Minimum Mandatory Deposit Requirements for Direct Investments and Financial Loans. Recent Flexibilization by the Argentine Central Bank's Regulations

Foreign exchange regulations in force require local companies who receive funds of foreign origin (either by means of a foreign direct investment or a financial loan) to demonstrate, within a specific term, that the resulting capitalization of such funds has been effectively registered before the Public Registry of Commerce. A recent Argentine Central Bank communication has extended the term to demonstrate such registration, aligning foreign exchange regulations with certain practical aspects related to the registration of capital increases.

1. Introduction

Foreign companies who bring funds into Argentina to carry out capital contributions in an Argentine company (as direct investments or by granting financial loans), are required to make, a "mandatory deposit" (*encaje*) in a local financial institution. Such mandatory deposit is to be made in U.S. funds for a calendar year and is to consist of a non-remunerated mandatory deposit that amounts to 30% of the funds brought into the country.

2. Capital Increase: Corporate Resolutions and Registration Thereof Before the General Inspection of Corporations

Once the local company has received the funds, such amounts shall be capitalized in the company. This will require the local company to hold a Shareholders' Meeting (in the case of a Corporation— *Sociedad Anónima*) or a Quotaholders' Meeting (in the case of a Limited Liability Company— *Sociedad de Responsabilidad Limitada*), to resolve to capitalize the investment or loan (converted into Argentine Pesos at the applicable exchange rate) and, consequently, increase the capital of the company and amend its bylaws/articles of association accordingly.

Such corporate capital increase is valid and binding *vis-à-vis* the company and its Shareholders as of the date of the meeting that resolves upon the corporate capital increase.

However, for such capital increase to have effect regarding third parties,[1] it is necessary to register such capitalization before the General Inspection of Corporations (*Inspección General de Justicia*—"GIC"), which is the administrative agency in charge of the Public Registry of Commerce for the City of Buenos Aires.

Filing for registration of a capital increase will generally require, among other documents, the filing of a certificate, signed jointly by the legal representative of the local company and a certified public accountant, evidencing the inflow of the total amount of the capital contribution in cash.

3. Mandatory Deposit. Exception

As an exception to the 30% mandatory deposit to foreign remittances of investments and loans, Argentine Central Bank (the "ACB") regulations require that, within a certain time frame, the local company which has received the funds demonstrates the final registration of the capital increase before the GIC.

If this evidence is not provided in due time, the recipient is required to deposit in the local bank (*banco de seguimiento*—which has received the funds) an amount equal to the mandatory deposit (*i.e.*, 30% of the amount remitted) until the registration of the capital increase is finally achieved.

Prior to January 2014, under Communication "A" 4762, the local company had a term of 240 calendar days (as from its date of filing) to demonstrate such registration before the GIC. This term could be extended for another 180 calendar days on a per case basis, with justification. Upon expiration of this term, the local company was required to make the deposit within the following 10 business days.

This system proved cumbersome, as it did not take into account certain day-to-day aspects of the GIC, mainly as follows:

The GIC provides for two distinct types of filing: (i) a normal filing; and (ii) an expedited filing. Under current GIC regulations, the expedited filing (which has an increased associated fee) shortens the term for the GIC to analyse and review the filings. However, the GIC *does not allow for an expedited filing* for registration of capital increases (which require both a legal and accounting analysis by the GIC's inspectors). As a result, the internal review process by the GIC normally takes several months.

In addition, it is not uncommon that the GIC makes observations and/or requests for additional information/documentation regarding the origin of the funds that are being capitalized. This generally requires the preparation of additional accountant's certificates, attorney's explanations and clarifications, informal meetings with the inspectors in charge of the filings, etc., which may significantly extend the time frame for the GIC to review and finally approve the registration.

In this context, in many cases, the 240-calendar day term (and its 180-calendar day extension) required by the ACB (to avoid making the mandatory deposit) was not met. As stated above, this forced local companies to immediately make a large transfer of funds to the relevant

bank (*i.e.*, 30% of the funds remitted). This situation was especially difficult in cases where the original capitalized funds had already been used by the local company (for instance, to purchase land, cover a negative net worth, repay a loan, etc.).

4. The Argentine Central Bank Responded

On January 29, 2013, the ACB issued Communication "A" 5532 (the "Communication"), which amended Communication "A" 4762. Specifically, the Communication restates and amends the rules regarding the application of the exceptions to the mandatory 30% deposit.

The Communication addresses the issues arising from the tight time frame for registering capital increases before the GIC, by extending to 540 days (from 240 days) the term to demonstrate the final capitalization of the funds that have entered Argentina by way of direct investments or loans in local companies.

Under the Communication, once the 540-day term has expired, the mandatory deposit must be made within 10 days following the date on which the company becomes aware that the contribution has not been accepted or has been rejected and/or suspended.

Finally, the Communication provides that any deposits made in U.S. dollars that are released by a local company (whether due to the expiration or to any other reason specified in the regulations) must be reimbursed by the ACB to the relevant bank, in Argentine Pesos (and not in the original currency), which then must give to the local company the amount of Argentine Pesos according to the prevailing exchange rate.

5. Conclusion

In conclusion, the newly adopted changes in the mandatory deposit exception procedure by the ACB have aligned and made its provisions consistent with the practical, day-to-day administrative aspects of the registration of capital increases by local companies before the GIC, favoring compliance by local companies with ACB regulations by granting more realistic terms for registration of capital increases before the GIC.

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Endnote

1. In this regard, Section 12 of the ACL provides that "Unregistered amendments (…): Inappropriately registered amendments are binding on the partners who approved them. They cannot be invoked against third parties who, nevertheless, can invoke them against the company and the partners, except in the case of stock companies and limited liability companies."

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The Brazilian Clean Company Act: Good News or No News?

Brazil is divided: while the Brazilians in the streets are celebrating the entry into force of the new "Clean Company Act" (the "Act"), scholars and practitioners remain concerned about its effectiveness and content.

The Act is undoubtedly a victory, in light of the demonstrations in Brazil in recent months about a great variety of issues, all of which had one thing in common—governmental corruption. According to Transparency International, a non-governmental organization that monitors and publicizes corporate and political corruption in international development, Brazil is considered a highly corrupt country, ranking 72nd on the list of the Corruption Perceptions Index 2013. It is clear that corruption is at the heart of Brazil's dreadful quality of education, health care, transportation, infrastructure and everything else.

The Act will try to reduce the degree of corruption in Brazil and will punish legal entities for acts of corruption against domestic or foreign public officials. It provides for the civil and administrative responsibility of such companies. Entities will be strictly liable for the illegal acts committed in their own interest or benefit.

Prior to the passage of the Act, there were already a number of statutes in force aimed at preventing corruption, such as the Criminal Code and the Administrative Improbity Law, among others, but Brazil only punished the individuals who received the bribes, not the entity who paid them. Moreover, it has always been hard for Brazilian courts to enforce such provisions as the Public Prosecutors had the burden of proving that the parties had intentionally violated the law. With the Act, it is now easier for authorities to punish the paying entities.

The Act provides that the following entities are subject to the law: (i) Brazilian entities and simple companies incorporated or not, irrespective of the form of organization or corporate type adopted; (ii) foundations, associations of persons or entities, joint ventures in general; and (iii) foreign companies with an office, branch, or representation in Brazil (incorporated by fact or by law, even if temporarily).

Furthermore, the liability of the entity does not exclude liability of the controlling, controlled or affiliated entities, which will be jointly liable for the wrongdoing under the law. Likewise, the offending entity's liability does not exempt the individual liability of its directors or officers or any natural person, author, coauthor or participant in the offence.

The Act establishes the conduct that is considered harmful and prohibited as follows: (i) to promise, offer or give, directly or indirectly, an undue advantage to a public official, or third person related to him/her; (ii) to finance, fund, sponsor or in any way subsidise the prac-

tice of illicit acts under the law; and (iii) to use an intermediary legal entity or individual to conceal or disguise its real interests or the identity of the beneficiaries of the wrongdoings.

Specifically with regard to acts relating to public tenders and governmental contracts, any kind of bid-rigging will be considered harmful conduct under the law. Such acts include: (i) defrauding the competitive nature of a public bidding procedure; (ii) preventing, hindering or defrauding the performance of any act of a public bidding procedure; (iii) diverting or trying to divert a bidder by fraudulent means or by the offering of any type of advantage; (iv) defrauding a public bid or its resulting contract; (v) deceitfully forming an entity to participate in a public bid or contract; (vi) illegally benefiting from changes or extensions of government contracts; (vii) defrauding the financial–economic balance of government contracts; or (viii) hindering the investigation or audit by public agencies, entities or agents, or interfering with their work, within the scope of the regulatory agencies and supervisory bodies of the national financial system.

With respect to sanctions, the Act creates stiff penalties and establishes the strict liability of the offending entity. Once the offense is determined, the offending entity will be subject to sanction even if (i) it has not obtained any benefit from its wrongdoing under the law; (ii) its employees or agents act on its behalf without authorization; and/or (iii) a third party, whether a natural person or a legal entity, is used for wrongdoing.

The administrative sanctions establish fines of 0,1 percent to 20 percent of the offending entity's gross revenues in the fiscal year prior to the initiation of the enforcement proceedings and publication of the punishing decision in a newspaper of wide circulation.

The judicial sanctions encompass, in addition to full disgorgement of the benefits illegally obtained, (i) forfeiture of assets, rights or other values obtained as a result of the wrongdoing; (ii) partial suspension or interdiction of corporate activities; (iii) compulsory dissolution; and (iv) debarment, which includes the prohibition from receiving incentives, subsidies, grants, donations or loans from public financial institutions for one to five years.

Although the new law holds promise, in an effort to change the culture, as previously mentioned, scholars and practitioners in the area are highly concerned about certain aspects of the new law, such as who shall be the competent authority, which raises questions such as who will establish and conduct administrative proceedings and enter into leniency agreements.

Competent Authorities

The Act neglected to designate a specific single government authority to establish and conduct administrative proceedings. Scholars and practitioners have criticized this failure. Such designation would have allowed this agency to become a qualified body, to develop the relevant technical expertise and to make consistent and equal decisions. Rather than establish a specialized agency, the Act allows any of the highest authorities of the Executive, Legislative and Judicial branches, of each county, state and Union, to be a competent authority. Therefore, jurisdiction to enforce the Act is diffuse, which will provide for much inconsistency and no standard in the application of the law, not to mention that it may empower the very authorities that may possibly be involved in the cases of corruption.

Leniency Agreement

Following the example of the Brazilian Antitrust Act, the Act authorizes the execution of leniency agreements with entities responsible for infringement of the Act, and who cooperate effectively with the investigation and administrative proceedings. Such agreements may reduce the fines up to two-thirds. Although the Act permits such agreements, it is silent as to the appropriate time for the execution of the agreement (if only permitted, for example, after the conviction or also in the course of the investigation). Further, given past experience in Brazil, companies may be hesitant to seek leniency given that, in practice, confidentiality of such legal agreements is not guaranteed.

Beyond that, the agreement has no impact on the criminal sphere: the charged entity may naively provide an administrative authority all evidence of the illicit act in seeking leniency from such administrative authority, but this agreement will not protect its executives from a criminal case.

Finally, practitioners doubt that the Brazilian authorities have the sophistication needed to secure a leniency agreement.

In conclusion, we now have to wait and see what will prevail: will we see the reduction of corruption or a lack of effectiveness of the law in a country known for not applying its own rules. Our hope is that the decrees that will regulate the Act will solve some of the controversial issues listed above and that Brazil one day becomes a reference in combating corruption.

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