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Mexico

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Mexico's fifty-seventh President, Enrique Pena Nieto, began his campaign in 2012, promising to be a reform champion. He began immediately with the Pacto por Mexico (Pact for Mexico), signed by the leaders of the three main political parties. The Pacto por Mexico has initiated many much-anticipated reforms. In some areas, notably human rights and gay rights, the progress is tenuous. In other areas, the reforms are in their infancy. It is too soon to assess the viability of the reforms. One thing is certain —two-thirds of the way into President Enrique Pena Nieto's presidency, which is not without its detractors, the reforms are pointing Mexico in the right direction. 2016 saw the trend toward reform advanced on all fronts, with the legislature taking the leading role, resulting in several legally significant changes.

I. Mexico's Supreme Court of Justice

A. Equality Improvements for Widowhood Pension in Mexico

Mexico's 2011 Constitutional amendment on human rights represented an enormous step towards the protection and guaranty of the fundamental rights of its population. The 2011 Constitutional amendment[1] expanded the scope of Mexico's Constitution by including a series of provisions for Mexican authorities in the exercise of their respective duties, seeking to provide and secure the widest protection to rights of the human person.

On August 24, 2016, the Second Chamber of Mexico's Supreme Court ruled that men are as equally entitled to receive a widowhood pension as women are. The Second Chamber reached the decision based on the

1. Decreto por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos [Decree by which the denomination of Chapter I, Title First, of the Political Constitution of the United States of Mexico is modified and several provisions are amended], Diario Oficial de la Federación [DOF] 10-06-2011 (Mex.).

revision resource 371/2016, to which the Supreme Court granted an amparo. The Second Chamber held that Article 152 of the Social Security Law[2] (Ley del Seguro Social) violated the principles of non-discrimination and equality,[3] and therefore it should be considered unconstitutional.

The Justices of the Second Chamber of Mexico's Supreme Court ruled that the imposition of unjustified and differentiated requirements to obtain a widowhood pension clearly violated Article 1 of Mexico's Constitution, constituted gender discrimination, and assaulted human dignity. In the same regard, the Second Chamber found that Social Security encompasses not only the rights of workers, but also the rights of their families to be free from gender-based requirements in obtaining a widowhood pension.[4]

B. Same-Sex Adoption

Several states, *e.g.*, Coahuila, Chihuahua, Quintana Roo and Mexico City, have recognized same sex marriage. In November 2015, the Supreme Court ruled clearly that same-sex marriages were constitutionally permitted in Mexico.

Despite recognition of same-sex marriage in several states and the Supreme Court's decisions—and perhaps in response to substantial protests—Mexico's Chamber of Deputies voted down President Enrique Pena Nieto's proposed constitutional amendment to permit same-sex marriage in a stunning rejection by his own party (PRI).[5] The vote, viewed as a major setback for gay rights in Mexico, was widely lauded by religious organizations.

Although Mexico's jurisprudence in the area of discrimination has rapidly evolved in the last five years—beginning with reform of the Article 1 of the Mexican Constitution[6]—it is clear that Mexico's legal system is struggling with the evolution of ethical and behavioral norms. The Supreme Court has made giant strides that have been kept in check by the legislature.

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2. Published on March 12th, 1973, article 152 imposed excessive requirements for widowers, different from the required for widows who attempt to obtain a pension, such as the existence of a total incapacity and economic dependence of the widow on the deceased wife.

3. Noticia de la Suprema Courte de Justicia de La Nación, Evolución Normativa del Poder Judicial de la Federación [Normative Evolution of the Judicial Power of the Federation], formato HTML, http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=4370, consultada el 4 de abril de 2017) (Mex.).

4. *Id.*

5. *Mexico Congressional Committee Nixes Constitutional Amendment on Same-Sex Marriage*, (Nov. 11, 2016), http://www.constitutionnet.org/news/mexico-congressional-committee-nixes-constitutional-amendment-same-sex-marriage.

6. Decreto por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos [Decree by which the denomination of Chapter I, Title First, of the Political Constitution of the United States of Mexico is modified and several provisions are amended], Diario Oficial de la Federación [DOF] 10-06-2011 (Mex.).

The Supreme Court recently declared that any law prohibiting homosexual persons from adopting is discriminatory and, therefore, unconstitutional in an action brought by the Human Rights Commission of the State of Campeche, challenging the constitutionality of Article 19 of its local Civil Connivance Partnerships Regulatory Law (*Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche*).[7] In a power-packed two sentence decision, the Supreme Court held that sexual orientation is not relevant for the formation of a family or to adopt a child and declared that any prohibition on that basis is unconstitutional. The strongly held, differing views on this subject in Mexico demonstrate that this is a difficult issue. Critics argue that the decision violates Article 40 of the Mexican Constitution.[8] It remains to be seen which view will prevail: Did the Supreme Court overstep its boundaries, or did the Supreme Court properly exercise its function to apply and interpret the Constitution?

II. Human Rights

A. Ayotzinapa: A Non-Binding International Human Rights Mechanism in Action

On September 26, 2014, around one hundred Ayotzinapa students travelled 150 miles to Iguala city, to raise funds for their school activities. That night in the city, for unknown reasons, the local Iguala police and of the neighboring municipality of Cocula opened fire against the students. Six students died and others were injured. Forty-three students have been missing since that night.

The Federal Authorities conducted the initial investigation. They reached a conclusion that was strongly disputed by the victims' families and a considerable sector of civil society. In 2015, the Inter-American Commission on Human Rights (IACHR) began a review of the events. Based on an agreement signed in 2014 between Mexico, the victims and the IACHR, the IACHR designated an Interdisciplinary Group of Independent Experts (IGIE) to conduct a technical analysis of the actions undertaken by Mexico in this case.

After six months of work, on September 6, 2015, the IGIE published its (non-binding) report. The report offered some noteworthy conclusions contesting the government's official version, including characterizing the crimes as enforced disappearances. The IGIE recommended reconsideration of the hypothesis and investigation lines. The IGIE's

7. Adopción. El Articulo 19 de la Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche Viola el Principio de Igualdad y No Discriminación [Adoption. Article 19 of the Regulatory Act of Civil Society Coexistence of the State of Campeche Violates the Principle of Equality and No Discrimination], Suprema Corte de Justicia de la Nación [SCJN], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo I, Septiembre de 2016, Tesis P./J. 14/2016 (10a.), Página 5 (Mex.).

8. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 40, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

mandate was extended until April 30, 2016, and Mexican authorities expressed their willingness to cooperate. The day after the report was published, Enrique Peña Nieto gathered with the students' families and ordered the creation of a special agency to search for the disappeared students.

In November 2016, the Special Follow-up Mechanism, whose purpose is to monitor compliance with Precautionary Measure 409/14 and with the IGIE's recommendations,[9] presented a Work Plan. The Work Plan consists of four basic objectives:[10] "(1) monitor the progress of the investigation; (2) provide advisory assistance and support to the process of searching for the disappeared; (3) ensure that comprehensive attention is given to the victims and their relatives, and (4) promote any structural measures appropriate to resolution of this matter and ensure that such an event does not happen again."

IACHR Rapporteur for Mexico and Coordinator of the Follow-Up Mechanism, Commissioner Enrique Gil Botero expressed his disappointment in Mexico's receptiveness towards the specific technical recommendations made by IGIE. He stated that the Mechanism expects Mexico's full cooperation to reach the objectives of the Work Plan.[11]

III. Legislative Reform

A. The Political Reform of Mexico City

1. *Historical Background of the Federal District (Distrito Federal)*

In November 1824, the Constituent Congress approved (by forty-nine votes against thirty-two) that Mexico City should become the Federal District ("Distrito Federal" or "D.F."), seat of the Executive, Legislative, and Judicial branches of the federal government. Such situation was materialized in Article 50 of the 1824 Mexican Constitution (Article 44 of the current Constitution) by instructions of Guadalupe Victoria, the first elected President of Mexico. While there have been several unsuccessful attempts to transform D.F. into a federal State, in 2016 the D.F. was successfully transformed into a federal State. The decree by which various articles of the Mexican Constitution were amended and derogated was published in the Official Journal of the Federation (Diario Oficial de la Federación or

9. On July 29, 2016, the IACHR issued Resolution 42/16 by which it decided to implement a special mechanism to follow up on the Precautionary Measure 409/14 and on the recommendations made by the Inter-Disciplinary Group in its 2015 and 2016 reports.

10. Inter-American Commission on Human Rights [Inter-Am. Comm'n H.R.], *WORK PLAN?"Special Follow-Up Mechanism to the Ayotzinapa Case"*, at 2, (November 2016), http://www.oas.org/en/iachr/docs/pdf/WorkPlan-FollowUpMechanism-Nov2016.pdf.

11. Press Release, Organization of American States, IACHR Presents its Work Plan for the Follow-Up Mechanism to the Ayotzinapa Case (Nov. 10, 2016), http://www.oas.org/en/iachr/media_center/PReleases/2016/165.asp.

"DOF") on January 29, 2016. That decree effectively transformed D.F. into Mexico's thirty-second federal State.

2. *Concept and legal nature of the Federal District (Distrito Federal)*

Article 44 of the Mexican Constitution[12] established that D.F. was an entity with its own legal personality and different from the rest of the States. It is the seat for the three branches of Federal Government and hence it is the capital of Mexico. It is an integral and permanent part of the Mexican Federation and also the seat for the numerous offices of the Federal Government's local authorities, which is why it is subject to the same existing obligations for the States.

The President of Mexico (Federal Executive branch), the Federal Congress with its Chambers of Deputies and Senators (Federal Legislative branch) and the Mexican Supreme Court (Federal Judicial branch), are all located within D.F.'s territory, along with the Offices that locally govern said District. Nevertheless, because its nature is significantly different from the rest of the States', it was referred to with a different terminology. Before the amendment, instead of a Governor, D.F. would have a Mayor (Jefe de Gobierno) in charge of the local Executive branch, it does not have a local Congress, but a Legislative Assembly (Asamblea Legislativa) for the local Legislative branch, and the High Tribunal of Justice (Tribunal Superior de Justicia) for the local Judicial branch. D.F.'s territory is divided into delegations instead of municipalities. D.F. does not have a local Constitution, but a Government Statute (Estatuto de Gobierno).

3. *Initiatives to Transform D.F. into a Federal State*

Altogether, the Legislative Assembly, Federal Deputies, Local Congresses and the Federal Executive, presented a total of 109 law initiatives (bills) to transform D.F. into a Federal State. In January 2016, more than fifty articles of the Federal Constitution were amended, changing D.F.'s denomination and granting it almost the same powers as the rest of the States.[13] Some of the provisions contained in Articles 76 and 105 of the Mexican Constitution were derogated,[14] such as the exclusive power of the Senate to appoint and remove D.F.'s Mayor from office, and Mexico's Supreme Court's jurisdiction to review cases that involve a conflict between a State or municipality and D.F. (similar to a writ of certiorari).

12. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 44, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

13. Viridiana Rios, *Mexico City Will Become a State*, Wilson Center (June 2, 2016), https://www.wilsoncenter.org/article/mexico-city-will-become-state.

14. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 76, 105, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

4. *Legal and Political Consequences of the Reform*

Some of the legal and political consequences of the Reform are: the change of name from "Federal District" (Distrito Federal) to "Mexico City" (Ciudad de México),[15] regardless of the fact that it will remain as the seat of the Federal Government; replacement of the Legislative Assembly for a local State Congress, integrated by deputies and not by representatives anymore, with the power to vote and approve law initiatives; the creation of a local Constitution, whose final draft should be approved on January 31, 2017, superseding the Government Statute.[16] The Constituent Congress is currently evaluating the convenience of including provisions regarding the rights of same-sex couples, the use of marijuana, and the people's right to recall elections for Governor and local government officials, within the final draft of the new Constitution. Mexico City's Mayor will become a Governor, who will no longer need the President's approval to appoint the chief executive officers of the Public Safety Department and of the Office of the Attorney General. The delegations shall become territorial demarcations, which imply the presence of a municipal police force and an increase in federal funding. Mexico City will be able to decide on its debt limit (which was previously authorized by the Chamber of Deputies), accountability, and the auditing of its fiscal year. The Federal Government will remain responsible for the financing of education and health services.

After 192 years of existence, D.F. became another federal State. The new status offers greater autonomy, because the Federal Branches of the government will no longer make the essential decisions for the City. To some, this reform represents an improvement for Mexico, providing now an equalitarian position for all of its States and allowing Mexico City to remain the seat of the Federal Government with greater autonomy and resources to satisfy its own needs. The sentiment is that Mexico City did not lose leadership, but rather gained self-determination as a State. Others consider it to be an imposition of left-liberal ideology and express concern that the new city's Constitution is unsustainable and incomplete, failing to properly address issues such as corruption and pollution, for example.

B. New Opposition System for Trademarks

On April 26, 2016, Mexico's Federal Chamber of Deputies approved an amendment to several articles of the Industrial Property Law (Ley de la Propiedad Industrial).[17] The amendment implemented a new opposition system for trademarks. The amendment was published in the Official

15. Rios, *supra* note 13.

16. *Id.*

17. Ley de la Propiedad Industrial [Law of Indistrial Property] [LPI], Diario Oficial de la Federación [DOF] 27-06-1991, últimas reformas DOF 01-06-2016 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/50_010616.pdf.

Journal of the Federation (Diario Oficial de la Federación) on June 1, 2016,[18] and became effective on September 1, 2016. As expressed by the Mexican Industrial Property Institute (Instituto Mexicano de la Propiedad Industrial or "IMPI") in a press release last August, the new system intends to "inhibit disloyal commercial practices" by serving as a tool to protect legitimate owners' rights and to optimize the efficacy of the trademark registration process.[19] The much-anticipated trademark opposition system seeks to become an incentive for foreign investment by adapting Mexico's Industrial Property legislation to global standards of efficiency and protection. The amendment clearly aims to comply with the standards of the Madrid Protocol. Now, after a long wait, Mexico has finally become part of the numerous countries that protect the rights of the public to oppose to a trademark registration request before registration is granted.

The new system can be found mainly in Article 120 of Mexico's Industrial Property Law.[20] It sets forth a simple process by which any person who wishes to oppose a trademark registration request can do so the day following publication of a request in the Industrial Property Gazette (essentially ten business days after a request is filed) and before one month has passed since its filing. To oppose a trademark registration, the opponents must base their arguments on the prohibitions contained in Articles 4 or 90 of Mexico's Industrial Property Law[21] and submitted in writing to the IMPI, along with a payment receipt and any evidence deemed relevant by the opponent to discredit the legitimacy of the requesting party's claim of trademark ownership. The opposition does not interrupt the registration process and will be published along with any other opposition in the Gazette.

One relevant characteristic is that opponents will not be recognized as legitimate third parties or as any type of party whatsoever in the process, and all of the oppositions presented will merely be persuasive and not binding for the IMPI when deciding whether or not to grant trademark ownership to the requesting party. Furthermore, a requesting party may submit a response to the arguments of the opponent(s) within a one-month period, but is not compelled to do so, nor will their silence be considered as an implied acceptance.

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18. Decreto por el que se reforman y adicionan diversas disposiciones de la Ley de la Propiedad Industrial [Decree by which various provisions of the Industrial Property Law are reformed and added], artículo 120, Diario Oficial de la Federación [DOF] 01-06-2016 (Mex.) *available at*, http://www.wipo.int/edocs/lexdocs/laws/es/mx/mx152es.pdf.

19. Press Release, Instituto Mexicano de la Propiedad Industrial, Entra en vigor Sistema de Oposición de marcas en México [Mexican Trademark Opposition System enters into force] (30-08-2016), http://www.gob.mx/impi/prensa/entra-en-vigor-sistema-de-oposicion-de-marcas-en-mexico.

20. Ley de la Propiedad Industrial [Law of Indistrial Property] [LPI] artículo 120, Diario Oficial de la Federación [DOF] 27-06-1991, últimas reformas DOF 01-06-2016 (Mex.), *available at* http://www.diputados.gob.mx/LeyesBiblio/pdf/50_010616.pdf.

21. *Id.* at art. 4, 90.

Legal professionals have regarded this amendment with skepticism. They are concerned that the new system will increase the length of time for the trademark registration process because similar transformations have proven to compromise the authority's efficiency in the first few months following their implementation. Moreover, according to Article 14m of IMPI current service fares, the cost for the study of an opposition is $3,733.72 Mexican pesos plus tax (approximately $208.00 USD), which is significantly more than the cost for a trademark's registration request itself.[22] Because the Mexican business sector is predominantly comprised of small and medium size companies, imposing such an elevated economic burden for the defense of their rights could signify a weakening of the legal certainty intended by the amendment. It is a process that only bigger companies can afford and utilize.

Nevertheless, the motives behind the amendment suggest that it is only one of several modifications necessary to update Mexico's Industrial Property Law. Despite its flaws, such an achievement is to be celebrated because it grants a wider range of process for the defense of the legitimate trademark owners' rights. Ideally, the new system will decrease the presence of unlawful trademarks in the market, as it offers legitimate trademark owners the means to defend their rights before ownership over their trademark is granted to another party. Before the amendment, any person who wished to oppose a trademark would have to do so through an administrative procedure after the trademark ownership was granted, and would necessarily have to prove the existence of a legitimate legal interest. Therefore, even though the costs are quite high, the opposition system may spare legitimate trademark owners from the expenses traditionally incurred in an administrative procedure and expedite the defense of their rights, if IMPI deems their arguments persuasive enough.

C. Amendment to Mexico's General Law of Business Organizations-Introducing the Simplified Shares Corporation

On March 16, 2016, Mexico's Department of Economy (SE) published in the Official Journal of the Federation (*Diario Oficial de la Federación* or DOF) a congressional decree upon which several amendments to the General Law of Business Organizations (*Ley General de Sociedades Mercantiles* or LGSM)

22. Instituto Mexicano de la Propiedad Industrial, Servicios que ofrece el IMPI Terifas Marcas, Avisos y Nombres Comerciales [Services Offered by IMPI Rates Trademarks, Notices and Trade Names], gob.mx (14-01-2016), http://www.gob.mx/impi/acciones-y-programas/servicios-que-ofrece-el-impi-tarifas-tarifas-marcas-avisos-y-nombres-comerciales?state=published.

were approved. The amendments became effective on September 15, 2016.[23]

The most relevant innovation among these amendments is the introduction of the Simplified Shares Corporation (*Sociedad por Acciones Simplificadas* or SAS), a new type of business entity with unique characteristics that allow it to be incorporated electronically[24] and with a sole shareholder.[25] For decades, such possibilities have been thoroughly discussed by several authors but never legally recognized until March's decree.

Although the new business entity could (and was in fact designed to) be appealing to entrepreneurs who wish to incorporate their businesses without necessarily including additional shareholders or incurring notary public expenses,[26] the SAS has two main limitations that may be discouraging:

a. Only shareholders who are natural persons and are not controlling shareholders on any other business association may integrate a SAS; and

b. The annual total income of a SAS may not exceed 5 million Mexican pesos,[27] as adjusted for inflation.

Legislators included the first limitation to prevent *SAS* from being incorporated with the purpose of serving as a subsidiary for bigger entities, and thus ensuring that they remain as small and medium size businesses. As to the second limitation, the annual total income of a *SAS* may not exceed 5 million Mexican pesos, or otherwise it would have to be transformed into another type of business entity.[28] The amount limit for the income will be adjusted annually based on the updating factor published by the Department of Economy every December. If shareholder(s) do not comply with their duty to transform the company, they become jointly and severally liable to third parties for outstanding company indebtedness.

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23. Decreto por el que se reforman y adicionan diversas disposiciones de la Ley General de Sociedades Mercantiles [Decree by which several provisions of the General Law of Business Organizations are amended and added], Diario Oficial de la Federación, 14-03-2016 (Mex.).

24. Ley General de Sociedades Mercantiles [General Law for Commercial Corporations] [LGSM] art. 263, Diario Oficial de la Federación, 04-08-1934, últimas reformas DOF 14-03-2016 (Mex.).

25. *Id.* art. 262(I).

26. Newsletter, Cámara de Diputados Boletín N°. 0916, Aprueba Cámara de Diputados facilitar trámites para crear micro y pequeñas empresas en sólo 24 horas [Mexico's Chamber of Deputies approved a facilitated process to incorporate micro and small companies in only 24 hours] (02-02-2016), http://www5.diputados.gob.mx/index.php/esl/Comunicacion/Boletines/2016/Febrero/09/0916-Aprueba-Camara-de-Diputados-facilitar-tramites-para-crear-micro-y-pequenas-empresas-en-solo-24-horas.

27. Approximately $243, 000.00 USD.

28. Ley General de Sociedades Mercantiles [General Law for Commercial Corporations] [LGSM] art. 260, Diario Oficial de la Federación [DOF], 04-08-1934, últimas reformas DOF 14-03-2016 (Mex.).

1. *Incorporation*

As mentioned above, *SAS* is intended to be an affordable option for start-ups and entrepreneurs with limited resources. These small enterprises are not required to formalize incorporation before a notary public, but rather through an electronic system of the Department of Economy (*Secretaría de Economía*) in which a serial number is assigned to each application,[29] sparing the shareholder(s) from the high costs of the traditional incorporation required for other types of business entities. Moreover, the shareholder(s) must select and agree on the standardized corporate bylaws suggested by the *SE*, under which the new entity will be governed.[30] The denomination of each *SAS* must be previously authorized by the *SE*[31] and the shareholder(s) signs the final deed with an electronic signature[32] (*e.firma*). The *SE* evaluates the compliance of the corporate bylaws with the provisions of the *LGSM* and sends the deed to Public Registry of Commerce (*Registro Público de Comercio*) for final approval.[33] Once all the legal requirements have been met and the Public Registry has issued an inscription notice, the incorporation deed can prove the legal existence and effectiveness of a *SAS* without the need of additional formalization.[34]

2. *Shares*

The shared capital of an *SAS* can be obtained by issuing shares or securities with adjustable or no par value. The shares of an *SAS* must be released or payable within one year from the inscription of the corporation in the Public Registry of Commerce and are not subject to any restriction on their circulation (freely transferred). Once they are fully subscribed and paid, it is necessary to publish a notice in the *SE* electronic system. An *SAS* must electronically publish its financial statements on an annual basis. If the company fails to do so for two consecutive years, it may be dissolved by a default notice from the Department of Economy. *SAS* may not issue different types of shares. All must have the same value and grant the same rights.

29. *Id.* art. 263(I).

30. *Id.* art. 262(II).

31. *Id.* art. 262(III).

32. The electronic signature (*e.firma*) is a digital file that identifies a person when performing internet transactions on various governmental websites. *See id.* at art. 262(IV).

33. A *SAS* must be registered in the Public Registry of Commerce so that it may become enforceable before third parties. This requirement applies to all other Mexican business entities and seeks to provide legal certainty. *See id.* art. 2, 20, 263(V).

34. *Id.* art. 263(VII).

3. *Supreme Corporate Governance Body – Shareholders' Assembly*[35]

If the *SAS* has only one shareholder, they are considered its Supreme Corporate Governance Body by default. But if the corporation has two or more shareholders, all of them constitute Shareholders' Assembly.[36]

The decisions approved by the Assembly are made by a majority of votes, via physical presence at a meeting, or by electronic means, if allowed by the bylaws. In either case, a registry book must be kept with the record of all the approved resolutions. Furthermore, all shareholders have the right to participate and vote in the decisions of the SAS. Any shareholder may bring issues to the Assembly's attention by addressing an electronic or written notice to the manager.[37]

To be valid, the Assembly must be convened by the manager of the corporation through the online system of the Department of Economy at least five days prior to date on which the Assembly is to be held. The agenda for the meeting and all related documents must be attached to the call for meeting. If the administrator refuses to summon the meeting within fifteen days following receipt of a shareholder's request, the corresponding judicial authority may make the call instead.[38]

Unless agreed otherwise, the alternative dispute resolution methods contained in the Mexican Code of Commerce[39] are taken into account in resolving the controversies arising among the shareholders and/or third parties.

4. *Representation*

The administrator, who must be a shareholder of the *SAS* in all cases, has the power to enter into or perform all acts and agreements encompassed in the corporate purpose or that are directly linked with the existence and functioning of the *SAS*.[40] If the shareholders decide on a form of governance or management that is not legally permitted for a *SAS*, they are required to transform it into a different business entity and formalize their agreement before a notary public.[41] The manager must submit the *SAS's* financial information via the online system of the Department of Economy. Failure to do so for two consecutive years leads to dissolution of the entity.[42]

35. *Id.* art. 266.
36. *Id.* art. 267.
37. *Id.* art. 268(III).
38. *Id.* art. 268.
39. *Id.* art. 270.
40. *Id.* at art. 267.
41. *Id.* art. 269.
42. *Id.* art. 272.

5. *Differences from the Limited Liability Company*[43] *(Sociedad de Responsabilidad Limitada or SRL)*

Even though Mexico's LGSM eliminates certain requirements to facilitate the incorporation of SAS, it imposes certain limitations on SAS that do not apply to an SRL. Thus, it is essential to evaluate the advantages and disadvantages of an *SAS* and an *SRL* before deciding on incorporating one type of business entity or the other.

While an *SAS* may be integrated by one or more shareholders, an *SRL* requires at least two shareholders to be legally incorporated and must be incorporated before a notary public or a public broker[44] (*corredor público*), except for certain subcategories of SRL, such as those used for artisan, small business or public interest purposes.[45]

While the LGSM does not allow improperly formed SAS companies,[46] it does recognize that a SRL exists from the moment it presents itself as such to third parties. The SRL is also more versatile and often used to structure large companies, due to its lack of income-related restrictions. The SRL it is required by law to allocate five percent of its net profits on a yearly basis for a legal reserve fund.

D. The Adversarial Accusatorial System

Several articles of the Mexican Constitution were amended to adopt a new type of accusatorial justice system based on the five main principles encompassed in Article 20 of the Mexican Constitution: openness, challenge, concentration, continuity and immediacy.[47]

The amendments aim to optimize the functioning of institutions at different levels of Mexico's criminal justice system responsible for public

43. The SRL is similar to the limited liability company (LLC), a business form that since 1988 has gained favor in the U.S. *See* Kevin W. Finck, How to Form a California Corporation or LLC From Any State: SmartStart Series 4, 70 (2005).

44. In Mexico, the functions and characteristics of a *corredor público* are similar to those of a notary public, but are limited to commercial transactions exclusively.

45. Ley de Sociedades de Responsabilidad Limitada de Interés [Limited Liability Company Public Interest Law] [LSRLIP], Diario Oficial de la Federación [DOF], 31-08-1934 (Mex.); Ley Federal para el Fomento de la Microindustria y la Actividad Artesanal [Federal Law Promoting Artisan and Small Businesses], Diario Oficial de la Federación [DOF], 26-01-1988, Últimas reformas DOF 09-04-2012 (Mex.).

46. While the LGSM calls for proving "the company's formation through the articles of incorporation," it fails to note that an SAS may be created with a single shareholder. On the other hand, a contract is formed when at least two parties consent to an agreement. Ley General de Sociedades Mercantiles [General Law for Commercial Corporations] [LGSM] art. 263(VII), Diario Oficial de la Federación [DOF], 04-08-1934, últimas reformas DOF 14-03-2016 (Mex.).

47. "Article 20. The penal system shall be accusatorial and oral. It shall be governed by the principles of openness, challenge, concentration, continuity and immediacy." Constitución Política de los Estados Unidos Mexicanos [CP], artículo 20, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

safety, prosecution, justice and social reintegration of criminals. Among the innovations of the reform, perhaps the most relevant is the transition from an inquisitorial criminal system to an adversarial system.[48]

Traditionally, the role of a judge in a criminal procedure has been more flexible. In the new system, the prosecution and the defense have wider and more equitable responsibilities in the investigation of possible crimes. Likewise, the new system recognizes defendants' rights to adequate legal representation and defense, to be exclusively provided by certified attorneys with law degrees. Moreover, criminal procedures will be conducted publicly and orally, in contrast to the former system where parties would file their motions in writing. As a result of this reform, trials will now be continuous and held before impartial judges who will preside over cases without the power to delegate duties to a secretary.

Another relevant aspect of the reform is the increased emphasis on the recognition of human rights for victims and the accused, and the possibility of resolving conflicts through alternative dispute resolution systems or summary judgments (procedimiento abreviado). With the introduction of the National Law of Alternative Dispute Resolution Mechanisms for Criminal Procedures (Ley Nacional de Mecanismos Alternativos de Solución de Controversias en Materia Penal), the alternative dispute resolution mechanisms provide the opportunity for victims of minor crimes to reach an amicable settlement with the offender without unnecessary expenses or lengthy procedures. With respect to serious crimes found in Article 167 of the National Code of Criminal Procedure (Código Nacional de Procedimientos Penales), the list has been significantly narrowed down,[49] to the extent that only murder, human trafficking, crimes against public health or against the nation, will be punishable with preventive imprisonment.

Because of the broad scope of the reform, the Legislative Branch of Federal Government established an eight-year implementation period, which concluded on June 18, 2016.

Goals of the new criminal justice systems include eliminating corruption—which has permeated the judiciary branch throughout various levels of government—and overcoming bad judicial system practices. When the penal reform started, it was deemed feasible to have separate judges supervising each stage of a process to reach greater impartiality and adherence to the law, both for motions and case decisions.

48. Constitución Política de los Estados Unidos Mexicanos [CP], artículo 20, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014.

49. Código Federal de Procedimientos Penales [Federal Code of Criminal Procedures] [CFPP], art. 167, Diario Oficial de la Federación [DOF], 30-08-1934, últimas reformas DOF 17-06-2016 (Mex.). Serious crimes formerly listed in article 194 of the Federal Code of Criminal Procedure included organized crime, kidnapping, terrorism, theft, forced disappearance, among others. Código Federal de Procedimientos Penales [Federal Code of Criminal Procedures] [CFPP], art. 194, Diario Oficial de la Federación [DOF], 30-08-1934, últimas reformas DOF 14-03-2014 (Mex.).

But despite amendments to various articles of the Constitution, the creation of new institutions and even of the National Code of Criminal Procedure, the efficient functioning of the new justice system requires the will, commitment, and work of the entire Mexican government, attorneys, and society itself. Just a few months have passed since the introduction of the adversarial system, and deficiencies have already been identified within the new system's institutions and among its operators.

Some of the issues that require immediate attention are the lack of proper infrastructure for the recently introduced oral hearings nationwide, and the inadequate training of judges, attorneys, and police officers in the new system. These deficiencies affect the right to legal certainty of the parties in a criminal procedure. In addition, the investigation stage, intended as a period of time for the prosecution to gather evidence, often delays unnecessarily the process for months and compromises the constitutional right to prompt and expedited justice of victims and defendants.

The lack of preparation of government officials, deficiencies in the chain of custody, and the inappropriate preservation of crime scenes and evidence, have led to several procedural violations. Those violations resulted in the release of felons whose prosecution was based on an illegal or inadequate detention.

IV. Professional Certifications

A. Mandatory Certification in Jalisco: A First Step in a Long Road

The State of Jalisco is the first State in Mexico to establish mandatory certification for specific professions including the legal profession.[50] The new requirements are based on the Law for the Exercise of Professional Activities of the State of Jalisco (Ley para el ejercicio de las Actividades Profesionales del Estado de Jalisco, LEAPEJ), effective since January 1, 2016.[51] The LEAPEJ requires mandatory certification but not mandatory bar association membership.

Under the law, professionals may pursue their process of certification directly in the Office of Professions of the State, pursuant to Article 62 of LEAPEJ, or with the bar associations which may provide the certificate of professional competence and provide mandatory continuing legal education. The law does not require mandatory bar association membership. Recognizing that bar associations play an important role in the exercise of

50. Other regulated professions include accounting, engineering, architecture and health services.

51. This state law differs in many aspects from the General Law of Professional Practice Subject to Mandatory Certification and Compulsory Licensing (Ley General del Ejercicio Profesional Sujeto a Colegiación y Certificación Obligatoria), introduced in the Federal Congress on 2014, with no significant advancements since.

professional activity, the LEAPEJ provides rules related to the organization and supervision of bar associations.

Bar associations must be registered in the Office of Professions of the State. They also need to comply with specific requirements including a code of ethics. Moreover, bar associations will have sufficient authority to sanction their members if members violate the ethics code.

The LEAPEJ establishes some requirements for certification and provides that mandatory certification will begin in 2022. It affords benefits to those who start the process to obtain the state license during the first two years. The most important benefit is that the process of certification will require only the showing of evidence of mandatory continuing legal education for those who possess their license before 2018. The process of certification is repeated every five years. In contrast, anyone who does not have a license before the end of 2018, will have to follow the complete process including an examination.

LEAPEJ created new entities to regulate the professions. Concerns about its implementation are: Who will manage these new entities and what are the specific regulations? In general, however, the new law has been well received among lawyers who have started the process to obtain a local license. To obtain a federal license and practice law in Mexico, one only has to graduate from one of the more than a thousand law schools in the country. Mandatory certification, continuing legal education, or bar membership are not required just yet.

V. International Tribunals

A. Mexico's Recent Experience at the Court of Arbitration for Sport in Lausanne, Switzerland

The Court of Arbitration for Sport (CAS) in Lausanne, Switzerland is an adjudicatory body established to handle disputes related to sports through arbitration and hear appeals from decisions made by most national and international sport associations.

In 2015, the International Swimming Federation (FINA) sued the City of Guadalajara and the State of Jalisco, the Mexican Swimming Federation (FMN), and Mexico's National Sport Commission (CONADE), over the cancellation of the seventeenth FINA World Championships scheduled to take place in the City of Guadalajara in 2017. FINA filed a claim for payment of a penalty clause for USD 5 million before the CAS based on an arbitration clause in the Host City Agreement that designated the CAS as the proper venue to resolve any dispute. FINA's complaint triggered the application of "ordinary" arbitration proceedings under the CAS Code. All Mexican respondents in the arbitration, except for FMN, denied that they were parties to the Host City Agreement on different grounds.

The Mexican respondents' refusal to be bound by the penalty clause led to retaliation by FINA. In January 2016, FINA temporarily suspended the

FMN for "not fulfilling contractual obligations concerning the cancellation of the 2017 FINA World Championships in Guadalajara." The suspension was based on clause 12 of the FINA Constitution that stipulates that "[a]ny Member, member of a Member, or individual member of a Member may be sanctioned . . . if duties and financial obligations to FINA are not fulfilled." FINA's sanction resulted in Mexican swimming athletes being barred from participating as members of the FMN in international competitions; they were able to participate as FINA athletes only.

In the middle of this suspension, Mexican diver Rommel Pacheco won gold in the three-meter springboard competition at the FINA Diving World Cup 2016 in Rio de Janeiro. Despite the Mexican victory, the flag raised highest during the medal ceremony was that of FINA. Mexican swimmers were also banned from using the Mexican uniform bearing Mexico's coat of arms, flag, or name or to have their national anthem played during the gold award ceremonies.

Following an appeal by FMN, FINA agreed to lift the suspension, implicitly recognizing the lack of legal basis for the suspension. This allowed Mexican swimmers and divers to use the Mexican uniform, see the Mexican flag, and hear their national anthem again during the 2016 Rio Olympic Games.

Meanwhile, the CAS proceedings continued as expected until the final hearing in Switzerland in September 2016. At the hearing, FMN did not challenge the terms of the Host City Agreement, but requested the tribunal to find that the other three respondents were also liable. The City of Guadalajara argued that despite being listed as one of the Parties in the Host City Agreement, it was not bound by its terms, including the arbitration clause, because it had not signed the Host City Agreement and there was no other indication of tacit or express intention in the record. The State of Jalisco and CONADE similarly contended that in spite of the signature of their respective representatives on the Host City Agreement, they were not bound by its terms because their names were not contemplated as parties in the body of the Host City Agreement. In addition, CONADE and Jalisco claimed the reimbursement of approximately USD $7 million that the Republic of Mexico, through CONADE and the State of Jalisco, had advanced as part of the funds requested by FINA to sponsor the event under a collateral contract called the Conditional Agreement.

In the end, the CAS arbitration offered all parties involved an opportunity to hear and understand the positions of their opponents. Those positions converged on one point, namely that their dispute should be settled soon and without further hostility for the benefit of all parties and for the improvement of the aquatic sport in Mexico and the world.

Against this background, some of the Mexican respondents acknowledged that the penalty clause became payable to FINA as a penalty under the Host City Agreement but that the penalty was already paid from funds available to FINA under the Conditional Agreement. CONADE and the State of Jalisco thus proposed that FINA set off the amounts of the penalty clause under the

Host City Agreement against the moneys paid by Mexico under the Conditional Agreement.

In light of this, FINA lifted the sanction against the FMN in the appeal proceeding, while all parties agreed on a full and final settlement of any and all claims against each other, including any claims between the Mexican respondents, in the ordinary arbitration. By granting an arbitral award on the agreed terms by the parties, the CAS panel opened the way for the renewal of fruitful cooperation and further development of aquatic sport in Mexico and the world.

VI. International Agreements

A. New United States-Mexico Air Transport Agreement: Benefits and Challenges

1. *Modernized United States Mexico Air Transport Agreement*

On July 22, 2016, the United States and Mexican governments "exchanged diplomatic notes" aiming at bringing into effect a more modern air transport agreement.[52] This United States-Mexico Air Transport Agreement (USMATA)[53] which became effective on August 21, 2016, has many benefits for both countries in terms of new and broader market access opportunities for air carriers of both sides of the border and for passengers.

2. *Benefits and Challenges of the Modernized United States-Mexico Air Transport Agreement*

Cargo air carriers will benefit from the execution of the new bilateral USMATA because they will be allowed to operate in new routes, strengthening trade and creating business opportunities for both countries. More United States and Mexican air carriers are entitled to serve in any city on both sides of the border and beyond. Opening new routes also provides passengers with more travel options at competitive fares.

The modernized USMATA potentially gives rise to new and more sophisticated alliances between air carriers from both countries. The new bilateral agreement grants operational flexibility, concedes new traffic rights to air carriers, lifts prior restrictions, and removes government interference. Those benefits provide an unprecedented opportunity for airlines to optimize operations and reach new markets in air transport services.

Of course, with the opportunity comes the challenge to guarantee that airport infrastructure meets the traffic demand of existing air carriers and

52. Anthony Foxx, A New Era for U.S-Mexico Travel, Trade as Air Transport Agreement to Enters Into Force (July 25, 2016), https://www.transportation.gov/briefing-room/new-era-us-mexico-travel-trade-air-transport-agreement-enters-force.

53. Air Transport Agreement Between the Government of the United States of America and the Government of the United Mexican States, U.S.-Mex., Dec. 18, 2015, Department of State Press Releases, https://www.state.gov/e/eb/rls/othr/ata/m/mx/250782.htm.

new entrants seeking to take advantage of the opportunities the new agreement offers.

Mexico has already taken decisive actions to face such challenges by building a new airport to handle increased air traffic. The new airport of Mexico City[54] is expected to commence operations in 2020, with a passenger capacity of 50 million per year and around 550,000 operations. When fully operational, the new airport will have a passenger capacity of up to 125 million on a yearly basis, and more than one million aircraft each year will be able to take off and land.[55] This expanded capability makes Mexico competitive in allocation of slots amongst air carriers,

3. *Conclusions*

United States and Mexico have accomplished an important milestone in the history of their commercial aviation relationship by adopting a new air transport agreement. As a result, air transport competition will be fostered; air carriers and passengers will be the recipients of important benefits created by the new agreement.

On the other hand, Mexican airlines must be prepared not only to take advantage of the new market opportunities but to face the challenges ahead. Mexican policy makers have the challenge to act proactively. They need to coordinate efforts with their US peers to guarantee fair and equal opportunities for airlines to compete in a level playing field.

Ultimately, the USMATA helps accomplish the main purposes of international civil aviation stated in the preamble of the Chicago Convention to establish international air transport services on the basis of equality, opportunity, and sound and economic operations.[56]

54. *Advances Continue on Mexico City Airport*, MEXICAN NEWS DAILY (Jan. 5, 2016), http://mexiconewsdaily.com/news/advances-continue-on-mexico-city-airport/.

55. *See* GRUPO AEROPORTUARIO, EL NUEVO AEROPUERTO INTERNACIONAL DE LA CIUDAD DE MÉXICO, VENTANA AL DESARROLLO REGIONAL DE LOS PRÓXIMOS 50 AÑOS (Nov. 20, 2015), http://www.sct.gob.mx/despliega-noticias/article/el-nuevo-aeropuerto-internacional-de-la-ciudad-de-mexico-ventana-al-desarrollo-regional-de-los-pr/.

56. The Convention on International Civil Aviation, also known as the Chicago Convention of 1944 set the basis for the international regulation of air transport. *See* §§ 1, 2, 6.