**Message from the Co-Chairs** by Ben Rosen

This 51st Edition of the Mexico Update marks the final one in which I will have the honor or writing to you as Co-Chair of the Mexico Committee. It has been a fun and rewarding three years. As I leave this venerable position, I wanted to thank those members of the committee that have made it such a vibrant one over the years, including my Co-Chairs Susan Burns and Rene Alva, incoming Co-Chair Luis Perez Delgado, SIL Publications Officer Patrick Del Duca, SIL Council Member Juan Carlos Velazquez, and all current and past Mexico Committee Vice-Chairs, Co-Chairs and Senior Advisors, including, to name a few, Eddie Varon Levy, Ernesto Velarde, Andres Nieto, Enrique Garcia, Laura Nava, Judith Wilson, Melina Juarez, Alejandro Suarez and of course our Vice-Chair of Publications, Matt Hansen and Yurixhi Gallardo Co-Editors of the Mexico Update, and Founder and Co-Chair of the San Diego-Tijuana City Chapter, Antonio Maldonado. I look forward to continuing to work with all of you as well as those who will assume new leadership positions in the Committee in the coming bar year and all aspiring leaders and committee members. Next year, I will have the honor of co-chairing the Cross Border Real Estate Committee and of serving as a Division Chair (Legal Practice).

The 2016-17 Bar Year has been a significant and exciting one for the Mexico Committee. We started off the year at the Section Retreat in Half Moon Bay, followed by a memorable trip to Tokyo for the 2016 Fall Meeting and then the successful Spring Meeting in DC where the potential for a NAFTA overhaul was on center stage. 2017, of course, has thrust Mexico into the geopolitical spotlight due to the threats posed by the current US Administration regarding international trade and immigration. These threats, however, also serve as opportunities for our committee to play a larger role in not only the SIL, but the ABA at large. With that has come the unofficial announcement from Section leaders that Mexico City will be the venue for the Fall 2018 Conference/Forum. More details on that to come!

Yours truly,
Ben Rosen, Co-Chair
About the Mexico Committee

Anchored by coordinators in cities in Mexico and the United States, the Mexico Committee seeks to grow its members' involvement in dialog on current and potential developments of Mexican, United States and other law relevant to their practice of law and to the establishment of sound policy. Current substantive focuses of the Committee's work include arbitration, antitrust law, criminal procedure reform, data privacy, environmental law, legal education, secured lending, and trade law. The Committee contributes to the annual Year In Review publication, is developing its newsletter in partnership with a leading Mexican law faculty, maintains its website, and actively organizes programs at the spring and fall meetings of the International Law Section.

The Mexico Committee's membership is its most important asset. We encourage all Committee members to be involved in Committee activities and to communicate freely their suggestions and ideas.

Upcoming Events — Save the Date

Employment Law World Tour: Employment Law in Switzerland
Teleconference
Jan. 18, 2018

2018 Annual Conference
New York, NY
April 17-21, 2018

2018 Investment Arbitration & Trans-Pacific Transactions Conference
Singapore
May 10-11, 2018
Co-Chair Rene Alva at standing-room-only Mexico Committee NAFTA panel at Spring Meeting DC including panelists Aristeo Lopez-Sanchez, Legal Counsel for International Trade and Investment, Ministry of the Economy at Mexican Embassy, Washington DC, Greg Kanargelidis (Canada Committee), Nick Guzman (Mexico Committee), moderator and co-chair Susan Burns and Fernando Holguin
Implementing an Antitrust Compliance Program in Mexico
By Azucena Marín Díaz

Mexico’s antitrust framework has evolved significantly in recent years. Constitutional amendments adopted in 2013 provide for two autonomous antitrust authorities:

a) The Federal Institute of Telecommunications (“IFETEL”), which has primary authority over telecommunications and radio broadcasting, and

b) COFECE, the new Mexican competition authority, which has become more functional, gaining financial and operative independence, and whose mission is based on the principles of transparency and increased governmental oversight of competition, with jurisdiction over large areas of the economy, excluding those attributed to the IFETEL.

The Federal Economic Competition Act (“FECA”), effective July 2014, was adopted to implement these constitutional changes. Based on overarching principles of transparency, COFECE has since issued and published several regulations, guidelines, technical criteria and documents, actively promoting the culture of competition and legal compliance within Mexico.

In August 2015, COFECE published practical recommendations for effective implementation of antitrust compliance programs within companies and private entities. COFECE recommended inclusion of topics related to antitrust and economic competition in company checklists of ethical and legal compliance policies. This article reviews the recommendations as they relate to corporate compliance with FECA.

Anticompetitive conduct and practices contemplated by FECA
FECA regulates or prohibits the following:

a) Absolute monopolistic practices, also known as cartels or horizontal agreements, are certain arrangements between competitors that are illegal per se, meaning COFECE has merely to prove their existence to impose penalties, without the need to assess their restrictive or negative effects;

b) Relative monopolistic practices, internationally known as abuse of dominance, are restrictions imposed by agents with substantial market power. These are subject to a “rule of reason” analysis under certain conditions and considerations provided by FECA, for COFECE to determine if they are to be penalized;

c) Illegal concentrations are acquisitions, mergers and other transactions that obstruct, lessen, impair or hamper competition. As a preventive measure, those arrangements producing any concentration as defined under Mexican law are subject to pre-merger filings, and when certain thresholds are met, are analyzed and cleared by COFECE. Illegal concentrations, or those requiring a pre-merger
filing, that do not comply with FECA’s notification requirements, are subject to the imposition of penalties, including divestiture of assets in cases of recidivism; and,

d) Entry barriers6 that negatively affect competition. FECA introduced a special procedure to determine the existence of entry barriers or essential facilities. COFECE may order imposition of measures to eliminate entry barriers or regulate the access to essential facilities, or even the divestiture of assets, rights or shares in certain cases, as well as make recommendations to governmental authorities.

Companies and individuals, including corporate representatives and consultants, participating in proscribed anticompetitive practices are subject to substantial fines and penalties, including criminal liability in the case of absolute monopolistic practices.

**COFECE’s recommendations for implementation of an effective antitrust compliance program:**

International compliance standards and the ICC antitrust compliance toolkit (prepared by the International Chamber of Commerce’s Commission of Competition) inspired COFECE’s recommendations. They are as follows:

1. **Create a corporate culture of FECA compliance**

   Each organization is required to create a culture of antitrust compliance. COFECE has remarked that an isolated training session, chat or e-mail does not suffice to create such a culture. The organization must show real commitment in its compliance values, acknowledging the importance and benefits of complying with FECA.

   Accordingly, an antitrust compliance program should be congruent with other codes of conduct and policies, such as those involving anti-corruption, government relations, social responsibility, money-laundering, employee relations, communication and security. All of these corporate policies should display consistent ethical principles and organizational values.

2. **Appoint a person responsible for antitrust compliance and allocate adequate resources**

   Depending on the organization’s level of complexity and size, a specialized antitrust compliance department or officer may implement and oversee the program. In smaller organizations, a director performing internal auditing or managerial functions may be appointed. The responsible person must have direct contact and reporting access to the high-level bodies or directors of the organization.

   As part of the real commitment element indicated above, each company must allocate appropriate resources (human and monetary) effectively to perform, supervise, monitor and update the compliance program.

3. **Risk assessment for appropriate design of the compliance program**

   Not all companies are subject to the same level of risk pertaining to antitrust compliance. COFECE considers market concentration, type of industry, size of the company, vertical integration structure, and level of contact with competitors as topics to be considered when making a risk assessment and designing control measures.

   Also, some directors, officers and employees will be exposed to more risks than others, depending on the functions they perform within the organization, such as those that have contact with competitors or participate in chambers and industry associations, members of sales or purchasing departments and other strategic areas of the organization. COFECE notes that the conditions of a company will change from time to time. Therefore, a risk assessment must be made periodically to identify potential risk control measures that should be added to the program.

4. **Drafting and implementing guidelines, manuals and policies**

   First, all documents drafted as part of corporate compliance with FECA must be prepared in accessible
language. Antitrust regulations are not easy to understand by non-specialized professionals, or individuals that are not well-acquainted with these topics. Hence, FECA principles must be “translated” into easily understandable language, lest the policies be useless or ineffective.

Second, compliance documents must be based on the types of activities performed by the company, as well as identifiable risks. Based on these principles, special protocols for those activities or risks may also be developed, such as in the case of bidding participation.

Third, training programs must be implemented. COFECE suggests that these be led by antitrust experts or already trained officers. Training sessions must be first completed with those officers and employees who are exposed to higher levels of risk.

Employees often change within organizations, and those that have already been trained may need further training from time to time, along with further updates to training modules.

Delivering guidelines or presentations to employees prior to a training session makes the meeting more productive, as it allows for a Q&A session with inquiries identified in advance and based on previous experience or real concerns.

5. Tracking, auditing, whistleblowing

As with any internal control program, the organization must implement monitoring and auditing measures to identify level of knowledge and compliance, as well as any red flags, in order to analyze data and apply corrective measures as needed. Internal monitoring and auditing activities have preventive and corrective purposes.

FATCA serves as an example for compliance programs. Having a “hot-line” or e-mail appointed for internal complaints and protecting employees from retaliation, has proven useful. Additionally, a point of contact should be appointed not only for internal complaints, but also for potential questions and inquiries that arise during the daily operations of different departments.

6. Disciplinary measures

Disciplinary measures should be implemented to give the message that the organization is serious about the program. These measures should be implemented against any defaulting member of the organization, irrespective of position within the organization. COFECE also recommends that organizations create incentives that motivate compliance as a positive aspect of employee-performance evaluations.

7. Periodic Evaluation

COFECE requires periodic evaluations to assure that objectives are met, and to identify areas of opportunity to update, improve or strengthen the program. Surveys, knowledge tests, follow up training and interviews with key members are also valuable.

Legal regulations evolve due to amendments to existing law, regulatory changes, case experience, governmental guidelines and technical criterion, as well as due to administrative and judicial rulings. Corporate antitrust programs must be updated and adjusted accordingly.

Conclusions/Benefits

Antitrust compliance programs represent important benefits for organizations. However, mere avoidance of substantial fines and penalties, as well as civil and criminal liability, should not be the sole reasons for implementation.

Compliance programs also provide additional benefits, aside from prevention of legal risks. The benefits
include aggregated value within the company, business reputation, safeguards, and avoidance of costly litigation, as well as a variety of social benefits. Although not considered binding, evidence of real, sincere, consistent and proactive compliance programs may be considered by COFECE when making a determination on the imposition of lesser fines.

A culture of competition also produces positive effects for the success and growth of business. It has been proven that competition compels companies to do better.7 As Jerry Flint, a Forbes journalist, once said: “competition is a painful thing, but it produces great results”.8

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3 Price fixing, output restrictions, market allocation, bid-rigging and a fifth practice consisting of exchange of information with any of the purposes or effect previously referred.
4 FECA lists 13 conducts that may be subject to abuse of dominance investigation and prosecution.
5 FECA defines a concentration as any merger, control acquisition, or any other act involving the consolidation of corporations, companies, associations, stock, partnership interest, trusts or assets. COFECE shall not authorize or, if the case may be, shall investigate and punish those concentrations whose purpose or effect is to hinder, harm or impede competition and free market access.
6 Any structural characteristic of a market, act or fact impeding access to competitors or limiting their ability to compete in the markets, as well as any legal provision that unduly impedes or distorts the process of competition and free market access.
7 See NatGeo “American Genius” episodes, which provide good and entertaining examples of the benefits of competition and, in some cases, struggles against anti-competitive conducts. “Jobs vs Gates”, “Colt vs Wesson”, “Edison vs Tesla” are only a few examples of this interesting series.
8 Chris Myers in Forbes: “If your business doesn’t have competition, you have a problem”. http://www.forbes.com/sites/chrismyers/2016/03/01/competition/#66a5a444c2e8.
U.S. and Mexican Anti-Corruption Enforcement in an Era of Uncertainty: Risks and Opportunity

By John Walsh, Rommy Flores, Sonia Fleury, WilmerHale, Carlos A. Bello & Noé Pascacio*

In 1977, the United States Congress passed the Foreign Corrupt Practices Act (“FCPA”), the first law seeking to govern business conduct of U.S. companies in foreign markets and with foreign government officials. Since then, the FCPA has become a cornerstone of U.S. anti-corruption enforcement efforts at home and abroad. From its inception, the FCPA was conceived of as a pioneering example of anti-corruption legislation that would “facilitate … an international solution” to the problem of corruption. And in fact, 46 jurisdictions around the world now implement comprehensive domestic anti-corruption regimes— including Mexico.

In the 40 years since the FCPA’s enactment, the U.S. Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) have brought a total of 484 FCPA-related enforcement actions, 44 of which have involved bribes paid to public officials in Mexico, accounting for almost 11% of all actions globally. Building on the increased enforcement trend started during the second George W. Bush Administration, FCPA enforcement efforts reached a numerical peak under the administration of Barack Obama. From 2009 to early 2017, the SEC and DOJ filed a total of 299 FCPA-related actions, more than all prior administrations combined, and constituting fully 61% of all cases brought since the FCPA took effect. Of the 44 cases brought since the FCPA’s inception that involved bribery conduct in Mexico, 30 were brought during the Obama administration.

After this period of increasingly active FCPA enforcement by the Bush and Obama Administrations, proponents of a robust FCPA enforcement scheme expressed concern that the Trump administration would shift its enforcement priorities away from the prior administrations’ far-reaching anti-corruption efforts. However, in April 2017, Attorney General Jeff Sessions announced the Government’s continued commitment to “strongly enforce[ing] the FCPA and other anti-corruption laws” by “work[ing] closely with… law enforcement partners, both here and abroad.”

Sessions’s remarks regarding cross-border cooperation with other nations align with a vision of the FCPA as a key piece of a global anti-corruption framework comprised of various international conventions and domestic legal schemes and enforcement priorities that will persist regardless of how vigorously the U.S. pursues these cases.

Although current relations between the U.S. and Mexico may be stressed, anti-corruption efforts may be one area where the two countries occupy common ground. During a speech in Mexico City on June 1, 2017, Mexico’s Economy Minister Ildefonso Guajardo “explicitly welcomed” some of the objectives the U.S. set out for the renegotiation of the NAFTA trade deal, “including plans to enshrine anti-corruption provisions in NAFTA.”

Mexican anti-corruption efforts have accelerated in recent years as well. On May 27, 2014, the Mexican Congress amended the Constitution to create the National Anti-Corruption System (Sistema Nacional Anti-Corrupción, or “SNA”). The SNA coordinates federal, state and local authorities dedicated to prevention, detection and sanction of corrupt acts, as well as those authorities focused on accountability and control of public resources. To implement the SNA, the Mexican Congress passed several statutes in July 2016 that came into effect July 19, 2017. These new laws established an overall framework for anti-corruption efforts, created a new federal tribunal (Tribunal Federal de Justicia Administrativa) to hear anti-corruption cases, and established an independent anti-corruption prosecutor’s office (Fiscalía Anti-Corrupción). The SNA also seeks to decentralize anti-corruption efforts by providing for “local anti-corruption systems” to be enacted and implemented at the state and local government levels and by creating a committee of citizen participants (“Comité de Participación Ciudadano”, or “CPC”) composed of notable citizens. The CPC’s chair is also chair of the SNA’s coordinating committee (“Comité Coordinador”), which develops anti-corruption policies and monitors and evaluates progress.

*Disclaimer: The materials and information in this newsletter do not constitute legal advice. MEXICO UPDATE is a publication that is made available solely for informational purposes and should not be considered legal advice.
The SNA has strong enforcement authority over the private sector since both individuals and companies can be held responsible and are subject to potentially heavy sanctions, including monetary fines, debarment from public procurement, payment of damages and losses, and prison if a crime has been committed. Companies found to have violated the SNA can also be forced to dissolution.

However, the SNA provides corporations the opportunity to reduce the extent of exposure to sanctions and penalties by implementing robust internal compliance programs, codes of conduct, control, vigilance and audit systems, whistleblower procedures, personnel training and cooperation with authorities. Much like U.S. companies, Mexican companies are now beginning to adopt these procedures and systems as a part of good corporate governance.

The SNA is still in its infancy, and an evaluation of its effectiveness in practice is not yet possible. Still, there are early signs of progress. Public reaction to the new law has been largely positive. Members of the new CPC were named in January 2017. Commentators have lauded the creation of the CPC and the seriousness with which it has undertaken its work: “[T]here is nothing dark in the creation of an entity for the fight against corruption... some are starting to shake, but this is normal, it is a sign that this group of citizens in taking the right path.”

Nevertheless, challenges remain. The SNA’s budget is not yet adequate to support the robust structure required for such an undertaking. Additionally, key appointments for the SNA have lagged: the specialized anti-corruption judges have not been confirmed and the SNA’s anti-corruption prosecutor’s office has become the subject of partisan controversy.

The SNA’s first real case may be one involving corruption in the construction of the busy Cuernavaca-Acapulco highway. Earlier this year, a sinkhole suddenly appeared in the highway, taking the lives of two people. According to reports, the highway’s construction suffered from corruption at all levels of government. The first full meeting of the SNA’s coordinating committee revealed seven investigations related to the sinkhole matter. The coordinating committee’s supreme audit institution (“Auditoría Superior de la Federación”) has already uncovered approximately $15 million in unjustified payments and services that did not comply with the specifications of the contracts. Although we have yet to see the full results of this investigation, it will certainly be a test case for the SNA’s commitment and effectiveness.

In this first year of the Trump Administration, Mexico-U.S. relations are at a moment of tension and uncertainty. Anti-corruption efforts by both countries, however, may be an area of continued and even renewed joint cooperation and resolve.

* Bello, Gallardo, Bonequi y García, S.C.


2 Id. at 949.


4 We developed these statistics from the source material from the SEC and DOJ along with the Stanford Law School FCPA Clearinghouse. See Foreign Corrupt Practices Act (FCPA), Chronological List, DEPT OF JUSTICE; SEC & EXCHANGE COMM’N, SEC ENFORCEMENT ACTIONS: FCPA CASES. See also http://fcpa.stanford.edu/statistics-keys.html. We count FCPA enforcement actions as follows: any proceeding brought by the DOJ or SEC (or both) against individuals or corporations based on violations of the FCPA or based on FCPA-related misconduct, including declinations with disgorgement that are listed on the DOJ and SEC’s websites as “enforcement actions.” We also include the most recent FCPA enforcement action United States v. Baptiste (1:17-mj-06216-MPK, Doc. No. 3) (Aug. 29, 2017) even though it is not yet listed on the DOJ’s 2017 cases.
5 We count Bush/Obama administration cases as all cases filed between January 1, 2009 and January 18, 2017. We count Trump administration cases as all cases filed between January 19, 2017 and the present.

6 Chronological List, DEPT OF JUSTICE; SEC. & EXCHANGE COMM’N, SEC ENFORCEMENT ACTIONS: FCPA CASES. See also http://fcpa.stanford.edu/statistics-keys.html. Thus far, the Trump administration has not brought any FCPA-related enforcement actions involving bribery conduct in Mexico.

7 Increased enforcement during this time period could also be related to increased use of Mutual Legal Assistance Treaties (“MLATs”) between the U.S. and other countries, including Mexico. See Department of State, 7 Foreign Affairs Manual § 962.1, stating that “[t]he treaties include the power to summon witnesses, to compel the production of documents and other real evidence, to issue search warrants, and to serve process.”


Addressing Virtual Currencies in Mexico

By: Diego Alejandro López Ramírez

Technological advances have had a great impact in the way society has developed. Nowadays, technology has altered the way consumers pay for goods and services. Virtual or crypto currencies such as Bitcoin, Litecoin, Peercoin, Dogecoin, Namecoin, Quark, among others, represent new means by which a wide range of transactions can quickly and efficiently take place. As these digital currencies are created and held electronically, they are not centrally controlled. This lack of central control creates new ways for parties to hide their financial transactions.

Due to the social and economic implications that these currencies have in the Mexican market, especially in the financial sector, the Mexican government, through the Ministry of Finance and Public Credit, seeks to regulate crypto currencies in order to “protect” vulnerable users. The Mexican Ministry of Finance estimates that there are currently 160 entities involved in technological financial operations, which have loaned over one billion Mexican pesos (approximately 57 million US dollars) and have over 540 thousand active users.

Virtual currencies and other digital services of the kind have proven that they can function adequately without the intervention of the State. Moreover, the application of Blockchain, a software platform where virtual assets are registered and exchanged, provides virtual currencies users a top of the line security system that is essentially un-hackable and offers users a secure and efficient means of paying for goods and services, as well as other electronic transactions. Unlike traditional financial methods that must go through the global financial system, Blockchain offers users a secure, relatively inexpensive, and rapid mechanism to move virtual funds.

Financial operations carried out through the use of crypto currencies have naturally rattled members of the financial sector, since these entities are both highly regulated and have a heavy compliance burden. The implications of regulating virtual currencies and companies that provide services such as collective financing, electronic payments and virtually held assets, goes far beyond the protection of vulnerable users.

The preliminary draft of Mexico’s Fintech Law tries to integrate these e-companies and operations into Mexico’s formal financial sector by requiring these companies to acquire authorization from the National Banking and Stock Commission in order for them to legally operate, as well as to be subject to the supervision of Mexican banking authorities and the Mexican Central Bank. In this regard, they will also be required to publish and provide all relevant information regarding their operations to the Mexican government.

Under Mexican monetary law, the only legal currency within Mexican territory is the one issued by Mexico’s Central Bank. This means that privately issued virtual currencies will have to be classified under local financial legislation in order to determine their legal nature and the way they will be regulated. Through the Fintech Law, this task is entrusted to the Mexican Central Bank. These three elements: integration into the financial sector, provision of information, and classification of assets—will put Mexican tax authorities in a better position to subject virtual operations and assets to taxation.

In the present circumstances, virtual currencies represent two relevant issues that must be addressed—over-regulation versus under-regulation. One of the most important commitments Mexico has as a member of the international community with respect to financial industry is the prevention of money laundering. Virtual currencies such as Bitcoin, allow payment schemes for deep web criminals in transactions involving drugs, illegal weapons, and nuclear materials, among many others. It is estimated that since 2014, these illegal activities amount to USD $8 Billion, and up to 80,000 transactions per day. The efforts to regulate virtual currencies will shed light onto these operations, and will aid in minimizing their use in illegal transactions. This would be particularly important for Mexico, as money laundering is a particular concern to Mexican
authorities due to the surge in activities by strong drug cartels that reside within Mexican territory. Thus, not regulating virtual currencies in Mexico represents a high level of risk for continued money laundering operations.

On the other hand, over regulating a functioning system would discourage innovation, not to mention potential violations of human rights if e-companies involved in the issuance of virtual currencies do not voluntarily comply with local regulations. The enforceability of the law would have to be done through more coercive methods such as the use of a “cyber force” to hack individual users and e-companies in order to obtain information, which risks claims of breach of privacy, and possibly violate the sovereignty of other nations if these e-companies were located in foreign countries.

In any event, Mexico is making great strides in balancing the need for regulation in this sector, and as the technology continues to grow, Mexico will grow along with it.

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7. Article 2, Ley Monetaria de los Estados Unidos Mexicanos, Congreso de la Union de los Estados Unidos Mexicanos. This law can be consulted at http://www.diputados.gob.mx/LeyesBiblio/pdf/152.pdf.
Nothing is More Dangerous Than the Truth

By Karla Ruiz Romero

Every year, thousands of people including women and children, fall in the hands of traffickers.

“Our lives begin to end the day we become silent about things that matter”

Article 3, paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, defines Trafficking in Persons as the “recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

A Global Report on Trafficking in Persons launched by the United Nations Office on Drugs and Crime states that the most common form on human trafficking is sexual exploitation. The victims of sexual exploitation are usually women and girls, and they make up the largest proportion of traffickers.

The US Code in its Title 18 Part I Chapter 110 define sexual exploitation of children as: “Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished… Any parent, legal guardian, or person having custody or control of a minor who knowingly permits such minor to engage in, or to assist any other purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct shall be punished.

Child sexual exploitation is a form of sexual abuse. “It occurs where an individual or group takes advantage of an imbalance of power to coerce, manipulate or deceive a child, young person or women into sexual activity in exchange for something the victim needs or wants, and for the financial advantage or increased status of the perpetrator or facilitator. The victim may have been sexually exploited even if the sexual activity appears consensual. Child sexual exploitation does not always involve physical contact; it can also occur through the use of technology”.

Sexual exploitation is a crime that affects not only the victim, but the victims’ family as well, since it has lasting and devastating consequences for both the victim and their families. The victim's life can be ruined when he or she does not receive appropriate support and counseling. Unfortunately, many of these victims rarely receive the proper support. Many fear leaving their perpetrators since they are made to believe that nobody will want them if they leave. The perpetrators convince them that there is no other place for them, and that no one will love or take care of them after what they have been forced to do.

In order to survive, victims sometimes develop Stockholm Syndrome, whereby they form attachments with their perpetrators and become the traffickers themselves, helping their captors recruit more girls or children. Stockholm Syndrome is defined as a “[p]sychological phenomenon whereby a hostage develops positive feelings for his or her captor”.

According to the Global Report on Trafficking in Persons the second most common form on human trafficking is forced labor, which is less frequently detected and is the most common form of modern slavery.

The 2012 Global Estimate of Forced Labor by the International Labor Organization ("ILO") estimated that there are 20.9 million victims of forced labor of whom more than 9.1 million were in forced labor as a result of human trafficking.
The ILO defines forced labor as “work or service exacted from a person under threat or penalty, which includes penal sanctions and the loss of rights and privileges, where the person has not offered him/herself voluntarily.” The ILO has categorized forced labor into five key areas, which include slavery and abduction, misuse of public and prison workers, forced recruitment, debt bondage and domestic workers under forced labor situations, and internal or international trafficking.

Sadly, human trafficking is one of the fastest growing criminal industries in the world. It is estimated that human trafficking generates billions of dollars in illegal profits for criminal enterprises. “Slavery and trafficking in persons, either for sexual exploitation or for labour, has taken place in different forms throughout history”. Even though human trafficking is not a new phenomenon, globalization, the internet and modern communications has led to its explosive growth around the world.

Traffickers take advantage on their victims’ vulnerability, since most of the victims lack education leaving them without employment opportunities, live in extreme poverty and may reside in dysfunctional family environments. These factors contribute to the growth in human trafficking, making it easier for perpetrators to convince their victims of a “new, better life” with them.

Although, trafficking has been targeted by the international community, it is still a rising phenomenon throughout the world. Traffickers take advantage of holes in the law. Indeed, many countries do not have laws to combat human trafficking and some countries do not consider human trafficking a crime.

Human trafficking is a profitable business for organized criminal groups, for business enterprises, and even for governments. Often times, victims who have been trafficked into one country, and then deported to their home country, face the horror of being trafficked all over again. Countries need to engage and combat this problem by strengthening measures to reduce poverty, unemployment, and lack of equal opportunity, among others. Additionally, attacking and punishing users of prostitution would make it harder for traffickers to enslave their victims in brothels and nightclubs. Increasing penalties for perpetrators and traffickers, enforcing domestic laws, signing and ratifying agreements and treaties between countries will help to prevent trafficking, and reduce the nightmare of modern slavery.

1 Martin Luther King Jr.
2 http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx 09/05/2017
3 https://www.law.cornell.edu/uscode/text/18/2251 09/11/2017
5 United States v. Chancey, 715 F. 2d 543- Court of Appeals, 11th Circuit 1983
The New Code of Ethics of the Barra Mexicana, Colegio de Abogados

By: Yurixhi Gallardo

Legal ethics are comprised of the following: principles, obligations and values that legal professionals must possess in the exercise of their profession. Unfortunately, members of the bar who violate their professional ethics are very rarely sanctioned. While criminal sanctions exist for violations of law by attorneys, trustees, and litigants, this extreme sanction is rarely applied. Indeed, because lawyers are not required to be members of bar associations, there exist few sanctions that may be applied against unethical lawyers. Moreover, Mexican lawyers are not required receive additional legal education related to legal ethics, or professional responsibility, and are not subject to examination on this issue. Thus, with little no mandatory state required education regarding professional ethics, the task of educating Mexico's attorneys on legal ethics fall on the voluntary bar associations. Indeed, the issue of legal ethics is imperative to Mexico's governance given the renewed efforts by society to eradicate corruption in both the public and private sector.

The Barra Mexicana Colegio de Abogados ("BMA"), is one of the most prestigious and well known Mexican bar associations, and seeks greater professionalism within the legal community by promoting mandatory licensing, and legal reform. The BMA aims to provide guidance to members of the BMA on how to conduct themselves in every possible ethical dilemma. Last February 2017, a new Code of Professional Ethics was published by the BMA to replace the existing 1948 Code of Ethics. It’s goal is to prevent and punish unethical behavior.

The new Code lays out nine ethical principles which should guide attorneys in all aspects of their professional responsibilities: dignity, justice, respect, honesty, loyalty, diligence, honesty, good faith, freedom and independence. With 36 articles divided into 8 chapters, the new code of ethics widely expands the current 1948 version. The first chapter establishes general rules. The second chapter governs relationships between attorneys and judges, authorities, arbitrators and mediators. The third chapter is comprised of rules governing relations with clients. The fourth chapter governs an attorney's relationship with third parties. The fifth chapter relates to the attorney-client privilege. The sixth chapter deals with fees and expenses. The seventh chapter discusses advertising and unfair practices. Last, the eighth chapter discusses the application of the code. One of the most important changes to the previous code, is the relationship of attorneys with arbitrators or mediators, beyond of the judges. This reflects a new awareness that the use of alternative dispute resolution mechanism is important and relevant in modern litigation. Another significant change relates to attorney compensation. With respect to the attorney-client relationship, the 1948 Code provided compensation to clients who had been injured by an attorney, while the new Code eliminates this provision entirely. While the new proposed code of ethics is far from perfect, it is a step in the right direction in getting Mexican attorneys to voluntarily comply with these guidelines. Moreover, the new code of ethics is an opportunity for promotion and dissemination of legal ethics in the Mexican legal community.

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A Case for Arbitration: The First Chamber of the Supreme Court Weighs In

By Guillermo Coronado Aguilar*

Recently, the First Chamber of the Mexican Supreme Court issued a ruling regarding the ability to use arbitration in disputes with public entities. In its ruling, the Court ruled that an arbitral award against a public entity may be nullified under the "public order" doctrine. In reaching its decision, the Court considered the public policy behind engaging in arbitration with public entities.

The matter before the Court involved a public contract between a private contractor and the Federal Electricity Commission ("CFE") related to the generation and sale of electrical energy (the "Public Contract"). The Public Contract included a dispute resolution clause that mandated that the parties to the agreement engage in arbitration in the event of a dispute.

The dispute between the parties arose after the private contractor failed to generate the amount of electricity called for under the Public Contract. The private contractor claimed that it was excused from generating the electricity due to force majeure. Prior to arbitration, the parties retained an independent expert who determined that no force majeure event had occurred.

The private contractor rejected the expert's finding, and sought to arbitrate the dispute pursuant to the terms of the Public Contract using ICC rules of arbitration. In 2009, during arbitration, the arbitral tribunal nullified the expert's opinion, and determined that a force majeure event had occurred. As a result, the arbitral tribunal found in favor of the private contractor, and issued an award against the CFE in the contractor's favor.

In 2012, the CFE appealed the arbitral award in the Federal District Court, based among other arguments, that the award was a violation of the public order. The CFE brought its District Court claim in accordance with article 1457, section II of the Mexican Commercial Code, which is substantially similar to Article V, Paragraph 2, Section B, of the New York Convention, and Article 34 of the UNCITRAL Model Arbitration Law. The private contractor answered the CFE's claim, and filed a counter claim seeking recognition and enforcement of the arbitral award.

The District Court upheld the validity of the award, and rejected all claims posited by the CFE, including the CFE's claim that the award was a violation of the public order. The CFE further appealed this ruling through a writ of amparo seeking an annulment of the ruling by the District Court, and argued that the award should be annulled due to a violation of the public order by both the District Court and the Arbitral Tribunal.

The Supreme Court took the matter for review, with the matter for consideration whether or not the arbitral award constituted a violation of the public order. The Supreme Court's decision to review the matter came at an opportune time as the change in the Mexican Constitution in 2014 related to Article 17, Paragraph 4, which allowed for the application of alternative dispute resolution mechanisms in the public sector, had not yet been reviewed by the Court.

The Supreme Court declined a de novo review of the matter, finding that arbitration and the arbitral awards were intended to be final and binding rulings. The Supreme Court would not analyze the legality or correctness of the award, but instead, would restrict its review to whether or not the award violated the principle of public order.

To this end, the Supreme Court established that the only way an arbitral award could be set aside was if it determined that the arbitral tribunal acted in an arbitrary manner, and whether the interpretation and reasoning of the tribunal was reasonable. The Supreme Court further affirmed that arbitral tribunals are free to use whatever interpretive methods that particular tribunal was most comfortable with. Therefore, merely disagreeing with the method employed by one tribunal is insufficient to cause a court to later nullify the award. Indeed, the Supreme Court found that an arbitrator does not have the same duty as a judge to comply with Articles 14 and 16 of the
Mexican Constitution, which requires a judicial officers to provide support in their reasoning.

Instead, the Supreme Court reasoned that the only issue before it was whether or not the courts were the sole arbiter of disputes involving the public order, or whether such claims could be resolved through arbitration. In accordance with Article 1457, the Supreme Court bifurcated the public order argument from its determination of whether the specific arbitral award was valid.

The Supreme Court distinguished those issues that were considered not subject to arbitration—i.e., public health, divorce, nullity of marriage, and civil status, among others—versus those that may be subject in principle to violation, but an award may violate the public order. The Supreme Court then found that the subject matter of the dispute before it fell within the second category.

In reaching this conclusion, the Court first had to determine what "public order" meant, finding that "public order" is an "undetermined legal concept" since the law does not establish with exactitude what the concept means. Indeed, the concept of "public order" varies from country to country, moment to historic moment, and is both flexible and variable within a set space and time. Nevertheless, while acknowledging that the concept of "public order" is amorphous, the Supreme Court differentiated it from the concept of "social interest."

The Supreme Court defined social interest as the necessity to give a benefit to society, or to prevent society from prejudice, disadvantage or disturbance. While the concept of social interest overlaps with that of social order, the Supreme Court found that public order essentially is aimed at fixing a problem within a community in order to satisfy the community's collective needs, procure the general welfare, or avoid a wrong to the public. In other words, the concept of a social interest seeks to provide a benefit to the public, while the public order is to rectify a wrong to the community as a whole.

The Supreme Court then found that an arbitration award is against the public order when the subject matter of the arbitration affects the fundamental interest of society. The Supreme Court next affirmed the importance of alternative dispute resolution mechanisms, given their inclusion in the Constitution, and is subject to constitutional protection, affirming that arbitration entails the exercise of relevant constitutional contractual liberties, relating to a fundamental human right, which is the freedom to choose the form in which a person can resolve a dispute.

The Supreme Court then tied arbitration as a function of public policy. The government had previously found that it was in the public interest to award energy generation contracts through a public bidding process, and to include an arbitration clause in the Public Contract that would allow resolution of disputes without the interference of judges. The Supreme Court upheld the arbitral award by rejecting the annulment claims; concluding that it is inevitable for arbitrators to resolve a dispute over terms in a public contract, including semantic ambiguities.

In conclusion, the Supreme Court's analysis provided significant progress for arbitration in Mexico. It recognized the Constitutional right for citizens to opt in favor of arbitration. Public contracts that include alternative dispute resolution provisions are in the public interest and demonstrate a public policy in favor of such mechanisms. Public policy and public order are not the same, and the violation of a public contract does not automatically entail a violation of the public order. Lastly, Mexico's legal arbitration culture is maturing, and is moving forward as a knowledgeable arbitration venue.

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An amparo is a legal proceeding that aims to protect the constitutionality of laws or acts issued by Mexican authorities.
A Plausible Solution to Corruption

By: Andrea Cointa Lamas

Throughout the years, various efforts have been made to attack corruption in Mexico. Corruption degrades the nation on several levels. Examples abound of government officials who abuse their positions, and steal millions. Recently, Javier Duarte stole millions from the Veracruz state government, while Raul Cervantes is accused of owning a car worth 4 million pesos, yet never having paid any taxes for it. In an effort to eradicate this public illness, in May of 2015, Mexico modified its laws, including its Constitution, and created a joint task force entitled the National System Against Corruption (the "NSAC"). The NSAC is comprised of several government institutions, which has joined forces with citizens group to eliminate public corruptions. Its main objection is to coordinate between federal, state, and municipal authorities in their prosecution of administrative misdemeanor and public corruption cases.¹ This July, the creation of the NSAC made major news in Mexico as Mexican law had to be modified and new laws implemented to allow for the prosecution of these crimes.

Articles 22, 28, 41, 73, 74, 76, 79, 104, 108, 109, 113, 114, 116, and 122 of the Mexican Constitution were reformed to establish the infrastructure needed to establish the NSAC. Examples include the designation of personnel to administer claims, granting Congress the authority to write legislation related to public corruption, and the creation of a new Tribunal of Administrative Justice to hear claims of corruption. The most important reform, however, was to Article 113, which governs public officials. Article 113 establishes what responsibilities public officials have, the scope of their powers, the manner in which public officials should administer their power, and their respective punishments for violations of their duties of trust. Indeed, since the reform of July 2016, Article 113 expressly recognizes the NSAC as the proper forum to address any claim or dispute that may arise as a result of public corruption.

In July 2016, Mexico's Congress also modified several key statutes as well, such as the “Ley General del Sistema Nacional Anticorrupción”, “Ley General de Responsabilidades Administrativas”, “Ley Orgánica del Tribunal Federal de Justicia Administrativa”, “Ley de Fiscalización y Rendición de Cuentas de la Federación.” Additionally, Mexico's Congress amended specific laws as they relate to the powers of the Attorney General and its office, the Penal Code, and the Organic Law of Federal Public Administration. Congress' goal in amending these laws was to clarify and specify the changes to the Mexican Constitution, regarding public corruption.

Besides the implementation of the various news laws, Article 113 of the Constitution establishes a joint public private task force and creates two sets of powers, one that resides in the hands of the government, and one that is given to private citizens. The first set of powers to government establish the powers granted to the various heads of governmental institutions, such as the Attorney General, the president of the Administrative Justice Tribunal, representatives from the Citizen's Committee, one of government officials, and another one integrated only by citizens. The first one includes the authorities (presidents) of institutions that are addressing corruption: head of the Superior Federal Auditor, the president of the Administrative Justice Tribunal, representatives from the Citizen’s Committee, and the Federal Judiciary Counsel, among others. On the other hand, citizens now also have the right to fight cases of public corruption. Under the NSAC, they may...
establish Citizen Participation Committees, which are comprised of 5 people who are selected based on their efforts to achieve transparency in government.

While the NSAC is a tremendous first step in the war against corruption, more is needed. Three institutions (Instituto Mexicano para la Competitividad, COPARMEX, and Transparencia Mexicana) have developed two scales to judge the effectiveness of the new law. The first scale classifies entities according to the state of the reform procedure that they have reached, and the latter judges how the entity is actually implementing these new laws. Present data shows that all 32 states have initiated local constitutional reform, and that 22 states have actually modified their laws to reflect the changes in the Mexican Constitution. Unfortunately, the newspaper El Economista conducted its own review, and found that only 7 of 32 states have met all their obligations under the NSAC. Moreover, while local governments must still take immediate action to comply with the law, citizen groups have shown that they are key in putting pressure on government to end public corruption.

Many questions remain unanswered on how effective the NSAC will be. Several politician and experts have criticized the manner in which the NSAC will work, i.e. that it relies heavily on the cooperation of government authorities rather than ordinary citizens. Nevertheless, the NSAC is ground shaking. Never before has Mexico engaged in such widespread reform to reduce public corruption. The NSAC now lays the groundwork by which government and citizens can work together to end the national tragedy of corruption, and use the NSAC as the instrument to eradicate it.

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