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NEWSLETTER 33

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Editorial

Although we began the year 2012 with hopes for a better economic panorama, the world has remained immersed in a crisis of large proportions that has lasted longer than anyone expected. It seems that the same economic crisis that began in the United States is now being transferred to the European Union.

The conditions that prevail in Greece and in major nations such as Italy and Spain suggest that this crisis could become one of the deepest and most acute in history. The cohesion of the European Union itself and the survival of its common currency may be at stake. With high levels of debt, an environment that now approaches an economic recession, and unprecedented unemployment rates, the European panorama in the short and medium terms looks somber.

The repercussions for Mexico are difficult to know yet. While our strong commercial ties to the United States seem to imply some protection from the events in Europe, globalization and the growing interconnection of world markets require us to remain alert, take precautions, and continue working in earnest.

In order to facilitate and contribute to the work of our clients and friends, we offer in this newsletter a review of certain new legal and economic novelties. These include a variety of points that are important to be aware of and understand due to the effect they could have on business operations and daily activities.

Claus von Wobeser

Articles 65, 66 and 67 of the General Law of Business Corporations

ARTICLE 65

Text of the Article

> For the assignment of partnership interests, and for the admission of new partners, it will be sufficient to have the consent of the partners representing the majority of the corporate capital, unless the bylaws require a greater proportion.

Comments

The original text of this article recognized that the principle of *intuitu personæ* was as important for the limited liability company as for the general partnership. It established that for the assignment of partnership interests or for the admission of new partners, the approval of all the other partners was required. The Article maintained the personalistic element, but it established the possibility of stipulating in the bylaws that a resolution by the majority would be sufficient, "the majority" being defined as representing at least three-fourths of the corporate capital. Thus a capitalistic element was incorporated.

As part of the Reform of 1992, Article 61 of the General Law of Business Corporations (*Ley General de Sociedades Mercantiles*, LGSM) was modified. The maximum number of partners was increased from 25 to 50, and it was foreseen that, with this number of partners, it would be more difficult to reach unanimity for the assignment of partnership interests or the admission of a new partner. For this reason, the consent of the partners representing the majority of the corporate capital is now sufficient.

Obviously, the reform weakened the personalistic element that the creators of the LGSM were interested in conserving. At the same time, it strengthened the capitalistic element and ensured the limitation of liability, similar to what happens in a stock corporation (*sociedad anónima*), which is what seems to be of most interest in our environment to the business people that choose this type of company.

However, as the new drafting permits firms to stipulate in their bylaws the requirement of a greater proportion of corporate capital for the admission of new partners —which proportion could be all of the capital—, the preeminence of the personal element can be restored indirectly.

ARTICLE 66

Text of the Article

> When the assignment mentioned in the previous article is authorized in favor of a person unrelated to the company, the partners will have a right of first refusal and will enjoy a term of 15 days to exercise it, counted from the date of the meeting at which the authorization is granted. If there are several partners who wish to use this right, they may do so in proportion to their contributions.

Comments

As it is drafted, this article is only applicable in the case of an assignment of the partnership interest of a partner to a person unrelated to the company, which is to say to a nonpartner. The resolution of the majority that has approved the assignment to an unrelated person is adopted without prejudice to the right of first refusal, which this article grants to all partners without exception and which may be exercised within a term of 15 days from the date of the meeting where authorization was granted. Thus, through the exercise of the rights of first refusal, a minority or even a single partner can invalidate the resolution adopted by the majority approving the assignment of a partnership interest to an unrelated person. This provision can be considered as a means to prevent the entrance into the company of an unre-

lated person, and as a protection of the principle of *intuitu personæ*, to the benefit of the objecting minority. However, it is worth asking whether this protection exists when the admission of a new partner is approved by a majority as a result of a capital increase.

Article 65 refers to both the assignment of the partnership interests and the admission of new partners. This can only happen in the case of an increase of the corporate capital, which is addressed in Article 72, and necessarily implies the waiver by one or more partners of their preferential right.

Apparently, in this case the objecting minority to which we have referred will not be protected, since Article 72 establishes that the bylaws or the resolution of the company to increase the corporate capital can cancel the preferential right.

ARTICLE 67

Text of the Article

> The transfer by inheritance of partnership interests will not require the consent of the partners, unless there is a covenant to dissolve the company upon the death of any partner or that provides for the liquidation of the partnership interest of the deceased partner in the event that the company does not continue to represent the heirs of the deceased partner.

Comments

This article is related to Article 32 and seems to contradict it. It provides that in the bylaws it can be established that upon the death of one of the partners, the company continues with the heirs of the deceased. *A contrario sensu*, this implies that if this is not established, upon the death of one of the partners the company is not permitted to continue, that is, it is dissolved.

In contrast, this article provides that the transfer by inheritance of the partnership interests will not require the consent of the partners, unless the bylaws establish the dissolution of the company for the death of one of them or the liquidation of the partnership interest of the deceased partner.

Based on the above, two things can be seen. The first is that this article confirms Article 32 and that—given the personalistic nature of the company and the force of the principle of *intuitu personæ*—an express bylaw provision is required for the company to be able to continue with the heirs of the deceased partner.

The second is derived from the capitalistic influence and it is the provision in Article 67 that establishes that partnership interests can be freely transferred without the consent of the partners.

However, the Article has two exceptions. The first is if the bylaws provide for the dissolution of the company upon the death of one of the partners. This is what Article 32 establishes, which is different from the premise that the death of any of the partners of a partnership of any type prevents it from continuing, and therefore an express agreement is needed for the company to continue with the partner's heirs replacing the partner.

The second exception is the natural and necessary consequence of the heirs of the deceased partner not continuing within the company: it is necessary to liquidate and pay such heirs the partnership interest of the deceased partner. •

Licenciado Manuel Lizardi A.†

Multilateral Exchange of Tax Information

The Convention on Mutual Administrative Assistance in Tax Matters (the "Convention") is a multilateral instrument that dates from 1988 and was recently (in 2010) modified by the issuance of a protocol. Such modifications were made in order to reflect the transparency and information exchange standards approved by the Organization for Economic Cooperation and Development (OECD).

The purpose of the Convention is to help the signatory countries exchange relevant information regarding the administration or application of their tax laws. The exchange of information can occur by express request, automatically (for this to operate an agreement between the competent authorities of the States will need to have been executed), or spontaneously.

The protocol of modifications also permits non-members of either the OECD or the Council of Europe to adhere to the Convention. It is clearly hoped that this will have a significant global impact on tax administration assistance.

Mexico adhered to the Convention and the protocol in May, 2010. Currently, ratification by the Senate and publication in the *Official Federal Gazette* (*Diario Oficial de la Federación*) are pending. Publication is necessary to comply with the requirements set forth in the Law on Entering into Treaties allowing adherence to the treaty to be considered binding in Mexico.

Judicial rulings have established that international treaties such as the Convention take precedence of all other federal laws; only the Constitution has precedence over an international treaty.

The Convention is extremely important since it will permit a broader exchange of information than other current treaties contemplate. There is also the possibility of carrying out simultaneous tax audits and tax audits abroad, and of receiving assistance in the collection of tax liabilities, including precautionary measures and document notification.

This means that the tax authorities are being given ever-greater powers in order to prevent tax evasion. Companies residing in Mexico that carry out activities in any other signatory country, and companies of such countries with activities in Mexico, as well as their legal representatives, should bear this in mind.

The countries that have adhered to the Convention at this time are Denmark, Finland, France, Iceland, Italy, the Netherlands, Norway, Sweden, Ukraine, the United Kingdom, the United States, South Korea, Portugal, and Slovenia.

It should be specified that the possibilities for assistance contemplated in the Convention do not restrict nor are they restricted by those contained in existing or future international agreements, whether or not they are conventions related to cooperation in tax matters.

In the case of Mexico, the application of the Convention may face practical difficulties. For example, the Convention establishes that the State from whom assistance is requested to collect an amount imposed must take precautionary measures even when the liability has been challenged or it is not subject to a document that makes it enforceable. The above could give rise to defense actions, such as the amparo proceeding, which seeks to prevent the violation of citizen's rights protected in our Constitution.

Since this is an international tax instrument of great importance, it will be very interesting to analyze how it is complied with in practice and if in reality it proves to be an efficient means for investigating taxpayers with international operations and for the different signatory countries to increase their tax collection. •

Moving toward a New Amparo Law

The amparo proceeding is a constitutional means of control that allows for the defense and preservation of the fundamental rights protected in the Political Constitution of the United Mexican States ("Federal Constitution"). The bases for the amparo proceeding are found in articles 103 and 107 of the Federal Constitution. At the secondary legislative level, the amparo proceeding is regulated by the Amparo Law (*Ley de Amparo*), published in the *Official Federal Gazette* (*Diario Oficial de la Federación*, *DOF*) on January 10, 1936, which implements articles 103 and 107 of the Federal Constitution.

Over the last five years, an important sector of the Mexican legal community had insisted that the original shape of the amparo proceeding was archaic and was not responsive to the current social reality. "Evolve or die," this sector said. The complaint of this group was heard by the Federal Legislative Branch; this resulted in two constitutional reforms and a proposal for a new Amparo Law.

Here we will address the two constitutional reforms. (The draft of the new Amparo Law is currently passing through the legislative process. Everything seems to indicate that the new Amparo Law will enter into force very soon; its content and scope will be discussed at another time.)

The constitutional reforms in question were published on June 6 and 10, 2011, in the *DOF*. The first of them primarily concerns the amparo proceeding; the second, closely related to the first, consists of an express recognition of the progressive nature of human rights.

The Amparo Reform

We have selected, due to their relevance, the following topics: (I) the expansion of the application of the amparo against violations of human rights as set forth in the international treaties to which Mexico is a signatory; (II) the recognition of legitimate individual and collective interests; (III) the incorporation of the adhesive amparo; (IV) the general declaration of unconstitutionality, the scope and conditions of which will be determined in regulatory law, and (V) the new parameters for the granting of a suspension. We will address each of these topics below.

I. Expansion of the Application of the Amparo against Violations of Human Rights Protected by International Treaties to which Mexico Is a Signatory

Before this reform, the Federal Constitution gave human rights the name of "individual guarantees," which was technically incorrect, since the word "guarantee" can only be linked to the amparo itself, and not to the rights protected by it. The amparo is the guarantee of the effectiveness of such rights. The Federal Constitution was reformed to substitute the words "individual guarantees" for the words "human rights" (see Article 1 of the Federal Constitution).

In addition, through this reform the human rights referred to in the international treaties to which Mexico is signatory are elevated to the level of constitutional rights. This obligates the national courts to analyze acts of authority, not only in light of the human rights protected in our Federal Constitution, but also considering the human rights recognized in the international treaties adhered to by Mexico. This is nothing other than the incorporation into our law of the international principle of "conventionality control"[1] as a complement to the principle of "constitu-

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[1] It should be mentioned that the Inter-American Court of Human Rights has determined that judicial powers should take into account, in the exercise of conventionality control, not only the contents of the international treaty itself, but also the interpretation it has been given by the Inter-American Court in its latest interpretation of the American Convention.

tionality control," previously existing and recognized in our law.

II. Recognition of Legitimate Interests, Individual and Collective

Traditionally the complainant is required to demonstrate standing by showing the existence of a "legal interest," that is, a personal and direct affect on the subjective right that is considered violated.

The reform "softens" the requirement of standing for the complainant. This requirement can now be met by showing the existence of a "legitimate interest" (individual or collective), and not just a legal interest. This implies the expansion of the principle of the aggrieved party suit: with the reform, the amparo proceeding will be valid not only when a right is directly and personally affected, but also considering the special situation of the complainant in relation to the public interest. It should be mentioned that in the case of acts of judicial, administrative, or labor courts, a legal interest must still be shown in order for an act to be in compliance with the standing requirement in the case of the complainant (see Article 107, section I, of the Federal Constitution).

III. Incorporation of the Adhesive Amparo

The Federal Constitution was reformed in order to incorporate, just in the case of direct amparos, the so-called "adhesive amparo," as well as to preclude any right to allege procedural violations in subsequent proceedings. In view of the above, a party that has obtained a favorable decision and a party with an interest in the survival of the challenged act should adhere to the amparo that the opposing party files in order to strengthen the considerations of the definitive judgment (see Article 107, section IIIa, of the Federal Constitution).

IV. General Declaration of Unconstitutionality

Since the creation of the amparo proceeding, one of its most criticized characteristics has been the principle of the relativity of the amparo decision. This principle establishes that the amparo decision that is issued must not make general declarations of unconstitutionality. The decision must limit itself to granting the amparo and to protecting federal justice for the complainant that filed the amparo claim. An amparo judgment does not apply to parties that did not participate in the proceeding.

This situation, according to many, can lead to injustices that can affect the Mexican legal order, in that it permits the enforcement and application of rules that have been declared unconstitutional. For this reason, through the reform in question, our law has incorporated the concept of the general declaration of unconstitutionality, which qualifies the principle of relativity of the amparo decisions, and therefore the subjective transcendence of an amparo decision is now feasible.

The general declarations of unconstitutionality may be issued by a qualified majority of the justices of the Supreme Court of Justice of the Nation when indirect amparos in review are resolved, and only when the authorities issuing the challenged regulations have not overcome the problem of unconstitutionality.

In this regard, one matter that is questionable is the decision by the lawmakers that a general declaration of unconstitutionality does not apply to tax laws (see Article 107, section II).

V. New Parameters for Granting a Suspension

The incorporation into the text of the law of the criteria of "affect on the public interest" and "appearance of good law" is important. Both criteria must be

weighed by the amparo judge when deciding on the suspension of a particular act.

Express Recognition of the Progressive Nature of Human Rights

This reform shows the recognition of the progressivity of human rights through the incorporation and clear expression of the principle *pro persona* as a guiding principle for the interpretation and application of legal rules. The law must be understood in the sense most favorable to individuals and always safeguard their human rights. With this reform, specific modifications were made to several constitutional articles that protect human rights, such as Article 3, into which the respect for human rights as an educational goal was incorporated; Article 29, in which the procedure for the suspension of the exercise of rights was modified, and Article 33, which incorporated the right to a hearing into the procedure for the expulsion of foreigners. These are just a few examples.

In conclusion, we can say that the reforms commented on here represent a great advance in the protection of human rights. They will help to strengthen the effectiveness of these rights and, consequently, to improve the conditions of life for Mexicans. •

Equivalence Agreements in Telecommunications and Gas Emissions

Article 908 of the North American Free Trade Agreement (NAFTA) establishes, among other provisions, that "each Party shall give sympathetic consideration to a request by another Party to negotiate agreements for the mutual recognition of the results of that other Party's conformity assessment procedures."

The application of this article is based on the recognition that each of these governments grants to certain testing laboratories located in the territory of the other signers of NAFTA. These laboratories certify that certain materials comply with the technical requirements established in the legal and regulatory provisions applicable in each country. Thus, the exporters that subject their merchandise to analysis by any authorized laboratory within its country will not have to submit the same merchandise to a second analysis in the other country or country of import, which reduces the costs of free trade and promotes economic growth.

Under this NAFTA obligation, Mexico and the United States recently signed a telecommunications agreement. Mexico also issued a unilateral equivalency ruling in relation to gas emissions by vehicles.

Bilateral Agreement Regarding Telecommunications

On July 28th the Mutual Recognition Agreement between the Government of the United States of America and the Government of the United Mexican States for Conformity Assessment of Telecommunications Equipment was published in the *Official Federal Gazette* (*Diario Oficial de la Federación,* DOF).

This agreement is intended to facilitate the import and export of telecommunications equipment and optimize access to new technologies. It applies to equipment that can be connected to a public telecommunications network or other equipment, including wire and wireless equipment, and terrestrial and satellite equipment. It sets forth a system whereby each

government will, through its designating authorities, name and list authorized testing laboratories, verify that they comply with their obligations, and when applicable, limit or withdraw their designation. Furthermore, these authorities will have the authority to recognize the testing laboratories designated by the government of the other party. Among the criteria that the designating authority should assess are the laboratories' experience and competence to evaluate whether the equipment conforms to the other party's technical regulations.

Especially important are the requirements that each party shall recognize the laboratories named by the designating authorities of the other party and accept the test reports produced by these laboratories. Also important is the authority both parties have to suspend the recognition of laboratories and reject their test reports, provided the other party is notified 60 days before such actions take effect. Either of the governments may terminate the agreement with a 180-day advance notice.

The agreement establishes a period for "building of trust and confidence." During this period, the parties agree to create and implement a cooperative work plan that includes activities such as joint meetings between designating authorities to review the technical requirements, joint training courses and seminars for testing laboratories, etc. This work program must be elaborated within 60 days from the date the Agreement enters into force; subsequently, a maximum period of 18 months is established for completing the transition period and the entrance into force of the accreditation system established by the agreement.

Unilateral Ruling in Relation to Gas Emissions

The complete name of this instrument is: "Ruling accepting the equivalency of the Official Mexican Standard NOM-041-SEMARNAT-2006 that establishes the maximum permissible limits of contaminating gas emissions coming from the exhaust pipe of motor vehicles in circulation that use gasoline as fuel, and the Official Mexican Standard NOM-047-SEMARNAT-1999, which establishes the characteristics of the equipment and the measurement procedure for the verification of the limits of contaminating emissions coming from motor vehicles in circulation that use gasoline, liquid petroleum gas, natural gas, or other alternative fuels, the regulations that are indicated and their respective conformity assessment procedures and that are recognized as valid for purposes of proving compliance at the points of entry into the country of the certificates indicated."

The Federal Regulatory Improvement Commission (*Comisión Federal de Mejora Regulatoria*) approved this ruling, and therefore it should be published in the DOF soon.

This ruling establishes that the official Mexican standards NOM-041-SEMARNAT-2006 and NOM-047-SEMARNAT-1999 are equivalent to certain technical regulations of the United States of America, and therefore it is sufficient to show compliance with these regulations in order to be considered in compliance with the Mexican standards. The following are the technical regulations declared equivalent by the Ruling:

1. *Arizona Revised Statutes*. Title 49 "The Environment," Section 542: Emissions inspection program; powers and duties of director; administration; periodic inspection; minimum standards and rules; exceptions, and definition;
2. *California Code*. California Air Pollution Control Laws, Health and Safety Code, Division 26 "Air resources," Part 5 "Vehicular air pollution control," Chapter 5 "Motor vehicle inspection program";
3. *Texas Statutes*. Texas Administrative Code, Title 43 "Transportation," Part 10 "Texas Department of motor vehicles," Chapter 217 "Vehicle titles

and registration," Subchapter B "Motor vehicle registration," Rule §217.31 "Vehicle emissions enforcement system";

4. *New Mexico Statutes*. New Mexico Administrative Code, Title 20 "Environmental Protection," Chapter 11 "Albuquerque-Bernalillo County Air Quality Control Board," Part 100 "Motor Vehicle Inspection-Decentralized."

This declaration of equivalence is important because with it, Mexico recognizes the validity of the certificates issued in the United States that verify conformity with any of the above technical regulations with respect to the definitive import of used vehicles in circulation that use gasoline as fuel, provided such certificates are no more than six months old. The verification of the authenticity of the certificates is the responsibility of the customs agent.

Thus, the laboratory results establishing that the regulated vehicles fully comply with any of the technical regulations declared equivalent to the official Mexican standards are sufficient to establish compliance with these standards in Mexico. •

CUSTOMS

Physical Transfer of Merchandise in Virtual Transactions of IMMEX Companies

Among the changes made to the provisions governing companies affiliated with the Export Manufacturing, Maquiladora, and Services Industry Program (*Programa de la Industria Manufacturera, Maquiladora y de Servicios de Exportación*, IMMEX Program), is one that requires IMMEX companies to physically transfer merchandise when they carry out virtual transfer transactions.

Virtual transactions are one of the most significant benefits of the IMMEX Program. Through these transactions, merchandise imported temporarily is transferred to other IMMEX companies or to companies that are part of a special program or that are authorized to receive it. When the merchandise is transferred, the company that imported the merchandise is relieved of the obligation to return it abroad (even when it has been introduced into Mexico under the "temporary import" customs regime).

It is worth mentioning the power that is conferred on the customs authority to verify that the transfers made by IMMEX companies comply with certain requirements. Among the most important of these requirements are those relating to the physical transfer of the merchandise. The IMMEX companies have to establish the following:

1. The payments made for the transfer of the merchandise, including the expenses the transporter incurs during the transfer. If these costs are covered by the company that receives the merchandise, this must be proven;
2. The physical departure of the merchandise from the warehouses of the company that transfers it;
3. A document verifying the receipt of the merchandise, generated by the warehouses of the company that receives it;
4. An invoice or other document verifying that the merchandise being transferred has been paid for;
5. The processing of one customs declaration per vehicle, in the understanding that this customs

declaration may not cover the physical transfer of amounts greater than 25 tons.

It is also important to consider the prohibition on transferring merchandise to the same state from which it was imported; in other words, it is necessary that the merchandise be submitted to a prior transformation process, except in the case of IMMEX companies that have an authorized services program.

In addition, the virtual temporary import customs declaration must be presented on the same date that the transfer is made, while that of the virtual return must be filed on the following day or no later than within the following month; in this latter case, a fine must be paid.

The companies that receive the merchandise are obligated to return it abroad through a customs declaration or to import it definitively within 6 months (previously, this term was 18 months). •

Renewable Energies Market in Mexico

Mexico is one of the most important economies in Latin America, and it has a privileged geographic location that allows it to expand and develop its exploitation of renewable energies. This has also allowed it to play an important role in the sustainable development of the region. However, much remains to be done, since the greater part of Mexico's energy is still obtained from fossil fuels.

Over the last few years, business opportunities have been opening up in renewable energy projects—principally in wind, solar, geothermal, biomass and biofuel energy projects. The world is calling for the use of these energy sources. The expectation that exists in Mexico of a greater opening in these markets is growing day by day.

According to the most recent data from the Energy Regulatory Commission (*Comisión Reguladora de Energía*, CRE), around 76% of the total energy produced in Mexico is obtained from fossil fuels. The second most important source of energy is hydroelectric (19%), while only 3% comes from renewable sources. The remaining 2% is nuclear.

Our energy regulatory framework has seen important modifications over the last few years, which have provided greater certainty for national and foreign investors who seek to participate in the growing green economy. The legal framework applicable to renewable energies in Mexico is found in the Constitution, the Electric Power Public Service Law (1975), the Sustainable Use of Energy Law (2008), its Regulation (2009), the Law for the Use of Renewable Energies and the Financing of the Energy Transition (2008) and its Regulation (2009).

In several strategies and programs, the Federal Government has established the objectives Mexico should achieve in the short, medium, and long term in order to reduce greenhouse gas (GHG) emissions and increase the capacity to generate energy from renewable sources.

The Special Climate Change Program (2009–2012) seeks the reduction of GHG emissions by 50% by the year 2050. The National Energy Strategy (2010) states that by the year 2024, the exploitation of natural gas will have grown by 94% and the capacity to generate renewable energy by 35 percent.

The National Strategy for Energy Transition and the Use of Renewable Energies (2011) establishes the goal of reducing the use of fossil fuels by 4.75% by 2012, and of increasing the generation of renewable energies by 3.95 percent.

The Government's involvement in this sector consists of the establishment of policies, through the Ministry of Energy, and the implementation of these policies through the CRE and the Federal Electricity Commission (*Comisión Federal de Electricidad*, CFE).

The legal framework applicable in Mexico establishes that the provision of energy services to the public is the exclusive prerogative of the State, and that it shall be executed through the CFE. However, the private sector is authorized to carry out certain activities, including self-supply; cogeneration; small- (up to 30 KW), medium- (up to 500 KW), and large-scale production (more than 500 KW); and importation and exportation of electricity.

The dominant trend in this market is to pursue renewable energy projects through self-supply or cogeneration. The investors, developers, and beneficiaries of these alternatives commonly make use of the joint venture structure to organize the project. The beneficiaries are normally municipal and state agencies, as well as a large variety of private companies.

There are several legal mechanisms to promote national and foreign investment in renewable energies, such as renewable portfolio standards, energy banks, net metering, interconnection contracts with the CFE, tax instruments consisting of benefits related to the acquisition and import of equipment used in the generation of renewable energies and financial instruments such as the Fund for the Energy Transition and the Sustainable Use of Energy.

Another important incentive is the agreement between the Mexican government, the World Bank, and the Global Environment Facility (GEF). Thanks to this agreement, Mexico will receive a grant of 70 million dollars (in two payments). Its purpose is to offset the cost difference between the generation of energy by the conventional model and by the use of renewable sources.

The existence of these instruments illustrates the government's efforts to develop a renewable energy market. However, we consider that these measures will not attract the private investment necessary to reach the goals set by the Federal Government regarding the generation of clean energy.

Similarly, there are still certain barriers that affect this market. For example, the obligation of the CFE to find the lowest price in the acquisition of energy, the insufficient interconnection infrastructure, the scarcity of financial mechanisms, and few economic incentives.

Even with these barriers to investment and the development of projects, the renewable energy market in Mexico is growing rapidly and has been supported significantly by the Federal Government. The Government is analyzing strategies that would permit development of the necessary infrastructure and offer more incentives and financing mechanisms, in order to attract greater investment in this important market. •

Reforms Regarding Class Actions

On August 30, 2011 the decree amending Article 24 and adding a Fifth Book to the Federal Civil Procedures Code (*Código Federal de Procedimientos Civiles*, CFPC) referring to class actions was published in the *Official Federal Gazette* (*Diario Oficial de la Federación*, DOF).

In order to implement this reform to the laws relevant to the filing of class actions, amendments were made to the Federal Civil Code (Article 1934 bis), the Federal Economic Competition Law (Article 38), the Federal Consumer Protection Law (Article 26), the Organizational Law of the Federal Judicial Branch (articles 53, sections VI, VII and VIII, and 81, sections XL, XLI, XLII and XLIII), the General Law of Ecological Balance and Environmental Protection (Article 202), and the Protection and Defense of the Financial Services User Law (articles 11, 91 and 92).

The decree established that the reforms will go into effect six months after their publication, which is to say on March 1, 2012.

Below the principal aspects of these reforms are analyzed.

I. Types of class actions

The CFPC classifies them in three groups:

1. *Diffuse actions (Acciones difusas)*. These actions are indivisible and are for claiming damages caused to the class. They consist of the restitution of the things damaged or an alternative remedy, without the need for any legal connection between the class and the defendant;
2. *Class actions,* stricto sensu *(Acciones colectivas en sentido estricto)*. These actions are indivisible, are exercised to protect the rights of a particular class, and are for recovery of damages caused by certain actions or the definitive suspension of these actions. The purpose is also for the defendant to pay damages to each member of the group individually. These class actions arise from a legal connection between the class and the defendant by legal requirement;
3. *Individual Homogeneous Class Actions (Acciones individuales homogéneas)*. These actions are divisible. They are exercised to protect rights and interests of individuals who form a class in order to demand the specific performance of a contract or its rescission.

Federal civil district judges will hear and resolve matters related to class action suits.

II. Active Standing

This reform granted the capacity to exercise class actions to the Federal Attorney General's Office, to various governmental entities (the Federal Competition Commission, the Federal Environmental Protection Agency and the National Commission for the Protection and Defense of Users of Financial Services), to nonprofit organizations that have been in existence at least one year, and to the common representative of a class of at least 30 members.

The nonprofit organizations must be registered with the Federal Judicial Board and deliver annual reports of their activities. The standing of a class in the proceeding will be considered as a matter of public interest.

III. Joining the Action

Once the proceeding has been initiated and during the 18 months following the issuance of a decision not appealable in the ordinary courts, the class members may join the claim filed by the representative voluntarily, in a procedure known as *opt in*. In the case of *stricto sensu* and individual homogenous class actions, if there is a ruling favorable to the class, its members must file an ancillary liquidation pro-

ceeding in which they must prove the damage suffered in order to obtain any restitution.

IV. Injunctions and Enforcement Measures

The judge may determine at any time the application of the injunctions he/she considers appropriate. These injunctions may include the withdrawal or seizure of goods and measures to guarantee that there is no imminent and irreparable harm to the class. The defendant may grant a bond in order to avoid the application of the injunctions, except in cases where damage to the social welfare, the life, or the health of the members of the class is imminent and irreparable, or for national security reasons.

The judge will also have several enforcement measures, including fines of up to 30,000 days of minimum wage in the Federal District (approximately 1,800,000 pesos), arrest for up to 36 hours, searches and police intervention, among others.

V. Fund

The monies collected as a result of the judgments issued in class actions will be administered through the creation of a fund by the Federal Judicial Board. This fund will be utilized for the payment of the expenses generated by the class action procedures and the professional fees of the legal representatives of the claimant, as well as for the investigation and dissemination of the class actions and rights. •

Payment of Salaries and Benefits by Electronic Banking

Currently it is a common practice for companies to pay salaries and benefits to personnel through electronic bank deposits and/or transfers from the bank account of the company to the bank accounts or payroll accounts of the employees.

Below we will comment on what should be done to implement this payment system and the risks that the company may face if it does not comply with the requirements established in the Federal Labor Law (*Ley Federal del Trabajo*, LFT) and the different interpretations and precedents issued on this point by the Collegiate Circuit Court and the Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación*, SCJN).

What are the requirements that companies must comply with in order to make salary and benefit payments to their personnel by electronic bank deposits and/or transfers?

The LFT provides that salaries shall be paid to employees in cash. Thus, for companies to be able to pay salaries and/or benefits by electronic bank deposits and/or transfers, they must obtain a prior, written authorization from each employee.

The authorization to pay salaries and/or benefits by electronic bank deposits and/or transfers must contain:

1. Bank or payroll account information indicating where the employee wishes to receive the payments;
2. Recognition by the employee that the payment of salaries and/or benefits by electronic bank deposits and/or transfers is valid and that such payment is made to cover the salary and/or benefits accrued in the corresponding period;
3. Signature of the employee at the end of the document.

It is also recommended that in the salary clause of individual employment agreements it be specified

that, by request of the employee, salaries and benefits will be paid by electronic bank deposits and/or transfers into the bank and/or payroll account provided by the employee and that the account statements and electronic bank deposit and/or transfer receipts will be considered proof of the payment of the corresponding salary and/or benefits.

In a proceeding, are the account statements and electronic bank deposit and/or transfer receipts valid evidence?

According to Article 784, sections IX, X, XI, XII, and XIII, and Article 804, sections II and IV of the LFT, in the event of a labor lawsuit in which the employee demands payment of salaries and/or benefits by the company, the company as the employer has the obligation to preserve and exhibit the receipts that prove that such payments were in fact made.

Thus, according to these articles, the appropriate evidentiary documents for proving in a proceeding that salaries and/or benefits have been paid are the payment receipts and the pay slips duly signed by the employees.

However, the Collegiate Circuit courts and the SCJN have issued interpretations that permit the use of bank account statements and/or electronic bank transfer receipts as means of proof, provided they comply with the requirements indicated in the following section.

What requirements must the bank account statements and/or the electronic bank transfer receipts comply with in order to serve as valid evidence?

They must comply with the same requirements established for a payment or payroll receipt to be considered valid in a proceeding; they must indicate the payment items covered. It is therefore necessary that the electronic bank deposit and/or transfer payments specify the following:

1. The amount the employee is being paid in salary and/or benefits;
2. The deductions that will be taken from the employee's pay for such items as taxes, Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*, IMSS) fees, and other fiscal charges. Alternatively or complementarily, it can be stated in the written authorization that electronic bank deposits and/or transfer payments will be made after deductions have been taken for taxes and other corresponding tax and social security charges;
3. The time period covered by the payment of the salary and benefits and the deductions.

Apart from the above, the company must be sure that:

1. The adhesion contract entered into with the banking institution, by which the employee payroll account is opened, contains the signature of the employee;
2. It is agreed in the adhesion contract that the employee will *not* be charged any commission for the handling of the payroll account;
3. Preferably, the corresponding electronic bank deposit and/or transfer receipt is signed by the employee.

It is important to note that if all these requirements are not complied with, in the case of a labor lawsuit, the account statements and electronic bank deposit and/or transfer receipts will not be considered on their own as proper evidence of the payment of the salary and/or benefits of the employee, above all because the simple deposit of an amount in an account does not prove that it represents the payment of salary and/or benefits. The employee can allege that such a deposit was made for some other purpose and the company will not have the evidence necessary to disprove this.

The company can make the payment of salary and benefits by electronic bank deposits and/or transfers and, as proof of payment, preserve both the corresponding account statements and receipts as well as the payment receipts duly signed by the employees that itemize salary, benefits, deductions, and net pay, which must coincide with the corresponding electronic bank deposit and/or transfer. It is important that in the bank account and/or the electronic bank deposit and/or transfer receipt the item that is being paid and the time period covered be specified, for example: salary from September 1 to 15, 2011, Christmas bonus for 2011, etc.

Conclusions

1. The company can pay salaries and/or benefits to its employees by electronic bank deposits and/or transfers, provided that (i) it preserves the bank statements and/or receipts from the electronic bank deposits and/or transfers as evidence of payment, and (ii) these documents comply with the necessary requirements for the labor authorities to consider them valid in case of a proceeding;
2. It is advisable for the company to maintain its account statements and/or electronic bank deposit and/or transfer receipts for the payment of salaries and/or benefits to the employees, and that it print the payment receipts corresponding to each pay period and have the employees sign them, so that the company has better coverage and more evidence to defend itself in case of a proceeding. •

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