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MEXICAN MERCANTILE ORGANIZATIONS UNDER THE NEW LAW†

JOSEPH M. CORMACK* AND FREDERICK F. BARKER**

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1. THE NEW LAW

The law of mercantile organizations in Mexico has been modernized, not, as expected, through promulgation of the projected new Code of Commerce,1 referred to a number of times in earlier articles in this series,2 but by a special Act. The new law, the Law of Mercantile Organizations (Ley de Sociedades Mercantiles), of July 28, 1934,3 went into effect upon its publication August 4, 1934.4 It is accompanied by the customary official Exposition of Purposes.

†[This is the fifth of a series of articles on Mexican law by these authors. The earlier articles are: The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1 (1932); The Mexican Law of Business Organizations, 6 SOUTHERN CALIFORNIA LAW REVIEW, 181 (1933); Mexican Civil Organizations Under the New Code, 7 SOUTHERN CALIFORNIA LAW REVIEW, 196 (1934); The Mexican Labor Law, 7 SOUTHERN CALIFORNIA LAW REVIEW, 251 (1934). The present article concludes the series on business organizations. An article upon the position of the foreigner in Mexico is contemplated.—Ed.]

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1 A draft of the proposed code was made officially available to the public in printed form in 1929 and 1930, under the title "Proyecto para el Nuevo Código de Comercio," published by the Secretariat of Industry, Commerce and Labor. The President was authorized by the Congress to put the new code in force, in original or amended form, through executive decree. In addition to business organizations, other matters covered by the draft have been the subject of special laws. The future of the balance of the draft has been rendered uncertain.

2 The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1, 7, 18, 23 and especially 25-26 (1932); The Mexican Law of Business Organizations, 6 SOUTHERN CALIFORNIA LAW REVIEW, 181, 182 (1933); Mexican Civil Organizations Under the New Code, 7 SOUTHERN CALIFORNIA LAW REVIEW, 193, 196 and especially 201-203, 205-206, 213 (1934).

3Diario Oficial, Aug. 4, 1934, 598-615. Future citations of the law will give only the article numbers.

4 Transitory Art. 1.
The character of the new law is thus stated in the Exposition of Purposes:

"It is pertinent to note that the final text of the law was not arrived at as the result of a simple labor of repetition or of synthesis of the material which has been developed in regard to business organizations in the jurisprudence of foreign countries, set forth in their laws and proposals, but as the consequence of considering with the same zeal, as far as possible, also those native elements which could not be disregarded, since our legal institutions form part of a juridical culture connected closely with the thought of foreign countries as well as with our present laws, in an effort to conserve all that has been incorporated in our tradition and the peculiarities of our atmosphere."

In the Exposition of Purposes accompanying the new federal Civil Code, the underlying purpose of the current Mexican legislation to harmonize the private law with the socialistic features of the new constitutional régime, is pointed out. Certain classes of organizations are governed by special laws, and will not be treated in this article. Among these are banks, railroads, warehouses, pawnbrokers, insurance companies, mutual and charitable organizations and cooperatives. Institutions of credit are required to conform in general to the Law of Mercantile Organizations. Accounting requirements are presented in the income tax legislation. In Mexican practice there is no tax upon business organizations as such.

2. A CRITICAL ESTIMATE

There fortunately is available a critical estimate of the new law from the pen of one of Mexico's leading scholars, Mr. Eduardo Pallares. He says:

"I do not know who the authors of the new law of Mercantile Organizations are; but by means of these lines I take the liberty of extending to them my sincere although modest felicitations on the production of a law which is clear, precise, simple and of easy comprehension and interpretation, and which does not have any relationship with other changes put forth in regard to matters of commerce. We greatly feared that the law which has just been issued would have the same defects as has that in regard to Operations and Instruments of Credit, which is prolix, minute to the point of exaggeration, inspired by foreign theories and doctrines, to the point of transplanting to our milieu institutions which do not have in it any antecedent, giving the impression of an exotic plant, without root in Mexico."

"The law relating to mercantile organizations is felt to be Mexican,

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6Diario Oficial, Aug. 4, 1934, 593-598.
7Diario Oficial, Aug. 4, 1934, 593.
9Co-operatives are referred to further in Section 10, infra, pp. 217-228.
and a considerable portion of the reforms which it contains correspond to real and positive necessities of our juridical system, based upon the jurisprudence of our tribunals, which, whether good or bad, is already known in our fora. There is not in this law as in others the vainglorious attempt to shine, to produce something so original and erudite that it can be comprehended only by the high priests of the science of the law. Here we find ourselves in an atmosphere of clarity and simplicity, favorable to the most modest intelligences. The intervention which is permitted to the state, while going beyond that provided for in the Code of Commerce, is not as great and oppressive as that set forth in other laws recently issued, and this consideration alone makes us like the law, since it implies respect for human self-determination.10

3. MERCANTILE ORGANIZATIONS DISTINGUISHED FROM CIVIL

The fundamental division of the entire body of the law, in Mexico and nearly all civil law countries, into the civil and the mercantile, or commercial, branches, has been discussed fully in earlier articles.11 It is not affected by the Law of Mercantile Organizations. However, as an important innovation, removing many difficulties, it is provided in the new law that any organization adopting a mercantile form is itself mercantile.12 Therefore, unless an organization civil in form is created, it is no longer necessary, in the field of business organizations, to inquire into the substantive character of the distinction.

To be valid, a civil organization not only must be civil in form, but must be engaged in activities which are preponderantly civil in character.13 Activities thus defined14 are so narrow in scope that civil organizations are of no general importance to business men. Changes proposed in the draft of the contemplated new Code of Commerce, in accordance with the historic trend of the Mexican law,15 will restrict still further the definition of civil acts. Civil organizations then will be practically limited to partnerships of professional people and artisans, casinos, social, cultural and recreational clubs, political organizations, Bar associations and other professional bodies, including labor unions, and joint enterprises for the administration and conservation (by leasing, for in—

10Prontuario Crítico de la Ley de Sociedades Mercantiles (1934), 7.
11The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1 (1932); The Mexican Law of Business Organizations, 6 SOUTHERN CALIFORNIA LAW REVIEW, 181, 187–190 (1933); Mexican Civil Organizations Under the New Code, 7 SOUTHERN CALIFORNIA LAW REVIEW, 195, 201–203 (1934).
12Art. 4; to the same effect, Civil Code (1928), Art. 2695.
13Civil Code (1928), Arts. 2670 & 2680; Barker and Cormack, Mexican Civil Organizations Under the New Code, 7 SOUTHERN CALIFORNIA LAW REVIEW, 195, 201–206, especially 204–206 (1934). The “principal and accessory” test applied in this connection may be illustrated by the case of a civil organization of cobblers, who purchase shoe laces and polishes which they sell to their patrons. Because of the nature of their principal activity—the sale of the product of their artisanship—the accessory purchase and sale of the laces and polishes, normally commercial, are civil. Other illustrations are given in Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1, 22 (1932).
15Barker and Cormack, The Mercantile Act: A Study in Mexican Legal Approach, 6 SOUTHERN CALIFORNIA LAW REVIEW, 1, especially 23–24 & 30 (1932).
stance) of real estate owned by members. It is scarcely necessary to add that, unless authorized by a special law, a business organization must be either civil or commercial.

Formerly it was possible for a civil organization to have a mercantile form and retain its civil character. The baffling questions arising in connection with such organizations now have been eliminated. In the Exposition of Purposes accompanying the Law of Mercantile Organizations it is stated that, apart from theoretical considerations, the adoption of a purely formal criterion was justified, because the existence of civil organizations mercantile in form usually had been due to a desire to evade constitutional restrictions upon the juridical capacity of commercial organizations. It is pointed out also that to impress upon an organization the character of mercantile does not subject it to any serious inconvenience nor impress upon it exorbitant burdens or obligations, but simply brings it within the requirements of a system deemed adequate for the protection of members and third persons.

Since the federal Constitution gives the Congress power to legislate upon matters of commerce, the Law of Mercantile Organizations governs all such entities throughout the Republic, whereas civil organizations are governed by the civil codes of the various States or the federal Civil Code applicable to the Federal District and Territories. The effect, therefore, of characterizing all civil organizations with a mercantile form as commercial, as likewise of expanding the definition of mercantile acts, is to increase the sphere of action of the federal government. To carry this process beyond a proper definition of commerce as the term is used in the Constitution would be unconstitutional. Until this limit is reached, the Congress is acting within its powers. As a practical matter, the Mexican Bar will assume the constitutionality of such changes. Expansion of the sphere of the federal government is in harmony with the dominant political ideals.

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17In regard to the conducting of a mercantile enterprise by a workers' syndicate, see Sindicato de Obreros y Obreras de Molinos de Nixtamal de la Ciudad de Puebla v. Juez Primero de lo Civil de Mexico, Segundo del mismo ramo de Puebla y Diligenciario de Este último, Supreme Court, Third Chamber, Feb. 8, 1934, reported, 5 Revista General de Derecho y Jurisprudencia, 431 (Mexico, 1934), accompanied by comment, Mario de la Cueva, ¿Pueden los Sindicatos de Trabajadores Explotar Una Empresa Mercantil o Industrial?, 487.

18Code of Commerce (1889), Art. 91.

19As of the authors of the Exposition of Purposes have in mind is that, by claiming to be civil in character, although really commercial, those interested in such an organization hoped to obtain the advantages of the mercantile form and at the same time evade the constitutional restrictions upon its activities, particularly in regard to the participation of foreigners.

20Art. 73, X.

21The Federal District includes the City of Mexico. The Federal Territories are Northern and Southern Lower California, with Quintana Roo shortly to be added.
4. PROVISIONS APPLICABLE TO ALL FORMS

A. CONTRACT AND BY-LAWS

The number of provisions applicable to all forms has been increased greatly.

Every form of organization is created by a contract executed by the original members. The law provides that the contract shall include the following details:

(1) The names, nationality and domicile of the physical or moral persons forming the organization;
(2) The object;
(3) The name;
(4) The duration;
(5) The amount of the capital;
(6) A statement of what each member contributes in money or in kind; the value attributed to contributions in kind and the standard adopted in their valuation. If the capital is to be variable, that fact should be stated, together with the minimum amount;
(7) The domicile;
(8) The manner in which the organization is to be managed, and the powers and names of the directors (administradores);
(9) The manner of distribution of profits and losses;
(10) The amount of the reserve fund;
(11) The causes of premature dissolution; and
(12) The principles to govern liquidation, and the method of proceeding to the election of liquidators, if they have not been named previously.

The first seven of the above requirements are indispensable to the creation of a valid organization. If the others are omitted, the provisions of the Act apply. Because of the literal viewpoint of the Mexican thought in the interpretation and application of statutory provisions, there would be no objection to the use of "dummies" in connection with the execution of the contract, although open ownership of the organization by a single person at any stage of its existence causes dissolution.

24Arts. 5-6.
25Discussed in subsection C of this section, infra, pp. 203-204.
26Art. 6.
27Art. 7; Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 594.
28Art. 8. Pallares points out that this provision of the law is in error, because specific persons are to be named as directors, in the eighth requirement set forth in the text, and the law can not designate the individuals who are to serve. Prontuario Critico de la Ley de Sociedades Mercantiles (1934), 16. A court would seem clearly to be justified in ordering a special meeting of the members to select directors. If an election failed to result from the meeting, the court then would seem to be confronted with the necessity either of selecting directors itself or of declaring that sufficient cause existed for a premature dissolution, although want of directors is not listed among the grounds for dissolution in Art. 229.
30Art. 229(4).
The contract, and all amendments, are required to be executed, or protocolized, before a notary. Any member may summarily require the protocolization of a contract containing the provisions requisite to its validity. Any persons acting in the name of an organization prior to recordation (which follows protocolization) of the contract of formation are subjected to joint and unlimited liability in favor of third persons. Members contributing credits must guarantee their validity and the solvency of the debtor.

It is stated in the Act that the general regulations governing the organization (the estatutos) shall consist of all the provisions in the contract relating to the formation and functioning of the organization, whether or not required to be inserted. This contemplates that the by-laws shall be adopted as a part of the contract of formation.

B. RECORDATION AND JUDICIAL INVESTIGATION

In Mexico, as in the civil law generally, throughout the history of the law, every form of business organization, whether corresponding to the common law corporation or to the partnership, has been recognized as a legal entity, possessing a juridic personality distinct from that of its members, and this viewpoint is carried forward in the new law.

In the past, the coming into existence of the legal entity has resulted solely from the contract of the parties forming the organization. In certain instances the contract may have been oral or even implied. There has been no charter.
nor any other form of grant of authority by the State. Recordation of documents, when required, has been solely for the purpose of giving notice.

Under the new law, this system has been abandoned as to mercantile organizations. In avowed imitation of the common law, the principle that an act of the State is necessary to the creation of a legal entity is adopted. It is pointed out that, with no act of the State in the first instance in connection with the formation of an organization, it has fallen to the courts to determine later, retroactively, the validity of actions taken in behalf of the alleged legal entity.

The change is accomplished through the requirement of a judicial investigation prior to recordation of the contract of formation, the latter being compulsory. Until recordation, no legal entity can come into existence and until then, as already noted, the individuals acting in behalf of the alleged organization are subjected to unlimited and joint liability in favor of third persons. On the other hand, recordation, when it has occurred, is conclusive in favor of the existence of the desired legal entity. After recordation, the organization can be declared null only by reason of illegal purpose or acts.

The judicial proceeding is upon notice to the Attorney General (El Ministerio Publico), thus giving him an opportunity to protect the public against deception through the recordation of imperfectly formed organizations. If the required details have been inserted in the contract, neither the court nor any other public authority has any discretion to refuse recordation. Any member may bring a summary suit to compel recordation of the contract.

C. VARIABLE CAPITAL

As an innovation in Mexican practice, following foreign examples, it is provided that all forms of organization may be created with variable capital. They may also adopt the system at any time. The term "variable capital"

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42 The former system is retained as to civil organizations. Civil Code (1928), Arts. 2688-2694; Barker and Cormack, Mexican Civil Organizations Under the New Code, 7 Southern California Law Review, 195, 204-206 (1934).
44 Art. 2; Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 594.
45 Diario Oficial, Aug. 4, 1934, 593, 594.
47 Art. 260-264.
48 Art. 2.
49 Art. 7, 13.
50 Art. 2.
51 Art. 2 & 3.
52 Art. 262.
53 It will be recalled that only the first seven clauses of the specified contents of the contract of formation are compulsory. Art. 8; Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 594, col. 2, I4.
54 Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 594. According to the provisions of the Act (Arts. 262 & 263), the judicial proceedings will require only fifteen days. Pallares says: "The law is optimistic in regard to the possibility of completing the recordation, after having obtained the judicial authorization, within fifteen days after the execution of the constitutive contract. Anyone who is familiar with judicial and notarial proceedings knows to what extent to rely upon this possibility." Prontuario Critico de la Ley de Sociedades Mercantiles (1934), 8.
55 Art. 7, 12.
57 Except co-operatives. Art. 1, last par.
58 Art. 1, last par. The system is outlined in Arts. 213-221.
59 Art. 227, last sentence.
is thus given a technical meaning, and an organization taking advantage of the new provisions must add to its name the words "of variable capital" (de capital variable).\footnote{Art. 215.}

The chief purpose of variable capital is to make possible gradual changes in the amount of capital in an organization, without the proceedings required when the capital of an organization with a fixed amount is later changed.\footnote{Art. 216.} It may be used also to facilitate the admission and departure of members in non-stock organizations. The value of the system is largely destroyed, for stock organizations, by providing that if they adopt variable capital all their stock must be registered.\footnote{Art. 218.}

The contract of formation of the organization is to contain the conditions governing the changes in the capital, except that, in the case of a stock organization, this may be handled by a special stockholders' meeting.\footnote{Art. 218.} Minimum amounts of capital are fixed, in some instances a percentage of the initial capital.\footnote{Art. 217, \S 112.} The minimum selected, within the prescribed limits, must be set forth in the original contract.\footnote{Art. 217, \S 112.} A stock organization is forbidden to announce the amount of stock which is authorized without at the same time announcing the minimum.\footnote{Art. 220.} Partial or total withdrawal of contributions made by a member, when permitted by the contract, takes effect only at the end of a fiscal year, and unless notice is given to the organization more than three months before the end of the fiscal year it does not take effect until the conclusion of the succeeding year.\footnote{Art. 220.} Variable capital organizations are governed by the provisions relating to the anonymous form in regard to balance sheets and the liability of directors.\footnote{Art. 220.} Stock can be delivered only when fully paid.\footnote{Art. 220.} Upon the whole, the parties interested are given great freedom in controlling the changes in the capital.

**D. DIVIDENDS AND RESERVE FUND**

Formerly a reserve fund was compulsory only in the case of organizations having the anonymous form. Now it is required of all.\footnote{Art. 215.} Five per cent. of the net profits must be set aside for the fund, until it equals twenty per cent. of the capital.\footnote{Art. 216.} When diminished for any reason, it must be built up again in like manner.\footnote{Art. 216.} Directors are liable to the organization for any amounts paid out in violation of these provisions, but may recover such payments from the members.\footnote{Art. 220.}

\footnotesize{\textsuperscript{61}Art. 215. \hfill \textsuperscript{62}Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 595 & 597. \hfill \textsuperscript{63}Art. 218. In the Exposition of Purposes it is stated that the system is of special importance for stock organizations, as they are enabled to take steps (such as the issuance of stock not yet subscribed) which otherwise would not be possible. Diario Oficial, Aug. 4, 1934, 593, 597, last topic. Stock so issued must be held in the treasury until the subscriptions have been paid. Art. 216, \S 2. \hfill \textsuperscript{64}Art. 216. \hfill \textsuperscript{65}Arts. 217 & 221. \hfill \textsuperscript{66}Art. 6(6). \hfill \textsuperscript{67}Art. 217, \S 2. \hfill \textsuperscript{68}Art. 220. \hfill \textsuperscript{69}Art. 214. Discussed in Sec. 6, subsecs. D & E, infra, pp. 211–212. \hfill \textsuperscript{70}Art. 216, last sentence. \hfill \textsuperscript{71}Arts. 20-22. An excellent general discussion of reserve funds will be found in Carlos Prieto, Constitución y Disponibilidad de los Fondos de Reserva en las Sociedades Anónimas, 5 Revista General de Derecho y Jurisprudencia, 325 (Mexico, 1934). \hfill \textsuperscript{72}Art. 20. \hfill \textsuperscript{73}Art. 20. \hfill \textsuperscript{74}Art. 21.}
There are no restrictions upon the method of investment of reserve funds. Normally they will exist in the form of excess of assets over liabilities. Proposals to control the method of investment have been advanced, but the objections outweigh the advantages. Writers disagree as to whether legal or other reserve funds can be converted into capital. If this were to be done, it would seem to be clear that it would be necessary to retain sufficient funds immediately to increase the reserve fund to 20 per cent. of the augmented capital.

If the capital of the organization is lost, in whole or in part, it must be restored or reduced before the declaration or payment of further dividends. Dividends may be paid only when the balance sheet shows them actually to have been earned and any payments in violation of this provision are recoverable from either the recipients or the directors declaring them, at the instance either of the organization or of creditors.

It is contemplated that organizations may consist jointly of members contributing capital and others contributing services, the former being termed capitalist, and the latter industrial, members. Unless there is an agreement to the contrary, half of the profits will be distributed equally among the industrial members and they will not share in losses.

E. DIRECTORS AND MEMBERS

Each organization is to be represented by one or more directors (administradores) who, except as otherwise provided in the law or in the contract of formation, are empowered to perform all acts inherent in the purposes of the organization.

76Carlos Prieto, Constitución y Disponibilidad de los Fondos de Reserva en las Sociedades Anónimas, 5 Revista General de Derecho y Jurisprudencia, 325, 333 (Mexico, 1934).

77Carlos Prieto, Constitución y Disponibilidad de los Fondos de Reserva en las Sociedades Anónimas, 5 Revista General de Derecho y Jurisprudencia, 325, 336-341 (Mexico, 1934). The disagreement persists even in the event of a unanimous agreement of the members. Of course it would be possible to effect the conversion through an increase in the capital in the usual manner, accompanied by a special dividend to enable each member to pay for his portion of the new stock.

78Art. 19.

79Arts. 16 & 114. A system of this kind may be a convenient way to administer the sharing of profits with employees required by Const., Art. 123(6 & 9). Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 596. It may be helpful, at least psychologically, to issue some sort of special industrial stock certificate to the worker.

79Pallares feels that it is somewhat doubtful whether industrial stock can be figured in as part of the capital. Exposition Crítico de la Ley de Sociedades Mercantiles (1934), 11 & 41. His opinion that it can not is in line with express statements to that effect in the Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 596, and seems clearly to be correct, in view of the fact that the worker does not contribute anything at the time of the formation of the organization. This conclusion is also impliedly supported by the provisions in the Act relating to payment for stock either in cash or through transfers of property.

79Pallares takes the position that an organization issuing stock can not have industrial members. Exposition Crítico de la Ley de Sociedades Mercantiles (1934), 17 & 41. The contrary would seem, however, to be clearly established, through the express recognition in Art. 114 of the issuance by anonymous organizations of special shares of stock to those rendering services to the company. Pallares’ view is due to a feeling that this is not in harmony with the nature of a stock organization and is an interesting illustration of the importance attached in civil law practice to the nature of legal acts in general and of business organizations in particular. Cormack and Barker, The Mexican Law of Business Organizations, 6 SOUTHERN CALIFORNIA LAW REVIEW, 181, 185, 197, 202 & 220 (1933).
An incoming member must assume liability for all obligations previously incurred, even though the name of the organization is changed at the time of his admission. The outgoing member, whether withdrawing or expelled, is also liable to third persons in connection with all matters pending at the time of his departure. Except in organizations with variable capital, the organization may retain his interest until those matters have been disposed of. The participation of foreigners is limited only by the applicable provisions of the federal Constitution and ancillary legislation.

F. CHANGES IN CAPITAL

An organization may diminish its capital. If a reduction involves reimbursement of members, or releasing them from unpaid subscriptions, advance publication must be made. Creditors may oppose such a reduction.

G. CHANGE OF FORM

Any organization may change its form, or adopt the variable capital system, at any time, being governed in so doing by the provisions relating to fusion.

H. FUSION

Fusion is regulated carefully, in order to protect the rights of creditors. An agreement for fusion must be recorded and officially published, and publication also must be made of the last balance sheets of the old organizations and of the provision made for the payment of liabilities. In fusing organizations it is not necessary that a new one be formed. In addition to fusion, it will be recalled that legal entities may participate in the creation of any form of organization.

I. DISSOLUTION AND LIQUIDATION

It has been observed that the contract of formation may specify causes for premature dissolution. In addition to usual causes, dissolution results from loss of two-thirds of the capital or from ownership of all the capital by one person. Liquidation is regulated in detail.

J. ILLEGAL PURPOSE OR ACTS

An organization which has an unlawful object or which habitually performs illegal acts may be declared null, and immediately liquidated, at the instance of any person, including the Attorney General. This is the only
instance in which there can be a declaration of nullity in regard to the existence of an organization which has been duly recorded.\(^{101}\) After payment of the liabilities, any remaining assets are devoted to charity.\(^{102}\)

5. GENERAL SURVEY OF VARIOUS FORMS

The anonymous form corresponds to the common law corporation, the collective form to the general partnership, and the mandatory to the limited partnership.\(^{103}\) The limited liability form is intermediate between the corporation and the partnership, consisting of a small group operating without personal liability and without stock. Co-operatives are along familiar lines. Associations in participation are joint ventures rather than organizations.

6. THE ANONYMOUS FORM

A. FORMATION

The anonymous, corresponding to the common law corporation, is the form of most general interest. It is stated in the Exposition of Purposes that, in preparing the portions of the new law dealing with the complex and difficult questions arising out of the anonymous form, an especial effort was made, along with the endeavor to adopt the best in foreign experience, to conserve what had been developed in the national tradition and the peculiarities of the national atmosphere.\(^{104}\) The Exposition continues:

"The Chief Executive could not be ignorant of the feeling of suspicion, of want of confidence, justified by experience, with which large portions of the public view this type of organization; and therefore, although at first sight it may appear unjustifiable that the law does not adopt as the basis of its system the principles which, especially in the Anglo-Saxon laws, have found full recognition and acceptance, and which among ourselves were presented in the proposal of the Secretariat of Industry in 1929, as adequate to accomplish, within a much more flexible juridical frame, a rapid development of companies issuing stock, it has been decided to preserve, basically, the rigid structure which the Code of Commerce gives to the anonymous form. The government is certain that if the feeling of lack of confidence which has been mentioned can be made to disappear, it will not be with the adoption of rules which amplify to too great an extent the possibilities of action on the part of the founders of this class of enterprise."\(^{105}\)

The anonymous form\(^ {106}\) is so called because its name does not disclose the identity of any of its members.\(^ {107}\) The name must be followed by the words "anonymous organization" (sociedad anónima) or their abbreviation, "S.A."\(^ {108}\)

\(^{101}\)Art. 2. \(^{102}\)Art. 3.
\(^{103}\)A discussion of the advantages and disadvantages of these forms, from the standpoint of a Mexican writer, Manuel Cervantes, in his Las Diversas Clases de Sociedades Mercantiles y Civiles (1918), 52 et seq., 76 et seq. & 108 et seq., is quoted at length in Cormack and Barker, The Mexican Law of Business Organizations, 6 Southern California Law Review, 181, 221 et seq. (1933). The passage of the new law has not affected the present pertinence of that discussion.
\(^{104}\)Diario Oficial, Aug. 4, 1934, 593.
\(^{105}\)Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593.
\(^{106}\)Arts. 87-206. \(^{107}\)Art. 87. \(^{108}\)Art. 86.
The minimum number of members is five, each of whom must subscribe for at least one share of stock. The capital must be not less than 25,000 pesos, and must be fully subscribed. If stock is to be paid for in cash, at least 20 per cent. of the amount must be paid at the time of formation, and if a subscription is to be covered, in whole or in part, by a transfer of other property it must be fully paid.

There are two methods of creation of an anonymous organization: the execution of the contract of formation in the usual way, called the "public writing" method; and the securing of subscriptions upon a prospectus, called the "public subscription" method.

Under the "public writing" method, which has been the more commonly used in the past, the contract of formation must contain, in addition to the details required of all organizations, the following:

1. The amount of the paid-up capital;
2. The number, par value and nature of the shares of stock (the stock may be without par value);
3. The method and the time within which the unpaid portion of the stock shall be paid;
4. The share in the profits reserved by the promoters;
5. The names of the inspectors (comisarios), whether one or more; and
6. The powers of the stockholders' meeting, and the rules prescribed in regard to its methods of procedure and the exercise of the right to vote, insofar as the provisions of the law can be modified by agreement of the parties.

Under the "public subscription" method, the promoters execute and record a prospectus, consisting of a draft of the contract of formation, including the by-laws, from which certain specified portions of the usual contract may be omitted. Subscriptions, with specified contents, are then secured in duplicate upon copies of the prospectus. The subscribers deposit in an institution of credit designated by the promoters the portions of the subscriptions which are to be paid in cash. Transfers of other property are made at the time of the protocolization of the minutes of the first meeting of stockholders. The capital must be fully subscribed and the company formed within one year from the date of the prospectus, or such shorter period as may be specified, otherwise the subscriptions are cancelled. As soon as the capital has been fully subscribed, within the designated period, a stockholders' meeting is held, which takes certain prescribed steps, including approval of the value of property contributed in payment, and the share in the profits reserved by the promoters. If the stockholders' meeting approves the contract of formation as proposed in the prospectus, creation of the organization is completed by protocolization and recordation of the contract and the minutes of the meeting, after, of course, the

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109Art. 89(1).
110Art. 89(2).
111Art. 89(2 & 3).
112Art. 90.
113Art. 91.
114Arts. 92-102.
115Art. 92.
116Art. 93.
117Art. 94.
118Art. 95.
119Arts. 97-98.
120Arts. 99-100.
prescribed judicial investigation preliminary to recordation.\footnote{Art. 101.}\footnote{Art. 102.} Action taken by the promoters; other than that essential to the process of formation, is not binding upon the organization unless approved by the stockholders' meeting.\footnote{Art. 103–110. The bonds may be registered or bearer. Art. 108.}

The promoters may reserve for themselves a share in the profits, to be represented by promoters' bonds (bonos de fundador).\footnote{Art. 105.}\footnote{Art. 106.} The compensation of promoters may not exceed 10 per cent. of the profits for the first ten years of the corporate existence, and may be paid only after a dividend of 5 per cent. upon the amounts paid in by stockholders.\footnote{Art. 125 (4); Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 596.} Regulation of the compensation of promoters is an innovation. Holders of promoters' bonds, as such, have no right to participate in the management or to share in the capital upon dissolution.\footnote{Art. 115.}\footnote{Art. 114.}

B. STOCK

The owners of stock\footnote{Art. 113; Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 596.} have no personal liability.\footnote{Art. 112.} Stock may be bearer or registered,\footnote{Art. 127.} preferred or common.\footnote{Art. 116.} It may be with or without par value,\footnote{Art. 113, f2. And of course may be given a higher dividend rate than that of common stock. Art. 118, f2.} but must not be issued for less than any stated nominal value.\footnote{Art. 117–141.} Special forms of stock may be given employees.\footnote{Art. 114.} The contents of stock certificates are prescribed\footnote{Art. 112–113.} and dividend coupons are to be attached.\footnote{Art. 127.} The contract of formation may guarantee annual dividends not to exceed 9 per cent. for not over the first three years, and such payments are to be charged to general expense.\footnote{Art. 123.}\footnote{Art. 124.}

A class of stock may be deprived of voting rights except upon matters having to do with the corporate existence.\footnote{Art. 113, f3.} Stock with limited voting powers is entitled to cumulative preferred dividends of 5 per cent.\footnote{Art. 128.} In case of liquidation, such stock is given preferential payment in full.\footnote{Art. 118, f4.} The holders

\footnote{\textit{Constitución y Disponibilidad de los Fondos de Reserva en las Sociedades Anónimas}, 5 Revista General de Derecho y Jurisprudencia, 325, 336 (Mexico, 1934). The provision is not limited to stock issued at the time of formation of the company. The danger of affecting a legal reserve fund is much greater in connection with an increase in the capital of an already functioning organization.}
of such stock have minority rights in regard to opposition to decisions of the stockholders' meeting and in regard to examination of the balance sheet and records. 139

Stock not fully paid is required to be registered 140 and dividends may be received only upon the amount already paid in. 141 If unpaid stock is transferred, both the seller and the purchaser are liable for the unpaid balance for five years from the registration of the transfer, the liability of the seller being secondary. 142 Stock paid for, in whole or in part, by transfer of property, must remain with the company for two years, and if, within that period, the value of the property decreases to less than 75 per cent. of the price at which it was taken, the subscriber must make up the difference. 143 It will be recalled that complete ownership of any form of organization by one person is ground for dissolution. 144

The contract of formation may provide for the use of profits to retire fully paid stock 145 to be purchased on the exchange or selected by lot. 146 The holders of such stock may be issued "enjoyment" shares (acciones de goce). 147 Enjoyment stock participates in the profits after the stock not retired has received a specified dividend 148 and may be with or without voting rights. 149 In the event of liquidation, unless there is a contract provision to the contrary, enjoyment stock participates after that not retired has been fully paid. 150

The capital of the organization may be increased only when the stock already issued has been fully paid. 151 Upon an increase, the stockholders have a preferential subscription right. 152 The corporation may not make loans or advances upon its own stock. 153 It may acquire its stock only in payment of debts under judicial authorization. 154 Such stock must be sold within three months, or the capital reduced. 155

C. STOCKHOLDERS' MEETINGS

If possible, meetings of stockholders 156 must be held at the domicile of the organization. 157 The meetings are either ordinary or extraordinary. 158 The former handle all usual matters 159 and the quorum and favorable vote required...
are smaller than at the extraordinary,\textsuperscript{160} which makes the more vital decisions.\textsuperscript{161} Meetings normally are called by the directors or the inspectors.\textsuperscript{162} A call also may be issued by the holders of 33 per cent. of the stock.\textsuperscript{163} Any stockholder may require a meeting if there has been none within the two preceding years, or if those held within that period have not taken up certain matters required to be treated annually.\textsuperscript{164} A call must be published officially\textsuperscript{165} and must set forth the matters which will be taken up.\textsuperscript{166} From the time of publication until the meeting the books and records relating to the matters which will be passed upon must be at the office of the company for the inspection of stockholders.\textsuperscript{167}

Those having a personal interest adverse to that of the organization are not permitted to vote.\textsuperscript{168} Neither directors nor inspectors may hold proxies.\textsuperscript{169} A minority of 33 per cent. of the stock who do not consider themselves sufficiently informed upon a matter may require an adjournment for not over three days, without the necessity of a new call.\textsuperscript{170} The privilege may be exercised only once in regard to the same matter.\textsuperscript{171} It is provided that any agreement restricting the liberty of voting of stockholders is void.\textsuperscript{172} This would prevent the setting up of a voting trust. In the event of change in the object, nationality or form of the organization, dissenting stockholders are permitted to withdraw and receive their proportionate share of assets.\textsuperscript{173} A 33 per cent. minority may judicially oppose any action that is illegal or in violation of the contract of formation, except in regard to the liability of directors or inspectors.\textsuperscript{174}

**D. OFFICERS**

The officers\textsuperscript{175} are the board of directors (\textit{consejo de administraciон}),\textsuperscript{176} the inspectors (\textit{comisarios})\textsuperscript{177} and the executives (\textit{gerentes}).\textsuperscript{178} None is required to be a stockholder.\textsuperscript{179}

As already noted, the contract of formation of the organization may specify the powers of the directors.\textsuperscript{180} When the directors are three or more in number, the contract must specify the rights of minority stockholders in regard to their election but, as a minimum, a minority of 25 per cent. must be granted the right to name one director.\textsuperscript{181} The designation of such a director may be revoked only when that of the other directors is likewise revoked.\textsuperscript{182} A director may not vote upon a matter in which his personal interest is adverse to that of the
organization. Each director gives a bond and detailed provisions govern his responsibility to the organization.

The inspectors are chosen by the stockholders with compulsory minority representation. They make monthly inspections and watch over the affairs of the organization generally. Notice of all meetings of the board of directors must be given them, and at the meetings the inspectors are entitled to speak but not to vote. They may call stockholders' meetings at any time and in emergencies may designate temporary directors. Inspectors are bonded and their responsibility to the organization is regulated strictly.

The law contains detailed provisions designed to insure that there will be inspectors at all times.

The only point in regard to executives which requires mention is raised by Pallares, who states that the Act leaves the question open as to whether a general grant of authority to an executive impliedly carries with it the power to make transfers of property within the scope of the authority granted. The answer probably is that the power to transfer property is impliedly included if the making of such transfers constitutes, in whole or in part, the corporate purpose, but that otherwise express authority must be given.

E. BALANCE SHEET

The directors are required to prepare an annual balance sheet. It is to be delivered to the inspectors, together with documents supporting it and a general report upon the business of the organization, at least one month before the stockholders' meeting to which it is to be submitted. Within the next fifteen days after receipt, the inspectors prepare the observations and proposals which seem pertinent to them. All the documents are then held at the office of the organization, for the inspection of stockholders, during the fifteen days preceding the meeting. After the balance sheet has been approved by the stockholders, it is officially published and recorded, together with a notation in regard to any votes cast in opposition to approval.

7. THE LIMITED LIABILITY FORM

The limited liability form (sociedad de responsabilidad limitada), intermediate between the anonymous form and the common law partnership, the
The latter being represented by the collective form, is an innovation in Mexican practice. The reasons for its adoption are thus outlined in the Exposition of Purposes:

"This addition hardly needs to be justified now, since for some time past there has been felt a strong current of thought, in the realm of doctrinal discussion as well as in various legislative proposals, so directed as to cause our legislation to resort to this form of organization, which has come to constitute a type intermediate between the organizations of persons and the anonymous, with the fundamental advantages of both the former and the latter, and which it is to be hoped will open a natural channel of development for enterprises of medium size, which, up to now, in order to limit the liability of the members, have had to adopt the anonymous form, losing the element, which for many of them would be of great value, of the credit and personal reputation of the members, and have had to support the burden of a complicated organization which is justified only for enterprises of importance."

Pallares, after pointing out that the new form is intermediate between the anonymous and the collective, says:

"Like the latter they are organizations of persons, and like the former they are of limited liability. They are distinguished substantially from the former in that the capital can not be divided into shares, and from the latter in that there is not unlimited liability."

The new form is thus defined in the Act:

"The organization of limited liability is one which is formed by members who are obligated only to make payment of their subscriptions, without their interest in the organization being represented by negotiable certificates, to order or to bearer, as the interests shall be transferable only in the cases and subject to the conditions which the present law establishes."

The number of members may not exceed twenty-five. The capital may not be less than 5,000 pesos. It may be divided into interests of unequal amounts, but only in multiples of 100 pesos. Pallares states that the purpose of this restriction is to avoid speculation in connection with organizations of this character. Prontuario Crítico de la Ley de Sociedades Mercantiles (1934), 33.

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The name may or may not include the names of members, but in any event must be followed by the words "organization of limited liability" (sociedad de responsabilidad limitada) or their abbreviation, "S. de R. L." 215

Although it would seem to be contrary to the nature of such an organization, different classes of stock are permitted, 216 with different voting rights. 217 Voting normally is upon the basis of one vote for each one hundred pesos of contribution. 218 The interest of a member may be transferred only with the consent of all the others, unless the contract of formation provides that the consent of a majority in number, representing 75 per cent of the capital, shall be sufficient. 219 If the transfer is to be to one not already a member, the other members have a preferential right of purchase. 220 An express provision in the contract of formation is necessary in order to enable a member to make a partial transfer of his interest. 221

It may be provided in the contract that members are obligated to make later additional payments in proportion to the amount of their original subscriptions. 222 This amounts to the imposition of a limited personal liability, as an exception to the general provision of Article 58 to the contrary which has been quoted. Also it may be provided that members shall make compulsory loans to the organization, the compensation and terms to be specified in the contract. 223

Provision may be made for the retirement of the interests of members out of profits. 224 Enjoyment shares 225 may be issued to those whose interests are retired. 226 In connection with an increase in the capital, the members have a preferential right of purchase, unless there is a contract provision or a vote of the members to the contrary. 227

The limited liability form does not have a board of directors, but may have managers (gerentes), 228 appointed at the meeting of members. 229 There also may be a board of inspectors (consejo de diligencia). 230

Initial dividends, not to exceed 9 per cent., may be guaranteed, and paid as a matter of general expense, for the period required before operations can be

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215 Arts. 59-60.
216 Arts. 62 & 68.
217 Art. 79.
218 Art. 79.
219 Art. 65. Acquisition by inheritance does not require consent of the members, unless there has been an agreement that upon death the organization shall be dissolved or the interest of the deceased liquidated. Art. 67.
220 Art. 66.
221 Art. 69.
222 Art. 70; Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 595.
223 Art. 70. It is stated in the Exposition of Purposes that the "loans" (prestaciones) may be of labor or of services. Diario Oficial, Aug. 4, 1934, 593, 595.
224 Art. 71; Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 595.
225 Discussed in Sec. 6, subsec. B, at p. 210, supra.
226 Art. 71.
227 Art. 72.
228 Art. 74-76. If no managers are appointed, all the members participate in the administration. Arts. 74 & 40. The managers need not be members. Art. 74.
229 Arts. 77-83. Unless the contract provides otherwise, notice of meetings is given by registered mail, with return receipt requested. Art. 81. The contract may provide for votes to be taken by mail. Art. 82.
230 Arts. 94 & 78(4).
commenced—in any event not over three years. A number of provisions relating to the collective form are made applicable to this form.

A brief later "Law of Organizations of Limited Liability of Public Interest" (Ley de Sociedades de Responsabilidad Limitada de Interés Público) provides for an additional variation in form. Such organizations may be created only to undertake activities which are jointly of public and of individual interest. The decision in regard to this is to be made by the Secretariat of National Economy. As to most matters, these organizations are governed by the provisions of the Law of Mercantile Organizations relating to the limited liability form. They are required, however, to have variable capital. There is no limitation upon the number of members. One member may not hold over 25 per cent. of the capital. Twenty per cent. of the profits must be placed in the reserve fund until it equals the capital. The Secretariat of National Economy may intervene in the administration in very limited respects. Such intervention does not restrict the liberty of action of the members and is entirely for their protection. The principal effect of the new variation in form, in enterprises of public interest, is to free limited liability organizations from the restriction to twenty-five members, coupled with a larger reserve fund and special governmental protection of the members.

8. THE COLLECTIVE FORM

The collective form (sociedad en nombre colectivo) carries out the general partnership idea, with personal liability upon the part of all members. The changes made in regard to it are thus summarized in the Exposition of Purposes:

"The collective form preserves in the law its traditional structure, insofar as the liability of the members is concerned, the subsidiary character of the liability being merely clarified, in accordance with the recent tendency of the Supreme Court, and in agreement with unanimous opinion upon principle.

"As changes of importance from the provisions of the Code now in force, the following should be mentioned:

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231 Art. 85. It is interesting to note that, in connection with the limited liability form, the right to pay initial dividends without profits is expressly limited to the period required before operations can be commenced, although, as commented upon in footnote 135, supra, no such restriction has been placed upon the guaranty of initial dividends by anonymous organizations during the first three years.

232 Art. 86.


241 Art. 25. The participation may be only to: (a) obtain reports from directors; (b) call meetings of members; (c) bring judicial proceedings for dissolution or liquidation when legal cause exists; and (d) to denounce before the Attorney General tortious irregularities upon the part of directors.

242 Arts. 25-50.
"The principle of majority rule in the adoption of various resolutions; "The possibility of entrusting the administration to third persons, granting the right of withdrawal to members voting against such action; and 
"The broadening of the duty which the members have not to be connected with any other enterprise of the same class as the organization."

By the reference to the subsidiary character of the personal liability, it is meant that the organization, which is recognized as a legal entity, must be sued first before a recovery can be sought against the members individually. The name of the organization contains those of one or more of the members, and if all are not included the words "and company" (y compañía), or their equivalent, must be added. The organization may continue to make use of the name of one who is no longer a member, but if this is done the word "successors" (sucesores) must be added. The same word must be added when the name used is the same as that of a predecessor organization which has transferred its rights and obligations to the new group.

Members may be capitalist or industrial, that is, they may furnish capital or services. The contract of formation may provide that majority consent is sufficient to authorize the transfer of the interest of a member, but if a transfer is to be made to one not already a member the other members have a preferential right of purchase. Provision likewise may be made for majority consent to changes in the contract, but dissenting members must be permitted to withdraw. Industrial members are entitled to support out of the business. The compensation of capitalist members who act as directors may be charged to general expense. Any agreement of the members to distribute profits prior to dissolution can not prejudice the rights of third persons. Dissolution at the will of a member is not possible unless so provided in the contract of formation. The Act provides for dissolution upon other grounds. The office of director (administrador) is regulated in detail. Members who are not directors may select an interventor (interventor) who will have the right to make inspections.

9. THE MANDATORY FORM

The mandatory form (sociedad en comandita—literally, organization upon command) corresponds to the common law limited partnership. There is

Exposition of Purposes, Diario Oficial, Aug. 4, 1934, 593, 595. The character of the liability of the members is covered by Art. 25. The other changes referred to are set forth in Arts. 46, 58, 38 & 35. Majority rule is limited by a provision that, if the contract of formation provides for voting in accordance with contributions to capital, nevertheless a single member who holds over half the capital must be supported by another. Art. 46.

The subsidiary nature of the liability is set forth in Art. 25. As among themselves the members may limit liability. Art. 25.

The distribution of alleged profits when the organization is insolvent. Art. 25. Instead of appointing directors, all the members may participate in the administration. Art. 40.

The personal liability of the active members and the exemption from liability of the silent members are covered by Arts. 51 & 207.
this important difference, however, that the interests of the silent members (comanditarios—literally, those commanding) may be represented by negotiable stock certificates.261 Stock also may be issued to the active members (comanditados—literally, those commanded), but it must be registered and may be transferred only with the consent of all the active members and two-thirds of the silent members.262 The rules as to name are the same as in regard to the collective, except that if stock is not issued the name must be followed by the words “mandatory organization” (sociedad en comandita) or their abbreviation, “S. en C.”263 and if stock is issued it must be followed by the words “mandatory organization with shares” (sociedad en comandita por acciones), or their abbreviation, “S. en C. por A.”264 Many provisions of the Act relating to the anonymous and the collective forms are made applicable to the mandatory.265 Unless the contract of formation provides to the contrary, the loss of an active member results in dissolution.266

10. CO-OPERATIVES

Co-operatives (sociedades cooperativas)267 are recognized in the Act as mercantile organizations,268 but are left for regulation by special legislation.269 The present General Law of Co-operative Organizations (Ley General de Sociedades Cooperativas)270 went into effect June 1, 1933.271 Great importance is attached to co-operatives, as the government hopes to use them to further the national program of socialization.272 Co-operatives are organized along familiar lines. While interest-bearing certificates of contribution (certificados de aportación) may be issued to represent contributions of services or cash or other property,273 sharing in profits as such depends upon participation in the activities of the business.274 Personal liability generally is limited.275 Each member always has one vote276 and no

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261 Arts. 207–211, especially 207–209. The mandatory with stock is set forth in the Act as a separate form from the mandatory when stock is not issued. The latter is known as the simple (sencilla) and the former is known as the mandatory with shares (por acciones). Arts. 51 & 207.
262 Art. 209.
263 Ar. 52.
265 Ar. 52. 266 Arts. 231 & 230.
267 Art. 1. (6). The present writers previously expressed an opinion to the effect that co-operatives should be considered hybrid in nature, part civil and part mercantile. Barker and Cormack, Mexican Civil Organizations Under the New Code, 7 SOUTHERN CALIFORNIA LAW REVIEW, 193, 201, n. 24 (1934). Pallares states that they are mercantile in form, although not as to purposes, which are foreign to the idea of mercantile profits. The character of their purposes is evidenced, among other things, by the fact that upon dissolution the reserve fund is devoted to the development of co-operativism. Prontuario Crítico de la Ley de Sociedades Mercantiles (1934), 13–14.
267 Arts. 231 & 230. 268 Art. 1.
269 While not controlled or furnished with capital by the government, it is felt that participation by the members in the management of co-operatives will be an important educational and psychologically predisposing factor leading in the direction of social control over economic forces upon a wider scale.
270 Act of May 12, 1933, Diario Oficial, May 30, 1933, 397, Arts. 2(1) & 21–23.
271 Act of May 12, 1933, Diario Oficial, May 30, 1933, 397, Arts. 2(1).
preferences to any class of members are possible. A twenty per cent. of the profits must be devoted to social prevision (prevision social) and upon dissolution the reserve fund is devoted to the development of co-operativism. Governmental intervention is provided for, for the benefit of the members and to insure compliance with the law. The liberty of action of the members is not interfered with, so long as they comply with the law.

11. ASSOCIATIONS IN PARTICIPATION

The association in participation (asociación en participación) is a joint venture rather than an organization. It is not a legal entity and has no name. It is defined in the Act:

"An association in participation is a contract by which a person grants to others, who contribute goods or services, a share in the profits and losses of a mercantile business or one or more commercial operations."

The former momentary association (asociación momentánea), which could not be clearly distinguished from the association in participation, now has been eliminated as a separate form.

The association in participation is formed by a written contract. Recordation of the contract is permitted, but not required. The member receiving the goods or services (the asociante—literally, the one associating) acts in his own name and there is no juridical relation between third persons and the other members (the asociados—literally, the ones associated). It is therefore to be noted that, unlike the common law rule, sharing in the profits and losses does not result in partnership liability. Third persons may treat all property involved as that of the member who has received it, unless the nature of the property is such as to require some other form of transfer, or a contract provision to the contrary has been recorded or the third person has or should have knowledge of the facts. As to matters not specially regulated by the Act, the associations in participation are governed by the provisions of the law relating to collectives.
Every legally constituted foreign organization is recognized as a legal entity, but if it desires to engage in commerce in Mexico it must record certain documents. Three requisites are established in order that the organization may be entitled to secure such recordation:

“(1) It must be shown that the organization has been duly formed in accordance with the laws of the state of which it is a national, such proof to consist of authentic copies of the contract of formation and other documents relating to its creation, together with a certificate that the organization has been constituted and authorized in conformity to law, executed by the diplomatic or consular representative of Mexico in that country;

“(2) The contract of formation and other constitutive documents must not be contrary to the precepts of public order established by Mexican law; and

“(3) The organization must be establishing or have in Mexico an agency or branch.”

The requirement last stated, that an agency or branch must be established in Mexico, is often burdensome, but insures the jurisdiction of the Mexican courts in personam over the foreign corporation. The provisions of the law relating to foreign organizations are discussed thus in the Exposition of Purposes:

“The problem of foreign organizations, which in the legislation now in force has given rise, through the imperfection of the applicable provisions of the Code of Commerce, to many controversies and uncertainties in our jurisprudence, has been resolved by the law in a different manner, when it is dealing with an organization which desires to establish in the country an agency or branch, from the situation in which the organization only wishes to undertake the defense before Mexican authorities of rights born out of juridical acts validly performed without or within the territory of this country, assuming, in the latter case, that no engaging in commerce has been involved.

“The Commission felt that while it was necessary to surround the first of the situations mentioned [the establishment of an agency or branch] with formalities and guaranties, as to the latter it was sufficient to require that the organization be legally formed; which question will be passed upon in each instance by the appropriate authority.”

Pallares objects strenuously to the retention of engaging in commerce as a criterion in this connection. He says:

“In the portion concerning foreign organizations there is reproduced the provision of the Code of Commerce which has given rise to the already famous decisions of the Supreme Court in regard to the personality of such organizations, famous because they have been the object of severe criticisms and in some sensational cases have involved a veritable denial of justice.”

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13. SUMMARY OF CHANGES EFFECTED

Among the more important changes effected may be mentioned the following:

(1) Numerous provisions have been inserted to protect the rights of minority stockholders—formerly a weak point in the Mexican law;
(2) The number of provisions applicable to all forms of organizations has been increased greatly;
(3) An Act of the State, the judicial proceeding prior to recordation of the contract of formation, is required as a prerequisite to the recognition of an organization as a legal entity;
(4) By reason of the judicial proceeding just mentioned, the danger of difficulties arising out of the existence of de facto organizations is greatly lessened, coupled with greater severity in the event of their occurrence;
(5) Any organization mercantile in form is mercantile in character;
(6) The limited liability form is introduced;
(7) All organizations may be of variable capital;
(8) The requirement of a reserve fund is extended to all forms;
(9) Reduction of capital is provided for;
(10) No-par-value stock is introduced;
(11) Greater freedom is permitted in the issuance of stock with limited voting rights, subject to strict regulation to prevent abuses;
(12) The compensation of the promoters of anonymous organizations is regulated; and
(13) The momentary association is abolished.

14. PRE-EXISTING ORGANIZATIONS

Pallares says, in regard to the only point which requires mention:

"... There is established a principle of such a general nature that in practice it will prove to be inefficacious for the decision of the conflicts which must arise. It consists of stipulating that the provisions of the law shall govern the juridic effects of acts prior to its going into effect, provided that their application does not produce retroactive results. Everyone knows that the subject of non-retroactivity of statutes is one of those most discussed in jurisprudence, and that it has produced not hundreds but thousands of volumes. Therefore, to refer to it is to refer to juridical chaos, without any firm basis to put an end to it."

While, as Pallares feels, the provision is largely inexplicable, in general it is probable that in dealing with organizations already in existence the new law will be held applicable to all matters of public interest, and to other matters only when not covered by provisions of the contract of formation.

10-11. While no entire provision of the Code of Commerce is reproduced literally in the new law (see Code of Commerce [1889], Arts. 3, 14-15, 19, 24-26 & 265-267) it is clear that this is the portion of the new law to which Pallares takes exception. For an excellent discussion of the Mexican decisions relating to foreign corporations, see Edward Schuster, The Judicial Status of Non-registered Foreign Corporations in Latin America—Mexico, 7 Tulane L.Rev. 341 (1933).

202 Eduardo Pallares, Prontuario Critico de la Ley de Sociedades Mercantiles (1934), 2. The provision referred to appears in Transitory Art. 10.