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Von Wobeser y Sierra

Editorial

Having arrived at the second quarter of the year, it is undeniable that the global economic crisis has significantly affected Mexico. The real impact of the crisis is greater than what has been announced or was expected by the Government. While it is true, as they say, that the crisis was not generated in Mexico, the effects of globalization and financial interdependence have pulled Mexico into the crisis. The most recent unemployment figures in Mexico are the following: In the month of February 2009, the unemployment rate reached 5.3 percent of the economically active population, which is the highest unemployment rate since September 1996.

The automotive industry and the construction industry have been among those most affected, both globally and in Mexico. Furthermore, the reduction of financial resources and of credit has resulted in a reduction in the level of demand for goods to levels not seen since the end of the Second World War. Companies, regardless of their line of business or activity, are reducing expenses and, as a basic measure, they are decreasing their labor pool or, in the best of cases, reducing the work hours and benefits of workers, and even looking for ways to reduce salaries. For their part, the Federal Government and the state governments are investing large amounts of money in infrastructure, in job creation, and in counteracting the crisis to the greatest extent possible.

In addition, given that the largest portion of the economic resources of the State come from the export of oil, the dramatic reduction in the price of a barrel of crude internationally must be mentioned—a fact which has considerably reduced the income of the Government from exports of hydrocarbons. It is also important to recall that in the last six months, the Mexican peso has suffered a very significant devaluation in relation to the American dollar. The economic crisis, the devaluation of the peso, and the general situation of the economy keep Mexico on its toes and has led us to redouble our efforts to confront the situation calmly, convinced that the country and the economy will continue forward with the work and dedication of the Mexican people.

Regarding this issue of the *Newsletter*, I would like to mention that, as always, we are presenting a variety of articles related to important and timely legal topics. Specifically, I am referring to two topics: the environment and intellectual property. Regarding the environment: In October 2008, the Law on the Use of Renewable Energies and Energy Transition Financing (*Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética)* was promulgated. The purpose of this law is to regulate the use of sources of renewable energy and clean technologies for generating electricity, which will encourage and promote the great potential our country has for renewable energy. Regarding intellectual property, it is worth mentioning that on January 5, 2009, the Regional Intellectual Property Chamber of the Federal Court of Tax and Administrative Justice opened its doors, with jurisdiction over all of Mexico and with its headquarters established in the Federal District. The creation of this regional chamber will allow intellectual matters to be seen to with the high degree of specialization that they require.

Finally, I am pleased to inform you that, as of this past January, Rupert Hüttler—a member of this firm since 1998—has been admitted as a partner to the firm. Born in Austria, Rupert Hüttler is a graduate of the University of Vienna and the Law School of the National Autonomous University of Mexico. Welcome, Rupert; we wish you great success.

Claus von Wobeser

Article 141 of the General Corporations Law

Text of the Article

> Shares paid, either fully or partially, by contributions in specie, must remain on deposit with the company for two years. Should it become apparent during this period that the value of the assets is 25 percent less than the value for which they were contributed, the shareholder must pay the difference to the company, and the latter shall have a preferential right over any other creditor to the value of the deposited shares.

Comments

There are several observations that we think must be made regarding this article. Generally, these observations lead us to the conclusion that the Article is inoperative due to its content and because it does not take into account the existence of other articles of the General Corporations Law (*Ley General de Sociedades Mercantiles*, LGSM).

The first part of the Article refers to "the shares paid, either fully or partially, by contributions in specie, and reproduces Section IV of Article 89 of the LGSM: "The incorporation of a stock corporation [*sociedad anónima*] shall be subject to the following requirements: [...] (IV) the value of each share that should be paid, in part or in full, in assets rather than cash, must be paid in full."

In practice, the provisions of this article have become obsolete or inoperative, that is the possibility of issuing shares paid in part with cash and in part with contributions of assets other than cash. Many years ago, it was possible and customary to incorporate stock corporations with shares having a very high par value. We might imagine as an example a share with a par value of $100,000.00 (one hundred thousand pesos) for which the shareholder paid $10,000.00 (ten thousand pesos) in cash and $90,000.00 (ninety thousand pesos) in the form of an asset with that value. Today, both stock exchange activity and custom have greatly reduced the par value of shares to, for example, $1.00 (one peso), and shareholders prefer to separate their cash shares from their contribution shares. Therefore, although their existence is still legally possible, shares paid partly in cash and partly in assets other than cash have fallen out of use.

It seems to us that the expression "contributions in specie" is not the best term to be used in order for the concept to be easily understood. According to the *Diccionario de la Lengua Española*, *especie* (specie) means "group of things that are similar, having one or more characteristics in common," although it can also mean "in fruits or genera and not in cash." But in this case the term *especie* also seems inadequate because much of what is most often contributed is real estate, machinery, equipment, etc., even though contributions in specie can also be made.

The Article provides that the shares paid by contributions in specie must be deposited with the company for two years. This deposit has two purposes. The first, which is not expressly mentioned, is to protect the partners whose contributions have been made in cash, and prevent the deception of the public by making it appear that the capital stock is of greater value than it actually is. The second purpose, which is mentioned in the "Statement of Legislative Intent" of the LGSM, consists of temporarily denying the negotiability of the certificates that cover such contributions, "imposing the duty of paying the difference in value that appears, when it must reasonably be considered that such difference goes beyond the natural errors of valuation."

But the text of Article 141 does not correspond to the good intentions of the "Statement of Legislative Intent," nor do we consider it applicable, for reasons we will explain.

The first paragraph of this article provides that the shares paid by contributions with assets other than cash must be deposited with the company for two

years, and that "should it become apparent during this period that the value of the assets is 25 percent less than the value for which they were contributed, the shareholder must pay the difference to the company." Of course, it would seem that 25 percent goes beyond the "natural valuation errors" mentioned by the "Statement of legislative intent". But, as Article 141 is drafted, it can and should be understood that if the value of the assets contributed is *less than* 25 percent—we presume 25 percent of the value at which they were contributed—the shareholder is not obligated to pay the difference to the company. The consequence is that the capital of the company may not be fully paid, and neither this article nor the Law establishes how to adjust the capital.

But it seems that the comparison made by Article 141 is not correct. It compares assets at the value at which they were contributed to their value at a later date, that is to say, within the term of two years, on the date of the so-called "appearance." This can be unjust for either of the two parties, since the value of the assets contributed may have gone either up or down. The comparison should be made between the contribution value and the real or market value of the assets on the date they were contributed.

Although it appears that the deposit of shares is a pledge guarantee, it is not. The shares are certificates created by the company itself, which represent obligations of the company. They cannot serve as a guarantee of payment of these shares. The deposit of the shares to the possession of the company can at most be considered a means to pressure the shareholder to pay any difference in their value with the contributed assets.

The Article adds that the shares paid by contributions with assets other than cash must be deposited with the company for two years, and that if during that time it appears that the value of the assets contributed is 25 percent less than the value at which they were contributed, the shareholder must pay the difference to the company. Several observations must be made in relation to this part of the Article. The first is that within the term of two years that the shares must remain on deposit in the possession of the company, it can appear that the value of the contributed assets is 25 percent less than when they were contributed.

The verb *aparecer* in Spanish means "to become manifest, to come into sight, often causing surprise, admiration, or other change of mood." Therefore, it cannot be accepted that the determination of the value of certain assets contributed can be the result of an appearance, of chance, or of an incidental fact. The authors of the LGSM themselves overlooked the provisions of the Law itself. Article 157 thereof provides that the directors shall have the responsibility inherent in their mandate and the responsibility arising from the obligations that the law and the bylaws impose on them. More specifically, Article 158 provides that "the directors are jointly liable to the company for the existence of the contributions made by the shareholders." Thus, the so-called "appearance" could just as well be the result of the management of the directors.

The article in question then provides that if during the mentioned two-year term "it appears that the value of the assets contributed is 25 percent less than the value at which they were contributed, the shareholder must pay the difference to the company." Of course, it seems to us that this difference of 25 percent in the value of the assets contributed "goes beyond the natural errors of valuation" as described in the "Statement of legislative intent" of the LGSM. But in addition, the way the Article is drafted, it in fact provides that if the value of the assets contributed by any shareholder is 25 percent less than their value at the time they were contributed, the shareholder is obligated to pay the difference to the company. This necessarily has the character of a general rule, and one can easily imagine the difficulties in consolidating the real capital of a stock corporation that has been incorporated, using the contribution of assets with a supposed value greater than the real value. Specifically, it seems to us that this article, as it is drafted, does not resolve the problem of the consolidation of the capital of a stock corporation.

The only possible solution is to determine the value of the assets contributed on the date of formalization of the contribution and to compare this to the real or market value on the same date of the shares issued to the shareholder. If there is a difference in favor of the company, whatever the amount, the shareholder must pay it to the company, so that the capital remains consolidated.

As a result of the above, since it is not possible to apply Article 141 to ensure the consolidation of the capital stock of a stock corporation paid in part or in

Single-Shareholder/Member Corporations under the General Corporations Law

full by contributions of assets other than cash, what provisions of the current law would be applicable to make that consolidation possible?

We find that Section VI of Article 6 of the general section of the LGSM provides that the articles of incorporation of every company must contain "a declaration of what every partner/shareholder contributes in cash or in other assets, the value attributed to each contribution, and the criteria used in valuing it."

Furthermore, we find that Section I of Article 158 of the LGSM provides that the directors of the stock corporation "are jointly liable to the company for the existence of the contributions made by the shareholders."

This liability, which only applies to the directors, is assumed by them from the moment they are installed in their posts and receive all the assets of the company for their management. Therefore, from that moment the directors are in a position to know the value of the assets contributed and the criteria followed for their valuation.

The Law does not set a time period for this and we do not believe that the two-year period established in Article 141 for the appearance would be applicable. In their own interests—and in order to limit their potential liability—the directors should verify the value of the assets as soon as possible.

We do not want to fail to comment on the final part of this article, which provides that the company "will have a preferential right with respect to any creditor" (this should be understood to mean shareholder) to the value of the shares deposited, since the preferential right to the deposited shares belongs to the company. •

Licenciado Manuel Lizardi A.

In February 2007 a bill was presented in the Chamber of Deputies amending the General Corporations Law (*Ley General de Sociedades Mercantiles*, LGSM) and creating a type of company called a Single-Shareholder Corporation (*Sociedad Anónima Unipersonal*) and another called a Single-Member Limited Liability Corporation (*Sociedad de Responsabilidad Limitada Unipersonal*).

It was not until the end of the year that the above-mentioned bill was approved by the Chamber of Deputies. In April 2008 it was sent to the Senate, where it was passed to the Trade and Industrial Promotion and the Legislative Studies commissions for their review and opinion.

The draft bill amending various provisions of the LGSM proposes to incorporate into our law companies with only one partner or shareholder in order to meet new needs and satisfy today's complex commercial relationships, as is done by laws in other countries, particularly in Europe.

The Senate commissions made some changes to the minutes sent by the Chamber of Deputies, which we mention below:

1. The term "company" (*empresa*), proposed by the Chamber of Deputies, is changed to "corporation" (*sociedad*), since the commissions considered that the former is more of an economic term than a legal one. European law uses the word "corporation" (*sociedad*), in spite of the fact that it evokes the idea of an association of two or more persons;
2. The "articles of association" (*contrato social*) are distinguished from the "incorporation papers" (*acta constitutiva*). *Contrato social* is a term that will now be used for corporations with more than one shareholder or partner, while *acta constitutiva* will be used for shareholder/member corporations. In both cases, the internal rules that will govern their structure and organization will be called *bylaws* (*estatutos sociales*). The Chamber

of Deputies wanted to use only the terms *contrato social* and *estatutos sociales*;

3. The proposal of the Chamber of Deputies that commercial notaries public may formalize the resolutions of a shareholder/partner meeting or of the administrative body of a commercial corporation to which powers of attorney have been granted is eliminated. The Senate commissions consider that such a proposal violates the distribution of jurisdiction established in the Constitution, since the granting of powers is of a civil nature and therefore belongs to state law;
4. The draft bill of the Chamber of Deputies indicated that a limited corporation would be incorporated by one or more partners or shareholders. The Senate commissions eliminated the word *shareholders*, since limited liability corporations do not have shareholders, but rather partners;
5. The single-shareholder/member corporations are divided into two classes: (1) original single shareholder/member corporations (*sociedades unipersonales originarias*), which are incorporated by one partner or shareholder from the beginning, and (2) derived single-shareholder/member corporations (*sociedades unipersonales derivadas*), which are corporation originally incorporated with two or more partners/shareholders, where the partnership interests or shares have become the property of just one partner or shareholder. In this respect, the Chamber of Deputies called the first a "single-shareholder/member company from its incorporation" (*empresa unipersonal desde su constitución*) and the second a "supervening single shareholder/member company" (*empresa unipersonal sobrevenida*);
6. The single shareholder/member corporations will add to their corporate name the word *single* (*unipersonal*) or the abbreviation SRLU, in the case of single-member limited liability corporations, and SAU, in the case of single-shareholder corporations;
7. In the case of Article 229 Section IV of the LGSM, the Senate commissions have adjusted the drafting proposed by the Chamber of Deputies to include the derived single shareholder/member corporation as an exception to the causes for the dissolution of a company.

The draft by the Senate commissions was approved by 92 votes in the Plenary meeting held on December 9, 2008, and was returned to the Chamber of Deputies as required under paragraph (e) of Article 72 of the Constitution.

The Chamber of Deputies has not yet discussed the changes made by the Senate. However, it should be emphasized that both chambers agree on the importance of the reform. In any case, we must wait for the final text of the bill in order to be able to better evaluate its scope in our law. •

Joint and Several Tax Liability for Corporate Entities

Joint and several tax liability is a concept taken from civil law. Tax law incorporates this concept and regulates it in Article 26 of the Federal Tax Code (*Código Fiscal de la Federación*, CFF). In order to adequately understand joint and several tax liability, it is necessary to understand the general principles that govern it in civil matters.

Joint and Several Liability in Civil Matters

Joint and several liability can be active or passive. In active liability there is a plurality of creditors, each of which has the right to demand the full payment of the obligation. In passive liability there is a plurality of debtors, each of which is obligated to pay the debt in full. In both cases, the effect of payment is the extinction of the obligation with respect to the other co-creditors or co-debtors.[1]

The following general rules apply to joint and several liability (and are applicable to tax matters):[2]

- Joint and several liability is not presumed. It results from the law or is established by the parties;
- Novation, setoff, confusion, or remission by any of the joint creditors and any of the debtors extinguishes the obligation;
- Payment in full made by any of the joint debtors extinguishes the obligation;
- The joint debtor who makes the payment in full may seek recovery from each of the other joint debtors proportionate to their share of the debt;
- Any of the creditors may receive the full payment of the debt;
- If one joint creditor receives the entire payment for a debt, he or she must divide it among all the joint co-creditors in proportion to their contributions;
- The expiration of the statute of limitations on the debt affects all parties, whether creditors or debtors.

Relevant Circumstances Regarding Joint and Several Liability in Tax Matters

Article 26 of the CFF regulates joint and several liabilities in relation to taxes. Joint and several tax liability implies that both the taxpayer and the jointly liable party have the obligation to pay the tax in question. The tax authority can therefore require either party to pay any taxes, surcharges, and adjustments for inflation owed (but not fines). This is a brief analysis of certain presumptions of joint tax liability relevant to corporate entities.

The following persons will be jointly and severally liable with the taxpayer to the tax authority under the circumstances described:

1. Withholders and collectors.[3] Withholders and the persons on whom the laws impose the obligation to collect taxes owed by the taxpayers up to the amount of these taxes are jointly and severally liable. For example, the employer is obligated pursuant to Article 113 of the Income Tax Law (*Ley del Impuesto sobre la Renta*, LISR) to withhold the tax owed by its employee, and therefore is jointly liable for those payments.

2. Persons obligated to make provisional payments on behalf of the taxpayer.[4] This is the case, for example, of the withholding of the tax by the employer, regulated in Article 113 of the LISR. The employer is obligated to make withholdings and payments on a monthly basis (which are considered provisional payments) for the annual salary tax of the employee. Another example: under Article 154 of the same law, a notary public is responsible for calculating the tax and paying it to the tax authority in transactions recorded in public instruments; the provisional payment will be made by the filing of a declaration. The liability of these

persons is limited to the amount of the provisional payment owed by the taxpayer.

3. Liquidators and receivers.[5] These entities are jointly and severally liable for the taxes that they must pay for a company in liquidation or bankruptcy and for those incurred while they were performing their operations. When the company in liquidation files the notices and reports required by the CFF and its Regulation, there will be no joint and several liability.

4. Directors, managers and administrators.[6] Executive personnel, general managers, or the sole administrator of a corporate entity will be jointly and severally liable for:
   - The taxes incurred and not withheld by such corporate entities while they held such positions;
   - The taxes that should have been paid or delivered while they held such positions.

   The joint liability will be up to the part of the tax liability that is not guaranteed with the assets of the corporate entity they led. This will only occur when:
   - The corporate entity's registration in the Federal Taxpayers Registry has not been processed;
   - The corporate entity has changed its domicile without giving notice; or
   - The corporate entity does not keep accounting records, they are hidden or are destroyed.

5. Business acquirers.[7] They are liable for any taxes resulting from activities carried out by the business when it belonged to someone else. This liability may not exceed the value of the business.

   As an example, suppose that a person acquires one of the lines of business of a company (with its assets and debts). In this case, the buyer will be liable for the taxes incurred by that business up to the value of the business.

6. Representatives of non-residents.[8] The representatives of non-residents (no matter what they may be called), through whom the latter carry out activities for which they should pay taxes, will be jointly and severally liable up to the amount of such taxes.

   In the case of an agent who engages in activities or business in Mexico on behalf of a foreign entity, such agent will be jointly liable for the payment of taxes that are generated as a result of such activities.

7. Partners and shareholders.[9] Partners and shareholders will be jointly liable for the payment of any taxes that are owed for activities engaged in by the company.

   Shareholders will only be jointly liable with the company in question under the following circumstances:
   - The registry of the company with the Federal Taxpayers Registry has not been processed;
   - The company has changed its domicile without filing notice; or
   - The company does not keep accounting records, hides them, or destroys them.

   Joint liability applies to the part of tax liability that is not guaranteed by the assets of the company and will be limited to the participation of the partner or shareholder in the capital stock.

8. Partner or Shareholder Book.[10] The companies that—being required to register their partners or shareholders in the stock or partnership interest book—register individuals or entities that
   - Do not show they have withheld and delivered, when required to do so, the income tax caused by the alienator of such share or partnership interests, or
   - Do not show they have received a copy of the respective auditor's certificate and, if applicable, copy of the declaration recording the payment of the corresponding tax.

   The lawmaker's intention with the above is to prevent tax fraud, since if the company registers its shareholders without proving the payment of the tax, it would be difficult to collect the tax. The above is more of an issue if the seller resides abroad. For that reason the liability is transferred to the company up to the amount of the corresponding tax.

9. Spun-off companies.[11] Spun-off companies will be jointly and severally liable

- For the taxes caused in relation to the transfer by the original company of the assets, debt and capital, and
- For the taxes caused by the original company prior to the spin-off.

With the above, however, the liability may not exceed the value of the capital of each of them at the time of the spin-off.

In this case, the lawmaker is trying to prevent the spun-off companies from dividing the assets, thereby decreasing the guarantee of tax payments and escaping their tax obligations as a result of the transformation of the company.

10. Companies that receive services from residents abroad.[12] Persons to whom residents abroad provide personal subordinated or independent services, when they are paid for by residents abroad up to the amount of the tax caused.

    When a tax resident abroad provides services to a company with residence in Mexico and the service is provided through an employee who receives payments from the person that is a tax resident abroad, the company in Mexico will be jointly and severally liable for the payment of taxes caused by such service.

Thus, we can conclude that joint and several liability in the circumstances analyzed

1. Means that the tax authority can collect the tax from the person jointly liable with the taxpayer under any of such circumstances;
2. As a general rule, the liability is for the taxes owed, surcharges and adjustments for inflation (not including fines), except when the law expressly establishes some limitation. •

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[1] Fausto Rico Álvarez, *et al.*, *Teoría general de las obligaciones*, Porrúa, México, 2005, p. 315.

[2] See articles 1988, 1991, 1999, and 2001 of the Federal Civil Code (*Código Civil Federal*).

[3] See Article 26, Section I, of the Federal Tax Code (*Código Fiscal de la Federación*, CFF).

[4] See Article 26, Section II, of the CFF.

[5] See Article 26, Section III, of the CFF.

[6] See Article 26, Section III, third paragraph, of the CFF.

[7] See Article 26, Section IV, of the CFF.

[8] See Article 26, Section V, of the CFF.

[9] See Article 26, Section X, of the CFF.

[10] See Article 26, Section XI, of the CFF.

[11] See Article 26, Section XII, of the CFF.

[12] See Article 26, Section XIV, of the CFF.

Creation of the Regional Intellectual Property Chamber

Without doubt, the globalization of markets in which our country is immersed has resulted in a boom in intellectual property to levels previously unseen, which leads us to conclude that the transition we are experiencing in Mexico must include sectors that clearly and specifically facilitate the overall development of the country.

Intellectual property constitutes one of the essential elements influencing the promotion of technology, development, and innovation, which are reflections of the modernization efforts of companies and the competitiveness of the economy of a country.

From the legal point of view, the two primary divisions of intellectual property protection are copyright, or authors' rights, and industrial property, depending on whether the focus is on literary and artistic protection or on technological and industrial innovation. These rights, which are intimately related to the freedom of trade and industry, have an ethical basis, since the creators must be recognized and protected as such and therefore receive personal and material recognition, and an economic basis, given that they guarantee exclusivity and ensure loyalty in industrial and commercial relations.

Intellectual property rights are very specialized, not only in relation to the above-mentioned topics, but also judicially. In this regard the current trend is to attempt to ensure that each State has specific judicial bodies that address this area, with levels of specialization that provide the kind of judicial services required by modern societies.

In this respect, Mexico is advancing toward modernity. Proof of this is the updating of the legal framework protecting intellectual property rights, and the creation of judicial institutions in the area.

With Ruling G/17/2008, published on March 24, 2008 in the *Official Federal Gazette*, a specialized judicial body governing intellectual property was created, called the Regional Intellectual Property Chamber of the Federal Court of Tax and Administrative Justice (*Sala Regional en Materia de Propiedad Intelectual del Tribunal Federal de Justicia Fiscal y Administrativa*, TFJFA). This judicial body has jurisdiction over all of Mexican territory, with its seat in the Federal District. Until the entrance in force of the specialized Chamber in comment,[1] the TFJFA had heard intellectual property cases through its Regional Metropolitan chambers.

This innovative action is clearly the result of the efforts made by the Mexican Industrial Property Institute (*Instituto Mexicano de la Propiedad Industrial*, IMPI) to get the support of the Judicial Power and the President of the Republic. The creation of the Regional Intellectual Property Chamber of the TFJFA derives from the conclusions adopted in the international forum held in Cancun that brought together the best known members of different groups and institutions related to intellectual property. It places Mexico within a select group of countries that have specialized IP courts, including the United States, Spain, and Germany.

The Regional Intellectual Property Chamber has specialized jurisdiction to process and resolve proceedings that are filed against the definitive rulings referred to in Article 14, Sections XI, XI, and XIV of the Organic Law of the TFJFA, issued based on the Industrial Property Law, the Federal Copyright Law, the Federal Plant Varieties Law, and all other laws and regulations governing intellectual property.

While the mission of the specialized Chamber is easy to define, it is very difficult to satisfy, given that the challenges to be overcome are greater than any administrative body should have to confront.

The Chamber, currently formed of three magistrates,[2] must attend to, pursuant to the terms established in the Internal Regulations of the TFJFA, all matters pending resolution, which as of today are more than 4,800. They should be resolved within a time period that lessens the damages that such delays are causing to the case resolution process itself.

This situation makes it difficult to achieve the intended purpose of the Chamber, since, far from making the administration of justice in intellectual property matters more efficient, the risk is run of violating the principle of swift and expedited justice that is proclaimed in our country.

It is relevant to mention that any interpretation adopted by this specialized Chamber on intellectual property, as the only court responsible in the area, will be binding, which means that due to its specialization, this Chamber must ensure that its rulings are of high quality and reflect the other intrinsic elements of its judicial work, such as impartiality and transparency.

It can be concluded that the fact that specialized courts have been created is undoubtedly a great advance. However, their creation should be planned and organized in a manner that can truly achieve the desired goals and thereby open new frontiers in this matter and in others of economic relevance for the country, such as to concentrate in one specialized body cases related to antitrust, unfair competition, and intellectual property. Otherwise, rather than resolving the problem, new problems are created that the State must confront. •

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[1] By Ruling G/59/2008, dated October 29, 2008, the Plenary of the Superior Chamber of the TFJFA amended the second and third transitory articles of Ruling G/17/2008, in order to establish that the Regional Intellectual Property Chamber would begin functioning on January 5, 2009.

[2] According to the second transitory article of Ruling 6/17/2008, the Regional Intellectual Property Chamber shall be formed by the magistrates selected by the TFJFA, depending on their degree of specialization and training in the application of their area of specialty.

Amendments to the Public Sector Procurement, Leases, and Services Law

On July 2, 2008 a decree amending several provisions of the Public Sector Procurement, Leases, and Services Law (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*, LAASSP) was published in the *Official Federal Gazette*.

Important among these amendments is the addition of Article 2, which introduces the concept of *subsequent discount offers*, a new process that will be used in public bids. It will allow bidders, upon presenting their proposal (and after the presentation and opening of the sealed envelope containing their economic proposal) to make one or more subsequent discounted offers improving the initial price offered, without permitting a change of the specifications or characteristics contained in their technical proposal.

Subsequent discount offers will only be allowed (1) according to the premises established by the Ministry of Public Authority (*Secretaría de la Función Pública*, SFP) through the administrative provisions issued for such purposes, and (2) if the bidding agencies or entities duly justify their application.

The addition to Article 28 of the LAASSP is understood to have been made in order to promote the development and participation of micro-, small- and medium-sized businesses. It establishes that in national public bids, the governmental agencies and entities must give preference in the awarding of contracts to these types of companies, provided that this is not in violation of the rule establishing that preference must be given to disabled persons or to companies that employ disabled persons. The above addition is not very clear and the issuance of guidelines (in the Regulation of the LAASSP) that delimit its application and scope is still pending.

Articles 29 and 31 of the LAASSP were also added. They refer to the contents of the invitations to bid and the terms and conditions of the bidding. They were amended in order to allow the inclusion of subsequent discount offers if duly justified.

The statement of legislative intent regarding these amendments does not explain in any detail the reasons for adding the concept of subsequent discount offers. It only mentions that it seeks to guarantee better conditions for the State and, at the same time, support the micro-, small-, and medium-sized companies.

The amendments in question are confusing and unclear. It will be necessary to wait until the necessary adjustments are published in the Regulation of the LAASSP and until the SFP issues specific guidelines to be certain of the manner in which the concept of subsequent discount offers will be applied, as well as the scope and application of the preference for awarding contracts to micro-, small-, and medium-sized companies while respecting the rights of all companies participating in a national public bidding process. •

ENVIRONMENT

Use of Renewable Energies and Energy Transition

As part of the energy reform that was approved in October 2008, the Law on the Use of Renewable Energies and Energy Transition Financing (*Ley para el Aprovechamiento de Energías Renovables y el Financiamiento de la Transición Energética*, the "Law") was published. The purpose of this law is to "regulate the use of renewable sources of energy and clean technologies in order to produce electricity for purposes other than providing power as a public service, and to establish a national strategy and instruments for the financing of the energy transition" (Article 1 of the Law). The energy transition referred to in this Law will promote the efficiency and sustainability of renewal energies, the use of clean technologies, and the reduction of dependence on hydrocarbons as the primary source of energy.

There is great potential in Mexico for the use of renewable energy, principally solar, geothermal, and wind, and this new law is a first step toward promoting their use.

To what extent does the Law represent an opportunity for private investment? That will depend on the specific steps taken in the effort to implement the Law. In Mexico, private investment in this area has not developed significantly, principally because the Constitution reserves to the State the right to supply electricity to the public and, although the legal framework does permit private investment in the generation and importation of electricity, the Law obligates the State to buy electricity at the lowest price available. This inhibits the profitable production of renewable energy by the private sector (for sale to the State).

The renewable energies contemplated in the Law are aeolic, solar, hydraulic, wave-generated, geothermal, biofuel generated, and others that the Ministry of Energy (*Secretaría de Energía*, SENER) may decide to include. Excluded from coverage by the Law are nuclear energy, hydraulic energy from sources with capacity to generate more than 30 megawatts, heat

treatment of wastes, and sanitary landfills that do not comply with environmental laws.

This is a framework law that promotes the integration of renewable energy into the National Electricity System. The Law's Regulation will establish the specific requirements for use of the different sources of renewal energies, and should be published within a term of eight months from October 28, 2008, the date of publication of the Law.

In addition, the Law provides for a National Strategy for Energy Transition and the Sustainable Use of Energy (the "Strategy"), for which SENER is responsible. The Strategy will be the mechanism by which the State will promote different policies, programs, actions, and projects to ensure a greater use of renewal energies and clean technologies in Mexico. The Federal Executive, through the draft Federal Expenditure Budget Decree for the corresponding fiscal year, will consolidate the public sector funding proposed within the Strategy to promote and create incentives for the use and application of technologies of renewal energy, energy efficiency, energy savings, and the like. The SENER has a deadline of June 30, 2009 to present the Strategy publicly and is required to update it every year.

The SENER will also be responsible for the drafting and coordination of the Special Program for the Use of Renewable Resources (the "Program"). Through the Program, SENER should, among other things, (1) establish specific objectives and goals for the use of renewable energy and define the strategies and actions to be taken to meet them; (2) establish goals for the percentage of renewal energy in power generation, and (3) cover the construction of the power infrastructure needed to allow energy renewal projects to interconnect with the National Power System. SENER will have six months from the date of publication of the Law to submit the Program to the President of the Republic.

Some of the most promising provisions of this Law for private investment are:

1. That power is given to the Energy Regulatory Commission (*Comisión Reguladora de Energía*) to determine the maximum prices that the suppliers—the Federal Power Commission (*Comisión Federal de Electricidad*) and Mexico's Light and Power company (*Luz y Fuerza del Centro,* LFC), both State agencies—will pay to the Generators (Mexican individuals or entities incorporated under Mexican law with their domiciles in Mexico) for supplying energy from renewable resources;
2. That these prices must include payments for the costs derived from the capacity of generation and for the generation of energy associated with the project; and
3. That the suppliers must execute long-term contracts with the generators.

The Law also establishes that the Energy Regulatory Commission (*Comisión Reguladora de Energía*, the "Commission") must issue official standards governing the generation of electricity from renewal energies and must define the regulatory instruments used for the calculation of the prices for the services that the suppliers and the generators provide each other. The Commission must request the suppliers to amend the dispatch rules, issue general rules for interconnection with the National Power System as proposed by the suppliers, and issue guidelines to which the model contracts between the suppliers and generators that use renewable energies shall be subject (the Commission must issue the contract models within nine months from the publication of the Law).

The Law establishes a Fund for Energy Transition and the Sustainable Use of Energy, through which resources may be set aside for loans guarantees or other types of financial assistance for projects that meet the goals of the Strategy.

Finally, in the international sphere, the Law establishes that within six months from its publication, the Federal Executive will publish the rules of operation pertaining to policies and measures for facilitating the flow of resources from the international mechanisms for reducing emissions of greenhouse gases.

As can be seen, this Law represents a first step in the promotion of the use of renewable sources of energy. Whether it really represents an opportunity for private investment remains to be seen. •

Arbitrability in Mexico of Consumer Matters

Arbitrability refers to the possibility of resolving a dispute through arbitration. The general rule is that everything is arbitrable. Exceptions can be found in two spheres: (1) regarding the subject matter and (2) regarding the persons that execute the arbitral agreement.

1. Subject matter arbitrability refers to matters that are arbitrable and is determined by the substantive law of each country, based on the public interest. In this regard, matters reserved by law to be resolved exclusively by the courts are not arbitrable.
2. Personal arbitrability refers to whether or not the persons who executed the agreement to arbitrate are authorized to submit to arbitration.

In relation to subject matter arbitrability in Mexico, there is a problem in the scope of Mexican substantive law in that, while there are areas that the law has expressly determined as non-arbitrable either entirely or under certain circumstances, there are other areas whose arbitrability is not clear and therefore a study of judicial interpretation is necessary before submitting them to arbitration. This, in order for the parties to be fully aware of the type of proceeding to which they will be submitting and the characteristics of the award they will obtain.

This is the case with consumer rights. The Federal Consumer Protection Law (*Ley Federal de Protección al Consumidor*, LFPC) provides that if the parties (consumer and supplier) do not reach a conciliated settlement, they will be advised to submit their dispute to arbitration (Article 116). This provision clearly establishes that consumer rights disputes are arbitrable. However, an exhaustive analysis of the chapter entitled "Arbitral Proceeding" of this law shows that the nature of the proceeding to be followed (which cannot be changed or waived by the parties) presents certain particularities that can complicate its implementation.

We should recall that the nature of legal acts is not dependent on the name they are given but rather on their characteristics. In this regard, the LFPC contains only six articles that establish the rules of the arbitral proceeding (the Regulation of the LFPC has no provisions on the matter). These provisions establish that the parties must choose between two types of arbitration which, although at first glance they seem secondary, will determine if the proceeding will be more of a judicial nature or of an arbitral nature:

1. The parties can choose either to have the Federal Consumer Protection Agency (*Procuraduría Federal del Consumidor*, the "Agency") act as arbitrator or to elect an independent arbitrator to resolve the dispute;
   1.1. If the Agency is chosen as arbitrator, it should be taken into account that there is case law (registry number 188539) that has determined that the awards issued by the Agency as arbitrator constitute acts of authority and they may be appealed through an amparo proceeding. One advantage of this choice is that the arbitrator's fee is much lower;
   1.2. If an independent third party is chosen as arbitrator, arbitrator's fees will have to be paid (which vary for each arbitrator) and an amparo proceeding could not be filed against the award issued in the proceeding;
2. The parties must choose whether the arbitration will be resolved by an amiable compositeur or according to strict rules of law;
   2.1. In an arbitration resolved by amiable composition, the arbitrator will resolve according to his or her conscience and in good faith, without subjection to legal rules but observing the essential formalities of the proceeding. This type of arbitration can be

relatively swift because there are no time periods or ancillary proceedings;

2.2. If the arbitration is resolved according to strict rules of law, the parties will establish the procedural rules and if they cannot agree, the arbitrator will establish them. In this regard, the Commerce Code will supplement such rules at the first level; it will supplement secondarily the applicable civil procedure rules. The length of this proceeding will depend to a large extent on the procedural rules chosen.

In spite of the fact that the Law refers to a proceeding called "arbitral," whether in fact we have a judicial proceeding or an arbitral proceeding will depend on which of the proceedings described above (section 1) is chosen.

Indeed, as a result of the current judicial interpretation that awards issued by the Agency are judicial decisions, and as long as this interpretation is not changed by the courts, the "arbitral" proceedings in which the Agency acts as arbitrator will have, in our opinion, a judicial nature analogous to an administrative proceeding (with the particularity that the procedural rules will be established by the parties and not by the Federal Administrative Procedure Law). They will not have the judicial nature of a true arbitral proceeding.

In contrast to what happens in the case of a purely arbitral proceeding, the award issued by the Agency can be appealed in an amparo proceeding. Further, a proceeding for the recognition and enforcement of the arbitral award is not required, since no judicial approval is necessary to make it enforceable by the State. Therefore, if the parties choose an independent third party to act as arbitrator, the nature of the proceeding will be arbitral and, thus, (1) the award cannot be appealed in an amparo proceeding and (2) it will be necessary to carry out the procedure for the recognition and enforcement of the arbitral award in order to be able to enforce it.

In conclusion, the only form in which a consumer dispute can be resolved by an arbitral-type proceeding is for the parties to choose an independent arbitrator. If the Agency is elected, they will be submitting to an administrative-type proceeding (even though it is called an "arbitral proceeding"), with the particularity that the procedural rules will be established by the parties. Arbitration of consumer disputes (in the full sense of the word, which is to say arbitrated by an independent third party other than the Agency) has been used little since the reforms of February 4, 2004, and it is, therefore, somewhat unexplored territory about which judicial interpretation and criteria will be generated in the coming years.

In this regard, we would like to emphasize that this analysis is based on current judicial interpretation, which could change with new decisions, of which we will be certain to keep you updated. •

Constitutional Reform in Criminal Law

On June 18, 2008, the Constitutional Criminal Reform Decree was published in the *Official Federal Gazette*.

This decree amended several provisions of the General Constitution of the Republic including articles 16, 17, 18, 19, 20, 21, and 22; sections XXI and XXIII of Article 73; Section VII of Article 115, and Section XIII of Part B of Article 123. Below we will analyze each of the articles in question.

Article 16

In the past, among the requirements for issuing an arrest warrant was the existence of evidence proving that a crime had been committed and that the responsibility of the accused was probable.

With the reforms, the terms "body of the crime" and "probable responsibility" were changed to "commission of the act" and "probability of participation or commission."

Before the Reform, the term "detention of the accused" was restricted to cases of detention while the crime was being committed. Now the meaning of the term has been broadened to include the time immediately after the commission. Thus, previously the accused could only be detained by a private party in the very act of committing the crime, but not after. Now the detention of the suspect by a private party is allowed during the *post crimini* moment, an uncertain scope of time since it is extremely complicated to determine the moment when the *post crimini* begins and when it ends.

Article 16 also adds two paragraphs that establish that in the case of organized crime, the judicial authority, at the request of the Public Prosecutor, can call for the arrest of a person for no more than forty days (this period can be extended when necessary, but the total duration of the arrest cannot exceed eighty days). Organized crime is defined as a "*de facto* group of three or more persons, organized to commit crimes on a permanent or repeated basis as defined by the applicable law."

Finally, this article creates the figure of a controlling judge, who will immediately rule on everything concerning precautionary measures.

Article 17

Although this article maintains its original text, certain additions have been made, which can be summarized in the following two points:

1. Decisions that terminate the oral proceedings will have to be explained in a public hearing;
2. The Federal Government, the states, and the Federal District will guarantee the quality of the public defender service (the professional career service is established for public defenders and his or her salary will be at least equivalent to that of the agents of the Public Prosecutor).

Article 18

In this article, the terms of "corporal punishment," "criminal system," and "social readjustment of the delinquent," have been adopted in place of "detention," "penitentiary system," and "reinsertion of the convicted person."

This article also adds a paragraph at the end establishing that preventive incarceration and execution of judgments will take place in special centers when organized crime is involved.

Article 19

This article adds the following important points to the original text:

The Public Prosecutor may only request pretrial detention from the judicial authority when:

1. other precautionary measures are not sufficient to guarantee (1) the appearance of the accused at trial, (2) the course of the investigation, and (3) the protection of the victim, the witnesses, or the community; and/or

2. the accused is being processed or has been sentenced previously for committing an intentional crime.

In the case of organized crime, pretrial detention will be declared by the judicial authority *ex officio*.

The term "order of subjection to trial" was replaced with "order of assignment to trial."

Article 20

Before the Reform, this article only established the rights of the accused and of the victim or offended party. Now, in addition, it establishes the principles of the criminal process, dividing them into general and specific. The general principles can be summarized as orality, publicity, immediacy, and continuity. The specific principles can be summarized as follows:

1. The purpose of the criminal process is to shed light on the facts, to protect the innocent, and to establish restitution;
2. Every hearing will be held in the presence of the judge (this cannot be delegated);
3. The burden of proof is on the accuser;
4. The judge will only convict when there is certitude of the guilt of the accused.

Regarding the rights of the accused, the following changes have been made:

1. The principle of presumption of innocence is expressly established;
2. The defendant shall learn the name of his/her accusor and the charge being brought against him/her not upon being indicted before the judicial authority (as previously), but as soon as he/she is detained before the Public Prosecutor;
3. The accused will have the right to freely select an attorney to defend him/her. If the accused does not hire an attorney, a public defender will be appointed to the case. It should be emphasized that previously the accused could assume his/her own defense or could appoint a trusted person as his/her representative, but now these possibilities are not mentioned in the article in question.

With regard to the rights of the victim or offended party, a new right of protection of identity can be invoked when the person hearing the case judges it advisable.

Article 21

The Public Prosecutor no longer has a monopoly over the exercise of the penal action, and the possibility is established of private parties exercising such an action in the cases set forth in the criminal law, which is to say that now not only can the Public Prosecutor report the possible commission of a crime to the judicial authority, but also any private party may do so. This seems a sensitive issue at first glance but—as the constitutional provision itself provides—the form of this special exercise of the penal action will be delineated by the criminal law, and therefore we will have to wait for the reforms of the secondary criminal law in order to analyze the involvement of private parties in the accusatory action.

Article 22

The principle of proportionality for penalties is expressly established, which means that the balance between the crime in question and its affect on a protected legal interest must be maintained.

Article 73

This article establishes the powers of the Congress of the Union. Section XXI adds the power to legislate in relation to organized crime, while Section XXIII adds the power to establish and regulate the security institutions named in Article 21 of the Constitution.

Article 115

Previously, Section VII of this article stated that the municipal police were to be under the command of the municipal president in terms of the corresponding regulation. The Article now establishes that the preventive police are under the command of the municipal president pursuant to the Public Security Law of the State.

Article 123

Section XIII of Part B of this article establishes that the authorities of the three levels of government will

implement complementary public security systems in order to strengthen the security of the personnel of the Public Prosecutor, the police corps, and the expert witness services, their families, and their employees.

With respect to the entry into force of these reforms, the *vacatios legis* are determined by different circumstances that range from the entry into force of the secondary legislation to the exercise of power by the Congress of the Union, established in Section XXI of Article 73 of the Constitution.

Finally, the fifth transitory article of the decree discussed here establishes that proceedings initiated before the entry into force of the new accusatory criminal system will be concluded in accordance with the provisions in force before the act. •

ESSAY

The Banks and the Current Economic Crisis

It would be a bit repetitive to try to explain the causes of the economic crisis that all the economies of the world are experiencing. Although it is clearly a complicated matter, both with regard to the financial instruments that were used to multiply money (*e.g.*, Mortgage Backed Securities, MBS; *Collateralized Debt Obligations,* CDO; and Credit Default Swaps, CDS) and the diversity of participants and their interdependence, the majority of people with half an interest in the problem already have a basic idea of what happened.

Nevertheless, it seems important to us to emphasize some of the causes that we consider to be fundamental to the meltdown. Between 2005 and 2007, the financial markets were highly liquid. The crisis began because the real estate market in the United States became artificially overheated, which generated a bubble as a consequence of, among other things, the U.S. consumers' too easy access to credit.

The business of banks is to sell credit products. The generation of profits results principally from the difference between the interest rate at which the banks borrow and the interest rate at which they lend. In addition, banks make money from other charges, including fees charged to debtors and fees for services provided, such as processing mortgages. As in any business, each division of a bank sets its own sales targets. Executives are evaluated and compensated according to how well they meet their targets.

Before this crisis, it was common to come across mid-level bank executives on Wall Street who received annual bonuses worth 12 to 18 months of salary. The compensation of top executives was also disproportionate. In 2006, 96.6 percent of chief executive officers of S&P's 500 companies received an average of $1.9 million (USD) in cash at the end of the year. Compensation in the financial sector was even higher. For example, in 2007 Goldman Sachs paid its CEO, Lloyd Blankfein, a bonus of $30 million (USD) and a total compensation of $76 million (USD), making him

the seventh-best paid CEO. In addition to their inflated salaries, high-level CEOs received pension benefits worth millions, extensive salary perks, and termination contracts granting benefits up to $200 million, even for CEOs who had failed to reach their performance goals. With incentives like these, together with the large amounts of money available for loans, it is no wonder that the standards for granting credit, determined by the top bank executives, became lax.

In 2001, the Texas company Enron filed for bankruptcy protection. In a matter of days, what was then the largest corporate fraud in the history of the United States was uncovered. The response of the authorities to this scandal was the passage of the Sarbanes-Oxley Law, which revolutionized on a global scale the concept of corporate governance. The losses that Enron suffered were, however, miniscule compared to the consequences of the current mortgage crisis.

In his inauguration speech, U.S. President Barack Obama referred to the current crisis as "a consequence of greed and irresponsibility on the part of some." He also stated that this "has reminded us that without a watchful eye, the market can spin out of control." We can be sure that soon the U.S. executive branch will send various regulatory bills to Congress. If the authorities want to get to the root of the problem, such bills should focus on regulating standards for establishing credit policies. They should also propose rules to prevent conflicts of interest among decision makers and to establish reliable standards for the valuation and rating of both companies and credit portfolios. Finally, as a counterpoint to the school of thought of Alan Greenspan, regulations should be issued for oversight of investment banks (among other institutions), which—even though, as institutional investors, are aware of the risks they may be taking, unlike the public investor—need to be regulated in order to not commit certain "errors of judgment" based on the false assumption that they are "too big to fail." •

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