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Newsletter 31

Von Wobeser y Sierra

Editorial

The year 2011 has begun and, regreatably, the acts of violence associated with drug trafficking have tarnished Mexico's image in the world, overshadowing the enormous goodwill and advantages our country offers in many different spheres. While we believe that this is a temporary situation and that there is a medium-term solution, overcoming this perception requires not only the efforts of the authorities and of Mexican society, but also the understanding and support of the international community.

In the economic sphere, 2010 was characterized by a notable recovery of the Latin American region. The region is leaving behind a worldwide recession, the effects of which are still being felt in many countries. Mexico in particular showed clear signs of economic improvement, such as growth in the Gross Domestic Product of 5 percent, the robust creation of jobs, and an increase in international reserves and direct foreign investment, all of which point to a good 2011 for the finances of the country. For this coming year Mexico expects an increase in GDP of between 4 and 5 percent, an estimate that does not seem exaggerated if factors such as internal consumption and the U.S. recovery are considered. However, the governments of the region, and especially of Mexico, must take the measures necessary to effectively confront any crisis that may arise from the complex and uncertain international economic environment. Thus, we need to redouble our efforts to promote the competitiveness and productivity of the country. Mexico must invest more in education, innovation, and infrastructure.

Apart from the above, 2011 will have a special importance for all of us at Von Wobeser y Sierra, S.C. Founded on January 2, 1986, our firm celebrates its *twenty-fifth anniversary* this year. Since its doors first opened, Von Wobeser y Sierra, S.C. has worked to provide each of its clients with professional and effective services. This purpose, together with the knowledge and experience accumulated over time, has made our firm one of the most solid and reliable in the country. On this very important date, we wish to thank our clients and friends for the confidence they have shown in us during the last two and a half decades. I hereby renew the commitment of Von Wobeser y Sierra, S.C., to continue providing its clients with highly specialized, quality services, a commitment that will guide our performance in the years to come.

Claus von Wobeser

Articles 58 and 59 of the General Law of Business Corporations

ARTICLE 58

The Text of the Article

> A limited liability company is a company organized by partners who are only obligated to pay their contributions. Ownership interests cannot be represented by negotiable instruments payable to order or to bearer, since they can only be transferred in the cases and with the requirements established in this law.

Commentary

This type of company is partially described by making reference to the limitation of liability of the partners to the amount of their contributions, and by referring to a negative element, which is that their ownership interests, resulting from their contributions, cannot be represented by negotiable instruments payable to order or to bearer.

The authors of the General Law of Business Corporations (*Ley General de Sociedades Mercantiles*, LGSM) undoubtedly wanted to establish the difference between a limited liability company and a stock corporation, in which corporate interests, so to speak, are incorporated and represented by shares and, in general terms, are freely negotiable.

But the limited liability company is by nature personalistic, and the transfer of ownership interests, as well as the admission of new partners, is subject to the approval of the other partners. This makes it impossible for ownership interests to be freely transferable, and even less to be incorporated and represented by negotiable instruments. If the negotiable instruments were made out to the bearer, it would imply that they were freely circulating; if they were made out to order, it would imply that the holder is entitled to freely dispose of them. Clear and restrictive as it may be, the text of the Law is incompatible with the nature of a company of persons in which the element of *intuitus personae* is essential.

Actually, the restriction is unnecessary, since it is clearly stated in the final part of the Article that ownership interests can only be transferred by assignment, and only in those cases established by the LGSM and in compliance with the requirements stated therein. These cases and requirements are those that arise from the nature of the company and they are set forth in articles 65, 66, 67, and 73; in addition, the civil law provisions contained in Chapter 1 of Title 3 of the Federal Civil Code, which have notable similarities to the provisions of the LGSM, could be applicable secondarily.

The transfer of ownership interests and the admission of new partners imply modifications to the partnership agreement and must be formalized in a public instrument in accordance with Article 5 of the LGSM. Therefore, and given that the ownership interests cannot be represented by negotiable instruments payable to order or to bearer, all the rights and obligations of the partners are established in the bylaws and reforms of the company.

ARTICLE 59

The Text of the Article

> The limited liability company will have a corporate name or a company name that is formed from the name of one or more of the partners. The corporate name or company name will be immediately followed by the words "Sociedad de Responsabilidad Limitada" or their abbreviation, "S. de R. L.". Failure to comply with this requirement will subject the partners to the penalties described in Article 25.

Commentary

Article 58 described this type of company as a mixed company of persons and capital in which the liability

of the partners is limited to the amount of their contributions. Article 59 expands this description of a mixed company by describing it from an external point of view. That is, it describes the manner in which it can and should present itself to third parties. A mixed company can have a name which does not include the names of the partners, or it can have a name that includes the name of one or more of the partners; it will be subject to the rules established in articles 27, 29, and 30 of the LGSM.

However, this article imposes an obligation on the company to have a corporate or a company name. Further, either one must be immediately followed by the words "Sociedad de Responsabilidad Limitada" or its abbreviation, "S. de R. L."

Obviously, the failure to comply with this requirement when the company exists under a company name would result in third parties presuming that all the partners respond jointly and severally, secondarily and without limitation on corporate obligations, according to the terms of Article 25 of the LGSM. When the company exists under a corporate name, the infraction may be less serious, but the liability of the partners is the same. However, third-party claimants will have the burden of proving who the partners are.

For the formation of the corporate name, Article 59 does not refer to another article of the LGSM. The rule for this, which can be found in Article 88 of Chapter V regarding the stock corporation, is quite vague, only stating that it must be different from that of any other company. •

Comments on Article 207 of the Commercial Bankruptcy Law

With the tenth anniversary of the entry into force of the Commercial Bankruptcy Law (*Ley de Concursos Mercantiles*, LCM), it is timely to make some brief comments on one of its articles, which is of central importance. It contains a formula for the sale of the goods of a bankrupt company.

Notwithstanding that the LCM is a little over 10 years old, it continues to be an underutilized law: to date, only around 400 bankruptcy proceedings have been processed under this law, which implies that there are still many proceedings that have not found a practical solution.

Throughout its body, the LCM shows that the lawmaker's goal is to preserve a company in order to maintain it as a source of employment and to attempt to ensure that the economic problem of the bankrupt company affects the companies and persons that maintain a direct or indirect relationship with it as little as possible.

In this way, Article 197 of the LCM establishes that in order for the sale of the company in operation to be of the greatest benefit, the receiver should keep the company operating, so that it is sold as a unit in operation.

The ordinary procedure for the sale of the assets of a company in bankruptcy is by a public auction. The sale procedure for a public auction can be summarized as follows:

1. Valuation of the assets to be sold;
2. Establishment of the date the public auction will be held;
3. Call for bidders at the public auction;
4. Holding of the auction and admission of bids;
5. Awarding of the assets to the highest bidder.

This type of sale procedure represents a problem in practice, because it can be difficult to find bidders interested in acquiring the assets at the requested price. Generally, the price is reduced by the bidders and the sale is made well below the real value of

the assets. On many occasions, no bidders with offers appear.

To try to address this situation, Article 207 of the LCM established a formula for procuring the sale of any remaining assets. According to this formula, six months after the declaration of bankruptcy, any interested party may make an offer for the purchase of the assets still to be sold.

According to this article, it can be established that the only limitation on such an offer being accepted is that the bankruptcy trustee (specialist responsible for overseeing the economic situation of the company), the creditors, the merchant, and the creditors' representative do not file an opposition. The offer made will serve as a base price for a new public auction that will be carried out in the terms indicated previously.

What happens when, in spite of having declared bankruptcy, the company is economically viable and therefore continues operating? In this situation, is it valid to make an offer for all the assets of the company or for the company itself based on Article 207?

If we take into consideration the nature and spirit of the LCM, we must reach the conclusion that it is feasible to use the formula established in Article 207 to make a purchase offer for the entire operating company.

Nevertheless, the Article is imprecise and does not contain a solution for this situation. On the contrary, its text generates various questions, such as the following: Does the offeror have to justify the price offered? Does an opposition to the offer have to be supported or is the simple manifestation of opposition by a legitimate offeror sufficient? Should the assets be put at the disposal of other interested parties so that they can make an offer?

The acquisition of a company in operation in itself brings with it several additional complications. For example, should the acquirer of the company be considered jointly liable for labor, tax, environmental, and social security debts? Should it pay the debts acquired with suppliers?

These deficiencies not only discourage buyers, but also result in many companies having to cease functioning, given that the operation of the company subsequent to bankruptcy will be transitory as long as the conditions that led to the bankruptcy are not changed, and given that an injection of new capital is necessary.

We hope that this analysis encourages debate and discussion on these and other rulings. •

Compliance with Certain NOM's with Certificates Issued in the United States and Canada

According to several foreign trade provisions, the import of electronic apparatus and processing equipment is subject to the importers proving that their apparatus complies with the following official Mexican standards (normas oficiales mexicanas, NOM's), among other requirements: NOM-001-SCFI-1993 "Electronic apparatus-domestic use electronic devices fed by different sources of electricity-Safety requirements and testing methods for type approval," NOM-016-SCFI-1993 "Electronic apparatus-office use electronic devices fed by different sources of electricity-Safety requirements and testing methods," and NOM-019-SCFI-1998 "Safety of data processing equipment." As a result of the above, importers must obtain the corresponding NOM certificate prior to importation.

To obtain these certificates, importers must go through a long process which includes, among other things, the importation of samples which are subjected to a detailed analysis by Mexican laboratories to verify compliance with the above-mentioned NOM's.

With the signing of the North American Free Trade Agreement (NAFTA), the signatory countries agreed to exchange information and collaborate on regulation with respect to their product conformity standardization and evaluation measures in order to facilitate trade among the three countries and to unify the regulations to which they are subject.

In furtherance of this goal, on August 17, 2010, several rulings were published in the *Official Federal Gazette* in which the Mexican government recognized U.S. and Canadian regulations applicable to electronic apparatus and processing equipment as being comparable to Mexican regulations, and accepted and agreed to allow U.S. and Canadian exporters to use certificates or documents issued in their country to show compliance with the above-mentioned NOM's.

Through this recognition, the Mexican government intends to facilitate the importation of these products and offer Mexican consumers better access to the latest technology in electronic devices.

As of August 24, 2010, the date on which these rulings went into effect, Mexican customs was accepting certificates or documents issued in accordance with regulations ANSI/UL 60065 "Seventh Edition audio, video, and similar electronic apparatus-Safety requirements" (2003) and UL 6500 "Standards for audio/video and musical instrument apparatus for household, commercial and similar general use" (1999), approved by the American National Standards Institute (ANSI), and those issued in accordance with regulations CAN/CSA-C22.2 No. 60065-2003 + Amendment 1: "2006 audio, video, and similar electronic apparatus-Safety requirements," approved by the Standards Council of Canada (SCC), to show compliance with NOM-001-SCFI-1993.

For NOM-016-SCFI-1993, the documents or certificates issued in accordance with regulations ANSI/UL 60335-1 "Standard for Safety of Household and Similar Electrical Appliances, Part 1: General Requirements," approved by the ANSI, are accepted, as are those issued in accordance with CAN/CSA-E60335-1/4 E-03 (R2007) "Household and Similar Electrical Appliances-Safety-Part 1: General Requirements (Adopted CEI/IEC 60335-1:2001, fourth edition, 2001–05, with Canadian deviations)," approved by the SCC.

With regard to the NOM-019-SCFI-1998, the documents or certificates issued in accordance with the regulations ANSI/UL 60950-1 "Second Edition Information Technology Equipment-Safety-Part 1: General Requirements (Ed. 2 Mar 27 2007)," approved by the ANSI, will be accepted, as will be the documents or certificates issued in accordance with the regulations CAN/CSA-C22.2 No. 60950-1-07 "Second Edition Information Technology Equipment-Safety-Part 1: General Requirements (Bi-National Standard with UL 60950-1)," approved by the SCC.

So far the only bodies recognized by the Mexican government to issue the certificates and documents showing compliance with the above-mentioned regulations are Intertek Testing Services NA, Inc.; TUV Rheinland of North America, Inc., and Underwriters Laboratories, Inc., in the United States, as well as Canadian Standards Association, Intertek Testing Services NA, Ltd., and Underwriters Laboratories of Canada for Canada. However, the possibility exists of including new entities that are recognized as accredited bodies in their own countries. •

Reform of Article 7 Bis of the Federal Consumer Protection Law

On July 19, 2010 a reform of Article 7 Bis of the Federal Consumer Protection Law (*Ley Federal de Protección al Consumidor*, LFPC) was published in the *Official Federal Gazette*. Before the reform, this article established that "the supplier shall visibly show the total amount being charged for the goods, products, or services it offers to the consumer."

With the reform of July 19, 2010, the following was added: "This amount shall include taxes, commissions, interest, insurance, and any other cost, charge, expense, or additional payment that must be made as a result of the acquisition or contracting, whether in cash or by credit."

This reform addresses the need to protect *transparency* as a legal interest protected by the law, as can be seen from the first discussion in the congressional record regarding the approval of the reform. This discussion was held on Tuesday, April 13, 2010.

Although the obligation that the addition to Article 7 Bis of the LFPC imposes already existed previously in the Regulation of the Law, the need to protect the consumer from any abuse or deception brought it to the level of law. From this it can be concluded that the *ratio legis* of the addition lies in the importance and strength given by an obligation that is imposed through the principle of *formal authority of the law*.[1]

Thus, the provision contained in the Regulation reinforces, describes, and strengthens the mandate conferred in the second paragraph of Article 7 Bis.

Article 6 of the Regulation of the LFPC spells out the obligation contained in the reformed Article 7 Bis:

> For purposes of the provisions in Article 1, Section III, 7 Bis; Article 43; Article 66, Section III; Article 73 Bis, Sec-

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[1] Being contemplated in the Law and not in the Regulation, the repeal or alteration of said obligation is more difficult since it requires the same procedure as for its creation. If this obligation had remained only in the Regulation, its modification or repeal would depend exclusively on the discretion of the Executive.

tion IX; Article 73 Ter, Section VII, and the other relevant provisions of the Law, total price, total cost, or total amount to pay relative to operations in cash or on credit shall be understood to include, as applicable, the following concepts: taxes, commissions, interest, insurance, and any other cost, charge, expense, or additional payment that must be made as a result of the respective acquisition or contracting, such as those regarding investigation, opening of credit, guarantees, administration, and shipping.

In the execution of credit transactions, including the transactions of installment purchases, deferred payments, and periodic payments, before the corresponding contracting, the supplier shall inform the consumer of the Total Annual Cost applicable to the transaction, expressed in annual percentage terms. For the purposes of this article, the Total Annual Cost is the cost of financing that, for informative and comparative purposes, incorporates all of the costs and expenses of credit. The Total Annual Cost will be calculated utilizing the methodology established by the Bank of Mexico for the type of credit in question that is in force on the date of the respective calculation.

In advertising and any medium by which information is provided regarding the price of the goods or services that suppliers offer, the total price, total cost, or total amount to be paid in cash transactions shall be clearly indicated and, in the case of credit transactions, the respective Total Annual Cost must also be clearly indicated.

The only argument of the Economic Commission of the Chamber of Deputies against the reform stated that "the fact of establishing the obligation of itemizing each of the taxes, interest, or any other charge that must be paid as a result of the respective acquisition or contracting is excessive and could result in additional costs for the suppliers […]." From this transcription it can be seen that the lawmakers were aware of the possible cost for the companies that compliance with this legal provision may imply, but since the reform was approved, they determined the preeminence of the legal interest in *transparency* over any extra expense or cost for suppliers. •

New Forms for Filings with the National Copyright Institute

On July 14, 2010 the Ruling-Circular INDAUTOR-08 was published in the *Official Federal Gazette,* introducing changes to 10 forms available to be filed with the National Copyright Institute (*Instituto Nacional del Derecho de Autor*, INDAUTOR). These changes went into effect the day after their publication.

The principal reason INDAUTOR made these changes was to modernize, update, and improve the effectiveness of the proceedings carried out by it, as well as to benefit the public, which had been continuously subject to unnecessary expenditures and formalities, as well as delays resulting from a backlog of unresolved cases.

The most relevant changes in the forms are the following:

- Elimination of the requirement of showing evidence of legal status in the country of foreign individuals;
- Elimination of the requirement that individuals acting through a representative must provide a proxy signed before two witnesses and that both signatures must be notarized in the presence of a representative of the Institute. Now the people involved can be identified through the presentation of official identifications of the principal, the agent, and the witnesses, thereby eliminating the need to have proxies notarized;
- Elimination of the requirement to re-prove identity when it has already been established in the forms for carrying out the procedures of marginal notations, duplicate requests, and correction of records.

It is important to mention that although it has been possible to use the new forms since July 15, 2010, a period of six months existed during which the old forms continued to be used without presenting the above-indicated documents.

Finally, it should also be mentioned that, with the issuance of the forms in question, INDAUTOR took an important step toward the modernization of its copyright registration system, which will offer authors and the culture of our country in general significant benefits. •

Prosecution *Ex Officio* of Piracy Crimes

On June 28, 2010 the "Decree Reforming Article 429 of the Federal Criminal Code and Article 223 Bis of the Industrial Property Law" was published in the *Official Federal Gazette*.

The legal provisions named in the above paragraph refer to the crimes commonly known as piracy. Based on this reform, it is established that such crimes will be prosecuted *ex officio* (on the authority's own initiative).

The Industrial Property Law (*Ley de la Propiedad Industrial*, LPI) establishes several piracy crimes. However, the effect of the reform is that only the crime of selling objects having counterfeit protected trademarks fraudulently, for profit, to a final consumer in a public place, will be prosecuted *ex officio.* Therefore, there are other criminal acts that still require the filing of a complaint to be prosecuted.

Regarding copyright crimes, the effect of the reform is that practically all the crimes set forth in the Criminal Code will be prosecuted *ex officio*.

Previously, these types of crimes were prosecuted by complaint of the offended party, which is to say the holder of the trademark or of the intellectual property rights used without authorization. Many crimes remained unprosecuted and unpunished, since no complaint was filed. Therefore, the principal purpose of this reform is to grant the authorities the powers necessary to prosecute these crimes without requiring the filing of the corresponding complaint.

Furthermore, since the crimes in question have been in the past prosecuted by complaint of the injured party, the latter could grant a pardon. It was common for the filing of complaints to be used to pressure the unauthorized user of intellectual property rights to pay compensation, and once the payment was obtained a pardon was granted.

Thus, the prosecution of these crimes became inefficient, which made this reform necessary. It was also thought that these crimes have increased due to new technological tools that allow for better and better reproductions of original products or authored works, an activity that requires immediate and generalized actions by the authorities.

Another of the important points is that there are very high rates of piracy registered in our country. Although the efforts to combat these activities consist of actions that result in the constant confiscation of large quantities of counterfeit merchandise, this is not sufficient to guarantee the protection of intellectual property rights.

Ex officio prosecution by the federal public prosecutor of these types of crimes was further considered necessary because these crimes not only affect intellectual property rights, but also affect the State itself, which foregoes significant tax revenues. Therefore, it was considered that the prosecution of activities that affect the public interest cannot be subject to the discretion of the affected intellectual property rights holder.

It is important to mention that the position of the political parties on this issue was not uniform. There were those who considered this reform unnecessary, arguing that informal employment is a means of self-employment in times of crisis. This position was rejected with the argument that piracy is a detriment to the development of the formal economy and therefore contrary to the legal and economic interests of the Mexican State.

This reform also addresses the fact that piracy is an illicit, multinational business, parallel to legally established industry, having enormous economic, human, and technological resources.

Furthermore, according to the opinion of the Senate Chamber, piracy has become the second largest illegal business in our country, after drug trafficking and before car theft. Piracy implies the existence of organized crime networks that grow rapidly, destroy jobs in legally established companies and businesses, and harm the confidence of society in the institutions created by the State to combat it.

Thus the authorities consider that this reform is one of several important first steps toward perfecting the legal tools sought to eradicate crimes that are committed against intellectual property every day with impunity.

Furthermore, with the implementation of this reform, Mexico seeks to meet its international obligations as a signatory of the World Intellectual Property Organization Treaty and the North American Free Trade Agreement, among other international agreements that require member states to create legal standards that allow for the effective and efficient combating of intellectual property crimes.

Finally, it is important to mention that a crime as serious as this cannot be addressed only by the State. It is a problem that affects everyone: if there were no demand, there would not be sellers offering pirated products. •

Suspension of Tariff Benefits on New Merchandise Originating from the United States

On March 18, 2009, the Mexican government suspended tariff benefits on the importation of 89 products originating from the United States based on the argument that the U.S. had breached its cross-border transportation obligations under the North American Free Trade Agreement (NAFTA).

In an attempt to resolve this dispute through a ruling favorable to both nations, the Mexican and U.S. governments have held innumerable meetings. However, given that a satisfactory agreement has not been reached, on August 18, 2010 the Mexican government published a new decree suspending benefits for products originating from the United States.

The new "Decree amending Article 1 of the provisions establishing the rate applicable during 2003 of the General Import Tax for merchandise originating from North America, with respect to merchandise originating from the United States of America, published on December 31, 2002" lists a total of 99 items originating from the United States to which tariffs will be applied of between 5 and 25 percent. This decree repeals the prior one published on March 18, 2009.

With this new decree, around 16 products that were on the previous list were eliminated and 26 others were added, among which are fresh cheese, fruits, juices, toilet paper, filled and unfilled chocolate, gum, and certain pork products. According to the Ministry of Economy (*Secretaría de Economía*, SE), the new retaliatory list will have a commercial impact of approximately 2.5 billion dollars.

In light of the above decree suspending tariff benefits, several companies have filed constitutional appeals in the federal courts. They claim violations of individual rights and question (1) the constitutionality of the decree and the equivalency of the retaliatory measures, (2) the fact that the suspension of benefits is applied in a sector different from that of cargo transportation (in which the presumed original

breach occurred), and (3) the authority of the President to legislate in matters of foreign trade.

As a result of these proceedings, the Supreme Court of Justice of the Nation (*Suprema Corte de Justicia de la Nación*, SCJN) determined that the Federal Executive had issued the decree using the powers conferred on it by the Constitution to regulate foreign trade, the economy, and the stability of national production, as well as the powers that NAFTA confers on the executive, according to which, once the procedure set forth in Article 2019 is exhausted, the Executive can suspend benefits even in sectors different from those affected. Based on these arguments, the SCJN rejected the constitutional appeals filed by the companies.

Considering this fact, it is very likely that the rest of the constitutional appeals that are still in process will be resolved similarly.

Nevertheless, given that with the publication of the new decree, the decree of March 2009 was repealed, the companies that are again affected can consider the advisability of challenging the new suspension of tariff benefits as illegal and unconstitutional. •

Modifications of the IMMEX Decree

During the first half of this year, the President of the Republic, through the Ministry of Economy (*Secretaría de Economía*, SE), sent to the Federal Commission for Regulatory Improvement (*Comisión Federal de Mejora Regulatoria*, COFEMER) a draft of modifications to the decree for the promotion and operation of the Manufacturing, Maquiladora, and Export Services Industry Program (*Industria Manufacturera, Maquiladora y de Servicios de Exportación*, IMMEX). The principal purpose of these modifications was to prevent presumed abuses by some companies of the tax and customs benefits granted. The modifications further sought to reduce some of the obligations of companies of this industry.

Modifications in the Concept of *Maquila*

With this proposal, the authorities are seeking to change the definition of *maquila* found in the IMMEX Decree in order to change the effect of the last paragraph of Article 2 of the Income Tax Law (*Ley del Impuesto Sobre la Renta*, ISR) on this industry.

According to the current Article 33 of the IMMEX Decree, *maquila* is understood to be the operation carried out with inventories and other goods supplied directly or indirectly by a resident abroad with whom a contract has been executed for the transformation, preparation, or repair of such goods or for the provision of services with them.

The proposed modification establishes certain conditions that must be met in order for the *maquila* operations carried out in Mexican territory to be considered as such and not as permanent establishments in Mexico of the non-resident. These conditions vary depending on whether they involve (1) raw materials and other goods consumable during the transformation process or (2) fixed assets.

Regarding raw materials and other consumable goods, it is established that they will always consist of goods imported temporarily and supplied directly

or indirectly by the resident abroad. As an exception, it will be permitted to incorporate national merchandise and foreign merchandise imported definitively, provided that the first —supplied by the resident abroad— represents a "preponderant" proportion of the finished product. The value or percentage referred to in this last concept is not clearly established.

Regarding the fixed assets, it is established that they, in addition to being owned by the resident abroad, cannot have been property of the IMMEX company or of any other related party abroad. Only those companies that have operated under an IMMEX program since before November 13, 2006 are exempt from this requirement.

Additional Controls on IMMEX Companies

The partners and/or shareholders and legal representatives of a company must provide their contact information. They must inform of any change in this information, in order to detect those persons or entities that repeatedly make undue use of this program.

Also, steel is included as a sensitive product, and therefore its importation would be subject to a maximum period of permanency of six months. In addition, a series of specific requirements must be met in order for its importation to be authorized.

Generally, certain requirements are added for the importation of sensitive products. For example, the importation of these products will not be authorized for the IMMEX program companies that have a services program, except in the case of certified companies. Furthermore, these IMMEX program companies must provide details on their investment program, describe their investments in real estate and personal property, and indicate the number of persons with whom they have contracted directly or indirectly, among other information.

Updating of the Decree

Other modifications proposed are only intended to adjust the provisions contained in the IMMEX Decree to the current reality. In this regard, the benefits contained in the Decree Simplifying Customs and Foreign Trade Administrative Procedures" —published on March 18, 2008 in the *Official Federal Gazette*— are specified; such benefits eliminate the obligation to request the expansion of the program in order to add inputs to import (except in the case of sensitive products) or final export products, and that of presenting the geographic coordinates of the tax domicile —from which the companies were already exempt according to the General Foreign Trade Rules— among other benefits.

New Causes and Procedures for Cancellation

Causes of cancellation would include (1) a lack of documentation covering foreign trade operations, (2) not providing evidence of the legal stay of merchandise coming from abroad, and (3) the linkage of one or more partners/shareholders with companies that have had a program cancelled previously.

To cancel a program, the SE must notify the IMMEX company of the reasons for the cancellation. It will immediately suspend the temporary import and merchandise transfer permit and will grant 10 days for the company to offer evidence bringing into doubt or disproving the causes for the cancellation. The SE will have a period of four months to issue a ruling. As can be seen, this period is very long, which could endanger the capacity of the suspended companies to pay the costs and expenses their imports will generate.

In addition to the above, the partners/shareholders of the companies who have their programs cancelled for violation of the rules may not participate in the IMMEX program or in any other program to promote exports for a period of five years.

Elimination of the ALTEX and ECEX Programs

The elimination of the ALTEX and ECEX decrees has been proposed, given that the IMMEX program, with respect to services, together with the Certified Company registration, would achieve the same benefits as these programs, such as a more expedited refund of the VAT.

Status of the Draft Modifications

According to the Federal Administrative Procedures Law, private parties may make comments on the modifications proposed by the federal public administration through the COFEMER. Once such comments

are reviewed and analyzed, the COFEMER will issue a preliminary opinion, which must be answered by the authority.

Once the answer of the authority is evaluated, the COFEMER will issue a final opinion so that the authority can make any final modifications to its draft and publish the definitive modifications in the *Official Federal Gazette*.

Regarding this draft, it is important to mention that the preliminary opinion has already been issued, in which COFEMER determined that it was not competent to review drafts issued by the President of the Republic or matters related to tax questions.

Nevertheless, it did recommend taking into consideration the comments of private parties with respect to the lack of definition of the concept of *preponderance* and the possible effects of modifying Article 33 of the IMMEX decree; however, as of this date the President of the Republic, through the SE, has not issued any response, and therefore the issuance of the final opinion and the definitive publication of the Decree of modifications has now been delayed for several months in the COFEMER. •

Comments on the New Regulations of the General Law of Ecological Balance

The Regulations of the General Law of Ecological Balance and Environmental Protection in Matters of Self-Regulation and Environmental Audits (the "Regulations"), published on April 29, 2010 in the *Official Federal Gazette*, repealed the previous Regulations in Matters of Environmental Audits. The new Regulations entered into force on July 23, 2010.

The purpose of the new Regulations is to streamline the process of obtaining an Environmental Quality Certificate, a certification that the Federal Environmental Protection Agency (Procuraduría Federal de Protección Ambiental, PROFEPA) grants to companies participating in the National Environmental Audit Program.

The process for obtaining a Certificate consists of the following stages:

1. Request for the Certificate;
2. Presentation of the Environmental Audit Report (the "Audit Report"), which contains the result of the environmental audit;
3. Drafting of an Action Plan that consists of a document derived from the environmental audit. The document describes necessary preventive and corrective measures, as well as the period of time needed for their completion;
4. Certification.

The difference between this process and the process in effect under the previous regulations is the inclusion of the concept of *self-regulation*. Through self-regulation, companies first carry out the Environmental Audit without the involvement of the PROFEPA, and then present simultaneously before the PROFEPA their request for a Certificate and the self-regulation Audit Report.

Previously it was necessary for the company to notify the PROFEPA in order to proceed with the company's incorporation into the National Environmental Audit Program. The PROFEPA intervened in all stages. Under the previous regulations, the drafting of an

Action Plan was compulsory, while under the new Regulations it is only required in the event that the company's environmental performance is inadequate. *Environmental performance* is defined as the qualitative results of the operation and functioning of a company with respect to its activities, processes, and services that interact or may interact with the environment. The certification does not really change, because once the company meets the appropriate environmental performance standards the certification will be granted.

The new process will consist of the following: Once the Certificate is requested and the Audit Report is filed, and once the latter shows that the terms of reference are complied with, then the Certification will be granted. The Terms of Reference contain the methodology, requirements, and parameters for conducting the environmental audits and diagnoses issued by the Ministry of the Environment and Natural Resources (Secretaría de Medio Ambiente y Recursos Naturales).

In the event that the environmental performance of the company does not comply with the Terms of Reference, it must prepare an Action Plan and carry out the measures established in it, after which the corresponding Certificate will be granted.

The Regulations provides for three specific types of certificates which will be issued by the PROFEPA with renewable two-year terms:

- Clean Industry Certificate: work and activities of the industrial sector;
- Environmental Tourist Quality Certificate: activities and services of the tourist sector;
- Environmental Quality Certificate: activities not covered in the two previous cases.

It should be noted that the Clean Industry Certificate had its origins in the previous regulations and the Environmental Quality Certificate was regulated in the previous Terms of Reference, while the Environmental Tourist Quality Certificate did not have any explicit legal basis, but was granted in practice.

In addition to the above-indicated types of certificates, different levels of environmental performance are provided for and will be established in the new Terms of Reference, to be published by January 7, 2011. The maximum level of environmental performance is recognized through an Environmental Excellence Certificate.

The Regulations establishes that the environmental auditors must be accredited through a technical committee in which the PROFEPA participates. The purpose of this requirement is to guarantee to the companies that the auditors have the necessary experience to perform environmental audits.

We consider that the new Regulations will facilitate the certification process. Previously the certification process took approximately six months and its extension took two months. Now, with the new Regulations, a maximum period of 30 business days for both procedures is established. In the event an Action Plan is needed, the duration of the certification process will depend on the time needed to carry out the preventive and corrective measures included in the Action Plan, which will be mutually agreed upon by the company and the PROFEPA. •

Observations on the Administrative Simplification Ruling of SEMARNAT

The "Ruling eliminating requirements, simplifying filings, and introducing forms applicable to the Ministry of the Environment and Natural Resources in different areas" (the "Ruling") was published on June 29, 2010 in the *Official Federal Gazette* and entered into force on July 29, 2010. Among the matters the Ruling addresses are hazardous waste, protected natural areas, use of land in forested areas, forest biological resources, and Wildlife Conservation Management Units (*Unidades de Manejo para la Conservación de la Vida Silvestre*, UMAS).

The purpose of the Ruling is to simplify compliance by citizens with their environmental obligations to the Ministry of the Environment and Natural Resources (*Secretaría de Medio Ambiente y Recursos Naturales*, SEMARNAT), eliminating requirements to present information and documents that SEMARNAT can obtain otherwise, merging the procedures that require the same information and documentation, eliminating procedures that have met the purpose and time period that was attributed to them by the law originating them, and publishing new forms for those procedures that were merged.

Regarding the information that can be obtained by other means, the principal requirements are these:

1. All the requirements for information and documentation of the procedure related to the consent for the transit of hazardous waste through Mexican territory, in both types of transit;
2. All the information and documentation requirements of the procedure related to the notice for establishment of the UMAS within protected natural areas;
3. The requirement of indicating the trademark system that the holder of an UMA had authorized when he requested a change in the registration information regarding the UMA.

Similarly, several procedures are eliminated from the Bureau of Integral Management of Hazardous Materials and Activities (*Dirección General de Gestión Integral de Materiales y Actividades Riesgosas*, DGGIMAR) and from the National Protected Natural Areas Commission (*Comisión Nacional de Áreas Naturales Protegidas*, CNANP), related primarily with hazardous waste and protected natural areas.

In addition, several procedures and formalities of the Bureau of Forest and Soil Management (*Dirección General de Gestión Forestal y Suelos*, DGGFS), the DGGIMAR and the Wildlife Bureau (*Dirección de Vida Silvestre*, DVS) are merged. These relate primarily to the change in the use of land in forested areas, forest biological resources, hazardous waste, and UMAS.

Finally, the names of some formalities of the DGGIMAR are changed, as well as the name of some procedures of the DGGFS, the DGGIMAR, and the DVS. These changes are primarily related to the change of use of land in forested areas, origin of forest raw materials, registration in the National Forest Registry, hazardous waste, and UMAS.

As a result of the above-mentioned changes, new forms were issued in order to carry out the procedures before the different agencies mentioned. These forms should be provided to citizens at each of the mentioned governmental agencies as well as on the webpage of COFEMER. It is important to take these changes into account in order to avoid delays or denials in filings due to outdated information. •

Federal Law for the Protection of Personal Information in the Possession of Private Sector Parties

The Federal Law for the Protection of Personal Information in the Possession of Private Sector Parties (the "Law") was published in the *Official Federal Gazette* on July 5, 2010. It entered into force the following day. However, the issuance of its Regulation by the Executive Branch is still pending. The Regulation should contain a definition of concepts such as "the source of public access" and the forms, terms, and time periods for the various procedures this law covers.

The Second Transitory Article of the Law grants a period of one year from the entry into force of the Law to issue the Regulation. The Third Transitory Article also establishes a one-year period for those responsible for handling the information to comply with the obligation to appoint the person or department that will respond to individuals and their requests and to issue their privacy notices. The Fourth Transitory Article indicates that the rights holders may exercise the rights granted to them by the new Law 18 months after it goes into effect.

Although it would seem that in light of these time requirements the Law would be suspended for now, that is not the case. There are several relevant obligations that do not require the passage of any time period before becoming effective. Among these is the requirement that all persons who engage in or are connected to the treatment of personal information must take the measures necessary to protect this information from any damage, loss, alteration, destruction or unauthorized use, and to protect the confidentiality of this information.

Thus, it is essential that individuals or entities such as banks, insurance companies, hospitals, and commercial enterprises that handle large databases and have a direct and frequent relationship with the personal information of individuals know the content and scope of this new law. This is particularly true since the purpose of this law is to regulate the legitimate use of the information and, in turn, to control it in order to avoid invading the privacy of private parties and to respect informational self-determination.

The regulated subjects of the Law are private sector parties, either entities or individuals, who handle personal information; such persons for purposes of this law are known as "the responsible parties," with the sole exception of the credit information companies and persons who collect and store personal information for exclusively personal use and not for commercial dissemination or use.

It is also important to mention that the regulation and control sought by this law is accomplished through the observation of various principles that presume certain obligations for "the responsible parties" and certain rights for "the holders of the private information."

The Law sets forth the principles of legality, consent, information, purpose, proportionality and responsibility. These principles establish that personal information must be collected legally. Thus, it is prohibited to obtain it through deceit or fraud, and the holder of the information must consent expressly or tacitly to its obtaining. The party responsible for the use of the information must inform the holder of the personal information of the type of information that will be obtained from the holder and for what purposes. The use of such information is limited to accomplishing the purposes of which the holder has been informed. In this respect, this law stipulates that the information obligation shall be complied with through a privacy notice, which is nothing more than a paper, electronic or other form of document generated by the party responsible for the treatment of the information. This document must be made available to the holder of the personal information in a timely fashion and include at least (1) the identity and domicile of the responsible party; (2) the purpose of the treatment of the information; (3) the options and means offered to limit the use or the dissemination of the information; (4) the means for exercising the

rights of access, correction, cancellation, or challenge; (5) the procedure or means of communicating to the holders any change to the privacy notice and, if applicable, (6) any transfers made of the information.

In addition to the obligations of the responsible parties, the Federal Law for Protection of Personal Information in Possession of Private Sector Parties establishes four rights in favor of the holders of personal information: (1) the right to access, which includes both the privacy notice to which the treatment of the holder's information is subject and the personal information that is already in possession of the responsible party; (2) the right of correction, which involves the correction of inaccurate or incomplete information; (3) the right of cancellation, as long as the exceptions established by the Law do not apply with respect to personal information; and (4) the right to challenge the treatment of personal information when there is no legitimate cause for such treatment. The Law also establishes that for the exercise of any of these four rights, the holder or the holder's legal representative must request it in writing from the responsible party, who will have 20 business days to respond, either positively or negatively, in the latter case explaining the reasons.

Another obligation of the responsible party, arising upon the exercise of any of these rights, is to respond in a timely fashion. Article 30 of the Law indicates in this regard that every responsible party must designate a person or department to adequately process the requests of the rights holder.

The Law also includes a rights protection procedure that may be filed against the responsible party when the rights holder does not receive a response or when the terms of the response are not satisfactory. Such a procedure must be filed before the Federal Institute for Access to Information and Data Protection (*Instituto Federal de Acceso a la Información y Protección de Datos*), which will resolve it. For purposes of this law, this institute will be the body responsible for informing society about the right to protection of personal information, overseeing the observance of the Law, and imposing any corresponding sanctions.

It is worth mentioning that Article 63 of the Law establishes a list of actions that constitute infringements and that will be sanctioned with warnings or fines whose amounts vary according to the case (such sanctions are apart from any possible civil or criminal liability).

Finally, it should be kept in mind that this new law also establishes the following conduct as crimes: (1) to provoke for purposes of economic gain a violation in the security of the databases under their custody and (2) to obtain undue economic gain in the treatment of personal information through deceit by taking advantage of a mistake of the holder or of a person in order to transmit it, which will be punished pursuant to articles 67 and 68 with a prison term (from three months to five years).

Von Wobeser y Sierra, S.C. would be glad to discuss any doubts or comments you may have on this matter. •

Savings Funds and Employee Savings and Loan Associations

In practice, people often confuse a savings fund with an employee savings and loan association, and therefore it seems important to us to clarify the differences between them and to indicate how each should operate from a labor point of view.

What is a Savings Fund and How Is It Formed?

A savings fund is a benefit not required by law and therefore not mandatory for employers to provide. It was first created as a social welfare benefit, intended to (1) provide an incentive for workers to form the habit of saving, (2) provide workers an additional employment benefit, and (3) provide an employer benefit by permitting deductions provided certain requirements which will be mentioned below are met.

This benefit is not contemplated in the Federal Labor Law (*Ley Federal del Trabajo*, LFT), although this law does allow the company and the worker to agree on benefits additional to those stipulated in the law in order to provide the worker with better employment benefits. Nevertheless, there are several legal provisions that govern a savings fund, which we will discuss later.

To establish a savings fund, it is necessary to prepare a "plan" and/or "bylaws" which indicate as clearly as possible the following: (1) the objectives of the savings fund, (2) to whom it applies, (3) who are the beneficiaries, (4) what amounts will be paid by the workers and what amounts by the employer, (5) what procedure will be followed to obtain the funds, (6) when the funds will be paid, and (7) how the funds will be administered, among other things.

Such a plan and/or bylaws must be approved by the company and by each worker benefiting from the plan. Each worker must record his/her acceptance and agreement to comply. The plan must also include the names of the representatives of the savings fund who as a committee will be responsible for determining that the plan or the bylaws of the fund are complied with and for opening and managing the investment account into which the contributions will be deposited, in order to earn interest at the best possible rates.

It should be mentioned that the fund is composed of contributions of both the workers and the company. The company matches the workers' contributions and thus both parties must be considered parties to the instrument.

What is an Employee Savings and Loan Association and How Is It Formed?

An employee savings and loan association is an association formed by the workers of a company, without the latter's involvement and without the company imposing any obligations on the association. Its purpose is for saving and/or granting credit or loans to its participants, with low interest rates and through contributions made by the workers themselves.

Given that employee savings and loan associations are associations intended to provide economic assistance to their members, they are nonprofit and their formation and operation are not regulated by any law or regulation. Therefore it is the participants themselves who must create regulations or bylaws containing the rules under which the association will operate.

For an employee savings and loan association to be formed, it is necessary to have the authorization of each of the participants so that the company can make the respective deductions from their salaries and deliver them to the representatives of the association. Such deductions are subject to the provisions of Article 110, Section IV of the LFT.

In contrast to a savings fund, the company only operates as an intermediary for a savings association, withholding and delivering the contribution of the worker, and not as a participant in either the process

or the management of the instrument. As we have said, this association is administered by the workers themselves, who draft their own plan and/or regulations and/or bylaws and choose the investment regimen to use in order to investing their savings.

What Legal Provisions Regulate a Savings Fund?

Article 27 of the Social Security Law (*Ley del Seguro Social*, LSS) contemplates the creation of a savings fund. Based on this provision, it can be determined whether or not this benefit will be integrated into the base salary of a worker for purposes of calculating the dues that he/she must pay to the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*, IMSS).

The requirements set forth in Article 27 of the LSS that prevent this benefit from being integrated into a base salary for purposes of calculating social security dues are the following:

- That the savings fund consist of weekly, semimonthly, or monthly deposits by both the worker and the employer in equal parts. In other words, both parties must contribute the same amount either weekly, semimonthly, or monthly, as agreed, and
- That the worker can make withdrawals from his account a maximum of twice a year.

It is extremely important that these two requirements be complied with, since otherwise the savings fund will be integrated into the base salary of the employee for purposes of calculating the IMSS dues, which would represent a cost for the employer.

Both the Income Tax Law (*Ley del Impuesto sobre la Renta*, LISR) and its Regulation contemplate the savings fund and establish requirements governing it, including the maximum percentages that the workers and employers can contribute to it in order for it to be considered a social welfare benefit and therefore tax deductible.

It is important to note that Section XII of Article 31 of the LISR establishes a series of requirements in order for contributions to a savings fund to be deductible for employers. Those requirements are:

- In the case of social welfare contributions, as is the case of a savings fund, the contributions must benefit all the workers in general;
- In the case of unionized workers (when there is a collective bargaining agreement in the company), it will be considered that the social welfare provisions are granted generally, provided they are contemplated in the collective bargaining agreements or the industrywide labor agreements, as applicable;
- The savings fund will only be deductible when, in addition to being general, the amounts of the contributions of the taxpayer (in this case the employer) are equal to the amounts contributed by the workers, as established in Article 27 of the LSS;
- The contribution of the employer may not exceed 13% of the salary of the worker nor an amount equivalent to 1.3 times the annualized general minimum wage in force in the corresponding geographic area;
- Contributions to the savings fund must be duly registered in the accounting records of the company;
- The permanency requirements established in the Regulation of the LISR, which we will indicate below, are complied with.

Furthermore, Article 42 of the Regulation of the LISR establishes that the contributions made by taxpayers to a savings fund will be deductible, provided the time periods and requirements indicated in the Article, and mentioned below, are met:

- That the plan referred to previously establishes that the worker can only withdraw contributions made to the savings fund at the end of his/her employment or once a year;
- That the savings fund be used to grant loans to the participating workers and the remainder be invested in Federal Government securities registered with the National Securities Registry, in publicly-traded securities, or in fixed-income securities determined by the Tax Administration Service (*Servicio de Administración Tributaria*, SAT);
- In the case of loans to workers that have as a guarantee contributions to the savings fund, such loans may be granted only once a year and the amounts cannot exceed the amount that the worker has in the fund.

The above shows the importance of following and complying with all of the requirements established in

both the LSS and the LISR and its Regulation, in order for the savings fund to fulfill its purpose and provide companies with the benefits of both deductibility and nonintegration into a worker's base salary for the purpose of calculating IMSS dues.

What Requirements Apply to an Employee Savings and Loan Association?

Although an employee savings and loan association is not regulated by any provision, it must comply with certain requirements set forth in the LFT and the LISR in order to be valid:

- In relation to salary deductions for contributions to an employee savings and loan association, the rule established in Article 110, Section IV of the LFT applies. This rule provides that deductions from the salary of workers may be made for the payment of fees for the incorporation and promotion of cooperatives and employee savings and loan associations, provided that the workers expressly and freely manifest their agreement (preferably in writing) and that the deductions are no more than 30% of the part of the salary of the worker that exceeds the minimum wage.
- Workers that receive only the minimum wage may not participate in an employee savings and loan association, since such a deduction is not among the deductions permitted for workers receiving the minimum wage (Article 97 of the LFT);
- The funds of an employee savings and loan association must be delivered annually together with any interest generated by such savings. The amount of any loans to the worker should be discounted or it should be verified that the worker in question has already repaid the loan.

Conclusion

From the above we can conclude that a savings fund and an employee savings and loan association have different natures.

While the savings fund is created by the company and the workers together and composed of contributions of both the company and the workers, the employee savings and loan association is only formed by and contains only contributions of the workers. In an employee savings and loan association, the only involvement of the company is to act as an intermediary to withhold and deliver contributions through deductions from the salary of the participants, with their prior authorization.

A savings fund is formed by a committee of representatives of both the company and the workers, while the employee savings and loan association is formed with workers' representatives only.

The savings fund has a social welfare benefit, subject to various social security (LSS) and tax (LISR and its Regulation) provisions, in order for it not to form part of a worker's base salary for purposes of calculating IMSS dues and in order for contributions to be deductible.

Since it does not represent a social welfare benefit, the employee savings and loan association does not form part of the worker's base salary for purposes of calculating social security dues. In addition, income generated by the employee savings and loan association is exempt for the workers who are members, in accordance with Article 109, Section VIII of the LISR. •

Food Assistance for Workers Law

On January 17, 2011, a decree issuing the Food Assistance for Workers Law (*Ley de Ayuda Alimentaria para los Trabajadores*, LAAT) was published in the *Official Federal Gazette*.

The purpose of the LAAT is to encourage companies to grant to their workers, as a benefit, food assistance that will contribute to improving their nutritional state and to preventing illnesses and protecting their health.

The food assistance proposed by this law is voluntary, which is to say that companies are not obliged to grant it. It can be provided unilaterally by the company or through an agreement with the workers, in which case it should be covered in any collective bargaining agreement the company has executed.

Companies can provide food assistance through either of the following means.

1. Food provided to workers in:
   a. Cafeterias;
   b. Restaurants;
   c. Other food consumption establishments.

   The establishments indicated above may be contracted with directly by the company or form part of a food system managed by third parties through the use of printed or electronic vouchers, which are understood to be any device in the form of a plastic card that has a magnetic band or another mechanism that allows for identifying the card at the cash registers of the establishments affiliated with the issuer of the card.

   In the event that the companies establish or contract cafeteria services in their facilities, they will be subject to the standards governing all cafeterias issued by the Ministry of Labor and Social Welfare and the Ministry of Health.

2. Groceries, whether through food "baskets" or through printed or electronic food vouchers.

The printed or electronic vouchers referred to in paragraphs 1 and 2 above must comply with the requirements established in Article 11 of the LAAT in order for employers to avoid a fine of 2,000 to 6,000 times the general daily minimum wage in force in the economic zone where the company is located.

It is important to mention that food assistance cannot be granted in cash or by any means other than those mentioned above.

Furthermore, printed or electronic vouchers cannot be exchanged for cash or checks. The vouchers also cannot be used to buy alcoholic beverages or tobacco or for purposes other than the provision of food or for services other than those provided at a restaurant or other establishments for the consumption of food.

In addition, this law requires the company to maintain sufficient documentary control to be able to demonstrate that the food assistance was actually delivered to the workers, for which purpose the companies must keep documents signed by the workers recording the delivery of the food assistance. If the company does not have this documentary support, it can be fined up to 2,000 times the general daily minimum wage in force in the economic zone where the company is located.

The benefit that the LAAT offers companies for providing cafeteria services or for delivering groceries or vouchers for food consumption to their workers is that the expenses incurred for these purposes will be deductible pursuant to the terms and conditions established in the Income Tax Law (*Ley del Impuesto Sobre la Renta*, LISR) and the Business Flat Tax Law (*Ley del Impuesto Empresarial a Tasa Única*). Furthermore, any income the worker receives under the LAAT will not be considered as income for the purpose of determining social welfare benefits as established by the LISR and will not form part of the base salary considered for determining social security payments according to the terms and conditions estab-

lished in this regard by the Social Security Law and other applicable social security regulations.

As can be seen, the LAAT offers benefits to both companies and workers. Companies should determine if the implementation of food assistance for their workers is viable, taking into account that in principle it is not mandatory to grant it, but that if the company does, it must comply with the requirements we have described. •

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