1932, contracts not specifically provided for in the code are governed by the general rules of contracts, by the stipulations of the parties, and, where none exist, by the rules of the code governing contracts of an analogous nature. Code contract rules apply to all juristic acts and conventions insofar as they are not inconsistent with the nature of the latter or with special

<sup>4</sup> See footnote 3.

<sup>5</sup> Code of Commerce, art. 80, citations in footnote 3.

<sup>6</sup> Civil Code, 1932, arts. 1851-1857; Civil Code, 1884, arts. 1324-1325.

provisions of law governing them. Under this code the quotation of prices to the public binds the offeror; if public announcement is made of an offer in favor of anyone who meets the conditions of the offer or performs the services required, the offeror must fulfill his promise. Contractual stipulations in favor of third parties may be made, and, unless the contrary is set forth in writing, the third party beneficiary may demand performance of the promise running in his favor; such stipulations may be revoked before the third party avails himself of them.<sup>9</sup>

### KINDS OF OBLIGATIONS

Obligations in contracts may be of various kinds. They are conditional whenever the existence of the obligations depends on a future or uncertain event. Conditions, in turn, may be precedent ("suspensivas") whenever the existence of the obligation depends on their performance, or subsequent ("resolutorias"), which leaves the obligation in force but subject to termination by the happening of the condition. Conditions subsequent produce a retroactive effect; should the object of the contract be lost or impaired, the loss falls on the former owner unless the loss or impairment is due to the fault of the other party, in which case the latter is liable for the damages caused. On the other hand, if the thing has improved naturally or through the mere lapse of time, the improvements belong to the former owner, but the improvements made at the expense of the other party may be kept by him if the things suffer no impairment thereby. Nevertheless, the retroactive effect of conditions subsequent does not take place when the rights of third persons acting in good faith are involved unless so stated and recorded in the Public Registry. In various States, the rights of third parties in good faith may never be affected by a condition subsequent when the thing involved is personal property.

Conditions subsequent are always implied in bilateral obligations (obligations in which the parties are mutually bound) in the event one of the parties fails to perform. The other party may rescind the obligation and claim damages or elect to demand performance. He may demand rescission even after electing to seek performance when this becomes impossible.<sup>10</sup>

Whenever obligations have a date certain for performance they are known as "obligaciones a plazo." One obligated to do several acts or give things jointly must perform them all jointly; if to one of two things or acts, he may perform either, the election corresponding to the debtor unless otherwise stipulated. Obligations may be "mancomunadas" or "solidarias" where there is more than one debtor or creditor. Under the Civil Code of 1932 the former kind implies that the credit or debt is divided into as many equal parts as there are debtors or creditors, as the case may be, and each part constitutes a debt or credit separate and distinct from the others; however, each one of those who jointly contracted an indivisible debt is liable for the whole. An obligation is "solidaria", under this code, when each or all the creditors may demand or each or all the debtors are liable for

<sup>9</sup> Civil Code, 1932, arts. 1858-1872.

<sup>10</sup> Civil Code, 1932, arts 1938-1952; Civil Code, 1884, arts. 1328-1354.



the whole obligation; obligations are not presumed to be "solidarias", they become so by operation of law or will of the parties. Under the Civil Code of 1884, the term "mancomunidad" embraces "solidaridad." It provides that an obligation is "mancomunada" when one of the creditors may demand or one of the debtors is liable for the whole obligation.

It is advisable, therefore, to indicate in contracts, if there are several debtors, whether each is liable for the whole or only a portion, stating the proportion thereof, and whether they must be sued jointly or may be sued separately; if there are several creditors, it is advisable to indicate also whether each may demand the whole or only a proportional part, and whether each may act separately or must act jointly.<sup>11</sup>

### TRANSFER AND CONVEYANCE OF OBLIGATIONS

Rights may be transferred in Mexico by assignment with or without the consent of the debtor, unless the law, the stipulations between the parties, or the nature of the right do not permit it. The assignment of credits not drawn to order or to bearer do not affect third parties until the date of the assignment is made certain. The following constitute dates certain: The date of recordation in the Public Registry, the date of the public instrument, if the credit is so evidenced, and, in the case of private instruments, the date of the death of one of the signers, or when the document is delivered to a public official in the discharge of his duties. The defenses of the debtor are not cut off by assignment of a credit unless it is drawn to order or to bearer. The assignee, as soon as an assignment is made, notifies the debtor; this is required to prevent discharge of the obligation by payment to a person other than the assignee and also to enable the latter to enforce performance. This notification should be made before two witnesses or a notary public. In the absence of stipulations between the parties unless the assignment is gratuitous the assignor guarantees the existence and legality of the credit but not the solvency of the debtor. Under the Civil Code of 1884, assignments of rights or credits in litigation must be evidenced by private documents if the amount involved does not exceed 500 pesos and by public document if the amount exceeds that sum or whenever the matter involved must be so evidenced. Under the Civil Code of 1932 assignments of credits not to order or to bearer may be made by private writing signed by the assignor, assignee, and two witnesses, and must be evidenced by public document only when the assigned credit is evidenced by document of that nature.<sup>12</sup>

### ACTS AND CONVEYANCES IN FRAUD OF CREDITORS

Acts and conveyances of a debtor which prejudice his creditors may be annulled upon petition of the latter, provided they cause the insolvency of the debtor and are subsequent in point of time to the rights of the creditors. If the act is for a consideration, bad faith on the

<sup>11</sup> Civil Code, 1932, arts. 1953-2010; Civil Code, 1884, arts. 1355-1418.

<sup>12</sup> Civil Code, 1932, arts. 2029-2057; Civil Code, 1884, arts. 1621-1647.

part of the debtor and his assignee must be shown. Insolvency exists whenever the assets of the debtor, appraised at their just value, do not equal the sum of his debts; the knowledge of this deficit constitutes bad faith in this case. The creditor cannot seek the annulment of an assignment when the thing is in the hands of an assignee who has acted in good faith; in such a case the creditor must sue the assignors, who acted in bad faith, for damages.

Payments made by an insolvent debtor before maturity may be annulled, as well as any act or contract made 30 days before bankruptcy, the object of which is to create a preference in favor of an existing credit which it otherwise does not enjoy.

Under the Civil Code of 1932 conveyances for a consideration are presumed fraudulent when made by persons against whom judgment has been obtained, or attachment of his property has been issued, if such conveyance prejudice his creditors.

The action to annul acts and conveyances as indicated above may be filed at any time until the debtor pays his debt or acquires property with which to discharge it.<sup>13</sup>

### SUBROGATION

The substitution of another person in the place of the creditor, to whose rights he succeeds in relation to the debt, is known as subrogation. It takes place by operation of law and without any stipulation between the parties when: (1) A creditor pays to another creditor who enjoys a preference in accordance with the order of payment; (2) the payor has an interest in the performance of the obligation; (3) an heir pays with his own property any debt of the estate; (4) the purchaser of realty pays off a creditor who owns a mortgage credit prior to the purchase. If a debt is paid with money borrowed from another, the latter is subrogated to the rights of the creditor if the loan is evidenced by unquestionable proof ("título auténtico") in which it is stated that the loan was made to pay the debt; if no such evidence is present the lender is limited to his rights under the contract.<sup>14</sup>

### PERFORMANCE OF OBLIGATIONS

Performance of an obligation is effected by (1) payment which includes delivery of the thing contracted and the performance of a promised act, and (2) offer and deposit which discharges the debtor whenever the creditor refuses to accept delivery or to issue receipt without just cause.

Payment may be made personally, by an authorized agent, or by a third person, who may act with or without the consent of the debtor. It must be made to the creditor, his authorized agent, or to a third party if so stipulated or agreed and when such payment actually benefits the creditor.

Unless otherwise stipulated payment must be made at the debtor's domicile. If no time has been fixed, payment of obligations to give

<sup>13</sup> Civil Code, 1932, arts. 2163-2179; Civil Code, 1884, arts. 1683-1689.

<sup>14</sup> Civil Code, 1932, arts. 2059-2061; Civil Code, 1884, arts. 1590-1598.

something may not be sought until 30 days elapse after demand is made before notary public and two witnesses; in obligations to do something, performance is due upon demand provided the time necessary for performance has elapsed.

In the various States, payment, unless otherwise provided, must be demanded at the place where the personal property, object of the contract, was when the obligation was incurred; in any other case the debtor's domicile is preferred. If, however, no fixed domicile exists demand must be made at the place of the contract if the action is personal, and at the place where the property is situated if the action is directed against it. In these jurisdictions payment must be made on demand when no time is fixed, provided a term necessary for performance has transpired.

Where payment is made through error, the thing paid may be recovered; if the person who received it acted in bad faith he is liable for interest, increments, and damages caused; the third party who receives it from him in bad faith is similarly liable, but if he acts in good faith recovery against such third party is barred unless the transfer to him was gratuitous. In the various States this action is also barred whenever the conveyance was made by an insolvent person. In the Federal District and Territories the action to recover in these cases prescribes within 1 year after the error was discovered; the lapse of 5 years after the error actually occurred bars the corresponding action.<sup>15</sup>

#### TENDER AND DEPOSIT

The tender of payment followed by the judicial deposit of the thing owed is the equivalent of payment and discharges the debtor, whenever the creditor refuses the tender without just cause, is not certain, or is incapable of receiving payment. If the tender and deposit are made according to the procedure prescribed by the codes the risk of loss and costs incurred must be borne by the creditor.<sup>16</sup>

#### TIME AND PLACE OF PERFORMANCE

Whenever no time for performance of commercial obligations is specified, they will be demandable within 10 days after they are contracted if enforceable by ordinary action at law, and on the next day if enforceable by executory action. No terms of grace or courtesy are recognized. In computing time, the day is considered to have 24 hours, the month, as set out in the Gregorian calendar, and the year, 365 days. The effects of delay in performance commence, in contracts with time of performance stipulated by law or by the parties, on the day following maturity; if none is stipulated, on the day the creditor makes judicial or extrajudicial demand of the debtor before notary or witnesses. The place of performance is the one specified in the contract; if not so determined, the one which according to the nature of the business or the intention of the parties must be considered suitable by reason of their consent or judicial decision.

<sup>15</sup> Civil Code, 1932, arts. 2062-2096 and 1882-1885; Civil Code, 1884, arts. 1514-1555.

<sup>16</sup> Civil Code, 1932, arts. 2097-2103; Civil Code, 1884, arts. 1556-1569.

If kind and quality of the merchandise are not specified, the debtor can be required to deliver only goods of the average kind and quality. If the contract specifies a penalty for nonperformance, the party aggrieved has an election of remedies between demanding performance or the penalty.<sup>17</sup>

### EXTINGUISHMENT OF OBLIGATIONS

Obligations may be extinguished by set-off, merger, release, and novation. The set-off takes place when two persons are reciprocally creditors and debtors of each other; its effect is to extinguish the two debts in the amount of the smaller one. To effect a set-off both debts must be due and consist of a liquidated sum of money, or of perishable things, in which case they must be of the same kind and quality. Sureties may offset against the claim of the creditor whatever the latter owes to the debtor, but the debtor cannot offset against the creditor what the latter owes the surety. A debtor who has consented to the assignment made by the creditor to a third person may not set off against the latter his claim against the creditor; if he was notified of the assignment and did not consent to it he may set off against the assignee claims existing prior to the assignment; if the assignment is made without the knowledge of the debtor not only may he set off against the assignee claims against the creditor existing prior to the assignment but also the subsequent ones, until he knows of the assignment.<sup>18</sup>

### MERGER

Whenever the conditions of creditor and debtor are merged in one person the existing obligations are extinguished; but they become valid and enforceable again, under the Code of 1932, when the merger ceases. The merger of a joint and several creditor or debtor only affects the proportional part of his credit or debt.<sup>19</sup>

### RELEASE

Anyone may waive his rights and release others, in whole or in part, from obligations owed him unless otherwise provided by law. The release of the principal causes the extinction of accessory obligations, but that of the latter does not terminate the former. If there are several joint and several sureties or guarantors ("fiadores solidarios"), the release of some as to the proportion of the liability for which they are responsible does not benefit the others. But the return of the pledge is presumed to be a release of the right to it in the absence of proof to the contrary by the creditor.<sup>20</sup>

### NOVATION

The substantial alteration of a contract substituting a new one for the old one which thereby is extinguished constitutes a novation; it must be expressly stated, it is never presumed. It may occur by

<sup>17</sup> Code of Commerce, arts. 83-86.

<sup>18</sup> Civil Code, 1932, arts. 2185-2205; Civil Code, 1884, arts. 1570-1589.

<sup>19</sup> Civil Code, 1932, arts. 2206-2208; Civil Code, 1884, arts. 1599-1605.

<sup>20</sup> Civil Code, 1932, arts. 2209-2212; Civil Code, 1884, arts. 1648-1654.

a change in the subject matter of the contract or by the substitution of the creditor or debtor, for which the consent of the three parties must be obtained.<sup>21</sup>

### NONPERFORMANCE OF CONTRACTS—DAMAGES<sup>22</sup>

The person who is under obligation to perform an act and fails to do so or to execute it in the stipulated manner is liable for the resulting damages unless the default is caused by a fortuitous event. He is liable in the latter case when he caused or contributed to it, accepted such liability, or it is imposed on him by law. By damages is meant the loss actually suffered ("daños") and the profit one fails to gain ("perjuicios"); both must be the direct and immediate result of the nonperformance, whether they have been or necessarily will be caused.

If the object of the contract is lost or suffered an injury which in the opinion of experts prevents its natural use, the owner must be paid its whole value; if the injury is less serious, only its estimated value will be paid to the owner when the object is returned to him. The value of a thing is the one it has at the time it is returned to its owner, unless otherwise provided by law or by the parties. In estimating the injuries caused, consideration will be given not only to loss in value but also to cost of repairs. If the obligation is to pay a certain amount of money, damages resulting from nonperformance cannot exceed the interest at the legal rate unless otherwise stipulated.

The liability of parties under a contract may be modified by them unless the law otherwise provides, as in the case of fraud, the liability for which may not be waived.

### NULLITY OF OBLIGATIONS

Unlawful stipulations, that is, those contrary to law of public order and to good customs, give rise to no obligation or cause of action.<sup>23</sup> According to the Civil Code of 1932 no juristic act can exist without consent or object and therefore none may be ratified; its lack of existence may be alleged at any time. The illegality in the object, in the purpose, or in the condition of the act results in its being void ("nulidad absoluta"), in which case the act does not produce its effects provisionally; these become of no force and effect when the nullity is actually declared. Acts may be voidable ("nulidad relativa"), in which case the provisional effect of the acts is not destroyed by their subsequent annulment; the lack of form, except in case of solemn acts, as well as the existence of error, fraud, force, damage, and the lack of capacity of any of the parties, makes an act voidable. The action to annul a contract obtained by force is outlawed within 6 months after the exercise of force ceases. If only a part of an act or contract is subject to nullity, the other parts may subsist unless it is shown that the intent of the parties was that the act be effective in toto and not in part.

<sup>21</sup> Civil Code, 1932, arts. 2213-2223; Civil Code, 1884, arts. 1606-1620.

<sup>22</sup> Civil Code, 1932, arts. 2104-2118; Civil Code, 1884, arts. 1458-1487.

<sup>23</sup> Code of Commerce, art. 77, Civil Code, 1932, arts. 1830 and 2224-2242.

Whenever an obligation is annulled, the parties thereto must return to each other whatever they received thereunder. If one of the contracting parties alleges the nullity and seeks the return of what he has delivered, he must return what he has received; this may be done through a judicial deposit. If a contract is annulled after the personal or property rights involved have been transferred to a third person, such rights are without force and effect unless the transferee acted in good faith.

The action or defense grounded on nullity by reason of lack of form may be alleged by any one of the interested parties; it is extinguished by the ratification of the act made with the omitted formalities. The parties to a contract or act lacking the formalities necessary for its validity may demand that these be observed, provided the intent of the parties has been set forth beyond doubt and the act or obligation is not revocable. The nullity arising out of error, fraud, force, injury ("lesión"), or lack of capacity may be alleged only by the person who was prejudiced thereby, has suffered the injury, or lacks the capacity. When the contract is voidable by reason of lack of capacity, force, or error, it may be ratified whenever the cause of the nullity ceases; provided its confirmation is not obtained through any means which may make it void or voidable. This ratification is implied by the voluntary payment, novation, or other performance of the obligation and thereby extinguishes the action to annul.

The action of nullity grounded on the lack of capacity or error prescribes within the term fixed for the prescription of personal actions and actions concerning property according to the nature of the act whose annulment is sought; but if the error becomes known before the expiration of the prescriptive term the action prescribes within the 60 days from the day of the knowledge of the error.

#### NULLITY UNDER THE CIVIL CODE OF 1884

The action of nullity based on lack of capacity prescribes within the period of time indicated above; it cannot be alleged if known to the parties. If grounded on error, the action prescribes within 5 years unless it becomes known within that time, in which case the action prescribes within 60 days thereafter. The action to annul because of the exercise of force prescribes within 6 months after the force ceases. If the object of a contract constitutes an unlawful or morally wrongful act imputable to the contracting parties, none of them will have any right of action under the contract; if one alone is at fault, the other may demand the return of what he has performed without himself performing what he promised. The plea ("excepción") of nullity under this code never prescribes. The rules governing ratification and voluntary performance already discussed in the previous section are set forth in this code.<sup>24</sup>

<sup>24</sup> Civil Code, 1884, arts. 1664-1682.

## IV. NEGOTIABLE INSTRUMENTS AND CREDIT OPERATIONS

A comprehensive law of negotiable instruments and credit operations was enacted in Mexico under date of August 26, 1932.<sup>1</sup> It revokes several portions of the Code of Commerce in force (arts. 337, 339, 340-357, 365-370, 449-575, 605-634, and 1044, Laws of Nov. 29, 1897, and June 4, 1902) and makes numerous amendments to existing provisions. This legislation, which also regulates certain transactions not adequately treated by existing law, is intended to facilitate the extension of credit and the use of negotiable instruments.

The law is divided into three parts. The first classifies negotiable instruments and credit operations as commercial acts to be governed by the provisions of this law, primarily, then by general mercantile legislation, or by banking and commercial custom, or by the general laws of the country (the Civil Code of the Federal District insofar as its provisions may govern negotiable instruments and credit operations is made applicable throughout the Republic) in that order, if the previous one contains no rule governing the matter under consideration. Persons who have capacity to contract in accordance with these sources of law may perform any of the operations regulated by the new law. Codebtors in such credit operations are presumed to be jointly and severally liable.

The second part of the statute under discussion regulates the issuance, endorsement, acceptance, payment, etc., of negotiable instruments, such as bills of exchange, promissory notes, and checks. The third part of the law regulates credit operations, such as exchange of securities ("reporto"), bank deposits, banks' deposits of securities, deposits of merchandise in general warehouses, credit discounts, current accounts, letters of credit, extensions of credit, credits for raw materials and farm improvements ("créditos de habilitación o avío y los refaccionarios"), pledges, trusts, bonds, and certificates of deposit.<sup>2</sup>

### NEGOTIABLE INSTRUMENTS IN GENERAL

Article 8 of the law sets forth the exceptions which may be pleaded in actions grounded on negotiable instruments, such as lack of jurisdiction, of personality, falsity, payment, extension of time to pay, cancelation, prescription, lack of negotiability, or essential prerequisites in the body of the instrument, etc. Power to make, draw, endorse, accept or in any other manner sign a negotiable instrument, may be given by written document, duly recorded in the Mercantile Registry, or by a simple declaration in writing addressed to the third person with whom the agent is to deal. If a person acts without such authority he assumes a personal obligation, but his acts may be

<sup>1</sup> As amended by decree of Aug. 30, 1933.

<sup>2</sup> Arts. 1-7.

expressly or impliedly ratified by the principal. If the latter has held out the agent as having authority, he, the principal, cannot allege, in an action against him by a bona fide holder, that the agent did not have power to sign the instrument. Lack of personality, or fraud in a negotiable instrument, or the existence of any other circumstance which relieves any one of the signers thereto of liability, does not invalidate the obligations arising from the instrument as regards other parties to it. Whenever the text of a negotiable instrument is altered, the law provides that the persons who sign it will be liable in accordance with the text at that time; it is presumed that the instrument is signed before its text is altered. Negotiable instruments and the other credit transactions will not have the force and effect which the law provides if the legal prerequisites are not observed and all required statements set out in the text. If the amount written in figures differs from its statement in words, the latter prevails; but if the amount is written both ways, several times, and there is a difference between the figures and the words, the instrument will be binding for the smaller amount. The transfer of a credit instrument implies the transfer of the principal obligation as well as the right to interests or dividends accrued and guarantees and other accessory rights. If the instrument is given for merchandise only, the holder of the document may dispose of the goods.<sup>3</sup>

#### CONFLICTS OF LAW

The law provides the following rules for the purpose of determining the rights and obligations arising from, and validity of, instruments of credit drawn in foreign countries to be paid in Mexico:<sup>4</sup> (1) The capacity to draw an instrument of credit in a foreign country or assume any of the obligations included in the document will be determined by the law of the place where issued or the obligation assumed. Mexican law regulates the capacity of foreigners to issue such instruments or assume such obligations within the Mexican territory. (2) Essential prerequisites to the validity of an instrument issued abroad and of the acts in it stipulated are determined by the law of the place of issue or of the acts stipulated; but if payable in Mexico, they are valid if the prerequisites of Mexican law are fulfilled, although irregular according to the law of the place where issued or the acts stipulated. (3) If it has not been expressly stipulated that the act will be governed by Mexican law, the rights and obligations arising out of an instrument, or act therein stipulated, issued or contracted abroad, totally or partially payable in Mexico, will be governed by the law of the place of making provided it is not contrary to Mexican rules of public policy ("leyes de orden público"). (4) Instruments ("títulos") guaranteed by rights in Mexican realty are governed by Mexican law as regards the guarantee. (5) Time and formalities for presentment, payment, and protest are governed by the law of the place where the particular act must be made. (6) If instruments payable in Mexico are lost or stolen the steps prescribed by Mexican law in such cases must be observed.

<sup>3</sup> Arts. 8-19.

<sup>4</sup> Arts. 252-258.



(7) The Mexican law governing prescription and extinction ("caducidad"), by which rights in credit instruments are cut off, apply in actions filed in Mexican courts grounded on such instruments, even if issued abroad.

#### NOMINATIVE INSTRUMENTS—ENDORSEMENT

An instrument is nominative when drawn in favor of a designated person. Whenever its recordation in a registry kept by the issuing party is required, no operation will affect him or a third party unless set out on the face of the instrument and duly recorded. These documents are presumed to be drawn or endorsed to order unless the phrases "not to order" or "not negotiable" are inserted.

Nominative instruments may be transferred by assignment by which the assignee takes subject to all defenses of the party to be charged. Endorsement after maturity has the effect of an assignment. Transfer by endorsement cuts off these defenses against a holder in due course. Endorsements must set out: (1) The name of the endorsee. If omitted, the endorsement becomes an endorsement in blank, which enables the holder to fill in his name or to transfer the document without endorsement. (Endorsements to bearer are considered to be in blank.) (2) Signature of the endorser or of his agent. (3) Nature of the endorsement. It may be for collection ("en cobro, en procuración") by which title does not pass, but power to present it for acceptance, to collect on it judicially or extrajudicially, to endorse it for collection and to protest it, is given. (4) Date and place of endorsement. The endorsement may be in the nature of a guarantee or pledge ("en garantía, en prenda") by which the endorsee enjoys the rights of a pledge creditor and the powers of an endorsee for collection. An endorsement "without recourse" ("sin responsabilidad") frees the endorser of liability. The payor need not ascertain the authenticity of all the endorsements, but he must verify the identity of the person who presents the instrument to him as the last holder, and the continuity of the endorsements.<sup>5</sup>

#### BEARER INSTRUMENTS—RECOVERY OF DOCUMENTS

Instruments not drawn in favor of a determined person are considered as drawn "to bearer", whether this phrase is written therein or not. Title to them may pass by delivery. If the obligation is to pay a sum of money, it may be put in circulation only in the cases prescribed by law and in conformity therewith. The holder of an instrument of credit who loses it or has it stolen from him may revindicate it. He may demand its cancelation, in which case request for payment, replacement, or restoration may be made, as well as the suspension of the performance of the corresponding obligations while its cancelation is obtained or the opposition to the same is disposed of. In order to petition suspension adequate security must be given to answer for damages which may be suffered thereby.\*

<sup>5</sup> Arts. 23-41.

\* Arts. 69-72, 42-68, and 73-75.

## BILLS OF EXCHANGE

## FORM AND CONTENT

The bill of exchange must contain: (1) the term bill of exchange; (2) place where and date when signed; (3) an unconditional order to the drawee to pay a determinable sum of money; (4) name of drawee; (5) date and place of payment; (6) name of payee; (7) signature of the drawer or the person who signs at his request or in his name. Interest or penal clauses will have no force and effect. If no drawee is indicated the drawer or any other person bound by the instrument may indicate therein one or more persons from whom acceptance and payment, or the latter, may be demanded, in case the drawee defaults, provided such person is domiciled or resides at the designated place of payment, or at the drawee's domicile if no place of payment is indicated. If the place of payment is not designated, the domicile of the drawee will be considered as such; if he has several, payment may be demanded in any of them, at the election of the drawer. If several places of payment are designated, the holder may make demand in any one of them. The drawer may designate as the place of payment the domicile or residence of a third person, at the place of domicile of the drawee, or in any other place. If payment by the drawee at the third person's domicile is not provided, payment by the third person will be understood. The drawer also may designate his own domicile or residence as place of payment, although it may be different from that of the drawee.

The bill of exchange may be drawn at sight, at a certain time after sight, at a certain time after date, or at a fixed time. If other kinds of maturity, or succeeding dates of maturity, or no dates of maturity are designated, the instrument will be considered payable at sight. If drawn 1 or more months after date or sight, it matures on the day corresponding to its issuance of the month on which payment must be made; if there is no corresponding day, the bill matures on the last day of the month of payment. Maturity at the beginning, middle, or end of the month is understood as meaning the 1st, 15th, and last day of the corresponding month. The expressions "8 days", "a week", "15 days", "2 weeks", "a fortnight", or "half month" will be counted not as 1 or 2 whole weeks, but as terms of 8 or 15 actual days, respectively. If payment falls due on a holiday, it may be made on the following working day, but intermediate holidays will be counted in computing date of maturity. The starting day ("el día que les sirva de punto de partida") will not be counted in legal or contractual periods of time.<sup>7</sup>

The bill of exchange may be drawn to the order of the drawer and against him provided it is payable at a place different from the place of issuance. In the last case the drawer is liable as an acceptor, and if the bill is drawn at a certain time after sight, its presentation will only have the effect of fixing the date of payment. Presentation will be evidenced by a statement on the bill signed by the drawer or by notarial or broker instrument. Power to act for the account of or in name of another does not include power to incur obligations

<sup>7</sup> Arts. 76-81.

evidenced by document of exchange. Directors and managers of companies or commercial enterprises are considered authorized to sign bills of exchange in the name of the entities. The limitations upon that authority are those set out in the charter or/and bylaws or in the corresponding powers of attorney. If the drawer does not know how or is unable to write, another person will sign the instrument at his request before broker, notary public, or other empowered to attest to the act. The bill of exchange drawn to bearer will have no force and effect as such. If drawn to some person or bearer, the words "or bearer" will be disregarded. The clauses "documents against acceptance" or "documents against payment" and the terms "D/A" or "D/P" in a bill of exchange, accompanied by documents evidencing merchandise, bind the holder of the bill not to deliver the goods until the bill is accepted or paid. The drawer of a bill of exchange is liable for its acceptance and payment; any clause waiving this liability will have no force and effect. Regular endorsers ("endoso en propiedad") are liable jointly and severally with all other persons liable for the amount of the bill.<sup>8</sup>

#### ACCEPTANCE

The bill of exchange must be presented for acceptance at the place and address in it indicated or, if none is indicated, at the domicile or residence of the drawee. It must be presented for acceptance to all other persons indicated in case of drawee's default. If the bill is drawn at so many days after sight, it must be presented within 6 months of date unless a different term of time has been stipulated for presentation. Bills drawn at so many days after date need not be presented unless the drawer so ordered with indication of a period of time within which to present. If presentation lies within the holder's discretion, it must be made, if at all, not later than the last working day before the day of maturity.

The acceptance must be indicated in the body of the bill by the word "accept" or a similar expression, followed by the signature of the acceptor. This signature alone is sufficient. The acceptance must be dated whenever the bill is payable at some period after sight or when it must be presented for acceptance within a determined period of time; if the acceptor fails to date the acceptance, the holder may do so. If a place of payment different from that of the acceptor is indicated, the latter must state in the acceptance the name of the person who must pay; if he fails to mention one, he must make payment at the designated place, personally. If payable at the acceptor's domicile, he may indicate an address where payment will be made unless the drawer has already designated one. The acceptance must be unqualified; it may be limited to a certain sum, but any other condition will amount to a dishonor, the drawee being liable in accordance with the term of the acceptance made. If the acceptance is crossed off before the bill is returned to the holder, it is considered as having been refused. Acceptance binds the acceptor to pay at maturity even though the drawer has gone into bankruptcy before acceptance.<sup>9</sup>

<sup>8</sup> Arts. 82-90.

<sup>9</sup> Arts. 91-101.

## ACCEPTANCE FOR HONOR

Bills of exchange not accepted by the drawee may be accepted by a third person, after the corresponding protest. If the third person has been designated in the body of the bill to whom presentment must be made if drawee defaults, the acceptance for honor cannot be refused. If the person in whose behalf the acceptance is made is not indicated, it is presumed to have been made in behalf of the drawer, even though an endorser advised such acceptance. The acceptor for honor must notify his acceptance immediately to the person in whose behalf he acted. The latter, the preceding endorsers, the drawer, and "avalistas" may demand of the holder to accept payment, delivering the bill to them.<sup>10</sup>

## "AVAL" (SURETYSHIP)

"Aval" is an obligation set out in the body of the bill or on a separate paper attached to the bill, by which payment of all or part of the amount is guaranteed. It is expressed by the words "por aval" or equivalent expression and signed by the "avalista." If no amount is indicated in the "aval" it is presumed to guarantee the total amount; if no person is indicated in whose behalf the "aval" is given, it is presumed to be in favor of the acceptor; if not, of the drawer. A naked signature to a bill of exchange will be considered to be that of an "avalista" if it gives rise to no other obligation. The "avalista" is jointly and severally liable with the person in whose behalf he has acted; his liability continues even after the principal obligation becomes null and void. Upon his payment of the bill the avalista has a right of recourse against his principal and against those liable in favor of the principal, on the instrument. The action against the "avalista" is subject to the same terms and conditions as the one against his principal.<sup>11</sup>

## PAYMENT

The bill must be presented for payment upon maturity at the place indicated; if none has been designated, then at the domicile or residence of the drawee, acceptor, or "domiciliatario" or at that of the "recomendatario".<sup>12</sup> If drawn at sight, the bill of exchange must be presented for payment within 6 months of date. Any one of the persons liable may reduce this term by so stating it in the bill, while the drawer may extend it or forbid presentation before a set date. The holder may not refuse partial payment, but may retain the bill until full payment is made (writing in it the amount paid, for which he may give a separate receipt. The holder may not be forced to accept payment before maturity; the drawee who makes such payment is liable for the validity of the payment. If payment is not demanded at maturity, the drawee or any other person liable on the bill may deposit the amount due in the Banco de Mexico, after the time for protesting the instrument has expired.<sup>13</sup>

<sup>10</sup> Arts. 102-108.

<sup>11</sup> Arts. 109-116.

<sup>12</sup> A "domiciliatario" is a person or firm designated in the instrument and domiciled in a place different from that of the drawer or acceptor, at whose domicile the instrument is to be accepted or paid by the drawer or acceptor. Such instrument is called a "domiciled instrument." A "recomendatario" is an alternate acceptor whose name appears on the instrument to accept same if the primary acceptor does not.

<sup>13</sup> Arts. 120-132.

## PAYMENT FOR HONOR

When the bill is not paid by the drawee, payment for honor may be made by (1) the acceptor for honor, (2) the "recomendatario", (3) a third person. Payment for honor must be made at the time of protest or within the following working day and must be set out in the document of the protest. Payment for honor may not be refused while the holder has the bill in his possession; if he does refuse, he loses all rights on the instrument against the person for whom payment for honor was offered.<sup>14</sup>

## PROTEST

Protest must be made for nonacceptance or nonpayment before notary public, public broker, or the highest political power of the place if either of these two are not available, within the two working days following presentation for acceptance or following maturity. Against the drawee and "recomendatario" protest for nonacceptance must be made at the place designated for acceptance; if there is none, at their domicile or residence. Protest for nonpayment must be made at the place therein stated; if there is none, at the domicile or residence of the drawee, acceptor, or "domiciliatario" or of the "recomendatario". If the person against whom protest is directed is not present, it may be taken up with his employees, family, servants, or some neighbor. When the domicile or residence of that person is not known, protest may be made at the address chosen by the official making it. If the drawee is forced into bankruptcy or civil insolvency, before acceptance or after it, but before maturity, the bill must be protested for nonpayment; the protest must be prepared between the date when the insolvency proceedings start and the date when protest normally would have had to be made for nonacceptance or nonpayment. The protest must be evidenced in the bill itself or in a paper attached thereto. In addition the official in charge must prepare the document of protest in which must be set out: (1) An exact reproduction of the bill of exchange, with its acceptance, endorsements, "avales", etc.; (2) the request for acceptance or payment with a statement of whether the person requested was present or not; (3) reasons given for nonacceptance or nonpayment; (4) signature of the person with whom the protest was taken up or a statement that he refused to sign or that he was unable to do so; (5) place, date, and hour when the protest was made and signature of the official making it. If protested for nonacceptance, a bill need not be presented for payment or protested for nonpayment.

The notary public, broker, or other official may retain the bill during the day of the protest and during the day following; the drawee may pay it in that time with interest for the delay and costs of the protest. Notice of protest must be given to all the parties to a bill of exchange by the official who made the protest, on the day following, if such parties reside at the place where protest was effected, and by the next mail, duly registered, directed to the addresses indicated by them on the bill, if the parties reside at some other place. Failure to notify renders the party at fault liable for damage caused, provided the addresses were written on the bill.<sup>15</sup>

<sup>14</sup> Arts. 133-138.

<sup>15</sup> Arts. 139-149 and 155.

## WAIVER OF PROTEST

Protest may be waived by the drawer writing on the bill "without costs" ("sin gastos"), "without protest" ("sin protesto"), or similar clause. Such a statement does not relieve the holder from the obligation of presenting the bill for acceptance or payment or from notifying the refusal to accept or pay to the other obligees ("en vía de regreso"). If such clause is written by the holder or an endorser it will have no force and effect.<sup>10</sup>

## ACTIONS TO COLLECT ON BILLS OF EXCHANGE ("ACCIÓN CAMBIARIA")

The last holder of a bill of exchange may demand, *by filing executory action on it*, the amount of the instrument, legal interest from maturity, cost of protest, and other costs and exchange premiums between the place where payment should have been and the place where it actually was made, plus cost of remittance. The action proceeds against any or all of the parties liable on the instrument without previous judicial acknowledgment of their signatures.

The action to collect on bills of exchange by the last holder against prior obligees lapses (1) when no proper presentation for acceptance of payment is made; (2) when no proper protest is effected; (3) when proper acceptance or payment for honor is denied; (4) when the action is not filed within 3 months of the protest or of the date of presentation for acceptance or payment if protest was waived; (5) when the action against the acceptor has prescribed or will prescribe within 3 months after the filing of the complaint. The action by an obligee who pays the bill against prior obligees is lost (a) when the action of the last holder is lost as indicated in (1), (2), (3), and (5) above; (b) when he fails to file it within 3 months after he paid the bill or after the complaint in the action to collect against him is notified to him; (c) when the action against the acceptor has prescribed or will prescribe within 3 months after the filing of the complaint.

The periods of time upon which the action on bills of exchange depends for its effectiveness may not be suspended except by force majeure and may never be interrupted. The executory action to collect on bills of exchange prescribes (is outlawed) within 3 years counted from the date of maturity or, if there is none, from the expiration of the periods of time of articles 93 and 128 (that is, after date of maturity as determined in case of bills payable at a certain time after sight or at sight). The last holder and other prior obligees who have paid the bill of exchange may file actions, based on the transactions which gave rise to the issuance or transfer of the bill, after being unable to obtain satisfaction through the action on the bill against their direct debtors, provided always that the drawing or transfer of the bill did not operate as a novation of the original transaction, which novation is never presumed. If the executory action on the bill is lost by reason of prescription or "caducidad", the persons indicated above may file only an ordinary action at law ("acción causal") against the person directly liable to them, provided they have performed every act necessary to preserve whatever actions this person is entitled to and provided they

<sup>10</sup> Art. 141.

return the bill to him. If right of action against the drawer and other obligees is lost, the holder may demand of the drawer the amount by which the latter has been unjustly enriched to the damage of the holder; this right of action prescribes within 1 year after the executory action on the bill lapsed.<sup>17</sup>

#### BILLS IN A SET

Unless a bill is marked "única" (sole copy—without duplicates) the taker has the right to have the drawer issue one or more identical duplicates marked "first", "second", and so on successively according to the order of issuance. Any other holder may make the same demand through the immediately preceding endorser who, in turn, must apply to his predecessor until the drawer is reached.

Payment of one duplicate frees all the others from payment, but the drawee is liable on all the copies he accepts; endorsers who signed duplicates to different persons, as well as subsequent endorsers, remain liable by their endorsements as if they were made on distinct bills. The name and domicile of the person in whose possession a duplicate sent for its acceptance may be found, must be mentioned by the remitter in all the other duplicates.

A holder of a duplicate sent for acceptance must present it in time and must protest it whenever necessary; if at its maturity no one demands it, he must make collection on it and cause the amount thereof to be deposited in a bank, or, in its absence, in a commercial house. He must also deliver the copy sent him for acceptance and the protest note, as the occasion arises, to the legitimate holder of the other duplicate which contains mention of the person to whom the "first" was sent.

If the holder refuses to make delivery, the legitimate holder must make a protest against him, and against the drawee for failure to accept or pay the duplicate, before exercising his actions. When two or more holders of duplicates demand of the holder the duplicate sent for acceptance, he must deliver it to the first demanding the document; if all present themselves at the same time, he must prefer the holder of the duplicate bearing the lowest ordinal number.

The holder of a bill of exchange may make copies thereof. They must be exact reproductions of the original with the endorsements and all the statements it contains and indicating where that which is copied ceases. The autographed signatures of the acceptor, endorsers, and "avalistas", made on the copy, bind them as if written on the original.<sup>18</sup>

### PROMISSORY NOTES

#### FORM AND CONTENT

A promissory note must contain: (1) A statement that it is a promissory note; (2) an unconditional promise to pay a determinable sum; (3) name of payee; (4) date and place of payment; (5) date and place where made; (6) signature of the maker or agent. If date of payment is not stated, the instrument is payable at sight. If place of payment is not indicated, it is payable at the maker's domicile.

<sup>17</sup> Arts. 152-169.

<sup>18</sup> Arts. 117-125.

Notes may be made payable at a stipulated time after sight, in which case they must be presented within 6 months after date for the purpose of fixing the date of payment.

The holder of a promissory note need not present it for payment nor protest it for nonpayment in order to preserve his rights to executory action against the maker. But he must do so whenever the person who must pay it is not the maker, in order to preserve his rights of action against endorsers and maker. Article 174 of the law makes applicable to promissory notes the provisions of articles 77 (last paragraph), 79-81, 85, 86, 88, 90, 109-116, 126-132, 139, 140, 142, 143 (first, second, and third paragraphs), 144 (first and third paragraphs), 148, 149, 150 (subdivisions II and III), 151-162, and 164-169.

For the purpose of suit (article 152), the amount of the note will include the interest due; the discount of a note not yet due will be calculated at the rate of interest stipulated in it, and at the legal rate if no interest has been indicated. Interest for delay in payment will be computed at the stipulated rate; if none is indicated, at the rate stipulated on the principal sum; if no interest is indicated, then at the legal rate.

The maker of a note is considered for all purposes like an acceptor of a bill of exchange, except in the case of article 169, when he will be considered as a drawer.<sup>19</sup>

### CHECKS

Checks may be drawn against credit institutions only by persons having funds therein and authorized by them to draw checks on them; if drawn without having funds to cover, the drawer is guilty of fraud. The instrument must contain a statement that it is a check, an unconditional order to pay a determinable sum of money, name of drawee, place of payment, and signature of drawer, and make mention of the date and place of issue. Checks must be made payable at sight only and may be drawn to bearer or nominative; if no payee is designated, or if drawn to "X or bearer", it is drawn to bearer.

The check must be presented for payment at the address therein indicated or, if none is stated, at the principal establishment of the drawee at the place of payment, within 15 days of date if payable where drawn, within 1 month if payable at another place within Mexico, and within 3 months if drawn abroad payable within Mexico, and vice versa unless the law of the foreign country provides a different period of time (arts. 180-181). Even though not presented or protested in time, the drawee must pay a check if it has sufficient funds of the drawer. Whenever a check is presented in time and not paid, it must be protested within the second working day after presentation, in the same manner as a bill of exchange; but for the purpose of such protest, a statement made in it by the drawee to the effect that the document was presented and not paid in part or in full will be sufficient. The holder, after such protest, must notify all prior obligees.

<sup>19</sup> Arts. 170-174.



Failure to protest a check in time and in the prescribed manner prejudices the rights of action of the last holder against endorsers or "avalistas", of the latter against one another and the direct action of the last holder against the drawer and his "avalistas", if they prove that they had sufficient funds to pay the document in the drawee's possession during the time within which presentation should have been made and that the check was not paid because of a cause, foreign to drawer, arising after the expiration of such term. These rights of action prescribe within 6 months after presentation as regards the holder, and after the day following the date of payment as regards endorsers and "avalistas." Alterations and falsifications in checks may be a defense in favor of the drawer only if they are not due to his fault ("culpa") or that of his managers, representatives, or clerks.

The law authorizes the use of special forms of checks, such as crossed checks which may be cashed by credit institutions only, certified checks which are not negotiable, checks with a clause "deposit to the account of" ("para abonar en cuenta"), banker's checks which may only be nominative and nonnegotiable, and traveler's checks.<sup>20</sup>

#### BONDS, DEBENTURES, AND OTHER OBLIGATIONS ("OBLIGACIONES")

Corporations may issue bonds, debentures, and other obligations in denominations of 100 pesos or its multiples, nominative, to bearer, or nominative with bearer coupons, all holders thereof enjoying equal rights within each series. (Hereinafter whenever the term "bond" is used it is meant to include debentures and other obligations.) Bonds must set out the following facts: (1) Name, object, and domicile of issuing company; (2) company paid-in capital and amount of its assets and liabilities according to the balance effected for the purpose of the particular bond issue; (3) amount of the issue, stating number and nominal value of the bonds; (4) rate of interest stipulated; (5) term of interest and capital payment and condition and manner of amortization; (6) place of payment; (7) statement of collateral, if any, guaranteeing the issue and of the corresponding inscription in registry of property; (8) place and date of the issue, with inscription and its date in the mercantile registry; (9) signatures of authorized company directors; (10) signature of the common representative of bondholders.<sup>21</sup>

#### PREREQUISITES GOVERNING ISSUES

These obligations may not be issued for more than the net assets of the issuing entity which appears from the balance indicated in (2) above, unless the issue is made for the value or price of property whose acquisition or construction has been contracted by the concern (art. 212). Nor may they be amortized by drawing lots ("sorteos") in an amount larger than their nominal value or with premiums, except when the interest payable is over 4 percent annually and the

<sup>20</sup> Arts. 175-2074

<sup>21</sup> Art. 208-210.

periodical amount reserved for amortization and for interest is the same during the time set for the amortization. The company issuing bonds may not reduce its capital except in proportion to the payments it makes upon outstanding issues, nor may it change its object, domicile, or name without the consent of a general meeting of bondholders. It must publish annually its balance, certified by a public accountant, in the *Diario Oficial*.<sup>22</sup>

#### PREPARATION OF BOND ISSUES

In order to effect an issue of bonds formal declaration thereof must be drawn by the concern before notary public, to be inscribed in the Registry of Property if real estate is mortgaged to secure the issue and, in any event, in the Registry of Commerce. This declaration must contain the following facts:

1. The facts contained in (1) and (2) above, accompanied by: (a) Minutes of the general meeting of shareholders authorizing the issue; (b) balance prepared for the purpose of making the issue and certified by public accountant; and (c) minutes of the meeting of the board of directors in which were indicated the person or persons who must subscribe to the issue.

2. Facts contained in (3), (4), (5), and (6) above.

3. Statement of the special guarantees given to secure the issue, with all its legal prerequisites.

4. Statement of the use to be made of the funds received, in the case stated in article 212, *supra*.

5. Appointment of the representative (trustee) of bondholders, and his acceptance, with his statement to the effect that: (a) He has verified the value of the net assets declared by the company; (b) he has verified the existence and value of the property mortgaged or pledged to guarantee the issue; and (c) he will be the depositary of funds of the issue to be used, in accordance with article 212, to construct or buy property.

Whenever the bonds are offered to the public, any advertisement or notices thereof must contain all the facts set out above. Those guilty of breach of this requirement are liable jointly and severally for the damages caused.<sup>23</sup>

#### QUALIFICATIONS AND DUTIES OF BONDHOLDERS' REPRESENTATIVE

The bondholders' representative (trustee) must not be a bondholder. The position may be discharged by an individual or the representatives of a credit institution or finance company; as such he may grant judicial powers of attorney. He may not resign except for grave cause as determined by the judge of first instance, but may be removed at any time by the bondholders. If at any time there is no representative, any institution authorized to act as trustee will be appointed, while the bondholders designate a permanent one, by the judge of first instance, upon petition of a debtor or bondholder; a meeting of bondholders must be called within 15 days after appointment of temporary representative to designate the permanent one.

<sup>22</sup> Arts. 211-212.

<sup>23</sup> Art. 213.

The powers and duties of the representative, in addition to those previously indicated, are: (1) To verify the facts set out in the declaration of the bond issue; (2) to file such actions and perform such acts as are necessary to obtain or protect payment of bondholders' interests and capital; (3) to be present at drawings by lot and shareholders' meetings; (4) to call and preside over bondholders' meetings; (5) to sign all documents and contracts in the name of the bondholders, with the issuing entity.

In the absence of any stipulation to the contrary, compensation of representative and expenses of actions to preserve or make effective bondholders' rights must be paid by issuing company.<sup>24</sup>

#### BONDHOLDERS' MEETINGS

The general meeting of bondholders will represent all bondholders. It must be called by the representative or judge of first instance, to be held within a month, upon petition of 10 percent of bondholders. The quorum is constituted by a majority plus one of bonds in circulation; the decisions of the meeting are valid if approved by a majority. Upon a second call to a meeting it will be validly constituted, regardless of the number of shares represented. A representation of 75 percent of outstanding bonds and a vote of the majority of those present plus one (unless a second convocation becomes necessary when its decisions are valid, regardless of the bonds represented) is necessary for the purpose of: (1) Selecting the representative or revoking his appointment; (2) granting extensions of time to the issuing company or modifying the bond contract (arts. 218-219).

For meeting purposes, bondholders must deposit their evidence of ownership or the corresponding certificates of deposit at the place designated in the convocation on the day prior to the date of the meeting. They may be represented by proxies authorized by simple letter power. Bonds not placed in circulation or bought by the issuing entity may not be represented in the meeting. Directors of issuing company may attend bondholders' meetings (art. 221).

The meeting will be conducted by the representative. Minutes will be kept, to which will be added a list of those present, signed by them and the "escrutadores" (persons who at the meeting examine credentials of attendants). The minutes, certificates of title, books of account, and all documents will be kept by the representative who, upon request, must issue certified copies thereof, at petitioner's expense. Bondholders are entitled to one vote per obligation of the lowest denomination issued. The provisions of the Code of Commerce governing shareholders' meetings will apply insofar as these rules do not regulate a specific situation.

Expenses of convoking and holding meetings requested by bondholders in accordance with article 218 must be paid by those who requested it if the meeting did not approve their proposals.<sup>25</sup>

#### PAYMENT OF BONDS

If bonds are payable by drawing lots, this must be done before notary public. A list of those drawn must be published in the fed-

<sup>24</sup> Arts. 216-217 and 226.

<sup>25</sup> Arts. 218-226.

eral official journal and in a newspaper at the company's domicile and the amount thereof deposited within a month in a bank, in which case the bonds drawn for payment will not earn interest. This deposit may not be withdrawn by the issuing company before 90 days have expired since the date when payment may be made, which date must be fixed within a month after the drawing.<sup>25</sup>

#### ACTION BY BONDHOLDERS

The following actions may be instituted by individual bondholders: (1) To annul the issue in any of the cases stated in articles 209-211 (demanding only reimbursement of amount paid by bondholders—art. 224 and last paragraph art. 220), and whenever prerequisites to convoke and hold their meetings are disregarded; (2) to demand by executory action payment of matured coupons or bonds (including those drawn by lot) and amortization or reimbursement due according to bond contract; (3) to demand that representatives perform all necessary acts to preserve or make effective their rights; (4) to recover against representative for his gross culpability.

The first three actions above may not be instituted whenever identical action by representative is pending or they are inconsistent with resolutions of bondholders' meetings.

Actions to collect coupons or interest due prescribe within 3 years of maturity and those to collect the bonds within 5 years after term for amortization or after date of publication of list of bonds drawn by lot for payment.<sup>26</sup>

#### CERTIFICATES OF DEPOSIT AND PLEDGE BONDS

The certificate of deposit is an instrument issued by general warehouses organized in accordance with the General Law of Credit Institutions to evidence the ownership of property deposited in them. The pledge bond evidences a credit guaranteed by a pledge of the property indicated in the corresponding certificate of deposit. Receipts, records, or certificates issued by any other person or institution to evidence the deposit of property will have no effect as credit instruments. Whenever the certificate of deposit is expressly nonnegotiable no pledge bond may be issued on it. The law regulates the form and content of these instruments, how and under what conditions they may be issued and negotiated, the effect and rights arising therefrom, the rights and obligations of the warehouse with respect to them and the property deposited, and the actions to which such instruments give rise.<sup>27</sup>

#### CREDIT OPERATIONS

##### EXCHANGE OF CREDIT DOCUMENTS ("REPORTO")

"Reporto" is a transaction by virtue of which a person ("reportador") acquires title to certain credit instruments for a sum of money, and promises to sell to the vendor ("reportado") the same

<sup>25</sup> Art. 222.

<sup>26</sup> Arts. 223-227.

<sup>27</sup> Arts. 229-251.

number of credit instruments, of the same kind, within a certain time, for the same price plus a premium. Such agreements must be in writing and are binding upon delivery of the instruments sold, or their endorsement if nominative. If no time for liquidation is fixed, it is understood that the transaction will be executed by the last working day of the month unless it was entered into after the twentieth day of the month, in which case it is understood that the agreement is to be liquidated on the last working day of the following month; in no case may such transactions extend over 45 days. But these operations may be extended one or more times, without such renewals being considered new contracts, by writing "extended" ("prorrogado"), followed by the signatures of the parties, in the original contract. If, on the working day following the expiration of time for termination of the transaction, the original seller does not liquidate it nor is it renewed, it will lapse and the original buyer may demand payment of balances existing in his favor. Accessory rights of the instruments object of these transactions may be made effective by the original buyer for the original seller, and dividends and interests accruing thereon will be credited to the latter; options will be exercised in his favor, also, provided he supplies the buyer with the necessary funds at least two days before the time of the option expires.<sup>28</sup>

#### DISCOUNT OF CREDITS

Credits extended in the books of account of merchants may be discounted only by credit institutions, although not secured by credit instruments subscribed by the debtor, whenever: (1) Demandable within a certain time or after fixed prior notice. (2) Recognized in writing by debtor. (3) The discount agreement is evidenced in writing, stating name and domicile of debtors, amount of the credits, rate of interest, terms and conditions of payment. To this must be added the annotations ("notas y relaciones") indicative of the credits discounted. (4) Bills of exchange drawn on the debtor are given to the discounting institution for each credit, which bills may not be used except upon proper authorization or when, at maturity, payment of the credits is not made by the person who discounts the credit.<sup>29</sup>

#### EXTENSION OF CREDIT ("APERTURA DE CRÉDITO")

By virtue of this act (extension of credit) the creditor may place a sum of money at the disposal of, or may incur an obligation on behalf of, the debtor, who must return the sum of which he disposes or cover it to the extent of the obligations incurred, with the interests, expenses, commissions, and fees stipulated under the terms and conditions contracted. If the parties fixed the amount of the credit, the interest, commissions, and expenses are presumed included in it, in the absence of stipulations to the contrary; if no limit is fixed and there are no means of fixing it, the creditor may do so at any time. The parties may contract that one or both may restrain the other party or denounce the contract at any time upon due notice. If no term is stipulated, any of the parties may terminate the con-

<sup>28</sup> Arts. 259-266.

<sup>29</sup> Arts. 288-290.

tract at any time upon giving due notice. If no term is fixed for the return of the sums of which the debtor may dispose, or for the reimbursement of those paid in his behalf, restitution must be made at the expiration of the term fixed for the use of the credit, or, if there is none, within a month after its extinction. The credit is extinguished by (1) the debtor disposing of the total amount of the credit unless extended in current account, (2) expiration of term fixed, (3) denouncement of the contract, (4) failure of collateral, (5) suspension of payments, judicial liquidation, and bankruptcy of any of the parties, and (6) death, loss of civil rights, absence, incapacity, or dissolution of the debtor."

#### CURRENT ACCOUNT

Provision is made in the law for transactions by which credits arising out of reciprocal remittances between persons may be entered as debits and credits in a single account, the balance of which constitutes a demandable obligation. Commissions and expenses of the operations may be included in the account, which, in the absence of stipulation or use to the contrary, must be closed every 6 months for liquidation purposes. Actions or exceptions are not excluded by the inclusion of a credit in a current account. Remittance of credit instruments is always conditional on their payment. If a secured obligation is entered in an account, the security may be demanded by the one accepting and making the entry if the balance of the account runs in his favor; if there are guarantors or co-obligators of a credit in a current account they are liable to the party making the remittance if the balance of the account runs in his favor.

The creditor of one of the parties to a current account may attach the future balance of the account in security of his credit; in such case, debits ("partidas de cargo") arising out of operations subsequent to the attachment will not be considered.

Proceedings to correct errors, omissions, or duplications in current accounts lapse within 6 months after closing of the account, which may be terminated at one of the times it is closed for balancing, by giving notice to that effect to the other party at least 10 days before such closing. Death or incapacity of one of the parties does not terminate an account, unless his heirs or legal representatives or the other parties to the account so decide.<sup>31</sup>

#### LETTERS OF CREDIT

Letters of credit may be issued only to designated persons for a fixed amount, or in undetermined amounts included in a fixed maximum, and are nonnegotiable. They may not be accepted or protested and confer no right against the person to whom addressed. The holder will enjoy no recourse against the drawer of a letter of credit unless he paid the amount thereof to the drawer or is his creditor in that amount; in these cases the drawer must pay the amount of the letter if it is not paid, and is liable for the damages incurred. If the holder or taker of a letter of credit guaranteed the amount thereof and it is not paid, the drawer is also liable for the

<sup>30</sup> Arts. 291-301.

<sup>31</sup> Arts. 302-310.

damages incurred. The amount of the damages in question may not exceed one-tenth of the unpaid amount, plus the expenses of the security or guaranty. In the absence of stipulation to the contrary a letter of credit is good only for 6 months from date of issue.<sup>82</sup>

#### IRREVOCABLE CREDIT

An irrevocable credit ("crédito confirmado") is granted as a direct obligation from the issuer to a third person. It must be in writing and may not be revoked by the person requesting its extension. The third person may transfer it, but will continue subject to the obligations imposed on him in the confirmation. The creditor is liable to the person requesting the extension of the credit as his agent.<sup>83</sup>

#### MISCELLANEOUS CREDIT

Credit may be extended for the acquisition of raw materials, payment of wages, and direct expenses indispensable to an enterprise. This is known as "crédito de habilitación o avio." Such credits will be secured by the goods purchased or the produce earned, pending or future. By the contract of "crédito refaccionario" a credit may be extended to a person, who must use the amount thereof in the purchase of implements, fertilizers, animals, or necessary machinery, in construction and in cultivation.

It may also be stipulated, in the contract of "crédito refaccionario", that part thereof may be used to cover fiscal obligations of the enterprise of the debtor or the property which he uses in the same, at the time of making the contract, and that part thereof may be used to pay the debts incurred by the debtor in expenses of exploitation or for the purchase of personal or real property, or in the execution of the works previously mentioned, provided that the acts or operations from which such debts arise took place within the year prior to the date of the contract.

These credits are secured by the property in which invested, and the produce of the enterprise benefited. The corresponding contract must set out: (1) Object of the enterprise, duration and manner of disposing of the credit; and (2) the security and terms and conditions of the contract. They must be drawn as public instruments, or as private documents before two witnesses if the amount is less than 5,000 pesos, and must be registered in the mortgage registry of the place where the realty given as security thereof is located, or in the mercantile registry if no realty is involved; unless such registration is made they do not affect third persons. The law empowers the creditor to see to it that the credit is used as stipulated, and to recover the produce pledged from third persons who knew or should have known of the outstanding credit.<sup>84</sup>

#### TRUSTS ("FIDEICOMISO")

A natural or juridical person having the capacity necessary to encumber property in the manner effected by a trust, may give property in trust to a credit institution authorized to act as trustee, for

<sup>82</sup> Arts. 311-316.

<sup>83</sup> Arts. 317-320.

<sup>84</sup> Arts. 321-333.

the benefit of a designated person or object. The trust may not last longer than the lives of persons living or conceived at the death of the settlor of the trust, or 30 years whenever the "cestui que" trust (beneficiary) is a juridical person not a charitable or public order institution. A trust may be created by will or "inter vivos"; it must be evidenced in writing with the formalities required for the conveyance of the property constituting the "res" of the trust. It is extinguished by: (1) Realization of its object; (2) impossibility of object; (3) impossibility of performance of its condition precedent, or failure to perform it within the stipulated time or within 20 years after creation of trust; (4) performance of condition subsequent; (5) express stipulation between settlor and "cestui"; (6) revocation, if settlor reserved such power to himself; (7) impossibility of substitution of trustee. Any trust created in favor of the trustee ("fiduciario") is null and void.<sup>85</sup>

### BAILMENTS

A contract whereby a party known as the "bailee" agrees to receive from another, the bailor, personal or real property and to keep it until the latter demands it, is a bailment ("depósito"). It may be commercial, such as deposits of money and documents with banks and goods in bonded warehouses, civil, or judicial.

The deposit of national or foreign currency may be made in banks, payable at sight, within a certain time or upon previous notice. Title to the money passes to the bank, which must return the amount in the same currency; if the deposit is made in a box, bag, or sealed envelop, the title thereof is not transferred. Currency deposits payable at sight are understood to be made in checking accounts, unless the contrary is stipulated. Deposits made in the name of two or more persons may be paid to any one of them or according to his order, unless otherwise stipulated. Whenever interest is payable on deposits, it accrues from the working day following the deposits until the working day preceding the date of payment, in the absence of provision to the contrary (arts. 267-275). Provision is made also for the bank deposit of securities (arts. 276-279).

Whenever deposits of merchandise are made in general warehouses, these must return the same property in the condition in which it was received. If the property deteriorates without the fault of the warehouse to the extent that security or health is affected, it may be sold upon intervention of broker or upon authorization of health offices. The receipts of the sale will be applied to defray fiscal charges, storage fees, pledge bonds, if any, the remainder being kept for the holder of the certificate of deposit.

Warehouses may accept deposits of goods designated by class ("bienes genéricamente designados") under agreement to return other goods of the same kind and quality; in this case the depository may dispose of the goods and will bear all losses because of alteration or deterioration except natural diminution, the amount of which is expressly determined in the certificate of deposit. Merchandise must be insured against fire to the extent of the market price on the date of deposit.

<sup>85</sup> Arts. 340-359.



Goods deposited subject to payment of import duties may not be withdrawn except upon legal proof to the warehouse of such payments. The duration of the deposit may be stipulated between the parties except when the goods are subject to payment of taxes or other fiscal charges, in which case the Treasury will fix the duration, which will be 2 years if no period of time is specially designated.

Goods in a warehouse, the receipts of their sale, or amount of indemnity in case of loss, may not be recovered, attached, nor made subject to any other claim, if certificates of deposit have been issued, unless the latter are included. This may be done by order of court in cases of bankruptcy, testamentary, or intestacy proceedings of the holder of the certificate of deposit or bond, and in case of theft, loss, destruction, mutilation, or gross deterioration of the corresponding certificate of deposit or bond (arts. 280-287).

Civil bailments may be gratuitous or for a consideration. The bailee must preserve the property and will be liable if it is damaged, lost, or injured through his malice or negligence. He may not retain it until the expenses of the bailment are paid, but he may demand the judicial retention thereof until such payment is made. Innkeepers, according to the Civil Code of 1932, are liable for the property brought into their establishment with their consent or that of their agents, unless they prove that the loss is due to acts of the owners, their companions, or servants, force majeure, or inherent defect. This liability is limited to 250 pesos and may not be waived or obviated. But he is not liable for money, securities, or objects of greater value if not placed in his care.<sup>36</sup>

Judicial deposits ("secuestro") may be conventional or by court order, and concern property in litigation; the former lasts until the suit terminates or all the parties otherwise provide.

#### STAMP TAX

Upon the declared value of things deposited, or amount, if money is deposited, a tax of 50 centavos per 100 pesos or fraction thereof if the contract is evidenced by public instrument, and 1 centavo per 10 pesos or fraction thereof if otherwise evidenced. If no value can be fixed a 5-peso tax is imposed upon the contract if evidenced by public instrument, and 1 peso if otherwise evidenced. Deposits in public offices and in credit institutions are not subject to the tax.

#### PLEDGES "

The pledge is a contract whereby a lien is granted on transferable personal property to secure the performance of an obligation or its preferred payment. The property must be delivered to the creditor. Pledges may be constituted in commerce by: (1) Delivery to creditor of property of "bearer" instruments; (2) endorsement of nominative instruments to creditor or/and annotation of this act if necessary; (3) by the delivery to the creditor of the title or document in which the credit is set forth when title or credit object of the pledge are not negotiable, with inscription of the encumbrance in the registry of the title or with notification made to the debtor, with regard to

<sup>36</sup> Civil Code, 1932, arts. 2516-2546; Civil Code, 1884, arts. 2545-2593.

<sup>37</sup> Civil Code, 1932, arts. 2856-2892; Civil Code, 1884, arts. 1773-1809.

titles or credits concerning which such recordation is or is not required; (4) deposit of property; (5) deposit in places whose keys are kept by creditor, even though owned by or in the establishment of debtor; (6) by the inscription of equipment, operating, or financing credit; (7) delivery or endorsement of the instrument evidencing merchandise object of the pledge, or the issuance or endorsement of a pledge bond; (8) compliance with prerequisites of the general law of credit institutions in the case of book credits. If the pledged property fails to cover the amount of the debt plus 20 percent, and when the principal obligation matures, the creditor may request its sale of the proper court (arts. 334-345).

When the mercantile pledge consists of fungible goods or instruments, it may be stipulated that ownership be transferred to the creditor, who shall be obliged, in the respective case, to restore to the debtor a like amount of other property or instruments of the same kind. Such agreement must be in writing. When money is pledged its ownership is presumed transferred, unless otherwise agreed.<sup>88</sup> The pledged property may be retained by the owner thereof. Under the Civil Code of 1932 such retention does not bind third parties unless recorded in the public registry;<sup>89</sup> but in most of the States, in the case of civil pledges, the transfer of the pledged property to the creditor is essential to their effectiveness.

The contract must be evidenced in writing. Under the Civil Code of 1932 it will not bind third parties unless its date is made certain by registration, public document, or other authentic manner. In most of the States it must be evidenced by public document if the amount of the obligation exceeds 500 pesos. The registration of the contract in the public registry, whenever possible, is advisable in order to enable interested parties readily to prove the existence and nature of the obligation and to hold third parties.

Ungathered produce, credit instruments, securities, bearer or nominative documents, and property belonging to another, with his consent, may be pledged. But the debtor of a credit that is pledged must be notified of the pledge contract.

The creditor who accepts a pledge has the right to: (1) Be paid with the price of the pledge; (2) recover it against anyone who dispossesses him; (3) be paid expenses incurred in preserving it; and (4) demand another or payment of the debt if it is lost or deteriorates. He must preserve it, being liable for its damage due to his fault or negligence, and must return it when the debt, interest, and conservation costs are paid. If the debt is not paid in time, the creditor may demand the auction sale of the pledge which will be adjudicated to him for two-thirds of the legal bid if it cannot be sold. This sale may be avoided by agreement between the parties made at the maturity of the obligation, in the Federal District and territories. In most of the States the creditor may not keep the pledge; it must be sold judicially, extra-judicially, or must be adjudicated to him. If the sale does not cover the amount of the principal obligation the creditor may sue the debtor for the difference. The pledge lapses whenever the principal obligation is extinguished.

<sup>88</sup> Negotiable Instruments Law of Aug. 26, 1932, arts. 334-345.

<sup>89</sup> Art. 2859.

## V. AGENCY

### GENERAL CONSIDERATIONS

The distinction between civil and commercial acts is to be found also in the agency relationship under Mexican law. Whenever authority is given to a person to act in behalf of another in commercial transactions a "comisión mercantil" (commission agency) is created. The principal is designated as the "comitente" (consignor) and the agent as the "comisionista" (consignee). Their rights and obligations are defined in detail in the Code of Commerce which also regulates the activities of other commercial agents such as brokers, managers, and clerks. The civil agency is known as "mandato." Extensive provisions are embodied in civil codes concerning this contract, which rules are basic and are applicable even to the commercial agency insofar as the Code of Commerce is silent.

### COMMISSION AGENCY

The commission agent is a person who may transact commercial acts in his own or his principal's name. In the latter case, he becomes a simple agent and his rights and obligations are governed by general civil law. When acting in his own name he assumes a direct liability to the customer who is liable to him only and who has no direct action against the principal. The latter has no direct right of action against the third parties, but he may stipulate the assignment to him of the "comisionista's" rights against the persons with whom he deals. In order to avoid possible difficulties the consignor should instruct the consignee specifically in whose name he is to act. If business policies require that the agent contract in his own name, he should be advised not to act otherwise, and to send to the principal for acceptance or rejection any contract drawn in his own name. The principal should also specifically reserve in himself in this case the right to terminate the agency upon any attempt by the consignee to contract in the principal's name.

The agent's authority to act need not be written, but it must be ratified in writing before the transaction is terminated. In any event it is preferable to outline the extent and limitations of the powers of the "comisionista" if only by correspondence. If he is registered in the commercial registry the power under which he acts may be recorded therein, provided the importance of the business permits it and its nature requires or makes it advisable to give notice to third persons.<sup>1</sup>

### ACCEPTANCE OF COMMISSION

The mercantile commission, like any other contract, becomes binding upon offer and acceptance, which may be expressed or implied. The performance of any act in furtherance of the commission con-

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<sup>1</sup> Code of Commerce, arts. 283, 284, 274, 21.

stitutes an implied acceptance and the "comisionista" must continue it until concluded. Should he refuse the commission, he must so advise the principal immediately or by the next mail, and must take the measures necessary to preserve the goods remitted to him, until another agent is obtained. To this effect he may sell the merchandise through two brokers or merchants who certify its amount, quality, and value if the principal fails to appoint another agent upon receipt of notice of refusal. Such sale may be made also whenever the value of the consigned merchandise does not cover the expense which he must undertake for its transportation and receipt.<sup>2</sup>

#### DUTIES OF "COMISIONISTA"

The "comisionista" must discharge the commission intrusted to him, personally, unless he has been authorized to delegate it. But he may engage clerks on his own responsibility in subsidiary operations which, according to custom, are confided to them. He must comply strictly with the instructions given unless an unforeseen accident, according to his judgment, prejudices the execution of the instructions; in this case he may suspend performance and advise the principal accordingly, by the most rapid means.

The "comisionista" must consult his principal with regard to matters not foreseen and not expressly provided, whenever the nature of the business permits it. If it is not possible to do so, or if the "comisionista" has been authorized to exercise his own discretion, he must act prudently, caring for the business as though it were his own. He must also notify the principal of the facts and circumstances which may induce him to revoke or modify the commission. Like notice of its execution must be given without delay.

The "comisionista" who must remit goods to other places must contract for the transportation, fulfilling the obligations of a carrier. When entrusted with the forwarding of goods he must insure them, if he has orders to do so and the necessary funds have been provided or if he has agreed to advance them.

A complete and just account in accordance with his books must be rendered after execution of the commission and the balance of what has been received must be returned by the "comisionista" to his principal. In case of delay, he must pay interest.

The "comisionista" may not: (1) Buy for himself or for another that which he has been commissioned to sell, nor may he sell that which he has been ordered to buy, except with the consent of his principal; (2) alter the marks on the goods bought or sold for the account of another; (3) have goods of the same kind belonging to different owners under one mark, without distinguishing them by a countermark which indicates the property of each principal; (4) loan or sell on credit or on installment, without authority. In such cases, the principal may demand cash payment of him, leaving in his favor any interest or advantage resulting from the credit payable in installments. If, acting upon authority, the "comisionista" sells on credit, he must notify the principal of it, as well as the names of the buyers; if he does not, the sales are understood to have been made for cash.<sup>3</sup>

<sup>2</sup> Code of Commerce, arts. 275, 276, 279.

<sup>3</sup> Code of Commerce, arts. 280, 286, 288, 287, 290, 296-302

## PROVISION OF FUNDS

Whenever a commission requires provision of funds, the "comisionista" is not required to execute it until the funds are received; if those sent are consumed, performance may be suspended. If the "comisionista" promised to advance the funds, he must furnish them except in case of suspension of payments or bankruptcy of the principal.<sup>4</sup>

## LIABILITY OF "COMISIONISTA"

Failure to give notice of refusal or failure to perform subjects the "comisionista" to liability for the resulting damages. He is answerable for the loss or damage suffered by the principal in transactions effected in breach or in excess of the authority conferred. In such cases the principal has the option of ratifying them or leaving them to the account of the agent.

Nonobservance of the law and regulations governing the business entrusted to him renders the "comisionista" liable for the consequences; if he acted on orders of his principal, both are liable.

The loss of money which the "comisionista" has in his possession by reason of his commission must be borne by him. It must be borne by the principal whenever the agent observes all instructions in returning surplus funds. If the agent invests the funds received to discharge the commission in a different manner, he is liable criminally and for the loss and damages resulting and must pay them back with legal interest from the day he received them.

The "comisionista" is liable for the merchandise received, in accordance with the terms, conditions, and qualifications of the remittance, unless on taking charge thereof he records by certification of two brokers or two merchants the damages or deterioration in the goods. He is liable for their conservation in the condition in which he received them, unless their destruction or damage was caused by fortuitous event, force majeure, passing of time, or inherent defect in the things. In the last two cases, the "comisionista" must prove by certificate of two brokers or two merchants the loss suffered, and must notify the principal as soon as he discovers it.

If collections are not made on time or if legal means to obtain payment are not used, the "comisionista" is liable for the damages caused by his omission or delay.<sup>5</sup>

## FEES OF "COMISIONISTA"

Unless otherwise stipulated the "comisionista" is entitled to remuneration for his services. Whenever the amount thereof is not agreed upon by the parties the commission fees will be determined by the custom of the place where the commission was performed. The principal must also pay in cash to the commission agent, upon receipt of a proper account, the expenses incurred and disbursements made by him with commercial interest from the day on which they were made.

The merchandise actually or virtually in the possession of the "comisionista" is considered specially and preferentially subject to

<sup>4</sup> Code of Commerce, arts. 281 and 282.

<sup>5</sup> Code of Commerce, arts. 278, 289, 291, 303, 295.

the payment of the commission fees, advances, and expenses made by the commission on their account and he may not be dispossessed thereof until he is paid.<sup>6</sup>

#### TERMINATION OF THE AGENCY

A commission may be revoked at any time by the principal, but he is liable for the transactions already performed. Such revocation is not effective against third persons who contract with the "comisionista", unless they know of it. The death or incapacity of the "comisionista" terminates the agency; it continues after the death or incapacity of the principal unless his legal representatives revoke it. The commission may end with the conclusion of the transaction for which it was given, by the expiration of time, or revocation by the agent.<sup>7</sup>

#### EFFECTIVENESS OF DOING BUSINESS THROUGH "COMISIONISTAS"

"Selling or shipping on consignment", that is, operating in Mexico through commission merchants ("comisionistas") has been a common practice. It is usual also to disguise outright sales to Mexican importers as consignments, in order to derive the credit protection afforded by the consignment arrangement.

The true consignment, one made to a "comisionista" who acts in his own name for a commission fee, often permits the exporter to develop the Mexican market at less expense than that incurred in setting up and maintaining an agency or branch. Generally, the "comisionista" has his own establishment where he may store the merchandise consigned to him. He defrays the expenses out of his own pocket, and in many instances conducts his own advertising campaign at no charge to the consignor. The merchandise, while in his possession, is not subject to attachment by his creditors, nor will it form part of the mass of the estate should he be thrown into bankruptcy.<sup>8</sup> If the agent unlawfully disposes of it, it may be recovered by the principal even from innocent third persons.<sup>9</sup> However, in actual practice it is difficult to obtain this protection because of the dangers and expense involved in litigation, the tendency to prolong it, and the technical pitfalls in procedure which may arise.

Although the unlawful disposal of merchandise or funds render the "comisionista" liable criminally and civilly, the exporter may not find it an easy matter to bring him to task. It is, therefore, of the utmost importance and, in the final analysis, the principal assurance of success that great care be exercised in selecting the commission merchant. The "comisionista's" financial standing and reputation for honesty and diligence should be scrutinized with care in all cases.

Frequent use has been made of consignment transactions in dealings with Mexican merchants who are not, normally, commission agents. Every precaution should be taken in order to establish the

<sup>6</sup> Code of Commerce, arts. 304-306.

<sup>7</sup> Code of Commerce, arts. 307, 308; Civil Code, 1932, art. 2595.

<sup>8</sup> Code of Commerce, arts. 998-999.

<sup>9</sup> Civil Code, 1932, art. 2270; Civil Code, 1884, art. 2831.

commission agency clearly, even to the extent that the correspondence between parties may not indicate anything to the contrary. The difficulty lies in the fact that unless the consignment can be established the transaction will be construed as a sale, and in such case the exporter loses his preferred rights over the merchandise. If after a shipment "on consignment" the exporter sends a draft to the consignee ("comisionista") for acceptance, the transaction may be regarded as a sale. The same danger exists where collateral security is required of the consignee against consignment shipments.

Two methods in shipping on consignment are suggested by persons conversant with the Mexican market. One is to consign the merchandise to the order of a bank in Mexico, which clears the goods through the customs and reimburses itself for all charges from one of the contracting parties. It then consigns it to the agent, who executes a consignment contract with the bank. In the other, the bank stores the merchandise and releases it to the "comisionista" upon his acceptance of drafts; the latter is placed under obligation to sell the goods within a specified period and deposit with the bank, as collateral, the paper of his customers, properly endorsed. In order to guard against the possibility of extension of credit to irresponsible buyers or against fraud under this plan, it is advisable that the exporter-consignor approve the credit risk in every sale by the consignee. This method is used especially in cases where the consignor sells on credit merchandise of costly nature, such as machinery.

Other difficulties which are common in cases of consignment are the following: (1) The consignee, if he also is selling goods which he purchases on his own account, is likely to push the sale of that merchandise first and to give secondary consideration to consigned goods; (2) the consignor must bear the risk of loss of the consigned goods (this may be lessened through insurance); (3) the consignor must bear the credit and market risk; (4) in consignment transactions, it frequently becomes necessary to conduct lengthy correspondence between parties and also to keep somewhat complicated accounts—all of which necessarily is expensive.

#### GENERAL RULES OF AGENCY

The "mandato" is a contract by which a person binds himself to perform an act or acts in the name of another. It becomes binding upon acceptance, which may be expressed or implied from the performing of acts under the power.

#### KINDS AND SCOPE OF "MANDATOS"

The "mandato" may be general or special. It is general whenever the agent is given power to act in all the operations of the principal, and special when the powers are limited to the performance of certain and determined acts. Heretofore, it had been difficult to determine how far an agent might act under a general power, since the theory of implied powers does not obtain in Mexico. In the preparation of the instrument evidencing the agency (the power of attorney), lawyers therefore had been forced to make lengthy recitals of the powers granted, to circumvent the difficulty, but their extreme care

was not sufficient in many instances to foresee every conceivable power needed by the agent, who would often find himself thereafter with insufficient power to act. This is still the state of the law in the various Mexican States where a general power only implies acts of administration and special power is necessary to convey, mortgage, or perform any other act indicative of ownership ("dominio").<sup>10</sup> Under the Civil Code of 1932, however, this rigidity in the law has been avoided by providing three kinds of general powers, namely, to litigate and collect, to administer, and to exercise acts of ownership. Since all the powers necessary to carry out the purposes of the principal are implied under each one of these agencies, it therefore follows that by observing the statute strictly, the preparation and use of the corresponding instrument has been made an easier task in this regard. In order to avoid a possible misunderstanding the exact wording of the statute is translated as follows:

**ART. 2554.** In all general powers of attorney to litigate and to collect, it will be sufficient to state that they are granted with all the general powers and the special one which the law requires to be set forth by separate clause, in order that it be understood that they are granted without limitation.

In all general powers of attorney to administer property, it will be sufficient to state that they are granted for that purpose in order that the agents may enjoy all powers of administration.

In all general powers to exercise acts of ownership ("actos de dominio"), it will be sufficient to state that they are granted for that purpose in order that the agents enjoy all the powers which the owners thereof enjoy, both as regards the property and as regards every act necessary to protect it.

Whenever it is desired to limit the powers of the agents in the three cases provided for above, the limitations must be set forth or special power granted.

The notaries public will insert this article in the "testimonios" which they prepare.

#### OBLIGATIONS OF AGENTS

The agent must always act in accordance with instructions and never contrary to them. If he exceeds his powers or acts contrary to the authority granted, he is liable for the damages caused both to innocent third persons and to the principal, who may ratify the acts performed or obligations incurred in his behalf. If unforeseen circumstances prejudice performance the agent may stop his carrying out of instructions and advise the principal immediately. He must consult the latter, whenever the nature of the business so permits, with regard to those matters not covered by the powers, but if this is not possible or if he has been permitted to exercise his discretion, he must act as prudently as if the transaction were his own.

The agent must render accounts of his performance to his principal, and return to him everything that he has received in the exercise of the agency, even though it was not owed to the principal. Interest must be paid on money of the agency, but invested by the agent to his own use and profit.

An agency may be delegated to third persons if expressly so provided by the principal. If no one is designated as substitute the agent may appoint any one, but he is liable if the substitute is of ill-repute ("de mala fe") or notoriously insolvent. The substitute, as regards the principal, has the same rights and obligations as the agent.<sup>11</sup>

<sup>10</sup> Civil Code, 1884, arts. 2359-2371.

<sup>11</sup> Civil Code, 1932, arts. 2562-2576; Civil Code, 1884, arts. 2372-2377.



## OBLIGATIONS OF THE PRINCIPAL

The principal must pay the expenses and damages incurred in the performance of the agency as well as the fees stipulated, the agent having a lien right over the property object of the agency until he is paid in full. In addition, the principal must advance to his agent the amounts necessary to carry out his instructions. If there are several principals all jointly and severally liable in this manner, if one pays the agent in full, he may seek reimbursement from all the others.

As regards third persons, the principal is bound by the acts of the agent acting within the scope of his authority and may enforce performance of the obligations incurred by the third parties. The agent, on the other hand, does not enjoy this right unless it has been expressly granted.

The theory of implied authority prevalent in the United States, by which the principal is bound by the acts of the agent, done under powers deemed incidental or appurtenant to others expressly granted, or incidental to the business of the particular principal as he actually conducts it, is greatly limited in the various Mexican States. Neither is the principal liable in Mexico when by his conduct he has held another person as his agent. The law is rigid; no authority will be implied, except as otherwise previously stated, the agent alone being liable to third persons. The principal assumes no obligations in such transactions unless he ratifies the acts of the person purporting to act for him, but he must oppose the unauthorized performance as soon as he has knowledge of it, under penalty of being considered as having consented thereto—an implied ratification which makes him liable for the unauthorized acts.<sup>12</sup> The doctrine of implied powers has been shown to be recognized by article 2554 of the Civil Code of 1932.

## LIABILITY OF PRINCIPAL FOR DAMAGES

Juristic persons (corporations, partnerships, and other associations) are liable for the damages caused by their agents in the exercise of their functions. The same liability is imposed on artisans, masters, and owners of mercantile establishments as regards their laborers, employees, and clerks. It ceases upon proof, as regards artisans, that they exercised due vigilance over their laborers and in spite of this they were not able to prevent the occurrence and, as regards masters and owners, upon proof that they were not at fault or guilty of negligence. Hotel and boarding-house keepers are liable for the damage caused by their servants in the discharge of their duties. The principal who pays the damages caused by his agents may sue them for reimbursement. The liabilities defined in this paragraph are imposed by the Civil Code of 1932. It varies from the Civil Code of 1884.

## THE AGENCY FOR LITIGATION

In all actions at law in Mexico, any one of the litigants may appear personally or by duly empowered agent. In the latter case, a general power to litigate is sufficient under the Civil Code of 1932

<sup>12</sup> Civil Code, 1884, arts. 2416-2433.

unless the grant of certain powers only is desired, in which case these must be specifically mentioned.<sup>13</sup> In the various States special power is needed to desist from prosecuting suits, to compromise, to submit to arbitration, to make declarations under oath and to propound interrogatories, to make assignments of goods, to challenge the competency, jurisdiction, and actions of judges, to receive payments, and for such other acts as can only be done upon the grant of express authority according to law.<sup>14</sup>

Persons lacking civil capacity, such as minors, mental incompetents, etc., all judicial officials, and treasury employees, may not act as judicial agents. Those who lawfully may and do accept such powers must continue the litigation in all its proceedings while the agency is not terminated; he must pay the costs of his activities, but enjoys the right to seek reimbursement from his principal; and he must do everything necessary to protect his principal and to that effect must follow instructions, but if he has not received them, he must do whatever the nature and kind of the litigation demand. Having accepted power to act for a litigant, the judicial agent may never act for the adversary, even though he resigned his first agency, nor may he ever divulge the secrets or data, nor deliver documents of his principal to the adversary under penalty of payment of the damages caused and criminal prosecution. He may never abandon the agency without placing someone else in charge if so authorized, or, if not so authorized, without notifying the principal. The first agent may revoke the powers of his substitute if so authorized; the doing of any act in the litigation by him amounts to such revocation.<sup>15</sup> The acts of the agent performed in excess of his authority may be ratified by the principal.

It is possible, in actions at law in the Federal District and Territories and in the Federal courts, for anyone to act in behalf of another without authority, but to do so he must furnish bond to guarantee ratification, to answer for the judgment rendered, and to indemnify damages suffered and expenses incurred.<sup>16</sup>

#### TERMINATION OF AGENCIES<sup>17</sup>

The "mandato" is terminated by revocation by the principal, resignation of the agent, death or interdiction of either of these parties, expiration of the time fixed or termination of the business for which the powers were granted, and whenever the absent principal has disappeared and has not been heard from during 3 years in the Federal District and Territories or 10 years in the various States. The judicial agency may be terminated by any of these causes, but in addition it is extinguished by the withdrawal of the principal from the suit, the principal's lack of "personality", i.e., his lack of capacity to appear, his conveyance of his rights in the case in action to another, his doing of any act in the litigation, or his appointment of another agent in the same action or proceeding.

<sup>13</sup> See art. 2554 quoted on p. 51.

<sup>14</sup> Civil Code, 1884, art. 2387.

<sup>15</sup> Civil Code, 1932, arts. 2585-2594; Civil Code, 1884, arts. 2382-2396.

<sup>16</sup> Code of Civil Procedure for Federal District and Territories, art. 51; Federal Code of Civil Procedure, art. 12.

<sup>17</sup> Civil Code, 1932, arts. 2595-2604 and 2592; Civil Code, 1884, arts. 2397-2405 and 2393.

Revocation or resignation may not be made at any time, whenever its creation was stipulated as a condition in a contract or as a means of performing an obligation. This rule, the Mexican equivalent of the agency coupled with an interest in the laws of the United States, is effective only in the Federal District and Territories; in the States the revocation may be made at any time unless otherwise stipulated. The appointment of another agent for the same transaction revokes the first agency from the date the second one is communicated to the first agent. Notice of revocation must be given to the agent and the third persons with whom he deals; otherwise, the principal is liable to the latter if they acted in good faith. But in the Federal District, the principal is not so bound unless he failed to notify determined third parties with whom the agent was specially instructed to negotiate.

Heirs of the principal must communicate his death to the agent, who thereafter may continue in the exercise of the agency until otherwise provided if his failure to do so will cause some prejudice. In this case he may demand the court to assign a short term to the heirs to take care of their business themselves.

The principal must request the return of the instrument or writing, setting forth the "mandato" and all documents concerning the transaction intrusted to the agent.

#### FORM

The creation of an agency may be evidenced orally, or in writing. In the latter case, the instrument setting forth the powers of the agent is generally known as the power of attorney. In most of the States, powers of attorney must be in the form of a public instrument when a general power is granted, when the amount involved exceeds 1,000 pesos, and when the agent is authorized to perform some act which must be evidenced by public instrument. Under the Civil Code of 1932 the power of attorney must be evidenced by public instrument or by a private document signed by the grantor and two witnesses, whose signatures are authenticated by notary public, judge of first instance, justice of the peace, minor judge ("jueces menores"), or the corresponding administrative official (when powers in administrative matters are granted) whenever a general power is granted, or the amount involved is 5,000 pesos or over, or when the agent is to perform an act which must be set forth in a public instrument. Whenever the amount involved exceeds 200 pesos but does not reach 5,000 pesos, a simple letter power without authentication of signature may be used, while under the Civil Code of 1884 the powers may appear from a private document signed by the grantor, or by another at his request and two witnesses, whenever the amount involved exceeds 200 but does not reach 1,000 pesos. It may be granted orally whenever the amount involved does not exceed 200 pesos, but under the Civil Code of 1932 it must be ratified in writing before the transaction for which it was granted is terminated.<sup>18</sup>

The judicial power of attorney under the Civil Code of 1932 must be in the form of a public instrument or in a writing presented to and ratified by the grantor before the judge in charge; in most of

<sup>18</sup> Civil Code, 1932, arts. 2552 and 2555; Civil Code, 1884, arts. 2345-2346 and 2352.

the States and in the Federal courts the latter method is permitted only when the amount involved does not exceed 1,000 pesos.<sup>19</sup>

Although it is a recognized principle of Mexican law that the form and solemnities of acts and contracts are governed by the law of the place of execution,<sup>20</sup> nevertheless, the practice as regards the preparation of powers of attorney has been to conform as much as possible to the form prescribed by the law of the place where they are to be used. It is asserted that this is essential whenever a public instrument is prescribed because in such cases the requirement ceases to be one of form and becomes an essential condition to the existence of the agent's power. The requisite of a public instrument affects the validity of the act itself; hence it is governed, in that respect, by the law of the place where the agent is to exercise his powers.<sup>21</sup>

What is known in Mexico as a public instrument is almost entirely unknown in the United States. It is therefore advisable to follow the rules laid down by Mexican notarial law in drawing powers of attorney. In the Federal District and territories these rules, briefly, require that the instrument:

1. Be drawn in Spanish, without abbreviations, erasures, corrections, or blank spaces.

2. Set forth the date when and place where drawn, full name of notary public authorizing it, and the full name, age, marital status, nationality, profession or trade, domicile, and address of the contracting parties and witnesses.

3. State that the notary public certifies that he knows the parties and that they have legal capacity to contract or that he has ascertained this from two witnesses.

4. Contain the recital of the contractual clauses; in this case the powers granted and the agent's acceptance.

5. Express the notary's certification that the instrument was read to the parties and witnesses and that its value and legal consequences were explained to them. The party who does not know Spanish may have an interpreter who will give assurance that he will faithfully discharge his duty.

6. Set forth at the end the words crossed out or interlined, with indication of their number. It must be stated, as regards the first ones, that they have no force and effect, and as to the second ones, that they are valid and effective.

7. Be closed with the signature of the parties, witnesses, interpreters, and notary public and his seal.<sup>22</sup>

The requirements just indicated do not vary substantially in the States; therefore, it will be sufficient to follow these rules when preparing public instruments abroad for use in Mexico. Mention might be made of stamp-tax regulations which require that whenever a document is subject to the tax at a rate per leaf, the page may not exceed 35 centimeters in length by 24 in width and contain not more than 80 lines on both faces of each leaf.

Powers of attorney may be, and generally are, drawn before a notary public, at the place where the contracting parties are located.

<sup>19</sup> Civil Code, 1932, art. 2586; Civil Code, 1884, art. 2383; Federal Code of Civil Procedure, art. 4.

<sup>20</sup> Civil Code, 1932, art. 15; Civil Code, 1884, art. 14.

<sup>21</sup> T. Esquivel Obregon, *Latin American Commercial Law*, p. 318.

<sup>22</sup> Notarial Law, Jan. 9, 1932, art. 74.

Whenever possible it should be drawn in Spanish in order to avoid its subsequent translation in Mexico.

Whenever powers of attorney are executed by a corporation, partnership, or person that acts as agent of another, evidence that the individual executing them for the entities or in behalf of another had authority to bind one or the other, must appear therein. In the case of a corporation, the notary public states in the instrument that a certain individual, personally known to him, appeared before him and showed certified copies of the articles of incorporation, bylaws, and certificate of existence of the corporation under the laws of the State where the entity was organized. The notary public then sets forth the pertinent clauses of the articles of incorporation and bylaws, which evidence the authority granted to the official executing the power of attorney in behalf of the corporation. It is also advisable to include in the instrument a certified copy of the pertinent portions of the minute book of the corporation of the session of the general meeting of shareholders at which the official in question was elected to office. If the authority just referred to does not clearly appear from the sources indicated above, it is proper for the notary public to set forth in the instrument a certified copy of the minutes of the session of the board of directors at which a resolution granting the required authority was passed, provided it appears from the bylaws or articles of incorporation that this board had power to do so. If such resolution is not proper because the board lacks power, the grant of authority to the official should be approved by a meeting of shareholders and certified copy of the corresponding resolution inserted in the power of attorney.

#### AUTHENTICATION

After the power is drawn and signed in the manner indicated, it must be authenticated prior to its transmission to Mexico. The signature of the notary public must be certified by the clerk of the county within which the notary public operates or the official who can legally do so. The signature of the latter must then be authenticated by the Mexican consul within that jurisdiction. If there is no Mexican consul, the signature of the official must be authenticated by the State Secretary of State, whose signature, in turn, must be authenticated by the Secretary of State of the United States. After this is done, the authentication by the Mexican Minister is indispensable. If the power is drawn originally before a Mexican consul, the authentication herein mentioned need not be made.<sup>23</sup> The power must then be sent to the Ministry of Foreign Relations in Mexico, where the signature of the consul or Minister must be certified. If the power is to be used in one of the Mexican States, the signature of the Secretary of Foreign Relations must be legalized by the Secretary of Gobernación.

#### PROTOCOLIZATION

When the power of attorney has been properly authenticated, it is ready for protocolization. Protocolization of powers of attorney is required in the Federal District and Territories. It must be

<sup>23</sup> Organic Law of the Consular Service of Oct. 25, 1923, art. 13, subdivision 5.

made whenever the power is to be used in litigation in Federal courts.<sup>24</sup> But in view of the fact that most cases in the ordinary courts may ultimately reach one of the Federal district courts if they are of any importance and even the Federal Supreme Court, it is probably a wise precaution to follow the usual practice of protocolizing in Mexico powers of attorney coming from abroad. But it is never required where the instrument has been drawn before a Mexican consul.

The Mexican notary public to whom a power of attorney drawn in a foreign country is brought for protocolization inserts in his protocol (notarial record) the minutes of protocolization ("acta de protocolización"). The foreign instrument, as well as the record of ex parte proceedings which terminates with the judicial order of protocolization, and also the Spanish translation (where the power is executed in a language other than Spanish) are physically inserted in an "appendix" to the protocol, being merely identified by the Mexican notary's flourish ("rubrica") and seal, and a serial number. The text of the power of attorney when executed in Spanish, or the Spanish translation, when the instrument is drawn in a language other than Spanish, is copied from the "appendix" into the "testimonio", which the protocolizing notary issues to the grantee of the power and which the latter uses, as evidence of his authority, as required by law.

#### COSTS

No exact statement concerning the cost of preparing a power of attorney for use in Mexico can be made, but the various items of expense that must be considered in estimating it are set forth as follows:<sup>25</sup>

1. Fees of attorneys and notaries public outside of Mexico who prepare the instrument—this varies according to the nature, importance, and technical intricacies involved.

2. Authentication by Mexican consul, 10 pesos.

3. Authentication of signature of consul by the Ministry of Foreign Relations, 11 pesos.

4. If the power is to be used in one of the Mexican States, the signature of the Assistant Secretary of Foreign Relations must be authenticated by the Secretary of Gobernación, for which a charge of 50 centavos in stamps is made.

5. Translation, varies according to number of pages.

6. Notarial fees for minutes of protocolization, 15 pesos for general and 20 pesos for special powers. The Mexican notary public also charges for the examination of documents submitted for protocolization, for the labor of writing out his protocolization, for his reports to the stamp-tax office, and for the authentication of the "testimonio."

7. Stamps of 1 peso must be affixed to each leaf of the protocol wherein the power is protocolized. The "testimonio" must bear stamps also of 1 peso per leaf.

<sup>24</sup> Notarial Law, ante, arts. 76 and 77; Federal Code of Civil Procedure, arts. 11 and 265.

<sup>25</sup> Notarial schedule of fees of Aug. 23, 1931, art. 7; stamp tax law, 1932; Federal revenue law, 1933.

8. Stamp tax on the instruments of power:<sup>28</sup>

- (1) Those granted by public document.  
If they are of special power, 2 pesos.  
If they are of general power, 5 pesos.
- (2) Those granted in private document which must be ratified before some public official, 5 pesos.
- (3) Juridical powers which must be ratified before the judge in the case:  
If the amount involved does not exceed 200 pesos, 1 peso.  
If the amount involved exceeds 200 but not 1,000 pesos, 3 pesos.  
If the amount involved exceeds 1,000 pesos, 10 pesos.
- (4) Those granted by letter-power without ratification of signature, regardless of the amount involved and the nature of the power, even though it may be a juridical one, 10 centavos.
- (5) The written ratification of oral powers, between the respective parties, 10 centavos.

## Exempted:

The power contained in endorsements "for procuracy" or "for collection."

The various manners of terminating powers.

## MANAGERS AND CLERKS

Managers are agents who have been placed in charge of some commercial or industrial enterprise or establishment, or have been authorized to contract concerning all the business of the establishment or enterprise in the name and for the account of the owners. Clerks are those who constantly perform certain acts pertaining to the business in the name and for the account of the owner. Any merchant may appoint them in the exercise of his business operations.

## MANAGERS ("FACTORES")

Managers must have capacity to contract and must have written power or authority of the person in whose behalf they act. They may operate in the name of the owner or in their own name, but may not, without authority, engage or become interested in operations of the same kind as those they transact in the owner's name.

When a manager contracts in his principal's name only, the latter is liable to the other contracting party; both are directly liable where the manager deals in his own name. If contracts made by the manager affect objects of the business entrusted to him, they are understood to have been made for the account of the principal, even though the manager did not so state, or exceeded his powers or committed an abuse of confidence. The principal is also liable for contracts made by his manager, although the obligation is foreign to the business, if the latter acted under orders of the former or the principal ratified them expressly or through positive acts. Fines incurred by a manager for violation of laws in the proper exercise of his employment may be collected out of the principal's property.

<sup>28</sup> Stamp tax law as amended by decree of July 12, 1933.

If the principal gives the manager an interest in one or more transactions he will be considered a partner as regards them and in relation to the principal. But neither the manager nor a clerk will be deemed to have been associated if the principal gives them an interest in the profits of the business, such interest being considered as salary.

The powers of a manager continue until expressly revoked or until the establishment is sold. The acts and contracts executed by the manager will bind the manager until notice of the revocation or sale reaches the latter; such acts and contracts are valid as regards third persons so long as the revocation has been recorded in the Mercantile Registry and published.<sup>27</sup>

The power granted managers and clerks may not be delegated unless so authorized by the principals. These must indemnify the former for the expenses and losses incurred in the performance of their duties unless otherwise expressly provided. The agents in question are liable to their principals for any damage caused to his interest by their malice, negligence, or violation of orders or instructions received.

#### CLERKS

The acts performed by clerks within the scope of their authority bind their principals. If authorized to sell, it is presumed they are authorized to collect the amounts of the sales and to give receipts therefor in the name of the principals, provided retail sales are made in stores open to the public; in case of wholesale transactions, they must have been made for cash and the payment made in the store. Traveling clerks, authorized by letters or other documents to seek business or execute trading operations, will bind the principal if they acted within the scope of the powers set forth in those documents. The receipt of merchandise made by the clerk is understood to have been effected by his principal. The principals also must keep proper account of the clerks' credits and debits.<sup>28</sup>

#### BROKERS

##### QUALIFICATIONS

Brokers are commercial agents through whose intervention commercial contracts may be proposed, adjusted, and made. The Code of Commerce by its articles 51 to 74 regulates in detail their prerequisites and activities. The exercise of this profession is limited to Mexican citizens over 21 years of age, domiciled at the place of operations. A broker must have been in business in Mexico for over 5 years, have a mercantile education, be of good character, not a public employee (either civil or military), be capable of exercising all civil rights, and in the enjoyment of the free disposition of his property. Brokers' titles must be issued by the Government and must be revalidated yearly. There are exchange brokers who deal in securities, negotiable paper, loans of money, and coins; merchandise brokers who intervene in transactions involving all kinds of goods; insurance, maritime, and transportation brokers. A bond to answer

<sup>27</sup> Code of Commerce, arts. 309-320 and 325-327.

<sup>28</sup> Code of Commerce, arts. 321-324.



for proper performance and for liabilities resulting therefrom must be given and recorded in the registry of commerce to exercise this profession, the amount thereof to be determined in the corresponding regulation.

#### MANNER OF OPERATING

The intervention of brokers in commercial acts is optional; the contracts otherwise made may be evidenced in accordance with their nature. Whenever a broker has intervened he must prepare a memorandum ("minuta") of the contracts, setting forth all the conditions and circumstances stipulated. This memorandum must be signed by the broker and contracting parties, in his presence. Certified copy thereof will be given to the parties within 24 hours; these copies are as effective as public instruments. The originals are kept by the broker in chronological order and duly numbered, and must be copied in a special book kept for that purpose and known as the "Registry."

#### OBLIGATIONS

In the exercise of their activities, brokers must assure themselves of the identity and capacity of the contracting parties; they must propose business with exactness, clearness, and precision, avoiding suppositions which may lead to error and must keep secret everything pertaining to the business, including names of the parties unless the law, the transactions, or the parties otherwise provide. Brokers must issue certified copies of entries in their registries, must act personally, and must witness the delivery of goods at the request of one of the contracting parties. In transactions involving negotiable paper, brokers are legally responsible for the authenticity of the signature of the last endorser or drawer and must collect the documents for delivery to the holder. Bills of lading in transportation contracts must be signed by the broker; in case of sales by sample, he must keep a sample of the merchandise marked with his seal and that of the parties so long as the buyer has not accepted the goods. Brokers may act as experts.

Brokers may not engage in commerce in their own name or act as a commission agent, manager, clerk, or partner of a merchant; they cannot form part of administrative boards or be examiner ("comisario") of corporations. They may not buy for themselves goods in whose trade they are engaged, nor authorize prohibited contracts for themselves or their principals, or issue certified copies of memoranda not in their registries, or issue them as to a part only. Finally, they may not effect assignments of their property; their bankruptcy always will be considered as fraudulent.

#### PENALTIES

Brokers are punishable with suspension if they fail to comply with any of their obligations and with expulsion if they do any of the acts they are not permitted to undertake. They may be fined up to 500 pesos in accordance with the regulations of the profession.

Generally, in each place of business there is a "colegio" (association) of brokers whenever their number exceeds 10, which is charged with the regulation of the profession and imposes the penalties of suspension and expulsion.

## VI. SALES

### DEFINITION OF A COMMERCIAL SALE

In studying Mexican sales legislation, the first problem which generally arises is the determination of the character of the transaction, that is, whether it is a civil or a commercial sale. The fundamental difference lies in the purpose of the purchaser. If he buys for the purpose of commercial speculation "with the direct and preferential object of trade", the sale is commercial. On the other hand, if the purchase is made for the use and consumption of the buyer, even when he is a merchant, the transaction is civil in character.<sup>1</sup>

### CONSUMMATION OF COMMERCIAL SALES

Sales are consummated (executed), title passing to the buyer, when the parties are agreed concerning the merchandise and its price. If made on samples or based on quality determined and known in commerce the contract becomes binding (consummated) by the simple agreement of the parties; disputes arising as to whether or not the merchandise conforms to the samples or quality may be settled by experts, appointed one by each party and a third by the other two. When the merchandise has not been seen by the buyer, and cannot be classified by quality determined and known in commerce, the contract is not binding until the buyer examines and accepts the goods. The sale of merchandise which usually is tested, weighed, or measured is not binding until these acts are performed. Sales made on sight or by bulk are binding as soon as the parties agree on the price, the vendor not being able to demand rescission of the contract on the grounds that he did not find in the bulk the quantity, weight, or measure he calculated; he may so rescind if the bulk is offered as homogeneous and there is hidden in it merchandise of an inferior class or quality to that on sight. These as well as all other rules governing commercial sales may be the subject of lawful stipulations between the parties, modifying, altering, or waiving them.<sup>2</sup>

Closely tied up with consummation is the price which must be determined before a sale becomes binding. It may be the one quoted on a certain date or place or one fixed by a third person, but it may never be left to the discretion of one of the contracting parties. It must be paid at the time and terms stipulated, but if nothing has been provided with regard thereto, the sale is for cash. Delay in its payment forces the debtor to pay interest at the legal rate on the amount owed.<sup>3</sup>

<sup>1</sup> Code of Commerce, arts. 75, 76, and 371; see ante p. 10.

<sup>2</sup> Civil Code, 1932, arts. 2249, 2257, 2260; Civil Code, 1884, arts. 2818, 2825.

<sup>3</sup> Civil Code, 1932, arts. 2248-2256; Civil Code, 1884, arts. 2811-2817.

### DELIVERY

Delivery may be effected by the material transfer of the merchandise or right. It may be juridical, such as delivery of shipping documents, keys to an establishment, etc., and it may be virtual when the buyer agrees that the merchandise sold remain at his disposition. If no time for delivery is stipulated the vendor must have it at the disposal of the vendee within 24 hours. If the amount of merchandise and time of delivery have been determined the purchaser need not accept performance in other terms, but if he accepts partial deliveries the contract is binding as to them. Unless a term for payment has been stipulated the vendor need not deliver until the price is paid, nor is he bound to make delivery if he subsequently discovers that the purchaser is insolvent, unless payment is guaranteed. The merchandise must be delivered in the same condition as at the time when the contract was consummated, with all the produce it has earned since that time.

Expenses of delivery must be borne by the seller until the merchandise, duly weighed and measured, is placed at the buyer's disposal; those incurred in the receipt or carrying away thereof fall on the buyer. The place of delivery is the one agreed between the parties; if there is none, then the place where the goods were when sold.<sup>4</sup>

### RISK OF LOSS

As soon as the sales contract becomes binding and delivery has been made the loss and/or damages suffered by the goods must be borne by the purchaser; if no delivery has been made the vendor is liable for them. However the party guilty of negligence, culpability, or fraud therein must answer for the same. The risk of loss may be modified by special stipulations between the parties.<sup>5</sup>

### REMEDIES \*

Upon receipt of the merchandise the buyer must examine it and make claim, if any exists, in writing, within 5 days if the goods are not of the kind and in the amount stipulated, and within 30 days if based on internal defects; otherwise, he loses his right of recourse based on these causes.

As soon as the sale is consummated, the party who has performed may demand, of the party who has not, the rescission or performance of the contract and, in addition, the damages suffered by him. If it is the seller who demands performance, he must deposit the merchandise at the buyer's disposal, if refused when delivery was tendered. If he elects to rescind, the vendor may prove, as elements of his damage, the loss suffered by him, including profits he failed to earn. If an action is grounded on nonpayment of price it may be demanded or rescission of the contract and consequent damages claimed, but such rescission does not proceed if the merchandise has been transferred to third persons in good faith.

<sup>4</sup> Code of Commerce, arts. 375-378, 379, 382; Civil Code, 1932, arts. 2284-2292; Civil Code, 1884, arts. 2851-2872.

<sup>5</sup> Code of Commerce, art. 377; Code of Commerce, art. 383.

\* Civil Code, 1932, arts. 2108-2109, 2300; Civil Code, 1884, arts. 1464-1465.

## WARRANTIES

Unless otherwise stipulated the seller warrants against interruption of peaceful enjoyment ("evicción") of the merchandise, and also warrants absence of hidden defects ("saneamiento"). The warranty of peaceful enjoyment includes that of title and possession.<sup>7</sup>

## FORM

No special form is required for a sales contract unless it involves real property. As stated under "Contracts," details of these transactions should be in writing, preferably in Spanish, in order to avoid difficulties in the preparation of evidence for presentation in case of litigation.

## METHODS OF SELLING

Cash sales generally offer little difficulty. But the method of making sales on credit must be carefully selected. It may vary in every jurisdiction and with every customer. Sales on open account are seldom made in Mexico, because of procedural difficulties experienced in the event that action at law to collect becomes necessary. More usual is the use of drafts attached to the shipping documents for acceptance or payment upon delivery of the documents to the purchaser. Any subsequent collection at law may be based on the draft exclusively, thereby obviating possible delays, technicalities, and expense in corresponding suit at law.

STAMP TAX<sup>8</sup>

The stamp tax rates on sales are as follows:<sup>9</sup>

1. Whenever the price is 20 pesos or over:
  - (a) If the contract is evidenced by public document, 70 centavos for each 100 pesos or fraction thereof.
  - (b) Sales of alcohol and liquors, wines, and other alcoholic beverages, 2 percent of value.
  - (c) In any other case, 5 centavos for each 10 pesos or fraction thereof.
2. Whenever the price cannot be determined at the time the contract is entered into, there shall be paid a stamp tax at that time of 5 pesos if the contract is evidenced by public document, and 1 peso if not. When the price is subsequently determined, the contracting parties must draw an additional document in the same manner as the original contract, in order that the tax may be paid in stamps affixed thereto. If the determination of the price depends upon periodical deliveries or the number, weight, or measures of the things sold, the seller must issue invoices duly stamped at the rates under 1 above, as the payments are effected, whether he discharges his obligation in one payment or in installments. When in a sale an amount is fixed as part of the purchase price, a part remaining undetermined, the proper stamp tax shall be paid in the first part, and the above provisions observed as to the second.

<sup>7</sup> Code of Commerce, art. 394; Civil Code, 1932, arts. 2119-2162; Civil Code, 1984, arts. 2873-2891.

<sup>8</sup> Stamp tax law cited.

<sup>9</sup> A 10 percent surcharge is imposed on the stamp tax by the Federal revenue law (see p. 132).

## RULES GOVERNING PAYMENT

1. The stamp tax on sales shall be paid by the seller, who must affix the corresponding stamps to an invoice. For this purpose he must keep an invoice stub-book, authorized by the Treasury. The invoice must contain (a) the names of vendor and vendee, (b) date of sale, (c) amount and kind of merchandise sold, and (d) price paid. The stub must set out (a) name and domicile of buyer, (b) class and value of merchandise sold, and (c) date of sale. Whether the purchase price is to be paid in one payment or in installments, the invoice must be issued within 15 days after date when the merchandise leaves the seller's place, if the parties reside in the same place, or within a month if they reside in different places. The buyer must request the stamped invoice or notify the Treasury of the seller's refusal to issue it; otherwise he is jointly and severally liable with the seller to pay the tax.

2. For the purpose of the stamp tax, when merchandise is removed from a warehouse, store, office, farm, or any other place wherein found, it is considered a sale, unless the merchandise is delivered under a commission for sale or is moved from one place of business to another belonging to the same person.

3. Whenever one receipt, invoice, or document sets out several sales made on the same day to the same buyer and jointly such sales amount to 20 pesos or more, they are subject to the stamp tax. Whenever the dates of the various transactions are omitted, in the absence of proof to the contrary, they shall be considered as having been made on the same day.

4. Whenever several deliveries are made to a single buyer during one or more days, and the amounts thereof are not paid in cash but are entered in accounts to be liquidated at the end of the week or any other period, a single invoice, receipt, or document must be issued for the total amount of all deliveries, and the stamp tax paid on it if the total amounts to or exceeds 20 pesos.

5. *Conditional sales.*—Promises of sales, by which the buyer is given possession of the goods prior to the making of the actual sale (transfer of title), or by means of which the prospective seller receives all or part of the purchase price, are considered similar to sales for the purpose of the stamp tax.

6. The purchase price, upon which stamp tax is payable, is the value stipulated by common agreement of the parties. Charges for insurance, freight, and packing do not form part of said price.

7. *Sales through agents.*—Consignments to established commission agents, accompanied by a transmittal note ("nota de envio") from a stub-book to be kept in accordance with a form to be issued by the treasury, will not be subject to payment of the stamp tax. If, within 1 year thereafter, the commission agent sells the merchandise he must invoice it and pay the tax. The goods remaining in the hands of the agent at the expiration of the year will be considered sold, and the consignor must invoice them in favor of the consignee at the price stated in the remittal note.

Whenever agents of manufacturers or business houses within Mexico offer merchandise for sale by means of samples, the transaction proceeding directly between the buyer and the agent's principal, the manufacturer or business house and not its agent must issue the corresponding stamped invoices.

## SALES MADE BY FOREIGN FIRMS

Whenever foreign factories or commercial houses have direct branches, agents, or other organizations within Mexico, the tax will be paid upon the sales effected through such organizations, whether the branch, agency or organization has goods in stock or the goods are consigned to them for delivery to the buyer. The organization in Mexico must issue the stamped invoices corresponding to said transactions.

In cases of orders transmitted abroad by agents not duly established (in accordance with certain provisions of law), who sell by samples, if the invoice and shipping documents are issued and sent directly to the customer, the tax need not be paid. But if the documents are issued in favor of the agent, the latter must stamp the invoices if he presents them for payment, or must issue new invoices duly stamped.

If, in the cases stated in the previous paragraphs, the agent incurs personal obligations to the buyer as to quality of the goods sold or other conditions in the contract, the transaction is considered as a sale between the agent and the buyer for the purpose of the stamp tax, unless it is conclusively shown ("que se compruebe per evidencia fehaciente") that the obligations were entered into with the authority and for account of the principal.

Itinerant merchants and traveling salesmen, making sales in their own name and delivering the merchandise themselves, will cause their invoice stub-books to be authorized at the first place where they trade. Before starting operations in any particular locality they must notify the Federal treasury office therein, in writing, indicating the place where they are staying. They must also advise that office of changes in living quarters, and every 8 days while they stay at one place must bring their books to show that they have issued their stamped invoices.

## PROMISE TO SELL OR TO BUY

1. On the price of the thing whose sale or purchase is promised.
  - (a) If the promise is set forth in a public document, for each 100 pesos or fraction thereof, 20 centavos.
  - (b) If set forth in a document not a public one, for each 100 pesos or fraction thereof, 1 centavo.
2. If the value of the thing cannot be determined.
  - (a) If the promise is set forth in public document, 5 pesos.
  - (b) If set forth in any other document, 1 peso.
3. When the minimum price of the thing only is determined, and undetermined obligations are stipulated in addition, the rate on the determined portion must be paid and the fixed rate in case of undetermined values must be paid also.
4. Contracts of promise to sell or purchase in which it is stipulated that the future buyer will take possession of the property before the sale, or that the future seller will receive the sale price or part thereof, before the sale is made, are subject to the tax on promise of sale and purchase. However, when the term fixed for the making of the sale or purchase expires or after 1 year has elapsed, and even when a condition is stipulated, the stamp tax on sales must be paid, unless it is stated in the document setting forth

the promise, or in a public document, that the sale or purchase was never consummated. If such statement is not made the failure to pay the tax is presumed and the corresponding penalty applied. Promises of conveyances of mineral or petroleum concessions are not subject to the stamp tax.

#### SALES EXEMPTED FROM THE TAX

The following sales are exempted from the tax:

1. Sales of slaughtering products made at the slaughtering places.
2. First-hand sales of articles subject to the Federal tax on yarns ("hilados") and textiles ("tejidos").
3. First-hand sales made by manufacturers of beverages mentioned above when the Federal tax has been paid.
4. Sales of metal to the Federal Government or the Banco de Mexico for coinage.

#### CONDITIONAL SALES

Whether or not conditional sales are valid in Mexico has been the subject of some controversy. Such sales usually are made in one of two ways in Mexico, namely, by a reservation of title in the vendor until the purchase price is paid, and the use of a hire-purchase contract.

#### VALIDITY SUSTAINED

The Code of Commerce contains no provision governing such transactions, so that the provisions of the civil codes must be considered. The distinction between mercantile and civil sales in this instance, therefore, appears to offer no appreciable difficulty since the same law governs both.

A report, based upon a thorough examination of Mexican law and authorities on the matter was prepared by the committee on foreign law and conflicts of law of the Bar Association of the city of New York, in 1931.<sup>10</sup> Its conclusion is that both types of contracts are valid and enforceable, not only against the purchaser, but also against his creditors and other third parties who have purchased or taken a pledge on the goods sold.

As regards the various Mexican States where the Civil Code of 1884 is in force today, the report previously mentioned states: "Although the Mexican Civil Code follows the Napoleonic tradition to the extent of providing that in a contract of sale title to the chattel passes upon the meeting of the minds, irrespective of delivery of the chattel or payment of the purchase price (Civil Code, arts. 2818 and 1436); nevertheless, it advances beyond the Code Napoleon in reserving expressly to the parties the right to stipulate otherwise (*idem*, art. 1436). In the exercise of this liberty of contract, the parties may agree that title shall not vest in the vendee until he satisfies a suspensive condition (*idem*, arts. 1331 and 1357). Moreover, the Mexican code rejects the French principle that 'In respect of chattels, possession is equivalent to title'; instead, it accords to the possessor of a chattel merely a rebuttable presumption of ownership (*idem*, art. 825), and, in consequence, the unpaid vendor under a contract of conditional sale, upon proof of his

<sup>10</sup> See 1931 Yearbook of this association, p. 263.

ownership, may replevy his chattel from any third person who has acquired possession, without regard to the presence or absence of good faith. (Code of Civil Procedure, art. 3, par. I, and art. 4). The chattel may be replevied from such third person, whether he is a vendee or pledgee, since the sale or pledge of a chattel by one who is not the rightful owner, is void (Civil Code, arts. 2831 and 1785)."

The Civil Code of 1932<sup>11</sup> expressly recognizes the chattel lien and the conditional sale contracts. As regards the former, it provides that persons may contract for the payment in installments of the purchase price of realty sold and that failure in the payment of one or more installments will cause the rescission of the contract which will affect third persons, if the provision for rescission has been recorded in the public registry. It provides that personal property such as automobiles, pianos, sewing machines, and any other articles which may be identified beyond doubt, may be sold under installment-sale contracts stipulating rescission, as above. Such rescission may be stipulated in the installment sale of goods which may not be identified beyond doubt, but it will not affect third parties since the contract cannot be recorded in the public registry.

Should the sale be rescinded in accordance with these provisions, the vendor and vendee must return to each other that which passed between them, but the former may demand payment by the latter of rental for the use of the property sold, to be fixed by experts, and an indemnity for deterioration of that property, also to be fixed by experts. The vendee, on the other hand, has a right to legal interest upon the part of the purchase price paid by him. Any stipulations more onerous than these are declared null and void (art. 2311).

With reference to conditional sales, the code provides that the retention of title to property may be made until its purchase price is paid. In the case of realty and personal property which may be identified beyond doubt such retention will affect third parties if the corresponding stipulation is recorded in the public registry. The vendor may not sell the property until its price is paid in full, a marginal annotation of this limitation being made in the inscription of the sale in the registry (art. 2313).

#### PREPARATION OF THE CONTRACT

In both cases the contract may be drawn in the form of a public document before a notary public, or as a private document. If the transaction takes place in Mexico and a private document is drawn and signed there, the registrar or the corresponding municipal authority or justice of the peace must state therein that he verified the authenticity of the signatures and the intention ("voluntad") of the parties to the contract. This statement must be signed by the official and stamped with his official seal (art. 3011). If drawn and signed abroad, the contract should be evidenced preferably by an instrument drawn before two witnesses and notary public, and the instrument properly authenticated in the manner indicated on page 56.<sup>12</sup>

<sup>11</sup> Arts. 2310-2313.

<sup>12</sup> Civil Code, 1932, arts. 3011 and 3005.



## ENFORCEMENT OF THE CONTRACT

The Code of Civil Procedure of 1932, in force in the Federal District and Territories, provides that the action of rescission stipulated in installment sales may be prosecuted like an executory action. (See p. 175.) It also states that the vendor must deposit whatever amount he received from the vendee less an amount corresponding to the depreciation of the thing sold while it was used by the vendee. This code, however, makes no provision with regard to a reduction of the amount to be allowed to the vendor as rental for the use of the property by the vendee as provided by the new Civil Code. This lack of harmony between these two codes of law is viewed with apprehension by some lawyers who feel that it may cause difficulties in enforcing the vendor's rights.

The code first mentioned also provides that, in contracts reserving title in the vendor until payment in full, the action to repossess the article sold, in case of nonperformance by the vendee, is executory and proceeds under the same condition prescribed for the action of repossession. It is possible, therefore, that the difficulty stated above may also exist in this proceeding.<sup>13</sup>

## FORM OF CONTRACTS IN USE

Since the present laws went into effect, existing contract forms had to be revised in order to take advantage of them. One of the forms now prevalent provides for the sale of property with an agreement that failure to pay any installment causes all other installments not yet due to mature immediately. The property in question appears as juridically pledged to the vendor with possession remaining in the vendee, who agrees not to transfer the article pledged nor grant its use or possession to a third person. Failure to pay is stipulated as enabling the vendor to sell the article so pledged, through a local merchant selected by the seller, for the price and under the terms fixed by said merchant, as well as to proceed against any other property of the vendee. As further security a guaranty is added to be signed by a third person as surety and principal obligee. This constitutes but a succinct outline of the main features of this form, the purpose of which is to avoid the necessity of appointing experts to appraise the depreciation and rental value of the property during the time it was in the possession of the buyer.

Another form now in use in Mexico provides for the reservation of title in the vendor; the vendee receiving the property sold is a lessor until payment in full. It is stipulated therein that the initial payment and any others made by the vendee are to be considered, in case he fails to pay in full, as indemnity to the vendor for the depreciation suffered by the article sold during the time it is in the possession of the vendee, as well as to compensate for the damages which the vendor may suffer by reason of the vendee's failure to perform the contract. This form also contains as additional security a guaranty ("fianza") to be signed by a third person. This form signed by the parties is to be legalized by broker instead of notary public.

<sup>13</sup> Arts. 456 and 466.

## USE OF THE NEW LAW RESTRICTED

So far as is known, conditional sales as prescribed by the new Civil Code are being contracted in sales of merchandise of high unit value. Concerns handling items of comparatively small price per unit have not taken advantage of it to any extent because legalization by notary public or otherwise as is prescribed is stated to be somewhat costly and inconvenient. Many of these firms use a bill of exchange when selling on a time basis. The instrument is drawn to show that it originated in a place different from that where accepted. In these transactions the bill of sale is not given to the vendee in order to permit of repossession; if it is delivered, the sale is consummated and in case of the vendee's failure to pay, the only recourse is an action at law and an attachment thereunder. In cases where the credit is poor, it is reported that the buyer has permitted the seller to draw up a contract showing the buyer already in default. With this, the seller files an action at law and obtains an attachment of the article sold which is then delivered to the customer. Another device which has been used is to have the buyer sign a bill of sale of the goods in favor of the seller before the merchandise is delivered to the buyer. In case the latter fails to pay on time, the property is repossessed by the proper action under the bill of sale. Rental contracts with a provision for final sale when all the rentals have been paid have also been used. The advice of attorneys conversant with Mexican law is to the effect that these devices are of doubtful legal effectiveness should it become necessary to resort to the courts in order to recover. It is of paramount importance in making conditional sales in Mexico to secure the advice of competent counsel in order to prepare all necessary documents in accordance with law and prevalent practice.

## VII. MISCELLANEOUS CONTRACTS—PRESCRIPTION

### LEASES<sup>1</sup>

The lease of realty under the Civil Code of 1932 may not exceed 10 years when used for living purposes, 15 years when used in commerce, and 20 years when used in the exercise of an industry. Under the Civil Code of 1884, the parties may stipulate the duration of leases unless otherwise provided by law. The contract must be in writing when the rental exceeds 100 pesos annually, and requires a public document whenever rural land is involved and the rent exceeds 5,000 pesos annually, according to the former code and 1,000 pesos under the latter. Leases must be recorded in the public registry whenever they extend over 6 years or advance payment of 3 years' rent has been made, according to the code of 1932; otherwise, they do not bind third parties. Unless the contrary is stipulated, leases do not lapse by death of any of the parties or the transfer of conveyance of the property. In the latter case the tenant, under the Civil Code of 1932, must pay the rent to the new owner from the date he is notified judicially, or extrajudicially, before notary public or two witnesses, of the conveyance of title to the property. The lessor must deliver and continue to maintain the property in such condition that it may be used for the purpose intended by the lessee; he must not disturb the latter in the peaceful enjoyment of the property and must indemnify the lessee for any damage suffered by reason of hidden defects. The landlord, according to this code, must also pay for the improvements made (1) whenever it was so agreed in the lease; (2) whenever the lease is rescinded through lessor's fault and the improvements are useful; and (3) whenever the contract is for an indefinite time and the improvements were made with lessor's consent, and the latter then terminates the lease before the lessee is compensated for his expenses.

On the other hand, the lessee must pay the rent in the manner and at the time stipulated, must use the property only for the purpose indicated, and is responsible for the damages suffered by it through his fault or negligence or that of his family, servants, or sublessees. He is liable for fire damages unless due to fortuitous event, force majeure, or fault in construction. If there are several lessees and the place of origin of the fire is unknown, all must pay the damages in proportion to rent paid. If the lessee is to establish a dangerous industry in the premises, he must insure it against the probable risk. The lessee may not change the form of the premises without lessor's consent and, if he does so, he must restore it before returning it or pay the damages caused, neither may he sublease without authority. The tenant must make slight repairs normally caused by persons occupying a building. After 5 years the tenant

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<sup>1</sup> Civil Code, 1932, arts. 2398-2496; Civil Code 1884, arts. 2936-3065.

is entitled to preference in the subsequent lease of the premises if he has made important improvements and is not in arrears in rent.

The rent must be paid as stipulated or, in case of urban property, monthly if it exceeds 100 pesos, fortnightly if between 60 and 100 pesos, and weekly when less than 60 pesos. If the tenant continues in possession after the expiration of the lease, he must pay rent at the contract rate until given 2 months notice to move.

Leases are terminated by the expiration of their term, by agreement, annulment, rescission (for nonpayment of rent, improper use of premises, or sublease), merger of rights (tenant buys the premises), total loss or destruction of the property through a fortuitous event or force majeure, expropriation for public purposes, or ouster.

The same rules discussed above apply to the lease of personal property.

#### STAMP TAX ON LEASES

A tax of 5 centavos per 10 pesos or fraction thereof is imposed on rent paid under leases or subleases made for a definite time not exceeding 5 years. If one runs over 5 years the rate is reduced to 1 centavo for the excess up to 15 years; thereafter no tax is payable. If no time limit is set the first rate must be paid upon the rent of 1 year. If in addition the rent cannot be determined, a tax of 5 pesos must be paid if the contract is evidenced by public document and 1 peso if evidenced by private instrument, and one of 5 centavos per 10 pesos on receipts issued for rent paid. Leases of realty for a rental not exceeding 500 pesos annually, as well as those less than 100 pesos, of personalty, are exempted from the tax.

#### LOANS<sup>2</sup>

Mexican law recognizes three fundamental kinds of loans, namely, the gratuitous loan of nonfungible things, known as "comodato", the loan for a consideration which is designated as "mutuo", and the commercial loan which is contracted for a consideration and with the intent of using the thing loaned in mercantile acts. Loans between merchants are presumed mercantile.

If no time for payment is stipulated, payment of loans may not be requested until 30 days have expired since demand was made judicially or extrajudicially, before notary public or two witnesses. In cases of delay in payment of mercantile loans, the debtor must pay the stipulated annual interest, or 6 percent if none is stipulated, from the day following maturity. If the loan involves things other than money, interest during delay will be calculated upon the price of the merchandise at the market where the return must be made, on the day following maturity, or as estimated by experts if the merchandise is gone when its valuation was to be made. If mercantile loans consist of securities the interest during delay will be that earned by the securities, or 6 percent annually if none has been stipulated, the price thereof being that quoted in the exchange, or the market price on the day following maturity. Interest due and unpaid will not earn interest, but the contracting parties may

<sup>2</sup> Code of Commerce, arts. 358-364; Civil Code, 1932, arts. 2384-2397, and 2497-2515; Civil Code, 1884, arts. 2661-2700.

capitalize it; but such capitalization may not be agreed to beforehand. The receipt of capital by the creditor without reserving his right to the interest stipulated or due will extinguish the debtor's obligation for same. Deliveries on account will be credited to interest payment first unless otherwise stipulated.

Delivery and return of the loan must be made at the places agreed upon. If none were contracted, delivery and return will be made where the object of the loan is located. If money is involved, it must be returned to the debtor at his domicile.

The existence of a loan in Mexico should always be evidenced in writing. Such documents may be of 2 kinds, public and private; the latter are of 2 kinds also, namely, those upon which executory action may be instituted and those which require a judicial acknowledgment of signature before the summary suit proceeds. Whenever possible, loans in general should be evidenced by public document. The holder thereof is entitled to priority in payment over holders of private documents and may recover through executory action.<sup>3</sup> If the expense of such documents or other circumstances preclude their use, then it is best to evidence the loan by draft, promissory note, or other instrument which will permit of executory action.<sup>4</sup> This discussion concerns only unsecured loans, and its importance lies in the fact that recovery through a general action at law is generally costly and greatly delayed, as may be gathered from a consideration of "The ordinary action" (p. 173) and therefore should be avoided whenever possible.

#### INTEREST RATES

Interest on loans may be stipulated at any rate by the parties, but it may be reduced to the legal rate of 9 percent if the court finds that advantage has been taken of the pecuniary needs, inexperience, or ignorance of the debtor. This is a limitation provided by the Civil Code of 1932. Under the Civil Code of 1884 the legal rate of interest is 6 percent.

#### MORTGAGES<sup>5</sup>

The mortgage is a contract whereby an encumbrance is placed upon real property to permit a creditor, in case of nonperformance of the obligation secured by the contract, to obtain payment out of the encumbered realty. It must be drawn in the form of a public document in most of the States, and only if it exceeds 5,000 pesos in the Federal District and territories, and must be recorded in the public registry in order to bind third parties who may acquire the mortgaged property. The security extends to natural accretions, improvements made by the owner of the property, personal property permanently attached thereto by him and which may not be separated therefrom without injury to the realty or deterioration of the personalty, and to new buildings erected or additional stories constructed upon the mortgaged premises. As regards third parties, it also extends to cover interest for 3 years under the Civil Code of 1932 due on the principal obligations, unless it has been expressly stipulated that it is to guarantee interest for a longer term not to

<sup>3</sup> Code of Civil Procedure of Federal District and Territories, art. 413.

<sup>4</sup> Negotiable Instruments Law of Aug. 26, 1932, arts. 174 and 167.

<sup>5</sup> Civil Code, 1932, arts. 2593-2543; Civil Code, 1884, arts. 1523-1927.

exceed the prescriptive period. (See p. 76 on "Prescription".) In most of the States this period is of 5 years.

Under the Civil Code of 1932, mortgages may be granted to secure obligations payable to order or to bearer, and in such cases, may be assigned respectively by endorsement or delivery of the particular obligation.

Mortgage rights are extinguished by: (1) Extinction of the mortgaged premises; (2) extinction of the principal obligation; (3) extinction of the rights of debtor on the mortgaged premises; (4) expropriation by eminent domain; (5) express waiver or remission by the creditor; (6) judicial sale of the premises; (7) prescription of the mortgage suit (10 years under the Civil Code of 1932, and 20 years in most of the States).

The mortgage security generally lasts as long as the obligation it guarantees, and, when the latter has no fixed maturity, it may last not more than 10 years.

The execution of a mortgage follows a summary but highly technical procedure.<sup>6</sup> In actual practice, the effectiveness of this security has often suffered because of the intricacy of the foreclosure suit, and further, because of the operation of the Alien Land Laws.

#### SURETY AND GUARANTY ("FIANZA")

The "fianza" is a contract whereby a person (the "fiador") promises to perform an obligation in behalf of another (the principal debtor) in case the latter fails to do so. Since the code of commerce makes no provision for this contract it is governed by the Civil Codes. The fianza is similar to obligations which in the United States are known as suretyship and guaranty.

#### NATURE AND EXTENT OF THE "FIANZA"

The "fianza" may be "legal" (required by law), "judicial" (required by judicial disposition like a court order), "conventional" (by the voluntary stipulation of the parties thereto), "gratuita" (gratuitous—for accommodation), or "onerosa" (for a consideration). There must be a valid principal obligation, never less in amount than the "fianza," but it may be a future debt, the amount of which is not known; in this case the "fiador" is not liable until the debt is liquidated. The "fianza" may consist of a promise to pay a sum of money if the principal debtor does not furnish a thing or perform a determined act; under the Code of 1928. A letter of recommendation in which the honesty and solvency of a person is asserted does not constitute a "fianza," but if given in bad faith, falsely affirming the solvency of another, the one who signs it is liable for the damages caused by the insolvency of the other to the person to whom the letter is addressed; relief from this liability may be had by proving that the recommendation did not induce the addressee to deal with the person recommended.<sup>7</sup>

<sup>6</sup> Code of Civil Procedure for Federal District and Territories, arts. 430 and following.  
<sup>7</sup> Civil Code, 1932, art. 2794-2811; Civil Code, 1884, art. 1700-1723.

## BENEFIT OF "ORDEN" AND "EXCUSIÓN"

The "fiador" may avail himself of all the defenses of the principal debtor against the creditor, except personal defenses. The waiver of the statute of limitations or other defense, or the nullity or rescission of the principal obligation do not prevent the "fiador" from invoking any of them in his own favor.

The benefit of "orden" is the right of the "fiador" to require that the creditor first proceed against the principal debtor. The benefit of "excusión" is the right to require that all the unencumbered property of the debtor be applied to the discharge of the principal obligation before the creditor has recourse to the "fiador." These benefits are lost by (1) express waiver; (2) civil insolvency or bankruptcy of the principal debtor or when (3) the latter cannot be sued in Mexico; (4) his whereabouts being unknown and having been summoned by publication, he does not appear nor does he have attachable property at the place of performance of his obligation (within the jurisdiction, under the Code of 1884); (5) the obligation was incurred for the benefit of the "fiador." These rights are also lost when the "fiador" expressly became jointly and severally ("mancomunadamente") liable with the debtor.

In order to enjoy the benefit of levy, not only must the "fiador" allege it, but he must indicate free and attachable property of the debtor within the jurisdiction where payment is to be made and must advance or secure the costs of the "excusión." He is thereafter discharged to the extent of the value of the property by him designated, if the creditor is negligent in levying ("promover la excusión") on it. However, the creditor may compel the "fiador" to apply the unencumbered property of the debtor to the discharge of the debt. When the "fiador" waives the benefit of "orden" but not that of "excusión" the creditor may proceed against him and the debtor jointly, but the "fiador" preserves his benefit of "excusión" even after judgment is rendered against the defendants. If he waived both benefits and is sued by the creditor, the "fiador" may notify the debtor of the suit in order that he may appear to offer the proper evidence. Should the debtor fail to appear as requested he will be prejudiced by the judgment rendered against the "fiador."

Any compromise between the creditor and the principal debtor benefits the "fiador" but it may never prejudice him; the one between the "fiador" and the creditor benefits and never prejudices the debtor.<sup>8</sup>

## RIGHTS OF "FIADOR" AGAINST PRINCIPAL DEBTOR

The "fiador" who is forced to pay the debt may seek reimbursement from the principal debtor including the amount of the debt, interest from the date of notice of payment, expenses incurred and damages suffered; he also becomes subrogated to the creditor's rights against the debtor. If the latter pays the creditor before receiving the "fiador's" notice of payment, he is no longer liable to the "fiador", who must proceed against the creditor.

<sup>8</sup> Civil Code, 1932, arts 2812-2827; Civil Code, 1884, arts. 1724-1741.

The "fiador", before payment, may demand that the debtor guarantee payment or relieve him of his obligation, whenever (1) he is sued for payment; (2) the debtor has suffered loss, so that he is in danger of insolvency; (3) the debtor attempts to leave the country; (4) the debtor bound himself to relieve the surety from his obligation within a specified time and this term has expired; (5) the debt is due, if it has no fixed maturity in the various States, after 10 years have elapsed, provided that no consideration was given for the suretyship obligation.

#### RIGHTS OF A "FIADOR" AGAINST OTHER "FIADORES"

Whenever there are several "fiadores" of one debtor, for one debt, each one of them is liable for the whole, unless otherwise stipulated, but, if one is sued, he may demand the others be summoned in order to defend the action jointly or else pay the judgment in due proportion. If he pays it all he may claim from his "fiadores" the proportional amount due from each of them; this is known as the right of contribution ("beneficio de división"). This benefit is lost (1) by express waiver; (2) when each of the "fiadores" is jointly liable ("mancomunadamente") with the principal; (3) when one or more of the "fiadores" is insolvent; (4) when the debtor cannot be sued in Mexico or his whereabouts is not known and he has no attachable property in that country; and (5) when obligation was incurred for the benefit of the "fiador."<sup>9</sup>

#### DISCHARGE OF A "FIADOR"

The obligations of the "fiador" expire at the same time as those of the principal and for the same causes as all other obligations. A "fiador" is discharged by (1) merger of his obligations with those of the principal; (2) extensions of the debt without his consent or discharge thereof. The discharge of a "fiador" by the creditor releases the other "fiadores" from liability for the share of the one who is released. If the right of subrogation is lost through the fault or negligence of the creditor the "fiadores" are discharged. Under the Civil Code of 1932, the "fiador" is discharged if he bound himself for a specified term and the creditor did not make judicial demand on the debtor within a month after the expiration of the term; he will also be discharged if the creditor, without just cause, fails for more than 3 months to prosecute the suit established against the debtor; if the "fianza" has no fixed term, the "fiador" may demand that the creditor seek performance of the principal obligation within a month of its maturity, the "fiador" being released if he fails to do so or does not prosecute the established action for 3 months, without just cause.<sup>10</sup>

#### STAMP TAX UPON SURETY AND GUARANTY OBLIGATIONS

The stamp tax upon surety and guaranty obligations is as follows:  
1. When a definite amount is determined, upon the amount of the principal obligation.

<sup>9</sup> Civil Code, 1932, arts. 2828-2841; Civil Code, 1884, arts. 1724-1761.

<sup>10</sup> Civil Code, 1932, arts. 2842-2849; Civil Code, 1884, arts. 1762-1763.



If the surety or guaranty obligation is evidenced by public document, 20 centavos per 100 pesos; if otherwise evidenced, 2 centavos per 20 pesos.

2. When no definite amount is determined, the tax is paid upon the document in which the contract is set at the rate of 5 pesos if the document is a public instrument, and 1 peso if it is a private one.

Surety or guaranty obligations incurred in favor of transportation enterprises, when package or freight is delivered when the bill of lading is not available, as well as those incurred in favor of pawnshops and loan establishments when the corresponding receipts are lost, if the amount is not expressed, pay a fixed tax of 25 centavos per obligation.

Surety or guaranty obligations incurred in the same document with the principal obligation are exempted from the tax, provided it has been paid upon the latter. Those incurred to answer for persons accused in accordance with constitutional and criminal law are also exempted, as well as those in favor of Federal, State, and municipal government employees, credit institutions, and to protect Government funds.

#### PRESCRIPTION (STATUTE OF LIMITATIONS)

Prescription is a means of acquiring property and of releasing a person from an obligation by lapse of time. The former is known in Mexico as "positive prescription", while the latter is designated "negative prescription". Public, continuous, and peaceful possession under claim of title is necessary for positive prescription. Under the Civil Code of 1932, title to real estate prescribes at the expiration of 5 years, if possession has been enjoyed in good faith or if it has been recorded and, after 10 years if it was enjoyed in bad faith; in the last two cases the term is increased by one-third if it is shown that the adverse possessor did not cultivate the land or, if urban realty, it remained uninhabited the major part of the time, or he failed to repair it. According to the Civil Code of 1884, these prescriptive terms are 10 and 20 years, respectively.

Title to personal property prescribes in 3 years when the adverse possession is in good faith, peaceful, and continuous, and in 5 years if bad faith is present; the latter term is 10 years according to the Civil Code of 1884.<sup>11</sup>

#### NEGATIVE PRESCRIPTION

A person is released from his civil obligation, unless otherwise expressly provided, by the lapse of 20 years according to the Code of 1884, and 10 years according to the Code of 1932; as regards commercial rights and obligations, this term is 10 years. The period of prescription generally has been indicated under each kind of transaction discussed in this bulletin: those not so treated are indicated hereinafter. If no term is specified, then those just indicated apply.

The following rights prescribe in 2 years under the Civil Code of 1932, and 3 under that of 1884.

1. Fees, salaries, and any other remuneration for services, from the time these were rendered.

<sup>11</sup> Civil Code, 1932, arts. 1135-1157; Civil Code, 1884, arts. 1059-1090.

2. Action by a merchant to collect the purchase price of objects sold to consumers, from the date of delivery if the sale was not made in installments.

3. Actions by innkeepers, boarding-house keepers, and restaurateurs, to collect for room and/or board owed them, from the time the lodging should have been paid and from the time the food was furnished.

4. Civil liability for damages caused by (a) written word or word of mouth, (b) persons, or (c) animals. The civil liability for illegal acts not constituting crimes prescribes under the Civil Code of 1932 within 2 years. The former runs from the day when the damage was caused or the injury was received or became known; in the latter case, from the day when the illegal acts were performed.

Pensions, rents, and any other periodical payments not collected at maturity prescribe within 5 years thereof; the prescription on the capital runs from the last payment made if no maturity has been fixed, otherwise from the maturity date. The obligation to furnish accounts, as well as the liquid obligations resulting therefrom, prescribe under the Civil Code of 1932 within 5 years; the term runs, in the first case, from the expiration of the administration, and, in the second, from the date of approval of the liquidation.<sup>12</sup>

#### COMMERCIAL PRESCRIPTION

The actions derived from acts of commerce are outlawed by lapse of time, which time is counted from the day on which they could have been instituted. The terms fixed by law in these cases may not be extended, but the period may be interrupted by (1) judicial demand which the plaintiff does not withdraw or in which he does not fail; (2) acknowledgment of the obligation; and (3) renewal of the document on which the creditor's right may be based. The new term runs in (2) from the day when made, in (3) from the date of the new document, and if in it the term of the obligation is extended, from the date of maturity of that term.

The following actions prescribe within 1 year: (1) Actions by retail merchants in credit sales, from the date the sale is made, except where current accounts are kept; (2) actions by clerks to collect salaries, from the date of their leaving; (3) all actions derived from maritime or overland transportation; (4) actions to enforce liability against exchange or commercial brokers for obligations in which they intervene by reason of their occupation; (5) actions derived from life insurance, sea or land; (6) actions for services and materials furnished to vessels, and for damages by fouling and average.

A prescriptive period of 5 years is provided for actions (1) arising out of company or partnership contracts and transactions of similar nature, as regards rights and obligations of the company or partnership to its members, of the latter to the former, and of the members among themselves; and (2) which may be brought by the liquidators of companies or partnerships by reason of their office.

Action to recover the property in a vessel prescribes in 10 years, even though the one in possession lacks title or did not act in good

<sup>12</sup> Civil Code, 1932, arts. 1158-1164; Civil Code, 1884, arts. 1091-1109; Code of Commerce, art. 1047.

faith. Actions derived from bans on bottomry contracts prescribe in 3 years.<sup>13</sup>

Prescriptive periods in commercial matters will run against minors and those under disability, but these may proceed against their guardians ("tutores o curadores").

#### SUSPENSION AND INTERRUPTION OF PRESCRIPTION

The prescription of civil obligations does not run, or, if it has begun to run, is suspended (1) as against those under disability until their guardianship is determined; (2) between ascendants and descendants during the existence of parental rights ("patria potestad") as regards the property of the latter; (3) between spouses; (4) between those under disability and their guardians, during the guardianship; (5) as against those absent from the country; (6) as between coowners or cotenants with regard to the common property under the code of 1932; (7) as against soldiers in active war service.

Prescription is interrupted if (1) the one in possession is deprived of it or of the enjoyment of the right for a period exceeding a year; (2) by suit or other form of judicial demand notified to the possessor or debtor; (3) by acknowledgment of the adverse possessor or holder of the rights of persons against whom prescription is running; this acknowledgment may be oral or written, or implied from proven acts. The prescriptive time elapsed until the interruption occurs is lost and prescription begins to run anew when the interruption ceases. The fact that a person enjoys property or right adversely only for part of the prescribed time and then conveys it does not cause the loss of the prescriptive time elapsed; the subsequent grantee may add it to the period of adverse possession he actually enjoys in order to complete the term required by law.

The interruption of prescription as regards a joint and several debtor interrupts it as to the other debtors; as regards joint and several creditors, the interruption in favor of one benefits all. Where the creditor who consents to the division of the debt as regards one of the joint and several debtors only demands of him the corresponding portion, the running of prescription is not considered interrupted as regards the others. In order that the interruption may be effective as regards all debtors not joint and several, their citation or acknowledgment is necessary.<sup>14</sup>

<sup>13</sup> Code of Commerce, arts. 1038-1048.

<sup>14</sup> Civil Code, 1932, arts. 1165-1175; Civil Code, 1884, arts. 1109-1124.

## VIII. MERCANTILE ORGANIZATIONS

The Mexican Code of Commerce includes in the term "sociedad" various types of mercantile organizations, which in the United States, generally, are wholly dissimilar—namely, partnerships, corporations, and cooperatives. The reason for this is principally historical and also the fact that corporations in Mexico are not creatures of the State but, like partnerships, arise by the will and contract of private persons.<sup>1</sup> The distinction between civil and mercantile acts exists in this field, and, therefore, we have civil organizations ("sociedades civiles") as well as the mercantile organizations ("sociedades mercantiles"); the difference between the two lies chiefly in their purposes. If the performance of mercantile acts only is intended, the organization formed is mercantile, and must be in conformity with the provisions of the Code of Commerce; on the other hand, if only civil acts, or both civil and mercantile acts, are intended, under the Civil Code of 1884, the organization is civil in nature and may be formed in accordance with the rules of the corresponding Civil Code; however, the parties may form it as a mercantile organization and this is often the case in actual practice. The distinction between these two types of organizations is excellently brought out in a recent paper on Mexican business law;<sup>2</sup> the reader, therefore, is referred to it, while we, in this brief summary, proceed to examine the law affecting the various kinds of mercantile organizations, namely, the general partnership ("sociedad en nombre colectivo"), the partnership with limited silent partner or partners ("sociedad en comandita simple"), the share partnership ("sociedad en comandita por acciones"), the business corporation ("sociedad anónima"), and the cooperative ("sociedad cooperativa").

### THE CONTRACT OF ORGANIZATION

All mercantile organizations, properly formed, enjoy a juristic personality separate and distinct from their members. Momentary associations or joint ventures and associations in participation ("asociaciones comerciales momentaneas o en participación") are recognized in Mexico as forms of business organizations, but are not "sociedades" and do not enjoy a separate *personality*; nor do these organizations require any formalities or documents to evidence their existence, which may be established by any of the ordinary means of proving facts, and therefore are not subject to registration in the Public Registry of Commerce.<sup>3</sup>

The formation of any mercantile organization requires the preparation of a contract of organization in the form of a public instru-

<sup>1</sup> For a fine historical analysis of this subject with citation of sources, see Cormack and Barker, *The Mexican Law of Business Organizations*, 6 *Southern California Law Review*, p. 184.

<sup>2</sup> Cormack and Barker, *opus cit.* pp. 189-190; Code of Commerce, art. 89.

<sup>3</sup> Code of Commerce, arts. 90-92 and 98-99.

ment. It is drawn and protocolized by notary public (see pp. 54-56) and subsequently registered in the Public Registry of Commerce. It must set forth the following facts:<sup>4</sup>

1. The full names and addresses ("domicilio") of the organizers.
2. The firm name and location of its domicile.
3. The object of the entity, its period of duration and manner of computing it.
4. The amount of capital; if shares are issued, the nature, number, and value; the amount subscribed in case of share partnerships and corporations; a statement of services, cash, credits, or property contributed by each person with the value ascribed to each item.
5. In case of a general partnership or partnership with limited silent partner or partners, the names of the partners in charge of the affairs of the enterprise, and the use of the firm name; as to the other mercantile organizations, the method of management and the powers of directors and managers.
6. The reserve fund of all organizations issuing stock, except cooperatives.
7. The method of distribution of profits and losses.
8. In organizations issuing shares, the participation of promoters in the profits and the manner of distributing same to them.
9. Causes of dissolution before expiration of period of duration.
10. Method of dissolution and manner of electing liquidators when not previously appointed.

The omission of any of these requirements is ground for the annulment of the contract, at the request of any member. The absence or insufficiency of a contract of organization cannot be set up against a third party who has contracted with the organization; as to him, it exists *de facto*. Any amendments or additions to the contract in question must be drawn with the same formalities as the original.<sup>5</sup>

## THE GENERAL PARTNERSHIP

### LIABILITY OF PARTNERS

A general partnership is one in which all the partners are subject to personal unlimited liability, jointly and severally, for all the transactions of the enterprise, which liability prescribes 5 years after publication of the liquidation of the company; any stipulations to the contrary will not affect third parties. The firm name may consist of the name of the members; if those of all are not included, the words "and company" ("y compañía") or their equivalent must be added; the abbreviation "& Cía." is most commonly used to meet this requirement. When the partnership succeeds to the name, rights, and obligations of another, the word "successors" ("sucesores") is added to the firm name. When this is done, members of the predecessor organization are not subject to personal liability for the obligations of the new by reason of the use of their names. Only the partners expressly authorized to do so may use the firm name; if any one does so without authorization, he does not bind the entity but

<sup>4</sup> Code of Commerce, art. 95.

<sup>5</sup> Code of Commerce, arts. 95-97 and 94.

is himself civilly and criminally liable. Those who permit the inclusion of their names in the firm name become subject to the same liability as partners.<sup>6</sup>

#### RIGHTS AND OBLIGATIONS OF PARTNERS

In the absence of stipulations to the contrary, the assignment of their rights without the consent of the other members is denied to the partners; nor may new partners be admitted without such consent. However, industrial partners may never assign their rights. In the sale or assignment of the interests of a partner, the other partners have a preferential right of purchase ("derecho del tanto") for 15 days after notification of the proposed operation.

As regards the partnership, the partners incur the obligation of depositing in the common fund, in the stipulated terms, the portion of capital which they agreed to contribute and to guarantee the title and peaceful enjoyment and absence from hidden defects of the property they contribute. The entries in the books of the partnership constitute sufficient proof that a partner has paid his contribution; however, managing partners must prove this by other sufficient evidence. If a partner delays in paying his contribution and the entity does not elect to rescind the contract of organization but to receive payment, it must be made with the corresponding interest accruing during the delay, and such other payments which may be due as damages suffered by the partnership on account of the delay. The industrial partner may not engage in any other occupation, either on his own account or on that of another, unless the organization expressly allows him to do so; in that case the capitalist partners may exclude him from the partnership, depriving him of the benefits due him in the organization or taking advantage of those accrued to him in violation of this provision. Any partner may examine the condition of the enterprise and its accounting and make the claims deemed necessary to the common interest.<sup>7</sup>

#### MANAGEMENT OF THE PARTNERSHIP

Unless the management of the partnership is intrusted to certain partners all the members may share in the conduct of its affairs. If there is no agreement among the managing parties, the majority may bind the entity, but it is liable personally to the partnership for the damages which its action may cause. Managing partners designated by the contract of organization may not be removed except by unanimous consent or judicially for fraud, fault, or incapacity; in turn the managing partners perform their duties until the termination of the partnership and are liable to it for the damages caused by their negligence in the conduct of the business. At any time an intervener in the management may be appointed by the majority; this may also be done whenever the removal of the managing partners is judicially requested.

The managing partners may exercise all the powers necessary in the conduct of the business; but they may not sell or mortgage the

<sup>6</sup> Code of Commerce, arts. 100-105 and 153.

<sup>7</sup> Code of Commerce, arts. 106-112 and 123.

immovable property of the enterprise unless expressly authorized to do so. If they violate the powers granted or use the firm name for their own ends or deal on their own account, they are liable to the organization for the damages which may be caused thereby in addition to the criminal liability provided in such cases. Managing partners must render accounts at any time when so requested by the majority of members. They may not delegate their powers without authority to do so, but they may grant certain powers for the transacting of certain operations relating to the partnership, on their own responsibility.

All partnership matters must be decided by majority vote and without violating the rights of the partners as provided in the contract of organization, unless otherwise stipulated; the majority is determined by the amount of contribution—consequently, industrial partners may have no vote. However, if a person has contributed over one-half of the capital, the vote of another is required to constitute a majority. The contract of organization may be modified only by the consent of all the partners.<sup>8</sup>

#### LIQUIDATION OF PARTNERSHIPS

Upon dissolution of the partnership it must be liquidated, within 6 months in the absence of agreement to the contrary; the words "in liquidation" ("en liquidación") must then be added to the firm name. The liquidators may be designated in the contract of organization or when the dissolution takes place; they may not be removed, if designated in the partnership contract, except for supervening cause considered sufficient by all the partners or by a court; in case of their failing through death, incapacity, or for any other reason, they must be replaced by unanimous vote of the members. When the liquidators assume control the functions of the managing partners cease and no new obligations may be contracted. In addition to any other express instructions set forth in the partnership contract the liquidator must (1) make an inventory of the assets; (2) demand an accounting from the managing partners; (3) present monthly statements to the partners which they may verify from the books and papers of the organization; (4) keep the books required by law; (5) collect debts due the partnership and pay the obligations it owes; (6) liquidate the particular account of each partner; (7) make the division of assets; (8) not settle or incur obligations unless so expressly authorized. The liquidators are liable to the members for the damages caused by their fraud or negligence.

Partners have the right to ascertain the condition of the organization during the liquidation by inspection of the documents in which it is being recorded. The books and papers of the organization must be kept by the liquidators until their operations terminate and then by the managing partners for 10 years more.<sup>9</sup>

#### RIGHTS OF ACTION

The partners may sue the liquidators for the amounts due them; in turn, they may be sued by the liquidators for any excesses paid to them. The creditors of the partnership may sue the liquidator to

<sup>8</sup> Code of Commerce, arts. 113-123.

<sup>9</sup> Code of Commerce, arts. 136-143 and 147-149.

collect the obligations due them, but these will be satisfied only to the extent of the assets of the enterprise; the creditors may then sue the partners, jointly or severally, for the residue. The personal creditors of a partner have no rights in the enterprise other than to attach the share of the debtor partner and to receive it at the same time and manner that the partner would have obtained it. However, if the debt was incurred before the formation of the partnership, the creditor of the partner may attach his share, request the liquidation of the organization, and demand immediate payment to him of the debtor's share. If a partner dies, his personal creditors may demand the liquidation of the organization unless its continuation with the heirs had been stipulated.<sup>10</sup>

#### DIVISION OF ASSETS

The capital or profits of general partnerships may not be divided until after dissolution and liquidation unless the contrary is stipulated. Upon the termination of a partnership a general balance will be made in order to determine the profits earned or losses incurred; the amounts paid to the partners from time to time are deductible as advance except those paid to industrial partners by way of sustenance. If nothing is stipulated in the contract of organization with regard to division of profits and losses, the division is made between the capitalist members in proportion to their contribution; the industrial partner in this case is entitled to share in the profits in the same proportion as the smallest capitalist partner. If there are several industrial partners, one-half of the earnings will be divided between them in equal shares, but in no case do they share in the losses, in the absence of stipulations to the contrary. Whenever the share of each partner in the earnings is fixed, he shares in the losses in the same proportion. The division may be objected to by any partner within 60 days after notification or removal of any legal impediment to his doing so; after this period he is deemed to have approved it. Any stipulations excluding one or more partners from participation in the profits, or depriving the heirs of a partner of their right to demand an accounting, and the payment of capital and profits, are null and void.

The division of the assets by the liquidators may not be made until all the liabilities of the organization are discharged. However, partial payments may be made to the partners if not inconsistent with the interest of the creditors. In the absence of express stipulation the division must be made in accordance with the following rules: (1) If the assets are capable of easy division, each partner will be given his corresponding portion; (2) if the assets are of different nature and not capable of division into the proportional parts to which the partners are entitled, the division will be made as nearly as possible in the proper proportions and those members receiving less than is due them will be given obligations to pay imposed on those who received more than they were entitled to; (3) the assets may be divided into portions upon agreement of the partners and drawn by lots between them; (4) if the liquidation is made because of the death of a partner, the division or sale of real estate will

<sup>10</sup> Code of Commerce, arts. 150-152.



be made in accordance with the rules of the Code of Commerce, even though the heirs of the deceased are minors. The partners may object to the division within 8 days after its notification.<sup>11</sup>

#### RESCISSION AND DISSOLUTION

The organization contract may be rescinded as regards one partner whenever he (1) uses the firm name or assets for his own purposes; (2) performs a managerial function without authority; (3) is guilty of fraud against the partnership; (4) does not deliver all or a portion of the stipulated capital; (5) performs operations prohibited by law or contract; or (6) fails to perform the personal services due to the organization without cause. The excluded partner is liable for his proportion of the losses, but his earnings and capital will be retained until all operations pending at the time of rescission are terminated.

A general partnership is dissolved (1) by mutual consent; (2) because of completion or impossibility of purpose for which organized, or expiration of the term of duration; (3) upon the loss of two-thirds of the assets, or of one-third if the partner demands the dissolution; (4) by the death or incapacity of the industrial partner if he brought the partnership into existence, or of any capitalist member; dissolution in this instance may be obviated by providing in the organization contract that the partnership may continue with the heirs of the deceased members or between the surviving partners; in this case the portion of the deceased must be liquidated and delivered to his heirs; (5) by the incapacity of a managing partner, at the request of another partner; (6) upon the revocation of the appointment of a managing partner, if dissolution is requested by any member; (7) because of the judicially declared bankruptcy of the organization. The member who asserts his rights under (3), (5), and (6) above cannot prevent the termination of pending negotiations, and until this is accomplished the division of the assets will not be made. Notice of dissolution must be published in order to bind third parties, unless it is caused by the expiration of the term of duration. The shares of a deceased partner must be liquidated and paid to his heirs, whenever the partnership is to continue with the surviving partners.<sup>12</sup>

#### PARTNERSHIP WITH LIMITED SILENT PARTNER

In the partnership with limited silent partner or partners there are two groups of members, those whose names appear in the firm name and who are personally, jointly, and severally liable for partnership obligations in the same manner as partners in a general partnership, and those whose liability is limited to the capital contributed but whose name does not appear in the firm name and who may not engage at any time in the management of the organization. The former are known as "socios comanditados" (active partners) and the latter as "socios comanditarios" (silent partners). In the firm name the nature of the entity is defined by the addition of "sociedad en comandita" after the individual or trade name of

<sup>11</sup> Code of Commerce, arts, 125-130 and 144-146.

<sup>12</sup> Code of Commerce, arts, 131-137.

active partners; if the names of all do not appear the words "y compañía" or "& Cía." must be added to the names used, followed by "sociedad en comandita", or more usually, "S. en C."

A silent partner becomes jointly and severally liable to third parties for all the transactions of the organization in which he takes part, and for all operations of the partnership if he manages it habitually or permits his name to appear in the firm name. Acts of advice, of the giving of authority, or of supervision, performed in accordance with the organization contract, are not acts of management. However, whenever the managing partner dies or becomes incapable and his substitution is not provided for in the contract of organization and the entity is to continue in operation, a silent member, if there are no other active partners, may transact the urgent or routine matters during a month thereafter and will be liable only for the execution of his duties. Silent partners may ascertain the condition of the organization only at the times provided in the partnership contract, but they may judicially request at any time the exhibition of the books and papers of the enterprise. Silent partners may not receive anything from the partnership except out of profits determined in the manner indicated in the partnership agreement, the managers being liable for any payments not made accordingly. All the provisions governing general partnerships apply to the ones herein discussed except as otherwise indicated above.<sup>13</sup>

#### SHARE PARTNERSHIPS

This organization is similar to the preceding one, except that the contribution of the silent partners is divided into shares and that the firm name need not include the name of any of the partners, in which case the words "sociedad en comandita por acciones" must be added to it. The names of the active partners who are to manage the business must appear in the organization contract. Share partnerships must have a "vigilance council" ("consejo de vigilancia") composed of three of the silent partners, appointed by the general meeting. This council must examine the books, cash, portfolios, and securities or paper ("valores") of the organization and present to the meeting an annual report pointing out any irregularities or inexactitudes found in the inventories and balances, and setting forth the reason for its opposition, if there is one, to the payment of dividends proposed by the managing partners. These reports must be available to members, at the offices of the enterprise, at least 1 month before the meeting is held. The liability of members of the council is the one prescribed for agents under the general rules of law. Unless otherwise stipulated in its contract of organization, a share partnership is dissolved by the death, incapacity, or disqualification of the active managing partner or partners; in these cases, in the absence of provision to the contrary, the council may appoint an administrator (manager) to transact all urgent or routine acts until a meeting of partners is called within a month thereafter. The provisions governing business corporations ("sociedades anónimas") not inconsistent herewith are made applicable to share partnerships. Shares of active partners may never be issued to bearer.<sup>14</sup>

<sup>13</sup> Code of Commerce, arts. 154-162.

<sup>14</sup> Code of Commerce, arts. 226-237.

## BUSINESS CORPORATIONS

This comment is limited to the form of corporation set forth in the Code of Commerce. Companies may be formed in Mexico for banking, railroads, and certain other special purposes, but in such cases their organization and operations are governed by special laws. The "sociedad anónima", as the business corporation is designated in civil law, more closely approximates the common-law corporation than does any other form of Mexican organization, and is the most widely used in large-scale commercial operations within Mexico.

The firm name of these Mexican companies must be indicative of their purpose and there must be added thereto the words "sociedad anónima", commonly abbreviated "S.A." The capital is divided into shares, the liability of the shareholders being limited to the extent of the amount represented by the shares held. However, if a shareholder allows his name to appear in the firm name he is jointly and severally liable, with the corporation, for all company obligations.<sup>15</sup>

## ORGANIZATION OF CORPORATION

There are two ways of organizing a company in Mexico, namely, by public subscription and privately by the action of two or more persons drawing up a proper company contract. Under the former method the promoters issue and publish a prospectus containing the projected articles of association and bylaws ("estatutos") with all necessary explanations, calls for payment on capital, and the proof of the value of any property which any member may contribute. The estatutos must contain all the matters which contracts of organization normally must contain, and must also set forth the manner of calling and holding the first meeting of shareholders. It is apparent, therefore, that in the formation of companies by public subscription no contract of organization is necessary. The stock subscription must be subscribed in one or more copies of the prospectus and must state the names or firm names and domiciles of the subscribers, the number (written out in full) of shares subscribed, the date of subscription, and the declaration that the subscribers know and accept the proposed articles of association and bylaws, the whole certified by two witnesses. As regards capital, the following requirements must be complied with: (1) It must be fully subscribed and 10 percent of the cash capital must be paid in; (2) if all or part of the assets consists of contributions of securities, personal or real property, it must be represented by paid-up ("liberadas") shares of stock; and (3) if 10 percent of the value of the stock payable in money is not paid within the time fixed, the shares will be considered as not subscribed. The payment of calls requested on subscriptions must be made by the subscribers, by delivery to the bank or commercial house designated in the prospectus, to be delivered to the directors ("administradores") appointed at the first meeting of shareholders held after protocolization and registration of the articles of association and bylaws; this money will be returned to the subscribers if the company is not organized. After the capital is subscribed and

<sup>15</sup> Code of Commerce, arts. 163-165.

the amount just indicated is paid in, the first meeting of the stockholders will be called for the purpose of (1) verifying and approving the calls as well as the value given to the property contributed by one or more subscribers who may not vote on the matter; (2) discussing and approving the bylaws; (3) determining the share in the profits reserved by the promoters; (4) making the appointment of directors, managers, and examiners to act during the term fixed in the bylaws. A list showing the number of shares and the votes which the stockholders represent must be signed by those present at the general meeting and attached to the minutes of that meeting. This record and the articles of association and by-laws are protocolized and then registered in the Commercial Registry, after the meeting; this completes the formation of the company.<sup>16</sup>

The simpler and more usual way of organizing a company in Mexico is by preparation of a contract of organization (articles of incorporation) signed by the organizers and setting forth the requirements governing the capital, etc., as indicated above under the heading "The contract of organization." This contract, accompanied by proof of the value of any property taken in payment for stock, must be protocolized and registered. The bylaws are approved at the first general meeting called in the manner prescribed by the company contract.

All operations performed by the organizers of a corporation, except those necessary to organize it, are void unless approved by the general meeting; the assignment or sale of shares by subscribers or organizers before the company is legally constituted, is also void.<sup>17</sup>

#### SHARES OF STOCK AND BOND ISSUES

The capital of a company is divided into stocks of equal par value, nominative or to bearer, common or preferred; the issue of no-par stock is not allowed. Each certificate must set forth: (1) The name of the company and its domicile; (2) the date of organization; (3) the amount of capital, the amount paid up by the stockholders, and the total number of shares; (4) the duration of the company; and (5) the rights granted to shares by the company contract or bylaws. Different classes of stock may have a different number of votes, and the number may vary upon different questions, but a class may not be deprived entirely of voting power upon any subject. Each certificate must be signed by the officers as provided in the bylaws. Shareholders of a designated class, or those holding less than a certain number of shares, may be deprived of capacity to hold office. Different classes of stock may be given different percentages of the profits, or the preferred may be given a certain percentage before any payment upon common; the preferred may not, however, be guaranteed a certain amount upon dissolution before payments upon common.<sup>18</sup>

A register of nominative shares must be kept by each company, which must state: (1) The name of each stockholder and the number

<sup>16</sup> Code of Commerce, arts. 167-174 and 21, subdivision 6.

<sup>17</sup> Code of Commerce, arts. 166, 175-177.

<sup>18</sup> Code of Commerce, arts. 178-180; Cormack and Barker, opus. cit. p. 207.

of his shares; (2) the amount paid in on the shares; (3) the transfers of stock, with their dates, and the conversion of nominative stock into bearer whenever permitted by the bylaws; and (4) a statement of the shares deposited as guarantee for the acts of directors and examiners. Entries in this register serve as proof of ownership of nominative shares; transfers are made by another entry dated and signed by the transferor and transferee or their authorized agents, certifications of which may be issued by the company to those who wish them, or new certificates of stock may be issued to the transferee. The transfer of bearer shares is effected by delivery. Each share is indivisible and therefore when one is owned by several persons, they must have a common agent designated by them or by a court if they do not agree on one.

The contract of organization may forbid the transfer of shares until fully paid. The company may sell the shares of stockholders who fail to pay subscriptions or calls unless otherwise provided in the bylaws, and may apply dividends to the discharge of these payments. In case of bankruptcy unpaid calls may be collected upon nominative shares but not upon bearer stock. Companies may not buy in their own shares except in the following cases: (1) When paid-up shares, issued for property other than cash ("acciones liberadas"), are bought with the consent of the general meeting and with profits not belonging to the reserve fund; (2) when the purchase is made upon authorization previously existing in the bylaws; and (3) when made with the assets, provided all formalities governing reduction of assets are observed. Purchases which contravene the above provisions are not void unless the vendor acted in bad faith, but the directors and the general director who authorized the transaction are personally liable for the damages caused to the company, in addition to any criminal liability. In no case may companies advance money or make loans on their own stock.<sup>19</sup>

#### MEETINGS OF STOCKHOLDERS

The management and operations of a company are conducted through the following agencies: The meetings of stockholders ("asambleas de accionistas"), the board of directors ("consejo de administración"), the managers ("directores"), the examiners ("comisarios"), and the advisers ("consejo consultivo"). The stockholders' meetings may be ordinary or extraordinary and must take place at the company's domicile; the former must be held at least once a year after the close of the business year (or fiscal year), while the latter may be called at any time. These meetings have the amplest power to carry out or ratify company acts, and may amend the contract of organization and bylaws unless otherwise stipulated. Meetings are called by the directors or examiners by publication of a notice in the official newspaper of the State, district, or territory where the company is domiciled, setting forth the matters to be considered. The holders of over one-half of the assets must be represented either personally or by proxy, but if this quorum is not available, a second convocation is made for a meeting to be held with

<sup>19</sup> Code of Commerce, arts. 180-186; see p. 36 for comment on bond issues.

such stockholders as may attend. Directors may not act as proxies. The number of votes to which stockholders are entitled and the manner of computing them is determined by the bylaws. It must be remembered that stocks may be of different nature, such as paid-up or not, common and preferred, etc., and therefore it is well to define precisely the voting privileges of each, so that at meetings all controversies over the matter may be avoided.

The resolutions of the general meetings must be approved by at least a majority of the votes of shares represented. Whenever the company contract or bylaws do not otherwise provide, the representation at the meeting of three-fourths of the capital and the favorable vote of a number of stockholders representing one-half of said capital is necessary in the following cases: (1) To dissolve the company in advance, unless done because of the loss of one-half of the capital; (2) to consider the extension of its duration; (3) to merge with other companies; (4) to reduce or increase the capital; (5) to change the object of the company; and (6) any other amendment of the bylaws or contract of organization. When an increase in capital is authorized it must be made with all the formalities and conditions prescribed for the formation of a company. The amendments indicated in (2), (3), (4), and (6) above must be set forth in public instruments to be recorded in the commercial registry.

The ordinary meeting must: (1) Discuss, approve, or modify the general balance, after hearing the examiners; (2) appoint the members of the board of directors; (3) appoint the examiners; (4) determine the compensation of the examiners and members of the board of directors, if not fixed in the bylaws; and (5) any other matter set forth in the notice. Extraordinary meetings may be held whenever called according to the bylaws, and with at least a month's notice, and when a written request for its call, specifying the questions to be submitted to the assembly, is made by shareholders representing one-third of the capital stock.

It is suggested that provision be made in the bylaws not only with regard to the manner of voting stock but also concerning the date of closing the stock register of nominative shares, before meetings or of depositing bearer shares preceding that event, in order to ascertain more readily who is entitled to vote. All minutes of each meeting must be prepared in duplicate and to one copy must be appended the list signed by all stockholders present, with an indication of the number of shares and votes they represent. The minutes ("actas") must set forth the date of meeting, the names of persons present, the number of shares each represents, the number of votes each may cast, the resolutions approved, the votes cast when the voting is not *viva voce* ("economica"), and everything necessary to a full understanding of resolutions.<sup>20</sup>

#### THE BOARD OF DIRECTORS

The actual management of a company in Mexico is conducted by the board of directors and one or more managers. Advisory boards ("consejos consultivos") may be appointed outside of the domicile

<sup>20</sup> Code of Commerce, arts. 201-211 and 41; Cormack and Barker, *opus cit.* p. 208; Fuller on Mexican Corporation Laws, p. 110.

to perform acts and manage the affairs of the enterprise in the manner provided in the bylaws or company contract. Such boards cannot lawfully perform the duties vested by law in the board of directors.

Unless the contrary is stipulated in the bylaws, the board of directors enjoys the fullest powers in conducting the operations of a company. The members of the board are appointed by the general meeting of stockholders; however, they may be named in the company contract. Directors may be reelected unless otherwise provided. Vacancies in the board may be filled in the manner provided in the bylaws. Directors must act personally, never through agents, and must deposit with the company the shares which the bylaws require as guarantee of faithful performance. They incur no personal obligation in the discharge of their duties but are liable to the company as its agents, which liability may be made effective only by the general meeting of stockholders or by a person authorized by it. If a member of the board of directors has an interest in a transaction adverse to the company, he must make it known. Directors may not vote at meetings of shareholders to approve the accounts, nor on resolutions affecting their personal liability.

Meetings of the board of directors are held generally at the domicile of the company, but provision may be made in the bylaws for holding them at another place. Minutes of such meetings must be kept in Spanish, setting forth the date, the names of the persons present, and the resolutions approved; this record must be signed by the persons so authorized in the bylaws. The board of directors is known in Spanish as the "Consejo de Administración".<sup>21</sup>

#### MANAGERS

The transaction of the business of a company as well as its representation must be entrusted to one or more general managers ("directores generales"), whose appointment, dismissal, and duties will be prescribed in the bylaws and whose liability is that of agents. Messrs. Cormack and Barker in their comments on Mexican corporation law designate these officials as "executives" and, as regards their functions, state: "It is the theory of the code that the executives of the organization together shall constitute an executive board, paralleling the administrative board—the board of directors. In modern practice, however, the board of directors decides all matters of importance and one of its members usually acts as the chief executive officer of the company. Under him there is commonly a 'gerente' (manager), in charge of the routine conduct of the business. The employees in charge of the different departments of the business are sometimes known as submanagers ('subgerentes'). The theory of the code that the executives shall constitute themselves into a board is disregarded almost universally. This is one of the rare instances in the Mexican law where failure to comply with literal legal requirements produces no ill results, because of the fact that the powers of the executives are left so completely in the hands of the stockholders."

<sup>21</sup> Code of Commerce, arts. 188-195; Fuller, *opus cit.* pp. 43-60.

It is usual to provide in the bylaws for a president, a vice president, a secretary, a treasurer, and a general manager. The president is generally empowered to preside over all meetings of shareholders, to cast the deciding vote at directors' meetings, to sign company documents, to represent the company before administrative and judicial authorities, and to execute powers of attorney. The vice president usually exercises the functions of the president in the absence of the latter, while the secretary keeps the minutes of meetings of stockholders and of directors and may sign certain company documents. The treasurer is given the custody of company funds, as well as valuable papers, and pays all obligations of the enterprise, the corresponding checks being signed by him and countersigned by the officer indicated in the bylaws for such purpose. The general manager customarily is given control over the employees of the company, signs the correspondence, and manages the business in accordance with instructions of the board of directors and in cooperation with sub-managers.<sup>22</sup>

#### EXAMINERS

The general meeting of shareholders must appoint one or more examiners ("comisarios") for the purpose of inspecting all company operations, to examine the books, correspondence, minutes, and all company documents and papers. The shareholders, therefore, may not act in this manner themselves. The examiners must be shareholders and must deposit a certain number of shares in order to exercise their functions. They may be designated in the company contract the first time and may be reelected and dismissed by the general meeting in spite of any provision to the contrary. The annual balance sheet must be examined by them. Although examiners may not impede the directors or managers in their functions, they may prevent any injurious action on the part of these officials through their power of calling a meeting of shareholders and laying before it the results of their investigation, with all details and their recommendations as to the proper course to pursue. However, it is reported that in actual practice the rights of minority stockholders are inadequately protected, since the examiners represent the majority interest which elects them and cooperate with the board of directors and the managers; the tendency, therefore, is for them to be perfunctory and ineffective in the performance of their duties. Their liability is that defined under the general law of agency.<sup>23</sup>

#### DIVIDENDS, RESERVE FUND, AND ACCOUNTS

Dividends may not be declared and distributed by Mexican companies except from profits as set forth in the balance sheet; however, the bylaws or company contract may provide that shares of stock may earn interest of not over 6 percent annually, during a period not to exceed 5 years. In the latter cases, such interest is considered as part of the cost of organization. Stockholders may never be forced to return dividends received by them.

<sup>22</sup> Code of Commerce, art. 197; Fuller, opus cit., pp. 60-66; Cormack and Barker, opus cit., p. 211.

<sup>23</sup> Code of Commerce, arts. 198-200 and 204; Cormack and Barker, opus cit., p. 211.



The code contemplates that the declaration and distribution of dividends shall be made by the stockholders, but the contract of organization or the bylaws often empower the board of directors to distribute anticipatory dividends. It is a common practice in Mexico to authorize the directors in this manner to declare and pay dividends from profits of the current business year at any time during such period, and without awaiting special authorization from the meeting of stockholders.

A reserve fund must be created by Mexican business corporations. A portion of yearly dividends, not less than 5 percent, must be set aside for this purpose until such fund amounts to one-fifth of the capital stock of the company. This fund may be diminished by such circumstances as loss, purchase of company's own stock, or distribution to shareholders of interest on stock as indicated above; in such case the fund is replenished by setting aside sums in the manner indicated above.

Companies must publish annually, in the official newspaper of the State, district, or territory wherein domiciled, a balance sheet setting forth the assets, the amount paid in and yet to be paid, cash on hand, and the several accounts making up assets and liabilities.<sup>24</sup> In practice this legal requirement is commonly ignored.

#### DISSOLUTION AND LIQUIDATION

The dissolution of a company takes place by: (1) Action of the stockholders at a properly constituted meeting (see p. 88); (2) the expiration of the period for which the company was organized; (3) the loss of one-half of the capital, provided that the dissolution under this head is approved at a general meeting, by a vote of the majority of stockholders representing one-half of the capital (does not apply to share partnerships); (4) the bankruptcy of the company, legally declared.

As soon as the general meeting of stockholders decides to dissolve the company, it must appoint the liquidators; if it does not, the judicial authority may be requested to do so. These officials may have been provided for beforehand in the company contract or, if not, the manner of electing them must be set forth therein, as well as the basis upon which the liquidation will be effected. Their appointment terminates the powers of the directors who, however, must assist them whenever so requested. The accounts of the directors during the period intervening between the last balance sheet approved and the opening of the liquidation, must be presented to the liquidators for their approval. When one or more directors are appointed liquidators these accounts must be published in two or more newspapers at the domicile of the company, together with the final balance sheet of the liquidation; but if this extends beyond a company year ("ejercicio social"), the accounts in question must be attached to the first balance sheet which the liquidators present to the general meeting of shareholders. However, if the liquidation lasts more than a year the liquidator must prepare the annual balance sheet in accordance with the legal requirements and the bylaws.

<sup>24</sup> Code of Commerce, arts. 213-215; Fuller, *opus cit.* pp. 73-77 and 71-72.

As soon as the liquidation is finished the liquidators must prepare the final balance sheet, with an indication of the portion of the assets corresponding to each share. This must be published during 30 consecutive days in one or more newspapers at the company's domicile. The shareholders, within 15 days after the last day of publication, must present their claims to the liquidators. Thereafter a meeting of shareholders must be called and pass on these claims by majority vote, each share having one vote. After the expiration of the 15 days without presentation of a claim, or after all claims are disposed of, the final balance sheet is considered as approved. However, the liquidators remain liable as agents of the company for their acts in the distribution of the assets. The sums belonging to stockholders and not collected within two months after the date when the final balance sheet is considered approved, must be deposited in a bank with an indication of the shareholder's name, if the stock is nominative, or the number thereof, if "to bearer", to be paid to the person indicated or to the holder of the corresponding share.

Books of account of a dissolved company must be preserved by the Public Registry of Commerce wherein deposited by the liquidators.<sup>25</sup>

#### MERGER OF COMPANIES

Companies as well as partnerships may merge in Mexico upon resolution approved by each organization. The merging organizations, however, are considered dissolved insofar as those members who do not assent to the merger are concerned. Publication by circular and newspaper (see p. 12) must be made. Each entity must publish its last balance sheet, and the ones which cease operating the plan proposed for discharging their outstanding liabilities. Unless the immediate payment of all liabilities or the deposit of like amounts in a bank is made, or the consent of all creditors is obtained, the merger may not take effect until 3 months have elapsed after publication of the stipulations for the merger. During this term any creditor of the merging organizations may oppose the merger until his credit is satisfied. Debts payable in installments mature immediately in case of merger. After the merger is consummated the continuing entity or the one created by it assumes all the rights and obligations of those which are extinguished. If a new entity results from the merger it must be organized in accordance with the prerequisites previously indicated.<sup>26</sup>

#### COST OF INCORPORATION

No accurate estimate on the cost of organizing a Mexican company can be made, because the amount of fees and stamp taxes collectible depend primarily upon the amount of capitalization and the length and intricacy of documents to be prepared. In the more usual manner of incorporating, as distinguished from the public subscription method, it might be well to consider the following items of expense:

<sup>25</sup> Code of Commerce, arts. 216-225.

<sup>26</sup> Code of Commerce, arts. 260-264.

1. Preparation of articles of incorporation as a notarial document: (a) Notarial fees vary in accordance with amount involved; (b) stamp tax, 1 per thousand on the amount of capital set forth in the company contract; (c) protocolization stamp tax, 1 peso per leaf; (d) certified copy (testimonio) of the articles, 1 peso per leaf. In calculating (c) and (d) consider that pages are limited to a size of 35 by 24 centimeters and to a total of 80 lines on both sides of each leaf.

2. Preparation of bylaws: (a) Notarial fees vary in accordance with amount involved; (b) protocolization stamp tax, 1 peso per leaf; certified copy ("testimonio") of the articles, 1 peso per leaf.

3. Recordation in public registry of commerce varies in accordance with the amount of capital involved and length of document.

4. Publication.

5. Stamp tax on shares of stock. Nominative or bearer shares of a company or enterprise must bear stamps of 2 centavos for each 20 pesos or fraction thereof of their par values; when no value is expressed they must bear a stamp of 1 peso. These rates apply also to founders' shares and any other documents which evidence a right or participation in profits without representing a share of capital. Shares must be stamped even though issued in exchange for others already stamped which are to be canceled ("amortizadas"). Definitive certificates which include several shares will be stamped in accordance with the value expressed by the certificate, irrespective of the value which each share may have.

6. Stamp tax on bonds and other obligations. Bonds and other company obligations must bear stamps at the rate of 1 centavo for each 10 pesos of par value.

7. Provisional certificates for shares or bonds must bear stamps of 10 percent of the above rates, but in no case shall the stamps be less than 1 centavo, nor more than 5 pesos. Such certificates must be issued within 6 months following the date of the company contract (articles of partnership or incorporation). If after a company contract is signed the issuance of such certificates is provided, the issue must be made within the 2 months following the date of the corresponding resolution of the meeting of shareholders.

#### FOREIGN COMPANIES

Foreign companies are permitted to engage in business operations in Mexico as freely as domestic companies, with the exception of the land-holding restrictions (see p. 6). Generally, whenever the Mexican market is entered for the first time it is usual to commence operations through a representative who only canvasses the market for orders to be accepted at the home office, shipment being made directly to the customer, who also is billed directly. The increased volume of business may subsequently justify the consignment of merchandise to a commission agent. If the operations in Mexico are large enough to justify the expense and if other considerations of business policy of the particular organization make it advisable, a foreign company may set up its own organization in Mexico, such as an agency or branch, a Mexican subsidiary, or an agency or branch of a subsidiary organized under the laws of the State of incorpora-

tion of the parent company or of another State. It is not customary for the parent company to open a branch or agency of its own in Mexico, principally because it necessitates registration of the company there and the consequent payment of a tax of 1 per thousand on its whole capital. It is also inadvisable because in the event of suit in Mexico against the company, it may be forced to respond with all its assets and not simply with the capital actually invested in Mexico. Another difficulty which arises in this case is the constitutional limitation upon the enjoyment of real estate titles (see p. 6); however, this is also present in the case where a foreign subsidiary is organized, and, in certain cases, even when a Mexican subsidiary is created.

The formation of a subsidiary under the laws of the domicile of the parent company or other State of the United States, and its subsequent registration in Mexico, is often used because it permits the parent company effectively to control and manage the subsidiary and, through it, all operations in Mexico. It must be remembered, however, that such subsidiary operates in Mexico as a foreign company and will be subject to the restrictions placed by Mexican law on such. More often a Mexican subsidiary is created and all transactions in Mexico are conducted through it, when the business necessitates frequent dealings with governmental authorities. It is more difficult to manage, because meetings of its stockholders must be held at its domicile in Mexico. However, the use of proxies obviates this to a large extent. Meetings of its directors and managers may be held outside of Mexico so that its effective management is not materially affected.

#### REGISTRATION OF FOREIGN COMPANIES

The registration of the parent or a foreign subsidiary company in Mexico is made by recording in the Public Registry of Commerce certified copies of the protocolizations (notarial recordations) of their bylaws, articles of incorporation, and other documents concerning their organization (such as the minutes of the election of the existing officers), the inventory or last balance sheet, and a certificate of being organized and authorized to do business in accordance with the laws of its domicile, issued by the Mexican Minister at that place, or, if there is none, by the Mexican consul therein. A power of attorney to the person in charge of the office in Mexico must be executed (see p. 64), protocolized and registered in like manner.

Before transmitting any of these documents to Mexico they must be properly legalized. In most United States jurisdictions, articles of incorporation are registered in State administration offices, while in several, the bylaws are not so registered. Where such registration has been made, copies thereof, certified by the proper official, must be obtained. As to all other documents not so registered, copies must be prepared and certified by the secretary of the company, whose signature is certified by a notary public. This official must state in the jurat or in a separate certificate that he has examined the records of the company, knows the executing officer to be such, and that he has power so to certify. The corresponding county clerk or other authorized official must authenticate the signature of the notary public. The secretary must also prepare an affidavit before

notary public guaranteeing the correctness of the last balance sheet or inventory, which affidavit must be legalized as described herein. All documents are then taken to the Mexican consul within the jurisdiction for legalization. He issues two certificates, one certifying that the signatures of the State officials are entitled to credit and the other that the corporation has been constituted and authorized in accordance with the laws of the State. If there is no consul within the jurisdiction, the State Secretary of State authenticates the signatures of all State officials, and issues the certification of existence, and, in turn, his signature must be authenticated by the Secretary of State of the United States. Thereafter, the documents must be taken to the Mexican Ambassador for authentication of the signature of the last-mentioned official. Upon transmittal of these documents to Mexico, the Foreign Office legalizes the signature of the Ambassador or consul. Thereafter, the documents, together with a translation into Spanish, must be presented to a court of first instance with an application for their protocolization with a local notary public, and the designation of a translator to certify to the correctness of the translations presented. This done, the "testimonios" issued by the Mexican notary public are presented to the public registry of commerce for recordation.

Foreign companies which have registered themselves, or a subsidiary foreign company in Mexico, must publish annually a balance sheet setting forth clearly the assets and liabilities, as well as the names of the persons in charge of the administration and management of the parent company or subsidiary, as the case may be. Failure to comply with this requirement and properly to register renders those who contract in the name of foreign companies jointly and severally liable with the company for the obligations contracted in Mexico. In addition, the documents which should have been but are not registered do not affect third persons, who may, however, take advantage of them insofar as they should be favorable to them.<sup>27</sup>

#### COST OF REGISTRATION

In the registration of a foreign company in Mexico, the following items of expense must be considered:

1. Preparation of copies of documents for presentation to the Mexican consul or Ambassador—this may vary within each jurisdiction of the United States and is readily ascertainable therein.
2. Authentications by consul or Ambassador, 10 pesos per authentication.
3. Authentication of signature of consul or Ambassador by Foreign Office, 11 pesos per authentication.
4. If the registration is to take place in one of the Mexican States, the corresponding "Gobernador" (Governor) must authenticate the signature of the Minister of Foreign Relations. A charge of 50 centavos in stamps is made for each authentication.
5. Translation of documents, varies with length and intricacy.
6. Court proceedings incident to protocolization and including fees of official translator who certifies to correctness of translations.
7. Stamp tax of 1 per mil on capital.

<sup>27</sup> Code of Commerce, arts. 15, 24-26, 265, and 266.

8. Notarial fees, vary in accordance with amount involved.
9. Stamp tax on protocol, 1 peso per folio.
10. Stamp tax on testimonios, 1 peso per folio.
11. Registration tax, varies in accordance with amount involved.

#### WHAT CONSTITUTES "DOING BUSINESS"

Perhaps because during the latter part of 1929 and early in 1930 the Supreme Court of Mexico had occasion to pass upon the judicial status of nonregistered foreign companies in that country, the problem generally arising in international trade as to what constitutes doing business by a foreign company in a country so as to necessitate its registration there was brought to the fore. It was not until recently that the matter was analyzed in all its details and that the Mexican sources of law were exhaustively collected and studied (the comments that follow are but a brief summary of this report).<sup>28</sup> The conclusions arrived at are briefly as follows:

1. An unregistered foreign company may sue in Mexico to enforce rights derived from acts or contracts done or made *outside* of Mexico.

2. As regards the enforcement of rights derived from acts or contracts done or made *within* Mexico, if the foreign company does not maintain in Mexico either its principal establishment or a branch or agency, on principle it is entitled to relief by a Mexican court, without prior registration of the company in Mexico. On the other hand, if it appears from the facts that the principal establishment of the company or an agency or branch exists within Mexico, prior registration is essential in order to seek the judicial enforcement of rights accruing in favor of a foreign company.<sup>29</sup> The difficulty here lies in the determination of a question of fact, that is, when does a company have its principal establishment, an agency, or branch in Mexico? This, of course, depends upon the particular facts of each case. However, the definitions of these terms by the Mexican commentator Jorge Vera Estañol are illuminating:

The law does not define what is a principal establishment, nor what is a branch, nor what is an agency. Case-law among us is poor and constantly contradictory; it has not settled anything on the subject. Accordingly we must be guided by the grammatical connotation of the words, insofar as this connotation fits within commercial language and is compatible with juristic practices. A principal establishment of a foreign company may be said to exist within the Republic when all the organs for the functioning of the company are moved here, when the action of these organs takes place within the national frontiers. . . .

The company has a branch when, organized abroad and having there resident the essential organs of its functioning, it institutes within this country an organ for the exercise of its juristic capacity in such manner that this organ independently administers and manages corporate assets . . . .

Finally, a company organized abroad has an agency in the Republic, when a person who represents it comes here, if that person in the exercise of his functions of representative has to submit constantly and continuously in all and every one of his acts to the instructions and decisions, both general and special, which are communicated to him from the home office.

<sup>28</sup> Shuster, *The Judicial Status of Non-Registered Foreign Corporations in Latin America—Mexico*, 7 *Tulane Law Review* 341. For a brief résumé of the law in other countries, see Latty, *International Standing in Court of Foreign Corporations*, 29 *Michigan Law Review* 1.

<sup>29</sup> Shuster, *opus cit.* pp. 381-382.

In résumé, a company organized abroad should be considered as established in the Republic, when within the frontiers of the nation it moves all its organs, its entire mechanism, by virtue of which it functions as a juristic entity. It establishes a branch, when it institutes a mechanism of administration which has a certain autonomy; and it establishes an agency when there is only a representative charged with performing all the commercial acts covered by the instructions received by him from companies established abroad.<sup>20</sup>

#### PROVISIONS OF LAW APPLICABLE

The conclusions indicated above are supported by Mexican statute law and its commentators. It must be admitted, however, that the supreme court cases are not harmonious and that, insofar as they indicate, considerable uncertainty still exists in Mexico on this question.

The Code of Commerce requires the registration in Mexico of foreign mercantile companies when they wish to establish themselves or when they organize or maintain a branch or agency in Mexico. The first case known in which these provisions are considered was decided in 1908. In it a plea of lack of personality of the plaintiff, in that it was a nonregistered foreign company, was alleged by the defendant and rejected by the lower court, on the grounds that the company was not forced to register, since it was not established or had no agency or branch in Mexico. "Amparo" was sought against this decision, but it was not granted. In September 1929 the second chamber of the supreme court denied the "amparo" of a nonregistered foreign company against acts of a Mexican State because it lacked personality by reason of its failure to register itself in Mexico. This same position was assumed by the third chamber of the court in the Amparo Palmolive, in October 1929, while the first chamber, in the Amparo Chickering, took the same position as that reflected in the 1908 case. Mexican jurists who have commented on these decisions generally approve the doctrine laid down in the case last mentioned.<sup>21</sup>

Article 15 of the Code of Commerce was patterned after article 15 of the Spanish Code, while articles 265 and 266 appear to have been inspired by article 149 of a project of law prepared for Luxemburg, and by articles 230-231 of the Italian Commercial Code of 1882. The Belgian commentators and decisions have interpreted these statutes liberally to exclude foreign companies which have *not* established themselves or have *no* agency or branch within the particular jurisdiction. The Spanish and Italian authorities have also followed this line of reasoning, while in Mexico the general trend of decisions of lower courts, prior to 1929, harmonizes with this view. The third chamber of the Supreme Court in the Amparo Koppel also sustained this general doctrine in deciding that the unregistered foreign company had an agency in Mexico and, therefore, had no capacity to sue there. However, in this case the company had sent a traveling representative to Mexico, whose orders were ratified by the company at its home office. A power of attorney

<sup>20</sup> Schuster, *opus cit.* pp. 375-376.

<sup>21</sup> Code of Commerce, arts. 19, 24, 25, 26, 3, 15, 265, 266; Schuster, *opus cit.* 351-361; Amparo Gross, 37 *Semanario Judicial, Cuarta Epoca*, 48 (Mar. 5, 1908); Amparo Zardain, 27 *Semanario Judicial, Quinta Epoca*, 387 (Sept. 14, 1929); Amparo Palmolive, 27 *Semanario Judicial, Quinta Epoca*, 1294 (Oct. 26, 1929); Amparo Chickering, 29 *Semanario Judicial, Quinta Epoca*, 16 (May 2, 1930); Schuster, *opus cit.* 361, note 80.

was granted to another person to register trade marks; it was one for judicial and administrative matters and not to engage in commercial transactions. On these facts, therefore, the finding that an agency existed in Mexico appears to be somewhat extreme and not in harmony with the generally understood concept of an agency.<sup>32</sup>

It seems, therefore, that while Mexican statute law appears to sustain and the commentators and Mexican jurists favor a liberal interpretation in accordance with the conclusions indicated above, Mexican case law is not harmonious and, therefore, leaves room for much uncertainty in this field of the law. This is particularly true of the few decisions rendered by the Supreme Court, whose second and third chambers appear to be alined against the first in favoring a restrictive interpretation of the law. This is unfortunate because an unregistered foreign company forced to sue a resident of Mexico there, on an obligation incurred outside of Mexico or, accidentally, in Mexico, may or may not succeed in its action depending upon the classification made of the "amparo" (if it is sought) for the purpose of determining the proper chamber to consider it.

#### ASSOCIATIONS AND COOPERATIVES

Commercial associations in Mexico are of two kinds, momentary temporary associations and associations in participation. The former has for its object the transaction of one or more commercial operations, without acting under a firm name; the associates are jointly and severally liable to the persons with whom they deal. The latter exists whenever two or more persons become interested in transactions conducted by one or more of them in their own name. Between the associates who do not deal directly with third persons and these third persons no direct right of action exists. It is hard to draw a distinction between these two kinds of associations; perhaps the main difference lies in the fact that the former exists for the purpose of certain definite operations, while the latter are formed to undertake an indefinite number. Neither requires any particular formality of organization, nor are they legal entities separate and distinct from their members.<sup>33</sup>

Cooperatives may be formed by no less than 10 persons. Their liability may or may not be limited, which fact must appear in the firm name. The contributions of members must be represented by individual nominative certificates of equal value, and transferable in accordance with the regulations of the law governing cooperatives and the organization contract ("bases constitutivas"). A reserve fund of from 10 to 20 percent of annual income must be set aside for the purpose of covering extraordinary losses or damages which the annual income is not able to cover. Cooperatives may be of three kinds, of consumers, of producers, or of both. They are formed by the preparation of an organization contract to be signed by the founders before the municipal authority, or a civil judge, notary public, or broker, at the domicile. The Department of National Economy

<sup>32</sup> Schuster, *opus cit.* pp. 363-374; Amparo Koppel, 26 *Semanario Judicial* (Quinta Epoca), 1171, June 12, 1929.

<sup>33</sup> Code of Commerce, arts. 268-271; see also remarks by Cormack and Barker, *opus cit.*, pp. 218-219.



then will authorize them to start operations. This authorization must be presented to the Registry of Commerce in order to record therein the contract of organization. Cooperatives will be dissolved by decision of two-thirds of their members, diminution in membership to less than 10, bankruptcy, attainment or performance of their objects, withdrawal of authorization, or other causes provided by law. Contributions of members may be in kind, cash, or in services. Cooperatives are managed by the general meeting of members ("asamblea general"), a board of directors ("consejo de administración"), and a vigilance committee ("consejo de vigilancia").<sup>34</sup>

#### ORGANIZATIONS UNDER CIVIL CODE OF 1932

Under this code individuals may group themselves into associations ("asociaciones") and organizations ("sociedades"); the purposes of the former must not be principally economic, while those of the latter must be principally economic but not commercial. Civil organizations are formed by drawing a contract of organization, which must be in the form of a public document if one of the members transfers to the organization property whose conveyance must be evidenced in this manner. The contract must set forth the full names of the members and the amount of their contributions, the firm name, object, and the amount of capital; it must be recorded in the public registry. The liability of managing members is unlimited, joint, and several, while that of all other members, unless otherwise provided, is limited to their contributions. Should a civil organization assume a mercantile form it becomes subject to the Code of Commerce. After the firm name the term "civil organization" ("sociedad civil") must be added.

Civil organizations are dissolved by unanimous consent of all members, termination of their period of duration, realization or impossibility of performance of their objects, death or incapacity of a managing member, the death of the industrial member whose industry gave birth to the organization, resignation of a member in organizations with no set period of duration when the other members do not wish to continue associated, and by judicial resolution. Upon dissolution civil organizations must be liquidated by all the members unless liquidators are appointed or have been designated in the organization contract, within 6 months, unless otherwise provided; the term "in liquidation" ("en liquidación") must then be added to the firm name.

Foreign associations and civil organizations may exercise their activities in the Federal District and territories when authorized to do so by the Ministry of Foreign Relations, after it is shown (1) that they have been organized in accordance with laws of their country; (2) that their organization contracts and bylaws contain nothing contrary to Mexican laws of public order; and (3) that they have an agent at the place where they are going to operate, duly empowered to answer for the liabilities therein contracted by the entities. After the authorization is obtained the contracts of organization and bylaws must be inscribed in the public registry.<sup>35</sup>

<sup>34</sup> Law of May 12, 1933 (Diario Oficial, May 30, 1933) revoking arts. 238-259 of the Code of Commerce and the Law of January 21, 1927, with the exception of title IV.

<sup>35</sup> Civil Code, 1932, arts. 2670-2735. See also Barker and Cormack, Mexican Civil Organizations under the New Code, 7 S. Calif. Law Review 195.

## IX. INSURANCE AND LABOR LEGISLATION

### INSURANCE CONTRACTS

The Code of Commerce contains certain fundamental provisions governing the insurance contract, which contract is mercantile in Mexico whenever made by "enterprises." It is not clear what is meant by "enterprise" ("empresa"), but certain authorities interpret it to mean "commercial enterprises." However, since only enterprises organized and operating in accordance with the General Insurance Law of 1926 and its regulations may write insurance in Mexico, the term "enterprise" now probably means "insurance enterprises." The Civil Code of 1884 has extensive insurance rules; the Civil Code of 1932 is silent as regards obligations of this nature and, therefore, in those jurisdictions where this code is in force insurance obligations are governed by the Code of Commerce and the insurance laws.<sup>1</sup>

The insurance contract must be in writing, the usual form being the policy. It must contain the names of the insurer and insured, the nature of the insurance, the matter insured, its estimated value and the necessary indications to determine the nature of the risks, the premium, duration of the contract, day and hour when it goes into effect, the insurance already in force on the matter, and any other stipulations of the contracting parties. It is governed by its lawful terms and in the absence of such by the laws herein discussed; and may cover any risks arising from natural accidents and mishaps. Any novations made in the contract during its life increasing the insurance, extending it to cover other risks, or reducing those originally provided, or their amount, or making any other essential modifications, must be set forth in the policy. The contract will be null and void (1) if either party acted in bad faith when it was entered into; (2) if the insured made an inaccurate declaration even if he acted in good faith, provided it may affect the determination of the risks involved; and (3) if the insured omitted or concealed facts or circumstances which may have had some influence in the making of the contract.<sup>2</sup>

### FIRE INSURANCE

#### INSURABLE PROPERTY

Both personal property and real estate which may be destroyed or injured by fire are insurable, including commercial paper, securities, bank bills, precious stones and metals, and objects of art; these

<sup>1</sup> The organization and operation of insurance companies in Mexico are governed by the General Insurance Law of May and its regulation of November 1926. The requirements and obligations imposed by it are outlined in *Qualification and Operation of Foreign Insurance Companies Under the Laws of the Latin American Countries*, published May 1, 1932, Division of Commercial Laws, Bureau of Foreign and Domestic Commerce.

<sup>2</sup> Code of Commerce, arts. 392-397 and 448.

will be included in insurance of this nature, provided that it is expressly stipulated and the policy sets forth their value and other pertinent circumstances. The substitution or change of the insured property for others of different nature not included in the insurance renders the contract null and void from the time the substitution is made; if such change is made by a fortuitous event or by a third person, either one of the contracting parties may elect to rescind.<sup>3</sup>

#### PAYMENT OF PREMIUMS

The insurer is not bound until he is paid the stipulated premium in advance, either in a single payment or in fixed installments. If not paid, the insurer may rescind the contract within the first 48 hours; thereafter he may only file executory action on the policy, upon acknowledgement of its signatures, to collect the amounts due. Movables are liable for the payment of the premium in preference to any other matured credit; immovables, however, are only liable thereto in the manner provided by the general rules of law.

#### EFFECT AND EXTENT OF FIRE INSURANCE

In cases of total loss by fire the existence of the goods at the time and place of the fire, in the absence of contrary proof, is shown by the amounts at which the insured goods are valued, the premiums paid, and the descriptions and valuations contained in the policy. In cases of partial loss, the insured must present additional proof to that of the policy, in order to determine the remaining value of the goods. Fire insurance includes indemnity for all material losses caused by the direct action of fire and its inevitable consequences, and in particular the expenses incurred in transporting the goods to save them, the damages suffered by saved goods, and those caused by the authorities in order to limit or extinguish the fire.

It does not cover, unless otherwise provided, the losses sustained by the insured through the suspension of work or industry, loss of rents of the burned property, or similar losses. The insurer is liable for the effects of the fire whether caused by accident, third person, or negligence of insured, or of those for whom he is civilly liable; he is not liable, in the absence of contrary stipulation, for fire caused by the crime of the assured, by military force, war, riots, volcanoes, and earthquakes. In insurance against meteorological accidents, gas or steam explosions, the insurer is liable for the consequences of the resulting fire, if any, in the absence of agreement to the contrary. The insurance only extends to the insured property at the place where it was and will never exceed the sum in which its value or the risks were estimated.<sup>4</sup>

#### OBLIGATIONS OF THE INSURED—RESCISSION

The insured must notify the insurer of (1) all prior, contemporaneous, or subsequent insurance contracted; (2) any modifications of those indicated in the policy; and (3) all the changes or alterations in quality which are suffered by the insured property and which may increase the risks. If goods are insured for their full value,

<sup>3</sup> Code of Commerce, arts. 400-401 and 415.

<sup>4</sup> Code of Commerce, arts. 402, 405-409.

they may not be insured a second time during the life of the first insurance contract except by way of guaranty of the latter obligation. If the same property is insured for a portion of its value under several policies, the insurers will pay the indemnities due in proportion to the amounts for which each assumed liability. Assignment of portions of an insurance is allowed in Mexico, but the first insurer remains directly and exclusively liable to the insured; in cases of such assignment, or of reinsurance, the assignees who receive the corresponding part of the premium are bound with the first insurer to contribute proportionally to the losses and to assume responsibility for arrangements, compromises, and stipulations entered into by the assured and the principal insurer. The insurance on real estate is not increased by the death, liquidation or bankruptcy of the insured, and the sale or transfer of the property; but that on personal property, factory, or store may be rescinded by the insured if any of these events takes place and notice thereof is given to the insured within 15 days.<sup>5</sup>

#### ADJUSTMENT OF LOSSES

In case of loss the insurer must be notified immediately and a report presented before the competent court concerning the goods existing at the time of the fire, those saved, as well as the estimated loss suffered. The damage will be ascertained by experts as provided in the policy, by stipulation between the parties or, if not, in accordance with the provisions of the procedural law (see p. 181). The experts must decide what were the causes of the fire, the actual value of the insured goods on the day of the fire and before it commenced, their value after the conflagration, and any other matter submitted to their judgment. Within 10 days after the expert's decision the insurer must pay in cash the amount of the indemnity or must repair, rebuild, or replace the insured goods, if so agreed; in case of delay the insurer must pay interest at the legal rate. The insured may collect from the insurer by filing executory action based on the decision of the experts, if it was rendered before notary public; if not, on the judicial confession of the experts and their acknowledgment of signatures and the truth of the document. The insurer may keep the property salvaged upon payment of actual value as estimated by the experts. The insurer is subrogated, upon payment of indemnity, to the rights and actions of the insured against those responsible for the loss. The insurer may cancel the policy as to future losses and any other contracts he may have with the insured, upon giving him 15 days' notice thereof and returning the unearned portion of the premium. The expenses of the adjustment and settlement must be equally divided by the insurer and the insured; however, if the latter has manifestly exaggerated the amount of the damages suffered he must bear these costs.<sup>6</sup>

#### TRANSPORTATION INSURANCE

Insurance may be written in Mexico against all risks of transportation; however, the insurer is not liable for losses caused by

<sup>5</sup> Code of Commerce, arts. 410-414.

<sup>6</sup> Code of Commerce, arts. 416-425.

inherent defects in the property or by the lapse of time, in the absence of stipulation to the contrary; in the latter cases, the insurer must establish judicially the condition of the insured goods, within 24 hours after arrival at the place of delivery. Unless he does this he cannot escape his liability as insurer. The insurer is subrogated to all the rights of the insured to collect damages from the carriers.<sup>7</sup>

## MARITIME INSURANCE

### NATURE OF THE CONTRACT

Maritime insurance must be set forth in a policy signed in duplicate by the parties. It must indicate (1) the date of the contract, name and domicile of the parties, and the captain of the vessel; (2) character in which the insurer contracts, whether he acts in his own or someone else's name, and, if so, the latter's name and domicile; (3) name, port, flag, and registry of vessel; (4) the ports or roadsteads where the merchandise is loaded, or where the vessels leave from and/or stop; (5) nature and quality of the goods, number of bales or packages; (6) time at which the risk is to commence and terminate, its amount and the premium, with indication of the date, place, and manner of its payment; (7) portion of the premium which corresponds to outward and to the homeward voyage, if the insurance be for the round trip; (8) the obligation to pay the damages suffered and the place, time, and manner of making this payment by the insurer. Both the vessel and the cargo may be insured in one policy by one or more insurers, with indication of the value and the amount of insurance on each. The specific designation of merchandise and vessel may be omitted in the insurance of the former when not known to the insured, but in case of loss, he must prove, in addition to the departure and loss of the ship, the shipment for his account and the value of the goods lost. The insurance may be extended to the order of the insured, in which case it is endorsable.<sup>8</sup>

### INSURABLE PROPERTY

The following may be insured against maritime risks: The hull of the ship in ballast or freighted, in port or at sea, the tackle, the machinery, all its stores and outfit, provisions, and fuel, amounts furnished on bottomry bonds, the amounts of freight and probable profit, and all commercial goods subject to navigation risks and whose value may be fixed at a definite amount. Some or all of these may be insured jointly or separately, in time of peace or of war, for a voyage or fixed period, for a single or round trip, on favorable or unfavorable reports ("noticias"). Insurance of a ship includes its machinery, tackle, stores, and everything belonging thereto but not its cargo; insurance on the latter does not cover metals coined or in bars, precious stones, or munitions of war. Insurance on freight may be obtained by the shipper, the carrier, or the captain; but the latter two cannot insure what they have received as advances on account of the freight, except when it has been expressly provided that in case the freight is not earned, through

<sup>7</sup> Code of Commerce, arts. 442-447.

<sup>8</sup> Code of Commerce, arts. 812-817.

shipwreck or loss of the cargo, they will return the amount received. Freight insurance must be made for a determined amount not to exceed that which appears in the freight contract.

Profits may be insured, but the policy must indicate the amount of profits fixed by the insured and the obligation of reducing the insurance if the sale value, after deducting the freight and expenses, as compared to the purchase price, is less than that estimated in the policy. Should the captain procure the insurance or should the owner of the goods travel in the same ship with them, 10 percent will always be left at their risk, unless otherwise provided; the insurance of the ship only covers four-fifths of its value. In both of these cases the amount of bottomry bonds must be deducted from the insurance.

The signing of the policy gives rise to the legal presumption that the insurers admitted as exact the valuation of the goods, except in cases of fraud or bad faith; if the estimate appears to be exaggerated, it must be ascertained whether the exaggeration is done through error and not in bad faith on the part of the insured, in which case insurance will be reduced to its proper value as determined by the parties or their experts, and the insurer will return the excess premium less one-half of 1 percent of the excess. If due to fraud and it is proven by the insurer, the insurance is null and void but the insurer may keep the premium and may file the proper criminal action. If the value of the property is not determined when the insurance contract is entered into, it must be ascertained from the consignment invoices or through the statements of broker or expert.<sup>9</sup>

#### OBLIGATIONS OF THE INSURER AND THE INSURED

The insurers must indemnify the assured for any damages suffered by the insured property, by reason of the running aground of the ship, with or without breaking, storm, shipwreck, accidental collision, change of course during the voyage, jettison, capture, pillage, war, embargo by government, retention by foreign government, reprisals, fire or explosion, and any other accidents or risks of the sea; any exceptions thereto must be mentioned specifically in the policy. This liability ceases, however, by: (1) Voluntary change of route without insurer's consent; (2) voluntary separation from a convoy with which it was stipulated the ship should go; (3) prolongation of the trip to a port more remote than that designated in the policy; (4) arbitrary arrangements contrary to the charter party or bill of lading made at the order of the carriers, shippers, or charterers; (5) barratry by the master of the ship; (6) shrinkages or leakage due to the nature of the insured goods; (7) lack of the documents prescribed by the Code of Commerce, maritime and navigation rules and ordinances, or omissions of the captain. In any of these cases the insurer may keep the premium provided that the risk had commenced to run.

In insurance of cargo for round trip, the premium on the return voyage will be reduced proportionately if no cargo or less than two-thirds is carried, the insurer being credited with one-half of 1

<sup>9</sup> Code of Commerce, arts. 818-829.

percent of the portion not carried. No reduction will be made, however, if the cargo is lost in the outgoing journey unless there is a stipulation modifying these provisions. If the freight is insured by various persons in various amounts without indicating the objects of the insurance, the insurers must answer for any loss in proportion to the amount written by each. If several ships are designated to carry the insured goods without indicating the amount to be carried by each, the assured may distribute the cargo as he sees fit but if the amount to be carried by each ship is determined and the goods are shipped in different amounts, the insured is liable only in the contracted amounts. If the merchandise is transferred to another ship before leaving port because of the unfitness of the first one, the insurers may elect to continue the contract or not and pay the damages suffered; however, if the unfitness arises during the trip, the insurers must continue carrying the risk even if the second ship is of a different port and flag from those designated in the policy.

If the time during which ship insurance is to be in force is not fixed, it lasts from the time it puts to sea until it anchors at its destination; on the cargo, insurance lasts from the time it is shipped until it is unloaded at the port of consignment. In insurance for a fixed time the liability of the insurer ceases when the period terminates. If the merchandise is unloaded at a nearer port for the convenience of the assured he is entitled to no reduction in premium. The stops made to preserve the ship and its cargo are included in the insurance unless otherwise stipulated.

The insured must notify the insurer, by the first mail or by telegraph, of the news he receives concerning the progress of the ship during the trip and the damages suffered by the insured objects. If merchandise insured by the captain is lost, he must prove its purchase to the insurers with the seller's invoices as well as the loading and direction of the ship by certification of Mexican consul or other competent authority at the port of loading and by means of other customs documents; the same obligation is imposed on the assured who travel with their own merchandise, unless otherwise provided. If an increase in premium in case of war is stipulated and its amount is not determined, it may be ascertained by experts. Should the parties fail to agree thereon, the gratuitous return of the ship or its cargo to its captain by the captors will inure to the benefit of the owners without obligations on the assurers to pay the amount insured.

Every claim based on the insurance contract must be accompanied by documents which prove the voyage, the loading of the insured objects, the contract itself, and the loss suffered; such documents, respectively, may be: (1) A statement by the captain; or (2) certified copy of the log-book; (3) bill of lading, customhouse documents, and the policy; and (4) the same documents as under (1), and the declarations of members of the crew. In addition, discount on the insured objects will be fixed upon examination by experts. The insurers may oppose any claim and may offer evidence with that end in view. After the documents previously mentioned are presented and the insurer is agreeable thereto and the loss is established, the indemnity must be paid within the term stipulated in the policy or within 10 days after the claim. However, if the insurer rejects the

claim and denies it judicially, he must deposit the amount involved or deliver it to the assured under bond as the court may decide.

In the case of slight damage ("averia simple"), the following rules will apply as regards the insured merchandise:

1. Everything that has disappeared through theft, loss, sale, or deterioration during the voyage, or any other maritime accident included in the insurance contract, must be proven with regard to the invoice value, or the one set forth in the insurance, and the insurer must pay its amount.

2. If, when the ship reaches port, the merchandise is found partially or totally damaged, experts will estimate its value as if it were in good condition and that in its damaged condition. The difference between these two values, after discounting customs duties, freights, and similar expenses, will constitute the amount of the damage, to which may be added the cost of the experts and any other expenses incurred. If the whole shipment is damaged, the insurer must pay the whole loss in value which may take place; if only a part is injured, the assured will be indemnified in the corresponding amount. If the profit of the shipper was specially insured, it will be liquidated separately.

If either of the contracting parties is thrown into bankruptcy while the risk is pending, the other may demand security for protection against the risk or for payment of the premium, as the case may be, and if the representatives of the bankrupt estate do not furnish it within 3 days after the request, the contract will be rescinded; if the loss takes place within these 3 days and no security has been furnished, there will be no right to the indemnity nor to the premium.<sup>10</sup>

#### ABANDONMENT OF THINGS INSURED

The insured may abandon the insured objects and demand the amount of the insurance in case of (1) shipwreck, (2) any other accident of the sea, (3) capture, embargo, or detention by order of the national or a foreign government, and (4) total loss of the objects (loss of three-fourths of the value is considered total). All other damages will be considered average and will be borne by the proper parties according to the insurance and the provisions of the Code of Law. The abandonment cannot be made in the first two cases if the ship may be set afloat and repaired in order to continue the voyage to its destination unless the cost thereof is more than three-fourths of the value of the insurance on the ship. If the ship is rehabilitated the insurer is liable only for the expenses of its running aground or other damage.

In case of shipwreck or capture, the insured must make every effort to recover the insured object without prejudice to the abandonment he may make at the proper time, and the insurer must reimburse him for all expenses to the extent of the value of the goods salvaged.

If several insurance contracts are made with regard to one object, in the absence of fraud, the first one only will subsist if the whole value is covered; subsequent insurers are relieved and will receive

<sup>10</sup> Code of Commerce, arts. 856-863.



one-half of 1 percent of the amount insured. If the first contract does not cover the whole value, the subsequent insurers are liable for the excess value in the order of the dates of their contracts. However, the insured must pay all the premiums to the various insurers unless he gave them notice of the rescission of their contracts before the insured objects arrived at the port of destination. The insurance contracted after the loss, damage, or safe arrival of the property is null and void, provided it can be presumed that notice thereof had reached one of the contracting parties; this presumption will be raised when the notice of loss, damage, or safe arrival is published in a market, and there was time to transmit it by mail or telegraph to the place where the insurance was obtained, in addition to any other evidence which the parties may offer. The contract of insurance on good or bad reports ("noticias") will not be annulled unless it is proven that one of the contracting parties had knowledge of the event expected or feared when the contract was made; if this is proven, the defrauding party must credit the other one with a one-fifth part of the insured amount without prejudice to the criminal liability to which he may be subject. If the person who contracts the insurance acts for the owner of the property and knows of the loss or damage thereto, he is personally liable therein but not if he acted innocently although the owner had knowledge of these facts; the same rule applies to the insurer who contracts through an agent and knew that the property was safe. If a fraudulent contract is made by several insurers the innocent ones may recover the whole premium due them from those who acted in bad faith; the same is true of the insured when some of them are guilty of the fraud.

If the ship becomes completely unfit for sailing the insured must give notice to the insurer by telegraph if possible, if not, by letter. Those interested in the cargo, or, in their absence, the captain, must do everything possible to transport the cargo to the port of destination, in which case the risks involved and the costs of unloading, storage, reloading, or transshipment in excess of the freight and all other expenses will be borne by the insurer until the insured goods are discharged at the place indicated in the policy. In addition, the insured may transport the insured merchandise to its destination within 6 months after receiving notice of the accident. The notice is presumed to have been received whenever made public by means of the press, or by circulating it as true among the merchants at the domicile of the insured as well as upon proof that the latter received notice of the accident by letter or telegram from the captain, consignee, or some correspondent. If, in spite of the efforts of all these persons, no ship can be found to transport the goods to destination, the insured owner may abandon them.

In case the voyage is interrupted by libel or detention of the ship, the insured must give notice of this to the insurer as soon as he is informed of it, and cannot abandon the goods until 6 months elapse after the notice was given; he must assist the insurers in every way possible to lift the libel. The freight charges on the merchandise salvaged are included in the abandonment made by the owner, even though it was paid in advance, and will be considered as belonging to the insurers without prejudice to the rights of other creditors.

The insured may also abandon the goods after 1 year has elapsed in ordinary trips, and 2 years on longer trips, without receiving

news of the ship. In this case he may claim the insured amount without proving loss; but he must prove the lack of news by certification of the consuls or maritime authorities of the ports of departure, of destination, and of registration indicative of the fact that the ship arrived at none of them; the corresponding action must be instituted within 1 year.

If the insurance was contracted for a limited term, a legal presumption is raised that the loss occurred within the term unless proof to the contrary is presented by the insurer.

The insured must declare all the insurance contracted upon the abandoned property as well as all bottomry loans at the time he makes the abandonment. Until this is done the term during which he must be reimbursed will not commence to run. If he is guilty of fraud in making this declaration he will lose all rights accruing to him under the insurance, without being released from liability for the loans he contracted on the property insured, in spite of its loss. In case the ship is captured he or the captain may proceed to ransom the insured goods if they have no time to act with the consent of the insurer, but he must give notice of his action at the first opportunity to the latter, who may accept or reject the agreement entered into by the insured or the captain within 24 hours after such notification. If it is accepted the insurer must immediately pay over the amount agreed upon as ransom, the subsequent risks of the voyage being borne by the insurer in accordance with the policy. If the insurer refused it, he will pay the amount insured, losing all right in the ransomed goods; and if he fails to accept or reject within the 24 hours he is presumed to have rejected the agreement. If the insured recovers possession of the merchandise through the recapture of the vessel, all expenses and damages caused will be considered average, to be reimbursed by the insurer; and if through the capture the merchandise passes into the hands of third persons, the insured may avail himself of the right of abandonment.

Abandonment will not be allowed:

1. If the losses occurred before beginning the voyage.
2. If it is made in part or on condition, without including all the insured goods.
3. If notification of intent to abandon is not given to the insurer within 4 months after the day on which the insured was informed of the loss, and the abandonment is not carried out within 1 year from that date.
4. If not made by the owner or someone specially authorized by him or by the person commissioned to write the insurance.

In case of abandonment the insurer must pay the amount of the insurance within the term fixed in the policy; if none was determined within 60 days after the abandonment was accepted or the carrier's declaration is made.<sup>11</sup>

#### STAMP TAX<sup>12</sup>

The stamp tax rates on insurance contracts are as follows:

1. In the policy or document in which the contract is set forth: Whenever the annual premium or the only one stipulated exceeds 10 pesos, 50 centavos, fixed quota.

<sup>11</sup> Code of Commerce, arts. 864-880.

<sup>12</sup> Stamp tax law cited.

2. Upon the premium received by insurance enterprises:

(a) Policies against risks of life or for life annuities or pension certificate, 1 percent of value.

(b) Health, liability, personal accidents, and any other risks not included in (a) or (c), 2 percent.

(c) Maritime, transportation, or fire risk, 4 percent.

Exempted: Reinsurance policies and premiums.

Endorsement and stipulation modifying the value of the insurance; the tax must be paid on increases, however.

### LABOR LEGISLATION

As the volume of his Mexican business increases the average exporter may consider the establishment of an organization in Mexico with which to keep stock on hand, and through which to serve the increasing clientele more effectively. In such cases, the hiring of laborers and office clerks becomes necessary, and, therefore, the rights and liabilities involved in the relationship of master and servant should be given some consideration. This relationship is governed by article 123 of the Mexican Constitution, and its regulation known as the "Federal Labor Code of August 18, 1931." The enforcement of these laws lies in the States instead of the Federal authorities, which, however, retain jurisdiction of matters relative to the textile industry, railroads, and other transportation enterprises operating through Federal concession; mining, and labor performed at sea and in the maritime zones.<sup>13</sup>

Since the basic rules governing master and servant are contained in constitutional article 123, a translation of it is set forth herein, as follows:

#### FEDERAL CONSTITUTION OF 1917

(AS AMENDED 1929)

#### TITLE VI—OF LABOR AND SOCIAL WELFARE

ART. 123 (as amended by the act of 1929). The Congress of the Union, without contravention of the following bases, shall enact labor laws which shall regulate the work of manual laborers, day laborers, office employees, domestic servants, and artisans, and, in general, every contract of labor.

I. Eight hours shall be the maximum limit of a day's work.

II. The maximum limit of night work shall be 7 hours. Unhealthy and dangerous occupations are forbidden to all women and to children under 16 years of age. Night work in factories is likewise forbidden to women and to children under 16 years of age; nor shall they be employed in commercial establishments after 10 o'clock at night.

III. The maximum limit of a day's work for children over 12 and under 16 years of age shall be 6 hours. The work of children under 12 years of age shall not be made the subject of the contract.

IV. Every workman shall enjoy at least 1 day's rest for every 6 days' work.

V. Women shall not perform any physical work requiring considerable physical effort during the 3 months immediately preceding parturition; during the month following parturition they shall necessarily enjoy a period of rest and shall receive their salaries or wages in full and retain their employment and the rights they may have acquired under their contracts. During the period of lactation they shall enjoy two extraordinary daily periods of rest of one-half hour each, in order to nurse their children.

<sup>13</sup> Amendment to par. X, art. 73, Constitution; Decree of Mar. 29, 1933.

VI. The minimum wage to be received by a workman shall be that considered sufficient, according to the conditions prevailing in the respective region of the country, to satisfy the normal needs of the life of the workman, his education, and his lawful pleasures, considering him as the head of a family. In all agricultural, commercial, manufacturing, or mining enterprises the workmen shall have the right to participate in the profits in the manner fixed in clause IX of this article.

VII. The same compensation shall be paid for the same work, without regard to sex or nationality.

VIII. The minimum wage shall be exempt from attachment, set-off, or discount.

IX. The determination of the minimum wage, and of the rate of profit sharing described in clause VI, shall be made by special commissions to be appointed in each municipality, and to be subordinated to the central board of conciliation to be established in each State.

X. All wages shall be paid in legal currency and shall not be paid in merchandise, orders, counters, or any other representative token which it is sought to substitute for money.

XI. When, owing to special circumstances, it becomes necessary to increase the working hours there shall be paid as wages for the overtime 100 percent more than those fixed for regular time. In no case shall the overtime exceed 3 hours nor continue for more than 3 consecutive days; and no women of whatever age nor boys under 16 years of age may engage in overtime work.

XII. In every agricultural, industrial, mining, or other class of work employers are bound to furnish their workmen comfortable and sanitary dwelling places, for which they may charge rents not exceeding one-half of 1 percent per month of the assessed value of the properties. They shall likewise establish schools, dispensaries, and other services necessary to the community. If the factories are located within inhabited places and more than 100 persons are employed therein, the first of the above-mentioned conditions shall be complied with.

XIII. Furthermore, there shall be set aside in these labor centers, whenever their population exceeds 200 inhabitants, a tract of land of not less than 5,000 square meters for the establishment of public markets, and the construction of buildings designed for municipal services and places of amusement. No saloons nor gambling houses shall be permitted in such labor centers.

XIV. Employers shall be liable for labor accidents and occupational diseases arising from work; therefore, employers shall pay the proper indemnity, according to whether death or merely temporary or permanent disability has ensued, in accordance with the provisions of law. This liability shall remain in force even though the employer contract for the work through an agent.

XV. Employers shall be bound to observe in the installation of their establishments all the provisions of law regarding hygiene and sanitation and to adopt adequate measures to prevent accidents due to the use of machinery, tools, and working materials, as well as to organize work in such a manner as to assure the greatest guarantee possible for the health and lives of workmen compatible with the nature of the work, under penalties which the law shall determine.

XVI. Workmen and employers shall have the right to unite for the defense of their respective interests, by forming syndicates, unions, etc.

XVII. The law shall recognize the right of workmen and employers to strike and to lock out.

XVIII. Strikes shall be lawful, when, by the employment of peaceful means, they shall aim to bring about a balance between the various factors of production, and to harmonize the rights of capital and labor. In the case of public services the workmen shall be obliged to give notice 10 days in advance to the Board of Conciliation and Arbitration of the date set for the suspension of work. Strikes shall only be considered unlawful when the majority of the strikers shall resort to acts of violence against persons or property, or in case of war when the strikers belong to establishments and services dependent on the Government. Employees of military manufacturing establishments of the Federal Government shall not be included in the provisions of this clause, inasmuch as they are a dependency of the National Army.

XIX. Lockouts shall only be lawful when the excess of production shall render it necessary to shut down in order to maintain prices reasonably above

the cost of production, subject to the approval of the Board of Conciliation and Arbitration.

XX. Differences or disputes between capital and labor shall be submitted for settlement to a board of conciliation and arbitration, to consist of an equal number of representatives of the workmen and of the employers and of one representative of the Government.

XXI. If the employer shall refuse to submit his differences to arbitration or to accept the award rendered by the Board, the labor contract shall be considered as terminated, and the employer shall be bound to indemnify the workman by the payment to him of 3 months' wages, in addition to the liability which he may have incurred by reason of the dispute. If the workman rejects the award, the contract will be held to have terminated.

The Federal Labor Code regulates in detail, among other matters, individual labor contracts and those which may be entered into between one or more labor unions and one or several employers or association of employers, hours of labor, days of rest, salaries, obligations of employers, suspension and termination of labor contracts, the right to strike and to lockout, workmen's compensation, and the machinery set up to consider all matters and problems arising by reason of the relationship of master and servant and the enforcement of the laws relative thereto.

#### GENERAL PROVISIONS

The code defines a worker as any person who performs manual labor, or intellectual services, or both, for another by virtue of a labor contract. An employer is an individual or corporate body employing the services of another by virtue of a labor contract. Directors, managers, administrators, shipmasters, etc., and in general all people who in the name of their principal exercise the functions of management or administration, will be considered the representatives of the employers and as such will bind the latter in their relations with other workers. Freedom to engage in any lawful work, profession, industry, or business cannot be restricted except when the rights of third persons or society are affected.

No enterprise may employ less than 90 percent Mexican workers in each of the skilled and unskilled classes when more than 5 persons are employed, not including managers, directors, administrators, superintendents, and general heads of enterprises.

#### THE INDIVIDUAL LABOR CONTRACT

The individual labor contract is one by virtue of which one person binds himself to render personal services to another under his direction and charge, in return for an agreed remuneration. It must be in writing, except contracts for agricultural work, domestic service, casual or seasonal employment for not more than 60 days and of specific value not exceeding 100 pesos. Minors under 12 may not be employed; those over 12 but under 16 may be, the corresponding contract being made with their father or legal representatives. Those over 16 may incur such obligations directly.

The contract must contain the names, nationality, age, sex, status, and domicile of the parties, the services to be rendered, the duration of the contract, length of the working day, the salary, and the place of performance. Any provision therein is null and void if contrary to the code; for instance, clauses providing less than the minimum

wage or the employment of minors under 12 have no force and effect. Contracts for the employment of Mexican workers abroad must be authorized by the municipal authority where made and visaed by the consul of the country where the services are to be rendered; the employer must deposit or guarantee expense of repatriation and must pay costs of transportation to the place of performance without deducting it from wages. Debts contracted by the worker with the employer, his associates, family, or subordinates can be demanded only up to an amount equivalent to 1 month's wages. For failure to perform laborers incur civil liability; under no circumstances may coercion be used.

#### THE COLLECTIVE LABOR CONTRACT

Collective labor contracts are agreements concluded between one or several labor unions and one or several employers, or one or more employers' associations, for the purpose of establishing the conditions under which the work is to be performed. Every employer who engages workers belonging to a union may be required to enter into a collective contract with the union if requested to do so. It must be executed in writing, in triplicate, one copy being kept by the employer, one by the union, and the third by the corresponding Board of Conciliation and Arbitration, or in the absence thereof, with the municipal authority. The contract must fix wages, hours of labor, nature and extent of work, rest days and vacations, and any other stipulations; it may be for a fixed time, for an indefinite time, or for a definite piece of work. Collective labor contracts may be revised in whole or in part every 2 years. If entered into by two-thirds of the employers and union workers in a specified branch of industry and in a specified district, it will be binding on all employees and workers in the branch of the industry in said district if so provided by decree issued by the Federal Executive. The withdrawal of an employer from the employers' association or the dissolution of a trade union does not affect the existing collective labor contract to which they are parties; unions which are parties to such agreements may bring actions arising out of the contract, to demand its fulfillment or payment of damages against (1) other unions and their members, (2) its own members, and (3) any other person bound by the contract. Individuals who are parties to such contracts may also sue, for performance or damages, other individuals or unions parties to the contract.

Collective labor contracts terminate by (1) mutual consent, (2) reasons stipulated in the contract, (3) bankruptcy or liquidation of the business, (4) termination of the work contracted, (5) the raw material, in extractive industries, becoming exhausted, (6) physical or mental incapacity of employer, (7) an unforeseen event or force majeure.

In case of liquidation, workers must be compensated with 1 month's wages, and the same is true in cases 5, 6, and 7. In case of general closing down, if the employer establishes another similar business within 1 year, either personally or through an intermediary, he must engage the same workers who had worked for him, or pay them 3 months' wages, whichever the workers prefer. When an unforeseen

event or force majeure occurs and the business is insured, as soon as the insurance is paid the workers must be compensated with 3 months' wages.

#### WORKING HOURS AND REST DAYS

Day work of not more than 8 hours must be performed from 6 a.m. to 8 p.m., and the maximum of 7 hours of night work from 8 p.m. to 6 a.m.; and 7½ hours are allowed for the mixed working day. Children over 12 years of age and not over 16 may not work over 6 hours a day, and on no occasion may they or women work overtime, nor perform industrial labor at night nor unhealthful or dangerous work.

For each 6 days of work the laborer is entitled to 1 of rest. Obligatory rest days are May 1, September 16, and September 25. Annual vacation of at least 4 working days must be allowed; after 2 years of service this must be increased to 6 days.<sup>14</sup>

#### WAGES

The code regulates, with a great deal of care, the determination and payment of wages. It defines the minimum wage as the one which, taking into consideration the condition in each district, will be sufficient to satisfy the normal needs of life of the worker, his education, and reasonable pleasures, considering him as the head of a family. The fact that he should have sufficient resources for his subsistence during the weekly rest days on which no pay is received, must also be considered. There must be taken into consideration also the facilities provided by the employer such as lodgings, farming privileges, and cutting of firewood. The minimum wage may not be the object of set-off or discount.

The amount of wages may be freely agreed upon, but it may not be less than that fixed as the minimum. The time for payment of wages may be fixed by the parties, but it cannot exceed 1 week for manual laborers and 15 days for domestic servants and other workers. Payment must be made at the place where the service is rendered, unless otherwise stipulated, but never in places of amusement, restaurants, etc., except to persons who work there. The payment must be made in legal currency only, directly to the worker or his duly empowered agent. No retention of wages can be made by way of fine, but debts contracted by the employee with the employer through advances, overpayments, errors, losses, damages, purchase of articles produced by the enterprise, or income of any nature may be deducted in the proportion agreed to by the worker, but not to exceed 30 percent of that part of the wages exceeding the minimum. Deductions may also be made for union dues, cooperative organizations, and savings funds which the workers expressly agree to. Overtime work must be paid at the rate of 100 percent more than that fixed for normal working hours. Full wages must be paid for obligatory rest periods and vacations, and for the 8 days preceding and 30 following childbirth during which women may rest.

<sup>14</sup> Chapter III of the code contains other provisions on this matter dealing with other aspects and details of the problem.

**WORK RULES**

The regulations between employer and employees in the execution of the work of a business are governed by so-called work rules. These must contain the following stipulations in addition to any other which may be deemed advisable:

1. Time to enter and leave and for meals and rest periods during the day.
2. Place and time of beginning and ending the working day.
3. Days and hours fixed for cleaning the machinery, premises, etc.
4. Warning to avoid hazards, and first-aid instructions.
5. Dangerous and unhealthful work not to be performed by women or children under 16.
6. Work of temporary or transitory character.
7. Time and place of payment.
8. Time and manner in which workers must submit to physical examinations, prior to employment and periodically.
9. Disciplinary provisions and the manner of their application.
10. Other regulations necessary to obtain the greatest regularity and security in development of the work.

Work rules must be printed or legibly written and posted in a conspicuous place in the establishment. To be effective, a copy thereof must be deposited with the corresponding Board of Conciliation and Arbitration.

**WORK OF WOMEN AND CHILDREN**

Articles 106 and following define dangerous work for women and children under 16. These persons may not work in places where alcoholic beverages are sold and in dangerous work such as oiling and working on machines, automatic saws, shears, sharp knives, drop hammers, and other mechanical apparatus, underground or undersea work, manufacture of explosives, inflammable substances, alkali metals, and others so declared by law, regulations, contract, or work rules. The following are considered unhealthful occupations insofar as these persons are concerned: (1) Those which involve the danger of poisoning, (2) any industrial operation in which poisonous gases or vapors, etc., are liberated, or (3) in which dangerous or injurious dust is given off, or (4) which produces continuous dampness, and (5) others so specified by law, regulations, contract, or work rules.

**OBLIGATIONS OF EMPLOYER**

The obligations of the employer are defined in great detail in the code. He must provide sanitary and comfortable houses, for which a rent not to exceed one-half of 1 percent monthly of assessed valuation may be charged. He must also provide sanitary conditions, safety devices, tools and instruments, compensation for accidents, instruction for children of workers, if the work place is in a rural center more than 3 kilometers from the nearest town and there are more than 20 children of school age, in such rural labor centers. If the number of inhabitants exceeds 200, the employers must furnish land for certain municipal buildings and recreation centers. There



are several other obligations imposed on employers enumerated in article 111 of the code with regard to payment of wages, fair treatment, provision of medicines, deductions for labor unions and cooperative societies, and others. Preference in the employment of workers must be given to Mexicans over foreigners, and to members of legally constituted unions over workers who are not so organized.

The employer may not require workers to buy articles of consumption at a specified place, nor require withdrawal from a union, receive gratuities for giving employment, make collections or solicit subscriptions in labor centers, restrict in any way the worker's rights, conduct political or religious propaganda in the establishments, use blacklisting systems to prevent laborers from securing employment; the employee cannot carry arms inside the work places without proper permission, nor appear there under the influence of liquor, narcotic, or drug.

#### OBLIGATIONS OF WORKERS

Among the duties imposed by the code on workers the following are outstanding: To render assistance when needed in case of imminent danger to employer's person or interests, or those of his fellow workers; to unite in the organization provided by law; to submit differences with employers to such organizations; and to vacate employer's houses within 15 days after termination of the labor contract or within a month in case of agricultural workers or farmers. Article 113 of the code forbids workers to reveal technical, commercial, and trade secrets, or to commit any act which may endanger their own lives or those of their fellow workers or third persons, or the safety of establishments or workshops.

#### MODIFICATION AND SUSPENSION OF LABOR CONTRACTS

Labor contracts may be revised upon petition of either of the parties. The operation of such contract may be temporarily suspended because of lack of funds or raw materials, overproduction, unprofitable operation of the enterprise, fortuitous event or force majeure, death or disability of employer, circumstances under which the worker contracts any contagious disease, and failure of the worker to comply with the contract in consequence of imprisonment. Notice of resumption of work must be given by the employers, the former workers being properly recalled and reemployed if they present themselves within 30 days from date of resumption of operations.

#### RESCISSION OF LABOR CONTRACT

Among the principal causes which entitle the employer to rescind a labor contract are: Deceit of the worker or that of the union which recommended him, worker's lack of honesty or integrity, acts of violence, threats, intentional material damage to the building, tools, etc., immoral acts at work place by worker, revelation of trade secrets, and absence from work more than 3 times during 1 month without permission or just cause. The worker may also rescind the contract for the same causes attributable to the employer.

## TERMINATION OF LABOR CONTRACTS

Several grounds are set forth in the code for the termination of labor contracts. The most important are: Mutual consent of the parties, stipulation in the contract itself, completion of the work, bankruptcy or liquidation of the concern, shutdown, physical or mental incapacity of either party, and decision of the proper board of conciliation and arbitration. Termination is also permitted where the worker serves in a managerial, fiscal, or supervisory position and loses the confidence of the employer; but if he has been promoted by right of seniority from a position where his seniority right exists in the enterprise, he shall be returned to his former position unless there is a justifiable cause for his dismissal. The same procedure is observed when a worker who serves in a confidential position requests to be returned to his former employment.

## DOMESTIC LABOR

The domestic servant is defined as a worker of either sex who habitually performs the work of cleaning, cooking, and other services inside of a house or other place of residence. Servants in hotels, restaurants, hospitals, or other similar commercial establishments are not included, but they come under the provisions of the labor contract in general. Domestics are entitled to (1) be treated with proper consideration, (2) board and lodging, (3) be allowed to attend night school, (4) payment of funeral expenses in case of death, and, in the event of sickness not of a chronic nature, to 1 month's wages and medical attention.

## REGULATION OF LABOR IN VARIOUS INDUSTRIES

Special rules governing the performance of various kinds of services are embodied in the code. These apply to work on the sea and on navigable rivers, railroads, agriculture, small industries, and home work. Railway companies are required to employ only Mexican labor; managerial positions may be filled by foreigners, but in technical and administrative positions foreign personnel may be employed only when Mexicans are not available. Subject to agreement between the parties, time worked in excess of 48 hours a week by day, 45 partly by day and partly by night, and 42 entirely by night may be considered as overtime in railroad work.

The work of agricultural workers ("peones de campo") is regulated by the code. The employer of these laborers may be the lessees or share tenants of the lands or the owners thereof; they must furnish (1) compensation for accidents and occupational diseases, (2) free sanitary dwellings and medical attention, (3) a tract of land to be cultivated by the worker for his own account, whenever the farm consists of more than 50 hectares, (4) building timber and firewood from the nearest woods of the farm, to be cut and gathered free of charge by the workers themselves, (5) grazing rights up to 3 head of cattle and 10 head of sheep, and (6) other rights and privileges of minor importance.

Small industries are those which employ up to 10 workers if power-driven machinery is used, and up to 20 workers when such

machinery is not used. Home work is that performed by any person to whom goods are delivered to be manufactured at home or any other place not under the control of the person furnishing the material, while family workshops are those whose only workers are the wife, descendants, or wards of the owner. Employers of these workers are subject to the same obligations prescribed for employers in general; however, as regards workmen's compensation, the boards of conciliation and arbitration may fix the amount and the time limit for its payment at not less than 20 percent of the figure provided for industry in general. Compensation for injury does not apply in family workshops. These kinds of employment are subject to supervision by labor inspectors, and all the provisions relating to sanitation and hygiene must be observed.

#### CONTRACT OF APPRENTICESHIP

Whenever a party agrees to render personal services to another in return for training in an art or trade and the compensation agreed upon, he is considered an apprentice. The corresponding contract must contain the time of training and the amount of compensation. Employers and workers must admit into every undertaking apprentices numbering not less than 5 percent of the total number of workers. If there are less than 20 workers one apprentice may be employed.

Apprentices in skilled trades are examined annually, or at any time they may request, by a mixed jury of expert workers and employers presided over by a representative designated by the labor inspector.

#### UNIONS

The act defines a union as an association of workers or employers of the same occupation, trade, or specialty, or of similar or connected occupations, trades, or specialties, organized for the study, improvement, and defense of the common interests. Four classes of unions are recognized in Mexico, namely, trade unions formed by individuals of the same occupation, trade, or specialty, company unions formed by individuals engaged in various occupations, trades, or specialties who work for a single concern, industrial unions formed by individuals of various occupations, trades, or specialties who work for two or more concerns, and unions of various trades formed by workers in different trades. The one last mentioned may be formed only when in the particular municipality the number of workers in the same trade is less than 20.

Employers and workers may form unions without prior authorization; no one may be forced to join or not to join a union. In order to enjoy legal existence, unions must be registered with the proper board of conciliation and arbitration. They may not intervene in religious or political matters, engage in trade for lucrative purposes, use violence to compel workers to join, or foment criminal acts against persons or property. They may form federations and confederations which must be registered with the Labor Department.

Unions may request and obtain from the employers the discharge of members who resign or are expelled from the union, whenever there is an exclusion clause. Those who are 12 years of age or over

may join a union, but only those over 16 may participate in its management; foreigners may join but may not hold office on the board of directors of the organization.

#### COALITIONS, STRIKES, AND LOCKOUTS

A coalition is an agreement made by a group of workers or employers to defend their common interests. A strike is defined as a temporary suspension of work as a result of a workers' coalition and may be called (1) to obtain a balance among the various factors of production, harmonizing the rights of labor with those of capital, (2) to obtain from the employer the making or enforcement of a collective labor contract, (3) to demand a revision of the latter contract, and (4) to aid a strike called for any of the other three purposes. In order legally to call a strike it must be approved by a majority of the workers in the enterprise concerned, and it must be limited to the mere suspension of work and not to the commission of acts of violence against persons or property. Before it can be declared the demands of the workers must be presented to the employer with notice of the time it will begin, such notice to be given not less than 6 days prior to calling the strike, and, in case of public services, 10 days. A copy of the petition must be sent to the board of conciliation and arbitration. The strikers must wait for the employer's answer or until the end of the time fixed if no answer is received.

If the board decides that a strike is unlawful or is not declared for one of the purposes indicated in the code, it will declare the labor contract terminated; thereafter the employer is free to make new labor contracts. If declared by less than a majority of workers, if the prerequisites are not complied with, and if it is contrary to the labor contract or labor code, the board will declare within 48 hours after the work is suspended that no strike exists; the workers must return to work within 24 hours thereafter or the labor contract is terminated. If the strike is held proper and the employer is at fault, it must expressly order the employer to pay the wages due for the whole period of the strike; to safeguard the rights of the strikers, the employer is prevented from engaging other workers. If any of the prescribed formalities are omitted the workers will be paid no wages during the time they are on strike, even if the employer is held to be at fault and the strike has a lawful purpose. Strikes may be settled not only by the board of conciliation and arbitration but also by the parties or other persons chosen by them.

A lockout is a temporary, partial, or total suspension of work as a result of a coalition of employers and is lawful whenever an excess of production requires it in order to maintain prices at the profitable level. The approval of the board of conciliation and arbitration must be obtained to declare a lockout. If unlawful, the work must be resumed and the workers paid their wages for the time of the suspension.

#### OCCUPATIONAL HAZARDS

Occupational risks are the accidents or diseases to which the workers are exposed, arising out of or in the course of their employment. An industrial accident is any injury requiring medical or

surgical treatment, or any mental or functional disturbance of a permanent or temporary nature, taking place immediately or at a later time, or causing death, and any external injury caused by a violent exertion brought about under similar circumstances.

When the hazard results in the worker's death, his wife, legitimate or illegitimate children under 16, and his ascendants dependent on him, or if there are none, his partial or total dependents will be paid by the employer 1 month's wages for funeral expenses and an amount equivalent to 612 days' wages. If the worker is permanently or totally disabled the compensation will consist of an amount equivalent to 918 days' wages. In case of permanent partial disability, the compensation consists of the percentage fixed in the schedule of disability valuation set forth in the code, calculated on the amount payable in case of permanent total disability. If the accident results in temporary disability, the worker is entitled to 75 percent of his wages while unable to work; medical examination of the worker every 3 months may be made to determine whether he should continue to receive the same medical attention and compensation. The worker is entitled to receive the 75 percent of his wages for 1 year only. The employer may insure the workers against occupational hazards in amounts not less than the compensation provided by the code and at the employer's expense. The parties may also agree to substitute a temporary or life annuity equivalent to the compensation for the latter.

Employers are required to keep in their factories the necessary medicines for urgent cases. If they have from 100 to 300 workers a first-aid station equipped with medicines and supplies, necessary for urgent medical and surgical attention, must be established, to be attended by competent personnel under a surgeon-physician; if they have more than 300 employees they must have an infirmary or hospital under the care of a physician. The employers may comply with these conditions by making the proper arrangements with a hospital or sanitarium within 2 hours or less from the establishments by the ordinary means of transportation.

#### LABOR AUTHORITIES

The administration of the labor code rests with the (1) municipal conciliation boards, (2) central conciliation and arbitration boards, (3) Federal conciliation boards, (4) labor inspectors, (5) special minimum-wage boards, and (6) labor attorneys.

Municipal conciliation boards consist of a chairman, appointed by the municipal authorities, and one representative of the workers and another of the employers. They have jurisdiction (1) to hear for purpose of conciliation all disputes and controversies between workers and employers, (2) to report to the central board controversies under its exclusive jurisdiction and disputes in which no agreement could be reached, (3) to sanction agreements executed by the parties, (4) to carry out the procedure and instructions of the central boards, and (5) to exercise any other powers or duties conferred on them by law or regulations.

Central boards of conciliation and arbitration are organized in the capitals of the States and Territories and in the Federal District, and

are composed of a representative of the governor of the State or Territory or chief of the Federal District, a representative of the workers, and another of the employers for each branch of industry or group of diverse labor. Their powers and duties are:

1. To hear all collective differences and disputes, arising out of labor contracts or acts intimately related thereto, and affecting all the industries of the State.

2. To hear and arbitrate such disputes and differences when the parties are unable to come to an agreement.

3. To declare lockouts lawful or unlawful when they affect all the industries of the jurisdiction.

4. To decide questions of competence of central and municipal boards.

5. To review the acts of the special minimum-wage commissioners.

6. To see that municipal boards are organized and functioning properly and to give orders and instructions to the same.

7. To approve and disallow work rules.

Federal boards of conciliation function solely for the purpose of bringing parties to an agreement—they are formed like municipal boards and are presided over by the labor inspector. The Federal board of conciliation and arbitration is established in Mexico City for the purpose of hearing and deciding disputes between laborers and employers in enterprises or industries operating under Federal concession, or whose activities are carried on totally or partially within the Federal District, such as transportation and communication companies, mining, and others. The board is composed of one workers' representative and one employers' representative, for each industry or group of various allied works or industries, and the chairman appointed by the office of the Secretary of Industry, Commerce, and Labor. The Federal board in banc has power to hear and settle disputes between workers and employers in industries or groups under Federal jurisdiction or, if not under Federal jurisdiction, when two or more Federal entities are affected. It has supervisory power over Federal boards of conciliation and power to issue instructions to them and to hear and decide questions of competency, and to issue the internal regulations of the board. The special groups that make up the board have power to hear, for the purpose of conciliation only, the differences and disputes in one industry or branch of work and those forwarded for this purpose by Federal boards of conciliation, when the parties do not arrive at a solution there.

Labor inspectors must see that the provisions regarding hygiene and safety in workshops, as well as those specifying the rights and obligations of workers and employers, are duly observed; they are particularly charged with the enforcement of the rules governing the night work of minors and women. To this end they may enter the premises of companies at any hour of the day or night and question the personnel, and call for such documents and files as the law requires. Labor inspectors may be local or Federal; the former are appointed by the State governors and the chief of the Federal District, and the latter by the office of the Secretary of Industry, Commerce, and Labor. These authorities may also appoint attorneys for the defense of the interests of wage earners.

Minimum wage boards, composed of not less than two representatives of the worker and two of the employers and one appointed by the municipal authorities to act as chairman, must be organized by the central board of conciliation and arbitration, in November of the even years, to study the economic situation of the district for which it is proposed to fix a minimum wage, and the different classes of work. For this purpose they must study data concerning the cost of living, the amount necessary to meet minimum necessities of the worker, the economic conditions of the consumers' markets, and any further data that may be considered necessary for the better discharge of their duties.

#### PROCEDURE

The last part of the Mexican Labor Code sets forth in minute detail the rules governing the proceedings before the various boards, including the proper pleadings, impeachment of witnesses, precautionary measures such as attachments and bonds to guarantee the appearance of persons, and the execution of the awards rendered by the boards. In its concluding sections the code defines the liabilities of the members of the various boards and the penalties to be imposed for failure to observe the requirements of the code.

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NOTE.—See "Labor Legislation in Mexico", Bulletin No. 569, Bureau of Labor Statistics, Department of Labor; The Federal Labor Code, Legislative Series 1931, No. 1, International Labor Organization, Washington, D.C.; Troncoso, "The Mexican Federal Labor Code", 27 International Labor Review 631, May 1, 1933. For an excellent statement and detailed analysis of Mexican labor legislation, see Cormack and Barker's "The Mexican Labor Law", 7 Southern California Law Review 251.

## X. COMMON CARRIERS

The operations of common carriers in Mexico and their rights and liabilities are defined and regulated by the General Law of Means of Communications, the Code of Commerce, and the Civil Code of the Federal District and Territories. The first one regulates communications by rivers, lakes, canals and territorial seas, railroads, highways, bridges, oil pipe lines, air navigation, telephone, telegraph, wireless (including radio), and mails. As regards carriers, this law is principally concerned with their authorization to use the means of communications and their operations. The Code of Commerce, on the other hand, is concerned with the economic and commercial activities of carriers, defining their duties, rights, obligations, and liabilities with respect to shippers and consignees. This code first treats of carriers by land and river and then of those by sea and ocean; air transportation is not treated, since it is of more recent origin. The law mentioned above also provides that the Civil Code of the Federal District and Territories will apply to contracts relating to means of communication and transportation whenever it and the Code of Commerce fail to provide accordingly.<sup>1</sup>

### CARRIERS BY LAND AND RIVER

#### THE BILL OF LADING

The services of carriers by land and river are secured through the transportation contract. This is a mercantile obligation when it involves merchandise or other commercial objects, or when the carrier is a merchant or is habitually engaged in transportation; it is then governed by the Code of Commerce. The contract of transportation is evidenced by the bill of lading which is issued by the carrier to the shipper, setting forth:

1. The names and domiciles of the carrier and shipper.
2. The name and domicile of the person to whom or to whose order the goods are consigned or provision for delivery to the bearer of the bill.
3. Description of the goods, with expression of the kind, weight, and marks on the packages.
4. Cost of the transportation, date on which the carriage is made, place of delivery to carrier, time and place of delivery to consignee.
5. Indemnity payable by carrier in case of delay, if any is stipulated.

The lack of any of these requirements does not invalidate the bill; the facts lacking may be established by presentation of evidence.

The bill of lading may be in favor or to the order of a consignee or to bearer, and must be issued from stub books. Copies thereof

<sup>1</sup> General Law of Means of Communications of Aug. 12, 1932 (Diario Oficial, Sept. 28, 1932). hereinafter cited as Communications, art. 4.



may be issued to the interested parties. The holder of the bill becomes subrogated to the rights and obligations of the carrier. Since the bill of lading is the evidence of the transportation contract, all controversies arising in its execution and performance must be decided by the contents of the bill, the only defenses admitted being fraud and material error in the making.

Upon performance of the contract the bill of lading is exchanged for the goods; at this time all claims of the parties against each other must be set forth in writing on the bill; otherwise they are lost. Should the consignee be unable to produce the bill, because it has been lost or for any other reason, the goods will be delivered to him upon his signing of the proper receipt. Whenever the bill is lost, controversies must be decided by the evidence presented by the parties, the shipper being forced to prove delivery to the carrier.<sup>2</sup>

#### RIGHTS AND OBLIGATIONS OF THE SHIPPER

The shipper must deliver the merchandise to the carrier, at the time and place and under the conditions stipulated; he must deliver to him all fiscal and municipal documents to permit the free transit of the goods. The shipper must suffer the loss occasioned by confiscation, fines, or penalties imposed for violation of fiscal laws and must pay the carrier the damage suffered therefrom because of the shipper's nonperformance. The shipper is also liable for the loss or damage of the goods which arise from their own defects or from fortuitous events. He must pay all necessary disbursements made by the carrier outside the terms of the contract and in its performance and must transmit the bill of lading to the consignee in order that it may be used when the merchandise arrives.

The shipper may change the consignment or destination of the goods while in transit upon giving the proper order to the carrier, surrendering the original bill of lading and receiving another in exchange, and paying the freight agreed upon.<sup>3</sup>

#### RIGHTS AND OBLIGATIONS OF THE CARRIER

The carrier is bound:

1. To receive the merchandise at the time and place stipulated.
2. To begin and finish the carriage by the stipulated route within the time agreed, and, if no time is fixed, then at once, and by the first conveyance.
3. To take care of and preserve the merchandise until delivery to the consignee.
4. To deliver the goods to the holder of the bill of lading or to the proper order if there is no bill.
5. To pay the indemnity provided for his delay or any damage caused thereby, by deducting it from the freight charge.
6. To deliver the merchandise by weight, count, or measure if so called for in the bill of lading, unless it is packed, in which case he must deliver the packages in good condition.

<sup>2</sup> Code of Commerce, arts. 576, 581-585.

<sup>3</sup> Code of Commerce, arts. 588-589.

7. To prove that the loss, damage, or delay incurred was not due to his fault or negligence if he alleges he is not liable thereon.

8. To pay the loss or damages for which he is liable, at the price the merchandise had at the date and place of delivery, to the consignee as fixed by experts in accordance with the terms of the bill.

9. In general to pay the shipper or consignee the losses and damages suffered by them through his fault or failure to perform the contract.

The carrier is entitled:

1. To receive half the freight charge if the shipment is not made through the fault or negligence of the shipper, and the whole amount, if, in accordance with the contract, he furnished a special conveyance exclusively for the shipment, deducting any amount received for other use of the same.

2. To rescind the contract if force majeure prevents the continuation of the trip, or to continue it when the impediment is removed, if he does not rescind the contract, by the same route if possible; if not, by the most convenient one; if the latter is longer and more expensive he may collect the excess, but nothing for the delay.

3. To demand the opening and examination of the packages at the time he receives them; should the shipper refuse to do this upon demand, the carrier is relieved of liability except the one arising from his fraud.

4. To deliver to the consignee the uninjured portion of the merchandise provided its value is not diminished by the separation.

5. To retain the merchandise transported until paid the freight charge.

6. To procure the judicial deposit of the merchandise at the place of delivery if the consignee or his agent is not found therein or if he refuses to accept delivery, the condition of the goods being first determined by experts.

In the absence of stipulation to the contrary, the carrier may contract for the transportation of the merchandise by another party; however, he remains the carrier with regard to the original shipper and becomes the latter with respect to the second carrier who is bound to deliver to the consignee. The liability of the carrier for loss, or damage, is extinguished by the receipt of the merchandise without complaint, or by the lapse of 6 months in case of shipments within Mexico and 1 year for those to foreign countries, counted from the day following the one fixed for the end of the trip, in case of loss, and from 24 hours after delivery of the merchandise in case of damage.<sup>4</sup>

#### RIGHTS AND OBLIGATIONS OF THE CONSIGNEE

The consignee must (1) receive the merchandise promptly, when its condition permits and it is in the condition set forth in the bill of lading; (2) open and examine the packages upon receipt if required by the carrier, who is released from all liability except for fraud, if this is refused; (3) surrender the bill of lading or a receipt if it is lost; (4) pay the freight charges and expenses saving any

<sup>4</sup> Code of Commerce, arts. 590-594 and 577.

claim he may have; (5) enforce the right he may have against the carrier within 24 hours after receipt of the merchandise, and (6) comply with the instructions of the shipper and notify him promptly of anything affecting the merchandise.

The consignee is entitled (1) to have the goods delivered to him so long as he holds the bill of lading issued in his favor, regardless of any later orders to the contrary given by the shipper; (2) to refuse to receive the goods in the cases previously indicated and when their value is not enough to cover the expenses to be incurred in receiving, keeping, and selling them unless he is provided with funds by the shipper; (3) to be reimbursed immediately any advances made by him and to all other rights conferred herein.<sup>5</sup>

#### PREPARATION AND EFFECT OF CARRIERS' REGULATIONS

Carriers generally prepare and operate under regulations, approved by the Secretary of Communications, governing such matters as rate schedules, time and distance tables, classifications, and other matters. Such rules have the force of law when not contrary hereto, and, therefore, must be published in the official newspapers, circularized freely, and otherwise brought to the attention of the public.<sup>6</sup>

#### CARRIERS BY SEA AND OCEAN

The Code of Commerce prescribes certain rules of liability and with regard to contracts in the case of carriers by sea. These will govern vessels other than Mexican when they enter the territorial waters of Mexico and come within the laws of that country.

The shipowner is liable for all indemnities in favor of third parties by reason of acts of the captain in the custody of the freight; he may avoid this liability by abandoning the vessel with all its appurtenances and freight charges unless he is also the captain or is a coowner. The owner is not liable, however, for the excesses committed by the captain and the crew, the party injured being limited to recourse against the person and property of those at fault.<sup>7</sup>

The captain is liable for the damages caused in case of failure to make a contracted voyage, unless it is due to fortuitous event or force majeure. He is liable to the owner and the latter to third persons for:

1. All the damages suffered by the ship and its cargo by reason of his lack of knowledge or negligence.
2. The robberies perpetrated by the crew.
3. The losses, fines, and confiscations imposed for violating the laws and regulations governing customs, police, health authorities, and navigation.
4. Damages caused by disputes taking place on board ship or by offense of the crew in the service or defense of the vessel if he fails to prove that he opportunely used all his authority to prevent them.
5. Damage caused by the ill use of the power and failure to perform the obligations imposed on him.

<sup>5</sup> Code of Commerce, arts. 595-596.

<sup>6</sup> Code of Commerce, arts. 597 and 600. Communications, art. 3.

<sup>7</sup> Code of Commerce, arts. 672-673.

6. Damages caused by the changing of the course without just cause, in the opinion of the board of officers of the vessel assisted by the loaders and supercargoes.

7. Damages caused by voluntarily entering a port different from the one of destination, outside of the cases and without the formalities of article 686.

8. Damages resulting by not observing the provisions of the regulations governing position of lights and operations to prevent collisions.

The captain is responsible for the cargo from the time it is delivered at the dock or alongside ship until delivered by him at the shore or wharf at the destination unless otherwise stipulated. He is not liable for the damages suffered by the ship or the cargo due to force majeure, but he is liable for those due to his own fault, any stipulation to the contrary notwithstanding; nor is he liable for any obligations contracted by him in repairing and provisioning of the vessel unless he contracted them in his own name or account. The pilot is liable for the damage caused to the vessel and cargo through his negligence or inexperience.<sup>8</sup>

The cargo is subject to a lien for the payment of the freight charges and the expenses incurred in its transportation; the captain may retain it and demand the sale of the portion necessary to cover the amounts due. This liability extends for 20 days after delivery or deposit, even though other creditors exist or the shipper or consignee is thrown into bankruptcy; however, this right cannot be exercised against third-party purchasers in good faith and for a consideration.<sup>9</sup>

#### THE OCEAN BILL OF LADING

When the transportation of merchandise by sea is contracted the captain of the vessel and the shipper must draw the bill of lading, setting forth (1) the name, flag, and tonnage of the vessel, the name and domicile of the captain, the name of the shipper, and of the consignee if the bill is nominative; (2) the amount, quality, marks, and number of packages of the merchandise, and (3) the freight charged and "capa" (amount per ton of freight allowed the captain). The bill may be drawn to bearer, to the order of or to the name of a specified person, and must be signed within 24 hours after the cargo is received on board, the shipper being entitled to demand the unloading of the goods at the expense of the captain if he fails to do so and all the damages resulting therefrom. Four copies of the original bill of lading will be made, signed by the shipper and captain, one to be retained by shipper and one for transmittal to the consignee. The captain retains one and sends one to the shipowner. Any number of bills may be issued, but if they are to order or to bearer, the destination of each must be expressed. If a duplicate of the consignee's copy is issued the fact that it is a duplicate, as well as the fact that it is valid only if the first one is lacking, must be expressed. Bearer bills to be transmitted to the consignee are transferable by delivery and those to order by endorsement; the transferee or endorsee will acquire all the rights and actions of the transferer on endorser in the merchandise.

<sup>8</sup> Code of Commerce, arts. 692-694 and 706.

<sup>9</sup> Code of Commerce, arts. 740-742.

Bills of lading constitute full proof among those interested in the cargo and between these and the insurers, excepting that the latter may produce proof to the contrary. If the various bills are not in agreement, and none have amendments or erasures, those signed by the captain or shipowner and in the possession of the shipper or consignee constitute full proof against the former; those signed by the shipper and in the possession of the captain or shipowner constitute full proof against the shipper or consignee. The legitimate bearer of a bill of lading who fails to present it to the captain before unloading, forcing him to place the merchandise in deposit, is liable for the costs of warehousing and all others caused thereby.

The captain may not change the destination of the merchandise. Should he permit it at the request of the shipper, he must previously recover the bills of lading issued, under penalty of liability for the cargo to the legitimate bearer of the bills. If several persons present "bearer" or "to order" bills endorsed in their favor, the captain will deliver the merchandise to the holder of the copy first issued by him, unless the subsequent bill was issued because the first one was lost and both thereafter fall into the hands of different persons; in this case, and in the case where second or subsequent copies are presented without the first being lost, the captain must request the judicial deposit of the merchandise for delivery to the person entitled to it; the ocean bill of lading gives rise to executory action to obtain delivery of the merchandise or payment of the freight charges and expenses, as the case may be.<sup>10</sup>

#### LIABILITY OF COMMON CARRIERS

In addition to the liability imposed by the Code of Commerce on common carriers as discussed above, the General Law of Means of Communications provides several rules which merit some consideration in this regard. Carriers may operate in Mexico in one of two ways, by concession or by permission of the Secretary of Communications. In the latter class are railroads and private roads within 100 kilometers of the frontiers or 50 kilometers from the coasts, vehicles, private airplanes, and those used to transport agricultural or industrial products, and radio broadcasting for cultural or scientific purposes. In the absence of stipulation to the contrary, carriers operating under a concession such as maritime vessels and railroads, in the case of loss or damage to the merchandise they transport, must pay its market value at the place and date of delivery to them, and the consequent damages suffered by the parties in accordance with the Code of Commerce.

The liability of carriers cannot be limited, except when lower rates are allowed in return for (1) the obligation to pay less than the real value in case of loss of merchandise; (2) limitation or release of liability for delay. The shipper must be allowed freely to elect between the regular schedule of rates and the one of lower rates.

The carrier is relieved from all liability for loss or damage and all risks to which merchandise is subject in transportation when—

<sup>10</sup> Code of Commerce, arts 781-793.

1. Merchandise is transported in open vehicles at the request of the shipper when by their nature they should be placed in closed ones.

2. Goods are shipped unpacked or poorly packed; such defect must be set forth in the bill of lading.

3. Merchandise is carried which is subject to total or partial loss or damage, particularly through breakage, oxidation, interior deterioration, or diminution, caused by its very nature, by the fact that it is being transported, the heat, or other cause. In this case the following rules apply: (a) Carriers must prepare lists of merchandise subject to diminution and the proportion of the same for which they will not be responsible; (b) the normal diminution will be counted separately from the bill of lading which mentions the weight and measure of the goods; (c) carriers may exempt themselves from liability even when the diminution exceeds the normal one, in the case of merchandise loaded by the shipper or unloaded by the consignee; (d) in the case of total loss the carrier cannot limit its liability by reason of diminution.

4. Explosives, inflammable or corrosive substances, and other articles of a perilous nature are transported.

5. Merchandise is carried under the care of an agent of the shipper, unless the damage is caused by the carrier independently of the care-taking agent.

6. The goods are loaded and unloaded by the shipper and consignee, respectively, if the vehicle has no exterior defect which may have caused the loss or damage. In this case the shipper may have the vehicle sealed and have the seals broken in the presence of the person authorized to receive the cargo and an employee of the carrier who may demand a written statement of the condition of the goods. If the vehicle must be opened before arrival to comply with fiscal regulations the fiscal employee will issue a statement of the number and condition of the seals broken and the number of new seals.

7. Baggage is not delivered to the carrier but is kept by the traveler.

8. Baggage is not claimed within 15 days in domestic trips, and 30 days in international journeys, from the day following arrival.

When the shipper declares merchandise to be of a different nature or lesser value in order to pay a lower freight rate, the carrier is liable for the merchandise only as declared. His liability is also limited when any of the circumstances mentioned above take place. However, the liability of carriers is not so affected by any of these circumstances, in the transportation of animals and of goods which decompose easily such as fruits and vegetables, if it fails to furnish the vehicles at the proper time and to load and unload them with care.<sup>11</sup>

#### TRANSPORTATION THROUGH VARIOUS CARRIERS

Whenever merchandise is transported through several carriers the last one must deliver it in accordance with the bill of lading issued by the first, and is subject to the liabilities imposed by law for the

<sup>11</sup> Communications, arts. 73, 75, 76, and 68.

loss or damage to the merchandise; but he may proceed against the carrier responsible for the act or omission causing the loss or damage. The liability of each carrier begins when it receives the bill of lading and ends when the bill is delivered to the proper party.

In the transportation of merchandise from a foreign country to a place in Mexico, the Mexican carriers which intervene therein are liable for the delivery of the freight in accordance with the rules above; but if in the bill of lading issued abroad it is stated that the rights and obligations arising out of the contract are subject to the laws of the country of issuance, and if such legislation is proven and is applicable to the case, the liability of the carriers is governed by it. If merchandise is delivered to a Mexican carrier in transportation from a foreign country, it may elect to refuse it if the goods have suffered a total or partial loss or are damaged. The carrier must notify the consignee of this in order that he may issue the corresponding instructions; or the carrier may receive the freight, issuing a bill of lading stating the condition in which it received the goods. In the first case the carrier is exempted from liability due to the loss or damage occurring on the other lines, while in the second place it is liable only in accordance with the bill of lading it issues and the laws in force.

In transportation of merchandise from Mexico to a foreign country the Mexican enterprise which issues the bill of lading is liable for the loss and damages taking place on its lines, in accordance with the previous rules. If it has issued a through bill of lading it is also liable for the loss and damage occurring on the foreign lines, provided the loss or damage takes place along the route stipulated in the bill of lading; the Mexican carrier may then seek reimbursement from the carriers directly responsible for the loss. The shipper or consignee may also sue the foreign carriers for these losses in the courts, and in accordance with the laws of the corresponding foreign country.

If the carrier is unable to deliver merchandise within the 30 days following the end of the time within which this should have been done, the goods are considered lost and the carrier is liable accordingly; if it subsequently finds them and is able to make delivery it must notify the person entitled to receive the merchandise to advise the carrier within 8 days if he accepts delivery, either at the place of shipment or destination, without any additional expense. If this consent is obtained, delivery must be made accordingly and the amount of the indemnity must be returned to the carrier.<sup>12</sup>

The preceding rules governing loss and damage to cargo apply to baggage and express; however, the period of time at the expiration of which the presumption of loss arises is 15 days in domestic transportation and 30 in international carriage.

#### LIABILITY OF AIRPLANE CARRIERS

The General Law of Means of Communications regulates the operation of airplanes and imposes certain liability for losses arising therein. The owners of an airship are liable for the damages it causes to persons or property; the person who uses the ship without

<sup>12</sup> Communications, arts. 78, 80-82, 85, and 87.

the knowledge and consent of the owner is liable for the damages caused. The owner is jointly and severally liable with the person to whom he rents or allows the use of an airship for commercial purposes if he fails to give prompt notice thereof to the Department of Communications.

Whenever the damages are caused by fortuitous events, force majeure, or in flights ordered by the authorities, the owner is relieved from liability. Neither he nor the crew is liable for accidents suffered by persons if they prove that all reasonable and technical precautions to prevent the damage were taken.<sup>13</sup>

#### STAMP TAX <sup>14</sup>

The stamp tax upon transportation is as follows:

Upon gross freight receipts, 1½ percent.

Upon gross passenger receipts, 3 percent.

The following transportation enterprises, which comply with all the prerequisites of the general law of means of communication, are not subject to the tax:

Tramway enterprises; national coastwise shipping enterprises; automobile and truck transportation enterprises, whose lines in operation do not exceed 30 kilometers; the latter when exceeding 30 kilometers are exempted when (1) their route includes roads not constructed by or with the assistance of the Federal Government, provided this mileage represents at least 50 percent of the total routes of the enterprise; (2) they furnish regular communication to towns which did not have it, but whose commercial importance requires it.

The exemption may be enjoyed only after express declaration to that effect by the treasury after proper examination of the existence of all prerequisites.

A paragraph added to article 53 imposes a 2 percent surcharge monthly for any delay in the payment of the tax by automotive and on truck transportation enterprises.

<sup>13</sup> Communications, arts. 471-474. Convention on Commercial Aviation, ratified by Mexico on Apr. 24, 1929, and the United States on July 17, 1931.

<sup>14</sup> Stamp tax law of 1932 as amended by decree of May 29, 1933.



## XI. TAXATION

Taxes are imposed in Mexico by the Federal Government and by the States and their subdivisions.

The Mexican Constitution does not limit the taxing power of the Federal Government as regards the nature of the taxes. Considerable overlapping exists, therefore, between Federal, State, and municipal taxes.<sup>1</sup> It is impossible to furnish detailed information with respect to every tax collected in Mexico in a publication of limited nature. However, by enumeration and indication of sources of information a brief introduction to the Mexican tax system is possible.

### FEDERAL TAXES

The Federal Government imposes import and export duties, taxes on manufactures of tobacco, textiles, gasoline, other petroleum products, matches, electric energy, alcoholic beverages, henequen, and a 10 percent tax on the gross receipts of railroads. These taxes are constantly subject to changes, principally in the rates. Those who seek up-to-date information on them should address the Division of Foreign Tariffs, Bureau of Foreign and Domestic Commerce, United States Department of Commerce.

The Federal Government taxes alcoholic beverages, absentees, pensions not paid out of pension funds, inheritances and gifts, immigration, and the exploitation of certain natural resources, such as mining, petroleum, timber and forests, fishing, hunting, diving, fertilizers, and others. Many taxes are variable in nature, while the nature of others does not justify their detailed discussion herein. Information in regard to the latter is available by addressing the Division of Commercial Laws, of the Bureau of Foreign and Domestic Commerce. Attention is invited to the fact that a 10 percent surcharge is made on many of the Federal taxes whenever the amount of the tax exceeds 5 centavos. This is of interest to exporters because it is added to stamp-tax charges.

The Federal Government charges fees for certain public services, such as consular fees, maritime traffic and navigation fees, customs service, communications, health services, and inspection and verification services (weights and measures, banking institutions, seeds, plants, and animals, etc.). Under the so-called "registry service" are included fees for the registration of alcoholic beverages, patents and trade marks, copyrights, and recordation in the mining registry.

Perhaps the most important of all Federal taxes to the American exporter, outside of the import duties, are the stamp tax, the income tax, and the absentee tax. The first is collected through the affixing of revenue stamps to documents and has been discussed in various portions of this publication. The income tax affects commercial activities directly and is considered of such importance that it is summarized hereinafter.

<sup>1</sup> Constitution, art. 73, part 7.

## STATE AND MUNICIPAL TAXES

Article 117 of the Mexican Constitution prohibits the States from doing the following:

IV. Levy taxes on persons or property passing through its territory.

V. Prohibit or tax, directly or indirectly, the entry into its territory, or the withdrawal therefrom, of any merchandise, foreign or domestic.

VI. Burden the circulation or consumption of domestic or foreign merchandise with taxes or duties to be collected by local customhouses, or subject the said merchandise to inspection or require it to be accompanied by documents.

VII. Enact or maintain in force laws or fiscal regulations discriminating, by taxation or otherwise, between merchandise, foreign or domestic, on account of its origin, whether this discrimination be established with regard to similar local products or to similar products of foreign origin.

Article 118 prohibits the States from establishing tonnage dues or other port charges, or imposing taxes or octroi duties upon imports or exports. Despite these prohibitions, many States have levied transit, export, and other taxes. The Federal Government has attempted to do away with these through the granting of exemption from contributions to the support of the Federal Government to States which reform their tax legislation in order to discontinue these practices. Municipal taxes are fixed by the corresponding State legislatures, according to article 115 of the Constitution.

The tax on real estate forms the main source of State and municipal taxation. Most States impose a "patente" tax on the amount of capital productively employed in business or industry. Several States levy a sales tax on the total amount of sales made by an establishment. In many instances production taxes are levied on specific industries or agricultural enterprises are subjected to a special tax. Coffee, henequen, sisal fiber, cacao, and rubber have been the object of such taxes. Very few States impose an income tax, while jurisdictions like Nuevo Leon and Coahuila offer to new industries the inducement of tax exemption. The tax rates vary in every State; it is impossible, therefore, to present all the available information in this pamphlet, particularly when such rates tend to vary from year to year. However, the following outline of the taxes which may affect American trade in force in the Federal District will serve to convey an idea of the State and municipal sources of revenue.<sup>2</sup>

1. *Real-estate tax—on buildings.*—A tax of 12.7 percent on monthly rentals produced. This is imposed on the average monthly rent for the 12 months between November 1 and October 31 of the following year.

*On vacant lands.*—These lands are divided into those suitable for construction of buildings and those suitable for farming. On the first the tax varies between six classes and according to the number of square meters of each property. On the latter the tax is 5 per mil of the industrial valuation except those properties with elaborate construction, which are subject to an 8 per mil tax on the value of the construction plus that of the land occupied by the same plus 2 "tantos" more.

By law of August 21, 1933 (Diario Oficial, Aug. 31), this manner of taxing real estate is superseded by taxation according to the value of the property. All the real-estate properties of the district

<sup>2</sup> Hacienda law of Aug. 31, 1929, as amended on Dec. 29, 1933.

are to be classified and appraised and the corresponding tax levied each year by the income budget law ("Ley de Ingresos"). All lots valued at not more than 300 pesos will be exempted from taxation if the owner has no other properties and lives in a state of poverty thereon. The tax will be payable bimonthly in advance during the months of January, March, May, July, September, and November. Should a just valuation of all properties be made and an equitable application of class rates obtained, this system will tend to ease the burden of taxation now borne by income-producing properties, which valuable lands have heretofore avoided to a large extent; the new system will also tend to produce an increased activity in the building industry, since owners of nonproductive property will be inclined to construct new buildings and modernize old ones in order to receive rents commensurate with the new taxes to be paid. For the next fiscal year the President of the Republic is empowered to fix the tax rate.

2. *Tax on mercantile and industrial enterprises.*—This is a tax on capital invested in mercantile and industrial enterprises, as well as on mercantile operations transacted within the Federal District, in accordance with the following schedule:

Progressive schedule on capitals over 2,000 pesos	Percent	Progressive schedule on capitals over 2,000 pesos	Percent
Up to 5,000 pesos.....	4.50	200,000.01 to 250,000 pesos.....	1.80
5,000.01 to 10,000 pesos.....	3.50	250,000.01 to 300,000 pesos.....	1.60
10,000.01 to 20,000 pesos.....	3.30	300,000.01 to 350,000 pesos.....	1.40
20,000.01 to 30,000 pesos.....	3.00	350,000.01 to 400,000 pesos.....	1.30
30,000.01 to 40,000 pesos.....	2.80	400,000.01 to 500,000 pesos.....	1.20
40,000.01 to 50,000 pesos.....	2.60	500,000.01 to 1,000,000 pesos.....	1.00
50,000.01 to 100,000 pesos.....	2.40	Exceeding 1,000,000 pesos.....	0.90
100,000.01 to 150,000 pesos.....	2.20	On capitals up to 2,000 pesos.....	( <sup>c</sup> )
150,000.01 to 200,000 pesos.....	2.00		

<sup>1</sup> From 2 to 50 pesos every 2 months.

Commission agents with samples of catalogs, brokers, and representatives of firms established outside of the district, must pay a quota in proportion to their operations, but never less than 10 nor more than 3,000 pesos bimonthly.

3. Tax on establishments selling alcoholic beverages; cafes, restaurants, etc.

4. Amusement tax.

5. Tax on games such as billiards, cards, dominoes, and others.

6. Tax on vehicles.

7. Tax on tobaccos, waters, markets, slaughtering, burial places, licenses for posts, gasoline pumps, and other apparatus on public highways, and motion-picture reviewing.

8. Fees charged for recordation in the public registry of property and commerce, and for certification of the industrial office.

9. License tax to open commercial or industrial establishments, from 1 to 50 pesos, payable only once. This tax also applies to chauffeurs, amusements, games, and several other minor activities, and to billboards on the highways and buildings, the rates varying in each case.

10. Inheritance and gift tax.\*

\* Revenue law of the Department of the Federal District, decree of Dec. 28, 1933.

THE FEDERAL INCOME TAX LAW<sup>4</sup>

The Mexican Federal income tax must be paid by:

1. Mexicans domiciled in the Republic or residing abroad and living on their profits or income, regardless of the source; however, from the tax payable by Mexicans residing abroad may be deducted the one paid by them at the place of residence.

2. Foreigners domiciled in or outside of Mexico, living on their profits or income arising from sources of wealth or business transacted within Mexico.

3. Civil and mercantile companies, associations, foundations, joint enterprises, or co-ownerships, concessions, and in general corporations, in the cases indicated in the two previous paragraphs.

Income is defined by the law as every receipt of cash, securities, property, or credits which modify the patrimony of the taxpayer and of which he may dispose without having to return its amount. It does not include new contributions to capital, provided such contributions are not made from income derived during the tax year. For the purpose of the tax, income is divided into five schedules, namely, (1) that received by merchants, industrialists, and farmers, (2) that earned through loans, interest, securities, rentals, and other investments, (3) income derived from exploitation of the subsoil and Government concessions, (4) income from salaries, etc., and (5) income from professions, arts, trades, and sports.<sup>5</sup>

## I. TAX UPON MERCHANTS, INDUSTRIALISTS, AND FARMERS

The tax under this schedule is imposed upon the difference resulting after deducting from the income the expenses, deductions, and amortizations authorized by the regulations. The taxpayer is subject to a progressive tax in accordance with the following table:

Annual taxable income	Rates			Annual taxable income	Rates		
	Pro- por- tional	Pro- gres- sive	Total		Pro- por- tional	Pro- gres- sive	Total
0.01 to 2,000 pesos.....	Percent (1)	Percent (1)	Percent (1)	48,000.01 to 60,000 pesos....	Percent	Percent	Percent
2,000.01 to 2,400 pesos.....	2	(1)	2.00	60,000.01 to 72,000 pesos.....	2	3.8	5.80
2,400.01 to 3,600 pesos.....	2	0.1	2.10	72,000.01 to 84,000 pesos....	2	4.3	6.30
3,600.01 to 4,800 pesos.....	2	.2	2.20	84,000.01 to 96,000 pesos....	2	4.8	6.80
4,800.01 to 6,000 pesos.....	2	.3	2.30	96,000.01 to 108,000 pesos...	2	5.3	7.30
6,000.01 to 7,200 pesos.....	2	.4	2.40	108,000.01 to 150,000 pesos...	2	5.8	7.80
7,200.01 to 8,400 pesos.....	2	.5	2.50	150,000.01 to 200,000 pesos...	2	6.3	8.30
8,400.01 to 9,600 pesos.....	2	.6	2.60	200,000.01 to 250,000 pesos...	2	6.8	8.80
9,600.01 to 10,800 pesos.....	2	.7	2.70	250,000.01 to 300,000 pesos...	2	7.3	9.30
10,800.01 to 12,000 pesos.....	2	.8	2.80	300,000.01 to 350,000 pesos...	2	7.8	10.30
12,000.01 to 18,000 pesos....	2	1.3	3.30	350,000.01 to 400,000 pesos...	2	8.3	10.80
18,000.01 to 24,000 pesos....	2	1.8	3.80	400,000.01 to 450,000 pesos...	2	8.8	11.30
24,000.01 to 30,000 pesos....	2	2.3	4.30	450,000.01 to 500,000 pesos...	2	9.3	11.80
30,000.01 to 36,000 pesos....	2	2.8	4.80	500,000.01 pesos up.....	2	9.8	12.30
36,000.01 to 48,000 pesos....	2	3.3	5.30			10.3	

<sup>1</sup> Exempt.

<sup>4</sup> This law and its regulation were enacted in 1925. Their texts, numerous amendments, and treasury interpretative circulars up to 1930 are included in "Ley del Impuesto Sobre la Renta", by Antolin Jimenez, published by Talleres Tipograficos "Varona", price \$1.50. Since this publication the following amendments have been made: (1) Decree of Dec. 24, 1930, (2) decree of July 31, 1931, (3) decree of Dec. 23, 1931, (4) decree of July 13, 1932, (5) Decree of Mar. 8, 1933, (6) decree of Dec. 29, 1933, (7) decree of June 6, 1934.

<sup>5</sup> Art. 1-5.

Companies, partnerships, associations, foundations, corporations, "mancomunidades", joint ownerships, and, in general, the groups included in this class do not enjoy the exemption up to 2,000 pesos. They pay a tax of 2 percent on amounts of taxable income between 1 centavo and 2,400 pesos; thereafter the above schedule applies. Foreign surety and guaranty companies not domiciled in Mexico must pay a 4 percent tax on the total amount of premiums received for reinsurance ("reafianzamientos") made within the country. Persons who occasionally perform acts of commerce or occasionally engage in some industrial or agricultural business are subject to a 4 percent tax on the profit earned in each operation.

Enterprises organized to engage in the commercial development of real estate are included in this class and must pay the tax upon the difference between their receipts and the deductions allowed by the regulations of the law. Taxpayers who receive rental from realty owned by them must add such rental to the total receipts under this class; the regulations will determine what deduction may be made therefrom.

Classification boards are empowered to estimate the taxable earnings of agents or representatives of foreign firms who sell imported goods, taking into consideration the sale price of such goods and the cost of production of similar articles made in Mexico; if not made in Mexico, the cost of production is calculated according to the nature and manufacturing process of the goods.

Credit institutions and banking establishments are subject to this tax. The classification boards will not check the propriety of deductions made by way of uncollectible items or bad accounts which are set forth in the balances presented by them to, and approved by, the National Banking Commission.

Taxpayers must set forth the total amount of receipts during the period covered by their declaration, regardless of their nature and origin; but in order to calculate the tax in accordance with the schedule of this class they may deduct the amounts on which they advanced 10 and 14 percent under the following two schedules. The table above is applied to the sum of the incomes of the three classes, but the amounts advanced under the progressive schedules of the next two schedules may be deducted from the tax due.<sup>6</sup>

## II. TAX ON INVESTED CAPITAL

The second schedule is composed of income from the following sources:

- (1) Simple or capitalized interest on loans.
- (2) Interest on amounts due as sale prices; when the taxpayer falls within the first schedule, the income here indicated, which arises from his business operations and is set forth in his accounting, is exempt under this second schedule.
- (3) Interest on advances on account of the purchase price of any goods or rights, with the same exemption indicated in (2).
- (4) Interest from current accounts.
- (5) Discounts and advances on titles and documents.
- (6) Usufruct of capitals invested and pensions from quitrent and antichresis.
- (7) Irregular deposits.

<sup>6</sup> 6, 8, 11-20.

(8) Granting of guarantees and suretyships.

(9) Obligations and bonds, excepting bonds of the Mexican public debt if the holders thereof are taxed by some law in force.

(10) Shares of stock, silent partners, participations, founders' or interest shares, obligation, bonds, or any other investments in foreign enterprises when these do not pay income tax under this law.

(11) Lease of commercial, industrial, or agricultural establishments.

(12) Prizes, premiums, privileges, and recompense of any kind arising from the exploitation of patents of invention and trade marks by persons other than the owners.

(13) Prizes, premiums, privileges, and recompense of any kind received by owners or possessors of movable property from other persons whom they authorize to work and exploit such property. Owners of race horses, race dogs, and gambling machines, as well as foreign enterprises that derive income in Mexico from the exploitation of moving pictures, are particularly included in this section.

(14) Operation of games of chance.

(15) Any other transactions or investments of capital, regardless of the name given to them and provided the income is not included in any other of the schedules nor expressly exempted by this law.

The taxable income in this schedule is the total amount received except in the case of leases of establishments when certain deductions are allowed; the tax is collected in accordance with the following progressive table:

Annual taxable income	Rates			Annual taxable income	Rates		
	Proportional	Progressive	Total		Proportional	Progressive	Total
	Percent	Percent	Percent		Percent	Percent	Percent
0.01 to 2,400 pesos.....	6	0	6	48,000.01 to 60,000 pesos.....	6	3.8	9.8
2,400.01 to 3,600 pesos.....	6	.1	6.1	60,000.01 to 72,000 pesos.....	6	4.3	10.3
3,600.01 to 4,800 pesos.....	6	.2	6.2	72,000.01 to 84,000 pesos.....	6	4.8	10.8
4,800.01 to 6,000 pesos.....	6	.3	6.3	84,000.01 to 96,000 pesos.....	6	5.3	11.3
6,000.01 to 7,200 pesos.....	6	.4	6.4	96,000.01 to 108,000 pesos.....	6	5.8	11.8
7,200.01 to 8,400 pesos.....	6	.5	6.5	108,000.01 to 150,000 pesos.....	6	6.3	12.3
8,400.01 to 9,600 pesos.....	6	.6	6.6	150,000.01 to 200,000 pesos.....	6	6.8	12.8
9,600.01 to 10,800 pesos.....	6	.7	6.7	200,000.01 to 250,000 pesos.....	6	7.3	13.3
10,800.01 to 12,000 pesos.....	6	.8	6.8	250,000.01 to 300,000 pesos.....	6	7.8	13.8
12,000.01 to 18,000 pesos.....	6	1.3	7.3	300,000.01 to 350,000 pesos.....	6	8.3	14.3
18,000.01 to 24,000 pesos.....	6	1.8	7.8	350,000.01 to 400,000 pesos.....	6	8.8	14.8
24,000.01 to 30,000 pesos.....	6	2.3	8.3	400,000.01 to 450,000 pesos.....	6	9.3	15.3
30,000.01 to 36,000 pesos.....	6	2.8	8.8	450,000.01 to 500,000 pesos.....	6	9.8	15.8
36,000.01 to 48,000 pesos.....	6	3.3	9.3	500,000.01 pesos up.....	6	10.3	16.3

*Advanced payments.*—The tax will be paid on the annual income received, in the manner prescribed by the regulation. However, when the income is received ("al momento de la percepción") an advance payment of 10 percent of the taxable income must be made. From this, 6 percent will be used to pay the proportional tax, and the 4 percent remaining will be kept, pending the annual liquidation of the tax, for the purpose of the progressive tax. Should this be less than 4 percent, the taxpayer is reimbursed the overpayment.

*Tax on bonds and obligations.*—The income tax on bonds and obligations (indicated in no. 9 above) governed by articles 202-228 of the law of negotiable instruments and credit operations is 4 percent of the total taxable income, payable when the income is received.

*Retention of the tax.*—The creditor, lessor, or owner must pay the tax in the second schedule; any stipulation to the contrary is null and void. The debtors, exploiters, or lessees who pay rent, interest privileges, participations, and other income must retain and pay to the tax office any advance payment required by law; they are jointly and severally liable with the taxpayer for any tax not paid and which should have been retained or of whose payment they should have made certain.

*Calculation of income.*—Whenever no interest is stipulated in the documents setting forth any of the operations indicated in nos. 1, 2, 6, 7, 9, and 10 above, or it is agreed that no interest will be charged temporarily or permanently, in whole or in part, or interest of less than the legal rate of 6 percent annually is to be collected, the taxable income is determined in this manner:

(a) When the debtor agrees to return an amount greater than the one he received, the difference between the two will be considered as interest, if it is not less than 6 percent annually.

(b) In all other cases the result obtained by applying the legal rate of 6 percent will be considered as interest. The following are exempted from these rules:

- (1) Deposits in credit institutions operating according to law.
- (2) Deposits made to guarantee contracts, or required by law if no interest is earned.
- (3) Judicial deposits and those made in the receiving offices of the Nation, States, and municipalities.
- (4) Contracts made with the Nation.
- (5) Bonds of national or foreign public debt.
- (6) Bonds, obligations, etc., of credit institutions, those of public-service enterprises, and those issued to bearer according to law, by national enterprises.

In all these 6 exceptions the tax is paid on the interest stipulated.

*Payments first applied to interest due.*—All amounts received by a creditor will be applied first to the interest due, for the purpose of the income tax; when the payments must be applied in part to capital and in part to interest, the tax will be imposed on the latter if the interest rate is equal to or greater than the legal rate; if it is less, the tax is imposed on the amount resulting by applying the legal rate to the sum owed. Quittances and rescissions of debts, including the whole or part of the matured interest, will produce no effect insofar as the tax is concerned, and therefore, when a credit is canceled, it is presumed that all interest due has been paid and the tax will be imposed accordingly.

In case of adjudication of property in payment of debts which earn or should earn interest taxable under this class:

(a) If the adjudication was made to the creditor by stipulation between the parties or by court order, the creditor is considered as having received all the interest due up to the date of the adjudication, and the tax will be collected on the total amount of such interest.

(b) If the adjudication is made to a third party by judicial sale, the amount of the principal ("suerte principal") will be deducted from the sale price and the tax collected from the excess, if any.

Should the creditor reserve to himself his rights against the debtor, the tax will be collected on the interests earned until the date of adjudication and the amount of the latter will be subject to the preferred payment of the tax.

*Exemptions from the tax.*—The following are not subject to the tax:

- (1) Income from immovable property.
- (2) Interest paid to depositors by savings banks and banking institutions.
- (3) Interest and other payments within the second class received by banks and banking companies included in no. 2. These institutions will pay the tax under the first class. This exemption does not include amounts received by them for the account of third parties. In all cases when persons subject to the tax collect the interest so taxable through these institutions, the latter assume all the obligations and liabilities of taxpayers.
- (4) Premiums obtained through the granting of suretyship or guarantees by companies engaged in that business; these are subject to the tax under the first schedule.<sup>7</sup>

### III. TAX ON CONCESSIONS AND SUBSOIL EXPLOITATION

The following are included under this third schedule:

- (1) Taxpayers who normally or accidentally receive participations, either as rent or otherwise, from the exploitation of the subsoil or of concessions granted by the Federal, a State or municipal government.
- (2) Those who contribute, convey, or in any way dispose of the whole or a part of the title to a concession granted by any of those governments.
- (3) Those who perform these operations with rights of exploitation of the subsoil.

The tax rate will be imposed under section 1 above on the total amount of income, while under sections 2 and 3 it will be imposed on the excess resulting by deducting the cost of the concession or rights of exploitation and the price of the conveyance or contribution. When the conveyance or contribution includes explorations or exploitation work already performed, installations, machinery, utensils, and chattels of commercial value, the proven value of all these is likewise deductible to calculate the taxable income.

The tax varies in accordance with the following table:

Annual taxable income	Rates			Annual taxable income	Rates		
	Pro- por- tional	Pro- gres- sive	Total		Pro- por- tional	Pro- gres- sive	Total
	Percent	Percent	Percent		Percent	Percent	Percent
0.01 to 2,400 pesos.....	10	0	10	48,000.01 to 60,000 pesos.....	10	3.8	13.8
2,400.01 to 3,600 pesos.....	10	.1	10.1	60,000.01 to 72,000 pesos.....	10	4.3	14.3
3,600.01 to 4,800 pesos.....	10	.2	10.2	72,000.01 to 84,000 pesos.....	10	4.8	14.8
4,800.01 to 6,000 pesos.....	10	.3	10.3	84,000.01 to 96,000 pesos.....	10	5.3	15.3
6,000.01 to 7,200 pesos.....	10	.4	10.4	96,000.01 to 108,000 pesos.....	10	5.8	15.8
7,200.01 to 8,400 pesos.....	10	.5	10.5	108,000.01 to 150,000 pesos.....	10	6.3	16.3
8,400.01 to 9,600 pesos.....	10	.6	10.6	150,000.01 to 200,000 pesos.....	10	6.8	16.8
9,600.01 to 10,800 pesos.....	10	.7	10.7	200,000.01 to 250,000 pesos.....	10	7.3	17.3
10,800.01 to 12,000 pesos.....	10	.8	10.8	250,000.01 to 300,000 pesos.....	10	7.8	17.8
12,000.01 to 18,000 pesos.....	10	1.3	11.3	300,000.01 to 350,000 pesos.....	10	8.3	18.3
18,000.01 to 24,000 pesos.....	10	1.8	11.8	350,000.01 to 400,000 pesos.....	10	8.8	18.8
24,000.01 to 30,000 pesos.....	10	2.3	12.3	400,000.01 to 450,000 pesos.....	10	9.3	19.3
30,000.01 to 36,000 pesos.....	10	2.8	12.8	450,000.01 to 500,000 pesos.....	10	9.8	19.8
36,000.01 to 48,000 pesos.....	10	3.3	13.3	500,000.01 pesos up.....	10	10.3	20.3

<sup>7</sup> Arts. 20-25.



The tax corresponding to the total annual income earned by the taxpayer will be liquidated in the form and manner established by the regulations of the law. But, in any event, an advance payment of 14 percent of taxable income must be made at the time it is received. Ten percent will be used to discharge the proportional tax above, while 4 percent will be retained to liquidate the progressive tax, making such reimbursements or collecting whatever amounts are necessary.<sup>8</sup>

#### IV. TAX ON SALARIES

There are included among the taxpayers under this schedule those who receive salaries, pensions, life rents, per diems, commissions, allowances for representations and other expenses, prizes, and several other forms of remuneration. The tax is collected in accordance with the following schedule:

Monthly taxable income	Rates			Monthly taxable income	Rates		
	Proportional	Progressive	Total		Proportional	Progressive	Total
	Percent	Percent	Percent		Percent	Percent	Percent
0.01 to 166.66 pesos.....	(1)	(1)	(1)	1,500.01 to 2,000 pesos.....	1.3	1.8	3.1
166.66 to 200 pesos.....	1.3	(1)	1.3	2,000.01 to 2,500 pesos.....	1.3	2.3	3.6
200.01 to 300 pesos.....	1.3		1.4	2,500.01 to 3,000 pesos.....	1.3	2.8	4.1
300.01 to 400 pesos.....	1.3	.2	1.5	3,000.01 to 4,000 pesos.....	1.3	3.3	4.6
400.01 to 500 pesos.....	1.3	.3	1.6	4,000.01 to 5,000 pesos.....	1.3	3.8	5.1
500.01 to 600 pesos.....	1.3	.4	1.7	5,000.01 to 6,000 pesos.....	1.3	4.3	5.6
600.01 to 700 pesos.....	1.3	.5	1.8	6,000.01 to 7,000 pesos.....	1.3	4.8	6.1
700.01 to 800 pesos.....	1.3	.6	1.9	7,000.01 to 8,000 pesos.....	1.3	5.3	6.6
800.01 to 900 pesos.....	1.3	.7	2.0	8,000.01 to 9,000 pesos.....	1.3	5.8	7.1
900.01 to 1,000 pesos.....	1.3	.8	2.1	9,000.01 pesos up.....	1.3	6.3	7.6
1,000.01 to 1,500 pesos.....	1.3	1.3	2.6				

<sup>1</sup> Exempt.

Semiannual taxable income	Rate			Semiannual taxable income	Rate		
	Proportional	Progressive	Total		Proportional	Progressive	Total
	Percent	Percent	Percent		Percent	Percent	Percent
0.01 to 1,000 pesos.....	(1)	(1)	(1)	9,000.10 to 12,000 pesos.....	1.3	1.8	3.1
1,000.01 to 1,200 pesos.....	1.3	(1)	1.3	12,000.01 to 15,000 pesos.....	1.3	2.3	3.6
1,200.01 to 1,800 pesos.....	1.3		1.4	15,000.01 to 18,000 pesos.....	1.3	2.8	4.1
1,800.01 to 2,400 pesos.....	1.3	.2	1.5	18,000.01 to 24,000 pesos.....	1.3	3.3	4.6
2,400.01 to 3,000 pesos.....	1.3	.3	1.6	24,000.01 to 30,000 pesos.....	1.3	3.8	5.1
3,000.01 to 3,600 pesos.....	1.3	.4	1.7	30,000.01 to 36,000 pesos.....	1.3	4.3	5.6
3,600.01 to 4,200 pesos.....	1.3	.5	1.8	36,000.01 to 42,000 pesos.....	1.3	4.8	6.1
4,200.01 to 4,800 pesos.....	1.3	.6	1.9	42,000.01 to 48,000 pesos.....	1.3	5.3	6.6
4,800.01 to 5,400 pesos.....	1.3	.7	2.0	48,000.01 to 54,000 pesos.....	1.3	5.8	7.1
5,400.01 to 6,000 pesos.....	1.3	.8	2.1	54,000.01 pesos up.....	1.3	6.3	7.6
6,000.01 to 9,000 pesos.....	1.3	1.3	2.6				

<sup>1</sup> Exempt.

The following monthly deductions may be made by taxpayers residing in Mexico: For 1 dependent, 20 pesos; 2 dependents, 25 pesos; 3 dependents, 30 pesos; 4 or more dependents, 35 pesos.

Taxpayers residing abroad, in the Federal District, cities on the frontiers with the United States, Tampico, Tuxpan, Vera Cruz, Progreso, Merida, and places within the zone around these places, as fixed by the Secretariat of the Treasury, may deduct from the

<sup>8</sup> Arts. 26-27.

monthly income: For 1 dependent, 40 pesos; 2 dependents, 50 pesos; 3 dependents, 60 pesos; 4 or more dependents, 70 pesos.<sup>9</sup>

#### V. TAX ON PROFESSIONS, ARTS, AND TRADES

Those engaged in practicing a profession, art, or trade must pay a tax in accordance with the following schedule:

Semiannual taxable income	Rate			Semiannual taxable income	Rate		
	Pro- por- tional	Pro- gres- sive	Total		Pro- por- tional	Pro- gres- sive	Total
	Per- cent (%)	Per- cent (%)	Per- cent (%)		Per- cent (%)	Per- cent (%)	Per- cent (%)
0.01 pesos to 1,000 pesos.....	1.3		1.3	9,000.01 pesos to 12,000 pesos.....	1.3	1.8	3.1
1,000.01 pesos to 1,200 pesos...	1.3		1.3	12,000.01 pesos to 15,000 pesos.....	1.3	2.3	3.6
1,200.01 pesos to 1,800 pesos...	1.3	0.1	1.4	15,000.01 pesos to 18,000 pesos.....	1.3	2.8	4.1
1,800.01 pesos to 2,400 pesos...	1.3	.2	1.5	18,000.01 pesos to 24,000 pesos.....	1.3	3.3	4.6
2,400.01 pesos to 3,000 pesos...	1.3	.3	1.6	24,000.01 pesos to 30,000 pesos.....	1.3	3.8	5.1
3,000.01 pesos to 3,600 pesos...	1.3	.4	1.7	30,000.01 pesos to 36,000 pesos.....	1.3	4.3	5.6
3,600.01 pesos to 4,200 pesos...	1.3	.5	1.8	36,000.01 pesos to 42,000 pesos.....	1.3	4.8	6.1
4,200.01 pesos to 4,800 pesos...	1.3	.6	1.9	42,000.01 pesos to 48,000 pesos.....	1.3	5.3	6.6
4,800.01 pesos to 5,400 pesos...	1.3	.7	2.0	48,000.01 pesos to 54,000 pesos.....	1.3	5.8	7.1
5,400.01 pesos to 6,000 pesos...	1.3	.8	2.1	54,000.01 pesos and up.....	1.3	6.3	7.6
6,000.01 pesos to 9,000 pesos...	1.3	1.3	2.6				

<sup>1</sup> Exempt.

Those residing in Mexico may deduct the following: For 1 dependent, 120 pesos; 2 dependents, 150 pesos; 3 dependents, 180 pesos; 4 or more dependents, 210 pesos.

Those residing at the places indicated under the previous schedule may deduct 240 pesos, 300 pesos, 360 pesos, or 420 pesos for 1, 2, 3, or 4 or more dependents, respectively.

Those who derive profit from the exercise of their dexterity, culture, or ability in some sport or entertainment must pay this tax in accordance with the following schedule:

Daily taxable income	Rates			Daily taxable income	Rates		
	Pro- por- tional	Pro- gres- sive	Total		Pro- por- tional	Pro- gres- sive	Total
	Per- cent (%)	Per- cent (%)	Per- cent (%)		Per- cent (%)	Per- cent (%)	Per- cent (%)
0.01 to 5.56 pesos.....				133.34 to 166.67 pesos.....	1.3	3.8	5.1
5.57 to 6.67 pesos.....	1.3		1.3	166.68 to 200 pesos.....	1.3	4.3	5.6
6.68 to 10 pesos.....	1.3	0.1	1.4	200.01 to 233.33 pesos.....	1.3	4.8	6.1
10.01 to 13.33 pesos.....	1.3	.2	1.5	233.34 to 266.67 pesos.....	1.3	5.3	6.6
13.34 to 16.67 pesos.....	1.3	.3	1.6	266.68 to 300 pesos.....	1.3	5.8	7.1
16.68 to 20 pesos.....	1.3	.4	1.7	300.01 to 416.67 pesos.....	1.3	6.3	7.6
20.01 to 23.33 pesos.....	1.3	.5	1.8	416.68 to 555.56 pesos.....	1.3	6.8	8.1
23.34 to 26.67 pesos.....	1.3	.6	1.9	555.57 to 694.44 pesos.....	1.3	7.3	8.6
26.68 to 30 pesos.....	1.3	.7	2.0	694.45 to 833.33 pesos.....	1.3	7.8	9.1
30.01 to 33.33 pesos.....	1.3	.8	2.1	833.34 to 972.22 pesos.....	1.3	8.3	9.6
33.34 to 50 pesos.....	1.3	1.3	2.6	972.23 to 1,111.11 pesos.....	1.3	8.8	10.1
50.01 to 66.67 pesos.....	1.3	1.8	3.1	1,111.12 to 1,250 pesos.....	1.3	9.3	10.6
66.68 to 83.33 pesos.....	1.3	2.3	3.6	1,250.01 to 1,388.89 pesos.....	1.3	9.8	11.1
83.34 to 100 pesos.....	1.3	2.8	4.1	1,388.90 pesos up.....	1.3	10.3	11.6
100.01 to 133.33 pesos.....	1.3	3.3	4.6				

<sup>1</sup> Exempt.

These taxpayers may deduct daily: For 1 dependent, 1 peso; 2 dependents, 1.50 pesos; 3 dependents, 2 pesos; 4 or more dependents, 2.50 pesos.

Those engaged in the practice of a profession, art, or trade must make an advance payment of 4 percent of the income they receive. This tax payment is evidenced by canceling stamps in the documents

of payment of the income; no deduction will be allowed to taxpayers of the first schedule by reason of amounts paid to taxpayers of the fifth class unless they prove that the advance tax payment was made by showing the documents duly stamped.<sup>10</sup>

#### RETAINING AGENTS

The following persons must retain the tax or its advance payment and are jointly and severally liable for its payment under the second, third, and fifth schedules:

(1) Credit institutions, banking companies, exchange agents, and those who pay for the account of another or receive, under authority to collect, coupons, dividends, portions of interest obligations, or any other credit instruments, securities, or paper which produce or constitute income taxable by this law.

(2) Debtors of interest, public-service enterprises, and those whose debts are guaranteed by the Federal Government are exempted from making this retention if they prove to the Secretary of the Treasury that they are not in condition to make it because of contracts made abroad, their economic condition, or other causes of like nature; in this case no deduction will be allowed to them on this account. Any person or entity who pays, in Mexico, income on the obligations set forth in sections 9 and 10 of the second schedule must retain the tax thereon.

(3) Persons who pay prices, rent, or premiums under sections 11, 12, 13, and 15 of the second schedule.

(4) Persons, enterprises, companies ("sociedades"), or corporations which normally, or from time to time, pay participations taxed under the third schedule, either as rent or in any other form, by reason of exploitation of the subsoil or concessions granted by the Federal Government, the States, or municipalities.

(5) Surety and guaranty enterprises must retain the tax on the amounts paid to foreign enterprises as premiums for reinsurance ("reafianzamientos") made within Mexico.

(6) Taxpayers under the first schedule who pay fees, remunerations, etc., for services to persons exercising a profession, art, or trade.

(7) Enterprises which receive services, the remuneration for which is taxed under the fifth schedule.<sup>11</sup>

#### ABSENTEE TAX

Individuals, companies, and partnerships domiciled outside of Mexico, and individuals residing in a foreign country for more than four months at the beginning of a fiscal year must pay a 2 percent tax on the rents, profits, dividends, interests, salaries, etc., derived from Mexican sources. Individuals and entities domiciled in Mexico who invest abroad income or rents produced in Mexico are subject to a tax of 4 percent thereon.<sup>12</sup>

NOTE.—As this bulletin goes to press, new regulations governing the income tax are expected to be issued by the Mexican Government, covering method and time of collection of the tax, deductions allowed, and the administrative agencies concerned with the collection of the tax. A summary of these rules will be prepared by the Division of Commercial Laws, Bureau of Foreign and Domestic Commerce, as soon as they are received and will be published in special-circular form.

<sup>10</sup> Arts. 31-32.

<sup>11</sup> Art. 30.

<sup>12</sup> Decree of Feb. 14, 1934.

## XII. BANKRUPTCY

As a general rule, in Latin America, the procedure to settle the estate of an insolvent merchant differs from the one provided for winding up the affairs of a nonmerchant. The former is known as "quiebra" (bankruptcy) and is governed by the Code of Commerce, while the latter is designated "concurso de acreedores" (civil insolvency) and is subject to the rules of the Civil and Procedural Codes.

Under a "concurso", which may be voluntary or involuntary, the debtor is deprived of the management of his property, the assets being thereafter distributed to his accredited claimants in a certain order. Under the code of 1932, a composition may be reached with the approval of a majority of the creditors present whose interests represent three-fifths of the liabilities, after deducting the claims of secured creditors who elected not to take part in the "concurso."<sup>1</sup>

### MERCHANTS SUBJECT TO BANKRUPTCY

Any merchant who suspends payment of his obligations is in a state of bankruptcy; he may be declared in bankruptcy within 5 years after retiring from business if the suspension of payments occurred while he was engaged in commerce or within a year thereafter. The bankruptcy of a deceased merchant may be declared within a year after his death. The assignment of property made by a merchant before the civil courts raises the presumption of bankruptcy, and, upon being established, the procedure hereinafter prescribed must be followed, the assignor not being entitled to any of the privileges granted by civil law in these cases. The bankruptcy of a general partnership or cooperative with unlimited, joint, and several liability causes the bankruptcy of the members; however, that of a partnership with limited silent partners causes only the bankruptcy of the active partners. In all other business organizations thrown into bankruptcy the members are not so affected.

If a mercantile concern is thrown into bankruptcy abroad and it has one or more branches in Mexico, these will be put in liquidation without prejudice to their being declared in bankruptcy if such were their condition.<sup>2</sup>

### WHEN BANKRUPTCY PROCEEDS

Bankruptcy proceedings may be sought by the debtor (voluntary) or by his creditors (involuntary) whenever the debtor:

1. Actually suspends payment of his civil or commercial debts, provided they are liquid and demandable and are evidenced by public instrument or private document properly acknowledged or,

<sup>1</sup> Civil Code, 1932, arts. 2964-2979; Code of Civil Procedure, 1932, arts. 738-768.

<sup>2</sup> Code of Commerce, arts. 945-949.

if execution is sought by a creditor, sufficient property on which to levy cannot be found.

2. Has liabilities which exceed the assets by 25 percent.
3. Assigns his property to his creditors.
4. Hides or departs without leaving someone in charge of his business who may discharge the liabilities already matured and those which may mature in the future.<sup>3</sup>

### KINDS OF BANKRUPTCY

Bankruptcies in Mexico may be culpable or fraudulent. They are fortuitous when not of the former two types.

Bankruptcy is culpable whenever:<sup>4</sup>

1. The household and personal expenses of the bankrupt were excessive with respect to his liquid capital, social status, and number of persons in his family.

2. The expenses of the business were unduly large in proportion to the capital, volume of business, and similar circumstances.

3. The bankrupt lost heavy sums in gambling, speculations, or stock-exchange operations.

4. He bought merchandise on installments in order to sell it at less than current price, borrowed money, issued credit documents, or used ruinous means in obtaining funds, all for the purpose of delaying his bankruptcy.

5. After suspension of payments he paid a matured credit to the prejudice of the others (gave a preference).

6. The bankrupt has not preserved his business correspondence, if needed on some point relative to the operation of the bankruptcy.

7. He went surety or guarantor or incurred obligations for the account of others out of proportion to his means, without obtaining ample security for his liability.

8. During the 6 months prior to the bankruptcy he has borrowed with or without interest an amount of merchandise at a price greater than the market price, or a sum of money at 1 percent monthly more than current rate of interest.

9. He failed to make the required declaration within 3 days following suspension of payment; or, if the declaration is made by a business organization, it does not contain the names of all joint and several members, or is inexact in its statement of facts.

10. He failed to appear personally before the court or sindics whenever under obligation to do so, unless prevented by some lawful cause.

11. The bankrupt owed directly twice the amount of the liquid assets as set forth in the inventory, during the period between the last inventory and the declaration in bankruptcy.

It is fraudulent whenever the bankrupt:<sup>5</sup>

1. Kept no books or inventories, or, if he had them, failed to keep them in accordance with the Code of Commerce, or the inventories were not accurate and complete so that they failed to indicate the true condition of the assets and liabilities, or he mutilated, altered, or concealed them.

<sup>3</sup> Code of Commerce, arts. 951-952

<sup>4</sup> Code of Commerce, arts. 953-955.

<sup>5</sup> Code of Commerce, art. 956.

2. Failed to register in the registry of commerce the documents required to be recorded therein.

3. Is thrown into bankruptcy a second time without discharging the obligations contracted by a preceding composition.

4. Executed public or private instruments in which he acknowledged himself to be indebted without indicating the consideration received, unless it appears from the books of account as well as from the transfers of funds of the business.

5. Concealed money, goods, credits, or other property of any nature.

6. Bought for himself, before or after the bankruptcy, in the name of a third person, goods or credits or transferred his own without receiving their value.

7. Simulated conveyances or created or acknowledged fictitious debts.

8. Failed to prove the existence or disposition of assets according to the last inventory, or that of money or other assets of any kind which thereafter came into his possession.

9. Departed or absconded without leaving someone to pay debts due or becoming due.

10. Created fictitious debts, expenses, or losses, or exaggerated their amount, or in any other way created an appearance of assets or obligations in favor of or against his property.

11. Appropriated or used in his own business merchandise or funds deposited or consigned with him, or whose administration is entrusted to him.

12. Negotiated without authority commercial paper, sent to him for collection, remittance, or other purpose, without delivering the funds received in such negotiations.

13. Concealed permanently or temporarily the conveyance or payment of merchandise, goods, or credits entrusted to him for sale or collection.

14. Discounted bills of exchange with his own drafts against persons with whom he did not have funds or who did not authorize him to do so.

15. Paid debts not due until after the declaration of bankruptcy to the prejudice of his creditors, considering the bad state of his business affairs.

16. Received or took money, merchandise, or credits of the estate or invested them in other objects, after the institution of proceedings or after the declaration in bankruptcy.

17. Petitioned his bankruptcy, although the possibility existed of discharging his liabilities on time, with the intention of negotiating credits in order to make a profit in their discount.

18. Failed to petition bankruptcy when the liabilities exceeded the assets by 25 percent after the last inventory, and 2 months before the declaration in bankruptcy.

19. Did not make inventories in the time prescribed by the code, or in that fixed in bylaws or in contracts in which such is stipulated.

20. Made any other operation which fraudulently diminishes his assets or increases his liabilities.

21. Was a broker.

The bankruptcy of a merchant whose actual condition cannot be ascertained from his books will be presumed fraudulent, in the absence of proof to the contrary. The culpable or fraudulent bankruptcy will be prosecuted: (1) By indictment of the public attorney after it is so classified by final judgment; (2) by complaint of the syndic authorized by a majority of the creditors to present it; and (3) by complaint of one or more creditors who will prosecute the criminal action at their own expense without right to seek reimbursement from the estate.\*

### ACCOMPLICES OF BANKRUPT

The following are considered accomplices of a fraudulent bankrupt:

1. Those who, in collusion with the bankrupt, to create fictitious credits against him or to increase the value of their credits against his assets, sustain these false claims at the hearings concerning claims or in any meeting of creditors.

2. Those who, in order to obtain a preference in the order of payment and in collusion with the bankrupt, alter the nature or date of their credits, even though this is done before the declaration in bankruptcy, and sustain this fraud at the hearing concerning claims or before any meeting of creditors.

3. Those who help the bankrupt to hide or suppress assets, before or after the declaration in bankruptcy.

4. Those who conceal property, documents, or papers of the bankrupt or deliver them to him and not to the syndics, although they know of the bankruptcy.

5. Those who refuse to deliver the property of the bankrupt in their hands to the administrators of the bankrupt estate.

6. Those who after the declaration of bankruptcy accept transfers or endorsements from the bankrupt.

7. The legitimate creditors, who enter into private agreements with the bankrupt to the detriment of the estate.

8. Brokers who after the declaration in bankruptcy take part in any operation of the bankrupt.

9. Those who maliciously aid the bankrupt in any kind of deceit, suppression, or concealment.

The husband or wife, ascendants by blood, or relatives by affinity of the bankrupt, who suppress or conceal assets of the estate without the consent of the bankrupt, are not accomplices, but are considered guilty of larceny ("robo"). In addition to criminal liability, accomplices are liable civilly (1) to the loss of their rights in the estate, and (2) to reimburse thereto the property, rights, and actions in whose concealment or suppression they are implicated.

### EFFECTS OF BANKRUPTCY

While the declaration in bankruptcy does not deprive the bankrupt of the exercise of his civil rights, certain limitations are imposed upon him. He is placed under "arraigo", that is, he may not leave

\* Code of Commerce, arts. 958 and 961.

† Code of Commerce, arts. 957, 959-960.

the place where the bankruptcy is being prosecuted unless he is authorized by the majority of his creditors and leaves a duly empowered agent. Upon the declaration of bankruptcy, the debtor retains the ownership and control of property not subject to sequestration ("embargo") in favor of the bankrupt's estate and the management of the property of his wife and of his children, unless the former obtains a separation of her property. The bankrupt loses control of all other present and future property, retaining title under the limitations hereinafter indicated; this control passes to the *sindic* (trustee), who becomes vested with all the powers of the holder of a general power of attorney without limitation, except as herein provided. When the bankruptcy is declared the bankrupt ceases in the exercise of all agencies and commissions, and the agencies granted by him terminate as soon as the suspension of payment becomes known to the agents; all operations, therefore, must be liquidated in order that payment due to the estate may be demanded and the amount of the estate may be estimated. Nor may the bankrupt sue or be sued except as regards his person. Actions against his property must be instituted against the *sindic*.

If the bankrupt repudiates an inheritance or legacy, the *sindic* may accept it in favor of the estate, upon judicial authorization. This right of rejection is annulled only in favor of creditors and up to the amount lacking to cover all liabilities and expenses of the bankruptcy. In case a merchant dies after petitioning his bankruptcy, or after his estate requests it, his executors and heirs will enjoy the rights and obligations of the bankrupt in the bankruptcy proceeding except the criminal liability.<sup>8</sup>

#### PROPERTY OF HUSBAND AND WIFE

The following property is presumed to belong to the bankrupt and, therefore, he is deprived of its control even though title is in the wife's name: (1) Real estate acquired during his marriage, regardless of the marital stipulations concerning the property, because it is presumed not to have been bought with money of the wife; and (2) the personal property used by the husband, and jewels, pictures, and precious articles, whether belonging to one or the other spouse. The wife may recover such property if she proves that she owned it prior to the marriage or that she bought it with her own money.

The portion of the income from the property of the wife and children belonging to the husband, after deducting all legal charges, including one-half or such part as the marriage stipulations may provide, accredits to the bankrupt estate and the debtor must turn it over to the *sindic* every 2 months under penalty of intervention in the administration of the same if he fails to make delivery.<sup>9</sup>

#### PROPERTY EXEMPT FROM THE BANKRUPTCY

The following property does not form part of the mass of the estate and is therefore exempt from the sequestration:<sup>10</sup>

<sup>8</sup> Code of Commerce, arts. 968, 967, 962, 972, 970, 969, 973.

<sup>9</sup> Code of Commerce, arts. 964-966.

<sup>10</sup> Code of Commerce, arts. 963.



1. The bed and necessary clothing and furniture of the bankrupt, wife, and children, provided they are not considered extravagant by the court.

2. Instruments and utensils necessary in the art or trade of the bankrupt.

3. The oxen and other animals insofar as necessary for service on the farm where they are employed.

4. The books of persons exercising a literary profession and the instruments of doctors, surgeons, and engineers insofar as necessary, in the opinion of an expert appointed by the court.

5. The arms and horses of military men in active service, whenever necessary thereto.

6. Effects used in the development of industrial enterprises, if in the opinion of an expert appointed by the court they are found to be necessary.

7. Crops before harvest time.

8. The right of usufruct, but not its income and products ("frutos").

9. The rights of use and occupancy.

10. Allowances for sustenance (for food, shelter, clothing, and education) of the bankrupt subject to parental authority ("patria potestad") or guardianship, or who is physically unable to work or has no property, profession, or trade through no fault of his own (art. 545, Code of Civil Procedure for the Federal District and Territories, 1932).

11. Easements, unless the properties subject to them are sequestered; however, the easement of water may be sequestered when existing upon the dominant estate.

12. Life annuities under articles 2785-2787 of the Civil Code of 1932; the salaries and emoluments of employees and public officials and pensions paid by the public treasury.

These exemptions may not be waived.

#### REVINDICATION IN BANKRUPTCY<sup>22</sup>

By revindication in bankruptcy is meant the right of any person to claim and recover property belonging to him which is found in the bankrupt estate. The code provides that whenever property is found in the estate, title to which never passed to the bankrupt, it may be returned to the rightful owners upon acknowledgment of their claims by the meeting of creditors or by final judgment. However, the estate retains any rights which the bankrupt had in the property upon complying with any obligations attached thereto.\* The following property may be recovered in this manner:

1. Unappraised dowry property, and appraised dowry property in the hands of the husband.

2. Property belonging exclusively to wife.

3. The patrimony of the child or ward; registration indicated on page 12 must have been made in these three instances.

4. The property or effects held in deposit, administration, lease, hire, or usufruct by the bankrupt.

<sup>22</sup> Code of Commerce, arts. 994-999; Graves, *The Remedy of Revindication in Latin American Bankruptcy Law*, 40 *Yale Law Journal* 885.

5. Merchandise held under a commission of purchase, sale, shipment, or delivery (property usually consigned to agents in Mexico, therefore, is included in this classification; see p. 49).

6. Bills of exchange or promissory notes without endorsement or expression passing title, sent to the bankrupt for collection and those obtained for the account of another, issued or endorsed directly to the principal.

7. Funds sent to the bankrupt outside of current account and which he is to deliver to another person for the principal, or is to use in discharging the obligations of the latter at the bankrupt's domicile.

8. Amounts due the bankrupt on account of sales made for another and the bills of exchange or promissory notes drawn in these transactions and in his possession, even though these documents are not made in favor of the owner of the merchandise sold; provided, however, that it is proven that the documents or obligations arise out of such transactions and were in the hands of the bankrupt to be collected and the funds forwarded to the principal, which fact will be presumed conclusively if the account is not entered in the current account existing between the parties.

9. Merchandise sold for cash to the bankrupt and not paid for in whole or in part, while it is unpacked in his warehouse or unbroken and distinguishable by marks and numbers.

10. Merchandise bought on credit by the bankrupt while its delivery has not been made or it is in transit (this is the equivalent of the right of stoppage in transitu in Common Law).

11. Securities ("valores") or objects pledged by public document, broker's policy, or pledge bond (see p. 39), unless the majority of creditors decide to recover the property after paying the credit due. If the pledge is of any other kind the pledge creditor may dispose of it by sale through a broker or by judicial sale, the balance existing after the credit is paid being returned to the estate; on the other hand, if a balance is still due to this creditor, he may file claim for it against the estate.

12. The bills in circulation of banks of issue in bankruptcy.

#### MATURITY AND ANNULMENT OF OBLIGATIONS

The declaration of bankruptcy causes the maturity of all pending debts of the bankrupt, a discount of 6 percent annually being made, on the amount of those which do not draw interest and which are paid in advance, from the date of payment until maturity. Liabilities of the bankrupt on suretyships and guarantees given by him cease; however, the amounts owed by reason of these obligations until the declaration in bankruptcy will be admitted as credits against the estate. Current accounts are likewise suspended and liquidated. Payment of interest is discontinued by virtue of the declaration except that on credit secured by mortgage or pledge, but these will be satisfied only with the income derived from the property given as security.

All transactions entered into by the debtor at any time before his declaration in bankruptcy, thereby knowingly defrauding his creditors, are null and void, provided the other contracting party knew of

the fraud. All gratuitous contracts and transactions, in favor of ascendants and descendants or in discharge of obligations not yet due or realized, are also null and void if made within 30 days before the date on which the bankrupt failed to pay the first obligation, which failure causes his bankruptcy. The creditor who, within this same period, renews his credit ("refaccione su credito") in order to secure it with mortgage, pledge, or other collateral, will hold the security for the renewal if this is valid in accordance with the provisions of the Code of Commerce. Whenever the return of any object or amount is ordered, it is understood, although not expressed, that the corresponding products or interest during the time that the object or amount was enjoyed must also be returned.<sup>12</sup>

#### JOINER OF ACTIONS—FOREIGN BANKRUPTCIES

All actions against the bankrupt pending before the courts must be joined to the proceedings in bankruptcy, except those: (1) In which judgment in the lower court (first instance) has been rendered and notified; (2) arising from mortgage or pledge credits; and (3) instituted for the purpose of holding auction sales to pay debts due to banks or institutions of credit.

The bankruptcy declared in a foreign country may not be alleged against Mexican creditors in order to contest their rights in property within Mexico or to avoid contracts made with the bankrupt.<sup>13</sup>

#### TIME OF BANKRUPTCY

In Mexican bankruptcy proceedings it is necessary for the court to fix the time when the debtor becomes bankrupt, in order to determine when certain periods of time begin to run and to ascertain rights whose effectiveness or extinction are dependent upon this matter, as indicated in the preceding sections. As a general rule, a merchant is considered bankrupt as of the time when the inventories and balances which reveal this condition are prepared, provided this is done at least once a year. However, if before the preparation of the corresponding inventory an unforeseen but notable event should render the merchant unable to perform his obligations, the bankruptcy is considered to have taken place at the time of that event. Furthermore, if a merchant suspends payment of civil debts and does not have sufficient property to discharge them independently of that which constitutes his commercial enterprise, or is unable to pay them with the property of the latter without suspending payment of his commercial obligations, the bankruptcy is considered to have taken place when the suspension of civil debts occurs. But this is not the case if the civil debts may be paid off without causing the bankruptcy of the commercial establishment. In any event, the court may fix a time for the commencement of the bankruptcy different from the ones just indicated, in all cases according to the facts revealed by the record and upon considerations of justice arising therefrom.<sup>14</sup>

<sup>12</sup> Code of Commerce, arts. 974-981.

<sup>13</sup> Code of Commerce, arts. 982-983; Amparo Artiguez, *Revista General de Derecho y Jurisprudencia*, January-March 1931, p. 85.

<sup>14</sup> Code of Commerce, arts. 984-987.

## COMPOSITION OF CREDITORS

The bankrupt and his creditors may enter into a composition before he petitions his bankruptcy or it is declared, and during the bankruptcy proceedings, after the allowance of claims and the classification of the bankruptcy. Fraudulent bankrupts and those who leave the place where the bankruptcy is being prosecuted (violate the "arraigo") do not enjoy this right. The composition must be effected at a meeting of creditors, no private stipulations between the bankrupt and any of his creditors being allowed on penalty of loss of the rights of the creditors who attempt this; in addition the bankrupt is considered culpable if the facts do not merit his classification as fraudulent. The composition must be approved by a vote of a majority of the creditors present representing three-fifths of the liabilities after deducting the amount of secured credits. Creditors whose claims are secured ("privilegiados e hipotecarios") may abstain from voting, but if they do vote, they will be included in the discharges and extensions stipulated in the composition without prejudice to their rights in the order of payment. Within 8 days after the meeting which approves the composition, the dissenting creditors and those who did not attend the meeting may oppose it on the following grounds: (1) Defects in the form of calling, holding, and conducting the meeting; (2) lack of capacity in one of the creditors voting, if his vote made up the majority in number or amount; (3) fraudulent understandings between the debtor and one or more creditors or among the latter, in order to vote in favor of the composition; (4) fraudulent exaggeration of claims in order to make up the majority in amount; (5) fraudulent incorrectness in the general balance of the bankrupt's business or in the reports of the *sindics* in order to facilitate the approval of the propositions of the bankrupt.

As soon as the composition is approved by the court any creditor may appeal therefrom. It becomes binding on the bankrupt thereafter and on all creditors whose credits antedate the declaration of bankruptcy, if properly summoned or, if the approval of the composition was notified to them, they failed to oppose it, even though they were not included in the balance and took no part in the proceedings.

The composition effectively and definitely extinguishes credits in the proportion there stipulated; if the bankrupt fails to perform in accordance with its terms, any one of the creditors may demand its rescission and the continuation of the bankruptcy, in which case, as well as when no composition is entered into, the creditors who are not discharged in full by the bankrupt estate preserve a right of action against property subsequently acquired by the bankrupt.<sup>15</sup>

## PAYMENT OF CLAIMS

For the purpose of discharging claims the property of the estate is divided into two parts or sections, one to include claims payable out of personal property, and the other those to be satisfied with the proceeds of the real estate. Under each section creditors are classi-

<sup>15</sup> Code of Commerce, arts. 988-997.

fied in groups in order of payment, each group taking to the exclusion of the next, the creditors within each group sharing the property allotted to it, pro rata; however, mortgage creditors and those having liens on specific property are excepted unless there are several of the same class, in which case the general rule just mentioned obtains. Any sums received by mortgage creditors from the sale of personalty will be credited to their claims against the real estate.

Claims payable out of personalty are as follows:

1. Creditors specially preferred, in the following order: (a) The Federal, local, or municipal treasury; (b) expenses of preservation of the property and of administration of the bankruptcy; (c) funeral expenses, if the declaration of bankruptcy took place after the death of the bankrupt; (d) funeral expenses of bankrupt whose death took place after the declaration in bankruptcy, provided they were incurred by the syndic or administrators of the bankruptcy, or with their consent and the authorization of the court; (e) expenses of the last illness of bankrupt, if the declaration was made after his death; (f) creditors for personal labor, including business clerks during the six months preceding the bankruptcy; (g) rents due, with all that remains of the leased property, including the year's crops in the case of farm land; (h) creditors for sustenance furnished to the bankrupt or his family.

2. Preferred creditors who are given a preferred right by the Code of Commerce.

3. Common commercial creditors.

4. Creditors under civil contracts of any kind.

Claims payable out of the real estate are as follows:

1. Creditors with real rights, in the terms and in the order established in the civil law.

2. The creditors specially privileged as set forth in the previous paragraph and in that order.

The creditors under each letter group take to the exclusion of the next letter group and number, and those under a number take to the exclusion of the next. Mortgage creditors whose claims are not satisfied in full out of the mortgaged property may claim as creditors under group 4 above. Maritime creditors are governed by maritime law.<sup>16</sup>

#### DISCHARGE OF BANKRUPT

The right of discharge as known under the United States Bankruptcy Act is greatly limited in Mexico. First of all, the fraudulent bankrupts are not entitled to discharge until they serve the penalty imposed on them, said penalty prescribes, or they are pardoned; they are then considered as culpable bankrupts. Secondly, fortuitous and culpable bankrupts are discharged if they promise in legal form to pay their outstanding debts; the latter must furnish security acceptable to creditors, to assure performance; these bankrupts may be discharged by payment in full, of course, and also when they are allowed to manage their property by virtue of the composition with creditors.<sup>17</sup>

<sup>16</sup> Code of Commerce, arts. 1000-1008.

<sup>17</sup> Code of Commerce, arts. 1009-1014.

**BANKRUPTCY OF BUSINESS ORGANIZATIONS**

The bankruptcy of business organizations and the resulting bankruptcy of their members require separate liquidation. Their creditors may make compositions with one or more of the members jointly and severally liable, in which case the syndic administers the assets of the organization excepting therefrom the private property of such members. However, no property of the entity may be used to discharge obligations under the compositions nor will such members be discharged until it is shown that all obligations of the enterprise have been satisfied. The members entering the composition are free, as regards the creditors, of their joint and several obligations.

In case of a general partnership the private creditors of members, whose credits antedate the formation of the enterprise, may file claims in the bankruptcy of the entity together with its creditors in the order of payment provided according to the nature of their claims. The latter creditors, excepting mortgage creditors, will be paid out of the balance left after partnership debts are paid.

Limited silent partners or company stockholders whose contribution is not fully paid may be compelled by the administrators of the bankruptcy to pay in as much as may be necessary unless their shares are to bearer; if they are creditors of the company as well, they may set off their claims against the amounts due from them. The composition in the bankruptcy of a corporation not in liquidation may provide for the continuation or transfer of the business under the terms therein stipulated.

Business organizations will be represented in the bankruptcy proceeding by the persons designated in the bylaws; otherwise by the managers, administrators, or liquidators; if there is none, by an agent of the public attorney. If the organization in bankruptcy had issued bearer obligations, the holders thereof will share in its estate after deducting any payments made by way of amortization or reimbursement on the obligations.<sup>18</sup>

**PROCEDURE IN BANKRUPTCY****SECURING THE BANKRUPT ESTATE**

As soon as a petition in bankruptcy is presented by the debtor or one or more of his creditors, the court proceeds to safeguard the assets of the estate through the issuance of a writ: (1) Appointing a temporary syndic (trustee) and an interventor; (2) ordering the securing of the assets, books, correspondence, and documents of the debtor; (3) ordering the post office to deliver all mail to the syndic; (4) prohibiting payments or deliveries to the debtor under penalty of second payment; (5) ordering the bankrupt to deliver the property in his business to the syndic under penalty of being adjudged guilty of concealment of assets; (6) ordering the publication of the writ in the official journal of the State, district, or territory three consecutive times, and its registration in the commercial registry.

The official who executes this writ will procure the acceptance and assurance of faithful performance of the syndic and interventor, and

<sup>18</sup> Code of Commerce, arts. 1016-1024.

with them he will proceed to seal the doors of the storehouses and offices of the bankrupt, his business books, papers, and personal property, subject to sequestration in bankruptcy and found at his domicile, and will file a report of having done so; this may be done on any day and hour. If the debtor has branches or establishments in other jurisdictions the same proceedings will take place by means of letters requisitorial ("exhortos") addressed to the corresponding court.<sup>19</sup>

#### SINDIC AND INTERVENTOR

The syndic and interventor must be either lawyers or registered merchants of known integrity and repute. The syndic, whether temporary or permanent, represents judicially and extrajudicially the bankrupt business; when temporary, he may only take possession of the business with its books and assets, suspending all payments except taxes, rents, clerks, and minor expenses, and may not make sales except for cash and at current market prices. If he deems it necessary to dispose of property to prevent its loss or depreciation, he may be authorized to do so by the court after hearing the public attorney. Neither the temporary syndic or interventor may be removed until it is so decided by the meeting of creditors following the one held for the allowance of claims. The acceptance of their offices is voluntary, but they may not resign except for grave cause, in the opinion of the court and, if their offices become vacant, they must be filled immediately. The syndic may employ a lawyer if he is not one and such services are necessary; the corresponding fees, duly approved by the court, will be paid out of the estate.

The duties of the interventor are: (1) To watch the syndic, reporting to the court his acts which may prejudice the interests and rights of the creditors, and taking care that the functions of the syndics are performed on time; (2) assist in the preparation of the inventory following the securing of the property; (3) to be heard when the syndic proposes to sell any property or to file suits. In addition, the permanent interventor must pass upon the syndic's claims, if he is a creditor of the estate; for these purposes the interventors may freely examine books, correspondence, and other papers of the bankrupt estate.

The syndic's fees are as follows: 8 percent of the proceeds of the sale of property of the estate up to 25,000 pesos; 4 percent for the excess up to 200,000 pesos; and 2 percent on any greater excess. The interventor's fees are those fixed in the schedules of judicial agents ("apoderados").<sup>20</sup>

#### PREPARATION OF THE INVENTORY

On the day following the placing of the seals on the business establishments of the bankrupt the syndic will begin to prepare the inventory before the court notary or some one acting for him, the debtor and interventor being previously notified thereof. If the inventory at one place cannot be finished in 1 day, the doors are sealed again, a notation being made in the record of the condition of the seal when it is taken off. If property is found which should

<sup>19</sup> Code of Commerce, arts. 1415-1416 and 1429-1432.

<sup>20</sup> Code of Commerce, arts. 1417-1421, 1424-1426, 1422-1423, and 1427-1428.

be promptly disposed of, steps will be taken immediately to do so; property exempt from sequestration in bankruptcy will be delivered to the debtor. Personalty and objects necessary in the continuation of the business will be inventoried first. The *sindic* will take charge of the property as inventoried and to that effect he will sign the record of the inventory which will be made in duplicate, the original being filed in the record of the case and the duplicate kept by the *sindic*.<sup>21</sup>

#### PRESENTATION OF CLAIMS

When the inventory is finished the court must issue a writ ordering the presentation of proof of claims within 10 days if creditors reside within 200 kilometers of the court, 20 days if within 400 kilometers, and 30 days if at a greater distance, within Mexico. The creditors residing in North America and the West Indies must do so within 2 months, while those in Central America and Europe have three months, those in South America 4 months, and those in any other part of the world 5 months. Notification thereof must be made by summons ("cédula"), order ("despacho"), or letter rogatory ("exhorto") to the creditors whose residence is known, and by publication in the official journal three consecutive times to those whose residence is unknown. Absent creditors are represented until they appear by an agent of the public attorney.

The creditors must present to the court, within the time allowed, the instruments evidencing their claims or, if there are none, an itemized statement setting forth the consideration given must be presented with copies, the original to be attached to the record and the copies to be returned to the claimant. As the claims are received the court will turn them over to the *sindic* to be checked against existing records and bookkeeping. Within 8 days after the time fixed for presentation of claims the *sindic* will present a report on the claims presented to the court, copy being sent to the bankrupt; in view of this report the court decides who may vote at the meeting for examination and allowance of claims, and for what amount.<sup>22</sup>

#### STATUS OF CLAIMS NOT PRESENTED IN TIME

The creditors whose claims are presented within the extended periods allowed them, as previously indicated, but who are not able to present them before the general report on claims is filed by the *sindic*, do not lose their rights and preferences in the order of payment. The same procedure is observed with regard to these claims, and after the *sindic* reports on them they may be considered at a meeting of creditors. On the other hand, creditors who do not present their claims on time lose whatever preferences they had in the order of payment and become common creditors as to the dividends yet to be distributed, the judicial acknowledgment of their claims being made at their expense; if they never had a preferred right of payment, then they lose one-third of what they would have received on their claims. If the assets of the estate have been distributed when these claims are presented the court will not entertain them.<sup>23</sup>

<sup>21</sup> Code of Commerce, arts. 1433-1436.

<sup>22</sup> Code of Commerce, arts. 1437-1444.

<sup>23</sup> Code of Commerce, arts. 1462-1465.



## ALLOWANCE OF CLAIMS

As soon as the judge decides which claims are entitled to vote he will declare the statement of claims closed, and fix the fourth day after the general report is presented to him for the meeting of creditors to consider and allow claims. Creditors who appear thereafter are considered in default and suffer the penalties indicated in the previous paragraph. At the meeting of creditors and the public attorney (creditors may appear personally or by duly empowered agent) the list of claims with their corresponding documents, the syndic's report, and the court's decision with regard to them, will be read. After hearing any observation which those present or the bankrupt may make, the creditors vote on each credit; to exclude any credit a vote of three-fourths of the creditors present representing two-thirds of the claims or vice versa is necessary; for this purpose the court may convene the necessary meetings, but all must be held within 20 days, counting from the first meeting. The credits allowed will be marked "Allowed, for the amount of —", and the note signed by the judge and syndics; the excluded credits are returned to their owners.<sup>24</sup>

## CONTESTING ADMISSION AND EXCLUSION OF CREDITS

The resolutions of the judge, following the general report of the syndic, and those of the meeting, may be contested by one or more of the creditors, or the bankrupt, by separate proceedings before the same court. The action against a resolution of the meeting must be filed within 10 days thereafter; creditors may not contest a resolution for which they voted. The action against the admission of a credit must be directed against the creditor so favored, while that against the exclusion of a claim must be instituted against the syndic. The hearing in these actions must be held within 8 days following their filing; the corresponding proceeding must be concluded within 15 days thereafter unless the necessary evidence cannot be procured within that time, in which case it may be extended to 60 days. The proceedings on appeal or revision must be terminated within similar periods of time.<sup>25</sup>

## JUDICIAL LIQUIDATION AND SURRENDER OF ASSETS

Any merchant who has suspended payments may claim the benefit of judicial liquidation within 3 days thereafter, by filing a petition to that effect accompanied by a statement of his assets and liabilities and the circumstances which have forced him to suspend payments. The court then issues the writ indicated on page 153 to safeguard the property, and all the measures indicated on page 153 will be taken until the examination of credits prior to their allowance is terminated within the following 10 days. The court then summons the creditors to a meeting, which will consider the proposition of the debtor or the syndic concerning a composition. If this is entered into the debtor is again placed in charge of his business in accordance with its terms; otherwise the procedure in bankruptcy is followed in order

<sup>24</sup> Code of Commerce, arts. 1445-1450.

<sup>25</sup> Code of Commerce, arts. 1444 and 1451-1460.

to liquidate and pay the credits; the creditors will appoint a permanent syndic and interventor by a majority vote ("a pluralidad de votos").

The debtor whose liabilities exceed his assets must set this forth in a petition to the court in the manner indicated in the previous paragraph, within 3 days after suspending payments. This proceeding known as surrender of assets follows the same procedure as that of judicial liquidation indicated above.<sup>26</sup>

#### INVOLUNTARY BANKRUPTCY

One or more creditors of a bankrupt may institute proceedings in involuntary bankruptcy ("concurso necesario"), in the following cases: (1) When sufficient property of the debtor is not found to satisfy the execution of a final judgment on the merits (judgment which has the force of *res adjudicata*), bankruptcy proceedings will be ordered on the court's own motion or upon petition of a creditor; (2) when executory action is filed to collect a bill of exchange, an instrument payable to order or bearer, a public document, or any other on which such action may be grounded and sufficient property is not found, or the debtor fails to deposit or give bond in the amount of the complaint; (3) where the condition mentioned in (1) and (2) is true in suits against a merchant based on civil debts; (4) where the debtor absconds or conceals himself; (5) when the state of insolvency becomes apparent during the course of any suit; the bankruptcy proceedings in this case may be ordered on the court's own motion or on petition of a party; (6), (7), and (8) are cases involving the bankruptcy of banks; (9) in all other cases provided by the Code of Commerce.

In these cases, upon the presentation of the petition, the court will declare the debtor in bankruptcy as a matter of course and will order the securing of the property as indicated on page 153. However, the merchant or business organization declared bankrupt may request the revocation of the declaration within 3 days thereafter and offer evidence against it for which a period of 15 days will be allowed; but where he has made the declaration of his bankrupt condition the debtor may not ask its revocation, except upon a plea of error in the appraisal of the business. Creditors, either secured or unsecured, may demand the revocation of the declaration even after the debtor has petitioned or consented to his bankruptcy. A composition of creditors, even though unanimously approved, may not be alleged to revoke the declaration of bankruptcy. The revocation will be made only when it is proven that the debtor is meeting his payments on time and there is no excess of liabilities over assets. In all other cases, the debtor will be summoned to appear within 3 days and, if he has evidence to offer in opposition, a term of 15 days will be fixed for its presentation, after which the court will pass upon the issue. After the time to request the revocation has expired it is presumed that the debtor and all other interested parties accept the declaration in bankruptcy. When this becomes final the court proceeds in the manner indicated under "Judicial Liquidation."<sup>27</sup>

<sup>26</sup> Code of Commerce, arts. 1466-1473.

<sup>27</sup> Code of Commerce, arts. 1474-1484.

## ADMINISTRATION OF THE BANKRUPT ESTATE

If the bankrupt and his creditors do not enter into a composition, the *sindic* and the *interventor* will continue to administer the estate and will attempt to sell the enterprise within the month following notice of lack of composition, for not less than 75 percent of the value indicated in the last inventories; if there are no inventories, an appraisal will be made by a broker or creditor. After the month elapses and no sale is made, the property will be offered at auction sale, no bids being allowed for less than two-thirds of the value; the unsold portions will again be auctioned 5 days thereafter, bids for not less than 40 percent being allowed. Finally, the remaining goods will be sold at auction for what they may bring. Bids must be for cash and may be offered by anyone including creditors. The amounts obtained will be deposited in closed bags in a bank.

Six months after the first meeting of creditors, at the latest, the *sindic* will present a project of classification of creditors in their order of payment; should he fail to present it he may be removed and another one appointed to do so within a month. If at the time of the judgment of classification there is property in litigation which has not formed part of the estate, the unpaid creditors may appoint a special *sindic* to terminate the suits and dispose of the property. This *sindic* will earn the fees of a judicial agent and will be paid by the creditors who appoint him.<sup>28</sup>

## CLASSIFICATION OF CREDITORS

Within the month allowed for the sale of the assets, the *sindic* must prepare the project of classification of creditors in their order of payment in accordance with rules set forth on page 151. Credits for labor and rolling stock are in the second group of creditors to be paid out of personal property (p. 152). This project will be discussed in a meeting of creditors convoked by the court within 10 days after it is presented. Should the *sindic* be a creditor the *interventor* must submit a report on his claim within this time. If differences arise with regard to the classification of any credit another meeting will be held, with 20 days' notice, and the dissenting creditors may leave therein briefs in support of their contentions, which will be considered by the court together with the record of the meetings in rendering the judgment of classification. All credits whose validity is in litigation will continue this separate course until ready for judgment, when the parties will be cited for judgment of classification of credits which will be rendered within a term not exceeding 2 months.

The judgment mentioned above must set forth: (1) The existence and kind of bankruptcy in question; (2) the determination of the date of the bankruptcy; (3) statement of lawful claims, their amount, kind, and their order of payment; (4) the application of the proceeds to the payment of claims; and (5) the decision of all pending collateral proceedings (*incidentes*).

Against this judgment the public attorney, the debtor, or any common debtor whose claim exceeds 3,000 pesos, may appeal within

<sup>28</sup> Code of Commerce, arts. 1485-1490.

3 days. When the record is presented to the appellate court the appellant and syndic will be notified and they may ask within 3 days that proof be taken for which 8 days will be granted. A hearing is then fixed; within the following 8 days judgment is rendered therein, against which *only cassation* or nullity proceedings may be filed.<sup>29</sup>

#### ORDER OF PAYMENT OF CLAIMS AGAINST NONMERCHANTS

The order of payment of claims against merchants, including those arising out of civil or commercial transactions, has been indicated in the preceding sections (p. 151). This discussion is limited, therefore, to the classification and payment of claims against non-merchants in civil insolvency proceedings, as prescribed by the Civil Codes of 1932 and 1884. Under the former code all claims for taxes must be paid first out of the revenue from the property on which the taxes are due. Mortgage and pledge creditors may discharge their claims out of the property mortgaged or pledged; if any part of their claims remain unpaid they will be paid as third-class creditors. Laborers are entitled to wages or salaries during the last year of their employment and the indemnities due them; property of the insolvent must be sold, therefore, to satisfy these credits. In cases where the insolvent debtor inherited property already encumbered with certain claims, the holders of such credits may seek satisfaction out of the inherited property by requesting the withdrawal of that property from the insolvency proceedings within three months after acceptance of the inheritance or the filing of such proceedings, and provided a novation of such claims was not entered into or the personal liability of the insolvent was not accepted in lieu of such credits on property. This right also exists under the code of 1884.

The following claims are also entitled to preference under the code of 1932:

1. Debt incurred by reason of expenses of salvage, upon the property salvaged.
2. Debt contracted prior to insolvency proceedings in order to preserve certain property, upon such property.
3. Credits for construction of movable property, upon the property constructed.
4. Credits for seeds, cultivation, and harvest, upon the price of the thing harvested and in possession of the insolvent.
5. Credits for freight charges, upon the property transported.
6. Claims for lodging, upon the price of the property of the guest found at the lodging place.
7. Credits of the landlord, upon the movable property found in the leased premises, or upon the yield of the crops if the property leased is rural.
8. Credits arising out of goods sold and not paid for, upon such goods, if the creditor presents his claim within 60 days following the sale if made for cash, or after maturity, if made on credit.
9. Credits recorded in the property registry by virtue of judicial order, attachments, execution of judgments, and sequestration, upon the property recorded, but only as to subsequent credits.

<sup>29</sup> Code of Commerce, arts. 1491-1500.

Out of the remaining property the following claims must be paid (first-class creditors): (1) Judicial expenses; (2) costs of administration and conservation of the estate; (3) funeral expenses of debtor, his wife and children under his parental authority and who have no property of their own; (4) the expenses of the last sickness of these persons during the 6 months preceding death; (5) credit for sustenance during 6 months preceding the civil insolvency proceedings; (6) civil liability for the expense of the illness or funerals of the party aggrieved, and sustenance pensions owed to relatives.

After the previous claims are paid the following must be discharged (second-class creditors): (1) Claims of descendants, minors, incapables, and legatees who failed to demand legal mortgage as security, of the persons who administered their property; (2) claims of the Government other than taxes; (3) claims of public or private charitable institutions.

The claims evidenced by public instrument or other authentic document must be paid out of the residue (third-class creditors), followed in the order of payment by the credits set forth in private documents (fourth-class creditors), and lastly, all other credits will be discharged, if any property remains, pro rata, without regard to their dates or origin. If there are several creditors of the same class and number they will be paid in the order of the dates of their credits, if such date is proven beyond doubt; in any other case, they will be paid pro rata, within each class and number.<sup>20</sup>

Under the Civil Code of 1884<sup>21</sup> owners of nonfungible property deposited under seal, lock, or sealed, and mortgage debtors are entitled to recover and be paid out of the specific property. The first-class creditors must be paid in this order: (1) Judicial expenses; (2) cost of administration and conservation of the property of the estate; (3) last matured annuity on the insurance of said property; (4) taxes due during the last 5 years; (5) costs of repairs and reconstruction of immovables; (6) pensions, incomes, etc., which matured during the last 5 years. The preference under numbers (3) to (5), inclusive, is limited to the value of the property actually benefited or on which the taxes were imposed.

The second class debtors under the Code of 1884 are: (1) Credits for goods sold and unpaid in the manner previously described herein; (2) credits for freight charges, lodging, seeds, etc.; claims for rentals of rural properties, and certain claims of landlords of urban property, upon the specific property involved or the property of the debtor found therein, as the case may be.

The third-class creditors under this code have preference over the immovable property free from mortgage and the movables not included in the previous paragraph, and are paid in this order: (1) Funeral expenses of debtor; (2) expenses of last illness during a period not to exceed 1 year; (3) expenses of sustenance of debtor and his family during 6 months preceding the institution of insolvency proceedings; (4) claims for salaries of domestic servants and for services rendered to the family during the last 2 years; (5) claims of descendants, minors, incapables, married women, creditors

<sup>20</sup> Civil Code, 1932, arts. 2980-2998 and 2977.

<sup>21</sup> Civil Code, 1884, arts. 1928-1964.

and legatees entitled to legal mortgage as security to be given by the person in charge of their property but which security was not obtained; (6) claims for the value of deposits of fungible goods delivered without marks; (7) certain Government credits entitled to legal mortgage (see art. 1875) but not secured by one; (8) certain other persons entitled to legal mortgage (see art. 1875).

Under a fourth class, to be paid out of the remaining property, are included mortgage creditors for the unsatisfied portions of their claims, then creditors whose claims are evidenced by public document, and then the creditors under the preceding classes and not satisfied in full. After all these claims are discharged creditors whose claims are set forth in private document duly stamped are paid, next followed by all other creditors who are discharged pro rata, without regard to the date or origin of their credits. In last place in the order of payment are the claims for civil liability arising out of crimes and the fines.

### XIII. LEGAL PROCEDURE

Under the system of government in Mexico there are both Federal and State courts. The Federal Government has defined the jurisdiction of the former and enacted a code of procedure to govern the administration of justice in them. It has also created courts for the Federal District and territories and provided their rules of procedure. The various States have their own judicial machinery and procedure, analogous to the Federal in fundamental aspects.

The Federal courts take cognizance of all controversies arising out of laws or acts of: (1) Any authority which shall infringe any personal guarantees; (2) the Federal authorities, which shall limit or encroach upon the sovereignty of the States; and (3) the State authorities, which invade the sphere of the Federal authorities.<sup>1</sup> These tribunals also have jurisdiction over all controversies of a civil or criminal nature arising out of the application and enforcement of the Federal laws or out of treaties concluded with foreign powers; whenever such controversies affect only private rights, the regular local courts of the States, the Federal District, and Territories may assume jurisdiction, at the election of the plaintiff.<sup>2</sup> By virtue of this constitutional provision, therefore, it is possible to consider mercantile, mining, and other questions, arising between private persons in State courts, even though the laws applicable are creatures of the Federal legislative power; however, in the event that the Federal Government becomes a party to such controversies, then the jurisdiction of the Federal courts becomes exclusive. The jurisdiction of these tribunals extends to all admiralty cases, those in which the Federal Government is a party, cases which may arise between two or more States, between a State and a citizen of another State, cases arising out of treaties with foreign powers, and those concerning diplomatic and consular agents.<sup>3</sup> A distinction is made here with regard to cases in which the Federal Government is a party. Article 105 of the constitution gives to the supreme court exclusive jurisdiction of cases in which the Federal Government "is a party."

It is said that in a controversy the Federal Government may be an "interested party" only, in which case the Federal district courts have original jurisdiction of the case, or that the Federal Government may be an "actual party" in a controversy, in which case the Federal supreme court has exclusive jurisdiction. In many cases Federal laws provide where controversies arising thereunder will be heard, as in the case of laws governing waters, mines, patents, trade-marks, public lands, railroads, stamps, and taxes, which give original jurisdiction of cases to the Federal district

<sup>1</sup> Constitution, art. 103.

<sup>2</sup> Constitution, art. 104, part I.

<sup>3</sup> Constitution, art. 104.

court. The constitutionality of such provisions is said to be sustained on the theory that since the constitution does not define when the nation is a party to a suit at law, the power to so define lies in the Congress, in accordance with the last paragraph of article 73 of the constitution.<sup>4</sup> Where the jurisdiction is not determinable in this manner, it may become an intricate problem of law to ascertain whether a case should be filed in the district or supreme courts, due to the difficulty existing in deciding when the Federal Government is an "interested" or an "actual" party.

## JURISDICTION OF FEDERAL COURTS

### THE SUPREME COURT

This court consists of 16 justices (ministros) elected for life. It may act in banc ("de pleno"), that is, with all its members sitting (a quorum of 11 is sufficient), or in 3 chambers of 5 judges each. As a tribunal in banc it has exclusive jurisdiction to consider:

1. Controversies arising between two or more States, between branches of government of one State concerning the constitutionality of their acts, and conflicts between the Federal Government and one or more States, as well as those in which the Federal Government is a party.

2. Questions concerning the competency of certain courts and other matters concerning lower courts.

3. Civil matters with regard to the administration of justice and procedure in the courts.

The first chamber of this court considers "amparo" proceedings in criminal actions; the second, similar proceedings in administrative matters; and the third has jurisdiction of "amparos" in civil matters and of certain appeals against judgments rendered on appeal by the courts of the States, the Federal District and Territories in controversies arising out of the application and enforcement of Federal laws and treaties. (These courts may consider such controversies only when private rights are affected, at the election of the plaintiff.)

### THE FEDERAL CIRCUIT COURTS

These courts consist of one judge each, known as a "Magistrado de Circuito", appointed by the supreme court. They have jurisdiction of appeals from district courts, of proceedings to deny appeals, to consider questions involving the availability ("impedimentos, recusación y excusas") of district judges and of other matters referred to them by law.

### THE FEDERAL DISTRICT COURTS

These courts are presided over by single judges appointed by the supreme court and have jurisdiction of: (1) Controversies arising between a State and citizens of another State; (2) "amparo" proceedings in accordance with the regulatory law of articles 103 and 104 of the constitution; (3) civil and penal cases arising out of

<sup>4</sup> Campillo, *Derecho Constitucional Mexicano*, vol. II, p. 454.



treaties, Federal and maritime law, or involving national and foreign consular or diplomatic representatives; and (4) all other cases as determined by law. In the cases under (3) it is interesting to note, if the controversy affects only private rights, the plaintiff may prosecute the suit in the courts of the corresponding State, Territory, or Federal District, at his election.

The organic law of the courts of the Federal District and Territories<sup>6</sup> provides the following courts:

(1) *Superior tribunal*.—This court consists of 25 judges ("magistrados"). Besides certain administrative functions, it has jurisdiction of appeals and other proceedings in civil cases coming from civil courts of first instance in the Federal District and Territories.

(2) *Courts of first instance*.—The Federal District is divided into four judicial districts, in one of which is Mexico City. The territory of Northern Lower California is divided into three judicial districts, while Southern Lower California is divided into two. There are 14 civil judges in the judicial district of Mexico and one court of first instance in each of all the other districts. They have jurisdiction of civil controversial cases in which the amount involved exceeds 1,000 pesos. The courts of first instance in the judicial districts other than that of Mexico are of mixed jurisdiction, that is, they hear civil and criminal cases.

(3) "*Jueces Menores*."—These judges have jurisdiction of civil controversial cases in which the amount involved is from 200 pesos to 1,000 pesos.

(4) *Justices of the peace*.—The jurisdiction of these judges in civil cases is limited to those up to 200 pesos in amount.

In addition to the above courts, several other judicial bodies and officials such as "jueces ejecutores" (who execute attachments and execute judgments), "jueces populares" (who have jurisdiction of all judicial matters affecting the person and property of minors), criminal courts, popular jury, courts for delinquent minors and arbitrators, are created by this law.

#### PROCEDURAL LAWS IN FORCE

The procedure in the courts of the Federal District and Territories is governed by the Code of Civil Procedure for the Federal District and Territories of August 29, 1932, effective since October 1 of that year, while the Federal Code of Civil Procedure of December 26, 1908, governs procedure in the Federal courts.

#### THE "AMPARO" SUIT

Perhaps one of the most important legal remedies in Mexico, and probably an outstanding contribution to juridical science, is the "amparo" suit. This extraordinary remedy presents analogies to the American writs of prohibitions, error, certiorari, injunction, and habeas corpus. Its purpose primarily is to prevent breaches of the constitution through the enforcement of laws contrary thereto or acts of the governmental powers inconsistent therewith. It is also intended to preserve the personal guaranties of individuals, such as

<sup>6</sup> Law of Dec. 30 1932 as amended by law of Dec. 27. 1932.

freedom from slavery, ability to engage in lawful professional, industrial, and commercial pursuits, freedom of expression, press, petition, peaceful assembly, and the one providing against the deprivation of life, liberty, or property without due process of law.<sup>7</sup> The sources of the action are traceable to the Anglo-Saxon writ of habeas corpus; its fundamental basis is set forth in article 103 of the constitution.<sup>8</sup> It is, therefore, a remedy to be sought in the Federal courts, although in certain cases recourse is allowed to the State or other courts which then act in a temporary and auxiliary capacity only, the suit being transferred to the proper Federal tribunal immediately thereafter for final determination.

During recent years recourse to "amparo" has become so frequent that it is sought in practically every case of any importance filed in Mexican courts today. It is therefore advisable for the exporter to become familiar in a general way with the nature and procedure of the suit, when invoked in civil and commercial litigation.

#### GROUNDS FOR "AMPARO"

In addition to the grounds for "amparo" already set forth above, the remedy may be sought in civil and commercial litigation against final judgments—that is, judgments against which no other ordinary recourse such as appeal is available by which the judgment may be modified or amended. There must exist a violation of law in the judgment or, if such breach was committed during the course of the trial, objection to it must have been noted and protest entered against the denial of reparation and provided, further, that when the violation of law was committed by the court in which the case was originally filed, it was alleged on appeal as a violation of law. "Amparo" may be sought against final judgment when it is contrary to the letter of the law applicable to the case or contrary to its legal interpretation, when it includes persons, actions, defenses, or things which have not been made the object of the suit, or finally when all these have not been included, either through omission or express refusal. The writ of amparo may be issued also if substantial portions of the rules of procedure have been violated, if the violation deprives the petitioner of means of defense. These violations exist when the petitioner:<sup>9</sup>

1. Was not or was improperly summoned to appear in the original action.
2. Was poorly or fraudulently represented in the action.
3. Was denied the admission of evidence which was admissible.
4. Was not granted the terms and extensions of time allowed by law.
5. Shows that evidence offered by the other parties was admitted without his knowledge not due to his fault, except public documents.
6. Shows that some documents or portions of the record were not shown to him in order that he might remark upon them.
7. Shows that after a question of jurisdiction or competency ("competencia") was raised the court did not suspend the proceed-

<sup>7</sup> Constitution, arts. 1-30.

<sup>8</sup> See note supra.

<sup>9</sup> Constitution, art. 107; "Amparo" law, art. 108.

ings, or that the judges whose disqualification was sought continued to hear the case unless otherwise authorized by law to do so.

The petitioner of "amparo" grounded on violation of law must show that there is a law in force which is applicable to the case, that the judgment is contrary to it, and that there are no particular facts which eliminate this contradiction. By law is meant not only a legislative act but everything that has the effect of law; it may be, therefore, positive law, general principles of law, treaties, or foreign law if it causes the violation of Mexican law. The contradiction may consist in a breach of the text of the law, its false application, and its erroneous interpretation. As regards the facts, the court in which "amparo" is sought may examine the facts, the evidence of which is defined, or whose juridical weight and consequences are determined by law. It may not question facts, the findings of which lie in the discretion of the court which heard the case. Although the original court is sovereign as regards considerations of the law in a contract, in order to interpret ambiguous and doubtful clauses, if its resolutions in these matters change the nature of the act, the "amparo" court may question them.<sup>10</sup>

Writs of "amparo" against final judgments must be filed in the Federal Supreme Court. When "amparo" involves an act of an authority other than the judicial, or the acts of the judiciary exercised outside of suit or after its termination, or acts committed during suit whose execution cannot be redressed, or which affects persons not parties to the suit, the writ may be sought in a district court from whose decision an appeal may be taken to the Supreme Court. By a final judgment ("sentencia definitiva") against which "amparo" may be sought directly from the Supreme Court, is meant one which passes on the principal object (merits) of the case and which considers the action and the defenses alleged which give rise to the issues. Against interlocutory and mesne judgments and resolutions, "amparo" must be sought in the district courts.

The bulk of "amparo" suits are based at the present time on violations of law or procedure in the manner previously indicated. The extension of the writ to these cases gave rise to a notable increase in number of petitions for the remedy, because it affords the petitioner a convenient and expeditious manner of obtaining a review of the case not otherwise available. Such a review is in the nature of a cassation and may accomplish a similar purpose. The essential difference between the two lies in the fact that the amparo will not be granted unless an actual and positive prejudice or damage resulting from the act, against which the remedy is sought, is shown; the "amparo" is a practical means of seeking reparation and not a method of discussing abstract questions of law, nor is its object to preserve the purity of the law as is cassation, but to protect the individual against the abuse of power when such abuse prejudices him.<sup>11</sup>

#### PROCEDURE IN "AMPARO" SUITS

The "amparo" suit commences with the filing of a complaint by the party aggrieved, who may be an individual or a juristic person,

<sup>10</sup> Campillo, *opus cit.* vol. II, p. 541-544.

<sup>11</sup> Couto, *La Suspensión del Acto Reclamado en el Amparo*, p. 41.

such as companies, municipalities, States, or even the Federal Government. The petitioner may appear personally or by duly empowered agents. The grounds for relief and the act against which it is sought must be set forth in clear and concise language. The complaint, when directed against final judgments in civil cases, is filed in the Supreme Court.

In cases when the "amparo" must be filed in district courts, the one within whose jurisdiction the law or act complained of was enacted, ordered, or its enforcement or performance attempted, is competent to hear the "amparo." If there is no district court therein, the corresponding local court of first instance may admit the complaint and suspend the act. The justices of the peace may act in cases involving death penalty, banishment, or other act prohibited by article 22 of the constitution. Violations of the guarantee against illegal searches, seizures, and of proper criminal trials as set forth in articles 16, 19, and 20 of the constitution may be complained of before the tribunal superior to the one committing the act, or before the corresponding district court, and appeal may be made from either court to the Federal Supreme Court.

Justices of the peace, "alcaldes", and "conciliadores" may hear "amparos" against local judges of first instance whenever no district judge resides therein. In all these instances the cases must be referred, after the suspension of the act is considered, to the proper district court. When amparo is sought against a district or circuit judge, the complaint must be filed with the local judge of first instance or justice of the peace, "alcalde", or "conciliador"; but after the suspension of the act complained of the record must be submitted to the district court, which may act in substitution of the tribunal against which the complaint is lodged. If there are two or more district courts in a place, one may hear "amparos" against the others. No "amparo" lies against acts of the Federal Supreme Court; neither will it lie if the act has been executed, consented to by failure to seek "amparo" within 15 days after notice of the act, has ceased to cause effect, or there is pending before another court a proceeding to sustain, revoke, or amend it.<sup>12</sup>

#### SUSPENSION OF THE ACT COMPLAINED OF

The immediate result of a petition for "amparo" is the suspension of the act complained of ("suspensión del acto reclamado"). This suspension, in the nature of a preliminary (interlocutory) injunction, is issued in order to preserve the rights of the petitioner until the judgment in the "amparo" is rendered. In recent years, the granting or denial of the writ of suspension has become of paramount importance, because of the fact that the Federal courts of Mexico have become flooded with petitions for "amparo", and have been forced to incur delays in rendering judgment to such an extent that denial of suspension sometimes may defeat the petitioner's claim, since the act complained of may be performed against him before judgment can be rendered.

The suspension is directed against the performance of the act giving rise to the petition for "amparo"; it is directed primarily

<sup>12</sup> Ley de Amparo, arts. 68, 46, 29-33.

against the measures taken to execute the act and, therefore, when the act is not performable but merely declaratory the suspension does not proceed. It has been held, as a general rule, that the suspension cannot produce the effects of the "amparo" itself. It must be decreed as a matter of course in cases involving the death penalty, banishment, or other act in breach of article 22 of the constitution, or acts which, if performed, would make it impossible for the petitioner to enjoy the constitutional guarantee which is violated. Otherwise the suspension may be decreed at the request of the petitioner: (1) Whenever irreparable damage or prejudice will inure to the petitioner by the performance of the act complained of, provided that society, the nation, or a third party is not damaged or prejudiced thereby; (2) whenever the suspension may cause damage to a third party, if the petitioner furnishes security against such damage; but if the third party in turn guarantees to restore the things to the condition existing prior to the violation of the constitutional guarantee and to pay the resulting damages, the suspension will be lifted. Generally no suspension will be decreed of an act already performed, or against an act which denies something as differing from one which purports to do something, or against future acts. This rule is difficult of application and has been the subject of many interpretations and exceptions by the Supreme Court which in this limited comment cannot be discussed at length.

The procedure to obtain a suspension varies, depending upon the court in which "amparo" is sought. If the relief is directed against final judgment the petitioner may formally notify the official against whose acts he is complaining that he has sought "amparo" in the Supreme Court; upon exhibition of three copies of the complaint, the suspension of his own acts will be decreed by the official so notified. However, the petitioner, in these cases, must furnish security against damages which may be caused by the suspension; on the other hand, the injunction will be lifted if the contesting party, in turn, gives security in the manner indicated in the previous paragraph. The suspension in these instances must be decreed within 24 hours after the "amparo" is sought, and within the same time the admission or denials of security must be decided. If the suspension is denied, the party aggrieved may appeal ("procedimiento de queja") therefrom to the Supreme Court. If the suspension must be decreed it will, as a matter of course (officially, *de oficio*) follow by the quickest means, including telegraphic or telephonic communication.

The suspension in "amparos" filed in district courts follows a prescribed procedure. In very urgent cases, in which the resulting damages may be considerable, the court in which the "amparo" is filed may issue a preliminary restraining order, under the conditions which, in its discretion, it may impose to maintain the status quo for 72 hours, during which time it must decree the suspension or the order ceases to have effect. The normal procedure is to start the proceeding of suspension with a copy of the complaint. The authority against which "amparo" is sought is notified to file a report on the controversy within 24 hours, and within the 48 hours after expiration of this term, the petitioner, the public attorney, and the third party prejudiced will be heard and the suspension decreed or denied. In urgent cases, the report of the authority may be given by telegram; if it is not filed within the 24 hours, a rebuttable presumption

arises that the act complained of has been committed. No other evidence is admissible in this proceeding. From the resolution denying or granting the suspension, appeal ("revisión") may be taken to the Supreme Court.<sup>13</sup>

#### SUSPENSION IN "AMPARO" AGAINST TAX COLLECTIONS

If "amparo" is sought against taxes, fines, or other fiscal charges, the suspension of the act may be decreed at the discretion of the court, provided the amount charged is deposited with the collecting office until final judgment is rendered; if this office refuses the deposit the petitioner may make it with the court from which he seeks "amparo", or in the office designated by that court if he resides in another place. The Supreme Court has held that the discretion of the court in granting suspension in these cases must be exercised, taking into consideration not the legality of the collection but the amount thereof, so that if the lack of the funds claimed hinders the exercise of normal public functions, the suspension must be denied ("Semanao Judicial, vol. XX, Sección de Jurisprudencia, palabra 'Impuesto'"). It has also been decided that the Treasury may dispose of the funds deposited pending final disposition of the "amparo"; however, more recently the Supreme Court has held that such deposits must be made in the Banco de Mexico, which requirement in fact prevents the collecting office from disposing of the deposit. In certain cases it is possible to give security instead of depositing the amount charged; for instance, where an attachment of property is made in favor of the fiscal authority, when "amparo" is sought against the procedure to collect and not against the collection of a tax, when it is claimed that taxes not included in the budget are being collected by municipalities, in case of collection of large fines or obligations due a fiscal authority, not in the nature of a tax.<sup>14</sup>

#### EXECUTION OF THE SUSPENSION

When a suspension is decreed and it is conditioned on the giving of security by the petitioner, the official against whom it is directed need not obey it until notified that the security has been given. Should he disobey the writ of suspension, compliance therewith will be enforced in the same manner as the final judgment in the "amparo." In addition, the assistance of the police power of the executive branch of the Government may be requested by the court. The suspension must be obeyed, not only by the authority against whom it is directed, but by all others who may intervene in the execution of the act enjoined. The disregard of the writ of suspension gives the petitioner the right to file a bill of complaint ("queja") in the district court, in order that it may direct the authority at fault to comply with the suspension in case it is determined that it has not. Appeal may be taken to the Supreme Court from this resolution.

Until final judgment is rendered the writ of suspension may be revoked or decreed, whenever circumstances take place during that interval which may warrant one of these resolutions.<sup>15</sup>

<sup>13</sup> Couto, opus cit. pp. 46, 60, 67, and 159; Ley de Amparo, arts. 51-62.

<sup>14</sup> Couto, opus cit. supra, p. 144.

<sup>15</sup> Couto, opus cit. p. 166 and 155; Ley de Amparo, arts. 69 and 63.

## THE JUDGMENT IN "AMPARO"

The judgment in the "amparo" suit is indirect, according to the commentator Lic. Ricardo Couto, because in protecting the petitioner against the effect of a law or act it does not attack the official from whom either arises. The granting of "amparo" may render the law or act without effect, but this is the result of the judgment and is not set forth therein. It is said that the judgment is negative because it does not require the doing of an act but only subjects the law or act to the test of constitutionality and, if contrary to the constitution, sustains the supremacy of the latter and protects the aggrieved party accordingly. The judgment is not general, because it is limited to the consideration of the law or act complained of in relation to the constitutional provision alleged to be violated; furthermore, its effects are limited to the petitioner so that if the law or acts complained of affect other parties they are not protected by the judgment rendered. The law or act against which "amparo" is directed is not annulled, although in actual practice the law is not enforced thereafter or the legislature revokes it.

When "amparo" judgment is rendered by the Federal Supreme Court, it will be the official against whom it is directed who will be notified in order that it may be complied with within 24 hours after receipt. If compliance is not begun within that time, the Supreme Court, at the request of one of the parties, will request the official in question to comply with its judgment peremptorily, and if, in spite of this, no compliance is obtained, the court will report him in order that he may be proceeded against criminally and will notify this to the authority directly over him in order that the judgment may be executed. The same procedure will be observed in case of delayed compliance. In "amparo" suits before district courts, the final judgment rendered will be communicated by them to the parties in order that it may be complied with within 24 hours; if ignored, the district courts will request the superior authority to execute the judgment; if there is no superior authority and the one proceeded against refuses to comply with the "amparo", the Supreme Court will turn the guilty party over to the proper authority for civil and criminal prosecution.<sup>16</sup>

## REVIEW PROCEEDINGS ("SUPPLICA")

Final judgments rendered on appeal ("segunda instancia") by Federal, State, or Federal District and Territorial courts, in which the performance or application of Federal laws or treaties is involved, may be appealed from to the Federal Supreme Court by "amparo" or by review proceedings ("suplica"). The latter is advantageous in that it permits a complete examination of the controversy on its merits, as regards the facts as well as the law. The Supreme Court, therefore, may nullify the previous proceedings up to any point, whenever there exists an error of procedure and may confirm, reverse, or modify the judgment. The review proceedings will be prepared in accordance with the rules governing appeals as

<sup>16</sup> Couto, opus cit. p. 35; Campillo, opus cit. vol. II, p. 516; Constitution, art. 107, pars. 1 and 10; Ley de Amparo, arts. 124-130.

set forth in the Federal Code of Civil Procedure. This right is important in that it affords litigants a third consideration of their controversies, particularly so in mercantile cases filed in the State and Territorial courts ("tribunales comunes"). Whenever the review proceedings are allowed or denied by the court against whose judgment it is invoked, the party aggrieved may petition the Supreme Court to review the writ denying the proceeding, or to declare that the review was improperly allowed ("incidente de suplica mal admitida"), as the case may be.

Whenever an interlocutory judgment (one which decides some point, but which is not a final decision of the principal controversy), rendered during the prosecution of a case in first instance, causes damage to one of the litigants, it may be appealed. If no appeal lies, it may be alleged before the court which rendered the judgment; if not, it may be excepted to and included in the assignment of error on appeal from the principal judgment. If no such appeal is possible, it may be made the subject of an "amparo."<sup>17</sup>

#### EFFECT OF "AMPARO" JUDGMENTS

The "amparo" law<sup>18</sup> provided that 5 consecutive judgments of the Supreme Court voted by a majority of 7 or more justices establish jurisprudence on a given point of law. But the organic law of the judicial power of 1928, in dividing this tribunal into 3 chambers of 5 judges each, failed to provide that a majority of 3 judges in each chamber would be sufficient for the purpose indicated above. However, the second chamber has held that 5 consecutive judgments rendered by it establish jurisprudence notwithstanding the lack of a majority of 7 or more justices; the same position has been taken by the third chamber, while the first has not ruled on this point.<sup>19</sup>

The fact that the organic law cited, in reorganizing the Supreme Court into three chambers of coequal authority, failed to provide for harmonizing the divergent judgments of the chambers, has given rise to the occurrence and persistence of conflicts of decisions between them which may tend to confuse the lower courts and the bar in their endeavors to arrive at a true understanding of the law in force.<sup>20</sup>

#### COMMERCIAL PROCEDURE

The Code of Commerce of Mexico provides special rules to regulate litigation arising out of mercantile acts, previously defined on page 10. These special rules are applied in all Federal, State, District, and Territorial courts because of their concurrent jurisdiction in commercial cases.

A notable feature of commercial litigation in Mexico, in addition to the fact that it is substantially uniform throughout the country,

<sup>17</sup> Ley de Amparo, arts. 131-146 and 97; Campillo, opus cit., supra, vol. II, p. 438.

<sup>18</sup> Arts. 147-150.

<sup>19</sup> See Schuster, *The Judicial Status of Nonregistered Foreign Corporations in Latin America—Mexico*, 7 *Tulane Law Review*, note 74.

<sup>20</sup> See Schuster, opus cit., p. 384, for a typical example of the confusion which may be caused by divergent decisions of the three chambers. For further comments on the "amparo" suit, see article by Justice Benito Flores in *American Bar Association Journal*, 1921, p. 388; Francisco Cortes, *Amparo al alcance de todos*; and S. Moreno Cora, *Tratado de el juicio de amparo*. See also remarks by Edward Schuster, Esq., in 1931 Yearbook, *Association of the Bar of the City of New York*, p. 286, and in *Tulane Law Review*, April 1933, opus cit., note 78.



is that the litigants may stipulate the procedure to govern the controversy. These stipulations must be set forth in a public document, or broker's policy, or before the court in which the complaint in the case has been filed. This power of stipulation is limited in the following respects: (1) There must be a complaint, an answer, and the presentation of the necessary evidence; (2) evidence not otherwise admissible according to law may not be admitted; (3) the jurisdiction of courts may not be altered; (4) the terms allowed to judges to render decisions may not be shortened; and (5) no proceedings ("recursos") against decisions in the case may be stipulated other than those provided by law, in accordance with the nature of the case and the amount involved.

The instruments in which the stipulations governing litigation are contained must set forth the name, domicile, and contractual capacity of the parties, whether they act in their own behalf or as agents for someone else, the case in which the stipulated procedure is to be observed, the evidence to be presented, the methods of proof and legal remedies waived, and the judge or arbitrator who is to consider the controversy.

Mercantile proceedings are classified as ordinary, executory, and special in bankruptcy and must be in writing. In any of them the parties may appear personally or in writing. A person may appear for a defendant even though not authorized to do so, but he must give security that his acts will be ratified and for the payment of the judgment rendered, damages caused, and costs incurred. Attention is called to the fact that persons having no domicile in Mexico may be sued therein, service of summons being made by letters rogatory if his address abroad is known, or by publication in the official newspaper of the place where he is sued. Suits must be brought before the court expressly or impliedly designated by the parties; if no such submission has been made, the suit must be brought in the court of the place designated by the debtor where payment may be demanded or of the place of performance stipulated in the contract. In the absence of this designation the action must be instituted in the courts of the domicile of the debtor; if he has several, in the one selected by the creditor; if he has no fixed domicile, the courts of the place where the contract was made, if the action is a personal one, or of the place where the property is located, if the action involves property rights only (in rem), may hear the case. If the property should be in several places the plaintiff may file the case in any one of them. In meetings of creditors ("concurso de acreedores") the court of the domicile of the debtor is competent in the matter. In the case of absence legally proved, the court of the last domicile of the person is competent; if it is unknown, the one of the place in which the larger portion of his property lies will be competent. In all other cases suit must be filed at the domicile of the plaintiff.<sup>21</sup>

#### PRECAUTIONARY MEASURES ("PROVIDENCIAS PRECAUTORIAS")

In order to protect the rights of the plaintiff and to secure the judgment, the "arraigo" of the defendant or the attachment of his

<sup>21</sup> Code of Commerce, arts. 1050-1062; 1068-1074; 1090-1111.

property may be obtained before or after suit is filed. By "arraigo" is meant an order to the defendant not to leave the jurisdiction of the court (writ of ne exeat); to obtain it, it must be shown by documentary proof, or testimony of three competent witnesses, that it is feared the defendant will leave the jurisdiction or go into hiding and that it is necessary to prevent him from so doing. If this order is requested before the complaint is filed, security to answer for damages caused in case it is not filed must be given. To obtain the attachment of property in real actions it must be proven, likewise, that it is feared the property involved will be hidden or wasted; in personal actions, that the debtor has no other property than that for which attachment is sought and it is feared he will hide or transfer it. In attachment proceedings, the amount in controversy, or of the property in issue, must be set forth and the judge must fix the amount up to which attachment may be made; security to answer for damages caused must be given. If any of these precautionary measures is sought before suit is filed, the complaint must be presented within 3 days thereafter, unless the action must be heard at a different place, when an additional day is allowed for every 20 kilometers and one for any fraction over 10. If the complaint is not presented on time, the precautionary measures will be revoked at the request of the defendant, who may then sue for the damages he has been caused thereby.<sup>22</sup>

#### PRELIMINARY PROCEEDINGS

The case often arises where a prospective litigant in Mexico lacks certain facts in order to prepare his case properly, or in order to prevent the loss of certain evidence before the suit is filed in court. He may request before filing suit: (1) The examination of the defendant as regards his capacity to appear (personally); (2) the exhibition of the movable property object of the real action (in rem) to be instituted; (3) the exhibition of title documents of property sold, in case of dispossession; if the prospective plaintiff is the purchaser, the request is directed to the seller and if he is the seller, it is then directed to the buyer; and (4) the presentation of documents or accounts of the company ("sociedad") or coownership by the copartner or coowner in whose possession they are. The prospective litigant may also request the examination of witnesses of advanced age or those who are in imminent danger of death or about to leave for a place with which communications are slow or difficult, when the action cannot be instituted immediately because it depends on the expiration of a term or fulfillment of a condition; this evidence may be requested in order to sustain a plea, provided the evidence is indispensable and the witnesses are in one of the circumstances just indicated.<sup>23</sup>

#### THE ORDINARY ACTION

The ordinary action is the one prosecuted in a lengthy and solemn manner established by law, in order that the issues raised by the litigants may be carefully considered, the true facts ascertained, and

<sup>22</sup> Code of Commerce, arts. 1168-1193.

<sup>23</sup> Code of Commerce, arts. 1151-1167.

judgment rendered after a detailed analysis of the controversy. It is, therefore, an expensive and long-drawn-out procedure which should be avoided whenever possible. It is begun with the filing of the complaint accompanied by the agent's power of attorney and the necessary copies if the plaintiff does not appear personally. The defendant is then served with summons, requesting his answer within 5 days after service, and copy of the documents presented by the plaintiff. Summons must be served personally, except in the cases indicated on page 172. If the defendant is not found at his domicile, notice is left for him to be present there at a certain time; if he does not heed this notice, the service is made by leaving with his relatives or servants or any other person in the house a statement ("instructivo") informing him of the name of the plaintiff, the court, the matter subject of the service, and the date.<sup>24</sup>

#### PLEAS AND DEFENSES

Within 3 days after service the defendant may file dilatory pleas ("excepciones dilatorias"). These pleadings raise issues intended to prevent the prosecution of the action and, therefore, may serve the same purpose as the common-law demurrer. The most common grounds for dilatory pleas are one or more of the following: (1) Lack of jurisdiction; (2) pendency of another action before another competent court; (3) incapacity of the plaintiff or his representatives; (4) nonperformance of the term or condition to which the action is subject; and (5) a legal defect in framing the complaint or in bringing the action. A separate proceeding is allowed to consider these exceptions, the parties being permitted to offer evidence whenever necessary during 10 days. Pleas may also be filed challenging the court's capacity to act because the judge is an interested party or is related to either party by blood, affinity, intimacy, or because of other causes; each party may also challenge without cause one judge of first instance, municipal judge, justice of the peace, clerk, assessor, or "magistrado"; these challenges are known as "impedimentos, excusas y recusaciones." The procedure involved in considering challenges is somewhat technical and, therefore, is of interest only to the lawyer practicing before a Mexican court; hence it does not merit a detailed analysis here. It may suffice to say that, in general, dilatory pleas and challenges may cause considerable delays, since appeals are allowed from the decisions disposing of them, the prosecution of the suit being suspended during the appeal.<sup>25</sup>

After the dilatory pleas are disposed of, the defendant must answer. He may deny the allegations of the complaint, counterclaim, or allege defenses ("excepciones perentorias"), such as any fact which may extinguish an obligation, for example, payment, waiver, or prescription. If he does not answer, judgment by default follows. If an answer is presented, the court, at the request of any of the parties, fixes the term for the presentation of evidence. This is another possible source of delay, since it is possible to obtain extensions of time. After the expiration of these terms the evidence presented is communicated to the litigants ("publicación de las

<sup>24</sup> Code of Commerce, arts. 1377, 1338, 1061, 1063-1070; J. R. del Castillo, "Práctica de enjuiciamiento mercantil", p. 82.

<sup>25</sup> Code of Commerce, arts. 1379-1390 and 1132-1150; Del Castillo, *opus cit.*, p. 182.

pruebas") and the record delivered first to the plaintiff and then to the defendants for a term of 10 days each, in order that they may prepare their corresponding briefs. Thereafter the parties are notified that judgment will be rendered, this being done within 15 days of the notification.<sup>26</sup>

#### THE EXECUTORY ACTION

The executory action, writes Del Castillo, is a rapid and practical proceeding in which delays are greatly limited and which permits of the quick collection of debts without great effort and loss of time. It has the added advantage that an immediate attachment of property of the debtor may be made without having to furnish security for the damages which might be caused. It is, therefore, a procedure which merchants always try to use in seeking redress. The suit is so summary in nature that the law placed upon it certain limitations in order to protect the defendant; these consist in restricting the right of action to cases grounded on instruments which are said to have executory force, such as final judgments, public instruments, negotiable instruments (see p. 33), insurance policies, judicial admissions, the decision of experts appointed in insurance cases to determine the amount of loss, and invoices, current accounts, and any other mercantile contracts judicially acknowledged by the debtor.

As soon as the complaint is filed the court issues an order of payment against the defendant, with notice that if he fails to pay, his property will be attached for an amount sufficient to cover the debt and costs incurred. If no payment is made, his property is attached in this order: Merchandise, credits easily collectible, other movable property, immovables, and all other actions and rights of the debtor. When the attachment is made, the debtor or other person summoned is ordered to pay or present pleas within 3 days. The defendant may plead, against any instrument object of the action except final judgment or negotiable instrument (see p. 26): The falsity of the instrument or contract therein contained, the exercise of force or fear, prescription, extinction of the right ("caducidad"), lack of capacity of the plaintiff or lack of judicial acknowledgment, lack of jurisdiction in the court, payment or set-off, waiver or extension, offer not to collect or to wait, and novation of the contract. The defendant may be allowed as much as 10 days to present his evidence, if he has any to offer; thereafter the parties are summoned to an oral hearing to be held within 3 days and judgment will be rendered within 5 days thereafter. The defendant may oppose the execution alleging the corresponding pleas and offering the evidence he may have within 15 days. The litigants are notified thereafter of the evidence presented and the record is delivered within 5 days to each, in order to prepare briefs; judgment ordering the public sale of the property attached or denying the execution will be rendered within 8 days.

Before the sale is made, the property under attachment is appraised by two brokers or experts appointed by the litigants. Publication of the sale is then made three times within 3 days, in case of movable

<sup>26</sup> Code of Commerce, arts. 1381-1390; Del Castillo, opus cit. p. 176; Pablo Zayas. Tratado elemental de procedimientos, vol. 1, p. 83.

property, and within 9 days in case immovable property is involved. If no bids are made, the creditor may request the adjudication of the property to him, for the price set for the last public sale announced. However, the litigants may stipulate in writing the manner of appraising the property and the terms of its sale.<sup>27</sup>

#### JUDGMENTS AND APPEALS

A judgment is interlocutory when it decides an incidental issue ("incidente"), a proceeding to dispose of dilatory pleas ("artículo sobre excepciones dilatorias"), or a question of jurisdiction. It is final ("ejecutoria") when its execution may be sought and is on the merits ("definitiva") when it decides the main issues in a case. If a judgment includes payment of the products of property ("frutos"), interests, or damages, the amount thereof must be fixed, or at least there will be established the basis for the liquidation of these items if they do not constitute the principal object of the suit.

Against a judgment the party aggrieved may (1) appeal to the court immediately superior when the amount involved exceeds 1,000 pesos; (2) seek that it be explained or clarified by the trial court, if it is on the merits; (3) request its cassation (the annulment of the judgment), provided it is a judgment on the merits rendered on appeal ("segunda instancia") in the particular case.<sup>28</sup> "Amparo" may also be obtained against it. The execution of a judgment must be sought before the court which originally rendered it. The execution involves the attachment (if none was previously made) and sale of the property.

#### INTERVENTION

In mercantile actions third persons may intervene in support of the claim of either litigant ("tercería coadyuvante"), or to claim against both ("tercería excluyente"). The latter kind of intervention may be based on a claim that the third party is owner of the property in litigation ("tercería de dominio"), or that he should be paid first out of the proceeds ("tercería de preferencia"). The intervention is prosecuted separately and must be supported by documentary proof in order to be effective. In cases of "tercerías de dominio", the principal action is allowed to proceed until execution sale and will be then suspended until the tercería is decided; when a "tercería de preferencia" is presented the suit is allowed to proceed through execution sale, but payment thereafter is suspended until the third-party claim is considered, after which payment is made to the creditor enjoying the better right.

When an intervention is requested in a commercial action, the plaintiff may demand that the execution of property be made more extensive; if this is not possible, he may petition the bankruptcy of the debtor. If the amount claimed in the intervention exceeds the jurisdictional limitation of the justice of the peace or minor judge before whom the principal case is being tried, the record of the case and the intervention is then sent to the competent court designated by the third party for consideration of the intervention.<sup>29</sup>

<sup>27</sup> Code of Commerce, arts. 1391-1414.

<sup>28</sup> Code of Commerce, art. 1321.

<sup>29</sup> Code of Commerce, arts. 1362-1376.

## JUDICIAL COSTS

An important consideration to bear in mind in any litigation is the liability for costs incurred in an action and, if there is such, what its extent is. The person sentenced to pay costs must indemnify those incurred by the other party; however, the fees of the judicial agent or counsel are not included unless they are, respectively, a duly licensed business agent or attorney duly admitted to practice. If a lawyer acts as judicial agent his fees are not included in an award of costs unless he has conducted the case without the aid of another lawyer. It may be stated in passing that in commercial litigation the litigants need not be represented by lawyers; however, in actual practice it is always advisable to have one, even though the actual representation in the case may be given to a judicial agent ("procurador").

The award of costs may be made when so provided by law or when, in the court's discretion, the losing party has acted rashly ("con temeridad") or is guilty of bad faith. The following always will be sentenced to pay the costs: (1) The one who offers no proof in support of his action or plea if based on disputed facts; (2) those presenting false documents or false or bribed witnesses; (3) the person against whom judgment is rendered in executory action, and the person who institutes one and fails to obtain a favorable judgment (in this case the award of costs will be made in the trial court; on appeal the next rule is applied); (4) the person against whom two judgments are rendered which are in complete harmony in their deciding parts, without considering the award of costs. In this case the award will include costs incurred in the original proceedings until the first judgment is obtained, and those incurred in the appellate proceedings until the second one is rendered.

The memorandum of costs will be presented by the litigant to whom they have been awarded; when this is done the other party is notified and given 3 days to oppose it; after the opposition is answered and judgment thereon is rendered, the party aggrieved may appeal therefrom in the manner previously indicated (see p. 176).<sup>50</sup>

## EVIDENCE

The Mexican rules of evidence differ from those prevalent in the United States in several important aspects, particularly as regards the relative value of oral and written evidence and the manner of presentation in a suit. It is important to know at least the fundamentals of the former in order to understand instructions from Mexican counsel and, above all, to conduct business operations in such a manner that, should the necessity for litigation in Mexico arise, the evidence in support of one's claim may be readily available or procurable in the form required for its proper presentation.

In this brief comment there will be discussed, first, the rules governing burden of proof—that is, the duty of proving the facts in dispute on an issue raised between litigants, and the time when evidence must be presented; and, second, the various kinds of evidence,

<sup>50</sup> Code of Commerce, arts. 1081-1089.

namely: admissions, public and private documents, testimony of experts, judicial examination, public report and presumptions, and their probative value or force.

#### BURDEN OF PROOF

It is evident that in order for a court to determine the facts in a suit it must ascertain first what the issue is and then who is duty bound to prove the facts. In order to guide and assist justice in the solution of these problems, the Code of Commerce provides the following rules:<sup>51</sup>

1. The one who alleges the existence of a fact must prove it; consequently, the plaintiff must establish the facts of his cause of action and the defendant those of his defenses; but once a fact is proven, its continued existence is presumed and need not be reestablished.

2. If a litigant denies something, he is not obliged to furnish proof unless his denial involves the express affirmation of a right; to illustrate: If A sues B to collect \$50 borrowed from him by B and B denies the making of the loan, he is not obliged to present any evidence. But if B answers the complaint alleging payment he must prove it, because his denial, in this case, is based upon the affirmation of a fact, the performance of the obligation. In addition, if the defendant alleges the termination of the right of the plaintiff, that it is null and void, he must prove the facts in support of this defense.

3. Whenever a denial is made which ignores a legal presumption in favor of the other party, the one who denies must present evidence. For instance, in the conjugal partnership the property in the possession of either one is presumed to belong to the partnership; if anyone alleges that it belongs exclusively to one of them, he must prove it.

The law need not be proved, except foreign law in cases when one of the parties bases his rights on it.

#### TIME FOR PRESENTATION OF EVIDENCE

In order to assure the orderly disposition of a suit at law, Mexican law provides periods of time for the presentation of evidence. In the Federal District and Territories, 30 days are allowed for this purpose unless the evidence must be obtained from the various States or from the United States, in which cases it is increased to 50 and 100 days, respectively. In the Federal courts 60 days are allowed to present evidence obtainable in Mexico, and as much as 120 days when it must be procured abroad. In commercial cases the ordinary term for presentation of evidence is 40 days; however, the judge, in his discretion, may extend this period, taking into consideration the place where and the quality of the evidence to be procured. Terms for presenting evidence may not be suspended except by consent of the litigants, or for good cause determinable by the court.<sup>52</sup>

<sup>51</sup> Arts. 1194-1197; Mateos Alarcon, *Estudios Sobre Pruebas en Material Civil, Mercantil y Federal*, pp. 12-16.

<sup>52</sup> Code of Commerce, arts. 1201-1210, and 1383; Mateos Alarcon, *opus cit.* pp. 20-33 and 37-53; Federal Code of Civil Procedure, art. 216; Code of Civil Procedure for Federal District and Territories, arts. 300-303.

## KINDS OF EVIDENCE—PROBATIVE FORCE

Article 1205 of the Code of Commerce enumerates the various kinds of evidence which may be presented. Article 1198 adds that the court must admit any evidence not contrary to law or morals. Therefore, in addition to being of a certain class, evidence must be pertinent to the matter in issue; if not, it may be objected to. In general, hearsay evidence is not admissible.

As regards its probative force, evidence constitutes complete proof ("prueba plena") whenever it is sufficient to convince a court and to permit it to render judgment. Such evidence, of itself, establishes the existence of the facts in issue; admissions, public instruments, and appraisals constitute complete proof. Evidence is direct when it tends to prove the very facts in issue; such are admissions, documentary, and testimonial evidence, and the judicial examination. Indirect evidence is that which tends to prove a fact by deduction from known facts; such are the presumptions of fact.<sup>33</sup>

## ADMISSIONS

An admission is the declaration and acknowledgment by a party of a fact alleged by the opponent in a suit. It may be judicial, when made before competent judge at the time of answering the complaint or in reply to interrogatories ("absolver posiciones"), or extrajudicial, when made before incompetent judge. An admission may be made voluntarily, as is the case when the defendant acknowledges the plaintiff's rights in answering the complaint, or in any other judicial proceeding; it may be involuntary, when made in reply to interrogatories. From the time the complaint is filed in a case until notice to appear to hear judgment, each party may request the other to testify under promise to state the truth (has the same effect as if done under oath). The litigant seeking such declaration must prepare interrogatories ("articular posiciones") in writing, couched in precise terms, not misleading; each one must deal with one fact only and the fact must be one of the declarant's own acts. Upon receipt of the interrogatories the court summons the party to testify, who must appear without his attorney or other person except as interpreter, if he is a foreigner. If he fails to appear, he may be summoned a second time with the admonition that, if he fails to appear, his absence will be taken as an admission of the facts. The answers must be affirmative or negative; however, the declarant may add such explanations as he may deem proper, or as the judge may request. The party who requested the hearing may appear therein personally or by judicial agent and may ask such new questions as he may consider desirable. Refusal to answer a question or to answer affirmatively or negatively is deemed an admission. When the examination is finished, the record ("pliego de posiciones") must be signed by the declarant; thereafter his declaration cannot be changed except that the hearing may be repeated to clarify doubtful points, at the request of the party who prepared the interrogatories.

<sup>33</sup> Mateos Alarcón, opus cit. pp. 33-36.



The attorney for a litigant cannot be requested to answer interrogatories concerning the affairs of his client; but the judicial agent ("procurador"), if authorized to testify in this manner, may be summoned to do so.

Judicial admissions constitute complete proof of a fact when made by a person capable of incurring obligations and who had acted without force or violence, in full knowledge of the fact and who testified, according to the rules prescribed above, concerning his own acts pertinent to the transaction involved. If in addition to constituting complete proof of facts, a judicial admission affects the whole claim, the plaintiff may withdraw the proceedings, if ordinary, and file an executory action instead. A party who has made an admission may offer evidence to the contrary. An extrajudicial admission will constitute complete proof if the incompetent judge before whom it was made was considered competent by the two parties in the proceeding.<sup>84</sup>

#### PUBLIC AND PRIVATE DOCUMENTS

In general the following are considered public documents: (a) Those issued by public officials in the proper exercise of their functions ("documentos auténticos"); (b) certified copies of notarial documents and, in the Federal district and territories, the original instruments; (c) documents and books of official archives; (d) certifications of facts in civil registries and parish records; (e) judicial proceedings; and (f) certificates issued by broker of mercantile contracts made before him.

These are admissible in evidence upon presentation when properly authenticated; if drawn within a State, territory, or Federal District, to be used in another jurisdiction, the authentication must be made by the corresponding governor. Those coming from abroad must be authenticated in the manner already indicated on page 56. Public documents constitute complete proof; the party against whom they are offered may only object to them on the grounds of falsity or to demand their comparison with the corresponding protocols or archives.

Private documents are those drawn by private persons without the intervention of any public official, and in which are set forth juridical acts requiring no special form in order to be effective. These instruments have no probative force unless judicially acknowledged by the party against whom they are offered. To obtain the necessary acknowledgment, the party to be charged must be summoned before the court, shown the whole document, and asked whether or not the signature therein is his own; he may allege the (civil) falsity of the contents of the writing and/or deny the authenticity of the signatures (criminal falsity).

The acknowledgment is presumed (1) when private documents are offered and no objection is made to them; and (2) when the party summoned to acknowledge one does not appear, or appears but objects (not on the grounds of falsity—without questioning the authenticity of the document) to the contents instead of denying

<sup>84</sup> Code of Commerce, arts. 1211-1236 and 1287-1291; Mateos Alarcon, opus cit., pp. 54-111.

the authenticity of the signature, or neither denies nor admits the authenticity of the document, or refuses to acknowledge it but does not deny the signature thereto. When the acknowledgment cannot be obtained because of the death or absence of the party to be charged, or for any other reason, a comparison may be made of the signatures to the document with those in other documents signed by that party, such as public documents or private instruments acknowledged by him.

The allegation of the criminal or civil falsity of a document merits some comment. The latter exists whenever the existence of an act is set forth in a document when actually another was performed, as, for example, when a sale with option to repurchase is made to conceal a usurious loan; this involves the simulation of contracts. Mateos Alarcon bases his views to this effect on article 1403 of the Code of Commerce, which states that in executory action the falsity of a paper or of the contract therein contained may be alleged as a defense. Whenever the falsity of the document itself, as differing from the contract set forth in it is alleged, then there is raised against it an exception based on criminal falsity. In cases of allegations of civil falsity by the person against whom a document is offered, the proceedings in the suit are not suspended, because its authenticity or signature is not denied, the attack being limited to the transaction evidenced by the instrument; the court, in its judgment, passes upon whether or not there was a simulation of the contract whose performance is sought. However, when such simulation prejudices third parties it becomes criminal falsity, and as such it causes the suspension of the proceedings until the falsity is established by judgment in the corresponding criminal proceedings, provided always that the party who has presented it desires that it be taken into consideration in rendering the judgment in the suit in which the document was offered in evidence.<sup>35</sup>

#### TESTIMONY OF EXPERTS AND JUDICIAL EXAMINATION \*

Experts may testify in actions at law as to facts of science or art. To qualify they must have a degree in the science or art if their profession is regulated by law; otherwise, any person well versed in the matter may qualify as expert. The testimony of experts does not constitute complete proof, except appraisals; the court will weigh it along with the other evidence admitted, in rendering judgment.

At the request of one of the parties or on the court's own initiative (officially), an examination of a place or thing by the court may be ordered. Minutes will be made of the examination and signed by all the parties present; in it will be set forth all the points which have arisen, the observations made by the parties, the testimony of experts, if there were any, and everything which the judge may deem desirable to arrive at the truth. The examination constitutes complete proof unless special or scientific knowledge is required to examine the subject matter.

\* Mateos Alarcon, opus cit. pp. 114-126, 127-160; Code of Commerce, arts. 1237-1251, 1292-1293.

\* Code of Commerce, arts. 1252-1260, 1299-1301; Mateos Alarcon, opus cit. pp. 170 and 202.

## DECLARATIONS OF WITNESSES

The testimony of witnesses may be offered in mercantile cases to establish facts in a given case. The following may not testify: Persons less than 14 years of age, except in cases of absolute necessity, mental incompetents, habitual drunkards, those who have been declared false witnesses or forgers of a writing, seal, or coin, professional gamblers, relatives of the litigants by consanguinity up to the fourth degree and by affinity (marriage) up to the second degree, spouses, those having a direct or indirect interest in the controversy, those living at the expense or on the salary of the one who offers their testimony, a mortal enemy, the presiding judge, the lawyers or judicial agents in the case, the guardians of minors in behalf of their wards, and the latter in behalf of the former while the accounts of the guardianship have not been settled.

Witnesses will testify in answer to written interrogatories prepared by the party who offers their declarations. Copies of these interrogatories must be given to the other contestants in order that they may prepare cross-interrogatories, which are not made known to the party presenting the witnesses until the hearing. The interrogatories and cross-interrogatories are then read to the witnesses by the judge at a hearing held for that purpose and which may be attended by the litigants. The judge, at his discretion, and on his own initiative, or at the suggestion of one or more of the parties, may put questions to the witnesses based on the facts contained in the interrogatories and also when the witness has failed to answer with regard to some point, has contradicted himself, or his declaration is ambiguous. After the termination of the hearing the declarations are read back to the witnesses, who may then change them; immediately thereafter the witnesses must sign the declarations, no change or alteration being allowed subsequently. If witnesses do not reside within the jurisdiction of the court, their testimony may be taken by deposition before the court at the place where they may be found.

The presentation of the testimony of witnesses is limited not only by the qualifications of the declarant set forth above, but also by the fact that the testimony of various witnesses must be uniform as to the substance; as to details, if there is no complete uniformity, at least the lack of it may not change the essential qualities of the facts to which the testimony refers. Witnesses may only testify as to transactions personally seen or heard or whose existence is known to them through the exercise of their senses and not through hearsay. They must explain how and in what manner they acquired knowledge of the fact about which they testify, in order that the court may determine the weight to be given to their declarations.

Oral testimony is greatly limited in value in Mexico. It lies in the discretion of the court to determine its proper weight; however, the testimony of one witness is not sufficient to prove a fact; two persons at least must have declared substantially the same facts in the manner and in accordance with the rules and limitations of the previous paragraph, before the court's discretion may be exercised.

In weighing oral testimony the judge must consider that the witness (1) properly qualifies as such; (2) is of the age, capacity,

and education and has the criterion necessary to judge the act; (3) is completely impartial by reason of his probity, independence of his position, and personal antecedents; (4) has not testified from hearsay; (5) testifies in a clear and concise manner, without hesitation or nondisclosures, either with regard to the substance or to the essential circumstances; and (6) has not been compelled to testify by force or fear, or impelled by deceit, error, or intimidation.

The testimony of witnesses may be impeached ("tacha") during the term fixed for presentation of evidence, or within 3 days after notification of the decree in which the evidence admitted is published for lack of qualification not appearing from their declarations. This is the subject of a separate hearing, at which oral testimony may be offered. The decision on these proceedings is included in the judgment in the suit.<sup>37</sup>

#### PUBLIC REPORT

By public report is meant the common opinion or belief of all or the majority of the persons of a place, with respect to a fact which persons declare that they saw or heard of from truthful persons. Because of the difficulty in distinguishing between public report and rumors, the former, although admissible in evidence, must conform to certain restrictions. Its probative force is that given to the testimony of witnesses. Public report to be admissible must (1) refer to a time prior to the commencement of the suit; (2) have originated from honest, trustworthy, and well-known persons not interested in the matter; (3) be uniform, constant, and generally accepted by the people of the place where the event happened, and be not based on religious or popular notions nor the exaggerations of political parties, but on a reasonable tradition or some facts which directly or indirectly prove it. It is proven by three or more trustworthy and competent witnesses, who must testify not only as to the persons whom they heard but also as to the probable grounds on which the belief or opinion is founded.<sup>38</sup>

#### PRESUMPTIONS

The conclusion made by the court, or provided by law from a known fact in order to prove the truth of another which is not known, is called a presumption. The former is designated a presumption of fact ("humana"); in such a presumption a fact may be deduced from a proven fact if the former is the ordinary consequence of the latter. Presumptions of law are so designated because they are expressly established by law or are the immediate and necessary consequence of the law. The one in whose favor a presumption runs is only obliged to prove the fact on which the presumption is based. Presumptions of law are conclusive (*juris et juris*) when so provided by law, or when they annul an act or deny an action unless the law has expressly reserved to someone the right to present evidence; otherwise most presumptions are rebuttable (*juris tantum*).

Presumptions must be weighty, that is, worthy of acceptance by persons of sound judgment; they must be definite, that is, the proved

<sup>37</sup> Commercial Code, arts. 1261-1273, and 1302-1306; Mateos Alarcon, *opus cit.* p. 211.

<sup>38</sup> Code of Commerce, arts. 1274-1276; Mateos Alarcon, *opus cit.* pp. 276-280.

fact must be a part of the antecedent or the consequence of the one to be proved. If it is desired to prove a fact by raising several presumptions, they must be consistent with each other and must be so connected together and with the proved fact that they cannot fail to be considered as antecedent or consequence of that fact. If a presumption is based on several facts, in addition to being weighty and definite, these facts must be so connected that they may produce different indications all tending to prove the fact in question, which, therefore, cannot fail to be their cause or effect. Presumptions of fact may not be raised to prove facts which must be evidenced in a special manner, according to law.

Irrebuttable presumptions constitute full proof; presumptions of fact will be weighed by the court, taking into consideration the nature of the facts, the evidence presented, the natural relationship between the known facts and those whose truth is sought to be established and the rules governing these presumptions.<sup>39</sup>

A typical instance of a presumption of law is the presumption of payment of prior rent raised when the receipts of the three last annual rentals are presented. Another is, that one in possession of property is presumed the owner thereof. Illustrative of irrebuttable presumption is the one provided by article 879 of the Code of Commerce, which declares null and void all gratuitous transactions in favor of descendants or ascendants, or in performance of obligations not due or not existing if such transactions are performed 30 days before the bankrupt fails to pay the first obligation whose nonpayment causes his bankruptcy.<sup>40</sup>

### COMMERCIAL ARBITRATION

In the successful transaction of export operations the element of time often plays a very important part. Whenever a question or dispute arises between the exporter and his customer, particularly when it involves the kind, quality, and quantity of goods, or the time and manner of delivery, frequently an expeditious determination is desirable in order not to retard the activities of the exporter and to save to the parties the good will and confidence of each to the other. Unfortunately, this is likely to be lost in long drawn out and expensive litigation in which the tendency to become acrimonious can be avoided only with difficulty. These circumstances have encouraged efforts to obviate such unfortunate results through arbitration. The success of this system of settling differences between merchants depends largely upon two factors, namely, that the law recognize clauses in commercial contracts providing for the arbitration of disputes arising thereunder to the exclusion of civil litigation, and that it provide for the compliance with such clause and for the execution of the corresponding awards. It is also of primary importance, in order to encourage the practice of submitting to arbitration, that the machinery set up either by the parties or by other agencies function fairly and justly and render awards promptly.

<sup>39</sup> Code of Commerce, arts. 1277-1286 and 1305-1306.

<sup>40</sup> Mateos Alarcon, *opus cit.* pp. 294-298.

In Mexico it is not possible to enforce clauses to arbitrate or the awards made in compliance therewith. The procedural law provides only that when a dispute arises the parties may submit it to arbitrators or friendly compounders. The proceeding involved is semijudicial in character and in practice has not been used to any extent by traders. Resort is often had to commercial arbitration provided by chambers of commerce. The American chambers of commerce, as well as those of other nationalities and the local ones, have drafted rules and provided the means of settling commercial disputes by arbitration. There is no arrangement for arbitration of commercial disputes between Mexican nationals and nationals of foreign countries through the International Chamber of Commerce or through the League of Nations.

Arbitration proceedings, in Mexico, generally require the preparation of an instrument of submission setting forth the matters to be discussed and the appointment of arbitrators or friendly compounders. In the Federal District and Territories there is no provision for the latter, but the Code of Civil Procedure provides that arbitrators will make awards in accordance with the rules of law, unless it is provided in the instrument of submission that they do so as amicable compounders or in accordance with the dictates of their consciences ("se les recomendara la amigable composición o el fallo en conciencia").

The execution of the award lies with the ordinary court of law to which the record in each case is transmitted for this purpose, after the award is notified.<sup>41</sup>

#### FOREIGN JUDGMENTS<sup>42</sup>

The execution of foreign judgments in Mexico is governed by the treaties to which that country is a party and, if there is none, by international reciprocity. This term means that if the jurisdiction wherein the judgment is obtained will not enforce a Mexican judgment, the Mexican courts will not execute a judgment rendered in that jurisdiction. There being no provisions in existing treaties between the United States and Mexico, the rule of reciprocity will be applied whenever the enforcement of a judgment obtained in the United States is sought in Mexico.

The execution of a foreign judgment must be sought before the court in Mexico which would have had jurisdiction of the action in which it was rendered (see "Commercial Procedure", p. 172). In order that it be enforceable by that court:

1. It must be authenticated by the proper Mexican consul or minister.

2. It must have been rendered in a personal action ("acción personal")—that is, an action to demand performance of a personal obligation either to give, perform, or not perform an act.

<sup>41</sup> See Comparative Study of American Legislation Governing Commercial Arbitration, prepared by the Inter-American High Commission, published by the U.S. Government Printing Office in 1928.

<sup>42</sup> The Codes of Civil Procedure of the various Mexican States contain the rules governing arbitration. In the Federal District and Territories the 1932 Code of Civil Procedure regulates these proceedings in its articles 609-636. See also Decree of June 12, 1908, on Chambers of Commerce.

<sup>43</sup> Code of Civil Procedure for the Federal District and Territories, arts. 25, 108, 303, and 604-608. It is believed that this procedure is substantially followed in the various States.

3. The obligation sought to be enforced by the judgment must be legal in Mexico.

4. The defendant must have been served personally with summons.

5. It must be final and enforceable according to the laws of its jurisdiction.

6. It must be properly authenticated.

The judgment must be accompanied by a translation which the court delivers to the other side for examination; if there is no objection to it within 3 days, the translation is accepted. If there is objection, a court translator must be appointed. That court may not consider whether the judgment is or is not just, nor the facts and law on which it is based; it may determine only its authenticity and whether it should be executed according to the laws of Mexico. The court's resolution ordering or denying the execution of the judgment is appealable.

## SUPPLEMENTARY PUBLICATIONS

The Division of Commercial Laws, of the Bureau of Foreign and Domestic Commerce, publishes Foreign Legislative News, in which brief résumés of current foreign legislation are presented. Detailed analyses of important laws, decrees, and regulations may be found in the General Legal Bulletin (foreign laws affecting American business) and in the Industrial Property Bulletin (patents, trade marks, copyrights, and unfair competition under foreign laws).

The following Bureau publications contain information on important current Mexican legislation not covered by this bulletin:

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