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Newsletter 30

Von Wobeser y Sierra

Editorial

The first half of 2010—a year that economists have called "the year of recovery"—has come to an end. From an economic point of view, 2010 has certainly been the year of recovery for Mexico, as the numbers prove. While in 2009 the country's growth was between –7.2% and –6.8%, in 2010 conditions have improved to a point where experts foresee a growth of 3.8 percent.

Yet, we have to admit that the levels of growth and the balance expected have not been reached. We believe that said optimism, however, backed by solid financial and economic policies, will prove to be valid.

In this issue of our *Newsletter*, we offer twelve articles that we hope you will find interesting and useful. They deal with subjects from corporate and commercial law to civil law, including articles pertaining to industrial and intellectual property, antitrust, migration, environment, and labor.

We would like to mention especially the first article, by National Jurisprudence Prize winner Mr. Manuel Lizardi, who was recently awarded the highest distinction given by the Escuela Libre de Derecho to its professors, that of Emeritus Teacher.

Finally, it is my honor to inform you that, as of December 2009, Fernando Carreño became a partner of this firm. Trained at the Escuela Libre de Derecho, Carreño is a young Mexican lawyer who, I am certain, will perform with the drive and freshness that have always distinguish him. Welcome to the firm, Fernando.

Claus von Wobeser

Articles 20 and 21 of the General Law of Business Corporations

*It seems timely to us to publish on this occasion comments regarding articles 20 and 21 of the General Law of Business Corporations (*Ley General de Sociedades Mercantiles, LGSM*), which concern the formation of the legal reserve, since this is the time of year when companies hold their ordinary general meetings, where they should address the formation of said reserve.*

ARTICLE 20

The Text of the Article

> From the net profits of every company, at least five percent shall be set aside annually to form the reserve fund, up to the amount of one-fifth of the company's capital stock.
>
> The reserve fund shall be replenished in the same manner when it is reduced for any reason.

Commentary

Net profits should be understood as those shown in the annual financial statements of the company, determined in accordance with applicable legal provisions and generally accepted accounting principles, as well as any provisions that may have been approved by the general partner or shareholder meeting, according to the type of company in question.

The Law's intent is to improve the solvency of all companies, requiring them to set aside each year five percent of their profits in order to form a reserve fund, up to the amount of one-fifth of the company's capital stock. In reality, the effect of the Law is modest, allowing for the distribution of 95 percent of the profits and, once the reserve fund is complete, of 100 percent. Furthermore, the total amount of the reserve fund is not that significant, and therefore the corporate purpose of the partners or shareholders to share in the profits is not greatly affected. Since the reserve fund is established by the Law and its formation is mandatory, it is known generally as the "legal reserve," to distinguish it from other reserves, which may be called "statutory reserves," but which may have specific names, reflecting the interests and convenience of the partners/shareholders.

In theory, it is possible for the partners/shareholders to stipulate in the bylaws that a reserve greater than one-fifth of the company's capital be created and that it be formed by setting aside more than five percent of annual profits. In this circumstance, although the Law would be complied with, it would not be possible to speak of a *legal* reserve, but rather of a *statutory* reserve. In this case, it would be more practical to create another statutory reserve with the same purposes and treatment as the legal reserve.

The final part of Article 20 provides that the reserve fund shall be replenished "in the same manner when it is reduced for any reason." The expression *for any reason* is not appropriate. The fund is most likely to be reduced due to losses in a subsequent fiscal year. It should be replenished in the same manner it was formed. Another "normal" cause of reduction cannot be imagined. The reduction of the reserve fund as a result of an illegal distribution is addressed in Article 21.

ARTICLE 21

The Text of the Article

> Agreements of the administrators or the partner and shareholder meetings that are contrary to the above article shall be null and void by operation of law. If it appears at any time that the appropriate net profits have not been set aside to form or replenish the reserve fund, the responsible administrators will be jointly and severally liable for delivering to the company an amount equal to the amount that should have been set aside.

The administrators retain the right to sue for restitution against the partners for the value of the reserve fund distributed.

In this case, the capitalization of the legal reserve will not be considered a distribution. However, the legal reserve should be reestablished as of the fiscal year following such capitalization, pursuant to the terms of Article 20.

Commentary

To a certain extent the first part of this Article is unnecessary, since administrators do not have powers over the creation or replenishment of the reserve fund. Furthermore, any resolution taken at the partner or shareholder meeting against a mandatory legal provision, such as Article 20 of the LGSM, is null and void. Thus, in practice it is difficult for those resolutions to be adopted. It is more likely that administrators will simply fail to set aside the profits to form or replenish the reserve fund. In this case, Article 21 provides that the responsible administrators shall be jointly and severally liable for delivering to the company an amount equal to the amount that should have been set aside. By the way this provision is drafted, it cannot be determined what type of company is envisioned or if the administration of the legal reserve is the responsibility of one or more managers or of a board of directors; furthermore, it is presumed that what should have been set aside for the reserve fund was distributed among the partners or shareholders as profits.

It is interesting to consider to what degree are the administrators responsible for a failure to set aside the amount necessary to form the legal reserve fund. The situation can vary depending on the type of company involved. Consider, for example, the case of a stock corporation, since ultimately the requirements to be complied with are the same for all types of companies. In the case of the stock corporation, the administrative body prepares financial statements, which must be submitted to the consideration of the shareholder meeting. The same administrative body submits for the consideration of the meeting a proposal for the application of the profits of the fiscal year. In this proposal, it is customary and correct to mention the amount that should be set aside for the formation of the legal reserve fund. If the administrative body fails to do this, an objection can be raised and the omission corrected by the shareholder meeting. Such an omission would also be the responsibility of the examiners. Therefore, the fault for failing to set aside the necessary amounts for the formation of the reserve fund does not rest exclusively with the administrators, but also with the examiners and with the shareholders who approved the draft of the application of the profits.

In the next paragraph of the Article, the administrators are granted the right to sue the partners for restitution of the value of what has been distributed to the partners as profits that should have been used to form the reserve fund. This in theory could be very difficult, especially when the number of shareholders is very large, as in the case of a stock corporation.

Consider what happens when funds have not been set aside to form the reserve fund and the company has within its accounts an item for profits pending distribution. In this case, we believe that the administration of the company could take from this account the amount necessary to apply it to the formation of the reserve fund, informing the shareholder meeting at the appropriate time.

The premise of the final paragraph is that the capitalization of the legal reserve fund can be considered a distribution. This is absurd. The legal reserve fund was created to strengthen the solvency of the company, which is achieved to a large degree through the capitalization of the reserve fund. Even more, in this case the formation of the legal reserve fund would be initiated again, but now on the basis of its increased capital as of the fiscal year following the year in which the capitalization was carried out, as established in Article 20. •

Licenciado Manuel Lizardi A.

New NOM on Labeling: Commercial and Health Information

On April 5, 2010 the NOM-051-SCFI/SSA1-2010 (hereinafter, the "new NOM") was published in the *Official Federal Gazette* (*Diario Oficial de la Federación,* DOF). This standard establishes the commercial and health information that should be included on the labeling of prepackaged food and nonalcoholic beverages manufactured domestically or abroad and destined for the Mexican consumer.

The new NOM repeals the Official Mexican Standard NOM-051-SCFI-1994, "General specifications for labeling for prepackaged food and nonalcoholic beverages," published in the DOF on January 24, 1996 (hereinafter, the "repealed NOM"), as well as all the interpretations, rules, instructions, manuals, circulars, guidelines, procedures, or other provisions deriving from it.

The purpose of the new NOM is to provide greater protection to the consumer. It attempts to do so through the modifications and additions to the repealed NOM analyzed below.

Definitions

The definition of *nonalcoholic beverage* is changed to now read: "Any natural or transformed liquid that provides to the body elements for its nutrition and that contains less than 2.0% in volume of ethylic alcohol." The repealed NOM indicated in its definition a maximum alcohol content of 5.0 percent.

Reference is also made to the terms *Recommended Daily Intake* (RDI), and *Suggested Daily Intake* (SDI), establishing the manner in which these numbers should be calculated and when they should be used.

Some Inclusions in the General Labeling Requirements

1. The obligation is added of declaring all the ingredients or additives that cause hypersensitiveness, intolerance, or allergies, among which are cereals that contain gluten, crustaceans and their products, eggs and egg products, fish and fish products, peanuts and peanut products, soy and its products (except soy oil), milk and its dairy products (including lactose), nuts and their derivatives, and sulfites in concentrations of 10 mg/kg or more.
2. The declaration of additives must be made using a product's common name or one of its synonyms, established in the ruling published by the Ministry of Health (*Secretaría de Salud*); the declaration of enzymes and flavorings, seasonings, or aromatics should be made as generic names, and flavorings, seasonings, and aromatics may be classified with the terms *natural*, *identical to natural*, *artificial*, or in some combined form as applicable.
3. Quantitative labeling. On every prepackaged food or nonalcoholic beverage that is sold as a mixture or combination, the percentage of the ingredient must be declared with respect to the weight or the volume corresponding to the ingredient at the time of the preparation of the food (including the compound ingredients or categories of ingredients) when this ingredient (i) is emphasized on the label as present through words, images, or graphics, or (ii) it does not figure in the name of the prepackaged food or nonalcoholic beverage and is essential for characterizing it, because consumers assume its presence or because the omission of the quantitative declaration of ingredients could mislead the consumer.

   This information shall be declared as a numerical percentage on a specific part of the label.
4. The lot declaration should be printed in indelible and permanent ink.
5. The legends with respect to the date of expiration or preferable consumption are indicated and the obligation is established to declare the day and month for products of a maximum duration of

three months and the month and year for products of greater duration.

This declaration is not required for vinegars, food quality salt, solid sugar, candy products consisting of scented and/or colored sugars, and chewing gum.

6. Three sections are included regarding potentially misleading properties, conditional properties, and nutritional and health declarations, which we suggest be analyzed in order to be sure the declaration is adequate and correct.

Important Modifications to the General Labeling Requirements

1. The compound ingredients should be declared when they constitute more than 5% of the food or nonalcoholic beverage, including the additives that perform a technological function in the finished product or that are associated with allergic reactions.

   The repealed NOM established this requirement when the compound ingredients constituted more than 25 percent of the food, and therefore it is important to take this change into account and review the compound ingredients in each case.

   Furthermore, in the new NOM the additives that do not have a technological function in the finished product are exempt, as are preparation assistants, from their declaration in the list of ingredients, except for those that can cause hypersensitiveness.
2. Cheese mixes, lactose protein, condiment mixes, lactose cultures, milk solids, and chili or a mixture of chilis, are now considered general names of ingredients.
3. The repealed NOM established the obligation to declare the name and tax domicile of the manufacturer or of the company responsible for manufacturing and, in the case of importation, of the importer. The new NOM changes this requirement and establishes that in both cases the contact information of the one responsible for the product should appear, which would be the individual or entity that imports or produces the product or that had ordered its total or partial production from a third party.
4. The nutritional declaration on the label of the products becomes mandatory instead of voluntary, and the requirements that must be complied with are established. Only those products that have only one ingredient, herbs, spices or mixtures of spices, coffee extracts, whole bean coffee, herb infusions, tea without added ingredients, and purified bottled waters or natural mineral waters are excluded from this obligation.

Considering that the principal purpose of this NOM is consumer protection, it is established that prepackaged food and nonalcoholic beverages should not be described or presented with a label that uses words, texts, dialogues, illustrations, images, allocations of origin, and other descriptions that refer to or suggest, directly or indirectly, any other product with which it could be confused, or that could cause the consumer to presume that the food is somehow related to the other product.

The Federal Consumer Protection Agency (*Procuraduría Federal del Consumidor*) and the Federal Commission for Protection from Health Risks (*Comisión Federal para la Protección contra Riesgos Sanitarios*) are responsible for verifying compliance with the new NOM.

The new NOM will enter into force on January 1, 2011. It is important to mention that the companies may, as of the date of publication and up to three months before the entrance into force of the new NOM, request from the NOM Office of the Ministry of Economy (*Dirección General de Normas de la Secretaría de Economía*) modifications for the prepackaged food and nonalcoholic beverages for which the labeling cannot be changed in order to comply with the provisions of the new NOM at the time it enters into force.

In this article the most important points to consider with respect to the new NOM are mentioned. However, it is recommended to get advice and carefully read all the specifications in order to be prepared and therefore avoid any breach thereof once it has entered into force. •

Guidelines for Comparative Advertising

As we have informed our readers previously, advertising that compares products or services is permitted in Mexico, provided it has an informative purpose and complies with the provisions of the Federal Consumer Protection Law (*Ley Federal de Protección al Consumidor*, LFPC).[1] In this article, we would like to comment on the guidelines that were recently issued in this area, which are related to the verification referred to in the last part of Article 32 of the LFPC.

Since *price* is one of the attributes that are often considered when comparing goods, products, or services, a ruling by which the Federal Consumer Protection Agency (*Procuraduría Federal del Consumidor*) established specific guidelines for comparative information or advertising in relation to the prices of goods, products, or services was published in the *Official Federal Gazette* (*Diario Oficial de la Federación*) on October 19, 2009, adding a new criterion to those already existing.[2]

These guidelines establish that comparative advertising regarding prices that is graphic, visual, or auditory[3] must make reference to goods, products, or services[4] that, being identical (same type, model, presentation, and content), are sold by different suppliers, except in the cases of perishable products not prepackaged or products sold in bulk that by their nature are not subject to this type of comparison.

The purpose of the guidelines is to restrict and/or limit the terms of comparison based on price in order to provide consumers more certainty and security. For example, the ruling establishes that the prices of goods, products, or services must be stated in absolute numbers and not in percentages. It also indicates that the prices compared must be backed up by receipts or other documents that contain official certification of the price and that, allowing for the exact identification of the good, product, or service compared, they be made available to the consumer the day of the acquisition or of the verification of the price (the term of such information or advertising may not surpass five days). The date on which the price was compared must also be indicated clearly and visibly and the following caption must be included: "As of this date, the price being compared could have changed."

Finally, it should also be mentioned that a violation of these guidelines, as well as the previously existing one, will be punished according to the applicable provisions of chapters XII and XIV of the LFPC. •

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1 Comparative advertising is advertising that compares or contrasts two or more goods, products, or services, whether or not of the same trademark.

2 These guidelines are added to those contained in the *Procedures Manual* of the Procedures Bureau of the Federal Consumer Protection Agency.

3 Advertising in the press, radio, television, flyers or in any other medium or form.

4 In the case of services, the comparison can be made only with respect to those that are identical in type, concept, and/or characteristics.

Rights over Computer Programs

In Mexico, under the provisions of Article 19, paragraph VI of the Industrial Property Law (*Ley de la Propiedad Industrial*, LPI), computer programs are not considered inventions of a technical nature and therefore are not patentable. However, the combination of technical means (a device) with non-technical means (a computer program) may be patentable.

Computer programs as such are protected through the National Copyright Institute (*Instituto Nacional del Derecho de Autor*, INDAUTOR) and Article 13, paragraph XI of the Federal Copyright Law (*Ley Federal del Derecho de Autor*, LFDA), which recognizes copyright in relation to computer programs. However, the protection of such material provided by INDAUTOR and the LFDA is weak and of relatively short duration (see articles 33, 101, and 102).

Patents for inventions involving computer programs provide applicants with better protection than copyrights; however, the time required to acquire a patent continues to be excessive (3–6 years), considering the speed at which this technological area develops.

Currently computer programs are involved in and interact with various electronic devices. As a result, companies specializing in computer software development as well as companies in the field of communications are seeking to protect that technology through patents.

The evaluation of applications to the IMPI for patents on computer programs consists of this: determining if the non-technical mechanism (the computer program) interacts directly with the technical mechanism (the device or apparatus) to perform the functions for which it was designed, and whether such a combination also satisfies the patentability requirements set forth by the LPI (novelty, inventiveness, and industrial applicability). If the patent application meets these requirements, then the IMPI will grant the patent applied for.

However, the IMPI does not have guidelines for granting patents related to computer programs. As a result, there is still wide discretion in the application of the law. Thus, anyone applying for such a patent should have advisors who know the different interpretations of the legal framework assumed by patent examiners of the IMPI.

The patent offices in the United States and Europe have relaxed their criteria for granting patents relating to computer programs. We consider it likely that once the IMPI sets guidelines governing the issuance of these patents, Mexico will adopt American and European criteria. •

Changes in Making Filings before the IMPI

This year there are several changes regarding filings made before the Mexican Industrial Property Institute (*Instituto Mexicano de la Propiedad Industrial*, IMPI), which seek not only greater compatibility with a series of international guidelines, but also to facilitate the processing of patents and registrations in Mexico.

Specifically, these important reforms are found (i) in the decree published in the *Official Federal Gazette (Diario Oficial de la Federación*, DOF) on January 6, 2010, in which a third and fourth paragraphs were added to Article 181 of the Industrial Property Law (*Ley de la Propiedad Industrial*, LPI), and (ii) in the ruling published in the DOF this past March 18, which amends the ruling containing the rules for the presentation of petitions before the IMPI (hereinafter, the "Ruling").

Paragraphs 3 and 4, added to Article 181 of the LPI, put forth the possibility of establishing the representative capacity of an agent in applications for the registration of a trademark, collective mark, or slogan, or for the publication of a trade name (as well as in their subsequent renewals) and in the filings related to the registration of licenses or transfers,[1] simply by the agent stating in writing and under oath that he/she has the powers necessary to carry out such procedures.[2]

According to the ruling amending the rules for the presentation of petitions before the IMPI, the forms that have been used are being changed in order to eliminate several sections that refer to information that is no longer necessary. In addition, new forms have been created for filings that previously were made without pre-established forms in which sometimes all the legal requirements were not covered.[3]

These new forms have now been made available to users. In fact, the third transitory Article of the Ruling establishes that as of April 1, 2010, the IMPI will only accept these official forms.

In regard to the filings that are subject to these reforms,[4] it should be mentioned that to date there are several questions that have arisen and are being discussed in the corresponding forums in search of the specific interpretation from the authority, since in addition to amending the forms, the applications for

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1 Does not apply to patents, since they are not included in the Reform.

2 Based on the new paragraphs of Article 181 of the LPI, it is not necessary to attach the power of attorney document to the application. However, the person signing it must be the same person from the beginning to the conclusion of the procedure. If a new agent intervenes, he/she must establish his/her representative capacity. It is also important to be clear that the statement under oath by the representative claiming "to have the necessary power" presumes that a power of attorney document exists (even though it is not filed).

3 These official forms will be available at the site www.impi.gob.mx. The forms, as defined in Article 34 of the Ruling, are the following: (i) request for registration or publication of distinctive signs; (ii) request for renewal; (iii) request for registration of transfer of rights and complementary procedures regarding the information on changes of intermediary title holders; (iv) request for registration of license for use or franchise; (v) request to take note of change of domicile; (vi) request for registration of transformation of legal regime or change of corporate name; (vii) request for authorization for use of designation of origin; (viii) request for registration of agreement allowing the use of a designation of origin; (ix) patent, utility model, and industrial design application; (x) request for registration of integrated circuit design diagram; (xi) request for technical information on patents, and (xii) request for registration in the General Powers Registry.

4 Not all filings require official forms and, in fact, Article 36 of this ruling indicates that those requests or filings that do not require official forms should be filed in duplicate, indicating in the heading the type of filing requested; the number of the request, patent, registration, publication, declaration, or folio; and the date of reception thereof.

patents and registrations themselves are being amended.

For example, with the entrance into force of these new forms, the IMPI eliminates the possibility of mixed filings (with which it was possible to apply in the same document for the resolution of different kinds of filings). We will mention a few examples. While until now, in relation to transfers, two or more procedures could be requested on the same form, from now on an individual form will have to be presented for each filing.[5] Further, until now it was possible in the case of registrations to request the verification and certification of a document with the same petition. From now on each application must be accompanied by the related document in its original form or a certified copy (which means that before initiating the filings it is necessary to request the issuance of certified copies and wait for their delivery by the IMPI).

The legal consequences of the new paragraphs of Article 181 of the LPI have been widely discussed. In fact, it is not clear whether or not it is necessary that a power of attorney exist from the moment the filings are initiated. (If it did not exist, it would not be possible to subsequently ratify the steps taken.) It is important to clarify this point in order to avoid challenges based on the lack of representative capacity of the agents.

In order to keep our clients informed, Von Wobeser y Sierra will follow up on the interpretations and decisions issued in regard to changes that are implemented. •

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5 Mix requests are different from multiples requests, which refer to more that one official file at a time and are allowed according to articles 137 and 143 of the LPI.

ANTITRUST

The Substantial Power of TELMEX in Telecommunications

The Federal Competition Commission (*Comisión Federal de Competencia*, CFC) is authorized to carry out investigations on its own initiative or at the request of another party with respect to the substantial power of economic agents in different markets. Once the CFC has concluded an investigation, it can issue a declaration that an economic agent has substantial power in a particular market if its investigation so indicates.

The above is especially relevant when a declaration is made regarding an economic agent who provides telecommunications services. Article 63 of the Federal Telecommunications Law (*Ley Federal de Telecomunicaciones*, LFT) establishes that if the CFC declares that an economic agent to which public telecommunication networks have been concessioned has substantial power in the market to provide services in this sphere, the Ministry of Communications and Transportation (*Secretaría de Comunicaciones y Transportes*), through the Federal Telecommunications Commission *(Comisión Federal de Telecomunicaciones*, COFETEL), can establish specific obligations related to rates, quality of service, or information.

Through the above-mentioned provisions, the government can intervene in the telecommunications market in Mexico, which is clearly controlled by the economic group led by Teléfonos de México, S.A.B. de C.V. (hereinafter, "Telmex").

As explained below, in 1992 the CFC declared that Telmex has substantial power in various markets related to telecommunications; however, until now, more for reasons of form than substance, it has been impossible to implement the process of establishing special conditions for an economic agent such as that described above.

Past Declarations of Substantial Power

In 1997 the CFC conducted an investigation and declared that Telmex had substantial power in the

relevant markets of (i) basic local telephone services, (ii) national long distance services, (iii) international long distance services, (iv) access or interconnection services, and (v) interurban transportation.

In view of the above, in September 2000, pursuant to the LFT, the COFETEL issued special measures in these markets to Telmex, referring to the rates of the services, their quality, and the information related to them. In 2001 Telmex challenged the above-mentioned declaration through an amparo proceeding.

In 2006, after five years of analysis, the Federal Courts resolved that the CFC did not have sufficient evidence to declare that Telmex had substantial power in the mentioned markets. It therefore revoked these declarations, invalidating the measures imposed by COFETEL as a consequence of the findings.

Even though the declaration of the CFC was revoked, it was an important first step toward the prevention of monopolistic practices in an essential market in Mexico.

Recent Declarations of the Substantial Power of Telmex in Telecommunications Services

Recently, the CFC issued the following declarations regarding the substantial power of Telmex in the above-mentioned markets:

1. On June 25, 2009 the CFC declared that Telmex had substantial power over 97 local dedicated links leasing wholesale markets and 97 long distance dedicated links leasing wholesale markets.

   The dedicated links leasing markets refer to the use of Telmex infrastructure throughout the Mexican Republic by other suppliers of telephone services. Since Telmex is the company that currently has the best infrastructure in the country, Telmex could lease such links to its competitors at a price above the market price and therefore unfairly displace them from the market.
2. On October 1, 2009 and October 22, 2009 the CFC declared that Telmex has substantial power in different markets in local telephone services.
3. On January 21, 2010 the CFC again declared the substantial power of Telmex in the market of mobile telephone services in national territory.

These declarations were drafted by the CFC in a more detailed fashion in order to remedy any errors committed in the past. In other words, the CFC drafted the terms of these declarations carefully in order to avoid their revocation.

The declarations of substantial power made by the CFC from mid-2009 until early 2010 are another attempt to regulate and therefore be able to intervene in the important market of telecommunications, which is currently controlled by Telmex, preventing the entrance of new competitors and harming the competitive process in Mexico.

If these declarations remain firm—even after being challenged by Telmex before different authorities, as they will be—and the measures to be imposed by COFETEL are enforced, the CFC, and free competition in Mexico in general, will achieve one of its greatest victories. •

Important Changes Concerning Mexican Visas

1. In order to facilitate and promote tourism to Mexico, as of May 1, 2010, any alien arriving in Mexico on a flight from the United States for the purpose of engaging in tourism, business activities, or transit to a third country will not be required to obtain a Mexican visa, whatever his country of origin, provided he possesses a valid and current passport as well as his boarding pass. This provision does not apply to aliens entering Mexico using ground transportation.
2. Any alien arriving in Mexico for the purpose of engaging in tourism, business activities, or transit to a third country will not be required to obtain a Mexican visa, whatever his country of origin, provided he possesses a valid and current passport as well as a valid and current United States visa.

Visa requirements for aliens traveling to Mexico for purposes other than engaging in tourism, business activities, or transit to a third country have not changed. •

New Immigration Forms

Last March 3, the National Immigration Institute (*Instituto Nacional de Migración*, INM) released, through the *Official Federal Gazette*, the Basic Form and the immigration forms for Non-Resident Aliens, Immigrants, Resident Aliens, Non-Immigrant Visitors, Migrant Workers, and Non-Immigrant Local Visitors, as well as the Statistical Form for Mexican Citizens.

The new provisions issued by the INM entered into force on April 29.

The procedure for any person interested in obtaining a Non-Immigrant Immigration Form, an Immigrant Immigration Form, or a Migrant Worker Migration Form, is as follows:

1. Deliver a properly completed immigration form to the local immigration office;
2. Attach documentation substantiating compliance with all requirements applicable to the alien, according to the prescribed procedure for issuing or renewing immigration forms;
3. The immigration authority will verify the application by checking the file number in the system; subsequently, the migration authority will return a confirmation of same to the applicant;
4. The alien must report back to the immigration office to sign the Basic Form and be fingerprinted on the form in the presence of an INM official;
5. The immigration office will issue its decision within a period of 30 calendar days. Where the immigration document issued replaces an existing Multiple Immigration Form, a Non-Immigrant Migratory Form, or an Immigrant Migratory Form, the decision period shall not exceed three working days.

Immigration documents issued by the INM prior to April 30, 2010 shall remain valid for their stated duration. These documents should be renewed when the alien is granted an extended stay in Mexico or effects some other transaction that requires the issuance or renewal of the alien's migratory documents.

APEC Business Travel Card

The adoption of the new immigration forms will allow for their incorporation into computer systems, resulting in legal certainty in the immigration treatment of people and allowing the immigration authority to effectively provide immigration services and controls. •

As of April 29, 2010, the Asia-Pacific Economic Cooperation (APEC) Business Travel Card (ABTC) was introduced in order to expedite the entry of businesspeople into countries of the Asia-Pacific region.

The ABTC permits businesspeople to enter APEC countries by presenting only the card and a passport, obviating the need for cardholders to have obtained a visa in their home countries.

The economies participating in the ABTC program are:

- Australia
- Brunei
- Canada
- Chile
- China
- Chinese Taipei
- Hong Kong (China)
- Indonesia
- Japan
- Korea
- Malaysia
- Mexico
- New Zealand
- Papua New Guinea
- Peru
- Philippines
- Singapore
- Thailand
- United States
- Vietnam

Canada and the United States are currently transitional members of the ABTC scheme. As transitional members, these countries expedite the visa process for ABTC holders and grant them access to special immigration processing lanes at major international airports. It is expected that in the coming years, each will fully participate in the scheme.

The ABTC is valid for three years, allowing the holder multiple entries. The length of stay that the ABTC

allows may vary from one member country to another, the minimum being two months.

The ABTC is issued by government authorities in each member country. In Mexico, the relevant issuing authority is the National Immigration Institute. •

ENVIRONMENTAL

Renewable Energies in Mexico

The enormous potential of renewable energy in Mexico continues to be overseen through the National Energy Strategy.

In February of this year, the Ministry of Energy published the National Energy Strategy (hereinafter, the "Strategy"), which establishes as one of its objectives the diversification of sources of energy by increasing the participation in clean technologies, among them renewable energy.

It is commented in the Strategy that there are significant barriers that have limited the development of renewable energy in Mexico. In this regard, the Strategy states specifically that "the schemes used for its promotion do not have the incentives that are offered in other countries, and therefore it is difficult to attract investment, both public and private."

What are the mechanisms that have been implemented in other countries to promote investment in renewable energy? Some of the most common schemes used around the world are the following:

- *Feed-in Tariff*. Consisting of the creation of differentiated tariffs for the purchase of electricity generated by renewable energy sources and incorporated into the public power grid. Generally, tariffs are based on the cost of generation and can vary according to the technology used and the geographic location of the project.
- *Renewable Portfolio Standards (RPS)*. These are federal policies that require that renewable technologies supply a certain percentage of the energy generated in the country within a certain time period.
- *Carbon cap and trade*. The central authority establishes a gradually tightening cap on the carbon that can be emitted by large carbon emitting entities and auctions emissions permits according to the amount of emissions allowed. These entities can then trade the permits among themselves in order to efficiently distribute the costs of emissions reductions.

- *Net Metering*. Small generators of renewable energy can connect their generation systems to the grid and receive credit for any electricity they transmit to the grid.
- *Production Tax Credit* (*PTC*). Scheme by which a generator receives a tax stimulus for each kilowatt-hour (kWh) of energy generated from renewable energy sources.
- *Other economic, financial, and tax instruments*. There are many possible economic and financial instruments to promote the generation of renewable energy, such as subsidies or discounts on the capital investment in the production of renewable energy and exemptions from VAT, among others.
- *Renewable energy funds*. Funds to finance investments directly in renewable energy, as well as to offer low interest loans or otherwise facilitate investment.

Of the above-mentioned instruments, Mexico is making use of the following, in addition to promoting various projects and programs related to the energy sector:

- *Renewable Portfolio Standards* (*RPS*). The Special Program for the Use of Renewable Energy establishes as a target an installed capacity of renewable energy of 7.6% in 2012 (this percentage was 3.3 in 2008), without counting hydroelectric projects with a capacity greater than 30 MW.
- *Net metering*. The Energy Regulatory Commission has issued the following three model contracts for this type of interconnection: (i) interconnection contract for intermittent renewable energy sources, which applies to remote self-supply projects (located at a site other than the points of consumption) that use intermittent renewable sources (wind, solar, and hydroelectric in some cases); (ii) interconnection contract for small-scale source of solar energy, which permits homes and small businesses connected to the grid to generate their own electricity with solar power through a net metering system (compensating excess production at one moment in time against consumption at another); (iii) contract by which small producers promise to purchase electricity from the National Interconnected System. Also for small production projects (projects that generate electricity exclusively for its sale to the grid and with a capacity of less than 30 MW), which offer those who use renewable energy a monetary benefit.[1]
- *Economic, financial, and tax instruments*. The tax law allows companies that invest in machinery and equipment for the generation of energy from renewable sources to deduct 100% of the investment in a single tax year.
- *Renewable energy funds*. The Law for the Use of Renewable Energy and the Financing of the Energy Transition has created a Fund for the Energy Transition and the Sustainable Use of Energy. However, the instruments that have subsequently been issued in order to regulate the Law's provisions have not established rules for the operation of this fund, and therefore the financing of projects to produce renewable energy through this mechanism is uncertain.

These instruments already existing in Mexico show the efforts the Government is making to develop a market for renewable energy. However, it is doubtful that these measures are sufficient to attract the private investment necessary to reach the renewable energy capacity target established. The lack of legal certainty (reflected, for example, in the legal limits

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[1] See "Energías renovables para el desarrollo sustentable en México 2009" at the following site: http://www.sener.gob.mx/webSener/res/0/ER_para_Desarrollo_Sustentable_Mx_2009.pdf

on the participation of private investment in the energy sector and on the investment that the Federal Electricity Commission [*Comisión Federal de Electricidad*, CFE] can make in transmission lines for private use; in the obligation of the CFE to find the lowest price for the purchase of energy; and in the absence of an adequate regulation of renewable energy) and the scarcity of financial mechanisms and other economic incentives are barriers to the development of the market.

In spite of the fact that there are still significant barriers to investment in renewable energy, one piece of good news is that in March of this year, the CFE awarded the contract for the development of wind energy projects in the Istmo de Tehuantepec, in the state of Oaxaca, which will enter into commercial operation in 2011, with a generation capacity of 304.2 MW. The project will be carried out under the concept of "Independent Energy Producer," and shows that it is possible to attract private investment in this sector.

Nevertheless, the country's potential in relation to renewable energy continues to be underdeveloped. One clear example is the failure to develop the use of solar energy, in spite of its enormous potential in Mexico. In Germany and Spain, with adequate incentives, the investment in solar energy has grown impressively. Even in India, a Solar Energy Program has been set forth seeking to produce 20,000 MW in the year 2020 (currently in India, 3 MW of electricity are produced from solar energy) with binding renewable energy purchase targets and subsidies for its generation.

In the case of Mexico, the strategies for the exploitation of solar energy are limited to stating that the cost of the development of this technology is too high; those strategies do not show either the vision nor the will to create policies and schemes that would make such technology competitive and therefore attract investment. •

Inclusion of the Theory of Unpredictability in the Civil Code for the Federal District

On January 22, 2010 a reform of the Civil Code for the Federal District (hereinafter, the "Code") was published in the *Official Gazette of the Federal District*. The reform entered into force on the day following its publication. It amended Article 1796a of the Code; articles 1796b and 1796c were included. The reform maintains the previous contractual regulation that requires parties to perform what they have expressly agreed to, but adds the possibility, in the case of extraordinary changes in circumstances, of modifying the contract in order to ensure a better balance in the obligations undertaken by the parties.

Article 1796 substantially contemplated that legally executed contracts bound the contracting parties to what they had expressly agreed, a principle implemented since the Napoleonic Code (Article 1134) and contemplated in our prior Code of 1884 (Article 1419), under which contracts bind the contracting parties according to their contents.

This rule has governed contractual relations through several centuries, based on the theory that since the intent of the signatories is supreme, contracts must be complied with in the manner in which it was agreed their contractual relationship would be governed. However, this principle is called into question when the contractual relationship is faced with changes in circumstances from those under which it was negotiated.

The change in circumstances may make performance or execution of the contractual obligations partially or entirely impossible or modify such obligations to such an extent that the functional balance of the institution is broken. Legal scholars, relying on the principle of *rebus sic stantibus* ("if things stay the same"), argue that the courts could have the right to eliminate or modify contractual obligations, adjusting them to the new circumstances, so that they can be fulfilled in those cases where the parties have not provided for such modifications.

This argument is known as the "theory of unpredictability," which gives greater weight to justice than to legal certainty. This theory was not contemplated by our law; its application depends on the judgment of the court hearing a specific case, although there are interpretations of judicial authorities that completely reject its application in the Mexican legal system under the argument that our system has universally adopted the principle *pacta sunt servanda* —agreements are to be complied with—and the contracting parties must perform their obligations regardless of changes in circumstances.[1]

In this manner, the reform and the additions mentioned establish the inclusion of this theory of unpredictability in our Civil Code for the Federal District which, according to the words of the local representative of the PRD and presenter of the amendments, Alejandra Barrales, "constitutes an important effort to prevent families from being asphyxiated by debts."

The reform is only applicable to those contracts whose performance is subject to a term or condition or that are continuous performance agreements. It will not be applicable to aleatory contracts. Morover, the reform does not indicate if it will be applicable to all contracts currently in force or only to those executed after it enters into force.

In order for a contractual modification to be valid, it has been established that an "extraordinary national event" must occur; however, it is not speci-

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[1] In this regard, see this binding court decision: "Contracts. Those legally entered into shall be faithfully complied with, notwithstanding future unpredictable events that could alter the performance of the obligation, according to the conditions that prevailed when it was negotiated." Record no. 186972. Location: Ninth period. Instance: Circuit Collegiate Courts. Source: *Federal Judicial Weekly and its Gazette* XV, May 2002, p. 951. Decision: I.8o.C. J/14. Binding court decision. Matter(s): Civil.

fied how this phrase should be understood, nor is it clear who is authorized to determine what events can be considered to fall in this category.

The request for modification of the conditions of a contract must be presented—presumably to the other contracting party, although the reform does not specify—within 30 days following the extraordinary event. The request for modification must be grounded in fact and does not in itself confer the power to suspend performance of the contract.

Once the request is presented, the parties have a term of 30 days to reach an agreement with respect to the contractual modifications. If they cannot reach an agreement, the parties may go before the judicial authority. The plaintiff, in this case, within the next 30 days, may choose between (i) contractual modification, in order to re-establish a balance in contractual obligations, or (ii) termination of the contract. Rescission cannot be requested if the petitioner is in default or has acted in bad faith.

The reform does not establish if the 30-day periods alluded to are calendar days or business days. From the context of the Code, it should be understood that these time periods refer to calendar days.

If an agreement is reached or a judicial authority declares a contractual modification, this modification will only be effective in the future.

The reform is a bad implementation of a good intention to improve contractual regulation, given that in addition to the omissions we have pointed out, no summary proceeding is provided to obtain the contractual modification, and therefore it must be processed in an ordinary proceeding, which means that its resolution could take, in the best of cases, at least one year. During this time the contractual conditions cannot be modified, and when the final decision is issued it will only apply in the future, thereby leaving in place the "unjust" consequences of the extraordinary national event.

In addition, the deficiency in establishing the scope of this petition could result in its use as a strategy for not making payments when due, which would produce an effect contrary to the intention of the reform. •

The Importance of Attendance Controls in Companies

In this article we will explain the importance of employees registering their attendance at the company and the consequences and risks for the company of not having an attendance registry where the employees record their attendance.

What is the objective of having employees register their attendance at the company?

The objective is for the company to have a record of the hours its employees work and to ensure that they are completing their work schedules.

Secondly, in the case of a labor suit, the attendance registry will permit the company to evidence the actual work schedule of the employee and, if necessary, demonstrate that the employee did not work overtime. According to the Federal Labor Law (*Ley Federal del Trabajo*, LFT), the company has the burden of proving both of these to the labor authorities.

Thirdly, with the attendance registry, the company can show and prove any unjustified absences by employees.

Finally, the attendance registry allows the company to identify those workers who have worked overtime and to pay them any corresponding amounts.

What type of attendance registries exist?

The LFT does not require any specific system of attendance registry, and in practice several systems are used. Among the most common are the following:

a. *Time cards*, on which can be read—written by hand or by machine—the name of the employee and the corresponding date. The employee introduces his/her card into a time clock that marks the time of arrival and departure on the card. The employee must sign the card at the end of the week or semi-monthly.
b. *Attendance lists*. The employee records on the list his/her name, the date, the time of his/her arrival and departure, and his/her signature.
c. *Electronic attendance control cards*. When the employee gets close to a reading device, it registers the name (which is stored on the card), the date, and the times of arrival and departure of the employee. Every week, two weeks, or month the electronic records of each employee should be printed out and signed by the employee (thus indicating the employee's agreement). They should be kept as a record.
d. *Attendance registry by an electronic fingerprint or cornea reader*, which is activated when the employee puts his/her finger on or cornea in front of the device. The device identifies the employee and keeps a record of the date and the time of his/her arrival and departure. As in the case of electronic cards, this registry should be printed each week, two weeks, or month and be signed by the employee, thus showing his/her acceptance of it and thus serving as a record.

Of all the attendance registries that we have mentioned, the one we recommend most is the last one, the fingerprint or cornea reader, since it prevents an employee from recording the attendance of another employee.

What is the correct manner for the employees to register their attendance at the company?

The employees should register their attendance at the company four times a day, as follows:

1. When their work shift begins;
2. When they leave to eat;
3. When they return from eating;
4. When they leave for the day.

It is very important that the employees register their attendance in this manner and that the company requests the employees to sign the attendance control records, which should contain their name and the dates and the times of their arrival and departure each day for a week, two weeks, or a month.

Without the signature of the employees, these attendance control records will not serve as valid evidence for the company in the case of a labor lawsuit.

Should all employees register their attendance at the company?

In principle, all employees should register their attendance at the company, since the LFT does not distinguish between employees.

However, there are exceptional situations in which it would be difficult to have the employees registering their attendance, as in the case of salespersons and directors of the company.

In the case of these employees, and for the company to be protected, the individual employment contract should establish that, as a result of the functions they carry out, an attendance registry will be difficult and therefore their attendance will not be recorded, but that they are obligated to work within the work shift hours or the maximum work shift which should also be stipulated in the agreement.

For greater protection of the company from a claim for overtime, especially in the case of employees who do not register their attendance, we recommend that their employment agreement include a clause that prohibits the employees from working overtime without a prior written authorization signed by a high-level officer of the company, such as the human resources director.

What are the risks and consequences of employees not registering their attendance at the company or doing so incorrectly?

As we mentioned, in the case of a labor lawsuit where there is a conflict over the actual amount worked by the employee, the company will have to prove the hours worked before the labor authorities, and for that it will be necessary to show documents signed by the employee that establish the work shift in question, such as an individual employment agreement and the attendance control registry.

In general, employees may claim to have worked shifts or hours not actually worked in order to claim the payment of overtime. Therefore, it is very important to be able to prove the actual hours worked by the employee and evidence that he/she did not work overtime. The attendance control registry signed by the employee that meets the above-mentioned requirements and the individual employment agreement indicating the corresponding work shift, are the only documents necessary to prove this.

The lack of an attendance control record for the employee or the existence of a record that is deficient can have the following consequences:

a. In the case of a labor lawsuit, the company can be ordered to pay the corresponding overtime for at least the last year of the employee's employment, which can potentially be a large sum of money.
b. If the employee has more than three unjustified absences within a 30-day period, the company would not be able to rescind the employment for this cause, since it would not have the required evidence of such absences.
c. In the case of an unjustified absence, the company would not have the required evidence to be able to deduct the hours missed from the employee's pay.

Conclusion

It is very important that companies have the attendance records of their employees in order to avoid having to make payments to employees based on false claims. It is the company that, in the case of a labor suit, has the burden of proving the terms and conditions of employment. This includes the work hours of the employee and whether or not the employee has worked any overtime for the company. •

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