TERRUM

Briefing, analysis, opinion and insight of legal affairs in Mexico
Digital publication by SIERRA VÁZQUEZ OLIVARES MOLINA

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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

Relevant Aspects about Distribution Contracts prepared in the U.S.A. and enforced in Mexico.

by Mario Molina.

Because of the year-round demand in the United States of America for fresh produce such as tomatoes, cucumbers and peppers, imports from Mexico and Canada, mainly, are necessary during the winter, to supplement seasonal production from Florida and California.

Mexico is a direct neighbor, also a very important agricultural producer, and the majority of these imports originate here. Therefore export markets between Growers and the U.S. Distributors have created a very specialized industry that is concentrated in the ports of entry of Nogales and San Diego.

As is natural with a perishable, seasonally-supplied product, prices are very variable and most of the wholesale buyers close their purchases with verbal agreements on a daily basis. However, the most important Distributors have entered in alliances with Mexican Growers to guarantee their winter supplies, and under such negotiations, working capital, seeds, boxes and chemicals are provided in advance, in exchange for an exclusive distribution commitment for the eventual winter crop.

> "Since Mexico and the U.S. laws have a substantially different structure (common law vs. civil law), in most cases, the remedies that a Distributor is entitled to enforce without the intervention of a judicial authority are very limited."

Usually these alliances are executed through a Distribution contract, where all the details of the negotiation are included.

By definition, those Distribution Contracts involve two different applicable laws and jurisdictions, and even though the majority of these agreements are prepared and signed under the regulations of some U.S. State, if the Grower fails to comply with its obligations, those contracts need to be enforced by the Mexican court where the Grower is actually located.

In this scenario, we find that even when the Federal Mexican Civil Code prevents the application of a foreign law by the local or federal courts (applicable for commercial cases), previously established jurisdiction and applicable law clauses that did not take into consideration any of the Mexican Law regulations often limit the legal action the Distributor can really accomplish on this side of the border.

Since Mexico and the U.S. laws have a substantially different structure (common law vs. civil law), in most cases, the remedies that a Distributor is entitled to enforce without the intervention of a judicial authority are very limited. The specific circumstances under which a remedy can be exercised before the conflict has reached its final outcome are very special.

Another important subject is jurisdiction. Some foreign regulations prevent the privilege of the plaintiff to file claim or attempt the remedies of the Distribution contract in whichever jurisdiction the Grower or the product is located, waiving a previously designated jurisdiction in the contract.

“Distributors have a tendency to adopt a U.S. State regulation as the applicable law for their agreements with Mexican Growers, under the assumption that this will ensure them quick access to remedies."

In Mexico, jurisdiction is a complex matter and there are strict formal rules that must be followed in order to legally waive the competency of Mexican courts. These rules are even different for civil or commercial matters. When these rules are not followed, the jurisdiction clause can declared null by the local courts and the party located in Mexican territory would need to be tried before a local judge.

Distributors have a tendency to adopt a U.S. State regulation as the applicable law for their agreements with Mexican Growers, under the assumption that this will ensure them quick access to remedies. The Perishable Agricultural Commodities Act has proven to be an effective dispute resolution procedure for the final stage of the business, when no pre-season financing is being discussed. However, if any financing is involved, transactional documentation, regulated by Mexican law, has proven to be far more effective in enforcing in a collection process.

he Perishable Agricultural Commodities Act has also proven to be an effective dispute resolution procedure for the final stage of the business, when no pre-season financing is being discussed by the parties involved.

Parallel documents can be signed and prepared for every operation, keeping U.S. law as the applicable law for the main contract, but formalizing the security interests with provisions of Mexican law in order to have a better starting point when the time comes to execute the remedies.

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Six Strategies “A New Field for Mexico”.

To build a productive and competitive field, the Government is: a) improving the productivity of small and medium landowners; b) increasing the use of fertilizers and improved seeds; c) increasing arable irrigated areas; d) opening the flow of credit to farmers and entrepreneurs in the field; e) creating an information system that contributes to synchronize the offer and the demand of products in the domestic market and f) updating and simplifying laws, rules and regulations to encourage the investment and create more jobs. *Presidency of the Republic. 04/11/2013*

Agro-Business Trans-Pacific Partnership negotiations.

If it is finalized, the Trans-Pacific Partnership could lead to the elimination of tariffs on agricultural products and greater investment. The Trans-Pacific Partnership (TPP) is a multilateral free-trade agreement that is currently being negotiated by 12 nations, including Australia. The Australian Government has been participating in the TPP negotiations since 2008 with the aim of eliminating or at least substantially reducing barriers to trade and investment between these 12 countries. *Clayton Utz. 07/11/2013*

Mexico’s GDP.

The agency, Fitch Ratings, estimate an increase of 3.8 % in Mexico’s GDP for 2014, after the expectation of a low increase in the internal economy; however, the growth for the next year is explained by the projection of the reactivation of the economic activity in the United States. The stock market evaluation also indicates that for the next year, moderate growth is expected and sustained in Bond Funds and that the numbers of funds will be maintained. *El Universal. 19/11/2013*

The “Middle Class” fallacy for the tax incorporation .

The new tax reform implemented in Mexico is aimed to incorporate a larger sector of the population into the tax-payer bracket. However, new studies reveal that the perception the government has of “middle class” may not be close to reality. The tax reform originally planned on incorporating all those that have an income of $500,000 pesos a year. But the truth seems very different according to the Instituto Nacional de Estadistica y Geografía (The National Institute of Geography and Statistics or INEGI in Spanish). Truth is that the Mexican Middle Class is not as affluent as the government believes; 39% of the entire Mexican population make up this group, and are far from the $500,000 pesos income and closer to $120,000 pesos. This shows that this new tax bracket will not incorporate as much of the “Middle Class” as believed. *The Economist. 19/11/2013*

In this month extract was prepared by Vera García, Mauricio Castillo and José Manuel Muñoz.

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Exports to grow the domestic market: Peña Nieto.

"We have decided to create a new commercial undertaking that will break down walls and build new bridges to make our export sector a growth agent of our domestic market"; this in the words of President Enrique Peña Nieto, during the ceremony presenting the National Export Award. The president also said that Mexico has been making changes to the economy so as to become more competitive and dynamic, which together with the reforms already approved and the reforms that are in discussion in Congress will allow this country to release its full economic potential. *The Economist. 22/11/2013*

Secondary laws for the Mexico telecom overhaul to be delayed by lawmakers.

Legislation to implement a major overhaul of Mexico's telecommunications industry will not be approved until early next year. The secondary laws set out the fine print for a telecom reform as promulgated in June by President Enrique Pena Nieto, reforms which gives regulators sweeping powers over Carlos Slim's telecom giant and dominant broadcaster, Televisa. *Reuters U.S. Edition. 23/11/2013*

Mexico's president should push for a bolder energy reform.

A year ago Enrique Peña Nieto became Mexico's president, promising a series of reforms aimed at raising the country's unimpressive economic growth. To overcome a dozen years of legislative gridlock, he struck a "Pact for Mexico" with the opposition. All this sparked enthusiasm in the markets and led to talk of a "Mexican moment". *The Economist. 23/11/2013*

Mexico's leftists exit pact, raising hope for greater energy reform.

Mexico's main leftist party said it had pulled out of a cross-party pact on economic reform, raising hopes that the government will agree to a more far-reaching plan to attract private investment for the oil industry. The ruling Institutional Revolutionary Party, or PRI, is hoping its energy reform will spur faster economic growth, and the departure of the Party of the Democratic Revolution (PRD) from the accord is likely to push the debate closer to a more business-friendly proposal backed by the center-right. *Reuters U.S. 28/12/2013*

Florida Battles Mexican Strawberries.

As Florida's strawberry season ramps up production, the state's grower-shippers are considering how they can better compete against Mexican berries. The almost exclusive winter marketing window that Florida growers enjoyed in the past is coming to an end as Mexican growers expand production and increasingly affect demand and prices. Growing on twice as many acres as Florida, Mexican strawberry growers have significantly increased shipments to the U.S. and are expected to double acreage within the next five years, said Zhengfei Guan, a University of Florida assistant professor with the Institute of Food and Agricultural Sciences' Gulf Coast Research and Education Center in Wimauma. *The Packer. 02/12/2013*

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