OCTOBER 2009, MEXICO

# Newsletter 28



Von Wobeser y Sierra

# Editorial



In this second half of 2009 it is clear that we are passing through one of the worst world crises recorded, and it cannot be denied that Mexico is immersed in it. The Executive Branch recently delivered to the Congress of the Union the budget for the year 2010 and with it the tax proposal of the federal government for the fiscal year. In this tax proposal, increases in the current tax rates are contemplated and new taxes are created, both of which are being very polemic among the legislators of the different political parties in the Congress. However, it is certain that for fiscal year 2010 the revenues of the federal government will be very limited. Without sufficient revenues, the government will not be able to meet the budgeted public spending and the possibility of reactivating the economy will be limited.

In order to confront the economic crisis, the federal government has seriously contemplated cutting expenditures. To this end, it has announced the elimination of the Ministries of Tourism, Public Office, and Agrarian Reform, which would lead to the elimination of approximately ten thousand government jobs.

In this issue of our *Newsletter*, we refer to and comment on restricted circulation shares, which are a type of share often used in companies having various groups of shareholders; we refer as well to the rules or formalities that must be followed to transfer them. Because of their importance, we also refer to the reforms of the Commerce Code and the General Law of Business Corporations published in the *Official Federal Gazette* this past June the 2nd, in which the registration by merchants, individuals, or entities of various important acts, through which legal security has been provided up until now, has become optional.

It also seems vitally important to comment on the reform published on June 9, 2009 in the *Official Federal Gazette* amending the Social Security Law by which the employer or company contracting the services of workers from a services or outsourcing company may be held jointly liable in the event that the services or outsourcing company attempts to elude its responsibility as an employer. Also, in labor matters we mention the ruling published on February 3, 2009 by which the Fifth National Commission for the Participation of Workers in the Profits of Business concluded that said participation will continue to be ten percent, applicable to the taxable profit as calculated pursuant to the Income Tax Law provisions.

Mention should also be made of the article in this *Newsletter* under the Administrative Law section, the importance of the ruling issued by the Plenary of the Superior Chamber of the Federal Court of Tax and Administrative Justice, and the general effects —*erga omnes*— of the decision issued declaring the nullity of an Official Mexican Standard.

As always, we have included in this issue of our *Newsletter* the most relevant and important legal matters that have occurred since the publication of our last issue. I hope you find these articles of interest.

Claus von Wobeser

# Article 130 of the General Law of Business Corporations





## The Text of the Article

> In the bylaws of the corporation, it can be agreed that shares may only be transferred with the authorization of the board of directors. The board can deny authorization designating a buyer of the shares at the current market price.

## Comments

These are the shares that the doctrine designates as restricted circulation shares. The "restriction" is considered to be the maximum that can be imposed on the circulation of shares since, as securities, they are meant to circulate by nature.

The lawmakers thereby allow the introduction, to some extent, of the element *intuitu personae*, by restricting the free circulation of shares in order to protect the company and its partners, impeding the free entry into the company of persons that the board of directors considers not to be in the best interests of the company.

In principle, it would be difficult for the board of directors, removed from the shareholders' realm, to find a buyer for the restricted circulation shares, which presuppose the existence of a closed company with interests among the shareholders of a very particular nature. Therefore, the bylaws of some companies with restricted circulation shares often establish a procedure that veers from the letter of the law, but does not contradict its spirit, and through which all of the shareholders are given the preferred and proportional right to acquire the shares that a shareholder intends to sell. In this way, the board is able to fulfill the obligation of designating a buyer or buyers. This solution works in a closed company, with a small number of shareholders, but it would be very difficult to carry out in practice if the number of shareholders were large.

Article 130 contains an apparent inconsistency in stipulating that the board—understood to be the managing body—can refuse authorization, designating someone to buy the shares at market price, since the shares, due to the restriction on their circulation, do not have a market—in the market, the price can only be determined through free buying and selling.

It is generally accepted that the market price is understood as the fair price that should be paid for this type of shares, which in many cases is not easy to determine. In practice it has been attempted to relate it to the book value, which frequently represents neither the fair price nor what an expert's valuation would be. This latter may be closer to a fair price than book value, but is more expensive and slows the sale of shares.

The question arises of what would happen if the board did not fulfill its obligation to designate a buyer for the shares. There is a basis to sustain that in this case the shareholder can freely sell his shares (which are intended to be circulated), because he cannot be deprived of the right to dispose of his own goods and because Article 1949 of the Civil Code stipulates that the right to terminate reciprocal obligations is presumed in the event that one of the obligors fails to perform as agreed.

Furthermore, given that Article 130 does not establish a time period during which the board must designate a buyer, for greater security for the shareholder who wants to sell one or more shares, articles 83 and 85 of the Commercial Code could be applied. Article 83 stipulates that obligations that do not have a time period imposed by the parties or by the provisions of the Code will be enforceable ten days after being contracted if they only produce an ordinary action. Additionally, Article 85 stipulates that the effects of delinquency in the performance of commercial obligations will begin, according to Section I, in contracts that have a day indicated for

their performance by choice of the parties or by law, on the day after their expiration date.

It would be advisable for greater security for the shareholder who intends to sell restricted circulation shares that he/she proceeds in accordance with the above-cited articles. •

Licenciado Manuel Lizardi A.



# How Do Companies Guarantee that Their Clients Pay in Times of Crisis?

In years like these, the fear that clients will stop paying for our products and services is heightened, particularly when payment is deferred in part or in whole. The concern is very reasonable, because in times of crisis many companies have reduced cash flow and liquidity and therefore the risk of default on payment of assumed obligations increases.

Below we recommend some legal mechanisms that can be implemented to guarantee payment by clients, or at least to give them an incentive to pay.

1. The first tip, though simple, is that the sales always be put in writing. The greater the value of the goods, the more important it is to record the agreement regarding the transaction in writing. Sales executed verbally are valid and binding (except in some cases, like the purchase of real estate), but in these cases proving the existence of the agreement and therefore making it judicially enforceable can be complicated. The ideal is to use only model contracts approved by our legal advisors.
2. A second tip is to retain the good sold and/or its invoice until the entire price is paid. In this way, the buyer has an incentive to pay the whole price.
3. It is also recommended to push payment of the entire price forward as much as possible. This implies the negotiation of a high down payment, as well as the collection of various intermediate payments. It is not advisable to subject these intermediate payments to consideration or deliveries by the seller. On the contrary, these payments must simply imply an advance in the fulfillment of the obligations. For example, in the purchase of items that will be imported by the seller, it can be agreed that the buyer will be obliged to make an intermediate payment to the seller when the latter informs him that the product has arrived at the border.

4. Additionally, it can be contracted that if the buyer suspends any deferred payment, he will lose everything he has paid. This is called a *contract penalty*. The more payments that the buyer makes, the more difficult it will be to default on later payments, since he/she will face the risk of losing everything that has been paid.
5. It is also recommended to assess the advantages of using documentary letters of credit for certain transactions. In the documentary letter of credit, the entity that is obligated to pay is an entity distinct from the buyer, usually a bank of recognized solvency. The bank is required to pay the seller when the latter delivers to the bank the documents that certify the transmission of the property and the shipment of the merchandise. Obviously, the bank charges for this service and one must attempt to get the buyer to absorb the cost. With the documentary letter of credit, the seller completely eliminates the risk of non-payment.
6. The possibility of executing a surety bond should also be kept in mind. Through the bond the guarantor agrees to pay the seller in the event the buyer does not. For these cases, it is best if the guarantor is nothing less than a legally established bonding company, which constitutes a better guarantee.
7. A mechanism similar to the surety bond is a standby letter of credit issued by a banking institution. Through the standby letter of credit, a bank agrees to pay the seller in the event the buyer does not. The advantage of the standby letter of credit is that the payment process by the bank is quicker than it would be by a bonding company, although the cost is often higher.
8. A mechanism that is not a guarantee of payment but unquestionably decreases the risk that the debtor will default is the documentation of the debt in promissory notes. *A promissory note* is an unconditional promise to pay a certain amount of money. If the debtor does not pay, the creditor can initiate a summary commercial action that permits the seizure of assets of the debtor from the moment it is notified of the complaint. When using a promissory note, it is suggested that default interest be demanded in case of a default on payment. It is also suggested that the promissory note be negotiable and not tied to the contract in order to reduce the defenses (*excepciones*) that the debtor will have in the summary commercial action.

To determine the best method of guaranteeing payment by the clients of a company, it is necessary to have knowledge of the specific operations of the company, its concrete necessities, its risks, and its financial operation. This allows the suit to be custom fit. •

# Amendments to the Law of Business Chambers and Their Confederations and to the Commercial Code





On June 9, 2009, the executive order was published in the *Official Federal Gazette* by which various provisions of the Law of Business Chambers and their Confederations (*Ley de Cámaras Empresariales y sus Confederaciones*, LCEC), as well as the Commercial Code, were amended.

These provisions were amended with the objective of presenting those affiliated with the different chambers of commerce, services, and tourism that represent merchants and the chambers that represent industrialists (henceforth "the chambers") the possibility of resolving disputes that arise in their commercial relations through commercial arbitration in order to achieve greater efficiency in the distribution of justice.

Commerce in Mexico has been affected by the quantity of time, money, and effort that a merchant has to invest to ensure compliance with a commercial contract through the courts. The goal of the amendment that is explained below is to reduce the time, cost, and resources spent and to give greater security and speed to the resolution of disputes between merchants.

## 1. Amendment of the Law of Business Chambers and Their Confederations

a. Article 16 of the LCEC, which indicates the minimum requirements that the bylaws of the chambers and confederations should contain, is amended. Among the requirements is one establishing the procedures for resolving disputes, for which a clause stating the obligation of a chamber to submit to arbitration when its affiliate opts for said proceeding will be inserted. With the inclusion of this new requirement, the possibility of disputes between chambers and their affiliates being submitted to arbitration is expressly provided for when the affiliate opts for said means of dispute resolution. Also added to the above is the obligation of the chamber to inform its affiliates of the resources available for the promotion of arbitral proceedings.

b. A new Section VIII is added to Article 22, which establishes the attributes of the board of directors (executive body) of a chamber or confederation. Through the amendment, the promotion and subscription of agreements with organizations that engage in the resolution of differences through arbitration proceedings of a commercial character are added as an attribute of the board, according to the Commercial Code, in order to inform its affiliates and promote the use of said proceedings among them.

## 2. Amendment of the Commercial Code

A second paragraph is added to Article 1051 establishing the obligation of the courts to inform the parties of the possibility of resolving their disputes through a conventional proceeding before the courts or through an arbitration proceeding.

These days the courts of the country are saturated with work, which causes justice to be slow and ineffective. Through this reform an attempt is made to inform the private sector of the possibility of settling disputes through commercial arbitration, thereby expediting justice in Mexico.

The reforms mentioned in this article entered into effect the day after their publication in the *Official Federal Gazette*, that is, June 10, 2009. •

# Amendments to the Commercial Code and the General Law of Business Corporations





On June 2, 2009, the executive order through which various provisions of the Commercial Code (*Código Comercial*, CC) and the General Law of Business Corporations (*Ley General de Sociedades Mercantiles*, LGSM) were amended was published in the *Official Federal Gazette*.

These provisions essentially concern those acts that by law commercial corporations are required to report to the corresponding Public Registry of Commerce (henceforth, "the Registry"). The Registry seeks to grant judicial certainty and transparency to these acts.

These days, there is an international trend toward "deregulation of numerous proceedings pertinent to the sphere of the internal life of commercial corporations, since the registration of those proceedings is inconsequential and does not contribute to judicial certainty."[1] With this in mind, the following reforms were carried out.

## 1. Commercial Code

### Article 19

This article was amended in order to clarify what acts commercial corporations must enroll, since previously such acts were not specified.

The amended article specifies that "enrollment or registration in the commercial registry will be optional for individuals who are engaged in commerce and obligatory for all commercial corporations for everything related to their incorporation, transformation, merger, spin-off, dissolution, and liquidation and for ships. Individuals will be automatically enrolled upon registration of any document whose registration is necessary."

### Article 21

This article establishes the acts that each merchant or company must record in the electronic folio designated for it. To this effect, the sections mentioned below were modified:

1. *Section V.* This section established previously that the titles (*escrituras)* of incorporation, modification, rescission, dissolution, or spin-off must be recorded.

   Under the amendment, the concept of *title* (*escritura*) is changed to that of *public instrument* (*instrumento público*), since the latter is broader and includes the public instruments and the acts recording such commercial acts that are carried out with the certification of a notary public.

   Furthermore, which acts shall be recorded in the electronic folio is clarified, since before the term *rescission* was used, a figure that is not present in commercial corporations;
2. *Section VII*. This section previously required commercial corporations to record the appointments of managers, factors, employees, and any other agent, as well as the general powers granted to them, and the revocation of these powers.

   With the amendment, consistency was sought with the LGSM, as well as with judicial decisions that establish that the inscription of powers is not an essential element for the creation of legal effects.

   Therefore, through the amendment it is established that "for purposes of electronic commerce and consulting, *optionally*, the powers and appointments of officers [will be recorded], as well as their resignations or revocations."

   The inclusion of the word *optionally* fulfills the requirement of consistency between laws, and the interests of partners or third parties, whose intention is to carry out the corresponding enrollment, are protected;
3. *Section XII.* This section was added to fulfill the obligation of recording the change in corporate name, domicile, corporate mission, duration, and the increase or decrease of the minimum fixed capital in the electronic folio.

Before, only the increase or decrease of working capital in limited liability stock partnerships *(sociedades anónimas en comandita por acciones)* was considered.

## 2. General Law of Commercial Corporations

### Article 177

This amendment eliminates the obligation for corporations to deposit an authorized copy of the annual report that administrators must present at the general meeting and which includes, among other things, the corporation's financial statements.

Likewise, the publication and deposit of any opposition to the approval of the balance sheet by the general shareholder meeting is no longer obligatory.

### Article 194

This article establishes that extraordinary shareholder meetings should be notarized before a notary public and inscribed in the Registry.

The amendment changes the concept of *notary* (*notario*) for that of *commercial notary* (*fedatario público*), allowing said meetings to be notarized before a commercial notary and eliminating the obligation to inscribe them in the Registry.

The amendments mentioned in this text entered into force on the day after their publication in the *Official Federal Gazette*, which is to say, June 3, 2009. •

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[1] Deputies' Chamber, *Gaceta Parlamentaria*, Number 2696-IV, Thursday, February 12, 2009.



# Suspension of Customs Duty Benefits under NAFTA

Last March 18, the President of the Republic issued an executive order suspending customs duty benefits for certain products originating in the United States of America (USA).

This order constitutes a retribution measure taken by the Mexican government for the presumed failure of the American government to fulfill its obligations in the matter of cross-border ground transport under the North American Free Trade Agreement (NAFTA).

In the executive order, it is indicated that the Mexican government had already submitted the presumed non-performance of the USA to an arbitration panel under NAFTA and that said panel had determined, in the year 2001, that in effect the USA had not fulfilled its obligations in the matter of cross-border transport.

In the executive order, preferential duties for 89 products originating in the USA were eliminated. Thus, the importers of these products are now required to pay a Most Favored Nation general customs duty, which varies between 10% and 45%, depending on the product.

Although retaliatory measures are the right of the signatory governments to NAFTA, the exercise of this right is undeniably limited to certain premises. In effect, the customs duty benefits contained in NAFTA can only be suspended when, among other things, the suspended benefits are equivalent to the benefits that the affected party ceased to enjoy due to the failure of its counterpart to comply with its obligations under said treaty.

Likewise, only benefits in the same sector or sectors in which an arbitration panel declared there to be a breach of NAFTA can be suspended. Other sectors can only be affected when it is determined that it is neither advisable nor effective to suspend benefits in the same sector.

In the case in question, it is very questionable that it has been clearly proved that the suspended benefits are equivalent to those not being received and

that it is inadvisable or ineffective to suspend the benefits in the cross-border ground transport sector, given that it is in this sector that the measures taken by the USA government were declared incompatible with NAFTA. •



# Sharing by Workers in Company Profits





On February 3, 2009, the *Official Federal Gazette* published a resolution by virtue of which the Fifth National Commission for the Participation of Workers in the Profits of Business (the "Commission") reviewed the percentage of profits that businesses are obliged to distribute to the workers in order to comply with the requirements to share profits, pursuant to the Federal Labor Law (*Ley Federal del Trabajo*, LFT).

The review of the percentage, set by the Commission at 10%, was solicited by the Labor Congress and approved by the Commission, which thought that there were sufficient grounds to justify it.

Consequently, the Technical Director's Office of the Commission carried out studies and research relative to the state of the national economy, the need for industrialization of the country, the reinvestment of capital, and the reasonable interest that invested capital should return.

Based on the research and studies carried out by the Technical Director's Office of the Commission, we can mention the following points:

1. To address the issue of the distribution of profits, the Technical Director's Office analyzed in a general manner the economic framework of the nation in the short, medium, and long terms, through the observation and analysis of the gross domestic product (GDP) and its causal relationship with corporate earnings, as well as the relationship that exists between the performance of the GDP and factors of the economy like labor.
2. According to the research, the third and fourth reviews of the percentage of company profits to be shared with the workers were done in economic and social contexts very similar to the current situation in Mexico.

   In 1986, the GDP fell 3.8% compared to the previous year and for 1995 the fall was 6.2%. In 2009, it was expected that the economy would have a growth rate of 0%.

3. The time periods in which the resolutions of previous commissions were in effect were also analyzed. It was concluded that:
   - During the period that the third resolution was in effect, between 1986 and 1996, the Mexican economy had an average growth rate of 2.0%. The highest rates of the GDP were recorded in 1990, with 5.1% growth, and in 1996, with 5.2% growth. The lowest rates of growth were recorded in 1986, with –3.0% growth, and 1995, with -6.2% growth.
   - For the period that the fourth resolution was in effect (1997 to 2008), the economy grew at an average rate of 3.5%. Rates of growth of 6.8% were reached in 1997, and 6.6% in 2000. There were years like 2001, which had –0.2% growth.
4. Likewise, it was determined that the issue of profits cannot be separated from the issues of salary, employment, and productivity, since buying power has repercussions on consumption and on some other factors determining demand;
5. As the data from the research and studies indicate, for the fourth quarter of 2008 the economies of developed countries were in recession, and it was estimated that for the first half of 2009 these conditions would continue.
6. According to the results of the studies of the Technical Director's Office of the Commission, a degree of association was observed between the rate of growth of the GDP and profit-sharing by the workers, which is evidence of the fact that, when the economy grows, profit sharing also grows, although this correspondence is not mechanical or linear.
7. It also indicates that, according to treasury authorities, it can be anticipated that, in the period 2010–2014, the Mexican GDP will have an annual growth of 4.5%. It is estimated that in the medium term the import of goods and services will see an average annual increase of 7.6%, and the export of goods and services will rise to an average annual rate of 7.3%. The aggregated offer of the economy will record an annual average expansion of 5.6%.
8. It is forecast that in the period from 2010 to 2014, the gross fixed investment will increase to an annual average rate of 6.6%, while consumer expenditures will be at 4.4%.
9. It is expected that beginning in 2010, the median rate of inflation, through the National Consumer Price Index, will be of 3.0%, plus or minus one percentage point.
10. Likewise, from the study it is seen that throughout the period in which the percentage of 10% set by the Commission has been in effect, the percentage has not affected the economic surplus that developed in recent years, and that the reinvestment of profits and the gross formation of capital were not affected by worker profit-sharing.

The research and studies carried out by the Technical Director's Office of the Commission were provided to the Commission's Council of Representatives, which in its determination evaluated all this information and took into account for its decision primarily the following elements:

1. The economic projections render elements to believe that in the period from 2009 to 2018, the real monetary value of profits distributed will maintain a moderate growth.
2. There is no evidence that the distribution of profits has had an unfavorable effect on the economic surplus or on the mechanism for reinvesting profits.
3. Economic variables and world conditions will have to recover in the short term.

## Conclusion

After the evaluation of all these elements, the Commission concluded that the profit-sharing by the workers in the profits of companies will continue to be 10%, applicable on the taxable profit, in conformity with the provisions of the Income Tax Law.

Consequently, companies must continue to apply this percentage in determining their distribution of profits to the workers. •

# Domain Name Registry Directly under the Ending *.mx*





Last February Network Information Center México (NIC México), the entity in charge of managing domain names in this country, issued a press release announcing the reopening of the domain name registry directly under the ending *.mx*.

The reopening of this type of registry is the result of ongoing efforts by NIC México to position our country on the Internet and thus provide better service to all interested users. The domain names with the ending *.mx* are more attractive because they are shorter names and allow a direct identification of Mexico on the Internet.

As background, it is useful to mention that when NIC México was created in February, 1989, all registered domain names ended simply in *.mx*. Later, however, the classifications under which domain names can currently be registered were established, namely: *.com.mx*, applicable to any entity; *.net.mx*, applicable to suppliers of Internet services located in Mexico; *.org.mx*, applicable to non-profit organizations; *.gob.mx*, applicable to institutions or offices of the Mexican government (at the local, state, and federal levels) and *.edu.mx*, applicable to Mexican educational or research institutions.

The process of reopening the domain name *.mx* will be carried out in the following stages:

## 1. Pre-registration Period

This period was included in order to give preference to users who already have a domain name registered but also want to register it with the ending *.mx*. During this period, applications will be received only from those applicants who currently have a domain name registered under one or more of the following classifications: *.com.mx*, *.net.mx*, *.org.mx*, *.edu.mx*, or *.gob.mx*, and only if the domain names (already in existence) fulfill the following conditions:

a. They were registered by NIC México before March 1, 2009;

b. The application sent by the registrant (owner) for the acquisition of the new domain name with the ending *.mx* refers to the name that it already has registered, which falls under one of the classifications previously indicated (that is, the current owners of the domain name "www.despacho.com.mx" will be able to apply for the registration of "www.despacho.mx").

Likewise, NIC México has indicated that in the event it receives more than one application for the same domain name, priority will be given to the application of the owner of the oldest domain name (in other words, the one with the oldest creation date); if neither is older, the applications will be processed at the end of the pre-registration period.

The registration application for a repeated domain name that is not the oldest will remain under consideration and will be processed during the waiting period. It should be pointed out that domain names that end directly with *.mx* requested in the pre-registration stage will be activated at the end of the waiting period.

The duration of this stage will be three months, from May 1, 2009 to July 31, 2009.

## 2. Waiting Period

During this period, the applications received during the pre-registration period that have remained pending will be processed (new applications will not be accepted). Consequently, the participants in this period will be the registrants (owners) of domain names of any classification who have already applied for registration directly under the *.mx* classification during the period of pre-registration and whose applications have not been resolved.

The duration of this stage will be one month, from August 1, 2009 to August 31, 2009. At the end of this stage, all the domain names assigned during the

pre-registration period and this waiting period will be activated.

In order to verify that the assignment of a domain name contains the correct information, it is important that those interested remain up-to-date on the result of their applications by using the consultation service that NIC México offers, namely the WHOIS service (http://www.whois.mx).

Domain names will be assigned in the order in which the registration system (Registry.MX) receives applications for them.

Giving priority to these applications is of the utmost importance since, by accepting an application during the pre-registration or waiting period, the right of the registrant (owner) to the use and enjoyment of the domain name with the direct ending of *.mx* is recognized for the time of paid coverage, which is from the end of the waiting period, on which date the solicited domain names will be activated. The order of priority for applications described above has been established in order to avoid disputes regarding the registry of domain names with the ending *.mx* with the same denomination.





### 3. Initial Registration Period

At this stage, the general public can participate. That is, all applicants who, even though they do not have a previously registered domain name, are interested in registering a domain name with the ending directly in *.mx*, may apply to do so.

The domain names will be assigned in the order in which Registry.MX receives the applications. If the domain name is available at the moment of the application, it will be registered as soon as the registration process ends. The registration will only be for one year in its initial form and, in accordance with NIC México, will be submitted to a special schedule of prices for renewals, which will be revealed at the appropriate time. The duration of this stage will be two months, from September 1 to October 31, 2009.

It should be kept in mind that domain name registry under the ending *.mx* is in the process of reopening. NIC México has divided the registration process into three periods so that the reopening can be done in an organized fashion. Once the aforementioned stages are concluded, that is, after October 31, 2009, the registration process for domain names with the ending *.mx* will be conducted under the same terms and conditions as those that have been applied to the registration of domain names with the endings *.com.mx*, *.net.mx*, *.edu.mx*, etc.

Likewise, NIC México has indicated that at the end of the initial registration period, the cost of application and registration of a domain name under the ending *.mx* could increase, and therefore it is advisable that those interested apply within the aforementioned reopening stages.

### Objection Proceedings

As mentioned previously, applications for the registration of domain names will be processed in the order in which they arrive at Registry.MX. However, if an objection arises to the assignment of a domain name during the pre-registration period, NIC México will offer a resolution proceeding, whose purpose is the off-line review of the assignment. The objection must be filed with Registry.MX, a division of NIC México in charge of the administration of the domain name territory *.mx*. The objection can only be filed during the first twenty calendar days of the previously indicated waiting period. Assuming compliance with the filing requirements and admittance, the objection will be analyzed and resolved within a maximum of thirty calendar days.

This objection proceeding can be initiated only if Registry.MX has received the registration application for the name in question and it has not been resolved favorably, and if the registrant believes that the assignment of the domain name in question, directly under *.mx*, was not carried out in accordance with the assignment rules of the pre-registration period. In this respect, it is important to emphasize that any objection unrelated to the assignment of a domain name under the *Rules for the Reopening of the Registry of Domain Names Directly under .mx During the Pre-registration Period* will not be considered in this objection proceeding.

Finally, it is also important to mention that the maximum duration of registration of domain names under the ending *.mx* will be initially one year; after the initial year, the domain name may be renewed by periods of one or five years through the payment of the corresponding registration and maintenance fees.

We believe that it is of great importance that the users who have had a domain name registered with NIC México under any of the existing classifications for

more than two months in our country apply for the registration of the domain name with the direct ending *.mx*, since this type of registration allows an immediate connection for the users with Mexico, which results in a great advantage from a commercial and business point of view.

Our firm offers counsel on applying for registration of a domain name directly under the ending *.mx* before NIC México. We are available to carry out the registration process, as well as to help with any doubts or questions that may have arisen in reading this article. •

ADMINISTRATIVE

# Nullification of the Official Mexican Standard, National Campaign against the Avian Flu





## Introduction

In a ruling that constitutes a historic break in judicial practice in Mexico, the Plenary of the Superior Chamber of the Federal Court of Tax and Administrative Justice (*Tribunal Federal de Justicia Fiscal y Administrativa*, TFJFA) recently issued a final judgment declaring the nullification with general effects of the Amendment of the Official Mexican Standard NOM-044-ZOO-1995, National Campaign against the Avian Flu (*Modificación a la Norma Oficial Mexicana NOM-044-ZOO-1995, Campaña Nacional contra la Influenza Aviar*, the "NOM"). The ruling itself was meticulous; it was accompanied by a pair of dissenting opinions.

This decision was issued in a proceeding in which Von Wobeser y Sierra, S.C. represented a poultry production company. The decision was the first by a judicial body in Mexico in which a general provision was annulled with effects on all to whom it applied (*erga omnes*), regardless of whether or not they participated in the annulment proceeding.

In contrast to an *amparo* proceeding, where the nullity of an act cannot have general effects, in an administrative law court proceeding, a nullity with *erga omnes* effects must have the same scope of application as the general provision.

The grounds for annulling this general provision were that the TFJFA considered that the Ministry of Agriculture, Rural Development, Fishery, and Alimentation (*Secretaría de Agricultura, Desarrollo Rural, Pesca y Alimentación*, SAGARPA) did not follow the procedure established in the applicable law for the creation and publication of the NOM. The nullity was declared and SAGARPA was ordered to correct the defects in its creation process.

Regarding the general effects of the annulment, the legal reasoning contained in the decision is based on the general nature of the disputed provision. The court ruled that the effects must be extended to all those who fall under such a general

provision, in order to avoid inequalities with respect to the others bound by the terms of the provision. In other words, given that the regulation is general and its nullity affects its own act of creation, the nullity must have general effects, since it would be illogical for the provision to be null and void for only some parties but not all those to which it applies.

The TFJFA declared the nullity based on articles 48 (Section I, Subsection b), 49, 50, 51 (Section III) and 52 (sections III, IV and V, Subsection c) of the Federal Law of Administrative Procedures.

## Dissenting Votes

As might be expected, there are on this matter prior decisions by the magistrates of the Plenary of the TFJFA. In this proceeding there were two dissenting votes.

In his dissenting vote, magistrate García Cáceres explained that in spite of agreeing that the nullity of the NOM should be declared with general effects, the Plenary in this case erred when doing the substantive analysis of the matter, since there were already prior decisions in which the nullification of the NOM in question had been declared, and the ruling of the majority in this case was to rule on the same general act. Magistrate Urby Genel based her dissenting vote on her disagreement with the argument of the majority that the nullity of the NOM has general effects since, according to her, there is no provision in the applicable law that gives the TFJFA the authority to declare its rulings to have general effects.

## Importance of the Decision

The effects of the declaration of nullity will be general; the NOM has been nullified for all those to whom it applied.

SAGARPA, in order to comply with the decision, must issue a new official standard curing the defects of the original one. Such issuance will not only affect the plaintiff, but it will be applicable to all those to whom the NOM is applicable.

## Implications for the Future

It is important to emphasize that there are other decisions besides this one that declare the illegality and nullity of the NOM and that also apply the *erga omnes* criterion.

In other words, it is known that other decisions exist in which the TFJFA has ruled on the illegality of the NOM and on the general effects that the compliance with the decision will have on the legal sphere of those to whom it applies.

This idea is of vital importance since the decisions or judgments that have been issued in that respect can and are most likely to become binding case law. The future implications of the creation of binding case law in this case will establish an important precedent with regard to legal certainty in the practice of administrative and tax law.

Finally, it is important to mention that the challenged authority, SAGARPA, must cure the deficiencies of the annulled NOM. This suggests that the TFJFA is supervising and regulating administrative activities for the benefit of the citizens. •

# Reforms and Additions to the Social Security Law





On July 9, 2009, an executive order was published in the *Official Federal Gazette* that amends articles 5-A Section VIII, 304-A sections XX and XXI, and 304-B Section IV of the Social Security Law (*Ley del Seguro Social,* LSS). It also adds the third, fourth, fifth, sixth, seventh, and eighth paragraphs to Article 15-A, so that the current third paragraph is now the ninth paragraph. Likewise, it adds the second paragraph of Article 75 and Section XXII of Article 304-A, which regulate labor subcontracting and intermediation and guarantee social security to workers regardless of whether or not their employer recognizes the labor relationship.

## What is the principal objective of the reform?

The principal objective of the reform is to make liable or jointly liable the employer or company that benefits from the work or services of the workers (henceforth referred to as "the beneficiaries of the services"), as well as outsourcing companies that attempt to avoid their responsibilities as employers.

## What does the amendment to Article 5-A of the LSS involve? (The beneficiary of services as joint obligor)

This amendment is found in Section VIII of Article 5-A and has the purpose of including the beneficiaries of services as joint obligors, so that the Mexican Social Security Institute (*Instituto Mexicano del Seguro Social*, IMSS) can make them fulfill the obligations that result from the fact that they have workers assigned from service or outsourcing companies who provide the services contracted with these companies, when these service or outsourcing companies do not comply with their social security obligations to their workers.

Below, we present the relevant part of the Article. The amendment is in italics for greater clarity.

> For the purposes of this law, the following terms are understood as:
>
> - VIII. *Subjects or obligated subjects*: Those indicated in articles 12, 13, 229, 230, 241 and 250-A of the law when they have the obligation to retain the employee-employer contributions for Social Security or make payments of the same *and others that this law establishes.* [Note: companies that are beneficiaries of services fall in this category.]

## What do the additions to Article 15-A of the LSS involve? (Presentation of information to IMSS)

The additions to Article 15-A of the LSS establish that when an employer or obligated subject (whether judicial or economic in nature), by virtue of a contract (whatever its form or whatever it may be called), as part of contractual obligations, makes available workers or others who are entitled to be covered by IMSS to perform services or work under the direction of the beneficiary of the services and in the facilities that the beneficiary determines, the employer or obligated subject must provide IMSS with certain information.

Also, the addition to the cited article states that the beneficiary of the work or services will assume the obligations established in the LSS to the workers, only and exclusively in the event that the employer (service or outsourcing company) fails to comply, provided the IMSS has previously notified the employer (service or outsourcing company) of the corresponding requirement and the latter has not responded. The IMSS in this case will give notice to the beneficiary of the work or services of the requirement.

Likewise, the article imposes the obligation on both the employer or obligated subject (service or outsourcing company) and the beneficiary company of the services of informing the IMSS quarterly—within the first fifteen days of the months of January, April, July, and October of each year—in the sub-delegation corresponding to its domicile, of the following information regarding the contracts executed that quarter:

1. On the part of the employer or obligated subject (service or outsourcing company) and the beneficiary company of the services *as parties* to the contract that they have executed:
   a. The name or company name;
   b. Type of legal entity, if applicable;
   c. Corporate purpose;
   d. Corporate and tax address and, if applicable, address for purposes of the contract;
   e. Federal Taxpayers' Registry number and Employer Registry number with the IMSS;
   f. Information from the employer or obligated subject's incorporation document, such as number of the public instrument, date, name of the notary public before whom it was certified, number of the notary and the corresponding city, section, entry, volume, page or commercial folio, and the date of registration in the Public Registry of Property and Commerce, if applicable;
   g. Name of legal representatives of the parties who signed the contract.

2. Regarding *the contract* that they have executed:
   a. Duration;
   b. Profiles, positions, or categories indicating if the contract concerns operative, administrative, or professional personnel;
   c. Monthly estimate of the number of workers or other persons entitled to the insurance coverage made available to the beneficiary of the contracted services or work.

Additionally, for each of its workers, the employer (service or outsourcing company) will register in the computer system authorized by the IMSS the name of the beneficiary of the services or work contracted.

Within a term of 250 days from the publication of this executive order (that is, starting on March 16, 2010), the IMSS will authorize the computer system that the employer (service or outsourcing company) shall use to fulfill this obligation.

Consequently, in the aforementioned term of 250 days, the employer (service or outsourcing company), as part of the information detailed in items 1 and 2 above, will also provide the following information once with respect to each contract executed:

a. The estimated monthly amount of the payroll of the workers available to work for the beneficiary of the contracted services or work;
b. The addresses of the places where the services will be provided or where the contracted work will be executed;
c. Whether the beneficiary of the services is responsible for the management, supervision, and training of the workers.

It is important to point out that, in accordance with this article, when an employer (service or outsourcing company) agrees to make workers available to the beneficiary of the services to provide services or execute work in various work centers located in the territory of more than one sub-delegation of the IMSS, the employer (service or outsourcing company) and the beneficiary of the services shall communicate the above-mentioned information *only* to the sub-delegation in which its tax domicile is located.

## What does Article 75 of the LSS involve? (Risk degree premium)

This addition, which will enter into effect 250 days after the publication of the executive order (that is to say, March 16, 2010), states that, in order to classify workers in the occupational hazard insurance, in the case of the employers referred to in the third paragraph of Article 15-A (service or outsourcing companies), upon the request of either the employer or the IMSS, the IMSS will assign a registry for each of the classes that are required among those indicated in Article 73 of the LSS, class in which its workers will be registered nationally.

Likewise, Article 75 provides that the employers (service or outsourcing companies) who have been classified in this way will review their accident rate annually in accordance with Article 74 of the LSS, separately for each of the employer registrations assigned.

It should be clarified that, according to the third transitory article of the executive order in question,

the employers or obligated subjects (service or outsourcing companies) who were operating before the entrance into effect of the executive order will continue to be classified as engaging in the same activity as before for the purpose of occupational hazard insurance. The same premium will apply, determined in accordance with the procedure established by Article 74 of the LSS for the employer registrations that were in effect at that date.

Therefore, the employer registrations applied for after the entrance into effect of the executive order will be classified according to the provisions described above in this section.

## What does the amendment of articles 304-A and 304-B of the LSS involve? (Sanctions for noncompliance)

1. Article 304-A of the LSS sets forth the violations for noncompliance with the LSS and its regulations, derived from the acts or omissions by employers or other obligated subjects.

   In this regard, an amendment to sections XX and XXI is included as well as a new section (XXIII), which we reproduce below:

   > The acts or omissions of the employer or obligated subject enumerated below are violations of this law and its regulations:
   >
   > XX To fail to fulfill or to fulfill extemporaneously the obligation to certify through an authorized public accountant their contributions before the Institute (when there is an obligation to do so, that is to say when they have 300 or more employees in the taxable year);
   >
   > XXI To notify extemporaneously, to do so with false or incomplete information, or to fail to notify the IMSS, pursuant to the respective regulation, of the domicile of each of the construction sites or phases of construction that are carried out by employers that sporadically or permanently engage in the *construction industry*, and
   >
   > XXII To not present to the IMSS the information indicated in Article 15 A of the LSS [previously mentioned in this summary].

2. With respect to Article 304-B of the LSS, which establishes the sanctions for the violations provided for in Article 304-A, Section IV is also amended in order to include a new violation in Section XXII of Article 304-A, as follows:

   > The violations indicated in the above article will be sanctioned considering the seriousness, particular conditions of the infringer and, if applicable, the recidivism, in the following form:
   >
   > IV Those provided for in Sections I, II, XII, XIV, XVII, XX, XXI, and XXII, with fine equivalent to the amount of 20 to 350 times the minimum daily wage in effect in the Federal District.

Consequently, if the service or outsourcing companies or the beneficiaries of the services of these companies fail to provide the IMSS with the information that we have referred to in discussing the amendment of Article 15-A of the LSS, they can be subject to a fine *that goes from 20 to 350 times the minimum daily wage in effect in the Federal District.*

## Conclusions

Regarding the amendments explained above, we make the following recommendations:

1. **For the service or outsourcing companies:**
   a. To be up-to-date on their legal, labor, and social security obligations;
   b. To determine correctly the risk degree premium, taking into account Article 75 of the LSS, cited above;
   c. To provide the quarterly reports that the IMSS requires, in accordance with Article 15-A of the LSS, cited above;
   d. To verify that the companies benefiting from the services present the quarterly reports that the IMSS requires, in conformity with Article 15-A of the LSS, cited above.

2. **For the beneficiaries of the services:**
   a. To solicit from the service or outsourcing companies the records that prove compliance with their social security obligations. This is important because if the service or

outsourcing companies are not up-to-date in the fulfillment of their social security obligations, the beneficiaries of the services could be considered by the IMSS as joint obligors liable for the noncompliance and ultimately be obligated to fulfill said obligations;

b. In the event the IMSS notifies the company benefiting from the services of any requirement that the IMSS has placed on the service or outsourcing company regarding the fulfillment of social security obligations that were omitted, the beneficiary of the services must immediately demand the fulfillment of these obligations by the services or outsourcing company. Otherwise, the IMSS can determine the beneficiary of the services to be a joint obligor and, consequently, the beneficiary of the services would have to cover the omitted contributions that the IMSS has determined, which could be very costly;

c. To present, quarterly, the reports that IMSS requires, in conformance with Article 15-A of the LSS, cited above;

d. To verify that the service or outsourcing companies present the quarterly reports that IMSS requires, in conformance with Article 15-A of the LSS, cited above;

e. To contract with service or outsourcing companies that are financially solid. •

ARBITRATION

# Counterclaims to Ancillary Claims of Nullification of Arbitral Awards

On December 9, 2008, the Third Collegial Court in Civil Matters of the First Circuit passed a motion for review of a judgment of the Ninth District Judge in Civil Matters of the Federal District that denied the admissibility of a counterclaim to the arbitral award nullification ancillary claim for not being contemplated in Article 360 of the Federal Code of Civil Procedure (*Código Federal de Procedimientos Civiles*, CFPC), which establishes the form in which an ancillary claim should be processed.

The motion for review was resolved by establishing the admissibility of the counterclaim to the nullification ancillary claim. In other words, a counterclaim to *enforce* an arbitral award against a claim to *nullify* an arbitral award is valid.

The reasoning of the judgment of the Third Collegiate Court, which held that the counterclaim in question was valid, was supported by the following arguments:

1. The pillars of the award nullification proceeding are as follows:
   - *Judgments should be arrived at promptly and be final, with no right to appeal.* Taking into account the fact that a party can claim (in an ancillary claim) the nullification or the recognition and enforcement of an arbitral award separately, it would be more efficient and secure for the parties to allow the counterclaim to the nullification ancillary claim in order to avoid the necessity of trying both ancillary claims jointly, complying fully with the principle of swiftness.
   - *The parties seek swiftness, cost-effectiveness, specialization, and impartiality.* If the reasons for considering the admissibility of the nullification and for denying the recognition and enforcement of the award are essentially the same, then, to expedite the resolution, the counterclaim should be valid.

- *The section of nullification should be resolved in accordance with the ends sought by the legisture, without delaying obstacles or impediments.* As mentioned previously, the fact of not considering the counterclaim admissible in an arbitral award nullification ancillary claim could cause, once the procedure ended, the filing of the ancillary claim of recognition and enforcement of the award, or vice versa, which would result in delaying obstacles and impediments, representing a great and unnecessary undertaking of time and resources for the parties;

2. Furthermore, it must be considered that the right of the defendant to file the counterclaim is implicitly protected in the general rules of the Commercial Code, which governs arbitration based on guiding principles and assists in the interpretation of the rest of the arbitration provisions.

   In particular, Article 1417 of the Code should be mentioned, the third section of which establishes that when a provision that governs commercial arbitration refers to a claim, said provision also applies to a counterclaim. When it refers to an answer, it likewise applies to the answer to the counterclaim.

   "Although the procedural form for substantiating the dispute that concerns the nullification of an arbitration award is that of an ancillary claim, this in no way suggests that the ancillary claim does not have to do with a substantive dispute or lawsuit or one on the merits,"[1] which is the case of the validity implicit in an award, and, therefore, the counterclaim should be permitted.

3. Among the general provisions that govern arbitration, there is no express provision that excludes the admissibility of the counterclaim, and therefore it should be admissible. Furthermore, although the legislative could have excluded the admissibility of the counterclaim, he did not, and therefore it should be understood that the counterclaim is allowed.

4. In the legislative history of the draft reform of the Commercial Code, in order to include the "Model Law" on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL), speed and prompt enforcement were adopted as principles of an ancillary claim of nullification of an arbitral award. That said, as previously established in this text, the counterclaim allows and gives complete fulfillment to these principles.

   This judgment constitutes a decision that still is not binding. However, it can be used as precedent in similar cases and is of the highest importance in making the enforcement of arbitral awards efficient in Mexico. •

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[1] *Judgment of the Third Collegiate Court in Civil Matters of the First Circuit*, December 9, 2008.

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