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Argentina

FURTHER FOREIGN EXCHANGE RESTRICTIONS

On December 20, 2012, the Argentine Federal Tax Authority ("AFIP") passed General Resolution No. 3417/2012, which requires companies who intend to remit funds overseas (such as the payment of dividends and payment of imports, among others) to file, effective February 1, 2013, an anticipated overseas payment sworn statement (DAPE), prior to carrying out such payments.

Moreover, on March 18, 2013, AFIP passed General Resolution No. 3450/2013, which increased from 15 to 20% the additional charge that is added -as an advance payment of Income Tax- to credit card purchases in US Dollars. It also made applicable such charge to purchases of travel packages and tickets to travel abroad by land, sea and air.

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Brazil

LAND ACQUISITION BY FOREIGNERS IN BRAZIL

With the upgrowth of the national economy, proportioned by both the stability of currency and control of inflation, Brazil has been put in a highlighted position in the international scenario of foreign investments, especially with respect to the area of Agribusiness.

Data provided by the Ministry of Agriculture reveal that the exports related to the agribusiness represents 40% of all national exports, amounting for US$ 62.5 billion in the year 2012.

Foreigners usually come to Brazil to invest in the purchase of lands located in the midwest and north regions of the country. However, in order to invest in that determined manner, it is necessary for the foreigner to adequate themselves to Brazilian rules. In this case, it is up to the National Institute for Colonization and Agrarian Reform (Incra) to stabilize control over both acquisitions and leasing of lands by foreigners in Brazil, it being mandatory that Incra’s prior authorization is duly given. And it is also worth to mention that, from time to time, even the National Defense Council might be consulted for their agreement on the matter.

Many different interpretations have been given to the Brazilian legislation responsible for taking care of this issue throughout the last couple of decades. The most highly ranked of those laws dates back to 1971 (Law No. 5709/71), bringing a series of limitations to the property of lands in national territory.

In a brief analysis of the limitations brought by this law, there are some we find worth to highlight:

1. The previous consent of the Executive-Secretary of the National Defense Council is strictly necessary when the land of interest is located in any area designated as indispensable to national security.

2. There are certain mandatory information that must be in the Public Deed that certifies the purchase, in case it has been done by an individual, such as: the identity document, a proof of the individual’s residence in national territory and, according to the necessity imposed by the situation, the prior authorization of the Executive-Secretary of the National Defense Council; and, in the hypothesis of the purchase being executed by a legal entity, the transcription of the act responsible for giving the authorization for the purchasing of the rural area, as well as that of the documents capable of proving its incorporation and its authorization to act within national territory.

3. The total amount of rural areas reserved for foreigners may not exceed twenty five percent of the surfaces of the cities where they are located as a general rule. However, if the foreigners involved belong to the same nationality, the limit imposed is reduced to ten percent [1].

4. The limits imposed by this law can also affect the leasing of lands by foreigners[2], and any purchase, acquisition or leasing that may be suspect of violating the legal prescriptions shall be considered null in the terms of the law.

5. The foreign individual may not acquire more than 50 modules of undefined exploitation, in a continued or discontinued area.

6. The foreign legal entities may only acquire rural lands which are destined to the imple-
mentation of agricultural, cattle farming, industrial, or colonization projects, there being the necessity of the prior approval of the Ministry of Agriculture for these projects, there also being the consultancy of the competent federal department responsible for the regional development in the respective area.

Within the restrictions listed above, the most discussions involving this matter is found in the rule responsible for imposing all of those restrictions to all and any national legal entity of which any foreigner individual or legal entity is a part of, being the major quota or shareholder, having its residence or headquarters offshore.

The reason for the referred discussion is that the Federal Constitution of 1988 defined the Brazilian legal entity as the one incorporated under Brazilian laws, having its headquarters and administration within national territory. As a consequence of that, is has been understood that the extension in the limits imposed by law to the Brazilian companies in which there was the participation of foreigners without their headquarters or residence in the country would have been revoked.

Notwithstanding this, the constitutional provision that brought the concept of the Brazilian legal entity was also revoked by a constitutional amendment in 1996, resulting in the creation of even more doubts and questions on the matter.

In its last feedback regarding the term or the revocation of the legal limits’ extension to the Brazilian legal entity constituted through the participation of foreigners without residence or headquarters in Brazil, Brazil’s Attorney General’s Office concluded that the limitations remained enforced for both foreigner companies authorized to act within our country and for those naturally Brazilian but counting with the participation of foreigners as their major quota or shareholders.

The referred discussion has been brought back in the beginning of 2013, when the Special Department of São Paulo’s Superior Court decided, with just one contrary vote, for the registering of the corporate incorporation act that involved a company with foreign capital participation in the Real State Registry in the city of Casa Branca, within the countryside of São Paulo.

After this decision, the general magistrate of Justice in São Paulo, José Renato Nalini, reviewing the normative instruction edited by the Magistrate’s Office itself, approved the technical report[3] that dispenses the notaries and officers from applying the legal restrictions to the cases of rural land acquisitions by Brazilian legal entities in which there is a major participation of foreign share capital.

With the Magistrate’s Office new technical report, it is expected that similar attitudes shall be taken in other states throughout the county, allowing the access to rural lands even to those Brazilian legal entities which have more than half of their share capital owned by foreigners.

The new understandings given to these legal limits may create a significant increase in investments within the Brazilian agribusiness sector, rocketing the growth of those states whose economy depends on this branch of economic activities.

[1] These restrictions, however, are not applicable to the rural area whose size is inferior to three modules of undefined exploitation or if, in the case of an individual, they have a son, or are married to a naturally Brazilian individual under the regime of common property agreement. (Law No. 5.079/71, article 12).


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Brazil’s New Law is Not Tough Enough to Fight Electronic Crimes

After 15 years of discussion, Brazil’s government has enacted a law that typifies computer-related crimes and covers important issues such as electronic device invasion, unauthorized remote access and interruption of web services. This article intends to analyze some aspects of the long-awaited Law 12.737/2012.

The first point to mention is the fact that the law limits the typifying of invasion to cases in which an “infringement of security mechanisms” occurs, excluding computer devices without protection mechanisms from the enforcement.

Moreover, the expressions “security mechanism”
and “computer device” (Only hardware, what about software?) are not defined by the law, raising doubts about the legal framework in certain cases.

Furthermore, since the conduct “to invade” gives the idea of “entering forcefully”, cases of inappropriate acquisition of data through social engineering techniques and other means (e.g. disclosure of password by the owner to third parties) theoretically would not be included in the newly born classification. This is because such actions would not constitute violation, but merely unauthorized access.

Additionally, it is possible to foresee a broad debate about who would be the “owner of the device” that was invaded - expression used to designate the victim. The legal text seems to refer only to the owner, not clarifying if an eventual possessor or user could also be protected.

It is also important to mention that, concerning the penalization of disclosure of industrial secrets obtained by invasion, there is an apparent duplicity of legal prediction: the improper disclosure was already considered as a crime by the Protection of Industrial Property Law (Law 9.279/96).

It’s true enough that the new law comprises many other interesting topics. However, the sentences imposed appear to be too soft, allowing the enforcement of the conditions of Special Courts’ proceedings. This when the international trend is precisely the opposite: recently it became news the fact that the State of California (USA) sentenced to 10 years of prison a hacker accused of stealing pictures from celebrities through the web - in addition to the payment of a compensation for the sum of 76 thousand dollars.

In truth the decree can be summed up in three words, efficiency of communication. This appears to be the decree’s central idea, and is essential to be effective in the current scenario of both growing e-commerce activity and increased complaints by consumers to consumer protection bodies regarding that activity. In relation to the evolution of virtual medias, an old subject that had been previously scheduled in other bills under the new rules, it was established that sites should disclose their details, especially, their corporate name, CNPJ or CPF, physical address and any other necessary contact information.

This simple security measure, is clearly a positive development for good faith companies as it facilitates transparent access between the parties and thus allows customers to more effectively check the suitability of merchants. It also reiterates the responsibility imposed upon entrepreneurs in the online marketplace to follow the same rules of tax and customer service as those in the traditional physical marketplace. This vendor identification will encourage healthy competition in the market which to date has been tainted by some online cowboys who have used the anonymity of the internet to avoid the burden of Brazilian laws.

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BRAZIL PUSHES E-COMMERCE PROTECTION

On March 15th, International Consumers Day, Federal Decree 7962/2013 was published. It provides additions to the Brazilian Consumer Code, Código de Defesa do Consumidor, (CDC) - regarding e-commerce. The decree issues a number of benefits and renovates a proposal to reinforce the responsibilities of parties in online platforms.

The decree has recognizable merits, especially through the application of concepts relevant to the CDC which did need revising for online business, such as the right to information, efficient customer service and the right to return goods the consumer decides after purchase that they simply do not want.

In truth the decree can be summed up in three words, efficiency of communication. This appears to be the decree’s central idea, and is essential to be effective in the current scenario of both growing e-commerce activity and increased complaints by consumers to consumer protection bodies regarding that activity. In relation to the evolution of virtual medias, an old subject that had been previously scheduled in other bills under the new rules, it was established that sites should disclose their details, especially, their corporate name, CNPJ or CPF, physical address and any other necessary contact information.
Also, the decree provides that in cases of collective purchasing the company should provide clearly important details such as the minimum number of buyers, the deadline to join the offer and the full details of the offeror and collective shopping site.

In order to encourage clarity, it was also determined that to complement the above that the principal rights and obligations resulting before closure of a contract should be presented in an easier way to consumers. As for post closure these rights should also be made available so consumers can refer to them after the sale. The supplier should maintain a proper channel of electronic customer service for the consumer.

Furthermore, the decree rightly provides that the appropriate means to exercise the right of cancelation is by way of Article 49 of the CDC and that as such this must be made clear to the buyer.

Although the decree does not address the issue directly, the creation of simple channels of communication for consumers, the CDC Consolidated guidance could also be extended to social networks given their huge growth within the Brazilian media. Furthermore the theme of IP log stores as discussed in the debates surrounding the Civil Regulatory Framework should be considered appropriate in relation to consumer protection. It should also be mentioned, that companies seeking an adjustment in the terms of information security under Brazilian Technical Rules Association (27001 and 27002, for example), must remain in accordance with current legislation and therefore should comply meticulously with the provisions of the decree.

As noted, all the information required by the decree to be disclosed by the vendor may have another effect, that being to empower consumers to be able to evaluate effectively the supplier and the products he is offering, the legislation emphasizes the principle that consumers should have choices in their consumption decisions. So, although the law applies to everyone, sometimes the Law itself needs to remember its application in certain environments, especially in pioneering developments, in order to be most effective. This seems to be the case the with decree 7962/2013; its considerations are well timed and will serve as a foundation for the positive development of online business in Brazil.

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Two class actions are filed against LAEP company

Brazil’s Securities and Exchange Committee (“CVM”) and the Brazilian’s Federal Public Attorney’s Office (“MP”) filed on March 5th, 2013 a preliminary lawsuit in preparation for a class action against LAEP, the private equity company which owns the Parmalat and Daslu brands in Brazil. CVM and MP argue that a series of apparently legal moves, when seen all together show evidence of fraud. Among these actions are the continuous subscriptions of capital which caused dilution to shareholders. LAEP argues that these were made in order to pay creditors, however CVM and MP dispute the existence of such debts.

This preliminary lawsuit sought and obtained on March 6th, 2013 an injunction which froze all assets of LAEP and the entrepreneur and ex-CEO of the company Marcus Alberto Elias.

In its petition CVM and MP stress that this is without a doubt the most derogatory case that has ever occurred in the history of the Brazilian capital markets and perhaps in the world. The petition follows stressing that the case is an absolute outrage and a total disregard not only to the investors, but to all constituted powers in the country.

The actual class action by CVM and MP was filed on April 5th, 2013 and lists LAEP, some of its directors and two of its ex-CEOs, including Luiz Cesar Fernandes founder of the Pactual Bank, as defendants.

Notwithstanding the lawsuit above, on March 15, 2013 the Brazilian Association of Investors in the Stock Market (“Abrimec”) filed its own class action. Abrimec claims that the constitution of LAEP as a company in Bermuda was made with the sole purpose of defrauding the Brazilian capital markets. Abrimec also argues, and includes CVM as a defendant, that CVM did not act in accordance with its duties to protect the capital markets. The Abrimec case was remitted to the same judge who has taken over the CVM and MP case.

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On December 26, 2012, Congress approved a tax reform that entered into force on January 1, 2013. Among other issues, the reform introduces changes regarding VAT and income tax, as well as a new consumption tax. The reform also abolished the possibility of engaging into legal stability agreements as a protection for foreign investment. Nevertheless, requests for agreements filed before December 31, 2012 will still be subject to the previous regime.

Regarding VAT, the new law sets forth three main rates, namely: 0%, 5% and 16%. Besides, the existing list of excluded products and services was changed, by adding new items and eliminating others. For some of the eliminated products and services the VAT was fixed at a rate of 5%.

Regarding free trade zones, the law provides that in determining the VAT taxable base for finished products produced in free trade zones, the national component value would not be discounted. However, this new rule does not apply to free trade zones that were approved before December 31, 2012 or to the ones that were already under study. Also, it does not apply to the free trade zone’s users that are already qualified.

In connection with the income tax, the new law reduced the corporate rate of 33% to a lower rate of 25%. However, this new rate does not apply to foreign companies that do not have a branch office or permanent establishment in Colombia. The reform also introduced a new income tax called the CREE to replace payroll taxes, which entered into force with a rate of 9%.

This rate will change to 8% by 2016. This tax must also be paid by companies declared as free trade zones, companies which have presented a free trade zone declaration request and users of such free trade zones, as long as the declaration was issued or qualification was filed or obtained after December 31, 2012. Free trade zones established before that date and their users will be exempted from paying this tax and will continue to pay usual payroll taxes.

Additionally, the reform introduced a new tax over consumption which rate ranges from 4% to 8%. Certain activities such as mobile phone services, restaurants and the sale of vehicles will be subject to this new tax instead of VAT.

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NEW COLOMBIAN VISA FOR MERCOSSUR COUNTRIES

In December, the Ministry of Foreign Affairs issued Resolution 7183, allowing citizens from certain Mercosur countries to obtain resident visas for Colombia. However, application of this Resolution is conditioned to reciprocity among Colombian and states from Mercosur. This means provisions would only come into effect when Mercosur countries grant resident visas for Colombian citizens.

Until now, Brazil, Argentina, Bolivia and Peru have been granting this type of visa to Colombian nationals. Therefore, application of Resolution 7183 will enable citizens from these countries to obtain resident visas for Colombia. It is important to bear in mind that application for a resident visa is conditioned to the satisfaction of specific requirements when foreigners want to engage into labor agreements for activities regulated in Colombia. For instance Brazilian and Argentinian engineers must obtain temporary permits, engineer’s license and/or initiate validation of their university degree.

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NEW REGIME FOR INTERNATIONAL TRADING COMPANIES

In December, 2012, the Government issued Decree 2766 on International Trading Companies (“Sociedades de Comercialización Internacional” or “CI” in Spanish). This new regulation eliminated the existing prohibition of selling exportable goods to local third parties or other CI’s, widening as such the scope of business and operations od CIs. Moreover, it also eliminated the homologation process established by Decree 380 for existing CIs.

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THE COLOMBIAN LEGISLATION ON FOREIGN INVESTMENT IN REAL ESTATE

The Colombian legislation on foreign investment has enjoyed a healthy evolution in the last decade. As the government policies towards the foreign investment attempt to turn the country into a more attractive destination for investors, the legislation on such matters has become more flexible presenting new possibilities to foreign investors in Colombia. One example of the evolution is the removal of restrictions towards foreign investment in real estate that has been in force for more than ten years.

Before 1999, Colombia had several restrictions for foreign investment in real estate, measures that were justified by the Government as policies to prevent money laundering from the drug lords. After the issuing of the Decree 241 of 1999, the Colombian Foreign Exchange Law had lifted most of these restrictions. Considering that other Latin-American countries such as Brazil and Mexico still hold restrictions to the foreign investment in real estate, Colombia has grown during the last ten years as an attractive market for businessmen looking to invest in developing countries.

The actual Colombian exchange legislation classifies investment in real estate as a “Foreign Direct Investment (FDI)” that must be canalized through the exchange market. The canalization can be made through exchange market brokers (trading agents) or compensation accounts. Besides, it is required that the investor registers the transaction through a Statement of Exchange for Foreign Investment, issued by the Central Bank of Colombia, using Form No. 4 for real estate cases. It is highly advised to the interested investors to seek legal counsel in the filing Forms process in order to prevent mistakes that could cause legal problems such as fines or the loss of rights to transfer their capital and its net profits, generates in the future by the capital invested, to other countries.

Besides the lifting of the restriction, the Colombian legislation has periodically introduced other dispositions that pretend to make the foreign investment in real estate more attractive to investors, such as: i.) The investment made to the country for construction projects, improves or repair real estate joins the asset value previously registered as foreign investment, not requiring to file another Form No. 4.; ii) It is possible to a foreign investor to sell directly real estate in Colombia to another foreign investor, by filing Form No. 11 “Registry of international investment” and presenting the Certify of Liberty and Transfer of Property (document where the effective transfer of the property to the new owner appears). In this case, the buyer must register the new investment and the seller must cancel the old one. iii) Whenever the acquisition of the real estate is made through leasing contracts but the investor decides not to perform the buy option, the first payment of rent not intended to compensate the use of the good may be carried out for the foreign investor at any time.

Finally, it must be noted that as a measure to counter money laundering, all the registers of foreign investments in real estate are reported to a government institution called UIAF that studies the operations in order to prevent money from illegal activities entering into the legal market.

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AMENDMENTS TO TELECOMMUNICATIONS LAWS

On March 11, 2013, the Federal Government presented before the Congress a proposal for a constitutional amendment on telecommunications. This encompasses a very important possibility to modernize the legal framework of the telecommunications industry in Mexico, fundamental to our economy.

This proposal must be analyzed responsibly with the adequate technical grounds to make sure it turns into a platform to create a competitive and growing industry, as well as to provide concrete benefits for its consumers.

Pursuant to a recent study by the Organisation for Economic Co-operation and Development (OECD), the absence of open competition on the telecommunications sector in Mexico, particularly the high concentration on fixed and mobile phone services, i.e. high prices and low coverage, generates a cost of $26 billion dollars per year. We cannot hope to be a more developed and competitive country if we keep incurring in such costs.
Essentially, the constitutional amendment is based in four basic topics: (1) the inclusion to the Political Constitution of the United Mexican States of the constitutional right to access telecommunication services; (2) (a) the creation of two completely autonomous bodies that will govern competition, telecommunications and broadcasting, with full authority in these matters, (b) the creation of a public entity with technical, operational, administrative and managerial autonomy that will provide within the Mexican states, free of charge, broadcasting services, and (c) the creation of specialized courts with exclusive jurisdiction in these matters; (3) (a) the provision to the competent authorities of the appropriate and necessary tools to promote an effective competition in the market, including the divestiture of assets, rights or related parties known as dominant operators (operadores preponderantes), (b) local loop unbundling or last mile access, (c) full foreign investment in telecommunications and the opening of up to 49% of foreign investment in broadcasting, and (d) measures to allow replay of public access television channels through satellite or cable television providers, free of charge for a set period of time; and (4) the tender of two public access television channels and the creation of a State-owned telecommunications network that will provide telecommunications services to the public.

The amendment proposal will be turned to the Senate for review and, in the event of approval, must be approved by the local Congresses to take effect. Welcome competition in the Mexican telecommunications industry.

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