

# Mexican Contract Formalities and Interpretations: A Guide for the U.S. Legal Practitioner

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## I. Introduction

This article addresses important issues that a U.S. legal practitioner will confront when contracting in Mexico. Section I highlights the elements and formalities that are required for the formation of a valid contract under Mexican Law. Section II analyzes contract interpretation by the Mexican Courts. These sections emphasize distinctions and similarities between Mexican and U.S. contract law, while providing advice on how to best handle these differences. This information is intended to serve merely as a guide and not as a comprehensive treatment on the subject.

## II. Contract Formation

The first inquiries that a U.S. legal practitioner should make before contracting in Mexico are: (1) what is the applicable contract law; (2) what are the essential elements that must be present for the agreement to be valid; and (3) what formalities, if any, must be performed for the contract to be enforceable under Mexican law?

### A. *Governing Contract Law*

Mexico is a Federal Republic composed of thirty-one states and one Federal District that follow a civil law tradition.<sup>1</sup> Its contract law is codified in the Federal and States' Civil Codes and the Commercial Code.<sup>2</sup> The Federal Civil Code has been incorporated, nearly verbatim, in each of the thirty-one local Civil Codes of the Mexican States.<sup>3</sup> Since all thirty-one of Mexico's States' Civil Codes closely mirror the Federal Civil Code, this article will limit its analysis to the Federal Civil Code only. Such analysis will suffice in highlighting important provisions of Mexican contract law; nevertheless,

the individual State's Civil Codes should always be consulted.

In addition to the Civil Code, contract law is also codified in the Commercial Code, which governs all contracts that are deemed to be commercial.<sup>4</sup> In Mexico, commercial matters fall under federal jurisdiction; thus, the Mexican Commercial Code is Federal law.<sup>5</sup> It is essential to note that the Commercial and Civil Codes are not mutually exclusive.<sup>6</sup> For instance, the Commercial Code provides that the Civil Code shall be the controlling authority for issues not covered in the Commercial Code.<sup>7</sup> Therefore, the Federal and States' Civil Code should always be referenced and used as gap fillers for areas of contract law that the Commercial Code does not address, such as contract validity.<sup>8</sup>

### B. *Elements of Valid and Enforceable Contracts*

Article 1794 of the Federal Civil Code sets forth the only two required elements for creating an enforceable contract: consent and object.<sup>9</sup> *Consent* occurs when there is an agreement of wills between the offeror and the offeree that is intended to produce legal consequences.<sup>10</sup> *Object* can be defined in the following two manners: it may be an obligation that needs to be executed, or as an act that must be performed or must be abstained from being performed.<sup>11</sup> A U.S. legal practitioner should note that consideration is not an element necessary for the creation of an enforceable contract under Mexican law.<sup>12</sup>

### C. *Formalities*

At first blush, the Commercial and the Federal Civil Code appear to favor the general rule of freedom to contract, which seems to disregard form and formality. For example, Article 78 of the Commercial Code provides that "in commercial agreements each of the parties is obliged in whatever manner

and under whatever terms it appears each party intended to be obliged.<sup>13</sup> Likewise, Federal Civil Code Article 1832 states that “each party is bound in a way and by the terms to which each intended to be bound without specific formalities being required for the contract to be valid, except for certain instances that are expressly set forth by the law.”<sup>14</sup>

However, Article 1833 of the Federal Civil Code “provides that when the law requires a specific form or formality for an agreement, and this formality is not given to it, the agreement will not be valid.”<sup>15</sup> Therefore, despite an apparent freedom to contract, Mexican law does require that specific formalities be fulfilled in various circumstances.

Mexican law provides for two different types of formalities: (1) the contract may be required to be in writing, and (2) it may also be required to be in the form of a public deed issued before a notary public or a public commercial broker.<sup>16</sup>

The types of contracts that must be in written form, but are not required to be in the form of a public deed, are: “a lease, a short-term non-corporate joint venture or commercial partnership, a letter of credit, a chattel mortgage, a commission agency arrangement, a company loan, a letter of intent or promise to contract.”<sup>17</sup> In comparison, under the United States Statute of Frauds, only leases, letters of credit, or chattel mortgages must be in writing.<sup>18</sup>

On the other hand, public deeds involve legal formalities that are more extensive than that of a mere writing requirement. For instance:

“...[a]ll such documents [public deeds] must bear the signatures of the parties and the notary on each page and at the end of the document and must also bear the seal of the notary. In addition, the names of the parties involved, their nationality, date of birth, place of birth, marital status, occupation, and domicile have to be stated. Public deeds must be in Spanish.”<sup>19</sup>

Examples of contracts that require the form of a public deed are: purchases and sales of real estate, incorporation documents of a business or organization, contracts that transfer or create rights in real estate, such as mortgages and general powers of attorney or more specific powers of attorney relating to matters that must be finalized by public deed.<sup>20</sup>

#### *D. Enforceability against third parties*

Although a contract properly complies with the writing and / or public deed requirements, it also may need to be recorded in a Mexican Public Registry to have effect against third parties.<sup>21</sup> Examples of such contracts are, agreements for incorporation, dissolution, liquidation, contracts for the purchase and sale of real property for speculative purposes, powers of attorney, agreements related to maritime commerce ship mortgages according to Articles 25 and 26 of the Commercial Code, merger or acquisition of business organizations; and the purchase and sale of shares and

obligations or the issuance or acquisition of the capital stock of companies.<sup>22</sup>

As a precaution, “many businesses and individuals choose to register commercial agreements in the Public Registry as a matter of course, simply to facilitate proof of the transaction in case of future disputes.”<sup>23</sup> It is advisable that a U.S. legal practitioner register commercial agreements with a notary public, otherwise they may not be valid in Mexico.<sup>24</sup>

#### *E. Contracts between a U.S. and Mexican party executed in the U.S.*

If a contract celebrated in the United States seeks enforcement in Mexico, various formalities may have to be met. Mexican courts, in accessing the validity of such a contract, will only enforce the agreement if it complies with the contract formalities required under both U.S. and Mexican law.<sup>25</sup> For example, an oral agreement that is not required to be in writing under Mexican law, but fails to comply with a U.S. statute of frauds rule, would not be valid in Mexico. Therefore, in this example and in similar situations, the U.S. legal practitioner must be cognizant of fulfilling both the contract law requirements of United States and Mexican law.

### **III. Notary Public**

As stated, various types of contracts must involve the assistance of a notary public in order to have legal effect.<sup>26</sup> In civil law countries such as Mexico, the role of the notary public is similar to that of a quasi-public official.<sup>27</sup> Therefore, all contracts or other instruments performed by a notary public “would be accepted as full proof by any Mexican court or by any authority, without any other support.”<sup>28</sup> In other words, a document prepared by a notary public has a self-attesting presumption of authenticity. Therefore, before contracting in Mexico, it is imperative to review the types of contracts that require the involvement of a notary public, and if necessary, the US practitioner should always seek one’s coveted assistance.

### **IV. Powers of Attorney**

Another important element to understand is the overly important role that Mexican law confers on properly executed powers of attorney. For example, Mexican law requires a valid power of attorney to act on behalf of a corporation, especially if portraying oneself as an agent of the corporation.<sup>29</sup> Moreover, to retain legal counsel on behalf of the corporation, a person must not only demonstrate that he or she holds a position that would allow him or her to retain counsel for the corporation, but also that he or she has a properly issued power of attorney.<sup>30</sup> This is contrary to the United States where corporate officers are vested with the power to enter into transactions on behalf of the corporation and to retain legal counsel.<sup>31</sup> Furthermore,

powers of attorney will not likely be deemed valid under Mexican law unless they are issued before a notary public and meet the requirements of a public deed.<sup>32</sup> Thus, the effects of improperly executed powers of attorney in Mexico can be devastating. For example, “if the attorney is not properly authorized to represent the client, all documents filed by the attorney will be deemed not to have been filed.”<sup>33</sup> Moreover, “a party could lose a case by default simply because it did not follow the proper formalities to provide its attorney with a valid power of attorney to represent it in the litigation.”<sup>34</sup>

Additionally, a U.S. practitioner should be aware that the United States and Mexico are both parties to the Protocol on Uniformity of Powers of Attorneys to be Utilized Abroad (“Protocol”).<sup>35</sup> Consequently, if a power of attorney is issued in the United States it must adhere to the Protocol’s requirements to be effective in Mexico. The requirements of the Protocol are very similar to those under Mexican Law which as noted, are more extensive than under U.S. Law.<sup>36</sup> For instance, Article VII of the Protocol states “[p]owers granted in a foreign country do not require as a prerequisite their registration or protocolization thereof in designated offices. However, this rule will not prevail when the registration or protocolization of such instruments is required by the law as a special formality in specific cases.”<sup>37</sup> Hence, pursuant to the Protocol, a power of attorney that is executed in the U.S. and seeks enforceability in Mexico must first fulfill Mexico’s public deed requirements. Therefore, it is important to note that a notary public must perform the registration of the contract; otherwise the recordation will not be valid.

## V. Contract Interpretation

The basic principles for the interpretation of contracts are found in Articles 1851-1857 of the Federal Civil Code. For instance, Article 1851 provides that a “contract should be interpreted in accordance with the intention of the parties.” Article 1853 states, “the court should favor an interpretation that will give validity to the contracts.” And according to Article 1856, “Judges are to interpret contracts in accordance with the usages and customs of Mexico.”<sup>38</sup> The language of these articles seems to indicate that courts will not be adverse to the introduction of extrinsic evidence to prove a contract under Mexican law.

However, to best predict how a contract will possibly be interpreted, it is essential to understand the intricacies of the Mexican court system. Unlike the United States, Mexico has no jury trials; no application of the principle of *stare decisis*; no discovery, no punitive damages; and the losing party pays the prevailing party’s litigation costs, including attorney’s fees.<sup>39</sup> Moreover, the presentation of evidence in Mexican courts usually does not occur at one hearing, but at a series of hearings, meetings and written submissions. Also, Mexican judges have extensive powers in determining the admissibility

of all evidence, with certain formal rules, such as the best evidence rule, being disregarded.<sup>40</sup>

In Mexico, courts of general jurisdiction are found at both the Federal and State level. Both court systems have appellate processes which have much broader scopes of review than comparable U.S. appellate courts. Also, the Federal Constitutions delegates to each state the authority to establish the structure and function of its courts; thus, the laws and procedures of State courts should be reviewed on a state by state basis.<sup>41</sup>

Therefore, considering the absence of *stare decisis* and the noted differences between U.S. and Mexican Civil Procedures and Rules of Evidence, a U.S. Legal Practitioner should approach interpretation issues on a case by case basis, rather than relying on a traditional Common Law analysis; namely, legal precedent.

## VI. Conclusion

U.S. legal practitioners contracting in Mexico must recognize that the laws governing contracts in that country can be quite different from those of the United States. As discussed, the failure to recognize such distinctions may be harmful to the U.S. lawyer’s interests. This brief overview has highlighted a few of these peculiarities, but by no means does it provide complete coverage or serve as a substitute for the often needed participation of local counsel.

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1 Jorge A. Vargas, Mexican Law--The Best Mexican Websites, Section 5, *at*

[http://www.mexlaw.com/best\\_websites/5\\_state.html](http://www.mexlaw.com/best_websites/5_state.html).

2 Stephen Zamora, Mexican Law 510 (Oxford University Press 2004).

3 Jorge A. Vargas, The Federal Civil Code of Mexico, Section 1, *at* <http://www.llrx.com/features/mexcc.htm>.

4 Zamora, *supra* note 2. “Matters expressly designated as commercial...include the following: purchases, sales, and leases, of personal property entered into for business purposes; purchases and sales of real estate for commercial purposes; purchases and sales of shares and debentures of corporations; agreements involving debentures or other negotiable instruments issued by the government; the operations of corporations devoted to sales, construction, manufacturing, transportation, tourism, sales of books, editorial activities, public shows, or devoted to commercial transactions; the operations of banks; agreements regarding commercial transactions; insurance companies and the contracts entered into by them; deposits made in bonded warehouses and transactions regarding certificates of deposit and bonds of pledge issued by such warehouses;

checks; bills of exchange; the remittance of money from one city to another; negotiable instruments issued in bearer or registered form; transactions between merchants and banks, contracts entered into between merchants regarding their commercial activities and sales by farmers or producers of their crops. Even if a contract relates to a matter that is not expressly designated as commercial law, it will still be considered a commercial contract if it is entered into for a business purpose.” Manuel Garcia Barragán, *Legal Formalities Associated with Doing Business in Mexico*, in *Doing Business in Mexico* pt. I, §4.03[2] (Leon E. Trakman ed., Transnational Publishers 2006).

5 Jorge A. Vargas, *Mexican Law : A Treatise for Legal Practitioners and International Investors* Vol. 2, § 28.1 (West Group 2001).

6 Rona R. Mears, *Contracting in Mexico: A Legal and Practical Guide to Negotiating and Drafting*, 24 St. Mary’s L.J. 737, 743 (1993).

7 *Id.*

8 Vargas, *supra* note 5.

9 Federal Civil Code, art. 1794, *translated in* The Mexican Civil Code 329, 334 (Michael W. Gordon trans., Oceana 1980).

10 Vargas, *supra* note 5, at Vol. 2, § 28.2.

11 Mears, *supra* note 6, at 745.

12 Zamora, *supra* note 2, at 512. *See also generally* Hugh Beale et al., *Cases, Materials and Text on Contract Law* 127-142 (Hart Publishing 2002). “Under the doctrine of consideration, a promise is not enforceable under contract law unless it is supported by a bargained-for exchange; that is, the promisee must suffer a detriment in exchange for the promise. The principle effect of this requirement is to make donor promises unenforceable, unless the promisee has suffered a detriment based on justifiable reliance on the promise. In Mexico there is no such requirement. Thus, a contract to promise to sell property is binding, even if the promisee has not offered anything in return.” Zamora, *supra* note 2, at 512.

13 Commercial Code, art. 78, *translated in* *Doing Business in Mexico* pt. VIII, app. 2 (Michael Gordon ed., 1992).

14 Federal Civil Code, *supra* note 9, at art. 1832.

15 *Id.* at art. 1833.

16 Barragán, *supra* note 4, §4.03[3].

17 Mears, *supra* note 6, at 747.

18 This is assuming that all of the contracts listed in the text of note 17 *supra*, by its terms, can be performed within year. Generally, the common law Statute of Frauds in the United States, although it varies among jurisdictions, requires that contracts involving the sale or transfer of land, contract that, by its terms, cannot be completed within one year, and contracts in which one party acts as the guarantor for another party’s debt or other obligation must be in writing.

*See generally* Aaron Larson, *The Statute of Frauds and Contract Law*, (2003), *available at*

[http://www.expertlaw.com/library/business/statute\\_of\\_frauds.html](http://www.expertlaw.com/library/business/statute_of_frauds.html). The Uniform Commercial Code (UCC) also requires that sales of goods for more than \$500 be in writing.

*See* UCC § 2-201, *available at*

<http://www.law.cornell.edu/ucc/2/article2.htm#s2-201>.

19 Barragán, *supra* note 4, §4.05[4].

20 Mears, *supra* note 6, at 751. *See* discussion on Powers of Attorney *infra*.

21 Barragán, *supra* note 4, § 4.04.

22 Zamora, *supra* note 2, at 535.

23 *Id.*

24 *Id.*

25 Barragán, *supra* note 4, § 4.03[2].

26 Vargas, *supra* note 5, at Vol. 1 § 1.22.

27 Barragán, *supra* note 4, § 4.05.

28 Vargas, *supra* note 5, at Vol. 1 § 1.22.

29 Barragán, *supra* note 4, § 4.02.

30 *Id.*

31 *Id.*

32 *See generally id.*

33 *Id.*

34 *Id.*

35 Uniformity of Powers of Attorney to be Utilized Abroad, February 17, 1940, 161 U.N.T.S. 229.

36 Barragán, *supra* note 4, § 4.02.

37 Uniformity of Powers of Attorney to be Utilized Abroad, *supra* note 35.

38 *See* Federal Civil Code, *supra* note 9, at art. 1851-57.

39 Vargas, *supra* note 5, at Vol. 1, § 1.1.

40 Angel L. Oquendo, *The Comparative And The Critical Perspective In International Agreements*, 15 UCLA-PAC-Basin LJ 205 (1997).

41 Law Offices of Jaime B. Berger Stender, Mexican Legal System Overview, Section A, *at* <http://www.mexonline.com/lawreview.htm>.