



**MEXICO**

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Due to its geographical position, Mexico with its high population of more than 112 million inhabitants and liberal economic policies has developed to become an attractive commercial location for companies. The connection to the Atlantic and Pacific oceans and a growing number of harbours offer excellent conditions for international maritime trade and also the land borders of Mexico provide important access to the markets of northern and central America. Mexico has signed the North American Free Trade Agreement (NAFTA) and is one of the countries with the most free trade agreements in the world. This number of free trade agreements directly influences the continuous intensification of the international interlinking of Mexico and simultaneously improves the conditions for foreign investments in the country. The lively economic exchange between Germany and Mexico can look back on a tradition of almost two hundred years. In 2012 German companies invested more than 580 million euros in a market which opens up regional and international business areas across borders around the world.

### Legal forms of business and founding a company

The most common legal forms chosen in Mexico are the Sociedad Anónima (S.A.) and the Sociedad de Responsabilidad Limitada (S. de R.L.). Both legal forms have the structure of a joint stock company. In addition, it is possible to found a partnership. In Mexico companies are almost always founded as joint stock companies because the liability of the shareholder is limited to their contribution and there are no significant tax or legal disclosure differences between incorporated companies und business partnerships.

### Common legal forms

#### Sociedad Anónima (S.A.)

The S.A. is the most common company form. The S.A. is a joint stock company. In order to found the company there must be at least two shareholders, whereby one of the shareholders can hold a symbolic stake with a single Mexican peso. The shareholders can belong to the same company group. There is no legally stipulated minimum share capital. The share capital is defined by the articles of association and confirmed by shares.

The shareholders' meeting (Asamblea de Accionistas) is the highest authority of the S.A. The shareholders' meeting authorises and confirms all the actions of the company. The decisions are binding for the company management. The shareholders' meeting must take place at least once per year at the location of the company within four months after the closing of the financial year. The shareholders can be represented by means of a simple letter

of authorisation. Furthermore, the shareholders can take unanimous decisions outside the company location, but these must be confirmed in writing.

The company management and the representative of the S.A. are responsible to the board of directors (Consejo de Administración) or the single administrator (Administrador Único). There is no restriction with regard to the citizenship or domicile of members of the board of directors or the single administrator. Furthermore, third parties who may also be shareholders can be entrusted to represent the company. The representatives can be equipped with general power of attorney whereby the power of representation is regulated by law or equipped with special powers of attorney which authorise certain actions. The powers of attorney are revocable at any time. In addition, the delegation of authority to other persons is possible.

A special point of Mexican corporate law is the office of the Comisario. As an independent authority the Comisario performs an information and supervisory function. Those not eligible for this office are members of the board of directors, the single administrator or employees of the company and subsidiaries where the company has a business interest of more than 25 %. The Comisario has in particular responsibility for the preparation of the annual financial statement report and the obligation to call the shareholders' meeting and to inform the shareholders. Due to this area of responsibility, in Mexico it is usual that the position of the Comisario is held by a tax consultant or auditor.

The shares of the S.A. are usually transferred by a simple endorsement. However, the articles of association can include provisions to the contrary. All the shares have an equal value and transfer the same rights unless otherwise stipulated in the articles of association of the company. The shares are recorded in a share register giving details of the shareholder and the number of the shares with confirmation of the successful share transfer. In the case that shares are issued in order to increase capital, the shareholders have a priority right to purchase the shares in proportion to the amount of capital they have contributed.

### **Sociedad de Responsabilidad Limitada (S. de R.L.)**

The S. de R.L. is comparable to a German company with limited liability. The founding of the company requires at least two shareholders, whereby the company share of the second shareholder can be limited to a single Mexican peso. In contrast to the S.A., the number of shareholders with the S. de R.L. is limited to 50. The minimum share capital is not stipulated by law. At the time of the founding at least 50 % of the share capital has to be fully paid in und registered.

The shareholders' meeting (Asamblea de los Socios) is the highest authority of the S. de R.L.. The same rules are valid as for the S.A. in respect of the representation of shareholders at the shareholders' meeting and the possibility of holding a meeting outside the company domicile. The company management and the representation of the company is made by a managing director (Gerente Único) or a company management committee (Consejo de Gerentes). The company management can be dismissed at any time. The appointment of a Comisario is not obligatory for the S. de R.L..

Unless otherwise defined in the articles of association, the transfer of company shares and the acceptance of new shareholders require the approval of the shareholder which holds the majority of the share capital. With a legal transfer the co-shareholders can assert a preferential right within 15 days from the time the approval is given.

## Founding a company

Prior to the founding of a company the Mexican ministry of economic affairs (Secretaría de Economía, SE) must be notified of the required company name. The founding of a company must be certified by a Mexican notary. The founding certificate consists of the articles of association and the first shareholders' meeting where the founding capital is paid in, the company purpose is defined, the company authorities are named and if applicable a power of attorney is issued. The shareholders do not have to be personally present for the company founding. A power of attorney to found the company must be attested by a notary and legalised with apostille in the country of origin of the shareholder. The founding of a company in Mexico takes approximately six weeks.

## Joint ventures

In addition to the founding of a subsidiary, it is also possible together with other investors to found a joint venture company or to enter into a joint venture agreement (Asociación en Participación) which represents a type of silent partnership. Such a silent partnership has no legal personality and no share capital. It consists of at least two members of which one as a silent partner does not act externally and therefore is not liable. If a profit share of more than 49% is agreed, foreign investors must register at the national commission for foreign investments (Comisión Nacional de Inversiones Extranjeras, CNIE). The agreement is only subject to the written form. An entry in the commercial register is not required. The company is treated as a company enterprise in terms of tax.

## Foreign exchange law

The Mexican banking system is characterised by the Mexican central bank (Banco de México), the full service banks (Instituciones de Banca Múltiple), the development banks and the trustee banks. The Mexican peso is freely convertible to all other currencies and there are no exchange restrictions with regard to the repatriation of capital and repayment of an intra-group loan in a foreign currency and the transfer of dividends, intra-group interest and profit. Mexican companies are obliged, however, to form a statutory reserve to the amount of 5 % of the annual turnover until this has reached 20 % of the share capital. Foreign currencies for the transfer of fees and remuneration payments and the payment of imported goods are freely available on the foreign exchange market. There is no obligation to register for direct foreign investments to the extent that they are made in a foreign currency.

## Liquidation of the company

A Mexican trading company is ended according to the reasons listed in the general law on trading companies (Ley General de Sociedades Mercantiles) which are as follows:

- › overrunning of the company period
- › achieving or impossibility of achieving the company purpose as listed in the articles of association
- › shareholders' resolution to liquidate the company
- › the number of shareholders is below the legal minimum or the company shares are only held by one shareholder
- › losses which amount to two-thirds of the share capital

The winding up process is followed by a liquidation procedure in which one or more liquidators (Liquidador) are appointed by the shareholders and entered in the commercial register. The single administrator or members of the board of directors remain provisionally in office until the liquidator has taken up his activity. The single administrator or the members of the board of directors are obliged to disclose all documents regarding the stock of the company and to carry out a stocktake. The liquidator ends all on-going business activities, disposes of the assets, meets the claims of the creditors, prepares a liquidation balance sheet and applies for the cancellation of the company from the commercial register.

## Acquisition of real estate

The law on foreign investments forbids the direct acquisition of real estate and buildings near to borders and coastal areas by foreign natural persons and legal entities. In these locally

limited areas only renting is possible using a Mexican trustee and requires authorisation by the national commission for foreign investments (CNIE). In all other areas direct acquisition by foreign investors is possible. The direct acquisition requires a declaration in writing by the investor that he submits to the Mexican legal system and also permission from the CNIE. Mexican companies with foreign shareholders, however, whose articles of association include a corresponding submission clause can make a direct acquisition also within the border and coastal regions provided that the building is not for residence. All purchase contracts for real estate with a value above 24,560.85 Mexican pesos must be attested by notary and entered in the local land register (Registro Público de la Propiedad).

All contracts for commercially used land and buildings have to be concluded in writing. Although the obligations of the landlord are regulated in the individual civil codes of procedure of the federal states in detail, it is recommendable to list these in a contract. In particular, rent contracts should include that the assured features and potential for use of the rental property for the period of renting are given and that the replacement of consequential damage is guaranteed. In the case of the non-fulfilment of repair obligations, the person renting can either cancel the contract or enforce fulfilment through a court order.

## Labour law and dismissal protection

The unemployment rate in Mexico amounts to just 5%. In comparison to the European standard, the costs of personnel are still considered to be low. Since January 1, 2014 the minimum wage by law in Mexico amounts to 67.29 Mexican pesos per day in cities such as Guadalajara, Monterrey, Mexico City and the border region to the US and is 63.77 Mexican pesos in all other regions. The average cost of a skilled worker per day is 80 to 110 Mexican pesos. The daily working time for a day's work (between 6 am and 8 pm) must not exceed eight hours and for night work (between 8 pm and 6 am) seven hours. Accordingly, the maximum weekly working time (Monday to Saturday) amounts to 48 or 42 hours.

The legal basis for labour and social law is provided by the Federal Labour Act (Ley Federal de Trabajo) which underwent major reform at the end of 2012 and the Social Act (Ley del Seguro Social). Due to the reform, in particular the legal requirements for hiring workers and the terms of employment contracts were changed and further important conditions introduced for equality and anti-discrimination at the workplace. The creation of an employment relationship does not depend on a written contract although an employment contract in writing is prescribed by the Federal Labour Act. The lack of a contract in writing is at the cost of the employer who in a legal dispute must prove the existence of all verbal agreements which deviate from the statutory protection standard.

The employment relationship can be ended by termination of the employment contract due to conduct, the person or for operational reasons. Dismissal for reasons of conduct requires that one of the statutory listed facts must be present which the employer has to prove in the event of a dispute. A warning as a necessary pre-condition for dismissal for reasons of conduct is not required by law. As soon as one of the legally required reasons for dismissal is fulfilled, the employee is informed in writing about the termination which is valid upon receipt. In the case of notice of termination which is declared to be due to a permanent unfitness for work, the employee is entitled to one month's wages or – as far as is possible – to further employment at a different workplace which is suitable. In the case of a dismissal for operating reasons, the employee is entitled to a settlement to the amount of three month's wages.

In respect of foreign employees resident in Mexico, the Mexican immigration act differentiates between persons who intend a non-permanent residence (*Visitante*), persons who intend a temporary residence (*Residente Temporal*) and those who intend to reside permanently in Mexico (*Residente Permanente*). As a *Visitante* one is basically entitled to a stay of 180 days and is allowed to engage in business operations in the country. Visitors from countries with which Mexico has signed a treaty on visa exemption or facilitated visa issue (so-called endorsement treaty) to which the member states of the European Union also belong only have to fill in an entry form when entering the country which includes personal data and details of the reason for the visit. This can be for private reasons or for the purpose of doing business. An extension of the duration of the stay or change of the resident status is not possible. A permanent stay of more than 180 days, however, allows the resident status of *Residente Temporal*. This first of all requires the application for a visa at the Mexican embassy or consulate post in the country of origin. After arrival in the country it is mandatory to visit the local authorities within 30 calendar days in order to receive a residence permit in the form of an identity card. A resident status as *Residente Temporal* allows a period of residence of up to four years. After that an application can be made for *Residente Permanente*. The status of *Residente-Temporal* and *Residente Permanente* allows multiple entry to the country.

# Practical examples

## Auditing

### Background facts:

A German production company with international operations with a subsidiary also in Mexico was up to now, due to the exceeding of certain variable criteria (e.g. tax revenue more than 35 million pesos), subject to the obligation of submitting an annual tax return and an extensive tax report (dictamen fiscal) which had to be confirmed by the auditor who also prepared the annual financial statement. Now that the submission of the dictamen fiscal since 2010 also with the exceeding of the previously valid variable criteria is no longer obligatory, this year the production company decided for reasons of cost and capacity to dispense with the report and in the following year merely submitted the tax return to March 31 to the Mexican financial authorities (Servicio de Administración Tributaria, SAT).

Shortly after submission a number of necessary corrections become apparent and after a supplementary audit from SAT the company representative is faced with a number of unpleasant questions concerning alleged outstanding payments.

### What can be done now?

Even when it is no longer obligatory, the voluntary preparation of a dictamen fiscal is still possible and is usually undertaken. It is still possible to submit the dictamen fiscal up to three months after the tax return. This comprehensive report enables subsequent corrections to the



original tax return, omitted payments to be made and also significantly reduces the liability risk of the legal representative of the taxpayer because in the event of an audit carried out by SAT the first references are the working documents of the auditor.

### What should one have done differently from the beginning?

In principle, companies which have their company management or domicile in Mexico are subject to unlimited income tax. Tax returns for income tax, corporation tax and sales tax must be submitted to SAT annually by March 31 of the following year. Although the dictamen fiscal as an extensive tax report which complements the annual tax return is only required after certain variable criteria are exceeded, it is often voluntarily prepared and also has advantages for companies. The advantages include the already mentioned possibilities for correction, reduction of liability, in particular the accelerated repayment of tax assets (25 instead of 40 days) and the possibility of submitting data to the tax authorities on microfilm or CD.

It is therefore an advantage for companies in the following years to immediately submit a dictamen fiscal by June 30 of the following year and have this confirmed by the auditor. This makes subsequent corrections easier and also enables greater transparency for companies and the authorities and importantly also considerably reduces liability risks of the legal representative.

## Taxes

### Background facts:

A GmbH based in Germany is one of the leading companies in the area of induction technology. The company now plans to take on a Mexican employee who will initially conduct marketing and sales activities in Mexico and then in a second step further employees will be acquired. The employee has to report directly to the company management in Germany and not act as a self-employed employee. The GmbH currently has no plans to found an own company in Mexico. After consultation with several entrepreneurs who have been active in Mexico for a longer time, the GmbH now fears that Mexican financial authorities will view this act as the founding of a branch office subject to tax and will demand the payment of income tax.

### What can be done now?

In order to avoid double taxation, it must be verifiable that the activity of the employee in Mexico is only an activity relating to preparation or an auxiliary activity. It is often very difficult to differentiate between activities relating to preparation or an auxiliary activity and other activities. It is decisive whether the activity itself represents a main or material part of the activity of the whole company. The same activity, for example, can in one company represent an auxiliary task and in a second company represent the main activity. In any case a fixed place of business whose general purpose matches the purpose of the main company does not represent an activity relating to preparation or an auxiliary activity. Each case must be separately assessed under consideration of the respective circumstances. Preparation and auxiliary activity is only that which is carried out internally for the benefit of the company, whereby it is not an entrepreneurial activity carried out in connection with third parties.

### What should one have done differently from the beginning?

A tax presence is in principle a permitted form of investment in Mexico. However, it should be considered that time and administrative effort required for the registration of a branch office is not significantly less than that required for the founding of a company. Therefore, regarding the future expansion of business activities, the possibility of founding a company should be considered.

## Law

### Background facts:

Up to now a German company in Mexico has used temporary agency workers provided by an external service provider. After a change in the law the company management fears that due to the practice used up to now there might be a basis for an employment relationship between the hirer and temporary workers.

### What can be done now?

According to recently introduced legal regulations the service to be performed by a temporary agency worker must not cover all the areas of activity of the hirer. In addition, the activity of the temporary agency worker must be different to the work performance of the employees of the hirer. There must be reasonable grounds for the special necessity of using a temporary agency worker.

### What should one have done differently from the beginning?

The widespread practice in Mexico of hiring workers through own founded personnel service companies or external personnel service providers has been extensively regulated. In addition to the above-described restrictions care should be taken that the employer complies with the labour and social security regulations in connection with the hiring. The malpractice of using temporary workers to bypass the labour and security regulations now results in an offence which can lead to a fine.

## Law / Administration

### Background facts:

A German company would like to found a subsidiary in Mexico. During the registration of the required company name, the new name is rejected on the grounds that a Mexican company already exists and operates under the same or similar name.

### What can be done now?

Using an addition or a small modification of the company name it is possible to achieve the required difference to a company name which already exists in Mexico and obtain the approval. Here it should be observed that the decision to grant or reject the registration is not always predictable and sometimes only a small common element constitutes grounds for a rejection. An alternative possibility is to have the company name authorised from the company already operating in Mexico.

### What should one have done differently from the beginning?

Prior to the founding of a company the required company name should be submitted to the Mexican ministry for economic affairs (Secretaría de Economía, SE) for approval. In order to simplify this process it is a good idea at the beginning to authorise five possible company names so that the registration process initiated by the representative of the company does not fail at this point due to the rejection of the selected name by the ministry. The founding of the company must be attested by a Mexican notary. The name of the company is not automatically protected as a brand or trademark. A corresponding registration of a trademark should be made separately. In principle, with the exception of a few transactions the company can already start business operations with the notarially certified articles of association. In these cases, a notarial confirmation is necessary of the registration of the company in the commercial register.

## Corruption / Compliance

### Background facts:

A German company with a subsidiary in Mexico negotiates the conditions of a long-term supply contract with a Mexican company. After lengthy and costly negotiations, shortly before the contract is signed one of the negotiating leaders of the opposite party asks: "What could you do for me to help me sign the contract?"

### What can be done now?

Firstly, it is essential not to take up such an offer. In order to make appropriate arrangements it is important not to handle such negotiations as a single person but always with two persons present. It is helpful to have a collection of arguments ready for such a case. Regardless of the position of the person making the offer one can refer to the legal regulations in Mexico. This is because Mexico itself has already ratified international conventions and introduced national anticorruption laws. The risk of the unconcluded transaction is subordinate to the risk of a loss of reputation and possible criminal law repercussions.

### What should one have done differently from the beginning?

Even if each country has its own anticorruption laws, the above principle must be observed worldwide and is indeed regulated by law in almost all countries. This global consensus makes clear that corruption is not a minor offence and that it is not a requirement to do business. In reality corruption is just simply a form of criminality which has to be taken seriously.

In order to effectively prevent corruption it is first of all necessary for companies to identify the relevant risks. In this process it is a good idea to involve the employees from the areas of finance and controlling and also to question persons who are likely to be directly faced with the potential risk of corruption. A code of conduct represents an important measure to prevent corruption. This forms the basic framework of the internal prevention of corruption in a company. It presents a clear message from the company management in writing and reflects the company policy. In order to illustrate the formulated correct form of conduct, it is very important that this is actively communicated to managers and employees for example through regular and compulsory training sessions which are best carried out by local law firms who are familiar with the peculiarities of the country. In the course of such training sessions the subject of corruption can be illustrated by actual examples which enable and promote the exchange of personal experiences.

The ability to discover corrupt behaviour makes it important for companies to have an authority to which employees can turn to with questions or information which will be treated as confidential. From an organisational point of view the confidential contact interface can be internal or external. In practice one often sees so-called ombudsman systems consisting of trusted persons or lawyers.