DECEMBER 2012, MEXICO

NEWSLETTER 34

VON WOBESER Y SIERRA

Editorial

A new six-year presidential term is about to begin in Mexico and there is an air of expectation. After 12 years, the voters have given the *Partido Revolucionario Institucional* (PRI) the opportunity to return to power.

Under these circumstances, the labor reform is cause for optimism. Using the recently created mechanism of "preferred bill", former president Felipe Calderón sent a proposal to the Congress of the Union for the reform of the Federal Labor Law (*Ley Federal del Trabajo*, LFT). The Chamber of Deputies, acting as the chamber of origin, amended the bill, and on September 28 approved a draft decree. The draft went back and forth between chambers, saw certain changes, and finally, on November 13, the Senate sent to the Executive the Memorandum of Draft Decree approved by both chambers for its publication in the *Official Federal Gazette* and subsequent entrance into force.

A reflection of the coordinated, democratic work of the Legislative Branch, this reform is a great achievement for Mexico, being the first significant change to labor law in approximately 40 years. Throughout those decades, attempts were made to modernize labor law, but due to the complexity of the matter and for political and social reasons, all prior proposals remained "frozen." Mexico needed to modernize its labor law because it was anachronistic and did not correspond to the current situation of the country. Thus we consider this to be great news.

In this *Newsletter* we address the most relevant legal matters of the last few months. We focus on the reform of the LFT, summarizing the most relevant parts so that our clients and friends are aware of them and can thus adequately implement any appropriate adjustments.

Claus von Wobeser

Articles 68 and 69 of the General Law of Business Corporations

ARTICLE 68

The text of the article

> Each partner will only have one partnership interest. When a partner makes a new contribution or acquires all or a portion of the interest of another partner, the value of his partnership interest will increase in the respective amount, assuming they are not interests having different rights, in which case the individuality of the partnership interests will be maintained.

Comments

This article shows the personal nature of the limited liability company by establishing that each partner only has one partnership interest, similar to other associations of persons, such as the general partnership (*sociedad en nombre colectivo*) and the limited partnership (*sociedad en comandita simple*). In these types of companies the influence of each partner is personal, because the votes to decide the matters that concern the company are, in principle, by head count. In the limited liability company, in the case of limitation on liability, the personal element is reduced and the capital element is introduced, which results in the influence of each partner of the company being determined by the amount of his participation in its capital. This situation is formally different from that of the stock corporation in which the capital is divided into shares, where each share represents a partnership interest. Therefore, the influence of a shareholder depends directly on the number of interests, in this case shares, that he has.

The logical consequence of this is that if in a limited liability company there is a capital increase and one or more partners make new contributions, the value of their partnership interests will increase by the amount of their contributions, but each partner will continue having only one partnership interest. The same will happen when one of the partners acquires all or part of the partnership interest of another partner.

As an exception, the individuality of the partnership interests will be maintained when new contributions result in the formation of partnership interests with different or special rights. This is identical to what occurs in the case of the stock corporation: the division of the capital in several classes of shares with special rights for each class. Although the law establishes this possibility for the limited liability company, it is not a frequent practice in Mexican law.

ARTICLE 69

The text of the article

> The partnership interests are indivisible. However, the right of division and partial assignment may be established in the bylaws, respecting the rules contained in articles 61, 62, 65, and 66 of this law.

Comments

It is natural and logical that each partner cannot have more than one partnership interest in any personal company. This is what article 68 establishes. It would be inconceivable that in a general partnership, a partner could have two partnership interests with the same rights, when the vote to resolve matters concerning the company is, in principle, by head count. Even when the bylaws stipulate that the majority is calculated by amounts, as permitted in article 46, each partner will continue to only have one partnership interest.

The principle of unity of the partnership interests, established in article 68, is complemented with the principle of individuality established in article 69.

However, the capital element can influence the limited liability company. As an exception to the unity principle, it can be established in the bylaws that the partners have the right of division and partial assignment of the partnership interests, provided that the maximum number of 50 partners is not exceeded (article 61), that capital is not inferior to three million pesos (now three thousand pesos), that the partnership interests have the value of the multiple that is established in article 62, that the admission of new partners is approved by the statutory majority of the partners (article 65), and that the right of first refusal is respected when the assignment is authorized in favor of a person unrelated to the company.

However, it must be understood that the divisibility of the partnership interests permitted by this article is only for purposes of a partial assignment to another current partner or a new partner, not to satisfy the wishes of the holding partner since, in this case, the principle of the unity of the partnership interest that is established in article 68 would be violated.

It should be noted that the principle of indivisibility of the partnership interests is not exclusive to the limited liability company. It is expressly provided for in the Law (article 122, for shares of the stock corporation, each one of which represents a partnership interest). It is established that when there are several co-owners, they will appoint a common representative, and that the provisions of local law in matters of co-ownership will be applied.

This has to be the solution in the case of the limited liability company when the bylaws do not establish the right of division, since the local laws in matters of co-ownership are applicable whenever there are several holders of a good that cannot be easily divided. •

Licenciado Manuel Lizardi A.†

TAX

Decree on Tax Benefits and Administrative Simplification

On March 30, 2012, the Decree Compiling Various Tax Benefits and Establishing Measures for Administrative Simplification was published. It entered into force on April 1, 2012.

This Decree is part of the tax simplification measures that are intended to facilitate complying with tax obligations. It explains that there have been many prior decrees establishing tax benefits, but that they are scattered, and for this reason it was necessary to present them clearly and simply in a single statute.

In this way, tax benefits related to the laws on the Income Tax, the Flat Rate Business Tax, the Value Added Tax, and the Cash Deposit Tax; the Federal Fees Law, and the Federal Tax Code are brought together. Likewise, new benefits are established by the Decree, revoking prior contravening or inconsistent administrative provisions.

Among the benefits that we consider relevant is that of not having to comply with the obligation to supply the notification referred to in the first paragraph of article 25 of the Federal Tax Code. Those persons who wish to establish the amount of money to which they are entitled due to tax stimulus are exempted from supplying this notification, except when this obligation is established expressly for a particular tax stimulus.

Additionally, the number of provisional payment calculations for the Flat Rate Business Tax is reduced from twelve to six per year, and the payment of fees, products, and government charges by bank cards is authorized, at the bank or on bank websites.

Another new benefit established by the Decree is an increase in the income level below which businesses need not report their earnings. This figure has changed from 34.8 to 40 million pesos of "cumulative income."

In general, it establishes that in the case of a stimulus consisting of a tax credit, when there is a surplus, there will be no refund or any compensation.

The Financing of the Bankrupt Merchant

Likewise, the stimulus credits will not be considered as cumulative income for the purposes of the Income Tax Law.

It is important to note that there are certain provisions that controlled and controlling corporations should take into consideration and carefully consider in order to properly apply the tax benefits in the corresponding cases.

The tax benefits established by the Decree will be applicable when the taxpayer presents the information that the Tax Administration Service determines necessary through general rules.

We recommend the timely consideration of each of the benefits included in this Decree, both those that were already in existence and compiled and the new ones, in order to verify their applicability in each case and to comply with the formal requirements established for their use. •

The importance of promoting a culture against insolvency becomes more relevant every day, especially considering the current weak global economic situation.

Easy access to credit, but above all its abuse, has resulted in both companies and individuals undertaking obligations beyond their capacity to pay, generating an imbalance in economic conditions and therefore a generalized default with repercussions for all those participating in the economy.

This situation has led the experts in insolvency matters to rethink its theoretical principles, adapting them and even modifying notions deeply rooted in general legal principles. One example is the dilution of *par conditio creditorum* —equality of conditions among creditors— since today it cannot be maintained that in matters of insolvency the initial contractual conditions must, necessarily, be respected.

These are the conditions that led the entity into bankruptcy, in addition to its own bad financial management. Thus, one of the principal purposes of a bankruptcy proceeding is to reach an agreement between debtor and creditors to change economic conditions and thereby to allow the business of the bankrupt entity to continue to be viable. Unfortunately, it is the creditors that carry the burden of the costs and consequences of the bankruptcy proceeding.

Article 1 of the Commercial Bankruptcy Law (*Ley de Concursos Mercantiles*, LCM) indicates that "it is in the public interest to preserve companies and prevent a general default on payment obligations that puts at risk their viability and the viability of others with whom they have a business relationship."

For its part, article 9 indicates that the merchant who is in general default on the payment of its obligations will be declared in bankruptcy. Article 10 then specifies that general default should be understood as the default in paying two or more creditors and that (1) the obligations past due more than 30

days represent at least 35% of all the obligations of the merchant and/or (2) the merchant does not have sufficient assets to meet 80% of its past due obligations.

If we were to continue with the analysis of each provision of the Law, at the end of the road we would have to conclude that one of the elements (in fact the most important) of the state of insolvency is the lack of capital or liquidity to meet the debts contracted; that is, the failure to pay.

How to confront this situation? It is clear to us that the merchant cannot, with his own resources, satisfy the obligations he undertook, since otherwise he would not be in a situation of insolvency. Thus, the only possible response is that fresh capital be found, which is done primarily in three ways: (1) the sale of assets to transform them into capital, (2) the obtaining of forgiveness and forbearance by the creditors, or (3) the obtaining of new credit.

On this occasion we want to direct our attention to this latter point, since it seems to us that it is here that there is a true opportunity for restructuring that will reduce, to the extent possible, the harmful consequences of insolvency.

The injection of capital into bankrupt companies is a good incentive for investors with a vision for growth, since the majority of bankruptcy cases involve companies with good business ideas that generally became insolvent as a result of bad management.

Knowing how to identify both an investor with the qualifications for financing a bankrupt entity and a good project to invest in can result in great economic benefit for all concerned, since with fresh capital and a good business plan the bankrupt entity can continue its activities, the investor will make a profit, and the creditors may obtain a larger share of their credit, generating a virtuous circle.

This investment of new capital must go hand in hand with a global restructuring of the company, and it will be very important that the lender or investor carries out a serious study of the economic viability of the project it intends to finance in order to detect the causes of the insolvency, correct them and not repeat the same mistakes.

This approach is vital. The solution is not merely about injecting new capital. The investment must be made in a viable project, since otherwise it will only result in a temporary reactivation of the business, until the new capital is exhausted. Once exhausted, insolvency will be faced again but with new debt. As the saying goes, "Don't throw good money after bad."

There are European countries, such as Germany and Italy, where the function of financing bankrupt companies has been taken over by the State through the creation of specialized banks. Before granting credit, these banks carry out economic viability studies of the companies. When opening a line of credit, one of the requirements is the presentation of the business plan that will be implemented.

It seems relevant to us to emphasize this type of State policy in the case of insolvency problems. It is a very laudable solution whose implementation, we believe, should be considered in Mexico, not only under the model of a state bank, but also through raising awareness among private credit institutions and private investors, and to encourage them to support this type of financing, which can be very profitable. •

---

[1] The LCM provides that in the case of a request for declaration of insolvency by the merchant himself, it is only necessary for him to meet one of the two premises. However, in the case of a claim for commercial bankruptcy made by a creditor, it is necessary to show both premises.

Increase in Verifications of Origin by Mexican Authorities of Exporters and Producers Located in the United States and Canada

1. Reason for the Verifications

Many do not know that when they deliver to a Mexican importer a certificate of origin (CO) declaring that their merchandise originates in the United States or Canada under the North American Free Trade Agreement (NAFTA), they are assuming an obligation before the Mexican customs authority: the Tax Administration Service (*Servicio de Administración Tributaria*, SAT).

Under NAFTA, those who sign a CO are obligated to prove to the customs authority of the country where their merchandise has been imported from, that in fact it originates from the NAFTA zone. To do this, they must provide information consisting of records, reports, invoices, controls, and other documents that show that the merchandise originates from the NAFTA zone and that it therefore may enjoy the preferential tariff that was requested at the time of its importation.

These verifications can be carried out through questionnaires or inspections of the facilities of the exporter or producer located abroad (whether in the United States or in Canada).

In the case of a poorly handled verification, the SAT may determine that the products sent by the producer or exporter to Mexico did not originate in the NAFTA zone and can impose on the Mexican importer a tax liability that includes all the taxes that were not paid, in addition to a corresponding inflation adjustment, surcharges, and fines for failing to pay the tax and even, in some cases, countervailing duties. This tax liability will be a considerable amount of money for the importer, who will surely attempt to recover from the producer or exporter the amounts claimed by the SAT.

2. Increase of Verifications

Over the past several months, the SAT has increased its verifications of origin, for which purpose it now sends more questionnaires to producers and exporters located in the United States and Canada. It seems that this is the way the SAT prefers to carry out the verifications. There are very few cases in which it has chosen to go directly to the facilities of the producers and exporters to verify the origin of the merchandise that is imported to Mexico through a CO covered by NAFTA.

With the questionnaire, the SAT requests from the producer or exporter the records, reports, invoices, payment and transport documents, and other evidence that proves that the goods exported to Mexico through a CO comply with the rule of origin applicable under NAFTA. In this way it determines that in fact such goods originate from North America and therefore the preferential tariff requested at the time of the importation into Mexican territory is applicable.

3. Elements to Take into Account

The principal problem that producers and exporters confront is that they do not address the requirements adequately because the authority that requests the information does not belong to their country. This can result in the denial of the NAFTA origin of the products and the imposition of a tax liability on the Mexican importer.

The producer or exporter who understands the importance of these types of verifications and does respond to the requirements of the SAT often makes mistakes, such as not filing in a timely manner —within the terms set forth by the SAT— the information and documentation requested, or delivering incomplete or incorrect information.

The reality is that the SAT should be provided the best information available as well as a detailed report on the relationship of each document to the different steps of the production process in order to be able to prove the final origin of the merchandise.

4. Recommendation

Although it may not seem so, these verifications are very complex, and therefore it is advisable for companies to have a specialized advisor in order to avoid having the authorities deny the NAFTA origin of the merchandise and impose significant tax liabilities. Having a specialized advisor can also avoid having to challenge such determinations before a Mexican court or, most importantly, can avoid conflicts between the Mexican importer and the foreign producer or exporter. •

Public-Private Partnerships Law

On January 16 of this year the Public-Private Partnerships Law (*Ley de Asociaciones Público Privadas*, LAPP) was published, which establishes new partnership arrangements between private parties and the government (1) for providing services to the public sector or to the final user, related to construction and infrastructure, or (2) for the development of production investment projects, applied research, and/or technological innovation. This law falls under the rubric of public order and therefore its provisions are non-waivable.[1] It entered into force the day after its publication, on January 17, 2012.[2]

The LAPP amends various provisions of the following laws: Public Works and Related Services Law (*Ley de Obras Públicas y Servicios Relacionados con las Mismas*, LOPYSRM); Public Sector Acquisitions, Leases, and Services Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*, LAAYSSP); Expropriation Law (*Ley de Expropiación*); National Assets Law (*Ley General de Bienes Nacionales*, LGBN); and Federal Civil Procedures Code (*Código Federal de Procedimientos Civiles*, CFPC).

The LAPP incorporates the best international practices in partnerships for the development of infrastructure, backed by the Organization for Economic Co-operation and Development (OECD), through benchmarking of best practices (the British, Chilean, Brazilian, and Australian models) in order to place Mexico among the most advanced countries in public-private partnership laws. The principal objective of this law is to increase levels of investment (domestic and foreign) in Mexico, since the lack of public and private investment in infrastructure has been a big obstacle for national growth in recent decades.

---

1 Article 1 of the LAPP.

2 First transitory article of the LAPP.

Below the most relevant points of this law are briefly explained.

According to the LAPP, a public-private partnership project (*proyecto de asociación público privada*, PAPP) is one that is carried out under any plan to establish a long-term contractual relationship between entities of the public sector and the private sector with the purpose of providing services (to the public sector or to the final user) in which infrastructure constructed totally or partially by one or more private sector companies is used in order to increase the levels of investment in the country and increase social well-being.[3] Also considered as PAPPs are those projects whose purpose is to develop production investment activities, applied research, and/or technological innovation.[4]

All the information related to the PAPP must be published in the electronic system of public governmental information, CompraNet.

The LAPP is applicable to federal government agencies, federal public trusts not considered state-owned entities, autonomous constitutional bodies and the states, the federal district, municipalities, and local public entities that invest more federal resources than local resources in a PAPP. According to the LAPP, a project is considered to be carried out with federal resources when the contributions of the states, municipalities, and local public entities are less than the federal contributions.[5]

All PAPP must meet the following requirements: (1) be fully justified, (2) specify the social benefit they bring, and (3) demonstrate their financial advantage compared to other means of financing.[6] The PAPP may never involve the substantive production activities referred to in the Regulatory Law of Article 27 in the Area of Petroleum.[7]

For carrying out a PAPP the following is required: (1) in all cases, the entrance into a long-term contract in which the rights and obligations of the parties (public entities and private entities) are stipulated; (2) only in some cases, the granting of the necessary permits,[8] and (3) in the specific case of projects on innovation and technological development, in addition to the above, the approval of the Scientific and Technological Consulting Forum, established by the Science and Technology Law.[9]

The PAPP will be defined by the agencies or entities, and its concession, as a general rule, will be subject to a competitive bid. Only in exceptional and limited cases may an invitation to at least three persons or a direct award be used. These cases are: (1) single offeror, (2) exclusive holding of rights, (3) military purposes, (4) risk to national security, (5) risk of significant losses, (6) rescission of contract with the winning bidder before the initiation of the project, in which case it is awarded to the second place winner, (7) substitution for early termination or rescission, and (8) strategic alliance.[10]

The competitive bid for the awarding of a contract to develop a PAPP is very similar to the proce-

---

3 Article 2 of the LAPP.

4 Article 3 of the LAPP.

5 Article 4 of the LAPP.

6 Article 2 of the LAPP.

7 Article 10 of the LAPP.

8 The word *permits* encompasses everything referring to permits, concessions, or authorizations for the use and exploitation of public goods, the provision of the respective services, or both.

9 Article 13 of the LAPP.

10 It should be mentioned that the LAPP is much more restrictive than the LOPYSRM and the LAAYSSP regarding the number of situations for which an invitation to at least three persons or a direct award would be authorized. The two latter laws establish more than a dozen situations.

dure set forth in the LOPYSRM and in the LAAYSSP. It has five stages: (1) invitation to bid (bidding rules), (2) explanation meetings, (3) act of presentation and opening of proposals, (4) evaluation, and (5) award. Subsequently the contract is signed and executed to its natural termination (in the best of the scenarios). Notwithstanding that the names and number of these stages are the same, the competitive bidding procedure in the LAPP has various peculiarities, among which is one that goes beyond the nominative questions.[11] This peculiarity consists of the fact that while the LAPP permits the participation of physical persons (national or foreign) in the bidding,[12] they are obligated if they win the bid to incorporate an entity whose corporate purpose or ends are exclusively to carry out the activities necessary to develop the respective project. If an entity participates from the beginning, it must also have such exclusive corporate purpose.[13] Article 91 of the LAPP is clear in establishing that "the public-private partnership contract *may only be entered into* with private entities whose corporate purpose or ends are exclusively to carry out those activities necessary to develop the project […]."

It should be emphasized that, as an exception, private parties may define and present their PAPP proposals to the authorities. These proposals are called by the LAPP "unsolicited proposals." They must be evaluated by the agency or entity to whom they are presented. The agency or entity may, depending on whether or not the established legal requirements are met,[14] declare the project resulting from the unsolicited proposal valid or invalid.[15]

If the project is declared invalid, the proposal is rejected. If it is declared valid, then the agency or entity may follow either of the following scenarios:

1. *Submit the PAPP to competitive bidding*. In this case, the competitive bid is conducted in the same manner as a competitive bid of a defined PAPP requested by the agency or entity, but with the following particularities: (a) if the promoter (the one who presented the unsolicited proposal) does not participate in the competitive bid or does not win it, the agency or entity that is selected will reimburse the promoter the expenses he incurred and the promoter will assign his rights over the project;[16] and (b) if the promoter participates in the competitive bid, he will receive a premium in the evaluation of his offer (which cannot exceed the equivalent to 10% in relation to the award criteria).[17] This premium has been very criticized by the Mexican legal forum since it is considered contrary to the principles of free enterprise and equality established in our Magna Carta[18] for these types of competitive bids and expressly repeated in the LAPP itself.[19]

   In the case of unsolicited proposals, the direct award is not accepted, but the invitation to at least three persons is.[20] When only the promoter of the initiative participates in the competitive bid, he may be directly awarded the contract.[21]
2. *Acquire the PAPP* (including the studies done and the corresponding copyrights and industrial property rights). In this case, the consideration in favor of the promoter will consist of the total or partial reimbursement of the expenses he incurred.[22] It should be pointed out that in this case the LAPP refers to a total or partial reimbursement, which is not the case in the other scenario. From our point of view, there is no logical or legal reason that in this case, in contrast to the other one, the option of total or partial reimbursement is given. In legislative fairness, both scenarios should have provided for total reimbursement.

---

11 Such as the distinction between "invitation to bid" and "bidding rules" (they treat them as different documents), which does not occur in the mentioned works and acquisitions laws. Also, reference is made to "propuestas" and not to "proposiciones" as in the case of the latter two laws.

12 As well as entities, national or foreign.

13 Articles 41 and 91 of the LAPP.

14 Legal viability, social profitability, economic and financial viability, etc. See article 27 of the LAPP.

15 Articles 26 to 30 of the LAPP.

16 In addition, the promoter will deliver all the relevant information, documentation, and permits.

17 Article 31 of the LAPP.

18 Articles 25 and 134 of the Political Constitution of the United Mexican States.

19 Article 38 of the LAPP.

20 Article 64 of the LAPP.

21 Article 31, section VI of the LAPP.

22 Article 32 of the LAPP.

We will now analyze three more topics that are not only novel but also relevant. First of all we will refer to expropriation; secondly, to the means of challenging any irregularities that may occur during the contracting process, and thirdly, to disputes.

Regarding expropriation, the LAPP provides that the acquisition of real estate, goods, and rights necessary for the execution of a PAPP can be carried out contractually or by expropriation.[23] For every expropriation there must be a declaration of public utility, which is nothing new; however, it is very novel that the LAPP establishes a new cause of public utility that did not exist before the publication of the LAPP in the Expropriation Law, the Agrarian Law, or in any other law. According to article 76 of the LAPP, "the following are causes of public utility: […] the acquisition of real estate, goods, and rights necessary to carry out a public-private partnership project."

Regarding the means of challenging any irregularities that occur during the contracting process, the LAPP provides for challenges only in the case of irregularities that occur during a competitive bid, not with respect to those that occur during an invitation to at least three persons, nor those that may occur in a direct award. This law also provides that the challenging of irregularities that occur during the competitive bid must be done in one act, grouping all of them together at the time of challenging the award. Against the irregularities that have occurred during the competitive bid there is no ordinary defense. Such irregularities would be challenged independently and only through extraordinary means of defense.

Several things stand out above. First, from our point of view, there is no legal reason not to allow for an ordinary means of defense against the irregularities that occur during the procedure for an invitation to at least three persons. Although the tendency marked by the LOPYSRM and the LAAYSSP is to declare acts derived from direct awards as unchallengeable (which we also disagree with), these laws are still clear in establishing that the acts derived from the invitations to at least three persons are perfectly challengeable.[24]

Restricted to the scope of the competitive bid, article 59 of the LAPP establishes that against the award of the bid the interested participant may choose between the administrative review appeal (as described in the Federal Administrative Procedures Law) or the nullity proceeding (before the Federal Court of Tax and Administrative Justice). This article establishes that against any irregularities occurring during the competitive bid, no ordinary means of defense may be pursued, but rather they may be challenged through a challenge to the award, calling it the "basket challenge."

In this respect, it is important to recall that both the LOPYSRM and in the LAAYSSP provide for a "dispute procedure" before the Ministry of Public Function (*Secretaría de la Función Pública*, Sefupu) in the case of irregularities during the competitive bid (called in these laws "public bid"). In practice, most of the time it is the Internal Control Body (*Órgano Interno de Control*, OIC) of the Sefupu in the agency or entity in question that resolves the disputes.[25] Furthermore, the irregularities that are presented during the public bid can (in fact, *must*) be challenged almost at the time they occur (six days after the act in which the irregularity occurred, as a general rule), and it is not necessary to wait to accumulate all of them in order to challenge them through a challenge of the award.

The above merits several comments. First of all, the LAPP does not provide for the possibility of making use of a dispute resolution process before the OIC of the Sefupu in the agency or entity. This represents a great advantage consisting of the possibility of a defense before a dispute resolution body completely unrelated (formally and materially) to the entity or agency. The problem that has arisen in practice in this respect is that the independence and impartiality of the OIC, because they are within the facilities of the agencies or entities, are compromised. These OIC are unrelated to the agency or entity formally but not materially. This legitimate doubt regarding the independence and impartiality of the OIC is not an issue under the LAPP. Nevertheless, the conclusion is not completely positive since if the review appeal contemplated in the LAPP is chosen, the appeal is heard, in some cases, before the superior of the agency or entity, repeating the defect

[23] Article 67 of the LAPP.

[24] Articles 83 of the LOPYSRM and 65 of the LAAYSSP.

[25] See articles 83 of the LOPYSRM and 65 of the LAAYSSP.

of the dispute resolution process, and in other cases before the authority issuing the act, which is to say the agency or entity itself, in which case, obviously, the authority becomes both judge and party. Notwithstanding this, under the LAPP the nullity procedure before the Federal Court of Tax and Administrative Justice will always be an option free of the problem of independence and impartiality.

Regarding the "basket challenge," this represents an advantage and a disadvantage. The advantage consists in the fact that the participant in the bid does not need to worry about the terms for challenging any irregularities at the time they occur: they only need to be identified and the arguments and evidence kept until the issuance of the award. The disadvantage consists of the propensity for developing a chain reaction, in which one irregularity produces another and so forth. This would provoke, in addition to losses in efficiency and even economic losses for the entity or agency (because in the end the procedure would be annulled), the existence of long illegal proceedings destined to "die."

Finally, it is important to analyze the disputes chapter. By mandate of the LAPP, an attempt should be made to resolve technical or economic differences that arise between the parties to a public-private partnership agreement by mutual agreement and in good faith (negotiation stage). If this is not possible, they will be resolved by a committee composed of three experts in the area in question (experts committee).[26] The parties can agree in the contract to the possibility of going before the Sefupu to request a conciliation for disagreements arising from the performance of the contract (conciliation),[27] or agree to an arbitral proceeding (arbitration).[28]

The inclusion of all these alternative dispute resolution methods in the LAPP is sensible.[29] Nevertheless, the form in which arbitration is regulated is worrisome. We consider especially serious the fact that this law states that the award may be challenged by an amparo proceeding; this is illogical and a source of uncertainty.[30] As is known, the Amparo Law regulating articles 103 and 107 of the Political Constitution of the United Mexican States ("Amparo Law") establishes that the amparo may be filed against acts of authority; that is, against acts issued by the so-called responsible authority. In the case of arbitration, the arbitrator or arbitrators issuing the award cannot be considered under any circumstances to be authorities for purpose of the amparo proceeding, as has been established by the highest courts of Mexico in several judicial precedents.[31] Thus, the LAPP is contrary to the Amparo Law and its judicial precedents, since it treats the arbitrator as a responsible authority by permitting the challenging of the award issued by the arbitrator through an amparo proceeding. The LAPP is seriously defective in permitting the challenging of the award through an amparo proceeding.

Finally, it should be mentioned that the LAPP is expected to favor investments of 12 billion dollars, according to the national press.[32] •

---

26 Article 134 of the LAPP.

27 Article 1398 of the LAPP.

28 Article 139 of the LAPP.

29 Neither the LOPYSRM, nor the LAAYSSP provide for an experts committee, although they do provide for conciliation and arbitration.

30 Article 139, section III of the LAPP.

31 See: (1) Isolate decision with registry number 376884, Fourth Chamber, *Federal Judicial Weekly*, p. 2827, fifth period, and (2) Isolated decision with registration number 220999, Collegiate Circuit Courts, *Federal Judicial Weekly*, p. 115, eighth period.

32 Third Transitory Article of the LAPP.

Sustainability, Corporate Governance and Corporate Social Responsibility

Von Wobeser y Sierra, aware of the importance of being a socially responsible business, has been developing a sustainability program with both an internal and external component. Internally we have been implementing sustainability practices, measuring our use of resources and setting goals to reduce that use. Externally we have been studying how sustainability issues affect the activities of our clients and are investing in training in order to be able to provide support to our clients in the development and implementation of their sustainability strategies.

In this context, we would like to offer our readers a series of articles on the concept of sustainable business and how it is evolving in Mexico. Sustainability in business operations generally refers to environmental sustainability, social sustainability, and sustained economic growth. This first article will take a look at two related concepts that encompass many aspects of sustainability, with some comments on their application in Mexico.

The first concept is *corporate governance*, which seeks transparency and accountability in governance in pursuit of long-term economic growth for companies. The other concept is *corporate social responsibility*, which seeks greater accountability of companies for their environmental and social impacts. In fact, it can be argued that the two concepts are beginning to merge, both addressing shareholder concerns regarding risk management and compliance. In any case, they both comfortably fit under the concept of *sustainability*.

One possible definition of *corporate governance* is, "the framework of rules and practices by which a board of directors ensures accountability, fairness, and transparency in a company's relationship with all its stakeholders (financiers, customers, management, employees, government, and the community)."[1] Particularly in the wake of a number of corporate scandals such as the Enron and WorldCom scandals, governments of various countries have imposed new rules regarding corporate governance, such as the Sarbanes-Oxley Act in the United States. Similarly, a number of international organizations have developed guidelines and standards to ensure greater transparency and accountability in business operations. For example, the Organization for Economic Co-operation and Development (OECD) has issued its Principles of Corporate Governance as a guide for legislative and regulatory initiatives in OECD and non-OECD countries. The International Finance Corporation (IFC) of the World Bank Group is working specifically to improve corporate governance practices in Latin America, cosponsoring with the OECD the Latin American Corporate Governance Roundtable, which has issued a publication titled *Practical Guide to Corporate Governance: Experience from the Latin American Companies Circle*.

Corporate governance principles have been introduced in Mexico over the last decade through reforms to the Securities Market Law and the issuance of general rules by the National Banking and Securities Commission, as well as through a corporate governance code developed by Mexican business organizations, all in an effort to encourage more transparent management practices in Mexico's businesses, thereby attracting greater investment in the country.

According to the *2010–2011 Corporate Governance Report for Listed Companies*, issued by the Centro de Excelencia en Gobierno Corporativo (CECG), a Mexican nonprofit dedicated to promoting the adoption of corporate governance practices in the country, Mexico received a score of 6.05 (on a scale of 1 to 10, with 10 the highest score). The report's recommendations state that while the regulatory framework in Mexico does address corporate governance, business practices are not optimal.

---

[1] <www.businessdictionary.com>

Of particular concern are inadequate regulations or unsatisfactory practices regarding shareholder rights, inequitable treatment of minority shareholders, unsatisfactory risk management systems, and over-concentration of ownership.[2]

Corporate Social Responsibility (CSR) is a concept that envisions a voluntary pursuit by businesses of meeting sustainability goals regarding the environmental and social impact of their businesses. In response to the growing concern of citizens and nongovernmental organizations regarding these impacts, corporations have begun developing internal policies and programs to monitor and manage these issues, many now issuing annual CSR or sustainability reports.

A number of international instruments have emerged as guides for integrating sustainability into corporate strategies and operations. In 2010, the International Organization for Standardization (ISO) issued an international standard known as ISO 26000, a comprehensive guide to corporate social responsibility. The broad issues addressed by ISO 26000 are governance of the organization, human rights, labor practices, environmental practices, fair operating practices, consumer affairs, and active participation in the development of the community.

The Global Reporting Initiative has developed a framework for preparing sustainability reports that is used by many companies, often together with a commitment to align their corporate strategies with the United Nations Global Compact, which establishes 10 universally accepted principles in the areas of human rights, labor, the environment, and anti-corruption.

In Mexico, CSR ideas have been taken up primarily by the business community itself. Building on the prior work of business organizations such as the Confederación Patronal de la República Mexicana (Coparmex), Uniones Sociales de Empresarios de México (USEM) and the Centro Mexicano para la Filantropía (Cemefi). In 2000, the Alliance for Corporate Social Responsibility (*Alianza para la Responsabilidad Social Empresarial*) was formed to promote these ideas among Mexican businesses (www.aliarse.org.mx). Its purpose is to support and strengthen companies committed to CSR in Mexico through the exchange of information, research, products, services, and networking.

While CSR goals are still primarily voluntary, many consider that the concept is evolving from a movement promoted by outside organizations to an internal risk management strategy, thereby transforming CSR into an integral part of governance. The overlap is seen particularly in the areas of disclosure, accountability, and transparency, board diversity, and risk management.[3] In this regard it is important to be aware that Mexican laws have followed the international trend toward considering certain corporate conduct as crimes, and that Mexican business practice is beginning to incorporate social responsibility into its internal fabric.

Von Wobeser y Sierra would be glad to assist you in developing a framework of rules and practices to ensure good corporate governance and compliance, as well as for meeting your own social responsibility and sustainability goals, tailored to the needs of your company and to the regulatory and business environment in Mexico. •

---

[2] Centro de Excelencia en Gobierno Corporativo: *2010–2011 Corporate Governance Report for Listed Companies*, Sept. 18, 2011, <http://ols.uas.mx/cegc/GCNoticex1000.asp?ids=92>.

[3] The Convergence of Corporate Governance and Corporate Social Responsibility (2005), Strandberg Consulting, at <www.corostranberg.com>.

Climate Change Law

Climate change is defined in the Climate Change Law as the variations in the climate attributed directly or indirectly to human activity, which alter the composition of the global atmosphere and are in addition to the natural variability of the climate observed during comparable periods.

Climate change is a global problem that not only affects the environment but also has significant economic consequences. In terms of the highest emitting countries, Mexico is 13 in greenhouse gases emissions —1.5% of the global total. Climate change affects both the ecosystems and the economy of the country, the latter as a result of the actions that must be taken to counter the effects of climate change such as droughts and floods.

In order to mitigate climate change, it is essential to adopt both national and international measures. Currently, Mexico is a party to several international agreements to mitigate climate change, such as the Kyoto Protocol and the United Nations Framework Convention on Climate Change.

In addition to these international measures, Mexico has adopted important policies for mitigating climate change, beginning with the National Development Plan 2007–2012. In contrast to the United States, Mexico is one of the first nations to publish (June 6, 2012) a Climate Change Law (*Ley General de Cambio Climático*, LGCC).

The LGCC addresses both mitigation of greenhouse gas emissions and adaptation to climate change through policy planning instruments, economic instruments, and coordination of actions by the federal government, the states, and the municipalities. With the LGCC, Mexico aspires to reduce its greenhouse gas emissions (GHGI) by 30% of their 2000 level by 2020 and by 50% of their 2000 level by 2050, assuming financial and technical support is provided by developed countries. The federal government also aspires to generate at least 35% of the nation's electricity from clean energy sources by 2024.

Replacing the National Ecology Institute (*Instituto Nacional de Ecología*, INE), the National Ecology and Climate Change Institute (*Instituto Nacional de Ecología y Cambio Climático*, INECC) has been created. The INECC is part of the Ministry of Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*, Semarnat) and its purpose is to carry out research, provide scientific or technological support, and take part in the national strategy regarding environmental protection, climate change, and the sustainable use of natural resources.

The following organizations have also been created: the Interministerial Climate Change Commission (the Commission), composed of the heads of 13 ministries; the Climate Change Council (the Council), formed by at least 15 representatives of the social, private, and academic sectors whose function will be to advise the Commission; the National Climate Change System, consisting of the Commission, the Council, the INECC, the state governments, and representatives of the municipal authorities, which will be responsible for coordinating and disseminating the National Climate Change Policy; and the Evaluation Coordination Office formed by the head of the INECC and six representatives of the scientific, academic, technical, and industrial community, in charge of the periodic evaluation of the National Climate Change Policy.

The National Climate Change Policy has to be based on principles of sustainable use of natural resources, co-responsibility of the State and society, precaution and prevention to avoid harm to the environment, adoption of production and consumption patterns that diminish carbon emissions, and the use of economic instruments in the mitigation of and adaptation to climate change, among other principles. The National Policy will be divided into instruments of adaptation and mitigation. Those of adaptation will focus on instruments of diagnosis,

planning, measuring, monitoring, reporting, verification, and evaluation. Those of mitigation will focus on planning, policy, and economic instruments.

The mitigation policies and actions of all levels of government have to consider six areas, among which we mention two that have a bigger impact on the private sector: (1) the reduction of emissions from the generation and use of energy, through the promotion of the use of renewable energy to generate electricity and the drafting of policies and regulations for sustainable building construction; and (2) the reduction of emissions in the sector of industrial processes, through the development of programs to offer incentives for energy efficiency and the implementation of clean technologies in the activities of industrial processes.

Semarnat will prepare the National Climate Change Strategy together with the INECC and the Council. This strategy must be approved by the Commission. Semarnat will also be responsible for drafting the Special Climate Change Program, with the participation and approval of the Commission. The LGCC also requires that the states, the Federal District, and certain sectors all draft their own programs. The National Strategy has to address diagnosis and evaluation of emissions, vulnerability to climate change, and capacity for adaptation. The programs have to establish the objectives, strategies, actions, and goals for confronting climate change, such as the six-year goals in mitigation and adaptation, the actions that should be taken at the federal level, those responsible for implementation and measuring, reporting, and verification of the measures and actions, among other things.

The INECC has to develop an inventory of emissions according to international guidelines and methodologies. The National Statistics and Geography Institute (INEGI) has to create a Climate Change Information System that will create a list of key indicators, while Semarnat will be responsible for consolidating the National Emissions Registry of emissions generated by fixed and mobile sources that are identified as subject to reporting. Finally, the LGCC has established a Climate Change Fund that will be composed of both public and private funds, national and international. These funds will be used to support the implementation of actions to confront climate change.

What does this new law mean for companies and businesses? As a framework law, the LGCC does not impose obligations in order to meet its climate change mitigation and adaptation goals; rather it establishes a framework for developing the institutions and specific strategies that should lead to achieving these goals. However, several of the adaptation and mitigation instruments that the LGCC requires be included in the national and local strategies and programs, will impact the private sector.

It is also important to know that the LGCC does establish reporting obligations, in the sense that the emissions sources subject to reporting (yet to be determined) will be obliged to provide the information, data, and documents on their direct and indirect emissions that are necessary to form the Registry. In this regard, Semarnat is authorized to carry out inspections and oversight activities, and those entities subject to inspection will have 15 days to deliver any information requested by the Ministry. If such information is not provided or false information is provided, they will be subject to administrative fines.

In terms of incentives, the Law says that the federal government, the states, and the Federal District shall develop tax, financial, and market instruments that encourage the pursuit of the objectives of the national policy. The tax incentives have to favor the use of technologies that reduce emissions and promote energy efficiency practices, as well as the development of renewable energies, among other goals. The LGCC authorizes Semarnat to establish a voluntary system of greenhouse gas emissions trading in order to

promote emissions reductions. Since the LGCC does not provide any further specifics on this system, we will have to wait to see what actions the Ministry takes in this regard. And finally, the resources of the Climate Change Fund will be used for, among other things, projects related to energy efficiency; development of renewable energy, second generation biofuels and sustainable transportation systems, and purchase of emission reduction credits.

In summary, the LGCC is ambitious and vague at the same time. Furthermore, in its attempt to involve all sectors of society in combating climate change, it creates several institutions but with little clarity on the attributes and responsibilities of each one. It mentions a broad range of climate change adaptation and mitigation instruments but without establishing specific obligations or incentives. We will have to wait for the issuance of the regulations and programs to really know the scope and effectiveness of the LGCC. It is to be hoped that subsequently clear regulations and effective and efficient incentives to promote the actions necessary for the mitigation of and adaptation to climate change will emerge from this framework law. •

Reforms to the Federal Labor Law

This past September 28, 2012, the Chamber of Deputies of the Congress of the Union approved a decree amending various provisions of the Federal Labor Law (*Ley Federal del Trabajo*, LFT). This decree was sent to the Chamber of Senators as the reviewing chamber. On October 24, 2012, the Senate approved the decree with certain changes (eight articles were added regarding unions members and transparency) and returned it to the Chamber of Deputies for its review (and possible approval) of the changes made.

The Chamber of Deputies approved the majority of the additions sent by the Senate with the exception of amendments to two articles, and it completely eliminated two other articles. The minute was again sent back to the Senate for its review.

Finally, on November 13, the Senate approved the decree, now approved by both chambers, and sent it to the federal executive for publication and subsequent entrance into force.

It should be mentioned that this bill is significant, given that attempts to reform labor law have been frozen for almost 40 years for political and social reasons.

Below we present the most relevant reforms to the LFT.

Areas of reform	Changes made	Comments
Subcontracting (outsourcing).	Subcontracting is regulated, with specific limitations. The reform requires subcontracting to meet with the following requirements: (1) that all the activities of the company not be subcontracted, (2) that the specialized nature of the work done by the subcontractor be justified, and (3) that it does not include work the same as or similar to the work done by the rest of the workers of the contracting company.	Sanctions are established of up to 5,000 times the minimum wage (approximately 300,000 pesos). In addition, the contractor of the services might be considered the "employer" for the purposes of the LFT, which might involve obligations regarding social security and profit sharing (PTU). In other words, an employee might claim benefits from both companies.
New forms of hiring.	A new form of "seasonal" hiring is created.	In cases of seasonal activities or activities that do not require services during the entire week, hiring is permitted for certain months or specified periods. Under this plan, the workers will have the same rights (vacation, vacation bonuses, and Christmas bonus) as permanent employees, but only in proportion to the time worked in each period.
Payment of salary by unit of time (payment by the hour).	The possibility is established of the worker and employer agreeing to payment for each hour of work.	In no case may the payment workers receive per day under this plan be less than a daily minimum wage, regardless of the hours worked.

Areas of reform	Changes made	Comments
Payment of salary electronically (bank transfers).	The possibility is provided for the employer to pay salary and benefits by deposits or electronic transfers.	The employer must absorb any costs (commissions) generated for the worker in having a bank account to get paid. It should be pointed out that it was already established by court precedent that employers might pay employees by electronic transfer.
Individual employment agreements subject to a "trial" period or "initial training" period.	In employment contracts for an indefinite time period or temporary contracts (for specific work or for a specific time) of more than 180 days, it is possible to establish a "trial" period in order to verify that the worker meets the requirements for the job being sought. There are regulations governing the contracting of a worker for initial training of three or up to six months.	Employment can be terminated without liability to the employer if, in the latter's judgment, the worker did not pass the trial period or did not demonstrate having mastered the corresponding training.
Temporary suspension of employment for health emergencies.	The suspension of work when the competent authorities declare a health emergency is regulated.	The obligation is established for the employer to pay at least the minimum wage per day to its workers for each day that the suspension lasts, without exceeding one month.
New causes of termination of an employment contract without liability to the worker.	New causes are added for which the worker can terminate the employment contract with the employer, including (1) if the employer, his relatives, or his representatives engage in acts of harassment and/or sexual harassment and (2) if the employer and/or his representatives require the worker to commit acts or engage in conduct or behaviors that harm or threaten the dignity of the worker.	
New causes of termination of the employment relationship without liability for the employer.	Specific new causes of termination are set forth: (1) that the worker engages in acts of harassment or sexual harassment against any person in the work place or (2) that for causes attributable to the worker, he/she does not present within the indicated period of time the documents required by law and necessary to provide the service.	In reality, it will continue to be complicated and risky to terminate the employment contract of an employee. Therefore, it is essential that, before giving notice of termination, the employment situation be investigated and analyzed as to whether or not the necessary elements exist to prove the cause of termination in question.
Delivery of written notice to the worker of the cause(s) of termination.	The form of delivering the written notice to the worker is changed. Now, the worker may be informed either directly (personally) or through the competent Conciliation and Arbitration Board.	Notice can be given through the Board, without having to show that the worker refused to receive the rescission notice.

Areas of reform	Changes made	Comments
"Cap" on accrued wages.	Accrued wages are limited to a maximum period of 12 months. Thereafter, a monthly interest of 2% on the amount of 15 months of salary, which may be capitalized at the time of payment, applies.	Currently, the principal risk of labor proceedings is that the accrued wages, if the employer does not prove its case, run from the date of the unjustified dismissal to the date the award (judgment) is paid. Due to a backlog of work for the labor authorities, labor proceedings take on average two to two and a half years to resolve, which can represent a significant cost for the employer who is ordered to pay the wages accrued during the entire proceeding. (There are proceedings that for different reasons last much longer than two years.) While this measure seeks to protect employers, unfortunately, if the worker demands reinstatement and wins the proceeding, the wages would continue to accrue for each new proceeding filed by the worker.
Registration with the National Fund for Employee Consumption (Infonacot).	Employers will be required to register with Infonacot.	Currently, it is optional for employers to register with Infonacot. Under the reform, it will be obligatory; once the Law enters into force, employers will have 12 months to register.
Obligations regarding withholdings for child support.	When a worker who is required to pay child support ceases to be employed, the employer must inform the family court and those receiving support within five days from when the employment is terminated.	This responsibility does not currently exist; it is only required to withhold the support established by the court.
New obligations for employers.	(1) In work places with more than 50 workers, adequate facilities must be adapted for access and activities of disabled persons. (2) The provisions regarding safety, health, and work environment and regarding health emergencies must be complied with. (3) Five days of paid parental leave must be granted to male workers in the case of the birth or adoption of a child.	
New obligations regarding training, education, and productivity.	New obligations are established regarding training and education. It will be mandatory to create and maintain mixed training, education, and productivity commissions; their functions are regulated. The National Productivity Commission is created.	
New procedural rules and provisions.	Among the new procedural provisions, an important one is that now anyone advising, advocating for, or representing any party before the Conciliation and Arbitration Boards must show that he is a licensed attorney or has a law degree.	

Areas of reform	Changes made	Comments
Agreements "outside of a proceeding."	In the agreements to be ratified and approved by the Conciliation and Arbitration Board regarding termination of employment, the specific wages and/or benefits to be paid to the worker must be itemized.	In reality, it is already done this way; in fact, each board establishes its own criteria and rules for executing agreements outside of a proceeding.
Sanctions for violations of work standards.	Fines employers may be subject to for violating work standards are increased to a maximum of 5,000 times the minimum wage (approximately $300,000 pesos).	
Publishing collective bargaining agreements and internal work regulations.	It is established that the Conciliation and Arbitration Boards will be obliged to publish the collective bargaining agreements and work regulations registered with them.	Currently, the Federal Conciliation and Arbitration Board publishes the collective bargaining agreements registered with it.
Working women.	Working women can freely divide their twelve weeks of maternity leave. Breaks for nursing will be one hour in total and not two half hours.	

It is important to take the new provisions into account, particularly those regarding subcontracting, since currently business systems in Mexico, for tax and liability reasons, are based on operating companies and service (outsourcing) companies. The reforms represent a significant change in this regard that could impact the operations of companies.

For further advice or additional information, please do not hesitate to contact us. Our labor specialists would be glad to answer any questions or to assist in implementing any necessary changes. •

Court Precedent Regarding the *Economic Unit* Concept

In February 2012, the Third Collegiate Court for Labor Matters of the First Circuit published a court precedent (by confirmation of interpretation) under the following heading: "Civil contract for provision of professional services. If through such a contract a third party is obligated to supply personnel to a real employer with the commitment to relieve it from any labor obligation, both companies constitute the economic unit referred to in article 16 of the Federal Labor Law and, therefore, both are liable for the employment of the worker." Basically, this court precedent holds that when a company intervenes as a supplier of the labor force through the execution of a civil professional services contract (outsourcing) or any other legal act, and another contributes the infrastructure and/or capital, and they produce the good or service together, the conditions of the economic unit referred to in article 16 of the Federal Labor Law (*Ley Federal del Trabajo*, LFT) are met, and therefore both are liable for the employment of the worker.

It should be mentioned that the LFT and the Social Security Law *(Ley del Seguro Social*, LSS) establish three types of liability: the economic unit, joint and several liability, and secondary liability.

The Economic Unit, Joint and Several Liability, and Secondary Liability

Article 16 of the LFT indicates that for purposes of labor regulations, *company* will be understood as "the economic unit of production or distribution of goods or services." In other words, entities that make up the same unit will be considered together as a single entity (company) and, therefore, as the same employer.

Also the concepts of *joint and several liability* and *secondary liability* established —with the reform of article 15-A (July 2009)— in the LFT and in the LSS, respectively, already existed both in the concept of the beneficiaries of the services provided and in the concept of the intermediaries. According to the LFT, both the beneficiary company and the intermediary will be considered jointly and severally liable for the employment of the worker in the event that the true employer or intermediary company does not have sufficient resources of its own to face its labor obligations. In addition, the LSS indicates that in the case of providing personnel services, the beneficiary of the services will be liable in the event that the true employer fails to comply, provided the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*, IMSS) has previously notified the true employer of the corresponding requirement and it has not responded.

From the above, several concepts and guidelines can be taken: (1) the concept of the *economic unit*, (2) joint and several liability of the beneficiary of the services with the true employer, and (3) secondary liability of the beneficiary of the services with the true employer.

In this regard, it should be made clear that the concepts of *joint and several liability* and *secondary liability* are not new from the labor point of view. However, the concept of the *economic unit* —introduced by court precedent and understood as a single "employer" regardless of the different legal entities that may form it— has generated concern about the advisability of continuing to subcontract personnel, whether by outsourcing or by the creation of internal service providers (that is, affiliates of the beneficiary of the services) or through the operation of maquiladora companies, or by some other means.

Thus, the principal change introduced by this court precedent lies in the fact that previously the provider of the capital (beneficiary) could have been considered only as jointly and severally or secondarily liable for the employment relationship, while now both the beneficiary and the service

provider are considered the same economic unit and therefore as a single employer, with all the effects and consequences of the LFT.

Possible Scope of the Court Precedent

First, it is worth mentioning the two most common ways of subcontracting in Mexico: (1) by executing a services agreement with an external outsourcing company and (2) by the creation of internal services companies.

An internal company, which is in reality the operating company (the beneficiary of the services), absorbs all the costs, operating expenses, etc., while under the *outsourcing* model, the external company assumes all the duties and liabilities to its employees and all the responsibility to attend and remedy any contingency the company contracting its services may confront.

Furthermore, it is important to recall that the principal advantages of subcontracting are (1) control the distribution of profits and (2) division of responsibilities, on the understanding that one company is the operating party of the business and the other company, the service provider, is only responsible for personnel. In addition, in the event of a labor proceeding, given the possibility of an unjust outcome (since the LFT protects workers' rights), the company responsible for the employment in principle does not have production assets, which decreases the risk for the operation of the business.

In light of the new court precedent, the real risk lies in the fact that if the labor authority considers both companies as a single economic unit and therefore as a single employer, the worker, in principle, will be able to demand the payment of profits from both companies, which of course defeats the purpose or primary advantage of the current business framework in Mexico.

Conclusions and Final Comments

It will take time to know what impact, interpretation, or reach the recent precedent-setting court ruling may have; for example, it is not clear whether an employee can share in the profits of the company benefiting from the services.

We will have to wait to see the interpretation of the labor and tax authorities in studying and applying this court precedent, and even more the results of any amparo proceedings, since one or more claims could be filed for clarifications of judgments, contradictory judgments, interpretation of judgments, etc.

As long as this matter remains unresolved, it will be even more important to ensure that the personnel services company contracted is financially solvent and, preferably, that it grants security interests in personal or real property so that in case of a breach, the beneficiary is really held harmless from the possible claims.

Given that it will take time to know the true scope of this court precedent, we consider that subcontracting (utilization of internal or external services companies) continues to be a viable form of doing business and a framework that companies should continue to use in order to control and/or regulate the payment of profit-sharing to the employees of the companies. •

Reforms to the Regulation of Health Advertising

On January 19, 2012, the "Decree Amending the Regulation of the General Health Law regarding Advertising" (the "Regulation") was published in the Official Federal Gazette (*Diario Oficial de la Federación*, DOF). This decree entered into force on March 2 in accordance with its first transitory article.

The most relevant points of these amendments are the following:

- The amendments establish the minimum requirements of the notice that those responsible for advertising cosmetic products must present to the Ministry of Health (*Secretaría de Salud*, SSA). This notice must be presented for each brand name on the official form of the SSA. It must contain at least:
  - The name and domicile of the manufacturer;
  - The name and domicile of the importer and distributor, and
  - The trademark, name, and Federal Taxpayer Registry number of the person responsible for the product and its advertising.

  According to the third Transitory Article of the Decree, the SSA has 90 days from the entrance into force of the Decree to publish in the DOF the corresponding official forms.
- An obligation is imposed on the advertiser who intends to advertise products or services subject to heath control to present to the advertising medium in question a certified copy of the front page of the valid health registration or the notice filed before the SSA, as applicable. The registration or notice can be presented by the advertiser or its advertising agency.

  This ensures that all the services or products advertised have their health registration or that the corresponding notice has been filed.
- In addition, compliance with the safety measures required by the SSA is expedited and made more efficient. Previously, when the advertiser did not comply with the order to suspend an advertising message, the SSA could directly order the disseminating medium to do so. As a result of this reform, the SSA can now directly instruct the disseminating medium (without waiting for the advertiser to fail to comply with its order) to suspend the corresponding advertising within 24 hours from when it receives the notice. This makes it easier to suspend illegal advertising of cosmetic products that are promoted or sold as medicines or products to which therapeutic qualities or effects are attributed for the preventive treatment, rehabilitation, or cure of one or more ailments (commonly known as "miracle products"), as well as of products whose advertising does not comply with the requirements established in Article 6 of the Regulation.[1]

In this respect, at the beginning of March around 40 companies filed several amparo claims against this reform. These amparos were heard by different district administrative judges in the Federal District. However, the judges denied the requests to suspend the application of the Regulation to these companies. Therefore, companies intending to file an amparo claim must comply with the orders to suspend

---

[1] "ARTICLE 6. Advertising will be consistent with the characteristics or specifications that the applicable provisions establish for the products or services subject thereto, and therefore it shall not:

I. Attribute to them preventive, therapeutic, rehabilitative, nutritional, stimulant, or any other qualities that do not correspond to their function or use, in accordance with the applicable provisions or in the authorization granted by the Ministry;

II. Indicate or suggest that the use or consumption of a product or the provision of a service is a decisive factor for changing the behavior of persons, or

III. Indicate or suggest explicitly or implicitly that the product has ingredients or properties it does not have."

advertising until the amparos that were filed are resolved.

- Also with respect to safety measures, the authority may request police support in the event the manufacturers, distributors, vendors, or merchants prevent or resist the action of seizing stored products as set forth in the Regulation.
- Finally, the fines that the administrative authority can impose for infringements of the Regulation are raised. These increases are as follows:
  - The fine for infringing articles 21-23 of the Regulation is raised to 2,000-4,000 times the minimum wage. Previously the fine could not be more than 1,000 times the minimum wage.
  - The fine for infringing articles 7, 8, 10, 18, 32, 33, 34, 35, 44, 55, 68, 69, 77, 78, and 89 of the Regulation is raised to 6,000-8,000 times the minimum wage. Previously the fine could not be more than 4,000 times the minimum wage.
  - The maximum fine is raised for other violations of the Regulation. Now it can be as high as 16,000 times the minimum wage.

With these reforms, the authorities have greater control over the advertising of "miracle products," since often companies shielded their advertising of these products as medicines to avoid having the Federal Consumer Protection Agency (*Procuraduría Federal del Consumidor*, Profeco) sanction them for misleading advertising.[2] With tighter control of the administrative authority, better protection is provided to consumers who often buy "miracle products" that in reality do not have the qualities or properties advertised, or that were medicines but did not have the corresponding registrations and/or notices, which puts consumer health at risk. •

---

2 This is because the Profeco considered that it did not have the authority to review deceptive advertising of medicines which, according to the agency, was under the oversight of the Health Ministry. However, by the time of the final decision in the amparo in review number 282/2010 of the docket of the Ninth Collegiate Court, it was resolved that the Profeco does have the authority to take a complaint of deceptive advertising of a product considered a medicine.

Publication of the Regulation of the Federal Animal Health Law

On May 21, 2012, the Regulation of the Federal Animal Health Law (the "Regulation") was published in the *Official Federal Gazette* (*Diario Oficial de la Federación*, DOF), which is enforced by the Ministry of Agriculture, Livestock, Rural Development, Fishing and Food (*Secretaría de Agricultura, Ganadería, Desarrollo Rural, Pesca y Alimentación* [Sagarpa]) through the National Food and Agriculture Health, Safety and Quality Service (*Servicio Nacional de Sanidad, Inocuidad y Calidad Agroalimentaria*, Senasica). The Regulation (applicable nationwide) entered into force 90 days after its publication, on August 19, 2012.

Below we address the principal topics of the Regulation.

Animal Health Measures and Application of Best Livestock and Production Practices

In this section the requirements regarding best livestock practices that both production units and federal inspection type (TIF) establishments must comply with are set forth and regulated, as well as the requirements and procedures such establishments must comply with for obtaining, verifying and renewing best livestock practices certificates.

It also authorizes the Sagarpa to carry out various activities to oversee compliance with livestock best practices by the establishments, and to guarantee the control and removal of products that may represent risks to the public or that are contaminated. In this respect, the Regulation indicates that the Sagarpa will issue contamination risk reduction provisions, which establish livestock best practices for decreasing the physical, chemical and biological hazards and risks in primary production units. However, such measures have not yet been published in the DOF, and therefore establishments do not have sufficient means for guaranteeing best livestock practices in terms of the Regulation.

Wellbeing of the Animals

The third section of the Regulation establishes the requirements, conditions and characteristics that should be observed with respect to the different types of animals that are covered under the Regulation (for companionship, production, work and research, among others), in order to guarantee their wellbeing, including the conditions for feeding, living, health, import, export, shipping and hygiene.

In particular, the Regulation includes several provisions regarding the import and export of animals or elements related to such animals, through requisites, documentation and characteristics that must be complied with for their entrance into or exit from the country, by land, air or sea.

Animal Health Campaigns, Quarantines and Movement

The fourth section regulates activities related to health campaigns, quarantines and movement of animals. It also establishes the characteristics for their initiation and lifting, considering the priorities or risks in the zones, regions, municipalities and states or nationally, as well as the obligations of the assisting organizations determined by the Sagarpa for carrying out such campaigns.

It is also indicated that the Sagarpa will establish animal health provisions for carrying out epidemiological oversight actions in zones free of animal disease and pests, in order to maintain their recognition or promote the change of their animal health status. However, such provisions, subsequent to the Regulation, have not yet been published in the DOF.

Similarly, the movement of products and merchandise related to animals, whether domestic or imported, is regulated, as well as the requirements to comply with in case of the application of any animal

health campaign or quarantine that could have effects on such merchandise, including animal health movement certificates.

National Strategy of Animal Health Emergency; Traceability

This section establishes that the Sagarpa will activate, form and operate the National Strategy for Animal Health and Traceability, which will include the description of the disease, pest or contaminant to prevent, control or eradicate, as applicable, as well as the action plans and programs and the geographic scope, and the anti-epidemic and public health risk prevention measures.

In addition, several actions are established that, in relation to traceability in compartments and zones free of disease and pests, allow the Sagarpa to adopt epidemiological oversight measures, detection and early notice of outbreaks, rapid response and application of counter-epidemic measures, among others, with the creation of records identifying relevant suppliers, merchandise, mobilizations, vehicles and merchandise.

Nevertheless, the resolutions that establish the creation of the National Strategy of Animal Health Emergency, as well as the other publications necessary to verify the functioning, requisites, characteristics and compliance activities related to such strategy have not yet been published in the *DOF*.

Control and Certification of Products for Animal Use or Consumption, Establishments, Activities, and Services

Sections seven and eight indicate the products that must have a registration, certification or authorization issued by the Sagarpa, as well as the requisites and/or evidence that must be provided in order to obtain and renew such documents, depending on the types of products (food, homeopathy, medicines, chemicals, pesticides, formulas, among others).

Similarly, the requisites and characteristics that establishments related to such products must have are indicated, including the certification and maintenance of the certification of the TIF establishments, in accordance with the Federal Animal Health Law, and the procedures for their inspection and verification.

In addition, the activities and services related to the animals and the veterinarians that provide them are regulated, with the purpose of preventing, controlling or eradicating pests and diseases that affect the animals, as well as reducing risks of contamination in the production and processing of goods of animal origin or in products for animal use or consumption.

Finally, it is established that the Sagarpa will regulate and control the authorization or cancellation of the operation of the Points of Verification and Internal Inspection in relation to animal health, as well as the inspection procedures and the requisites for obtaining the corresponding certifications for such points.

The Animal Health Supporting Bodies and Assisting Organizations

The ninth section establishes the characteristics and requisites for several organizations assisting the Sagarpa, in particular the National Animal Health Consulting Technical Board, which will be made up of members of the Government and of the animal products production and sale sector.

The requisites and functions of individuals or entities authorized to assist the Sagarpa in animal health matters are also established, such as laboratories, responsible veterinarians, certification organizations and verification units.

Incentives, Epidemiological Oversight and Risk Analysis

The tenth section establishes the characteristics, requisites and procedures related to the incentives, the epidemiological oversight and the risk analysis that will be carried out by the Sagarpa in order to guarantee and promote adequate conditions in relation to animal health, which includes both the public, the animals themselves and the products related to them.

Citizen Complaint and Infringements and Crimes

Finally, the eleventh section of the Regulation indicates the citizen proceedings that can be initiated against acts or omissions that produce or could produce harm to animal health or that violate the Federal Animal Health Law, the Regulation or the applicable provisions, as well as the sanctions and crimes related to such violations. •

Von Wobeser y Sierra, S.C. provides professional services in all fields of law with the exception of criminal law, family law and some minor areas of commercial and civil court litigation, with particular emphasis on the following:

- Antitrust
- Banking
- Commercial contracts
- Commercial litigation
- Constitutional (*amparo*) and administrative proceedings
- Corporate
- Customs and international trade
- Energy regulation and projects
- Environmental protection
- Finance
- Foreign investment
- Immigration
- Industrial and intellectual property
- Labor
- Mergers and acquisitions
- National and international commercial arbitration
- Real estate
- Securities
- Tax advice and litigation
- Telecommunications
- Tourism

This newsletter is an additional service for our clients and friends. Its purpose is to provide information on legal matters. This newsletter is not legal advice on any particular matter or case, nor does it reflect any personal opinion of the attorneys that have contributed to its preparation and even less concrete or specific advice or opinion of the firm **Von Wobeser y Sierra, S.C.**

Von Wobeser y Sierra, S.C.
Guillermo González Camarena 1100-7º piso
Santa Fe, Centro de Ciudad
Delegación Álvaro Obregón, 01210, D.F.
Tel.: (52 55) 52 58 10 00
Fax: (52 55) 52 58 10 98 / 10 99

Please send any comments, suggestions, or questions to:
Javier Lizardi, jlizardi@vwys.com.mx
Fernando Moreno, fmoreno@vwys.com.mx
Claus von Wobeser, cvonwobeser@vwys.com.mx

To see prior newsletters, please visit our website at

www.vonwobeserysierra.com

Editor: Ignacio Ortiz Monasterio
Graphic Designer: Rogelio Rangel