

Contracts, negotiation and enforcement in Mexico: overview

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Country Q&A | [Law stated as at 01-Dec-2017](#) | Mexico

A Q&A guide to general contracts and their negotiation and enforcement in Mexico.

The Q&A gives a high level overview of the key legal concepts, including contract formation with general discussions as to authority, formal legal requirements, formalities for execution, the requirements for deeds and notarisation, and powers of attorney. It also considers the status of contractual terms, variation and assignment of contracts, and enforcement of the contract. The enforcement section covers remedies and liability, exclusion of liability, and cross-border/jurisdictional matters.

The Q&A is part of the global guide to contracts, negotiation and enforcement.

Formation of contracts

Authority and capacity

1. What are the authority/capacity rules for entering contracts, for different commercial entities?

There are no significant differences under Mexican law, as to how different types of companies enter into contracts.

The authority/capacity of a company to execute contracts is generally evidenced by its corporate purpose included in the company's bye-laws.

Authority

Mexican commercial entities can enter into all types of agreements, as long as the contract's purpose is lawful. The authority to represent commercial entities derives either from the law, or from specific appointment of its representatives (attorneys-in-fact) through granting of powers of attorney. Mexican law recognises a company's management bodies (such as the board of directors, managing directors or sole directors) as legal representatives with authority to enter into contracts on behalf of the company.

The scope and limitations on the authority of the legal representatives (management bodies) to enter into contracts on behalf of a company is usually provided in the company's bye-laws. The authority of the attorneys-in-fact is limited and subject to the scope of the general or special powers of attorney granted in their favour. Powers of attorney must be duly formalised to become effective.

Capacity

In terms of capacity, a commercial entity can enter into any type of contract that is:

- Lawful.
- Serves the company's corporate purpose.

A foreign company can enter into all types of contracts. However, a foreign company's direct participation in contracts relating to the following activities is partially or totally restricted (*Articles 5, 6, 7 and 8, Foreign Investments Law*):

- Nuclear generation.
- Control of the national electric system.
- Control and supervision of airports.
- Passenger transportation.

2. What are the essential requirements to create a legally enforceable contract?

There are two essential requirements to create a legally enforceable contract:

- **Consent.** Consent can be express (verbal, written, by electronic or optic means, or via any other technological means), or implied (resulting from acts or facts implying consent or leading the parties to assume its existence). In some cases, the law requires express consent as an essential requirement for certain specific obligations. For example, the provision of services by a subcontractor requires the owner's consent and the assignment of obligations by a borrower under a loan requires the lender's consent. Parties to an agreement can also require express consent as a requirement for enforceability of a contract.
- **Valid subject matter of the contract.** To comply with this requirement, the contract must identify the rights and obligations that it creates, transfers, modifies or terminates, as well as the goods and/or activities to which such obligations will apply. The purpose of the agreement must be possible, legal and marketable.

3. What are the main forms of contract?

Oral and written contracts are enforceable under Mexican law. For a binding contract to be formed there needs to be:

- Mutual consent.
- A legitimate purpose.

In some specific cases, Mexican law requires contracts to be in writing (*see Question 6*), while in some other cases, contracts must be formalised before a notary public (*see Question 7 and Question 10*).

Oral agreements are typically used for minor transactions between individuals (such as transportation, purchase and sale of goods excluding real estate and donations below MXN200). If the written contract is formed electronically or digitally, such as via email or another informatics system, then the consent needs to be given electronically (*see Question 9*) for it to be binding on the parties.

4. How are preliminary agreements used in your jurisdiction?

Mexican law recognises preliminary agreements in the form of promissory agreements. Promissory agreements are entered into on a binding basis, obliging the parties to enter into a future agreement. To be considered as such, a promissory agreement must be in writing, contain the elements of the definitive contract and provide the period in which the definitive contract must be entered into. If any of the parties refuses to enter into the definitive contract, the other party can bring claim before the courts to obtain the execution of the agreed definitive contract.

Preliminary agreements are also used in practice, such as preparatory agreements, memorandums of understanding or letters of intent. These are usually entered into on a non-binding basis, providing the general conditions on which the parties will negotiate a definitive contract. Depending on the specific negotiation, only some of the provisions in the preliminary agreements may be considered binding, (such as the term for negotiations, exclusivity terms and confidentiality obligations).

In certain cases, a liquidated damages clause for breaching the binding provisions can also be included. In practice, if the parties' intent is to enter into a preliminary agreement on a non-binding basis, this must be clearly indicated in the relevant document.

5. Can negotiations become legally binding in any circumstances? What are the principles and rules (if any) on pre-contractual liability and good faith in negotiations?

Pre-contractual liability does not exist in Mexico. In almost all cases, a binding contract is formed only if an offeror's offer is accepted by the offeree. If the offeree clearly and unambiguously accepts the offer, the agreement is made in line with the offeror's conditions. If, however, the acceptance is not articulated in a clear manner, this will be deemed to be a new offer from the offeree and invalidates the initial offer.

If the intent of an offeror is to issue an invitation to negotiate, then they should make this express, to ensure that the invitation is not intended to be legally binding.

An offer is valid and binding during the period expressly stated by the offeror. If this is not specified, the offer either:

- Remains valid for three days if it was not made through an instantaneous means of communication. However, existing communication technologies makes this rule difficult to apply.
- Lapses, if made by an instantaneous form of communication (such as in person, by phone or by other electronic or optical means that enable immediate acceptance, and it is not accepted immediately).

In practice, an offer can be revoked by the offeror as long as the revocation is communicated to the offeree before the receipt of the offer. Therefore, this is only applicable if the offer was initially issued via a distance contract.

Formalities for execution

6. When are written contracts required and for which assets/interests?

Contracts that must be in writing include:

- Promissory agreements.
- Acquisition and transfer of real estate rights with a value of more than 350 times the *unidad de medida y actualización* (UMA) value (that is, US\$75.49 for 2017).
- Donations of goods exceeding MXN200.
- Powers of attorney.
- Construction agreements.
- Lease agreements.
- Mortgages.
- Pledges.
- Securities.
- Trust agreements.
- Services agreements.
- Association agreements.
- Partnership or shareholders agreements.
- Settlements, if the transaction exceeds 200MXN.
- Usufruct agreements.

- Contracts of adhesion.

7. Are there different formalities for different types of contractual document?

Under the Civil Code, the General Law of Commercial Companies 1934 (as amended in 2016) (*Ley General de Sociedades Mercantiles*) and the General Law of Negotiable Instruments and Credit Transactions 1932 (as amended in 2014) (*Ley General de Títulos y Operaciones de Crédito*), certain written contracts must be formalised or ratified before a notary public, or registered in the relevant public registry of property. Examples of these contracts and their relevant formalisation requirements include:

- **Acquisition and transfer of real estate rights.** These must be recorded in the public registry and if the appraisal value exceeds 350 times the UMA (see [Question 6](#)) value at the time of the transaction, they must be granted before a notary public.
- **Powers of attorney.** These must be granted through a public instrument:
 - if the power of attorney is general;
 - when the transaction for which it is granted is equal to or higher than 1,000 UMA by the time in which it is granted; and/or
 - when the transaction to be entered into by the attorney-in-fact is a transaction that must be formalised through a public deed.
- A power of attorney can also be granted through a proxy signed before two witnesses (if the signatures of the grantor and the witnesses are ratified before a notary public, judge or the corresponding administrative authority).
- **Donations.** If the value of the donation exceeds MXN5,000, the donation must be formalised through a public deed.
- **Pledges.** When the debtor retains possession of the pledge, the pledge must be recorded before the public registry for it to be effective against a third party.
- **Mortgages.** To be effective against third parties, mortgages must be granted before a notary public and recorded in the public registry of property.
- **Trust agreements.** If the assets being transferred are real estate properties, the trust must be notarised and recorded in the public registry of property. If the affected assets are movable assets, it must be recorded in the registry of security interests.
- **A company's articles of incorporation.** These must be granted by its partners or shareholders before a notary public, and the same must be recorded in the public registry of commerce.
- All other agreements (such as service provision agreements, share purchase agreements and labour agreements) are not subject to these type of formalities and do not need to be formalised before a notary public or public broker (*corredor público*).

Companies

8. What are the formalities for the execution of documents by companies, foreign companies and individuals?

Companies

Mexican companies must provide evidence of their legal existence and incorporation via a notarised and registered incorporation deed and provide documents evidencing the powers of attorney of the individual executing the documents on behalf of the entity.

Foreign companies

Foreign companies must provide evidence of their legal existence and the authority of the individuals acting on their behalf, under the laws of their jurisdiction. Further, these documents must be legalised or apostilled if the contract to be entered into by the foreign company is going to be formalised before a notary public.

Individuals

Individuals must either be emancipated from their parents (that is, legally freed from control by their parents or guardians) or at least 18 years of age, to enter into a contract. Emancipated individuals can freely enter into all types of contracts with the exception of the sale, the encumbrance or the mortgage of their real estate properties (in these cases they require a prior authorisation from a judge).

Legally incapacitated persons can only enter into contracts through a legal representative.

9. What is the status of electronic and faxed signatures in your jurisdiction?

Electronic signatures are valid to execute a contract as long as:

- The e-signature has been created in accordance with the legal and technical requirements of the Code of Commerce, such as:
 - identifying the signatory using the electronic data included in the electronic signature;
 - the signatory's exclusive control over the electronic signature; and
 - the possibility to detect any alteration to the electronic signature after it is used to sign a document.

- The compliance of these requirements and the reliability of the electronic data included in them has been previously certified by an independent certifying entity authorised by the Ministry of Economy.

Facsimile signatures are not commonly used in Mexico, given that in case of a dispute, it is a mere indication of the existence of the contract, so the party interested in demonstrating its existence must submit additional evidence for such purpose.

Deeds

10. When are deeds required in relation to contracts?

Examples of the types of contracts that must be formalised through deeds are included in *Question 7*.

Deeds are issued by a notary public. Contracts that are exclusively related to commercial transactions are formalised through deeds issued by commercial brokers (*corredores públicos*).

11. What are the legal formalities for a deed?

Deeds must be formalised in writing, signed by the parties and authorised by a notary public or commercial broker (*corredor público*) (see *Question 10*). The original signed deed is kept in the notary's/commercial broker's records and the parties receive certified copies of the deed duly initialised, signed and sealed by the notary public or commercial broker, as applicable.

12. What are the legal requirements for the execution of deeds?

The parties must demonstrate to the notary public their legal existence and capacity, as well as the authority of the individual(s) acting on their behalf (if applicable).

With regards to foreign companies, if their documents are in a language other than Spanish, they must be translated by a Mexican court-certified translator, and those translations must be legalised or apostilled, as applicable.

Notarisation

13. Is notarisation required for contracts in your jurisdiction?

There are certain formal agreements that require notarisation in Mexico (*see Question 7*). Notarised deeds give certainty to the contract and authenticity to the signatures contained in them. Further, a notarised deed creates the presumption that the contract was effectively entered into as of the date of the public deed.

Although the facts contained in a notarised deed are rebuttable in trial, the grounds to do so are limited in comparison with private deeds formalised solely between the parties. For this reason and due to the commercial or financial relevance of certain agreements, the parties may decide to formalise them before a public notary, even if formalisation is not strictly required by law.

The legal fees of the public notary are provided in a public tariff.

14. What are the legalisation requirements in your jurisdiction and how is it carried out?

Mexico has signed and ratified the HCCH Convention Abolishing the Requirement of Legalisation for Foreign Public Documents 1961 (Apostille Convention).

Therefore, the apostille rules apply. For public documents issued outside the countries where the Apostille Convention is in place, the Ministry of Foreign Affairs (or equivalent) of that country must certify that the signature or seal of the officer issuing the document matches with the signature or seal registered in its records. On certification, the document must be legalised in the Mexican diplomatic offices (consulates or embassies).

Powers of attorney

15. What are the main types of powers of attorney in your jurisdiction?

The general powers of attorney are:

- For acts of ownership (*actos de dominio*), authorising the attorney-in-fact to mortgage, donate or sell the properties of the grantor.
- For acts of administration (*actos de administración*), authorising the attorney-in-fact to administrate the properties and rights of the grantor.

For lawsuits and collections (*pleitos y cobranzas*), authorising the attorney-in-fact to represent the grantor in lawsuits and administrative procedures and collect debts.

Special powers of attorney can also be granted for the attorney-in-fact (according to what is expressly authorised) to represent the grantor in specific transactions or activities. Some examples of special powers of attorney are identified below:

- To sign and endorse negotiable instruments.
- To open, manage and cancel bank accounts.
- To act on behalf of the grantor before a specific authority or in a specific matter (such as environmental, tax, customs or labour matters).
- To enter into a specific contract(s) of certain legal nature.
- To delegate the authority granted by the power of attorney to other individuals.

16. What are the main transactions when powers of attorney are used?

All individuals entering into any contract on behalf of a company must have sufficient authority granted through powers of attorney.

17. What are the key provisions in a power of attorney?

The power of attorney must clearly indicate whether it is being granted in a general or special manner and, if applicable, what type(s) of general powers of attorney are being granted (*see Question 15*).

If the grantor requires conditions on or limitations to the authority of the attorney-in-fact, the specific scope and limits of that authority must be clearly defined in the document. For example, the authority granted can be limited to

certain economic thresholds, the joint exercise with another attorney-in-fact or securement of the prior authorisation from the board of managers or another management authority.

In certain cases, such as for the execution of a specific agreement or the completion of a certain transaction, it is also advisable to specify when that particular power of attorney will expire.

18. What are the formalities for the execution of a power of attorney?

The relevant deed must be formalised in writing, signed by the grantor (no signature of the attorney-in-fact is required) and authorised by a notary public. If the power of attorney is granted by a company, the individual granting the power of attorney must demonstrate to the notary public the legal existence of the company, as well as his authority to grant or delegate powers of attorney.

The original deed is kept in the notary's records and the grantor receives certified copies of the deed duly initialised, signed and sealed by the notary public.

Other

19. Is virtual closing used in your jurisdiction?

Virtual closing is used. However, originals of the executed copies must be exchanged within the following days. There is no specific deadline by which they must be exchanged. Original copies facilitate the enforceability of the agreements before the courts.

20. How are legal opinions obtained and used in your jurisdiction?

Legal opinions are frequently used in cross-border M&A and financing transactions. The issuance and delivery of legal opinions addressing specific topics of the transaction are often included as conditions precedent for the corresponding agreement. In addition, counsel to the parties (particularly borrowers' counsel) are usually required to issue legal opinions.

21. What are the key issues in the conduct of completion meetings?

The nature of the deal determines the key issues in the conduct of completion meetings.

Before completion meetings:

- Lawyers must confirm that all of the documents that require signing are available in the necessary counterparts, and that any deliverables (that is, conditions precedent) have been duly issued and satisfied by the corresponding party.
- Lawyers conduct the review of certain documents that will require signing, such as powers of attorneys and, if applicable, notarial deeds drafts. Lawyers must ensure that specific post-closing document delivery obligations are complied with.

Content of contracts

22. What is the legal status of contractual terms in your jurisdiction?

There are three main types of contractual term:

- **Recitals.** These state the background information of the agreement in place and are generally used for reference purposes.
- **Representations.** These include the statements made by the parties with regards to:
 - their legal capacity to enter into an agreement;
 - the powers of their legal representatives; and
 - their legitimacy to enter into such transaction (for example, in an acquisition and transfer agreement, the representation made by the seller that they own the subject matter of the agreement).
- **Clauses.** These represent the integral part of the agreement, in which the rights and obligations of the parties, as well as conditions and guaranties are set out. In Mexico, it is common practice to avoid third party (judicial) interpretations of contracts. Therefore, it is important to include as much as possible in the clauses of the contract to make the agreed terms of the contract clear.

The majority of agreements are already regulated under Mexican law, establishing basic ground for their execution and compliance. However, based on the principle of contractual freedom, parties can agree to any disposition, as long as they do not contravene any rules of public order or are considered illegal under Mexican law.

Agreements regulated by law have mandatory clauses specifying the legal act the parties intend to carry out. For example, in a purchase and sale, the parties must at least agree on an object to be sold and purchased, and the price at which it will be purchased.

Formalities are required in certain cases. These formalities must be complied with to make the contractual terms effective and binding on the parties.

23. Are warranties recognised in your jurisdiction?

Warranties are recognised.

Warranties are common in consumer protection law (such as in relation to the quality of goods or services provided).

Real estate transactions can also include certain warranties, such as those relating to the condition of the property and the use of the property for the purposes established in the relevant agreement.

Many warranties established under Mexican law can be amended or waived by the parties. The parties can also agree on other warranties that are not necessarily contained in the law.

Variation and assignment

24. What are the main ways to transfer contractual rights?

The Civil Code recognises the assignment of rights and obligations. As a general rule, the obligor's consent is not required for the assignment of rights. On the other hand, the assignment of an obligation (assignment of debts) requires the express or implied consent of the creditor. The rules for the assignment of contractual rights and obligations are generally established in the relevant agreement.

Generally, assignment is completed by means of an assignment agreement executed by and between the assignor and the assignee. Under the specific negotiation, the consent of the counterparty to assign the rights and obligations under a contract may or may not be required.

Negotiable instruments are assigned through an endorsement in favour of the assignee.

Unless expressly prohibited in the relevant agreement or by law (personal rights), all contractual rights and obligations are assignable.

25. What are the rules relating to waiver of contractual rights?

Generally, all contractual rights can be waived, except if the waiver is expressly prohibited by law or if the relevant right is considered of public interest. Typically, contractual rights have to be expressly waived by means of written notice issued to the other party, although, implied waivers can also be agreed by the parties.

Enforcement

Liability and remedies

26. What are the rules relating to invalidity, misrepresentation and mistake relating to contracts?

Invalidity

If consent has not been provided by either party or if the contract lacks valid and lawful purpose, the contract is void.

A contract is void, with the possibility to remedy the nullity, if:

- Both contracting parties are legally incapacitated.
- The contract does not comply with the formalities required by law.
- The consent from one of the parties was defective.

Defects include:

- Mistake.

- Fraud.
- Fraudulent concealment.
- Duress.

Misrepresentation

With regards to misrepresentation, it is common practice to include a paragraph after the representations stating that the consent given by the parties to enter into the relevant contract was given by virtue of the representations made by the counterparts. Therefore, misrepresentation can render the contract null and void as the consent given by the injured party would be defective.

An error is considered a vice of consent, which would make an agreement null. The nullity can be revoked by means of ratification of the act that caused the error. Law contemplates error of law or error of fact. Both cases nullify the effects of a legal act. An error in calculation will not render an act null as the parties will rectify the miscalculation.

In summary, error occurs when the parties have the wrong conception of a thing or a fact.

27. What are the main performance and discharge rules relating to contracts?

A contract can be discharged in the following ways:

- **Expiration.** If the term of a contract expires, it is terminated automatically.
- **Performance.** If both parties perform their contractual obligations within the agreed term, fulfilling the main purpose for which the parties made the agreement, the contract is terminated. Contracts will be discharged on compliance with their purpose, as purpose is a requirement for the existence of an agreement.
- **Agreement between the parties.** If the parties mutually agree to terminate the contract, it is terminated.
- **Termination.** The parties can expressly provide in the contract for unilateral termination and its consequences.
- **Frustration.** If, due to a change in circumstances, the performance of the contract becomes impossible or 'it has lost its purpose, it is automatically terminated.
- **Rescission.** If one party fails to perform a contractual obligation, the contract is terminated.
- **Force majeure.** One or both parties are excused from performance of the contract following the occurrence of a particular event.

Finally, there are certain general rules for the termination of obligations in any legal relationship, such as:

- **Obligation confusion.** When the qualities of obligor and creditor are united in the same person.
- **Novation** (*novación*). When the parties amend the obligations under the contract and therefore terminate the original contract and form a new contract.

28. What are the key rules on privity of contract and third party rights?

The privity principle exists under Mexican contract law. A contract cannot confer rights or impose obligations arising under it on any person or agent except the parties to it.

However, the parties can agree for a third party to be the beneficiary of the contract, in which case, that third party can sue the parties to the contract, to enforce the performance of the agreement.

Other cases in which a third party is the beneficiary of a contract by virtue of its character include:

- Assignees.
- Heirs or successors.
- Guaranteed parties or guarantors.

29. What are the main rules relating to contractual liability?

There are two types of liability:

- **Several.** Each party is liable for their own specific obligations. Several liability is presumed, so if the parties wish liability to be joint, the contract must expressly state this.
- **Joint.** The non-breaching party can pursue a claim against any of the joint obligors for the totality of the obligation, regardless of which party breached the obligation. This kind of liability can be determined in the contract or by law, with the understanding that joint liability is never presumed.

30. What are the main rules relating to excluding contractual liability?

Generally, when a party fails to fulfil any of its contractual obligations, it will be liable to its contracting parties. This is unless the other party was the first to default on its obligations or was negligent, preventing the breaching party from complying with its obligations.

The components of contractual liability are:

- Negligent conduct (by means of which the party has not complied with its obligations).
- Damages caused to the non-breaching party (which can be quantified in the contract or by law).

Parties can agree, at any point, to exclude liability.

31. What are the main contractual remedies?

The main contractual remedies are the:

- Payment of conventionally agreed penalties. These are generally determined over a percentage of the total price of the agreement or of the damage caused, or by a fixed amount established in the agreement. These penalties must not exceed the total price of the contract.
- Award of damages. Damages can be quantified in the contract or by law.

In certain cases, when possible, the breaching party could be obliged to perform its contractual obligations (specific performance) and pay damages to the non-breaching party for the wrongful delay of the performance. If specific performance is not possible, the non-breaching party can terminate the contract and request the award of damages.

If agreed by the parties during the formation of the contract, liquidated damages can also act as a form of remedy. These compensate the non-breaching party for the losses suffered as a result of the breach. The liquidated damages cannot exceed the total consideration or value of the contract.

32. What are the main differences between indemnity and damages? Are penalty clauses subject to any limitation?

An indemnity is the obligation of the breaching party (the indemnifying party) to compensate the damages suffered by the non-breaching party (indemnified party) as a result of the former's breach of the law or its contractual obligations.

Damages are the losses suffered by one of the parties as a result of the other's breach of duty.

Penalty clauses/liquidated damages cannot exceed the total consideration or value of the contract.

Enforcement and cross-border issues

Choice of law

33. Is a foreign choice of law in a contract upheld by the local courts?

Parties can freely submit a contract to foreign law, (with the exception of real estate contracts, where the parties are subject to the laws of the jurisdiction in which the property is located).

However, a contract submitted to a foreign law must not contravene the fundamental legal principles of Mexican law (*see below*).

The following rules apply in the application of foreign law:

- A Mexican judge applies foreign law in the same manner that the judge in the relevant jurisdiction would apply it.
- Mexican law applies if a certain issue is not covered under the chosen foreign jurisdiction's law.
- Foreign law does not apply if it contradicts any fundamental principles of Mexican law and contravenes institutions of public order.

34. Are any mandatory terms implied by statute?

The contractual waiver of rights can only apply if the waiver does not affect the public interest or the rights of third parties. The waiver of rights must be expressed in a clear and precise manner to ensure that there is no doubt of the specific right being waived.

Jurisdiction

35. Is a choice of jurisdiction in a contract upheld by the local courts?

The parties' choice of jurisdiction is upheld by the local courts if the parties expressly waive any other jurisdiction that may be applicable to them in terms of their present or future domiciles.

Enforcement of foreign judgments

36. When are foreign judgments recognised in your jurisdiction?

A foreign judgment is recognised and enforced by the courts of Mexico, without a further review on the merits, if certain requirements are satisfied; such as:

- The judgment is obtained in compliance with the legal requirements of the jurisdiction of the court rendering it. The ruling court and judge must have jurisdiction to hear and rule on the matter.
- The judgment does not violate Mexican public policy, agreements binding on Mexico, international treaties, or generally accepted principles of international law.
- The courts of the foreign jurisdiction recognise the principle of reciprocity with regards to the enforcement of Mexican judgments in their jurisdiction.
- The defendant received notice or was served, granting him or her right to be heard and assert a defence.
- The matter is subject to final judgment without further resort in the country of origin, or there is no further recourse available.

Online resources

W www.diputados.gob.mx/LeyesBiblio/pdf/44_181215.pdf

Description. The official text of the Ley de Inversión Extranjera on the official website of the Chamber of Deputies.

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