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Mexico
Trends and Developments

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Trends and Developments

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2020 will be remembered as the year when the world changed. The COVID-19 pandemic introduced major changes to the way we have typically seen the world, such as almost two months of worldwide lockdown, social distancing measures and a tremendous long-lasting effect on global economies. In late May and early June, governments around the globe began to ease up on some of the imposed restrictions. The decisions to lift the lockdown controls were not necessarily due to breakthroughs against the COVID-19 pandemic or to actual "flattened curves", but rather were an attempt by politicians to salvage their severely maimed economies and political capital.

In Mexico, the measures against COVID-19 were imposed in early March. On 13 May 2020, President Andrés Manuel López Obrador – escorted by his labour and economy ministers – introduced the Federal Government strategy for the reopening of social, educational and economic activities, which had come to a halt following the health emergency.

The reopening plan contemplated three stages for a "gradual, ordered and cautious" return to the so-called "new normality". The first stage commenced on May 18 with the reopening of a few municipalities that had not suffered any COVID-19 cases and that neighboured other municipalities where no cases were recorded. The second stage (from May 18 to 31) consisted of the introduction of protocols and training measures to assure a safe return to activities. The third stage began on 1 June and marked the end of the social distancing measures, allowed for the commencement of additional activities as essential activities (eg, automotive, mining, construction and beer production) and implemented a "traffic light system" that would supposedly allow for a staggered reopening of social, educational and economic activities.

The Mexican economy is expected to be among the hardest hit by the pandemic. Record-low oil prices and steep drops in tourism and foreign remittances, together with limited fiscal and monetary stimulus, set the stage for severe complications in the financing and M&A activity of Mexican corporations. Many Mexican publicly listed companies have seen declines in their market caps and debt ratings, posing significant challenges to their viability and financial health.

New Normality

During the first six months of 2020, the world faced a global crisis of great dimensions, perhaps the biggest in a generation. The decisions made by governments, individuals and businesses during this time will probably reshape almost every aspect of the way we live, interact with others and do business, for many years. Many processes that in normal times would have taken years of deliberation and testing, including work from home arrangements, remote contracting, virtual meetings and other internet-boosted processes, were fast tracked and will become part of our day-to-day lives. Public companies' focus shifted partially from the once sacrosanct "shareholder first" to taking into account other stakeholders in a more "social" capitalism. Concepts such as environmental, social and governance impact investing and fairer wages may take precedence over blunt cash dividends and buybacks in the years to come. This accelerated reality may be beneficial as it facilitates the implementation of long-expected business environment measures, but could also pose some threats as it lacked the adequate experimental phase, with potential unexpected impacts in different areas.

Social distancing measures have forced a significant part of the workforce to stay home and work entire shifts from there, in front of sometimes tiny monitors. While some have found it liberating to give up the daily time lost to commuting and work at their own pace, others have found it stressful, feeling isolated at a time when companies are making cuts and furloughing workers. This has also been the case for legal services business. Most law firms around the world have implemented home working with – so far – promising results. However, the pandemic-forced confinement has also taken its toll in an already stress-prone and demanding sector.

The fast shift to home working has raised productivity, security and quality control concerns. With hundreds of employees working from home during the coronavirus pandemic, companies have found themselves looking for ways to ensure that employees are doing what they are supposed to be doing. Consequently, demand has surged for tools to monitor employees. While employees are used to some levels of tracking, such as security cameras and entry registration devices, the arrival of COVID-19 took surveillance to higher levels, raising privacy questions about where the line between maintaining productivity from a homebound workforce and bold surveillance is drawn. This may mark a new chapter in the debate over privacy,

and the trade-offs people are willing to make for safety. Privacy issues in the workplace became a mainstream topic of discussion several years ago, when the ability of employees to access the internet from their workstations posed concerns about employees using work instruments and facilities for non-work related matters. The guiding principle around these topics has been the premise that employees must use work-provided tools and facilities for work-related tasks, and employers may exert some level of surveillance solely to verify this. However, now that the dividing line between workplace and work-provided tools is blurrier (as employees work from home using their own computer and phones), employee privacy questions are yet to be resolved. One may anticipate some labour controversies along these lines in the near future.

The implications and new normality brought on by the pandemic and the measures adopted by society to combat it have been felt across practice areas and sectors. Most effective full-service firms have understood these new realities by giving appropriate attention to clients' new needs, adjusting their service offerings, and laying the groundwork for long-term success.

New Normal in the Execution of Commercial Agreements

The ability to execute commercial agreements and other legal documents using electronic signatures is already regulated, but seldomly relied on. Social distancing measures, in-person meeting bans and other health concerns have bolstered the need to implement remote alternatives for the execution of agreements and other legal documents. Electronic signature requirements and the recognition thereof will take paramount relevance in the Mexican transactional arena; understanding them is key to both clients and lawyers alike.

Mexican law has recognised the use of electronic signatures in agreements for several years now. The Federal Civil Code provides that formal requirements in agreements are considered as fulfilled using electronic or optic devices, or any other technological means, if the information may be attributed to the obliged individuals and may subsequently be consulted. Similarly, the Mexican Commercial Code recognises the legal effects, validity and binding effect of acts carried out through data messages. Mexican law provides for three types of electronic signatures:

- the simple electronic signature;
- the advanced electronic signature which, by law, needs to satisfy several requirements regarding uniqueness, time and detection in order to qualify as such; and
- the certified electronic signature, which is basically an advanced electronic signature but with the additional feature of being verified by an authorised service provider with the ability to issue the corresponding certificates.

Some notary publics in Mexico already accept certain documents (such as commercial agreements, shareholders' resolutions and board of directors' resolutions) executed by means of a certified electronic signature, as long as the electronic file is provided to consult the signature, and is included in the appendix of the notarial instrument (docx, pdf, html and xml documents along with the "hash" of the signature and printed copy of the "cer" – certificate of the electronic signature). Additionally, in the case of shareholders' and board of directors' resolutions, notaries require that the bylaws of the company include the possibility of executing this type of document through a certified electronic signature.

As a matter of Mexican law, the electronic signature has the same legal effect as a handwritten signature and is admissible as evidence in trial. The Federal Code of Civil Procedures recognises as evidence any information generated by electronic or optical means or any other technology, while the Commercial Code contemplates data messages as evidence. Both statutes provide that, in order to assess the evidentiary value of such information, the reliability of the method through which such information was generated, communicated, received or filed shall be considered.

However, even if the law recognises the legal effects and evidentiary value of electronic signatures, and as electronic information may be altered, it must be considered that, regardless of the type of electronic signature used, electronic signatures contained in a data message may always be disputed or objected against in the context of a court proceeding or arbitration (in the same manner in which a handwritten signature can always be disputed or objected against). In the case of an objection, evidence on technological matters would have to be provided, which may involve additional procedural challenges. In this regard, in a number of decisions, the Federal Courts have recognised the validity of commercial transactions executed by electronic means, and have concluded that a document executed with an electronic signature is reliable if it complies with the authenticity requirements established in the Commercial Code.

In the tax realm, authorities have rejected certain evidence and supporting documents provided by taxpayers in audit procedures, by arguing that it is not possible to confirm the existence of certain legal events based on private documents, as such documents lack a "reliable date"; as a result, the authorities have not recognised such evidence and documents as being valid for tax purposes.

This position was confirmed by Mexico's Supreme Court of Justice indicating that "reliable date" is an enforceable requirement in private documents that are submitted with the tax authorities, and that in private documents "reliable date" is achieved when

the document is recorded with the Public Registry of Property and Commerce, when the document is notarised, or on the date of death of any of the signatories thereof.

The new realities and the trendier use of the certified electronic signature will, sooner or later, force the courts to revisit past precedents to confirm if, in addition to the means of evidence listed by Mexico's Supreme Court, the execution of a document using a certified electronic signature is also evidence to prove a "reliable date" on such a document.

New Normal in Contract Interpretation

In the contractual and transactional court, the global economic lockdown and the steep effects it caused in several industries prompted purchasers in M&A deals or lenders and borrowers in financing transactions to try to get out of previously executed deals where they believed that the situation at the time of execution, closing or enforcement had materially changed the business rationale of the transaction as originally intended. The COVID-19 pandemic and the measures adopted in Mexico, both by governmental authorities and by the private sector, raised various questions regarding potential exceptions to the fulfilment of contractual obligations and the corresponding enforceability of rights. "Material adverse effect", "best efforts", "ordinary course of business", "force majeure", "act of God" and similar concepts, some of them with no prior judicial interpretation in Mexico, became particularly relevant to the analysis of the rights and obligations of the parties to contracts, and to determining whether or not the conditions precedent to which closing or disbursement were subject were being met.

Mexican contract law provides for the "Pacta Sunt Servanda" principle, which establishes that what has been agreed upon by the parties must be complied with – ie, legally executed contracts must be faithfully complied with, notwithstanding the occurrence of unforeseeable future events that could alter the compliance of obligations. Following the principle of the parties' autonomy of will, in practice it is usual for contracts to contemplate specific cases in which it will be considered that an act of God, force majeure or material adverse effect (and other similar concepts) has occurred, as well as the consequences derived from such occurrence; this is in order to avoid discussions between the parties on whether or not a certain case of fact leads to a liability release of the obligor, to meeting certain conditions precedent, or to a party walking away from a deal.

In this regard, it is valid for the parties to agree on the cases in which it will be considered that an "act of God", "force majeure", "material adverse effect" or any other similar concept has occurred, as well as the legal consequences of such occurrence, with the parties being able to agree on the temporary suspension of their obligations, the termination of the contract without liability for them, or any other consequences they deem appropriate. In the absence of an agreement between the parties, it is necessary to refer to what the statutory and case law establish about such matters.

Mexican law has recognised that there are situations in which non-fulfilment of an obligation cannot be attributed to the obligor, because such person is prevented from performing by an event beyond its control, which it could not foresee or, even when foreseeable, could not prevent. Actually, some non-binding judicial precedents even support that individuals can be released from certain tax obligations when there is an act of God or force majeure event, under the principle that nobody is obliged to the impossible. However, in order for an event to be considered an act of God or force majeure, certain requirements must be met, such as generality, unforeseeability and irresistibility.

Furthermore, some local laws have adopted the "Rebus Sic Stantibus" clause, also called the Unforeseeability Theory, which allows the party affected by an unforeseeable event to request the early termination of the contract or, alternatively, to balance the reciprocal obligations between the parties, in the case of contracts of a successive nature, such as leases, gratuitous bailment contracts or mandates, among others, whenever such event makes it physically or legally impossible for one of the parties to comply with its obligations, or causes the obligations of one of the parties to be more onerous than originally foreseen. In this case, it is important to mention that some federal courts have determined that the Unforeseeability Theory is not applicable in commercial matters, since the Commercial Code adopts completely the principle of Pacta Sunt Servanda and establishes an absolute hierarchy of the autonomy of contracting parties over the equity and balance of benefits.

Therefore, in sum, it is valid for the parties to agree and incorporate concepts dealing with the ability of the parties to an agreement to walk away from the deal or to control the conduct of the seller in the period between the execution and closing of an agreement in the event of the occurrence of an "act of God", "force majeure", "material adverse effect" or any other similar concept, and to ascribe consensual legal consequences arising from their occurrence. However, in the event that contracts do not refer to the foregoing or if there is controversy regarding their interpretation, it will be necessary for the courts to interpret such concepts; in doing so, judicial authorities will most likely refer to the abovementioned principles. In addition, parties to any contract, including M&A agreements as well as loan and other financing agreements, must be very cautious as to the scope of concepts such as "ordinary course of business", "past practices" and the like when negotiating covenants, where non-compliance could lead to a valid refusal to close. It is important

to take into consideration that Mexican law also provides that parties to an agreement are bound not only by the terms of the agreements but also by the good faith principle, which requires them to act in furtherance of the agreement reaching its intended consequences (eg, to complete the acquisition or disburse a loan) and to not take action deliberately designed to sabotage or otherwise frustrate the performance of the contract. Accordingly, it is important for all parties to document their decision-making process both with their respective counterparties and internally to demonstrate that the party is acting in good faith and reasonably, based on the agreements and prevailing market conditions.

New Normal in the Mexican Energy Sector

The COVID-19 economic slowdown has coincided with a trend in the Mexican energy sector initiated by the government soon after taking office in 2018, of achieving reforms and going ahead with flagship infrastructure projects through administrative powers, rather than through major constitutional or legislative changes.

These actions have been aimed at strengthening Pemex and the state utility Comisión Federal de Electricidad (CFE) in their respective markets, to the detriment of the private sector. For instance, the Mexican government has cancelled energy auctions (for oil and gas, and renewable power generation), replaced the leadership of energy and environmental regulators with individuals that lack technical credentials, pressed for the renegotiation of certain natural gas pipeline contracts awarded by CFE, and repealed price regulation and transparency rules, as well as market instruments designed to foster renewables.

Furthermore, in late April, the Independent System Operator (CENACE) published a set of rules allegedly aimed at reinstating the reliability of the National Electricity Grid, arguing historic instability caused by wind and solar power plants, currently enhanced by a lower electricity demand due to the COVID-19 emergency. Notwithstanding that existing regulations – in particular the Grid Code – already foresee procedures for emergency scenarios, based on these rules only CENACE ordered the suspension of tests of solar and wind projects in the process of starting operations, and curtailed the operation of projects arguing transmission restrictions. At present, this resolution has been suspended by federal courts through definitive injunctions that will stay until the merits of the case are finally resolved.

Subsequently, Mexico's Ministry of Energy fast-tracked a directive seeking to increase the discretionary powers of the regulator (CRE) and CENACE to restrict the development of new wind and solar projects, and to restrict the dispatch of already operational wind and solar assets, giving preference to facilities providing "reliability" to the grid (which are mostly owned by CFE), completely repealing the prior criteria that prioritised economically efficient generation. Environmental NGOs and numerous energy projects have filed amparo claims (constitutional review) against the directive, successfully obtaining definitive stays against such policy.

More recently, CRE approved an increase in wheeling costs for legacy clean energy (ie, renewable power plants developed prior to the Energy Reform of 2013, where a "postal stamp" wheeling methodology was put in place as a mechanism to foster this type of generation). This is despite the fact that legacy projects are grandfathered by the electricity statute and an acquired rights principle. While wheeling costs for legacy projects have only been updated on a monthly basis according to inflation over the last ten years, the latest increase result in rates approximately 500% to 900% higher than those in place for June. Action from energy projects is in progress, and numerous legal challenges are expected to be brought by the sector.

The recent developments in the energy sector beg the question not only of whether the Congress's sphere of competence has been unlawfully transgressed in the case of the Ministry of Energy's directive, but also if, overall, the checks and balances of the Mexican system are at risk.

While autonomous agencies such as the Mexican Economic Competition Commission (COFECE) have identified possible negative effects from CENACE's rules, they initially decided to take a soft approach on the issue. In particular, on 7 May 2020, COFECE issued a non-binding opinion of CENACE's rules stating that certain provisions thereof could hinder competition in the electricity market. The opinion points out how such measures lack clarity and justification in their exposition. Likewise, it considers that they generate the temporal displacement of more efficient power plants in Mexico and how, in turn, the inefficient power generation would result in higher electricity tariffs for consumers or the need for increased governmental subsidies.

However, in a more decisive move, on 22 June 2020 COFECE announced that it had filed a constitutional lawsuit (*controversia constitucional*) with Mexico's Supreme Court against the new SENER Policy – constitutional lawsuits may be brought by one agency or branch of the Mexican Government against another under the argument that the latter is overreaching in its authority, and are resolved directly by Mexico's Supreme Court. In its press release, COFECE remarked that the new SENER Policy violates the basic antitrust principles enshrined in Mexico's Constitution, as well as the electricity sector laws, seriously affecting the economic structure of the electricity sector, concluding by stating that the basic elements that are required for the electricity market to operate with competition conditions

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would cease to exist with the entry into force of the policy. Two states (Jalisco and Aguascalientes) have also announced that they have brought constitutional lawsuits against the SENER Policy, and six other states have announced that they will follow in due course.

Further anti-competitive claims filed with COFECE or ex officio investigations carried out by COFECE against the actions adopted by the energy regulators may be expected.

In the meantime, transactional deals of renewable assets face a slow-down. Buyers in M&A transactions may seek to walk out, while sponsors that have acquired debt through project finance may face hardship to repay their debt service. This is in addition to the fact that already stressed projects are facing claims from their EPC contractors and suppliers affected by COVID-19 delays and may have to invoke changes in law and force majeure provisions under their power purchase agreements and transactional documents in light of the uncertainty provided by the recent regulatory developments.

Looking Ahead

The COVID-19 pandemic and recent actions taken by the current administration in the energy sector – some of which are allegedly related to it – have posted new challenges in Mexico, particularly in M&A deals, financing transactions and the energy sector.

As disputes arise regarding topics such as the execution and interpretation of commercial agreements in the private arena, as well as the legality of governmental decisions in the public arena, Mexican courts and arbitrations will have a crucial role to ensure legal certainty, the rule of law and the integrity of the democratic system in Mexico.

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Mijares, Angoitia, Cortés y Fuentes, S.C. was established in Mexico City in 1994 by a team of highly qualified lawyers focused on offering professional, sophisticated and quality legal services to satisfy clients' business needs. It is deeply committed to quality and responsiveness, and has consolidated its status as one of the pre-eminent full-service Mexican law firms. As the firm has gradually grown, it has attracted professionals with significant experience in the public, industrial and financial sectors, creating a team with the highest level of professional experience. Most of its lawyers and other professionals have completed graduate studies at foreign universities and have worked at law firms abroad, giving them a better perspective on international legal systems.

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Patricio Trad is a corporate finance all-rounder with broad experience in corporate transactions and structured finance matters. He is also a noted practitioner in the practice areas of M&A and Energy. He has experience in M&A, buyouts, joint ventures and divestitures, securities regulation, corporate and structured finance, infrastructure, energy and general corporate law. He regularly advises issuers in diverse local and cross-border tender offers, acquisitions, buyouts, and joint ventures. He acts for both buyers and sellers, and also for institutional investors and private equity investors in different industries, including regulated industries and public companies.

Ignacio Armida has experience in general corporate law, M&A and financings, and has advised buyers, sellers and investors in mergers, acquisitions, joint ventures and strategic partnerships. He has wide experience in cross-border and international transactions, representing Mexican and foreign entities. Furthermore, he has advised both sponsors and lenders on infrastructure financing projects. Ignacio has represented creditors and debtors in liability restructuring transactions, including syndicated loans. He has experience in representing various issuers, financial intermediaries and securities placement agents in securities issuances, including securitisations, equity and debt issuances and issuances of structured instruments carried out through private or public offerings in Mexico and abroad.

Martín Sánchez has experience in capital markets, M&A and corporate finance. He has represented buyers and sellers in M&A transactions in a wide variety of sectors, including transactions involving publicly traded companies and in highly regulated industries such as infrastructure, energy, finance and real estate. He regularly represents issuers and underwriters in equity transactions, equity-structured transactions (FIBRAs, CERPIs and CKDs), Multi-Offering Programs, equity and debt tender offers and complex multi-financing structures involving the issuance of project/structured bonds in Mexico and the international markets.

Patrick Meshoulam assists Mexican and foreign clients in a wide range of corporate transactions, including public and private offerings of equity, debt and structured securities, M&A and financings. He has worked on multiple domestic and international offerings, assisting issuers, investment banks and other financial institutions. In addition, he has been involved in several M&A and banking and other corporate finance transactions in Mexico and the United States.

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Carlos Orcí focuses on competition, telecommunications and corporate law matters, including representing companies in M&A and merger control procedures, cartels, abuse of dominance, essential facilities, and barriers to entry investigations. He has advised companies in landmark competition matters in Mexico, counselling national and international clients in proceedings before the Federal Economic Competition Commission, the Federal Telecommunications Institute and the Federal Courts. His experience spans a variety of industries, including the technology, media and telecommunications, energy, banking and financial services, aviation, chemicals, pharmaceuticals, mining, maritime, railway, transport, consumer products, and automotive sectors.

Aisha Calderón joined the firm in 2010 and works in the Energy practice group, focusing on electricity and environmental matters. She has participated in multiple renewable energy projects, including wind farms, solar farms and hydroelectric power stations, from their development and financing through to their operation. Aisha has wide experience in permit-related matters, construction, supply and operation agreements, and power purchase agreements. She also advises electricity firms in connection with their day-to-day operations and their participation in the Electricity Market. She has also collaborated in several M&A, securities and project finance transactions, with regards to energy and environmental aspects and project documents, as well as in public tender processes regarding electricity assets.

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