

**HAYNES AND BOONE, LLP**

**LEGAL ISSUES IN DOING  
LOGISTICS BUSINESS IN  
MEXICO**



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UNT NAFTA CONFERENCE

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# **OVERVIEW**

- 1. Legal Vehicles to Do Business in Mexico**
- 2. Basics of Tax and Imports Regulations**
- 3. Labor Issues**
- 4. Legal Issues Leasing Warehouses in Mexico**
- 5. Legal Aspects of Transportation**
- 6. Technical Standards**
- 7. Free Trade Agreements Executed by Mexico**



# **I. LEGAL VEHICLES TO DO BUSINESS IN MEXICO**

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- a) Informal and limited activities: Representative Office to Promote Business Abroad**
  - b) Distributor/Agent**
  - c) Strategic Alliances**
  - d) Foreign company directly doing business in Mexico (Branch)**
  - e) Incorporation of a Mexican subsidiary**
    - Sociedad Anónima (Corporation)**
    - Sociedad de Responsabilidad Limitada (Limited Liability Company)**

# Distributionship/Agency

- **Freedom to terminate Agent/Distributor without liability for principal (vs other Latin American jurisdictions – Dominican Republic)**
- **Advisable to have a good written agreement to reduce risks of employment relationship claims**
  - **Other legal issues:**
    - **Non-compete provisions**
    - **Exclusivity**

# **Strategic Alliances**

- **Good alternative to expand business without capital investment**
  - **Key factors to consider:**
    - **Documented relationship**
    - **Ownership of client lists**
    - **Client Referrals**
    - **Liability before third parties**
    - **Transfer of know-how (intellectual property protection in Mexico required, protection in the US only will not suffice)**
    - **Tax implications**

# Branches and Subsidiaries

- **Branch vs. Subsidiary**
  - **Similar process and cost**
  - **Difference in liability. Branch is subject to higher exposure than a subsidiary**
    - **Same juridical entity**
- **Types of Subsidiaries:**
  - **Corporation (Sociedad Anónima)**
  - **Limited Liability Company (Sociedad de Responsabilidad Limitada)**

# **Sociedad Anónima (SA de CV) - Corporation**

- **No limitation in the number of shareholders**
- **No restrictions in transferability of shares**
- **Preemptive right in increase of capital**
- **Minority rights for shareholders representing 33% of capital**
- **Shares may be traded on the Mexican Stock Exchange (“Bolsa”)**
- **Minimum capital 50,000 pesos (equivalent US\$5,000.00)**

# **Sociedad de Responsabilidad Limitada (SRL de CV) Limited Liability Company**

- **No more than 50 partners**
- **Transfer of Partner Interest/Admission of new partners→approval by majority of partners**
- **Preemptive right in increase of capital**
- **Few minority rights**
- **Minimum Capital – 3,000 pesos (equivalent to US\$300.00)**



## **II. BASICS OF TAX AND IMPORTS REGULATIONS**

# Permanent Establishment (“PE”)

The concept includes:

- Having an office or facility in Mexico
- Having an agent or person with POA to execute agreements on behalf of foreigner regarding foreigner’s activities in Mexico
- Having a dependent agent in Mexico, including an agent who:
  - Has inventory on behalf of foreigner in Mexico
  - Assumes risks on behalf of foreigner
  - Is subject to control of foreigner
  - Receives his/her income independently from the results of his/her activities

In construction, there is PE when construction lasts more than 183 days in a 12 months period

# Income Tax

## **Income Tax Payable in Mexico by:**

- **Mexican residents under all their income**
- **Foreign residents with PE in Mexico for all their income from such PE**
- **Foreign residents for income sources located in Mexico**

**Income Tax Rate – 34% (To be annually reduced by 1% up to 32%)**

# **Treaty to Avoid Double Income Tax** **US-Mexico**

**The Treaty regulates income tax regarding:**

- **Real Property**
- **Business Profits**
- **Shipping and Air transportation**
- **Associated Enterprises**
- **Dividends – 15%**
- **Interest**
- **Royalties – 10% (vs regular 15% - 25% under Mexican Law)**
- **Capital Gains**
- **Personal Services (183 days presence rule)**

# VAT

- **Value Added Tax:**
  - **Applies to products and services**
  - **15% Rate, except in certain zones (border towns) which is 10% rate**
  - **Export of goods and services is exempted**
  - **Applies to imports of products and services**

# Imports

- **Critical to have an efficient Mexican customs broker**
- **Issues to consider:**
  - **VAT**
  - **Custom Duties**
  - **Certificates of Origin (for NAFTA products)**
  - **Compliance with Mexican Technical Standards (NOMS)**
  - **Importer should be registered in the “Importers Registry”**

# Custom Duties

- **Only for imports, not for exports**
- **Vary between 0% and 20% depending on the product (20% for finished products and 0% to 5% to raw materials)**
- **Few luxury goods are subject to 30%**
- **Removal of 10-year import restrictions on certain used goods under NAFTA (i.e., used computers)**



## **III. LABOR ISSUES**

# Labor

## **Statutory Severance:**

- **Not employment at will**
- **Three months of salary**
- **Seniority bonus (12 days of wages per year of service) when employee has more than 15 years of employment**

# Labor

## Recommendations:

- **Use individual written agreements**
- **If possible, use temporary agreements for specific periods of time (i.e. one month) before the company engages in an indefinite period of time**
- **Keep accurate records**
- **Avoid having US management team give orders to Mexican employee (especially written-email instructions)**



## **IV. Legal Issues Leasing Warehouses in Mexico**

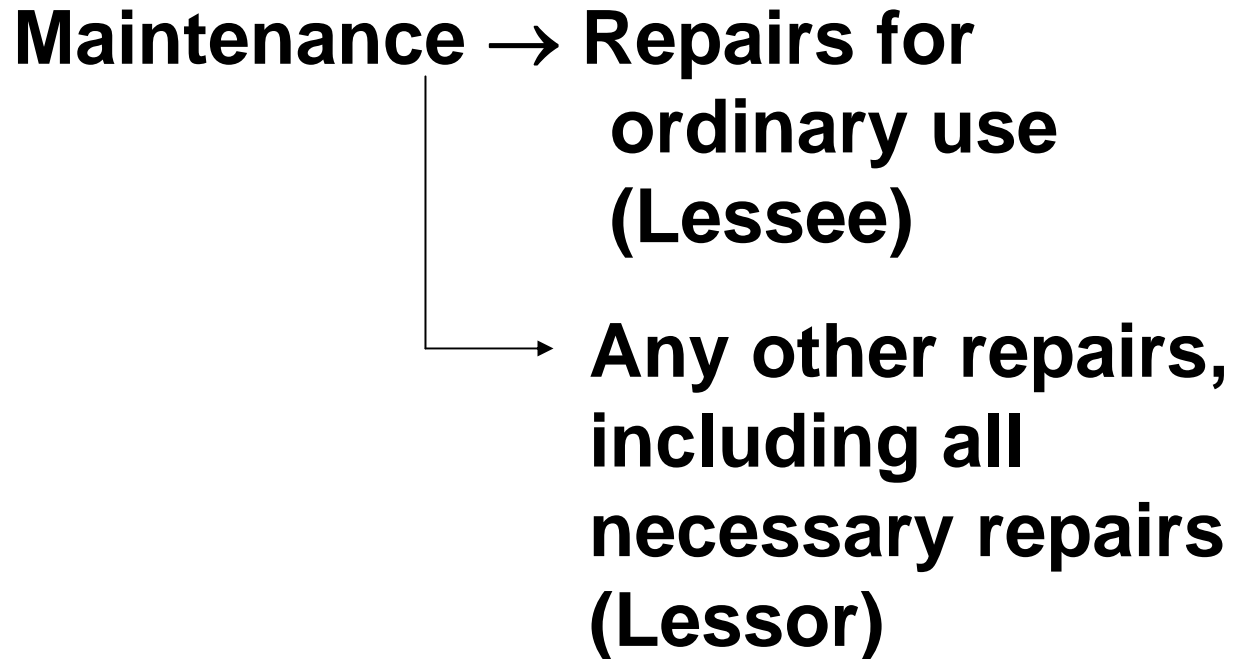
# Lease of Real Estate

- **Zoning. Do your own due diligence**
- **Rental payments guaranteed with bonds (which could be expensive) or deposits**
- **Eviction against lessee may take longer than in the U.S.**

## Lease of Real Estate

- Review waivers to articles of the law in the lease agreement
- Lessee is responsible for fire, except in case of *force majeure*, unless it comes from third party (opt out provision)
- Lessee is also responsible for handling hazardous materials (environmental regulations)
- Presumption by law that the real property is received in good condition, unless expressly stated

# Lease of Real Estate



- **Right of First Refusal to lease and buy the real estate for lessee with more than five years, provided that it has made important improvements**



## **V. Legal Aspects of Transportation**

# Transportation

## Freight Transportation



- **Authorization from the Transportation and Communications Secretariat (SCT) must be received when the freight weighs more than 8 tons**
- **Equipment must be periodically inspected**
- **Drivers must have special license**
- **Company liable for acts of drivers**

# Transportation

- **No regulation on tariffs**
- **Company must only register its maximum tariffs before SCT at least 7 days before its application**

# Major Mexican Government Agencies

<b>Agency</b>	<b>Primary Responsibility</b>
CUSTOMS	Ensures goods and services entering/exiting Mexico abide by laws and pay applicable duties and taxes (Check Points at (i) border, and (ii) km 25 / 30)
SAGARPA	Conducts phytosanitary inspections of plant and meat products entering Mexico
SCT (CAPUFE)	Administration, operation and maintenance of roads and toll bridges. Regulates Transportation
SEMARNAT	Regulation of hazardous materials movements and fumigation of forest products
SEGOB	Mexican Immigration – Check points at (i) border and (ii) km 25 / 30
SCT (Trucking)	Enforces Mexican motor carrier, driver and safety regulations



## **VI. TECHNICAL STANDARDS**

# Technical Standards

- **Regulations can be imposed on products or services by basically all Ministries of the Federal Government**
- **In some instances, Mexican regulations are drafted using international standards (which may differ from US and Canadian standards) so careful review is imperative**

# Technical Standards

- **In many instances NOMS are designed in a way to make international trade more difficult**
  - **WTO and Nafta validated concept of right to protect environment, life and health of humans, animals and plants, and consumer**
- **Additional challenge is documenting compliance (record keeping)**

# Technical Standards

- Mexico has growing network of private laboratories, verification units, and certification bodies (ANCE, CRT, etc.)
- Caution - complying with US requirements is not defense, unless there is a specific agreement for mutual recognition of test results and certificates by US and Mexican bodies (UL/ANCE/AENOR)
- Monitored at points of entry (customs authority) and points of sale (Profeco – consumer protection agency)

# Technical Standards

- **Compliance can be monitored by visual inspection (information tags) test results and certificates (electronics) or registration before certain governmental authorities (Cicoplafest, Ministry of Health) after detailed information, requirements and testing is furnished**
- **Certification given on a case by case basis and are not assignable**
- **Anticipate the time necessary to get NOMS could be crucial part of your operation**

# Technical Standards

- **Tendency to “order” (discriminate) international trade through technical regulations and procedures (Padrón de Importadores and Padrón Sectorial)**



## **VII. FREE TRADE AGREEMENTS EXECUTED BY MEXICO**

# Mexican Free Trade Agreements

**NORTH AMERICA** - NAFTA (United States and Canada)



**MIDDLE EAST** - ISRAEL



**LATIN AMERICA**



URUGUAY



BOLIVIA



CHILE

COSTA RICA



COLOMBIA



VENEZUELA



NICARAGUA

SALVADOR



GUATEMALA



HONDURAS

NEGOTIATIONS WITH MERCOSUR

**EUROPE**



EUROPEAN UNION

EUROPEAN ASSOCIATION

OF FREE TRADE:

LIECHTENSTEIN



NORWAY



SWITZERLAND



*Thanks!*

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