OCTOBER 2013. MEXICO

NEWSLETTER 35

VON WOBESER Y SIERRA

Editorial

Almost one year after Enrique Peña Nieto took office as president of Mexico and after the government and representatives of the principal political parties signed the Pact for Mexico, the country is at the important stage of making changes to its laws to accomplish the most important goals of the Pact.

These reforms –some of which have already been approved, while others are still being debated– are having a significant impact nationally and even internationally. Although in some cases they seem to be welcome, the majority of them have generated varied reactions among both the interested sectors and society as a whole.

The *education reform*, one of the pillars of the Pact for Mexico, has caused numerous protests by some groups of teachers, who have been engaging in lockouts, marches, and road blocks. It is clearly a laudable reform, but it will continue to confront strong resistance from those whose privileges and benefits are being affected.

For its part, the *energy reform* continues to be debated. Among its purposes is to reinforce the stewardship of the State as owner of all hydrocarbons and as regulator of the sector, while permitting private investment in extraction, refining, storage, and transportation of substances such as petroleum and gas. To circumscribe this participation, practices such as profit-sharing contracts are being considered. Everything seems to indicate that this reform falls short regarding the scope originally planned for private investment. Even so, it has confronted resistance in the media by a political and social sector that argues it represents a loss of State sovereignty over hydrocarbons. How this will play out is uncertain.

The *financial reform* seeks more and cheaper credit options for companies and individuals. The relevance of credit as an engine for growth and economic development is thus recognized. This reform implies the amendment of 34 laws, including the improvement of guarantee execution mechanisms and of regulations of commercial bankruptcy proceedings. However, it is doubtful that this reform will meet its objective unless it promotes effective competition among the various banking institutions in the country.

Finally, the objective of the *tax reform* is, on paper, to increase collection, simplify the tax system, and make the payment of taxes more equitable by the elimination of special tax schemes. However, in our opinion, as the reform is currently presented it will have an even more serious effect on captive taxpayers, significantly affecting companies and the middle class. For this reason, almost all social and business sectors have opposed it. In fact, some suggest a possible contraction in private foreign investment –above all in the maquiladora export industry– in the face of such an aggressive tax scheme.

This is, then, the scenario we face: we see a true desire to change the current law to meet the objectives of the Pact for Mexico, but it is impossible to know the effects of these changes.

In any case, we trust that the Legislative Branch will pay attention to all valid concerns and make the changes still needed to meet the general development objectives, while affecting the various sectors involved as little as possible.

Claus von Wobeser

Article 70 of the General Law of Business Corporations

The text of the article

> When the articles of incorporation so establish, the partners, in addition to their general obligations, shall make supplementary contributions in proportion to their original contributions.
>
> It is prohibited to contract in the articles of incorporation ancillary obligations consisting of work or personal service by the partners.

Comments

The obligation of the partners to make supplementary contributions and to agree to ancillary obligations is only a peculiarity, not of the essence and nature of the limited liability company, since as this article indicates, it is a possibility that depends on its express stipulation in the corporate bylaws. However, these obligations are what give the limited liability company its particular character and what distinguish it from the stock corporation and from general and limited partnerships.

Based on the usual practice of States, which has been consistent for decades (notwithstanding certain differences in the law of the various States), the "Statement of Intent" of the General Law of Business Corporations (*Ley General de Sociedades Mercantiles*, LGSM) says that:

> Supplementary contributions refer to money or other things that the partners agree to contribute, regardless of whether they have already satisfied the obligations they have undertaken to form the initial capital of the company; while ancillary obligations are any other work or services that the partners agree to perform, even when they do not imply delivery of things to the company, nor therefore affect its capital.

Consequently, article 70 was included in the LGSM, the first paragraph of which has remained unchanged. Note should be taken of the unfortunate use of the unclear expression "in addition to their general obligations," which can only mean the payment of their contributions to cover the partnership interests signed by the partners.

The second paragraph was drafted more clearly and descriptively as follows: "It may also be established in the articles of incorporation that the partners must undertake ancillary obligations, and in such case the content, duration and form of these obligations, the compensation corresponding to them, and the sanctions against the partners that do not perform them, shall be indicated."

But the reform of February 27, 1949 eliminated this paragraph and replaced it with the current one, which should have been a clarification of what was eliminated, improving its drafting in order to distinguish clearly the services of the partners of the company as partners from a situation of fact that could mask an employment and subordinate relationship. That would have prevented the evasion of the law that concerned the authors of the reform.

In any case, it is not a general practice in our country in limited liability companies to stipulate supplementary contributions and ancillary obligations; in fact it is a very rare practice, if it exists at all. The value of this type of corporation relies on the simplicity of the operation of a partnership and on the possibility of taking advantage of the limitation on liability.

Furthermore, the commentary of E. Feine on French law regarding supplementary contributions is applicable to Mexican law. Feine points out that French law rejects them absolutely, saying that they can be replaced perfectly by the variable capital type of company, which exists under French law (E. Feine, *Las sociedades de Responsabilidad Limitada*, translation into Spanish by W. Roces. Editorial Logos, Madrid, 1950, p. 159). •

Licenciado Manuel Lizardi A.†

Bankruptcy Proceedings for Corporate Groups

This past May 8th, the Federal Executive presented a draft bill for financial reform based on the commitments made in the Pact for Mexico. This reform is intended to provide incentives to financial institutions to make more and cheaper loans. The draft bill attempts to benefit small- and medium-sized companies.

The financial reform is composed of 13 decrees that amend more than 35 statutes, among which are the Financial Services Users Protection and Defense Law, the Financial Services Transparency and Regulation Law, the Credit Institutions Law, the National Workers Consumption Fund Institute Law, and the Commercial Bankruptcy Law.

The reform seeks to generate a system of greater security, as much for financial service users as for credit institutions, by means of creating mechanisms that permit the distribution of money among users at a low cost and ensuring that the credit-providing institutions will be able to recover the monies lent.

The reform calls for restructuring how companies with economic problems respond to their obligations. To reach this goal, the concept of the *corporate group* is included in the Commercial Bankruptcy Law.

Article 15 of the proposed reform states that merchants who are part of the same corporate group can solicit a joint judicial declaration of bankruptcy proceedings. If one member of the group falls under one of the premises of articles 10, 11, or 20 bis and this condition places one or more of the members of the corporate group in the same situation, the declaration of bankruptcy may proceed.

Also under article 15, lenders may file suit demanding that joint judicial declaration of bankruptcy proceedings be initiated against debtor companies who are members of a corporate group and that fall under one of the premises in articles 10, 11, or 20 bis as described above.

Additionally, it establishes the possibility that those companies that guarantee the obligations of bankrupt companies may solicit a declaration of bankruptcy proceedings if they demonstrate that the execution of the guarantees granted would fall within one of the premises of justification for bankruptcy proceedings.

For its part, article 15 bis of the proposed reform provides the possibility of consolidation of the bankrupt companies' assets, which is to say that the treatment that will be given to the different companies that make up a corporate group or that guaranteed a certain obligation is as if they were one and therefore they would be jointly and severally liable for each and every one of the obligations of the group, regardless of whether they are related to or involved in these obligations.

All these proposals differ from the paradigm provided in the General Law of Business Corporations regarding the corporate veil, which implies that each company is independent of its partners and that each company is only responsible for its obligations up to the amount of its assets. This veil seems to be necessary.

The bill seeks to reinforce the position of lenders to companies with financial problems, attempting to provide a solution for certain problems that have previously generated controversy regarding the application of the Commercial Bankruptcy Law in large part due to its effect on intercompany and/or related company debts.

Nonetheless, the solution provided in the proposed reform should be adopted with caution, given that the proposed draft may lead us to impose its provisions exhaustively such that in a bankruptcy claim all companies in a group will be pulled into bankruptcy proceedings, even those that are not insolvent, which would cause viable companies to be affected by the problems of companies with which they are joined.

For now, the proposed reform seems to contain a proactive position in favor of the granting of credit through the establishment of more guarantees for the

Omnibus Commercial Bill

grantors, thereby avoiding impunity. But we should wait to see how this reform develops to determine the reach, implications, risks, and advantages that it might have. •

Towards the end of 2012, a bill was presented to the Chamber of Deputies to amend or expand various provisions of the Commercial Code and commercial legislation in general.

The purpose of the reform is to modify six current statutory codes: the Commercial Code, the General Law of Business Corporations, the Foreign Investment Law, the General Law of Credit Instruments and Operations, the Federal Governmental Fees and Charges Act, and the Federal Government Organizational Law. Among the most important modifications and additions are the following.

Commercial Code

The reform proposes to centralize the information contained in the Public Registry of Commerce so that users can consult this information online without having to go to the local Registry offices. Similarly, it proposes the creation of a free electronic system that would be administered by the Ministry of Economy, allowing corporations to publish their notices of meetings, memorandums, and regulations, among other things, in order to eliminate the print format and thereby achieve a reduction in costs for corporations.

Furthermore, another goal of the reform is to modify how registrations of personal property guarantees are classified, to include in these classifications pledge and industrial mortgages, and to establish rules of enforcement regarding the order or priority of creditors.

The reform also proposes to expand the catalogue of activities subject to registration in the Movable Guarantees Single Registry to include financial leasing, receivables financing, termination and conditional sale clauses in commercial sales, guarantee trusts, and judicial or administrative rulings.

General Law of Business Corporations

The reform affects several issues, including confidentiality as an obligation for administrators who manage corporate information.

In another section, the reform indicates that it is convenient to delimit the reach of the "vigilance" function performed by the corporate officers, specifically detailing that it shall include the "management, direction, and performance of the business of the corporation."

An important aspect of the reform is the proposal to reduce from 33 percent to 25 percent the percentage of representative shares necessary to:

1. Initiate a civil action against the officers;
2. Defer for three days, without the necessity of a new notice, the vote regarding any subject on which shareholders consider themselves insufficiently informed (in this case, the 25 percent corresponds to the shares represented at the meeting in question);
3. Judicially oppose the decisions of the General Shareholder Meetings.

General Law of Credit Instruments and Operations

When all or part of the goods that are included in a guarantee are temporarily imported assets, the reform allows a judge, in enforcing a pledge, to authorize the lenders to carry out on behalf of the borrowers (when this is permitted under customs provisions) the permanent importation of the assets and to proceed with the sale thereof, provided the lenders make prior payments to the tax authorities for the taxes and rights associated with the permanent importation of the goods. If the assets are sold, the amount that remains after import taxes shall remain at the disposition of the lenders.

One of the main goals of the reform is to eliminate certain burdens. With the reform, corporations would no longer need to pay for the publication of information in print format. To this end, the process would be modernized by allowing shareholder meeting notices and financial statements, among other documents, to be issued electronically.

It is certainly true that the reform is ambitious in relation to its objective, specifically the creation of an electronic system to centralize the information in the Public Registry. Its implementation will require sufficient time and resources in order for it to materialize. •

Federal Law to Prevent and Identify Transactions Involving Illicit Funds

On October 17, 2012, the decree issuing the Federal Law to Prevent and Identify Transactions Involving Illicit Funds (the "Law") was published in the *Official Federal Gazette*. This Law became enforceable on July 17, 2013 and the Federal Executive Power had 30 calendar days from that date to issue regulations.

Objectives

The objective of this Law is to establish procedures and measures to prevent and detect transactions involving illicit funds.

Authorities

The competent authority to enforce this Law and its regulations will be the Ministry of Finance (the "Ministry"). The Attorney General's Office, through the Specialized Financial Analysis Unit, will have several powers, including the power to request compliance with this Law.

Financial Entities

All those who, pursuant to Mexican Law, are financial entities must take the following steps:

1. Establish measures and procedures to prevent and detect operations with illicit funds;
2. File with the Ministry reports of actions, operations, and services rendered that may be considered to fall under the previous numeral;
3. File with the Ministry any information and documents relating to the identification of clients and operations;
4. Retain this information and documentation for at least ten years.

Vulnerable Activities

For all those who are not financial entities, the activities listed below will be considered vulnerable activities. Depending on the valuation of each operation based on a multiple of the Enforceable Minimum Wage in the Federal District (MWFD), these operations shall be subject to identification to and/or notification of the authorities, in the following terms:

1. Operating gambling, betting, or lottery (identification for amounts equal to or greater than 325 MWFD and notification for amounts equal to or greater than 1,285 MWFD);
2. Marketing of services cards or credit cards (identification for amounts equal to or greater than 805 MWFD and notification for amounts equal to or greater than 1,285 MWFD);
3. Marketing of prepaid cards (identification in all cases and notification for amounts equal to or greater than 645 MWFD);
4. Marketing of traveler's checks (identification in all cases and notification for amounts equal to or greater than 645 MWFD);
5. Operating guarantee, lending, or credit operations (identification in all cases and notification for amounts equal to or greater than 1,605 MWFD);
6. Providing real estate construction services (identification in all cases and notification for amounts equal to or greater than 8,025 MWFD);
7. Marketing of precious metals or jewelry (identification in all cases and notification for amounts equal to or greater than 8,025 MWFD);
8. Marketing of works of art (identification in all cases and notification for amounts equal to or greater than 2,410 MWFD);
9. Marketing of any kinds of vehicles (identification for amounts equal to or greater than 3,210 MWFD and notification for amounts equal to or greater than 6,420 MWFD);
10. Armoring of vehicles or real estate (identification for amounts equal to or greater than 2,410 MWFD and notification for amounts equal to or greater than 4,815 MWFD);

11. Transporting or taking custody of money (identification in all cases and notification for amounts equal to or greater than 3,210 MWFD);
12. Providing professional services in representation of or on behalf of a client in the following cases: (a) purchase or assignment of rights over real estate; (b) asset administration and management; (c) handling of savings, stock, or bank accounts; (d) organization of capital or resource contributions for the incorporation, operation, and administration of companies; and (e) incorporation, division, fusion, operation, and administration of companies or corporate vehicles, including the trusteeship and the sale of corporate entities (identification in all cases and notification whenever the provider handles, on behalf and/or in representation of the client, any financial operations related to the aforementioned activities);
13. Certain operations relating to the rendering of public faith services by notaries public, public brokers, and public officials shall be subject to identification and notification in the exercise of their powers;
14. Receiving donations by nonprofit associations or companies (identification for amounts equal to or greater than 1,605 MWFD and notification for amounts equal to or greater than 3,210 MWFD);
15. Providing international trade services as a customs agent for vehicles, gambling, or lottery machinery; materials and equipment for the manufacture of credit and debit cards of all types; precious metals and jewelry; works of art; and bullet-proof materials shall always be subject to notification;
16. The constitution of personal rights of usage or enjoyment over real estate (identification for amounts equal to or greater than 1,605 MWFD and notification for amounts equal to or greater than 3,210 MWFD).

Those who engage in vulnerable activities shall identify their clients, request information about their occupations or activities, question their clients regarding the existence of third-party beneficiaries, safeguard the collected information, provide facilities to officials to conduct inspections, and submit all corresponding notifications.

The notices must be presented electronically on the official form no later than the 17th day of the next month.

The clients and users of those who engage in vulnerable activities will provide all the information and documents needed to comply with the obligations established by the Law. If the clients and users do not comply, those who engage in vulnerable activities must refrain, without any liability, from engaging in the actions or transactions in question.

Use of Cash and Precious Metals

It is henceforth prohibited to pay or receive payment in cash or precious metals for the following:

1. The creation or transfer of:
   a. Property rights to real estate;
   b. Property rights to any kind of vehicle;
   c. Property rights to shares of a corporation;
   d. Personal rights to real estate, vehicles, or jewelry;
2. The transmission of the following types of property;
   a. Precious metals and jewelry;
   b. Works or art;
   c. Tickets or prize payments from gambling or lotteries;
   c. Armoring services.

Inspections

The Ministry of Finance may verify, on its own initiative and at any time, compliance with the obligations set forth in this Law by inspecting those who engage in vulnerable activities.

Sanctions

Those who do not comply with the Ministry's requirements, breach their obligations regarding vulnerable activities, do not submit notifications on time, or submit notifications that do not meet the requirements, shall face a fine of 200–2,000 MWFD.

Those who fail to comply with the provisions for formalization of cash or precious metal payment operations shall face a fine of 2,000–10,000 MWFD.

Those who fail to submit notifications or who pay in cash or precious metals in the cases prohibited by this Law, shall face a fine of 10,000–65,000 MWFD or the equivalent of 10–100 percent of the value of the transaction.

In certain specific cases, noncompliance can result in revocation of gaming permits, cancellation of a public broker's license, suspension of incumbency, revocation of a notary's license, and cancellation of authorizations granted to customs agents.

An appeal as set forth in the Federal Administrative Procedures Law may be filed with the Ministry of Finance against any sanction.

Felonies

The entering of false information or the altering of documentation or information required for these notifications is hereby construed as a felony. Those who commit such a felony shall be sentenced to 2–8 years in prison and shall face a fine of 500–2,000 MWFD. Moreover, it will also be considered a felony for any authority or its agents to use improperly any of the information or documentation to which they have access as a result of this Law or to divulge information through which an individual or corporation or public official is linked with any notification or request for information made between authorities. They will be sentenced to 4–10 years in prison and will face a fine of 500–2,000 MWFD. •

Reforms to the Constitution Regarding Telecommunications

On June 11, 2013, the Decree to Reform and Add Diverse Provisions to articles 6, 7, 28, 73, 78, 94, and 105 of the Political Constitution of the United Mexican States Regarding Telecommunications (the "reform") was published in the *Official Federal Gazette* (*Diario Oficial de la Federación*, DOF).

The reform consists of a series of modifications to certain articles of the Constitution and a number of transitory articles that require the Federal Congress to issue secondary legislation, specifically a new Federal Telecommunications Act, through which the reform will be implemented.

The principal objective of the reform is to increase competition in the telecommunications and broadcasting sector. The reform also seeks to strengthen the government agencies that regulate the sector in order to make it more efficient and allow new competitors to enter the market under conditions of equality.

Below are the most relevant points regarding the reform:

- *Creation of Ifetel.* Through the reform, the Federal Telecommunications Institute (*Instituto Federal de Telecomunicaciones*, Ifetel) was created. This agency replaces the Federal Telecommunications Commission (*Comisión Federal de Telecomunicaciones*, Cofetel). The Institute members will be appointed and approved through a procedure that attempts to guarantee their independence.

  Ifetel has powers to grant concessions and apply the law in telecommunications and broadcasting matters, the authority for which was previously divided among Cofetel, the Ministry of Communications and Transportation, and the Ministry of the Interior. This will end the so-called "double window." Ifetel will also have authority in antitrust matters in the sectors of telecommunications and broadcasting.
- *Access to information and communication technologies.* The reform establishes the obligation of the State to guarantee the right of access to infor-

mation and communication technologies as well as broadcasting and telecommunication services through effective competition in the providing of such services.

- *Promotion of nonprofit broadcasting*. The reform provides for the creation of a public body that promotes nonprofit broadcasting (that is, noncommercial radio and television). This body will have a Citizens Board that insures independence and impartiality in the editorial criteria of the body.
- *Advertising*. The transmission of advertising or propaganda that is presented as reporting or news is prohibited. The goal of this prohibition is to regulate the advertising of "miracle" products that are presented to the public as medicines. It is also intended to eliminate certain types of television propaganda that is passed off as reporting and that is paid for by candidates for elected positions.
- *Establishment of a shared public telecommunications network*. The Government will create a shared public telecommunications network. This network will be established through "Telecomunicaciones de México", utilizing the fiber optic network of the Federal Electricity Commission (*Comisión Federal de Electricidad*) and at least 90 MHz in the 700 MHz band. This shared public network will be a national network that can be used by multiple telecommunications providers, a kind of "carrier of carriers" that leases infrastructure to all the concession holders without discriminating among them, thereby promoting greater competition in the sector.
- *Specialized courts*. The reform provides for the establishment of federal courts specialized in telecommunications, broadcasting, and antitrust.
- *Bidding for concessions*. All concessions for commercial use of the spectrum will be granted by public bid. This measure is intended to prevent illicit spectrum concentrations. It is important to mention that the reform indicates that, "in no case will the determining factor for defining the winner of the bid be merely economic."
- *Transition to the Regime of Single Concession*. Before the reform, each concession granted was limited to one or more specific services. The reform provides that the concessions shall be single, "such that the concession holders can provide all types of services through their networks," and therefore the concession holders can provide services for telephone and data, restricted television, and broadcasting based on the same concession.
- *Multiprogramming and analog switch-off*. The reform establishes that Ifetel shall issue rules regulating the capacity to transmit several digital television signals on the same channel. With this modification, the national broadcasters and television stations can multiply the signals they offer through their current channels in exchange for payment.

  The reform also imposes a deadline for concluding the land digital transition (analog switch-off) of December 31, 2015. The open television concession holders must return these frequencies to the State, which in turn will use them for the abovementioned public telecommunications network.
- *Must carry, must offer*. One of the most controversial aspects of the reform is the establishment of must carry and must offer. The reform indicates that broadcasters "must permit restricted television concession holders to rebroadcast from their signal without charge and without discrimination" (must offer).

  For their part, the restricted television concession holders are obligated to rebroadcast the signal of the broadcasters without charge, without discrimination, and with the same quality, simultaneously and in full. The restricted television concession holders must include these signals in the services contracted by the users, without any additional cost (must carry).

The free-of-charge rule in must carry and must offer will not apply in the case of dominant operators. In this case, the rate will be negotiated by the parties; if they do not reach an agreement, it will be set by Ifetel.

Finally, the reform establishes that the free-of-charge rule will terminate when Ifetel determines that there are competitive conditions in the corresponding markets.

- *Invitation to tender for open TV channels*. The reform establishes that Ifetel shall offer an invitation to tender for two new national open TV stations. The terms of the invitation to tender must be published no later than 180 days after Ifetel is formed. The broadcasting concession holders that have more than 12 MHz of spectrum in any geographic zone of the country will be prevented from participating in these tenders, thereby preventing illicit concentrations and promoting greater competition in the open television market.
- *Limits on the concentration of frequencies and crossed ownership of media; divestment of assets*. Ifetel "will impose limits on the national and regional concentration of frequencies, on giving concessions, and on crossed ownership that controls several means of communication that are concession holders of broadcasting, and telecommunications that serve the same market or zone of geographic coverage." In the transitory articles of the reform it is indicated that the Congress shall establish, in the secondary legislation, specific prohibitions in relation to crossed subsidies or preferential treatment to prevent the operators of the sector from granting subsidies to the services they provide. In addition, the concession holders shall set minimum rates for the issuance of ads.

  Furthermore, the reform gives Ifetel the power to order the divestment of assets that are necessary to ensure that the concession holders comply with the limits established by Ifetel. It is important to mention that the scope of this provision should be specified in the secondary legislation, since it is not clear if this divestment authority should be applied only for future acquisitions that violate these limits or could be applied for assets that have been acquired before the entry into force of the reform.
- *Foreign investment.* When the reform enters into force, foreign investors can participate 100 percent in telecommunications and satellite communications and 49 percent in broadcasting.

  With regard to broadcasting, foreign investor participation will be limited to the percentage of foreign investment that is permitted in the same sector in the country of origin of the investor. In other words, foreign investment in broadcasting is subject to a reciprocity requirement.

Finally, it is important to mention that the reform establishes that the Federal Congress shall make the adjustments that are necessary to the legal framework within a term of 180 days from when the reform decree is published. This term seems to be insufficient, considering that the reform requires Congress to issue a law that regulates both broadcasting and telecommunications. This means it will be necessary to create a new law that merges the Federal Radio and Television Law with the Federal Telecommunications Law and to ensure that this law is in compliance with the provisions of the reform, which clearly will be an extensive and complex task. •

Reform in Telecommunications and Economic Competition

Regarding antitrust implications and modifications, the Telecommunications Reform includes the following relevant topics.

The Mexican Antitrust Commission (*Comisión Federal de Competencia*, CFC), currently an agency of the Ministry of Economy, will now be an autonomous constitutional entity. In addition, the entity will be renamed the *Comisión Federal de Competencia Económica* (CFCE) and its governing body will consist of seven commissioners (two more than the current CFC). They will be appointed in stages. The President will nominate them and the Senate will ratify them. They will hold office for a period of nine years.

The CFCE will be provided with additional tools and mechanisms to modify market structures in which there are dominant companies, including ordering measures to remove barriers to competition, regulating access to essential inputs, and ordering the divestiture of assets, rights, partnership interests, or shares, in the proportions necessary to eliminate anticompetitive effects.

Probably the most important reform is that the only appeal that can be filed to the CFCE's final resolutions is an indirect amparo lawsuit before specialized courts that will be created. Only in cases in which the CFCE fines a company or orders a divestiture of assets, rights, partnership interests, or shares will the execution of a resolution be delayed until after the amparo lawsuit is resolved. In addition, no ordinary or constitutional appeals will be admissible against actions taken by the CFCE during a proceeding, and only the resolutions that put an end to a suit may be appealed for violations in the resolution or during the proceedings.

Finally, the reform states that a new entity, the Federal Telecommunications Institute, will have the power to enforce and to punish antitrust violations and approve mergers in the telecommunications sector. These powers are currently exercised by the CFC. •

New Amparo Law

On April 2, 2013, the "Decree enacting the Amparo Law, which regulates articles 103 and 107 of the Political Constitution of the United Mexican States, amending and supplementing a number of provisions of: the Organizational Law of the Judicial Power; the Law Regulating Sections I and II of article 105 of the Political Constitution of the United Mexican States; the Organizational Law of the Federal Government; the Organizational Law of the General Congress of the United Mexican States, and the Organizational Law of the Office of Mexico's Attorney General" (the "New Amparo Law") was published in the *Official Federal Gazette (Diario Oficial de la Federación, DOF*). It entered into force on April 3, 2013.

The New Amparo Law consists of a complete reform of amparo proceedings based on the constitutional reform that was published in the *DOF* on June 6, 2011 and entered into force on October 4th of that year. It is important to recall that the 2011 constitutional reform has five fundamental implications: (1) the expansion of the validity of the amparo against violations of the human rights protected in the international treaties to which Mexico is a party; (2) the recognition of legitimate individual and collective interests; (3) the incorporation of the amparo joinder; (4) the general declaration of unconstitutionality, and (5) the new parameters for the granting of a suspension. All these topics have been addressed in the New Amparo Law, changing the paradigms of constitutional protection and, with that, the relationship between the State and the individual, as explained below.[1]

1. Regarding the expansion of the validity of the amparo against violations of the human rights protected in the international treaties to which Mexico

[1] The New Amparo Law has a new structure, divided into five sections: the first is "General Rules"; the second is "Amparo Procedure"; the third is "Compliance and Enforcement"; the fourth is "Court Precedent and the General Declaration of Unconstitutionality," and the fifth is "Disciplinary and Enforcement Measures, Liabilities, Sanctions, and Crimes."

is a party: In the New Amparo Law, the sphere of protection of the amparo proceeding is expanded, since the federal courts will resolve all disputes that arise from acts or omissions of the authority that violate the recognized human rights and individual rights granted under the Federal Constitution and by the international treaties to which the Mexican State is a party.

2. Regarding the recognition of legitimate individual and collective interests: The new Law admits the validity of the amparo proceeding for violations of a legitimate interest. The person holding a right or legitimate interest (individual or collective) is considered the injured party in the amparo proceeding, provided he or she alleges that the challenged act violates his or her human rights. The amparo will be valid when applied to social, environmental, and agrarian rights. However, in the case of acts or rulings issued by the judicial, administrative, or labor courts, the complainant must show that he or she holds a subjective right and that he or she has been affected personally and directly.
3. Regarding the incorporation of the amparo joinder: The New Amparo Law specifies that both the party that has obtained a favorable decision and the party that has a legal interest in the survival of the challenged act may file an amparo that adheres to the one filed by either of the parties involved in the proceeding from which the challenged act emanates.
4. Regarding the general declaration of unconstitutionality: In the New Amparo Law, general effects are granted to amparo decisions. Thus, the court precedent in which the unconstitutionality of a general law is determined will have general effects. This is not applicable to tax matters. The procedure for the issuance of a court precedent that establishes the unconstitutionality of a general law will have two stages: (a) the Supreme Court of Justice of the Nation will notify the authority that issued the questioned law to remedy the problem of unconstitutionality (amending or derogating it); (b) if within a term of 90 calendar days the issuer does not remedy the problem, the Supreme Court of Justice of the Nation will issue a general declaration of unconstitutionality, provided it is approved by at least eight votes.
5. Regarding the new parameters for the granting of a suspension: The New Amparo Law adopts the principles that were set forth previously in court precedent, establishing that a suspension will be granted ex officio or at the request of a party. A suspension will be granted ex officio when, among other situations, there is an act that, if completed, would make it physically impossible to restore to the complainant the enjoyment of the right claimed. The suspension will be granted at the request of a party provided that (a) the complainant requests it and (b) neither the social interest nor public order is violated. The New Amparo Law increases the list (illustrative, not restrictive) of situations in which the granting of a suspension would violate social interest or public order. The list includes the following stiuations: (a) that the proceedings relating to the intervention, revocation, liquidation, or bankruptcy of financial entities are impeded or interrupted and (b) that the use or exploitation by the Mexican State of public resources of the nation is impeded or obstructed. Finally, the Law establishes that in granting of the suspension, the corresponding judicial body should do a balanced analysis of the semblance of a valid right and the lack of harm to social interest.

Finally, it is important to mention two more topics under the New Amparo Law that will have serious implications:

1. The concept of *responsible authority* is expanded, including the possibility of acts of authority issued by individuals who exercise duties granted by a general law. This constitutes a broadening of the scope of the constitutional protection whose limits in practice will have to be defined by our federal courts.
2. The dismissal due to procedure inactivity and expiration of the instance is eliminated.

In coming days, Von Wobeser y Sierra, S.C., will write a more detailed analysis of the above-mentioned topics, since the entry into force of the New Amparo Law is, without doubt, an important historic event in the legal life of our country. •

Federal Environmental Liability Law

With roots in both article 4 of the Constitution, which recognizes an unpolluted environment for the development and well-being of every individual as a human right, and in the contents of the 1992 Rio de Janeiro Summit Declaration, the Green Party of Mexico, after more than ten years of lobbying, presented the draft bill of the Federal Environmental Liability Law (*Ley Federal de Responsabilidad Ambiental*, Lefra) to the Senate Chamber in August 2010. After approximately three years of debate in both Chambers of Congress, the Lefra was published in the *Official Federal Gazette* on June 7, 2013, and entered into force on July 7 of the same year.

In the same decree as that in which the Lefra was published, various provisions of other laws, such as the General Law of Ecological Equilibrium and Environmental Protection, the General Law for the Restriction and Comprehensive Management of Wastes, and the Federal Criminal Code, were reformed in order to bring their texts in line with the Lefra.

The principal objectives of the Lefra are (1) to create a special regimen of environmental liability distinct from those already in existence in the Mexican legal system, (2) to authorize citizens to access the federal courts to file claims against activities affecting the environment and to hold liable those who perform works or activities that affect the environment in order to have them repair for the public benefit the damages they have caused as well as to pay any corresponding punitive damages (a sanction which is new in the Mexican legal system).

Before the publication of the Lefra, environmental liability was already regulated by various federal laws, but neither environmental liability, damages to the environment, mechanisms for their effective reparation, nor punitive damages were regulated in a uniform and clear manner.

Based on the above and on certain distinct events that have had grave consequences for the environment in Mexico in recent years, a need arose to create a special regime of environmental liability. According to recent announcements from the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*, Semarnat), each year Mexico loses around seven percent of its GDP due to damages caused to the environment.

Additionally, we believe that it is important to regulate the environment because of the discrepancy that exists between the nature of environmental harms and the nature of harms to private wealth. According to the Lefra, *environmental harm* is any "adverse and measurable loss, change, deterioration, decrease, effect, or modification of habitats, ecosystems, and natural elements and resources; of their chemical, physical, or biological conditions; of the relationship of interactions among these, and of the environmental services that they provide." We could say that this implies a socio-environmental harm that is diffuse and thus of social interest, while the private harm is particular and individualized. In this respect, the Lefra expressly distinguishes between harms to the environment and those suffered by the owners of the natural resources or elements affected.

The Lefra provides that environmental liability can be determined without adversely affecting other proceedings for determining other types of liability, whether civil, administrative, or criminal. This may at first seem to contradict the constitutional principle that no one can be tried twice for the same conduct, but in our opinion, the terms of the Lefra are not unconstitutional, given that each one of these other proceedings investigates distinctly different aspects of the same behavior. Administrative proceedings punish infractions of the law. Civil proceedings can only result in reparations for damages to the rights or property of an individual or a group (in this case, through collective action). Criminal proceedings seek to punish an act or omission that qualifies as a certain type of crime. The sanctions imposed must deprive the perpetrator of his freedom and/or of economic assets. In contrast, the

Lefra calls for punishment only for those harms caused to the environment through illicit acts or omissions. Nevertheless, judges will take into consideration the sanctions to be imposed under the Lefra on a case-by-case basis in light of any other applicable sanctions, in order to avoid the possibility of its resolution being considered unconstitutional and therefore challenged.

The Lefra establishes that liability for environmental damages is subjective as a general rule and that in all cases it derives from illicit acts or omissions that may be intentional or negligent. Under the Lefra there are two situations in which environmental harms shall be considered nonexistent: (1) when the liable party has expressly stated that these harms will result and possesses an environmental impact report or precautionary report from the Semarnat to this effect and (2) when the harms do not exceed the limits established by law and Mexican Official Standards (*Normas Oficiales Mexicanas*, NOMs). In addition, the Lefra permits participation by citizens, NGOs, and businesses in the creation of the NOMs establishing these limits.

In the draft bill of the Lefra there was a chapter referring to obligations resulting from harms to and effects on health and personal integrity caused by dangerous waste and by substances released into the environment. However, in the final bill this chapter was eliminated. Those whose health might be affected by contamination by large companies or manufacturers do not fall within the scope of the Lefra and must seek remedies through other ordinary applicable civil actions.

Until now, the sanctions imposed by the Federal Environmental Protection Agency (*Procuraduría Federal de Protección al Ambiente*, Profepa) had been insufficient to provide incentives, especially to the largest companies, to prevent environmental damages, or, once caused, to prevent their reoccurrence. For this reason, and in order to harmonize our system with that of the international community, legislators provided in the bill of the Lefra that, in addition to reparations for damages caused to the environment, punitive damages would be assessed. These are economic sanctions imposed upon responsible parties who act willfully. They constitute an additional form of punishment for causing harm to the environment. This economic sanction could be as high as MXN 200,000.00 pesos for individuals and MXN 38,800,000.00 pesos for entities.

The Lefra also provides for resolution through agreements or alternative dispute resolution mechanisms. In the event that this resolution is carried out before a sentence is handed down in the administrative responsibility proceedings, the responsible party is not obligated to pay the economic sanction.

For environmental damages, the Lefra establishes reparations as a general rule and environmental compensation for exceptional cases. Reparations, according to the Law, shall consist of restoring the affected elements (habitats, ecosystems, and natural parts and resources; their chemical, physical, or biological conditions; the relationship of interactions among these; and the environmental services that they provide) to their original state —that is, the state that those elements had before the damage.

Environmental compensation refers to substitute investments or actions to improve the environment that are equivalent to the negative effects of the harmful actions and that are enacted by the liable party. These compensatory actions are to be carried out in the ecosystem affected, or failing that, in an alternate ecosystem linked to the one affected. This sanction is applicable in exceptional cases in which (1) total or partial reparation of the harm is impossible or (2) following the harm caused, the Semarnat determines, after an evaluation of environmental impact, that the illicit activities or works that caused the damages are sustainable if combined with the activities that will be carried out to compensate for the damages that were caused.

It is interesting to note that, as a subsidiary means justified by urgency or importance, the Semarnat is

authorized to repair the damages caused by third parties. To do this, the Semarnat will use money obtained from the Environmental Liability Fund, the assets of which consist of resources obtained through economic sanctions or through any other means.

The Lefra requires that within 180 days of its own publication, the Environmental Liability Fund shall be constituted in order to pay the reparations or compensation that the Semarnat or the Profepa undertake in cases of environmental urgency or importance. The Fund will also pay for studies and research required by the judges of both agencies for the purpose of demonstrating environmental liability in the jurisdictional process.

Under the Lefra, the following parties are entitled to take action in situations where environmental liability has been demonstrated: (1) individuals living in the community adjacent to the environmental damage, (2) nonprofit entities whose purpose is environmental protection and who represent one or more inhabitants of the communities adjacent to the damage, and (3) local Attorneys General in conjunction with the Profepa.

NGOs have made several critiques to the Lefra, including the principal argument that it errs in legitimating nonprofits only when they act in representation of inhabitants of communities adjacent to a damage site, in contrast to the collective action proceedings provided for in the Federal Code of Civil Procedure, under which they are able to act legitimately on their own behalf.

The present statute of limitations for an environmental liability action is twelve years, counted from the moment in which the environmental harm occurs, whereas in the past, the period provided for in the General Law of Ecological Equilibrium and Environmental Protection was five years. In this sense, we may interpret that in relation to acts or omissions of a continuous character, the limitations period shall begin to run from the last instance in which said continuous act or omission produces environmental damage.

Those who can be held liable in terms of the Lefra are individuals or entities that cause direct or indirect harm to the environment as a result of their act or omission. Entities can be responsible for the environmental harms caused by their representatives, administrators, managers, directors, or employees when they order or consent to harmful conduct. Because the Lefra does not distinguish between public and private entities, we can consider that public entities are included within the group of persons who may be held liable. Another problem that arises from the preceding statement is that even though the law mentions both direct and indirect damages, in either case the causal nexus between the damage caused and the act or omission attributed to the defendant must still be proven.

The law provides that proceedings shall be conducted by District Judges with special jurisdiction in environmental matters. To this end, the judicial branch has two years from the effective date of the Lefra to establish jurisdiction through special training of existing District Judges. The Lefra grants the judges capacity to collect evidence through official requests to the Profepa and Semarnat. This has positive results for plaintiffs, who will not have to spend their own money to collect evidence, and the authorities will receive payment form the Environmental Responsibility Fund for studies performed.

It is worth highlighting that, within a maximum period of 60 days from the date the sentence becomes final, it is the parties and not the judge who propose the manner in which reparations or compensation —whichever is called for— shall be made for damages caused. Upon receiving the proposal from one or both parties, the judge will send it to the Semarnat for their opinion. In the event that the parties do not submit proposals, the reparations will be those issued by the Semarnat.

Regarding fulfillment of judgments against defendants, the Lefra establishes that it is the obligation of the Profepa to follow up on the fulfillment of judgments and report to the judge who decided the case. •

Cancellation of Employee Registration with the IMSS Analysis of the Precedent

In a private session this past February 24, 2013, the Second Chamber of the Supreme Court of Justice approved judicial precedent 2a./J.39/2013 (10a.) under the following heading: Offer of Employment. The Notice of Cancellation of Worker's Registration with the Mexican Institute of Social Security, After the Indicated Date of Dismissal but Before the Offer, Without Specifying the Cause Thereof, Does Not Imply Bad Faith.

Through this new precedent, the Second Chamber decided to modify precedent 2a./J.19/2006 and overturn precedent 2a./J.74/2010.

In context, it is worth recalling that when an employer faces a labor law claim for unjust termination, the most common defense strategy, and in many instances the only one possible, is to cancel the termination and offer to reinstate the employee. This strategy involves (basically) informing the labor authority that the employee was never terminated and that therefore employment continues at the employee's discretion. Nonetheless, and due to the fact that the employment offer is an entirely procedural figure, court precedent has been the only thing regulating when the offer to reinstate the employee should be considered as "made in good faith" and when it should not, with different legal consequences for both parties.

Among the many precedents issued to regulate the classification of an employment offer, those that stand out are those that today, through the precedent analyzed herein, have been modified and overturned, given that said criteria considered that the fact that the employer would have cancelled the worker's registration before the Mexican Institute of Social Security (*Instituto Mexicano del Seguro Social*, IMSS) without stating the cause of cancellation implied bad faith in the offer of employment.

In this sense and given the complexity implied in stating the cause of cancellation before the IMSS, it was easier and safer for the employer to maintain the employee as registered before the IMSS for the duration of the labor proceedings, for the purpose that the reinstatement offer would be considered to have been "made in good faith" and therefore preserve that possible defense in the trial. Obviously, the preceding represented significant costs for the employer based merely on the maintenance of the employee's registration with the IMSS and the corresponding payment of the employer-employee quotas.

Accordingly, the publication and entry into force of this new interpretation represents excellent news for employers in our country, given that it signals that, if a employee's registration with the IMSS has been cancelled, this will no longer be a factor in classifying an offer of employment as having been made in good or bad faith, *as long as the cancellation occurs on a date after the indicated date of termination but before the employer makes an offer of employment in the corresponding labor-law proceedings*.

Here is the complete text of the new precedent:

> Employment offers. The notice of cancellation of the worker's registration with the Mexican Institute of Social Security, after the indicated date of dismissal but before the offer of reinstatement, without specifying the cause thereof, does not imply bad faith (modification of the precedent 2a./j. 19/2006 and overturning of 2a./j. 74/2010).
>
> The offer of reinstatement made by the employer in labor-law proceedings, when the employee's registration with the Mexican Institute of Social Security has been cancelled on a date after that indicated as the date of termination, but before the offer, without specifying the original cause for cancellation, does not imply bad faith, because the notice of cancellation constitutes an obligatory communication that must be made within five business days after the cause of insuring in the mandatory social security regime ceased to exist; this is because the notice only demonstrates that the employment relationship has ceased to exist as of the date indicated, regardless of the cause of cancellation, since this cause will be subject to the

analysis of the dispute over the alleged dismissal. Thus, the conduct of the employer when –having cancelled the employee's registration on a date subsequent to that indicated as the date of termination– he or she proposes that the employee return to work, cannot be considered contrary to a correct action that disproves his or her true intention to continue the work relationship. Moreover, the notice does not represent, in and of itself, a modification to the fundamental conditions of the work relationship, or affect the employee's rights as provided in the Political Constitution of the United Mexican States, in the Federal Labor Law or in the Social Security Law, because if during the trial it is determined that the termination was unjustified, the true cause of cancellation will be discovered and, as a consequence, it will be possible to order re-registration with the Mexican Institute of Social Security. Based on the above, this Second Chamber modifies the precedent 2a./j. 19/2006, titled: "Offer of employment. The notice of cancellation of the employee registration with the Mexican Institute of Social Security on a date before that on which the employer offers reemployment to its workers in the corresponding trial, without specifying the original cause of cancellation, implies bad faith," and overturns precedent 2a./j. 74/2010, titled: "Offer of employment. The notice of cancellation of the employee registration with the Mexican Institute of Social Security and his or her subsequent registration, both on a date subsequent to that on which the employer offers reemployment to its worker in the corresponding trial, where the employer denies termination, without specifying the original cause of cancellation, implies bad faith."

However, it is still important that, before the cancellation of an employee's registration with the IMSS, the employer analyze the particular facts of the case to evaluate the best strategy to follow and verify the cause that should be indicated at the time of making the corresponding change with the IMSS. •

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VON WOBESER Y SIERRA, S.C.
Guillermo González Camarena 1100-7° 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

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Editor: Ignacio Ortiz Monasterio
Graphic Designer: Rogelio Rangel