United States - Mexico Law Journal

Volume 3 *Current Issues: Corporations, Energy and Labor Comparisons of U.S. and Mexican Corporate and Securities Law Regulation of the Energy Industry - The NAFTA Labor Cooperation Agreement*

Article 5

3-1-1995

Some Observations on United States and Mexican Corporate Law

Ignacio Gomez-Palacio

SOME OBSERVATIONS ON UNITED STATES AND MEXICAN CORPORATE LAW

IGNACIO GÓMEZ-PALACIO*

Mexican corporate lawyers are different from most United States corporate lawyers. Typically, Mexican corporate lawyers are generalists whereas United States corporate lawyers are specialists. Mexican corporate lawyers handle securities issues, antitrust matters, civil law, commercial law, banking and finance law, foreign investment matters, and many aspects of litigation. In contrast, a United States corporate attorney may come from a more limited background, such as handling mutual funds for the Securities and Exchange Commission (SEC) or practicing tort law for twenty years. Most importantly, the Mexican corporate lawyer is a civil law lawyer, but it is not unusual that we find ourselves learning about Mexican law from foreign colleagues, especially about particular administrative decisions, statutes or cases that have not been widely noted.

In this context, this article will address the practice of civil law in Mexico. A few years ago, while assisting in drafting Albania's foreign investment laws, I told an English lawyer, "One problem with Albanian companies is whether or not there is personality." The English lawyer jumped up and said, "What do you mean, personality? Who cares about a company's personality?" An Albanian lawyer affirmed my opinion, however, finding that personality was in fact an issue.

Due to his common law background, the English lawyer assumed that we were talking about personality from a psychological point of view. The Albanian lawyer and I, in contrast, were concerned about the existence of a legal entity with a judicial personality separate and apart from the members of the company.[1] This anecdote exemplifies the difficulties in communication and differences in corporate law between Mexico and the United States. These differences create a number of problems, perhaps because the legal terminology of corporate law in common and civil law countries is similar but actually reflects different concepts and legal traditions.

---

* Of Counsel, Jauregui, Navarrete, Nader y Rojas, S.C., México, D.F.

1. Phanor J. Eder, *Company Law in Latin America*, 27 NOTRE DAME LAW. 5 (1951) (commenting about the development of companies under Spanish law), has observed,

> in contrast to the rule laid down by Coke and Blackstone and which is still followed in our [common] law, they did not derive their corporate personality from the sovereign, but only their special monopolistic privileges. The corporate or legal personality came from men associating themselves, under the Merchant Law, into a "company." All "companies," whether formed as a general partnership or a limited partnership (*compañía en comandita*) had a legal personality separate and apart from that of the individual members. This separate or corporate personality adhered automatically to this new form of company, the stock company or *anónima* as it was soon to be called.

Id. at 15.

Mexican company law was adopted in the early 1930s.[2] It is based on European law—French, German, and with a particular reliance on Italian law. In understanding the Mexican Company Law, a United States lawyer must not apply the concepts used in the Delaware Corporation Act.[3] The creators of Mexican Company Law within the government were often opposed to such concepts.

When the Mexican Company Law was adopted, a clear distinction was made between what is called the *Sociedad Anónima* (S.A.), which is known as a corporation in the United States, and the *Sociedad de Responsibilidad Limitada* (S.R.L.), which in the United States is referred to as a partnership. The Mexican Legislature stated that 25,000 pesos is needed to establish a S.A, while 5,000 pesos is required for a S.R.L. At the time, 25,000 pesos was the price of a very luxurious house in a residential area of Mexico City. Today, it would be close to one million dollars. Thus, very few Mexicans could afford to incorporate their businesses. Incorporated businesses, however, had shares which could be traded without registration. These shares were known as bearer shares. Because the shares could be traded without registration, the corporation was *anónima* (anonymous); nobody knew who the owner was or was going to be. The idea of registered shares was not even considered by the jurists who wrote the Law. Although it was much cheaper to establish a S.R.L., the cost was still prohibitive. Very few Mexicans had the equivalent of U.S. $200,000 to establish a company.

The difference between the price of incorporation and the price of establishing a S.R.L. indicates that the legislators at the time believed that most Mexicans would be doing business under their own names. The policy behind this stance was to encourage Mexicans to do business under their own names as the high fees to incorporate anonymously precluded many Mexicans from incorporating. The 25,000 peso incorporation and 5,000 peso S.R.L. fees were not changed until recently, despite the devaluation of the peso. Although the fees seemed high to Mexicans, it only required about ten U.S. dollars to incorporate a S.A., and one dollar to establish a S.R.L. However, the incorporation included a charge of up to two hundred dollars by a notary public and a ten dollar contribution for corporate capital as well.

Mexican Company Law should be modernized to conform to American corporate law. However, the existing company law is very comfortable for United States lawyers in Mexico and for notary publics in Mexico, as they are content with something so familiar. Change, therefore, is slow.

A lawyer in the United States faces a different body of corporate law. Although American and Mexican companies both hold stockholders'

---

2. *Ley de Compañía [Company Law]*, DIARIO OFICIAL DE LA FEDERACIÓN [OFFICIAL GAZETTE OF THE FEDERATION], (July 28, 1934, Aug. 4, 1934, Aug. 28, 1934; as amended Dec. 31, 1942, Feb. 2, 1943, Dec. 26, 1956, Dec. 31, 1956, Jan. 23, 1981) (Mex.).

3. DEL. CODE ANN. tit. 8, §§ 102, 109 (1994).

meetings, Mexicans have a sole administrator instead of a board of directors. Mexicans have auditors but they are called *comisarios*. Their function is somewhat different than auditors in the United States. There are other differences between United States and Mexican company law: (1) Mexicans generally do not recognize stockholders' agreements in connection with the management of a Mexican company; (2) Mexican corporations cannot acquire their own stock; (3) Mexican directors cannot represent stockholders by proxy; (4) there must be a fixed duration for a Mexican corporation, which is generally 100 years;[4] and (5) there are special problems for the protection of minority shareholders' rights under Mexican law.

A final special problem is the incorporation of Mexican companies with foreign stockholders. If the foreign stockholder is a corporate stockholder from the United States who is going to incorporate a subsidiary in Mexico, the United States company must grant a power of attorney to a Mexican citizen, generally a lawyer, who will incorporate the company in his name. It is necessary to obtain a legal opinion that the corporation from the United States is duly and properly organized. Thus, Mexican lawyers must use Mexican notary publics to obtain a legal opinion or the transaction is invalid. Notary publics in the United States, however, may draft the opinion; they have this power according to a special treaty between Mexico and the United States.[5] United States lawyers are generally not aware of this power, believing that no notary public can issue a legal opinion in the United States. As an alternative to the notary public, one can go to the Mexican Consulate. In order to grant this power of attorney, the Mexican Consul will probably require a submission of the following: articles of incorporation of the United States company, bylaws of the company and a record of board meetings authorizing the transaction. These documents must all be translated into the Spanish language and certified by an official translator.

In summary, Mexico does not have a system where one can incorporate and transfer ownership interests easily. Shortcuts may create tax problems. Incorporating a Mexican company with foreign stockholders will take Mexican lawyers and notary publics at least one month. This is an intolerable situation. Unfortunately, the Mexican economy has been in the hands of economists who do not understand what is required for efficient legal actions. Practicing lawyers and others who suffer from this inefficiency should be heard. It is my hope that the United States-Mexico Law Institute can influence the proper persons to support the development of a modern, updated Mexican Company Law that satisfies the NAFTA scenario and permits the fast incorporation of companies as in the United States.

---

4. It is unclear why 100 years was selected. I once authorized duration of a company for 2,875 years.

5. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., annex 6, H.R. Doc. No. 103-159 (effective Jan. 1, 1994).