

Mexican Corporations

Types of Corporations

The General Mercantile Corporations Law regulates all business corporations established in Mexico. The most common forms of corporations are the following:

1. ***Sociedad Anonima (S. A.) and Sociedad Anonima De Capital Variable (S. A. De C. v.)*** are negotiable stock corporations of two or more persons whose liabilities for acts of the corporation are limited to their capital contribution.

2. ***Sociedad De Responsabilidad Limitada (S. De R. L.) and the Sociedad De Responsabilidad Limitada De Capital Variable (S. De R.L. De C.V.)*** are nonnegotiable stock limited liability corporations of two or more persons whose liabilities for acts of the corporation are limited to their capital contribution.

The abbreviation "S.A." or "S. De R.L.. De C.V." after the name of the company merely indicates that the company is incorporated under this corporate form in the way "inc:" is used in the United States. The addition of "De C.V." indicates that the corporation has variable capital, which simply means that the corporation may increase or decrease its capital stock within the limits established by the corporation's by-laws, without having to formally amend its corporate charter. Most corporations, regardless of their form, will opt for variable capital because of this added flexibility.

The majority of businesses set up in Mexico are ***Sociedad Anonima De Capital Variable***. When only a few parties are involved in the business, the ***Sociedad De Responsabilidad Limitada*** can be a good alternative, especially in the case of joint venture companies; nevertheless, the S.A. De C.V. still seems to be the most common choice when setting up a corporation in Mexico.

Corporate requirements

The S.A. and the S. De R.L.. corporations, regardless of whether they have variable capital, must fulfill the following requirements:

1. The S.A. must have a minimum of two stockholders and its minimum capital stock cannot be less than N\$50,000 pesos. In the case of the S. De R.L., a minimum of two stockholders and a capital stock of N\$3,000 pesos is required.
2. The corporation may be managed by a Board of Directors or a sole administrator.
3. The capital stock of the S.A. must be represented by nominative shares. The S. De R.L. does not have negotiable shares.
4. The general stockholders' meeting is the governing body of the corporations and ratifies the transactions and operations made by the Board of Directors or the sole administrator. Its resolutions are executed by either the sole administrator or the Board of Directors.
5. The general shareholders' meeting for the S.A. can be ordinary or extraordinary; both are normally held at the corporation's principal domicile.
6. The corporation must have an ordinary stockholders' meeting every year to approve the company's annual financial statements and annual report.

7. In extraordinary meetings the agenda must deal with certain unusual matters which, for the most part, may affect or change the basic principles upon which the company was founded.

Corporate management

The management of the S.A. and the S. De R.L. is essentially the same, although the S. De R.L. may be simplified by eliminating the shareholders' auditor. The basic hierarchy is as follows:

Shareholders' Meeting

Directors or Sole Administrator

Shareholders' Auditor Managers

The shareholders have total control over the activities and policies of the corporation through shareholders' meetings. Resolutions of shareholders' meetings are binding and dictate the duties and activities of the directors or the sole administrator. The directors or the sole administrator act as officers of the corporation: the officers are obligated to carry out the resolutions adopted by the shareholders' meetings and are generally responsible for the management of the company. The shareholders' auditors are supposed to oversee the activities of the directors or the sole administrator and report back to the shareholders' meeting. In this way the power of the directors or the sole administrator is checked on an ongoing basis in order to protect the interests of the shareholders.

Shareholders' meetings for S.A. corporations

S.A. corporations have two types of shareholders' meetings: ordinary and extraordinary. The determination of which shareholders' meeting the company should summon can be very important, especially when quorum and voting majorities may determine the outcome of such meetings. The easiest way to decide which meeting should be called is to compare the agenda of the proposed meeting to the list reserved for extraordinary meetings below. If the issues on the agenda are any of those in the list, the meeting must be an extraordinary meeting. Resolving such issues by an ordinary meeting would be invalid due to lack of quorum and proper notification procedures.

An annual ordinary shareholders' meeting must be held at least once a year within four months following the close of the fiscal year. Currently in Mexico, by law all corporations have the calendar year as their fiscal year. Calling other ordinary meetings during the year does not preclude having to call the annual ordinary meeting during the first trimester after the fiscal year. Such annual meetings must:

1. Discuss, approve, or modify the directors' annual report, taking into account the shareholders' auditor's report, and take whatever steps it may deem suitable.
2. Appoint the Director or Board of Directors and Stockholders' auditors in the respective cases as needed.
3. Set the remuneration payable to the Directors and the Stockholders' auditors when such remuneration is not fixed by the by-laws.

The following issues are reserved exclusively for extraordinary shareholders' meetings:

1. Extension of the duration of the company;
2. Premature dissolution of the company;
3. Increase or reduction of the capital of the company;
4. Changes in the objects of the company;
5. Change of nationality of the company;
6. Transformation of the company;
7. Merger with another company;
8. Issue of privileged stock;
9. Redemption by the company of its own stock and issue of benefit shares;
10. Issue of bonds;
11. Any other modifications to the deed of incorporation;
12. Such other matters as require a special quorum under the law or the articles of incorporation.

Quorum for S.A. shareholders' meetings

Ordinary meetings require a quorum of 50 percent of the outstanding capital stock for the first summons. If a quorum is not met, a second summons may be given and the meeting may legally proceed regardless of the number of shares represented at the meeting. In both cases resolutions are passed by majority vote.

Extraordinary shareholders' meetings require a quorum of 75 percent of the outstanding capital stock for the first summons, unless the articles of incorporation require a higher percentage. Unlike the percentage for quorum in ordinary meetings, which cannot be increased, given the importance of the issues voted on in an extraordinary meeting, it is possible to increase the quorum to 100 percent of the shareholders. It is important to point out that such provisions must be included in the articles of incorporation, or must have been adopted by a prior meeting as an amendment to the articles in order for the increased quorum to be valid. When possible, such quorum determinations should be agreed to and contained in the original articles. If the quorum is not met, a second summons may be given and the meeting may legally proceed provided that at least 50 percent of the capital stock is represented. Resolutions also require votes which represent at least 50 percent of the capital stock to pass; a simple majority is not sufficient.

Summons for shareholders' meetings must adhere to specific notice procedures which involve publishing the notification under the terms and conditions required by law. However, the articles of incorporation may provide that resolutions made outside of a shareholders' meeting by unanimous consent are valid, provided that they are confirmed in writing. Participation in shareholders' meetings is determined by the number of shares each individual represents: one share per vote. A shareholder may be represented in a shareholders' meeting by anyone other than a director, the sole administrator, or a shareholders' auditor. The articles of incorporation may stipulate

what is required to represent a shareholder at a meeting. Most often a letter of proxy is required, along with the corresponding share certificates.

Minutes of shareholders' meetings must be recorded in the corporation's minute book and signed by the Chairman, the Secretary of the meeting, and any shareholders' auditor who attends. Additionally, the documents proving that notification of summons to the meeting was made in accordance with legal procedure must be attached to the minutes.

Whenever, for any reason, the minutes of a meeting cannot be recorded in the minute book, they must be recorded by a Notary. Minutes of extraordinary meetings also must always be recorded by a Notary and filed in the Public Registry of Commerce.

Directors. managers. and the sole administrator

S.A. corporations may either have a board of directors or a sole administrator to act as the legal representative of the corporation and manage its affairs. In any event, such administrative personnel is appointed by resolution of the shareholders' meeting and does not necessarily have to be a shareholder. Foreign nationals may also act in this capacity, provided they have a visa. The articles of incorporation should clearly define the powers and duties directors and the sole administrator will have in representing the corporation's interests. In the case of a board of directors, it is important to also appoint alternative directors in order that board meetings may still be held, under certain conditions provided for in the articles of incorporation, when the regular director is unable to attend. This is particularly helpful when foreign nationals and non-residents are directors.

It is important to remember that the individual who acts as a director or sole administrator of a Mexican corporation is personally responsible for his or her duties as the legal representative of the corporation. For this reason it is of utmost importance that the scope of the director or sole administrator's responsibility be precisely defined.

Very often, much of the day-to-day activity will be delegated to a manager. In such cases the manager should be granted specific powers and duties that clearly indicate his or her limits with regard to acts of ownership concerning the company's assets. A manager is treated differently under the law as compared to a member of the board of directors or sole administrator, and their capacity to represent the company should not be confused. Typically a manager is subordinate to the board of directors or sole administrator. The board of directors or sole administrators are usually granted much more power and responsibility than a manager. The powers granted to a manager should either be granted in the articles of incorporation or by a notarized power of attorney.

The directors or the sole administrator, as the case may be, must present a report annually to the shareholders' meeting, which includes at least the following:

1. A report on the progress of the company in the fiscal year, as well as on the policies followed and, as the case may be, on the principal projects existing.
2. A report in which the principal accounting policies and criteria and the information followed in the preparation of the financial information are declared and explained.
3. A statement showing the financial situation of the company at the closing date of the fiscal year.

Shareholders' auditor

All S.A. corporations must have at least one shareholders' auditor {*Comisarioj* appointed by resolution of the shareholders' meeting. The shareholders' auditor serves to oversee the activities of the board of directors or the sole administrator and report back to the shareholders. The appointment of a shareholders' auditor should not be taken lightly given the inherent responsibility associated with that position. In the case of the S. De R.L.. corporations, a shareholders' auditor may be appointed but such an appointment is not required by law. This flexibility may make the S. De R.L.. attractive for smaller investments, or those involving only a few shareholders, because the corporation is less complicated and easier to operate.

In a S.A. corporation, the shareholders' auditor will have, among others, the following responsibilities:

1. To obtain monthly financial corporate reports.
2. To examine the transactions, documents, records, and supporting documentation in order to oversee the corporation's activities and issue the report as mentioned below.
3. To issue a report to the annual shareholders' meeting regarding the financial information submitted by the directors, including an opinion on the accounting practices and principles, and consistency in their application.
4. To call ordinary or extraordinary stockholders' meetings when so required.
5. To attend all board of directors and shareholders' meetings without voting privileges.
6. In general, to oversee at all times, and without limits, the operations of the corporation.

Minority shareholders in a SA, representing at least 25 percent of the stock, have the right to appoint one shareholders' auditor. Usually this position is held by a partner of an independent auditing firm or the accountant of the corporation.

None of the following may act as shareholders' auditors:

1. Persons who are incapacitated by law to engage in trade.
2. Employees of the company, employees of companies in which they also own more than 25 percent of the capital stock, or employees of companies in which they also own more than 50 percent of the shares.
3. Direct blood relatives of the Directors without limitation of degree. collateral relatives, within the fourth degree, and relatives by affinity within the second degree.

Limited liability corporations: S. De R.L.

Both the S. De R.L.. and the S.A. are business corporations. A S. De R.L.. is not a partnership, but rather a corporation, in that it is a body granted a charter legally recognizing it as a separate legal entity having its own rights, privileges, and liabilities distinct from those of its members. A partnership may be defined as a legal contract entered into by two or more persons in which each agrees to furnish a part of the capital and labor for a business enterprise, and by

which each shares a fixed proportion of profits and losses.

The basic differences between the S. De R.L.. and the S.A. are:

1. The S. De R.L.. is a non-stock corporation because ownership is not recognized by stock certificates.

Ownership is legally recognized only by being registered in the corporation's shareholders' register. This requires the shareholder to notify the corporation if he or she wants to sell his or her share in the corporation.

2. The S. De R.L. can only have up to 50 shareholders.

3. The capital requirements are lower in a S. De R.L., the minimum being N\$3,000, which is about \$1,000 U.S.

4. The capital of the company must be fully subscribed, and at least 50 percent of each interest must be paid up at the time of its incorporation.

5. For the transfer of shares, as well as for the admission of new shareholders, the consent of the associates representing the majority of the capital stock is required except when the articles of incorporation provide for a larger majority. Additionally, when the sale of shares is authorized in favor of a non-shareholder, the other shareholders have a preferential right to acquire that interest for the same price and have a term of fifteen days wherein to exercise this right.

6. The shareholders' auditor is optional in the S. De R.L..

7. When so provided for in the articles of incorporation, the shareholders, in addition to their general obligations, may also be obliged to make supplementary contributions in proportion to those they originally made.

8. The articles of incorporation may specify the cases in which a general meeting is not required, and when it will suffice for the text of the agenda to be sent by mail to the associates, who may vote by mail in writing.

9. The corporate structure and requirements in the S. De R.L.. have been simplified to facilitate running a "family" business.

The S. De R.L.. has only one type of shareholders' meeting, the general meeting of shareholders, which is the highest authority of the company. Resolutions are taken at shareholders' meetings by a majority vote of shareholders who represent at least one-half of the capital, provided the articles of incorporation do not call for a larger majority.

General meetings shall have power:

1. To discuss, approve, amend, or reject the General Balance Sheet for the past business year, and to take whatever measures may be considered pertinent in this respect.

2. To proceed to the distribution of the profits.

3. To appoint and dismiss the managers.

4. To appoint the Vigilance Committee, should there be one.

5. To decide regarding the division and amortization of interests in the capital.
6. To demand from the associates supplementary contributions and/or additional obligations, in the respective cases.
7. To bring action for damages against the company executives or the associates, when entitled to do so.
8. To alter and amend the articles of association.
9. To agree to transfers of interests in capital and the admission of new associates.
10. To decide regarding increases or reductions of capital.
11. To decide on the dissolution of the company.
12. Such other powers as may pertain to it under the Law or the Articles of Association.

Incorporation process

The incorporation of a business must be done before a Notary Public after obtaining authorization from the Ministry of Foreign Affairs for the name of the corporation. The Ministry normally grants these permits without delay, unless the proposed name of the corporation is the same as the name of an existing corporation. For this reason it is advisable to submit at least three names when applying for your corporate name to avoid having to reapply.

Unlike in the United States, the articles of incorporation in Mexico must be very specific with regard to the scope of activities the corporation will be engaged in. The mere fact that the company has been incorporated does not necessarily mean that it may engage in any legal activity. Rather, specific as well as generic activities must be included in a detailed list under the heading of "corporate propose." For this reason, and given that there are other subtle differences between United States and Mexican law, it is highly recommended that you consult with an attorney licensed in Mexico before executing the articles of incorporation.

Once the articles of incorporation are notarized the corporation must be registered with various governmental offices, such as: The Secretary of the Treasury, the Secretary of Commerce, the public registry, and other government agencies depending upon the activities of the corporation.

Foreign corporation branches

It is permissible to establish branches of foreign corporation, in accordance with the General Mercantile Corporations Law; however, given the red tape involved in getting approval from the Mexican government, it is usually better to establish a Mexican corporation. Under certain circumstances, such as operations set up for government contract fulfillment, and for international tax planning considerations, a foreign branch may be appropriate. If you think a foreign branch office is preferable for your investment plans, be sure to get legal advice before the final decision is made.

Sole proprietors

The Commerce Code permits individuals to perform commerce in any form. Therefore, it is possible that an individual, for legal and tax purposes, performs as an enterprise. Only resident foreigners who have a permit to work in the country may also operate as an enterprise. The difference between an individual enterprise and a corporation, as is the case in most countries, is that in a corporation the shareholders have limited responsibility, whereas in the case of a sole proprietorship, the individual has unlimited responsibility for the activities of the business enterprise. In practice, there are very few foreign businesses organized as individuals because it is more practical from the immigration and legal standpoints to operate as a corporation.