

Mexican Law

PAOLA JIMENEZ PONS-MADRIGAL, GUSTAVO SANTILLANA, LUIS RUIZ-GUTIERREZ AND
LUIS IGNACIO LÓPEZ-RODRIGUEZ*

I. Note on the Amendments to the Commerce Code on Electronic Signatures

A. INTRODUCTION

The growing influence and significant impact of electronic commerce and the operations carried out through electronic means recently received considerable support from the Mexican government. On August 29, 2003, the *Federal Official Gazette* published the decree that amended the Commerce Code (CC) to include a new series of rules governing data messages and the use of electronic signatures in our country.¹

In light of the relevance of these amendments and the impact of electronic commerce on commercial relationships, it is important to point out the main aspects covered by the amendments. The amendments incorporated into the CC will become enforceable within ninety days of their publication in the Federal Official Gazette. In the interim, the federal executive branch, through the Ministry of Economy, will issue general rules for the regulation of electronic signature certifying companies, which will allow for the proper implementation of the new provisions in the commercial arena.

B. DATA MESSAGES

The legislation on this topic emanated from four fundamental principles recognized by the United Nations Commission on International Trade Law (UNCITRAL) in its works on electronic commerce and electronic signature: (1) technological neutrality; (2) freedom

*Paola Jimenez Pons-Madrigal, co-author of part I is an associate with the law firm of Barrera, Siqueiros y Torres Landa. Mrs. Jimenez Pons-Madrigal specializes in corporate law and telecommunications. Gustavo Santillana, co-author of Part II is a partner at the law firm of LEXCORP Abogados. Mr. Santillana specializes in corporate law and foreign investments. Luis Ruiz-Gutierrez, co-author of Part III is a partner with the law firm of Barrera Siqueiros y Torres Landa. Luis Ignacio López-Rodriguez is an associate with the law firm of Barrera Siqueiros y Torres Landa. Both Messrs. Ruiz-Gutierrez and López-Rodriguez specialize in labor law.

1. See COD. COM. tit. II, ch. I, art. 89 et. seq.; "Decreto por que se reforman y adicionan diversas disposiciones del Código de Comercio en Materia de Firm Electronica," D.O. 29 de agosto de 2003.

of contract; (3) international compatibility; and (4) functional equivalence.² The principle of technological neutrality seeks to establish a set of rules capable of offering the necessary flexibility to adjust to any existing technology for the delivery of data messages and the documentation of electronic signatures. The freedom of contract principle acknowledges the parties' freedom to agree to a particular style of document, which could potentially lead them to agree on variations to the provisions of the CC on this matter. Functional equivalence is based on the fact that the non-materialization of an agreement into traditional paper-based documents is no longer an obstacle for the acknowledgement of binding agreements executed between the parties through electronic means. International compatibility refers to the acknowledgment of electronic signatures created in other countries, provided such signatures are subject to international parameters. It is through these principles that international commerce is being promoted with Mexican merchants.

In fact, generally speaking, the purpose of the amendments discussed herein is to give both transactions executed through electronic means and electronic signatures the same degree of reliability, enforceability, and validity in the legal realm as that given to a signed document.

In order to ensure this degree of enforceability, the amendments expressly include definitions of electronic signature, information systems, and certification services. These concepts will now become part of the recognized legal vocabulary.

The CC establishes specific rules to attribute the origin of a message from an issuer, the moment at which the data message is deemed to have been received, and the rules for the recipient of the data message to acknowledge receipt thereof. In all of these cases, no technological requirements are established, precisely because of the principle of technological neutrality where the type of equipment or computer program is of no consequence. The repercussion with regard to the emission, delivery, reception, and acknowledgement of each of these messages are the focus of the amendments. In these cases, it is of the utmost importance that the technological means are able to grant certitude with respect to the origin, authenticity, integrity, and reliability of the parties involved in the agreement.

Likewise, as part of the principle of functional equivalence, the amendments acknowledge that there are operations that the law demands be consecrated in writing. After the amendments, the requirements for data messages will be deemed satisfied as long as the information is integrally kept and is accessible for further consultation. Additionally, if the law demands the signature of the parties, such requirement will be met with respect to data messages, as long as they can be accurately attributed to each of the parties.

C. ELECTRONIC SIGNATURE

For the works related to electronic signatures, the legislature considered the UNCITRAL Model Law on Electronic Signatures, the development of technology in this area, and the principles established for the creation and recognition of electronic signatures in public key infrastructure systems, or "PKI." The CC expressly recognizes the existence of an electronic signature, such as a system that can identify the origin and authenticity of the individual generating the data message and its relationship with the data message attached to such electronic system, as well as the binding effect it can have in a commercial dealing. Such

2. UNCITRAL, MODEL LAW ON ELECTRONIC SIGNATURES WITH GUIDE TO ENACTMENT (2001).

an effect can be achieved as long as the parties involved in the process follow the provisions of the CC with respect to the use and verification of the validity of the electronic signature.

The CC recognizes that an electronic signature will be advanced or reliable where elements exist to ensure that, by virtue of the data related to the creation of the electronic signature, the holder of that signature has created the document. Further, the message must maintain its integrity, allowing it to be attributed to its issuer without a doubt. This integrity is present where the content of the message has not been altered after the issuer electronically signs the document and thus adequately reflects the will of the issuer.

In light of these circumstances, the CC demands from the signatories the care and diligence in the use of the "private key" through which they will be able to create their electronic signature so as to avoid any non-authorized use thereof and, consequently, ensure legal certainty to the receiving party or the "Party that Relies."

D. CERTIFICATION SERVICES

To guarantee the reliability of the electronic signature as well as its relationship to the content of the data messages attached thereto, the CC has included the principles for establishing the providers of certification services within Mexico. As indicated before, the specific rules that will govern all certification service providers must be issued by the Ministry of Economy prior to the date these amendments become effective. The certification service providers will offer their users the necessary tools to create their electronic signature and verify its origin. The providers can be Notaries, Public Brokers (*Corredores Públicos*), accredited entities, or public institutions. The main roles of the certification service providers will be: (1) to verify the identity of the users and its relationship with electronic identification means; (2) to prove the integrity and sufficiency of the data messages and electronic signatures; (3) to carry out the registration of the identification elements of the signatories; and (4) to carry out related activities that will give certainty to the operations performed through electronic commerce.³

The Ministry of Economy will be responsible for confirming the credentials of the certification service providers, who shall be bound to: (1) check the identity of the signatories to which an electronic signature is attributed; (2) confirm them as such; (3) keep a registry of the certificates issued by them; and (4) maintain their confidentiality.⁴

In recognition of the principles of international compatibility, the CC establishes the parameters for the acknowledgement of certificates or electronic signatures issued abroad regardless of the origin of issuance or authorization or the physical location of the certification service provider or the signatory.⁵ By virtue of this amendment, the reciprocity obligation with other countries is now assumed, removing the obstacles of physical and legal frontiers in commercial dealings, which in several instances are more significant between merchants of different nations.

E. CONCLUSIONS

With the incorporation of these new rules, the CC takes a formal and significant step to bring certitude in the verification of operations carried out through electronic commerce,

3. COD. COM. arts. 100, 101.

4. *Id.* art. 104.

5. *Id.* art. 114.

which, as is common with other commercial phenomena, evolve more rapidly than the corresponding legislation. Mexico has not been left behind from the phenomenon of commercial exchange through the Internet. The fact that the CC now expressly recognizes electronic signatures and certification services is proof, once again, that our country marches consistently with international commerce. The commencement of operations of the certification service providers constitutes a fundamental step toward legal certainty in the use of electronic signatures. This last step should be fulfilled in a very short term.

II. Credit and Guarantees: Amendments to Improve Commercial Transactions

A. INTRODUCTION

Credit—Amount of money or equivalent item owed by someone to a person or entity, which the creditor is entitled to demand and collect.⁶

Rule of Law—Where several bodies or individuals who are members of a state are governed by and subject to the law; the Rule of Law refers to a state, the power and activity of which are regulated and controlled by law.⁷

We are all familiar with both of the above definitions; however, in the last eight years, these concepts have been difficult to implement. Mexico's approach to applying these ideas to its economic activity has been complicated. The main purpose of this section is to present a summary and analysis of the recent modifications to the laws addressing credit activities in Mexico.

Anyone familiar with Mexican business is aware of the extremely profound economic crisis that Mexico underwent in 1995. This situation led to a banking crisis, requiring a bank rescue by the Mexican federal government to avoid the demise of the financial system due to defaults by bank debtors. It should be noted that this economic crisis tested, and continues to test, the Mexican legal system as a whole, including its structure of laws and, of course, its judicial branch.

In light of this background, a series of legislative amendments was needed to provide clearer rules, more effective systems, and, consequently, better legal structures to enable economic activity in Mexico to possess a new instrument needed for the operation of any economy worldwide—credit.

The following laws were modified under the Decree published in the *Federal Official Gazette (Diario Oficial de la Federación)* on June 13, 2003 by the Secretariat of Finance and Public Credit (*Secretaría de Hacienda y Crédito Público*):⁸

- (1) General Law of Credit Instruments and Transactions (*Ley General de Títulos y Operaciones de Crédito*).
- (2) Code of Commerce (*Código de Comercio*).

6. DICTIONARY OF THE SPANISH LANGUAGE (Royal Spanish Academy, trans., 22d ed. 2001).

7. MEXICAN LEGAL DICTIONARY (Nat'l Autonomous Univ. of Mex., trans., 2003).

8. See "Decreto porque se reforman, adicionan y derogan diversas disposiciones de la Ley General de Títulos y Operaciones de Crédito, del Código de Comercio, de la Ley de Instituciones de Crédito, de la Ley del Mercado de Valores, de la Ley General de Instituciones y Sociedades Mutualistas de Seguros, de la Ley Federal de Instituciones de Fianzas y de la Ley General de Organizaciones y Actividades Auxiliares del Crédito," D.O. 13 de junio de 2003.

- (3) Law of Credit Institutions (*Ley de Instituciones de Crédito*).
- (4) Securities Market Law (*Ley del Mercado de Valores*).
- (5) General Law of Mutual Insurance Institutions and Companies (*Ley General de Instituciones y Sociedades Mutualistas de Seguros*).
- (6) Federal Law of Bonding Institutions (*Ley Federal de Instituciones de Fianzas*).
- (7) General Law of Credit Organizations and Auxiliary Activities (*Ley General de Organizaciones y Actividades Auxiliares de Crédito*).

Following is a summary of the corresponding amendments to the above laws, as well as a brief analysis thereof.

B. GENERAL LAW OF CREDIT INSTRUMENTS AND TRANSACTIONS

1. *Pledge Without Transfer of Possession*

This concept was introduced into Mexican law on May 23, 2000, to allow a debtor to secure a debt with his own personal property, while keeping possession thereof.⁹ This structure offers great flexibility for credit transactions with payments guaranteed with personal property, as the debtor's continued possession facilitates commercial operations by permitting him to continue to carry on his trade or business.

The amendment was needed to make the use of this pledge more transparent and to modify certain limiting concepts, such as:

- (1) The definition establishes the possibility that the property may remain in the debtor's possession or in a general deposit warehouse.
- (2) The corresponding chapter of the pledge generally governs the Pledge without Transfer of Possession.
- (3) The amount or quantity to be secured may or may not be specified at the time the guaranty is created, provided that it may be specified at the time the guaranty is enforced.
- (4) In the case where there is no interest applicable to the debt, the amendment authorizes the application of interest under law. (Mexican commercial law sets a 6 percent annual interest rate.)
- (5) The amendment clarifies that all personal property may be subject to this type of pledge, except those properties that consist of the debtor's personal use or nature.
- (6) The prohibition of encumbering properties already encumbered by this type of guaranty is eliminated. This allows a debtor to secure various debts with a single property, thereby providing flexibility to commercial operations.
- (7) The debtor may, with the creditor's authorization, transfer possession of the property. This also enables greater flexibility of commercial operations, allowing properties to circulate.
- (8) An acquisition by a person who knows of the existence of a pledge without transfer of possession is deemed to be made in bad faith.
- (9) A fundamental change provided by the amendment involves a provision that eliminates the parties' obligation to stipulate that the sale value of the property secure

9. "Decreto por que se reforman, adicionan y derogan diversas disposiciones de la Ley General de Titulos y Operaciones de Credito, delCodigo de Comercio y de la Ley de Instituciones de Credito," D.O. 23 de mayo 2000.

the total amount of the debt. If the sale proceeds are insufficient to pay the debt, the debtor is relieved of his obligation. This legal requirement was a major limitation to using the Pledge Without Transfer of Possession. In our professional experience, we have seen transactions collapsed when confronted with this obstacle, which represented an important risk to creditors who could rely only on the sale proceeds to secure their liabilities. The amendment allows the debtor to address the remaining balance with other property when the pledged properties do not cover the entire debt.

- (10) The law provides for the payment of damages to the creditor where the debtor does not obtain authorization in writing to sell the encumbered property to persons related to the same debtor (such as shareholders or partners holding more than 5 percent of the debtor's capital, board members, family members, and employees).

2. *Trusts*

The 2000 amendments included the legal concept of a Guaranty Trust, which enables a person to transfer possession of a property to a trustee, to ensure preferred payment of an obligation. In practice, Mexican banks refused to use these trusts given the major contingencies in their implementation.

The amendment in question was intended to restructure chapter V, subchapters I and II of the General Law of Credit Instruments and Transactions, to establish the Guaranty Trust as part of the definition of the trust agreement.

We note the following principal changes in the law's chapter on trusts:

- (1) A new definition was created for greater clarity and precision of the concept:

“Under the Trust, the Grantor transfers to a fiduciary institution the ownership or holding of one or more properties or rights, as the case may be, to be allocated to legal and determined purposes, leaving the undertaking of such purposes to the fiduciary institution itself.”¹⁰

The new laws offer a much more precise definition of the trust agreement, by stating exactly what the transaction involves, as well as providing for the possibility of using the trust as a means to secure the grantor's obligations.

- (2) The fiduciary institution may be the beneficiary, in the case of credits granted thereby in the performance of its business activities.

This modification is highly important as banking institutions now may have trust agreements secured by the payment of credits they themselves have extended.

- (3) The trustee possesses an obligation to account for the properties or rights under trust, and keep them separated from their freely available assets.

This is an important change as it clearly establishes the separation of the fiduciary institution's assets and the trust's assets. It ensures that the bank will not respond with its assets if execution of the trust is needed. Furthermore, creditors' rights are protected by delimiting ownership of the property under trust.

- (4) Trustees shall be liable to the Grantors for any bad-faith dealings or excess power exercised to the detriment of the latter.

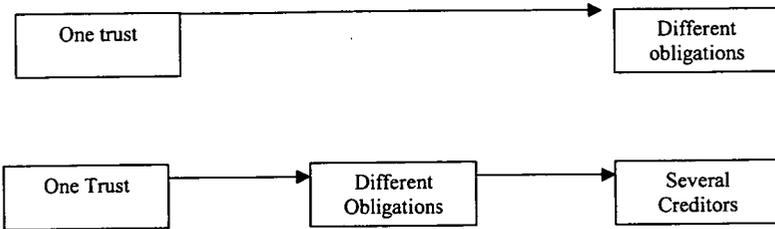
- (5) Banks may serve as trustees and beneficiaries of trusts.

- Insurance institutions.
- Bonding institutions.
- Stock brokerage houses.

- Limited-objective financial companies (non-bank banks).
- General deposit warehouses.

The above institutions may serve as trustees in order to secure fulfillment of an obligation and priority of payment for a beneficiary. These institutions in turn also may be the beneficiaries of such trust agreements, in order to guarantee the payment of credits they have granted.

(6) A Trust Agreement may secure a debt as follows:



(7) In the case of personal property:

- g.1) The grantor (debtor) may use the property in trust.
- g.2) The grantor may receive and use the yields and proceeds of the encumbered property.
- g.3) In the case of default, the trustee may proceed to sell off the property, extra judicially.

C. CODE OF COMMERCE

The body of amendments includes changes to the Code of Commerce, consisting of procedural modifications intended to facilitate the execution of guarantees in the case of debtor default. As mentioned in the introduction to this analysis, the economic situation of the past few years has led to a generalized crisis of non-payment to financial institutions. The amendment to the Code of Commerce sought to provide procedural rules to facilitate the exercise of guarantees in Mexico. Following is an analysis of the main points of this amendment:

- (1) The Federal Code of Civil Procedures (*Código Federal de Procedimientos Civiles*) will apply to the Code of Commerce in a supplemental manner. The state Codes of Civil Procedures will cease to apply supplementally, thereby providing legislative uniformity.
- (2) When the base document does not establish a domicile, the court that hears the commercial dispute must request the competent authority for recording addresses to provide the defendant's domicile.
- (3) The third-party intervention proceeding known as *tercería excluyente de dominio*, in which a property owner opposes a lien thereon because he is not the debtor, suspends the principal proceeding in the case of real property only when the public deed duly recorded in the Public Property Registry (*Registro Público de la Propiedad*) is provided. In the case of personal property, the title of ownership must be submitted. Previously, the proceeding was not suspended until auction, regardless of whether ownership was justified. A person filing this proceeding without justification before the court must pay the applicable expenses and costs.

- (4) Enforcement judgments may now proceed in the case of notarized statements or certified copies.
- (5) In the case of attachments on real property, a debtor or plaintiff must show documents or contracts meeting the legal and administrative requirements to evidence the transfer of use or possession to third parties.
- (6) A defendant may not enter into contracts that imply the use of attached real property, without court authorization. To do so would represent the commission of a crime.
- (7) There is a special enforcement proceeding under the Law of Credit Instruments and Transactions for the case of Guaranty Trust enforcement to which the parties may voluntarily adhere if the corresponding trust agreement so allows.
- (8) In the context of the sale of property in the execution of Guaranty Trusts or a Pledge Without Transfer of Possession, the following rules apply:
 - i. If the value of the property is less than the executed debt, the property may be disposed of and action may be taken on the difference. (An exception applies to housing credits with a value less than approximately US\$33,000.00.)
 - ii. If the value of the property is greater than the executed debt, the corresponding remainder is delivered to the debtor after the credit is paid off.

D. CONCLUSION

Mexico requires a legal framework that enables businesspersons to operate with certainty and under the rule of law. We need to promote a change allowing the courts to meet the expectation that they will deliver timely, complete, and impartial justice. In our opinion, the amendment discussed above is a major step in this process. The Guaranty Trust and the Pledge Without Transfer of Possession are useful legal concepts for extending the credit that Mexico needs; however, it is necessary to develop better recording and disclosure systems for real and personal property alike.

III. Personnel Transfer in Corporate Acquisitions

A. INTRODUCTION

In our country, and through the spread of globalization, it has become a common practice for large corporations to acquire companies in response to the challenges of a market that is growing more competitive on a daily basis.

One of the issues that may arise with acquisition is the manner of transferring personnel. This scenario must be considered in advance in order to maintain employees' peace of mind and a harmonic labor environment, as well as to avoid collective labor conflicts with unions or employees.

As a result of the need to transfer personnel, we frequently confront the fact that the labor conditions and benefits for personnel of a merged corporation differ from those of the new employer. Therefore, the legal concept of employer substitution, commonly used to carry out such transfer of personnel, could generate large problems for the subsisting corporation. These problems arise from the differences in labor benefits between the absorbed personnel and the current employees of the absorbing company.

B. HANDLING ALTERNATIVES

In view of the foregoing, the possible alternatives to handle these personnel transfers have certain economic, practical, and legal advantages and disadvantages, which are analyzed below:

1. *Employer Substitution*

The first alternative for the transfer of personnel is to utilize an employer substitution, which is considered the most direct method. There are two important issues to take into consideration with this method, depending on whether the labor conditions and benefits are similar or different.

a. Equal Labor Conditions and Benefits

In terms of this legal concept, the substitute employer (subsisting corporation) shall inform each employee facing transfer that the acquiring company shall continue the activities carried out by the acquired corporation. The acquiring company will become the substitute employer and will acknowledge the seniority of the workers, the benefits, and the working conditions existing under the previous management.

To that end, the delivery of such communication is enough so that the employees or workers automatically become employees of the subsisting corporation, which shall observe the same working conditions as those of the former employer.

b. Different Working Conditions and Benefits

If the working conditions and benefits prove superior to those granted by the new employer, an analysis is required before carrying out an employer substitution in order to homologate the working benefits of such personnel. Employees will be indemnified for those benefits that the new employer will not grant, or, for the difference between both employers' benefits. The aforementioned analysis shall be done before the employer substitution takes place, ensuring that when the new employer assumes control over the personnel, they will possess the same benefits provided by the subsisting corporation.

c. Implementation

This method for transferring personnel consists of delivering a communication whereby the employees are informed of the employer substitution, which shall be acknowledged by the employees and by the union where applicable.

Article 41 of the Federal Labor Law provides that, once the employer substitution takes place, the new employer (subsisting corporation) together with the former employer (acquired corporation) shall be jointly liable for any labor obligation that arose before the employer substitution until six months after the substitution took place.

2. *Termination of the Labor Relationship and Hiring by the Subsisting Corporation*

The second method applicable to the transfer of personnel, which might be very expensive but might allow a transfer without any liability for the new employer, requires the new employer (subsisting corporation) to terminate the labor relationship with the transferred personnel, indemnifying them as a consequence of such termination. The employer would provide a severance payment consisting of three month's salary, twenty days of said salary for every year of services rendered, a seniority premium, and the payment of the corresponding amount of the benefits due to the employee at the time of termination.

This scenario would allow the new employer to hire some or all the employees under new and more favorable working conditions, and with certain benefits or salaries different from the ones they previously enjoyed.

The disadvantage of this method is that a high amount of money would be spent because of such indemnification payment.

3. *Termination of the Labor Relationship and Re-Hiring by the Subsisting Corporation, Recognizing the Employee's Seniority*

A third method to handle the transfer of personnel from one corporation to another includes terminating the existing labor relationship and rehiring the employees thereafter. In order to implement this method, the employee shall sign a voluntary resignation and shall receive the corresponding severance payment. Consequently, the first labor relationship is terminated by mutual consent, and a new labor relationship commences that is different from the previous one.

In this case, because there are two different labor relationships, the new employer is not required to recognize the same working conditions. Therefore, different consequences may occur. Those consequences vary depending of whether the same conditions and working benefits are maintained, or whether they change.

- (1) In the event that the conditions and working benefits do not change, but are maintained in similar terms as the former labor relationship, it is unnecessary to make an indemnification payment for the termination of the labor relationship; however, the new employer must pay the corresponding amount of the benefits due to the employees at termination. The new employer may hire these employees immediately, recognizing their seniority from the former labor relationship. In this case, the employees shall execute a new employment agreement with the new employer that includes a clause containing the recognition of such seniority.

To that end, we reach the same goal as the employer substitution, but the employer has more flexibility to establish its own working conditions for the transferred personnel.

- (2) In the event that the working conditions and benefits change from those granted by the former employer, the new employer should indemnify the employees for the difference between the benefits as a consequence of their partial elimination. Insofar as there is a cancellation, reduction, or modification of the benefits that would be received with regard to those received from the former employee, at the time of termination of the former labor relationship. As a consequence of terminating the labor relationship, the employees should execute a release that recognizes the payment of the partial indemnification. In addition, the former employer shall compensate the employees for a corresponding Christmas bonus (*aguinaldo*), unused vacations, vacation premium, and other currently unpaid benefits.

Through this method, in view of the termination of the current labor relationship with the acquired corporation and the new and different labor relationship with the new employer, the subsisting corporation may establish new working conditions for the employees, so that such employees can not assert that their working conditions were modified or try to impute any liability to the new employer resulting from such new working conditions.

- (3) In the event that the new employer maintains the working conditions and benefits provided by the former employer, it is sufficient for the former employer to pay the

corresponding severance payment and to recognize the termination of the labor relationship. Thus, a new labor relationship commences with the subsisting corporation and new employer, who will recognize the employees' seniority and will maintain the same working conditions.

C. CONCLUSIONS

It will be necessary to analyze in detail each specific case and compare the working condition of both corporations in order to determine which one of the foregoing alternatives is more convenient to both corporations because each alternative bears several advantages and disadvantages.

Notwithstanding the above, we can conclude that the methods discussed in sections 2 and 3 above represent a better protection for both corporations, given that the current labor relationship with the acquired corporation is terminated and the subsisting corporation is free to hire the personnel under the same or new working conditions.

Additionally, in the third alternative, the same goal of the employer substitution is reached; to avoid the severance payment because of the termination of the labor relationship, with the advantage that two different labor relationships would be created. Conversely, in the transfer of personnel by means of an employer substitution, only one labor relationship survives, commenced with the acquired corporation and continuing with the subsisting corporation; consequently, any modification to the working conditions would bring labor repercussions to the subsisting corporation.

