# Newsletter Legal Developments in Latin America—June—August 2014

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On August 6, 2014, the Argentine Executive (the “Executive”) submitted to Congress (“Congress”) a bill to amend the Anti-Hoarding Law (Ley de Abastecimiento), No. 20,680, as amended (the “Bill”).

According to the message with which it was sent to Congress, the Bill is intended to:

(i) Guarantee a transparent operation of the goods and services market;

(ii) Guarantee access by medium and small producers to infrastructure and technology;

(iii) Propose a regulatory framework for production, construction, processing, trade, and consumption relationships with a view to avoiding abuse and undue appropriation of the surplus of the value chain; and

(iv) Avoid abuse and protect the general well-being of the people, ensuring the satisfaction of their basic or essential needs.

In public statements, several officers have defended the Bill and rejected the criticism expressed by several economic sectors. They stated that the powers conferred on the Executive by the Bill are similar to the ones already in place pursuant to the existing Anti-Hoarding Law, No. 20,680, which, according to them, is apparently in full force. Those officers are also of the opinion that the Bill is merely an update of the Anti-Hoarding Law framework and that, moreover, it is less stringent because it eliminates the imprisonment penalties provided for in the old law.

The truth is that, contrary to the statements of the supporters of the Bill, it is under intense debate both by legal scholars and by courts whether Anti-Hoarding Law No. 20,680 is in force and constitutional (except for Section 2(c), which is undoubtedly in force and empowers the Executive to “issue regulations on the business of sellers, intermediaries, distributors, and/or producers”). Besides, there are solid grounds for asserting that the law is not in force and is unconstitutional.

As a token of this situation, it may be pointed out that not even the previous Secretary of Domestic Trade, an officer who adopted lots of interventionist policies, attempted to enforce the parts of the law whose applicability is under debate. Instead, his measures were based upon the above referred Section 2 (c).

Despite the announced goals of the law, we believe it is precisely due to the controversy about the applicability of the old Anti-Hoarding Law, No. 20,680, that the Executive has put forward an almost identical bill, thus taking advantage of the fact that it knows the Bill will have enough votes to become law.

Doubtlessly, the purpose is to introduce a highly questionable law, which seriously curtails the right to engage in legal business and the property right.

There is no other possible serious explanation for submitting to Congress a bill that is almost identical with a law that, according to the proponents of the bill, is in force.

**Powers Granted to the Executive and Conditions for Their Exercise**

The Bill empowers the Executive to perform certain acts (through the law enforcement authority to be designated[1]) under certain circumstances, indicated in the Bill.

The Bill empowers the Executive to perform the following acts:
(1) Setting profit margins, benchmark prices, and maximum and minimum prices;
(2) Controlling the business of sellers, intermediaries, distributors, and/or producers;
(3) Requiring the relevant entities to produce, industrialize, sell, transport, distribute, provide services, and/or manufacture;
(4) Granting subsidies;
(5) Requiring merchants to submit all the documentation and information on their businesses;
(6) Seizing the books and documentation of companies or businesses and controlling prices and production.

The circumstances under which the Executive (or whomever the Executive may appoint) may exercise those powers are the following:

(a) When prices are raised artificially or unjustifiably other than in proportion to cost rises;
(b) When profits are too large;
(c) When inventory is revalued;
(d) When raw materials or products are hoarded or when inventory is larger than necessary;
(e) When there are unnecessary intermediaries or when new stages are artificially created for distribution and sale;
(f) When inventory or goods are destroyed, when the provision of services is blocked, or when any act is performed for the purpose of causing production, sale, or transportation to be scarce;
(g) When the sale of goods or the provision or services are unjustifiably denied or restricted, when usual production is reduced without cause or is not increased, if such course of action has been demanded and the company has the production capacity to satisfy demand for such good or services;
(h) When normal and usual supply of an area is discontinued or diverted to another area without cause.

Penalties and Court Proceedings to Contest Them

For the circumstances referred to above from (a) to (h), on top of the exercise of the powers mentioned, the Bill authorizes the imposition of penalties, including fines (ranging between AR$ 500 and AR$ 10,000,000 - ceiling which may be increased up to three times the profit made through the violation), closure of the business up to 90 days, disqualification up to 2 years from obtaining or renewing loans from public agencies, seizure of inventory, among others.

The Bill provides that penalties may be applied separately or jointly, which will be decided on a case-by-case basis. In the event of recidivism, the amounts or terms of the fine, closure, disqualification, special disqualification, and suspension may be raised up to twofold the original penalty.

Finally, the Bill establishes that the administrative order imposing penalties may be contested only through a direct petition filed with the Federal Administrative Court of Appeals for the City of Buenos Aires (Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal) or with the relevant Federal Court of Appeals, depending on the location of the authority that imposed the penalty. Additionally, the Bill provides that, before filing a direct petition against an administrative order levying a fine, the petitioner must deposit the amount of the fine into an account under the name of the authority that levied it and attach proof of the deposit to the petition. Otherwise, it will be dismissed, “unless compliance therewith may cause irreparable harm to the petitioner.”

Criticism of the Bill

As they have been worded in the Bill, we are of the opinion that the powers granted to the Executive and the circumstances under which such powers may be exercised infringe the constitutionally-recognized rights to engage in any legal business and use and dispose of property.

It is inconsistent with the abovementioned constitutionally-recognized rights to empower
the Executive (or, even worse, the lower-ranking officer appointed by the Executive) to substantially limit the freedom to engage in business and/or property rights by imposing conditions described through concepts that cannot be objectively determined.

For example, under the Bill, the Executive may set profit margins, benchmark prices, maximum and minimum prices, issue regulations on the business of sellers, intermediaries, distributors, and/or producers, require entities to produce, industrialize, sell, transport, distribute, provide services, and manufacture. Further, the Bill refers to mostly subjective concepts, such as artificial or unjustifiable increases in prices, too large profits, undue hoarding of raw materials, larger inventories than necessary, unnecessary intermediaries, the artificial creation of distribution and sale stages, unjustified restrictions on sales or provision of services. Also inconsistent with the right to engage in any legal business and with the property right are, in our opinion, some significant limitations on the property right spelled out by the Bill.

In that regard, it follows from the Bill that it is not permitted to (a) raise prices unless the increases are proportional to cost increases, (b) hoard more than the necessary raw materials or products, (c) act as or use intermediaries that are not strictly necessary, (d) restrict the sale of goods or the provision of services without cause, (e) discontinue the normal and usual supply of an area without cause.

If the Bill were enacted and became law, any of the acts indicated in the preceding paragraph would carry penalties.

From another point of view, we believe that the Bill also violates Section 76 of the Argentine Constitution, concerning delegation of legislative powers. That section clearly prohibits any permanent delegation of legislative powers, as proposed in the Bill.

In view of the above, we hope the House of Deputies will vote against this Bill or will substantially amend it in order to avoid enacting a law that, in all likelihood, will be seriously questioned by legal scholars and courts and that, far from creating a stable framework for the economic development of our country, will sow more confusion and scare off potential investors looking for stable and foreseeable legal systems.

[1] Originally, the bill directly appointed the Secretary of Domestic Trade as the enforcement authority, but this appointment, during the discussion of the Bill at one of the Senate committees, was replaced with any law enforcement authority designated by the Executive. We suppose this change was introduced because, in accordance with most case law, it is generally not possible for a law to delegate legislative powers-like in this case- to any entity other than the Executive.

Contributor: Sebastián Álvarez, Brons & Salas, Buenos Aires. For further information, please send an e-mail to salvarez@brons.com.ar.

NML CAPITAL VS. ARGENTINE REPUBLIC

Between 1999 and 2002, Argentina went into a deep recession which let it to default a total of some 95 billion dollars of external debt in December 2001. As a consequence, a large-scale restructuring was needed since the high interest bonds had become directly unpayable. In 2005 and 2010, some 93% of the bondholders accepted the restructuring offered by Argentina.

Regarding NML case, it is to be mentioned that in the debt restructurings of 2005 and 2010 the consenting bondholders (93% of the total) accepted an important haircut (70-75%) of their credits and included a “Rights Upon Future Offers” clause under which Argentina may not improve any payment conditions to any of the holdouts without improving to the same extent the conditions accepted by the consenting bondholders. The plaintiff demands payment of 100% of the face value of the bonds and stated that the “pari passu” condition (equal treatment provision) has not been respected by Argentina.
After adverse decisions that imposed full repayment by Argentina, the country requested a full panel rehearing which was denied by United States Court of Appeals for the Second Circuit (New York) in early 2013. Its ruling basically implied that the holdouts should be repaid the full face value which represented highly unequal terms to those accepted by 93% of the creditors will had entered into the 2005 and 2010 swap. Argentina filed an appeal before the United States Supreme Court and until it was finally declined on June 16, 2014, it had had the benefit of a “stay” against the adverse rulings which had mandated full face value payment to the holdouts.

The ruling of Judge Griesa had indicated that Argentina cannot make payments to its main class of bondholders (the consenting ones) without also paying the hedge funds what they are owed. In what some saw as a “defiant” move, Argentina announced a couple of days before the June 30th deadline that it had deposited some 540 million with the Bank of New York Mellon for it to be distributed to its consenting bondholders in payment of the June 30th interest maturity.

Judge Griesa indicated that he did not accept that conduct and ordered the bank that funds be returned to Argentina. He decided not to attach them at least this time around. The month cure period expired on July 30th, but due to said payment, Argentina stated an event of default had not occurred. Bondholders of at least 25% of exchanged bonds should be allowed to demand for its acceleration after funds transferred by Argentina to the Bank of New York Mellon were frozen.

**Contributor:** Marcelo Bombau, M. & M. Bomchil, Buenos Aires. For further information, please send an e-mail to marcelo.bombau@bomchil.com.

**INSURANCE FRAUD PREVENTION**

In line with Argentina’s policy to combat money laundering and fraud, several resolutions have been enacted. The National Insurance Agency (“NIA”) has been also concerned with said issue, and consequently enacted Resolution 38,477 which establishes that insurance and reinsurance companies must implement internal procedures and controls aimed at fraud prevention.

As from the enactment of this resolution, insurance companies must:
(i) draft a manual containing mechanisms and procedures aimed to prevent insurance fraud;
(ii) designate a contact person who shall be in charge of subjects related to insurance fraud, and inform this designation to the NIA. The contact person must hold and executive or managerial position within the company;
(iii) elaborate a report containing cases under suspicion of insurance fraud;
(iv) implement a program aimed to verify the compliance of the company’s fraud prevention manual described in (i);
(v) implement (a) a specific regime related to the hiring of new staff, guaranteeing their aptitude and suitability for the job; and (b) continuous training programs available to all the staff; and
(vi) if the company operates with appointed agents, it should provide them with a document aimed at fraud prevention, containing recommendations, questions and data to collect form potential clients.

Moreover, the resolution establishes that reinsurance companies must adopt fraud prevention policies which consider, at least, (i) operations with brokers and intermediate players, (ii) retrocessions, (iii) staff hiring and training programs; and (iv) a special regime for conflicts of interests.

The full compliance of this resolution will be required within 180 days as from its publication in the Official Gazette, which is to say by mid February 2015.

**Contributors:** Marcelo Bombau, M. & M. Bomchil, Buenos Aires. For further information, please send an e-mail to marcelo.bombau@bomchil.com.
NEW BOLIVIAN MINING LAW

Congress approved a new mining law which was enacted by President Morales under No. 535 of May 28, 2014 (the “Law”). It is a long and complex text on various matters, contained in 234 articles and additional provisions. Three “Rs” that could have characterized the Law are: Reorder, Reorganization and Reactivation of the mining sector. The former two have basis for being met but there are doubts on whether reactivation will be attained, given certain restrictive rules and the fact that the chapter proposed by the Law draft negotiating committee on taxation was not incorporated which, though it did not propose substantial changes on the current rules, had proposed incentives and differentiated systems for the small miners and mining cooperatives. Small miners are the most affected for the lack of inclusion of the rules for it proposed.

As to reordering of the mining sector, the Law is clear in providing procedures and requirements for current concessionaires to maintain their acquired rights: concessions will be substituted by administrative mining contracts with the reorganized mining jurisdictional authority. One of the most important requirements is the presentation of a Working Plan following guidelines fixed in the Law depending on the various sectors. Each contract is to have a term of thirty years, which can be extended for another similar period. To obtain new areas there are two possibilities: apply only for an Exploration License with a preferential right for development under an administrative contract, or directly the latter covering the different phases of the mining chain, totally or partially.

Other rules relate to internal and external trading, isolated activities of refining and foundry and others. The Law provides the obligation to obtain licenses for trading and isolated activities, both for current operators as well for new ones. The more imprecise rules relate to contracts between the various mining sectors, especially for purposed of adapting their existing rights to the new legal order both in respect of existing contracts between the state mining companies with private companies or cooperatives as well as in relation to contracts between these two last sectors. As between private companies, the rules of the Commercial Code are to apply.

As to reorganization of the public mining sector, the Law provides rules for the reorganization of the jurisdictional mining authority, updates rules for the trading authority (SENARECOM) and others. A strict control of internal trading is to be exercised, given the numerous irregularities that currently exist. State mining companies are to adapt themselves to a new Law of Public Enterprises and adopt new internal rules.

One basic feature of the Law is that only authorized state mining entities, cooperatives and private sectors can hold mining rights. No other person, entity or company can do so. Those which are not formed as mining entities and hold concessions have to follow special procedures for the recognition of their current acquired rights.

Retention and continuity of rights is subject to compliance not only with the payment of annual patents, as have been the case with the now abrogated Mining Code, but also with obligations of initiating and not abandoning activities, the breach of which constitute causes for contract resolution. On this subject, the questionable Law No. 403 of September 18, 2013 has been maintained, which penalizes with the loss of rights whenever it is determined that the concessionaire has not conducted mining activities on its current concessions, before complying with certain requirements for their change into contracts.

Other important rules relate to environmental obligations and, for new contracts, the obligation to conduct prior consultation with Aboriginal Indigenous People and Peasant Nations when their
collective rights may be affected, in addition to consultation to population that can be affected, as part of the filing for an environmental license.

Other obligations provide that producers of concentrates have to first offer their production for sale, under international market terms, to state refineries and foundries, or lacking them to private ones. Absent an agreement, producers have a free trading right.

The currently in effect mining taxation regime continues in place, as well as the royalty rules with certain adjustments. New fees for payment of patents have been adopted.

In connection with association agreements, of particular importance are those that can be signed between the state mining companies and non-state mining cooperatives and private companies, which would carry the right of the state mining company of receiving 55% of the profits, a rule which is not considered to be a vehicle for incentivizing this type of contracts.

The obligations to move from the current system to the new one will enter into effect after the reorganization of the mining jurisdictional authority (AJAM) takes place and when it approves a resolution opening a term of six months during which applications are to be filed. Reorganization of AJAM is also subject to the appointment of its new authorities, to be appointed by the President of the State.

The Law provides a guarantee to receive profits and, in case of foreign participants, the right for their remittance abroad, upon complying with the applicable tax rules. Other rights include regulations allowing the possibility of raising financing by using only the information on reserves in their natural condition, given that title remains under the Bolivian people as mandated by the Constitution. Further, Article 99 of the Law establishes general provisions on rights of legal stability and protection.

Contributor: Fernando Aguirre B., Bufete Aguirre Soc. Civ., La Paz. For further information, please send an e-mail to fernandoaguirre@bufeteaguirre-lawfirm.com.

◊ Brazil

DATA PROTECTION IN BRAZIL: A FIRST ANALYSIS OF THE MATTER BY THE CONSUMER PROTECTION DEPARTMENT

1) Introduction

The importance of data protection and privacy is indubitable, particularly considering the current economic model of the internet that provides free access to applications in exchange for users’ data, which is extremely valuable to any company that seeks to negotiate them for several purposes (from advertising to the creation of databanks for the analysis of credit and risk assessment of operations).

However, even before a bill on data protection reached the National Congress, the Consumer Protection Department (“Departamento de Proteção e Defesa do Consumidor” – DPDC), major organization of consumer protection at federal level in Brazil, issued a decision concerning the matter, which deals with irregularities on storage politics and processing access registry and personal data from consumers in internet applications.[1]

On this decision, the DPDC presented its view in an unprecedented manner regarding several topics currently discussed by the market, assuming a position that will be extremely important to the development of the matter in Brazil.

The DPDC approached manifold questions involving data protection that are recurring in global discussions, such as collection, storage, register, vigilance, processing and disclosure of users’ personal data. To address these questions, the department used concepts, principles and common rules to consumer protection in order to justify their
understanding in relation to personal data protection, as noted next.

2) Data treatment and its relevance

The management of personal data involves different steps during the business operation of any company, as mentioned above. The DPDC tried to provide directives and specific rules to each of the steps.

With regards to such moments, it is known that data collection occurs while obtaining personal data from the holder, either voluntarily (through the filling of a form) or indirectly (as in cases of companies that receive information from third parties for analysis and classification of risks in an operation).

Vigilance is not related to the personal data itself; it is related to how users use a service. Whenever such information is targeted for tracking and registering, they gain value, especially when allied to consumption patterns and to the personal data obtained with the collection.

Lastly, it is necessary to explain the concept regarding treatment and disclosure of information. Data processing includes operations that allow any kind of use of personal data (including collection, storage, planning, conservation and modification) as well as its disclosure to third parties.

Each of the moments of the personal data value chain has vital importance in the relation between holder and data manager. Currently, several companies obtain access to data directly from their users, but do not explain how they intend to store it and process it during the relation. In this sense, some users end up not having any knowledge that their personal data can and, as a matter of fact, is shared with third parties that will exploit it commercially.

In consideration of these facts, we analyze the DPDC’s decision below

3) DPDC’s understanding

On the Technical Note issued by the DPDC, the government body tried to approach most of the subjects related to data protection.

- **Collection:** Regarding the rules of personal data collection, the DPDC affirmed that the collection must be ruled by the customers’ guarantee of access to information, meaning that, all information should be made available in the moment of the register, record and/or personal and consumption data, foreseen in the Consumer Protection Code,[2] (which deals specifically with negative registration of consumers, but is interpreted analogously in this case to justify the creation of a database in general). Thereby, with the expansion of the understanding of these rules set forth by the DPDC, users will have to be properly informed whenever a company creates a registry of their data or activity.

- **Treatment and disclosure:** Regarding the treatment, limitations were established for the moment of presentation and acceptance of the services related to personal user data. According to the DPDC, the holder of the information must be properly informed of data treatment operations pursuant to constitutional and basic consumer protection principles, namely: (i) the right to access to information;[3] (ii) objective good faith[4] and transparency[5] and (iii) the vulnerability of consumers.[6]

Thus, a company that provides any kind of service or application, must inform the consumer in a proper and transparent manner, clearly and unequivocally how they intend to use the obtained information, including if their intention is to disclose it to third parties. In this sense, the disclosure of information is not directly prohibited by the DPDC, but companies have the obligation to inform the data holder if it occurs, and the holder must consent with such disclosure.

- **Vigilance:** Besides that, the analysis of the registration of activities was studied by the department of consumer protection, which classified the non-informed vigilance “of
constant manner of consumer browsing online” as a clear violation to the principle of objective good faith between the parties. Still regarding vigilance, the DPDC also presented arguments that reinforce the principles of data protection, in accordance to the Brazilian Internet Framework (“Marco Civil”):[7] the right to the inviolability of intimacy, privacy and secrecy of communications online.

4) Conclusion

The DPDC tried to address the questions and urges it thought to be most important at the moment, and further highlighted rules and basic principles that must be followed by companies that perform any kind of management and/or personal data treatment.

Some providers may need adjustments in their politics in order to abide to these basic principles. They will have to present information to consumers regarding an eventual possibility of any unusual activity concerning the users’ data.

Therefore, the violation of the principles described above, in each one of the steps of personal data management is subject to penalties that will vary according to (i) the severity of the infringement, (ii) the economical advantage obtained, and (iii) the economic condition of the agent, according to the Consumer Protection Code.[8]

Based on the arguments above, the DPDC took the first step to set general guidelines related to personal data protection and to alert all companies that currently perform this type of collection and data treatment in Brazil.

Contributor: Leonardo A. F. Palhares and Caio Iadocico de Faria Lima, Almeida Advocados, São Paulo. For further information, please send an e-mail to lpalhares@almeidalaw.com.br or cilima@almeidalaw.com.br.

OUTSOURCING PETITION PENDING BEFORE SUPREMO TRIBUNAL FEDERAL

On August 22, 2014, the Associação Brasileira do Agronegócio (“Abag” - Brazilian Association of Agribusiness) appeared before the Supremo Tribunal Federal (“STF” - the Supreme Court), seeking its ruling that repeated decisions of the Labor Courts restricting the terms of outsourcing of employment services violate constitutional principles of legality, free initiative and valorization of work. Abag challenged the decisions of the Labor Courts as relying on principles of the Tribunal Superior do Trabalho (“TST” - High Labor Court) Súmula 331, that Abag asserted to be contrary to the Constitution. Súmula 331 is the High Labor Court’s affirmation that outsourcing of employment be limited to temporary work, cleaning and security services, and other services unrelated to a company’s core activities.

Abag argued that the principles of Súmula 331 are contrary to the freedom of contract. Abag further argued that the restrictive view of the Labor Courts in respect of outsourcing violates fundamental constitutional principles that guarantee companies the protection and freedom of economic initiative.

Multinational companies engaged in telecommunications services and in pulp extraction/paper production have already filed similar claims, asserting that whether outsourcing of employment pertains to core or to supporting activities should not matter,
provided that terms of employment are not degraded.

While Abag awaits the STF’s response on whether Abag’s action can be maintained— and if it is, any outsourcing case currently pending will be stayed until the STF reaches a final decision on Abag’s action, the Associação Nacional dos Procuradores do Trabalho (“ANPT” - National Association of Employment Agents) submitted an amicus curiae brief asserting that acceptance of Abag’s position would improperly intrude on the findings of Labor Courts that specific instances of outsourcing gravely prejudice the rights of workers. ANPT’s position reflects the historical association in Brazil of outsourcing with schemes by which employers sought to evade the often costly and rigid protections contemplated by Brazilian labor norms. ANPT argues that in recent years the regulation of employment outsourcing has occurred within the framework of current legislation that allows appropriate flexibility in outsourcing, consistent with protection of workers’ constitutional rights.

Contributors: Juliana Martines, Gilead Sciences, São Paulo, Brazil; and Patrick Del Duca, Zuber Lawler & Del Duca LLP, Los Angeles, California. For further information, please send an email to pdelduca@zuberlaw.com.

Normative Instruction No. 24/2014 - The Boards of Trade and the Financial Activities Control Board - COAF

The Department of Companies’ Registration and Integration (DREI) has recently published Normative Instruction No. 24/2014, which came into force immediately after its publication on 06.06.2014. The purpose of such rule is to regulate the procedures the Boards of Trade in Brazil should adopt in order to implement the provisions set forth in articles 10 and 11 of Law No. 9,613/1998 (known as the Money Laundering Act), as amended.

It should be pointed out that the referred to Law No. 9,613/1998, when amended by Law No. 12,683/2012, specifically included the Boards of Trade and public registers within the entities subject to certain obligations regarding creation and implementation of control mechanisms. Allowing identification of clients, keeping data records up-to-date, adopting internal policies and controls, informing the authorities regarding financial operations, among others, are some of the actions that are required from the entities subject to the above referred laws.

To this effect, Normative Instruction No. 24/2014 sets forth that:

- Boards of Trade must observe the provisions in Title II, Decree No 1,800/1996, which provides for the acts and order of the services for public registration of commercial companies and related activities for purposes of identification of the persons and record keeping; and

- Should there be serious evidence of the crimes set out in Law No. 9,613/1998 (money laundering and related crimes), the technician, analyst or representative (vogal) of the Companies Register in charge of the procedure must submit the matter to the President of the Board of Trade who, in its turn, will notify the Financial Activities Control Board – “COAF” within 24 hours. This procedure does not stay the filing of the act and the content of the information submitted to COAF is protected by confidentiality.

The Trade Boards shall abstain from giving notice to any person, including the person concerned, of the information forwarded to COAF. Notices given in good faith, in the manner provided for in article 11 of Law No. 9,613/1998, will not imply civil or administrative laibility. Nonetheless, failure to fulfill the obligations under the Normative Instruction subjects the Boards of Trade to the sanctions contemplated in article 12 of said law (warning, pecuniary fine, temporary decommission, or suspension of authorization...
to operate or to exercise an activity).

The Boards of Trade have a maximum period of 18 months counted as of publication of Normative Instruction No. 24/2014 to implement its provisions. During this period of time, we should follow up the Boards of Trade next steps for putting this rule into practice.

Contributors: Cristiane Borges da Costa, Barretto Ferreira e Brancher Sociedade de Advogados, São Paulo, Brazil. For further information, please send an email to costa@bkbg.com.br.

Chile

Consumers Protection Bill

On June 3, 2014, a bill amending the Consumers Protection Act (“CPA”) (the “Bill”) was submitted. The Bill grants further authorities to the National Consumer Protection Service (“SERNAC”), aiming to provide more modern, expeditious and efficient tools to resolve infractions to consumers’ rights.

The Bill replaces the current jurisdiction of Local Courthouses (Juzgados de Policía Local) in charge of resolving individual consumers’ disputes and compensations, and appoints (i) SERNAC as the authorized entity to resolve and decide on regulatory infringements and compensations, and (ii) the Chilean Civil Courts to resolve matters related to consumers’ damages. Additionally, the Bill significantly increases the SERNAC’s authorities, including among others, the following: (i) supervising suppliers’ compliance of the CPA, allowing its entrance into suppliers’ facilities, even with the assistance of police force if necessary; (ii) imposing fines and other sanctions in administrative processes to be resolved by SERNAC’s Regional Directors; (iii) issuing general rules and regulations; and (iv) the administrative interpretation of the CPA.

Further, the Bill also: (i) increases the fines applicable to infringements to the CPA; (ii) provides the allocation of additional funds to consumers’ associations, which shall be used by these to provide legal assistance to consumers; (iii) it allows consumer associations to conduct profitable activities to the extent the funds obtained finance their operations and are not distributed to its members; (iv) expressly allows the consumers compensation for moral distress in consumers’ collective proceeds (previously excluded); and (v) broadens the statute of limitation applicable to suppliers’ liability, from six months to two years.

Contributors: Matías Vergara, María José Martínez and Paris Norambuena, Carey y Cía., Santiago. For further information, please send an e-mail to mvergara@carey.cl, mmartinez@carey.cl or pnnorambuena@carey.cl.

New Concept of “Employer” Applicable to Labor Matters

On July 9, 2014, a new act that broadens the concept of employer applicable to labor matters (the “Act”) entered into force. Chilean labor regulation provides several obligations for employers and rights to employees that arise only if an employer has a certain number of employees (e.g., obligation to collectively negotiate, right to form trade unions, etc.) Consequently several companies in Chile incorporate more than one legal entity, all under the same parent/holding company or controller, with the purpose of sharing their employees and avoiding such labor obligations/rights to be triggered.

The Act aims to decrease the infringement of labor and social security obligations, and to identify the employees’ real employer. On this regard, the Act modifies the Chilean Labor Code by providing that two or more companies shall be considered, for labor and social security purposes, as a single employer when they have a common labor management and meet certain specific conditions, such as if the products or services they elaborate or
provide are similar or strictly complementary, or the existence of a common controller.

The decision that two or more companies are considered as a single employer must be pronounced by a labor court, at the requirement of trade unions or employees of such companies, who claim their labor or social security rights have been affected. This judicial decision shall cause, among others, the following effects: (i) in the event the alteration of the single employer’s identity arose from a simulation or subterfuge, and it caused the noncompliance of labor or social security obligations, the employer would be sanctioned with a fine of 20 to 300 UTM (app. USD 70 to 21,150); (ii) the companies will be jointly and severally liable for the compliance of legal labor and social security obligations, individual labor agreements and collective labor instruments; (iii) the companies’ employees may form one or more trade unions (or maintain the current ones) and negotiate collectively with all or each of the companies considered as a single employer; and (iv) in the event trade unions amongst employees of such companies present collective agreements projects, the sole employer shall be obliged to negotiate with them.

**Contributors:** Matías Vergara, María José Martínez and Paris Norambuena, Carey y Cía., Santiago. For further information, please send an e-mail to mvergara@carey.cl, mmartinez@carey.cl or pnorambuena@carey.cl.

**Amendments to Tax Overhaul**

Since the Government submission of the bill aiming to overhaul the Chilean tax system on April 1, 2014 (the “Bill”), the Bill has been amended by a *Protocol of Agreement* between the Government and Senate dated July 8, 2014 and *Comments* to the tax overhaul submitted by the Government on August 9, 2014 (the “Amended Bill”).

Among other matters, the Amended Bill includes the following modifications to the Bill original content: (a) elimination of the additional 10% mandatory withholding tax of taxable income on account of shareholders’ final taxes; (b) Chilean Revenue Service (SII) tax-avoidance authorities to re-qualify transactions deemed abusive, artificial or inconsistent, will be limited by the contributors good faith and contractual freedom principles, thus protecting their possibility to exercise *option economy* (possibility to choose between legal tax alternatives), provided that the purpose of the taxpayer has not been to avoid taxes payment; (c) corporate taxpayers will have the possibility to choose between the following systems: i) *Integrated Income Attribution Tax System*, with a 25% corporate tax rate plus global complementary tax (which rates range from 0% to 35%) and a withholding tax rate of 35%; and ii) *Partially Integrated Tax System* with a 27% corporate tax rate in which dividend and profit distributions will be levied with personal income tax (*impuesto global complementario*) or withholding tax, with a credit of 65% of the corporate tax in force at the time of the dividend or profit distribution; (d) companies that carry full accounting records and have annual sales up to UF 100,000 (app. USD 5,000,000) will be allowed to deduct from their corporate tax basis (as a tax expense) an amount equivalent to 20% or 50% of the income that they reinvest depending on the system they choose from alternatives mentioned in (c) above; (e) tobacco, alcoholic beverages and non-alcoholic beverages tax will increase; and (f) goodwill in excess of the *fare market value* of assets will not be amortizable (currently, goodwill can be amortized over 10 years), but will be considered as intangible assets.

Additionally, the Amended Bill includes a transitory regulation (of one year) applicable to the declaration of income or equity held abroad, under the strictest OECD standards regarding this matter.

On September 10, 2014, the Amended Bill was approved by the House of Representatives, and it is currently in
process of being enacted and published by the Government.

**Contributor:** Matías Vergara, María José Martínez and Paris Norambuena, Carey y Cía., Santiago. For further information, please send an e-mail to mvergara@carey.cl, mmartinez@carey.cl or pnorambuena@carey.cl.

**Government Authorities’ Lobbying Regulation**

On August 28, 2014, a regulation on government authorities’ lobbying was published in the Official Gazette (the “Regulation”). The Regulation complements the provisions of the Government Authorities’ Lobbying Act, enacted on March 8, 2014 (the “Act”).

The Regulation main purpose is to regulate the publicity of lobbyist and private interest representatives’ (lobbying active subjects) activities. Specifically, it lists the information to be included in the registries that every public authority subject to the Act and Regulation provisions (lobbying passive subjects) must maintain, which are: (a) Public Agenda Registry, including i) registry of the meetings and hearings held by the lobbying passive subjects with any lobbying active subject, ii) travels registry and iii) donations registry -all these registries shall be updated monthly by each lobbying passive subject in a website to be provided by Chilean Transparency Council, and shall be available to public; and (b) a Registry of Lobbyists and Private Interest Representatives, which will also allow lobbying active subjects to voluntarily submit their information.

The Regulation also describes the following rights and duties for the lobbying active and passive subjects: (a) lobbying passive subjects must i) have an equal treatment towards persons, entities or organizations which request hearings on the same matter, and ii) comply with registration and publicity obligations by updating the mentioned registries; and (b) lobbying active subjects, at the time of requesting a hearing with a lobbying passive subject, must provide detailed information regarding the hearing attendants, matters to be discussed, and the organizations or interests they represent.

The provisions of the Regulation are not applicable to the following public institutions: (a) National Comptroller’s Office; (b) Central Bank; (c) Prosecutor’s Office; (d) Constitutional Court; (e) Election Review Board; and (f) House of Representatives. These authorities shall be only subject to the Act provisions.

**Contributors:** Matias Vergara, María José Martínez and Paris Norambuena, Carey y Cía., Santiago. For further information, please send an e-mail to mvergara@carey.cl, mmartinez@carey.cl or pnorambuena@carey.cl.

◊ **Guatemala**

**Memorandum of Understanding Between the Ministries of Foreign Relations of Guatemala and the Co-Operative Republic of Guyana**

On January 15th 2014, the Guatemalan Government approved the memorandum of understanding in order to establish a procedure for exchanging political information and bilateral cooperation between countries through their Ministries of Foreign Relations.

**Contributors:** Rafael Alvarado-Riedel and María Isabel Briz, Consortium - Rodriguez, Archila, Castellanos, Solares & Aguilar, S.C., Guatemala City. For further information, please send an e-mail to ralvarado@consortiumlegal.com.gt or mibriz@consortiumlegal.com.gt.

**Agreement Between the Ministry of Environment and Natural Resources and the United Nations Institute for Training and Research**

On October 22, 2013, The Guatemalan Government through the Ministry of Environmental and Natural Resources and the United Nations Institute for Training
and Research for the subvention of the Project and Implementation of the Strategic Approach to International Chemicals Management (SAICM). This agreement plans to set new standards, training projects and regulations for the usage of chemicals national and internationally.

Contributors: Rafael Alvarado-Riedel and María Isabel Briz, Consortium - Rodríguez, Archila, Castellanos, Solares & Aguilar, S.C., Guatemala City. For further information, please send an e-mail to ralvarado@consortiumlegal.com.gt or mibriz@consortiumlegal.com.gt.

**PROTECTION OF NEW VARIETIES OF PLANTS LAW (LEY PARA LA PROTECCIÓN DE OBTENCIones VEGETALES)**

The Guatemalan Government joined the International Union for the Protection of New Varieties of Plants, dated September 19th, 2000, as part of the political commitment acquired in the DR-CAFTA, Chapter 15, Article 15.5, in order to guarantee the existence of a system of protection of rights of plant breeders through intellectual property rights, whose verification will be assigned to the Ministry of Agriculture, Livestock and Food.

The Protection of New Varieties of Plants main objective is to recognize and protect the rights of plant breeders whenever they obtain a new variety of a determined plant by giving the corresponding property title of such breed.

This law has been subject to several amendments by the Government and Congress, to be defined in the month of September 2014.

Contributors: Rafael Alvarado-Riedel and María Isabel Briz, Consortium - Rodríguez, Archila, Castellanos, Solares & Aguilar, S.C., Guatemala City. For further information, please send an e-mail to ralvarado@consortiumlegal.com.gt or mibriz@consortiumlegal.com.gt.

**Puerto Rico**

**NEW DEBT RESTRUCTURING LAW FOR PUBLIC UTILITIES**

In June, the Puerto Rico Commonwealth (“Commonwealth”) passed a new law entitled the “Puerto Rico Public Corporation Debt Enforcement and Recovery Act” (Recovery Act or Act). This law allows the Commonwealth’s public corporations such as the Puerto Rico Electric Power Authority (PREPA), to restructure their debts short of bankruptcy. The new law creates a legislative framework to assist financially stressed public corporations to restructure debt through an orderly, statutory process that would allow these corporations to handle their debts equitably, while ensuring the continuity of essential services to citizens and infrastructure upgrades. According to the enacted statute, the distressed corporation would negotiate an agreement with bondholders. If negotiations fail to produce an agreement, the corporation would have to enter into proceedings before a commonwealth court in Puerto Rico.

Although Puerto Rico’s new law intended to protect the continuity of essential services by allowing certain public bodies to address their debt problems, it may have created some constitutional issues. PREPA bondholders recently filed a lawsuit in Puerto Rico federal court seeking declaratory judgment and an injunction blocking enforcement or implementation of the Recovery Act alleging that the new law was unconstitutional.

In the complaint, the bondholders claimed that federal statute essentially forbade Puerto Rico, similar to the states, from enacting independent bankruptcy legislation that allowed certain public agencies to restructure their debt. Principally, the federal Bankruptcy Code could not be usurped by the Commonwealth creating a law for composition of indebtedness that may operate as binding on a creditor without that creditor’s consent.
The bondholders argued that PREPA was highly likely to seek relief under the Act imminently threatening to improperly impair their rights under the PREPA bonds in conflict with the bankruptcy and contract clauses of the U.S. Constitution. They contended that the extreme impairment of the PREPA bonds was not necessary in light of the availability of more moderate courses of action and not reasonable in light of the surrounding circumstances. They also contended PREPA could moderately increase its rates to provide the needed revenues to satisfy its obligations under the bonds, cut needless costs and collect what it was owed by the commonwealth and other municipal entities. The Puerto Rico Commonwealth filed motions to dismiss the complaint.

The Commonwealth’s countered that the Act was justifiable if it achieved an important government purpose. Further, in their motions to dismiss, the Commonwealth claimed that - the U.S. Supreme Court has made clear that state and local governments retained the power to pass their own restructuring laws, as long as they don’t conflict with federal law. The Commonwealth contended that its public corporations were unable to avail themselves of protection under Chapter 9 of the federal Bankruptcy Code and therefore section 903 was not applicable to the Commonwealth. Section 903 provides that a state law prescribing a method of composition of indebtedness of a municipality may not bind any creditor that does not consent to the composition.

Moreover, Congress could not have intended to leave its public instrumentalities without access to any debt adjustment process, which given Puerto Rico’s express exclusion from eligibility under Chapter 9 of the Bankruptcy Code, would be the effect of treating Puerto Rico’s own public corporation insolvency legislation as preempted by Section 903.

Additionally, the Commonwealth and PREPA asserted that PREPA has not filed under the Recovery Act and that therefore there is no case or controversy to adjudicate. Likewise, PREPA claimed that the bondholders’ complaint was premature and they lacked standing, as PREPA had not taken any steps to obtain relief under the Act.

The bondholders filed a second amended complaint opposing the motion to dismiss and cross-motion for summary judgment challenging the constitutionality and validity of the Recovery Act. The second amended complaint reiterates that a PREPA filing under the Recovery Act, which establishes debt adjustment procedures for most of Puerto Rico’s public corporations, is both probable and imminent.

The summary judgment motion seeks that the Recovery Act be declared constitutionally and statutorily preempted and the Recovery Act’s automatic stay provisions deemed illegal to the extent they purport to preclude a federal court action. The motion asserts that these two claims were purely legal and will not be clarified by further factual development. The bondholders’ summary judgment motion argued that the bondholders suffered a devaluation of their bonds as a result of the Recovery Act’s enactment and that they were forced to litigate before a filing because the automatic stay provisions of the Recovery Act would preclude them from pursuing federal court litigation after a PREPA filing under Recovery Act.

Before August recess, Resident Commissioner of Puerto Rico Pedro Pierluisi, Puerto Rico’s nonvoting congressional delegate, introduced legislation in the United States House of Representatives that would allow Puerto Rico’s government-owned corporations to file for Chapter 9 bankruptcy protection, the same type of municipal bankruptcy protection Detroit sought last year. The bill would give Puerto Rico the privileges extended to states under bankruptcy law.

However, the legislation’s prospects are uncertain.

If the Recovery Act survives the bondholders’ preemption claim, we can certainly expect further litigation of the Act as the bondholders will assert that the Recovery
Act’s provisions result in an unconstitutional impairment of contracts. Courts have interpreted the Contracts Clause not as an absolute bar to impairment of contracts by state action, but rather as a balancing test that the state’s interests and needs and the extent of the contractual impairment are weighed against each other. This makes contract impairment claims highly fact-sensitive and unlikely candidates for summary judgment.

In conclusion, if PREPA eventually seeks protection and debt adjustment under the Recovery Act, whether the applicable issuer requires any debt adjustment in order to maintain financial and operational viability will be front and center in such proceedings.

Contributors: Jehmal Hudson. For further information, please send an e-mail to jehmal.hudson@gmail.com.

**Uruguay**

**NEW FINANCIAL INCLUSION ACT**

1) Electronic Money

Section 1 defines *means of electronic payment* as any instrument “that allows electronic payment through ATMs, online or through other means.” *Electronic money* is defined as “instruments representative of a monetary value by the issuer,” that are issued for a value equal to the funds received by the issuer, do not generate interest, are convertible to cash, and are stored in electronic media. The Act’s overarching goal is to reduce the use of cash to improve the security of transactions, reduce tax evasion, and provide a method for monitoring electronic transactions.

1) Financial Intermediary Institutions and Issuing Institutions of Electronic Money

Electronic money may only be issued by financial intermediary institutions or issuing institutions of electronic money. Issuing institutions of electronic money are created under the Act and subject to the approval of the Uruguayan Central Bank (“UCB”). Said institutions cannot perform financial intermediation or lending, and their functions beyond the issuance of electronic money are regulated by the UCB. Issuers of electronic money shall deposit the funds, as property in trust, into accounts with financial intermediary institutions.

These issuers will act as fiduciaries and will be responsible for their own assets independent of any liability from the financial intermediary institutions. Section 7 makes clear that in the event an issuing institution of electronic money files for a reorganization proceeding (Act No.18.387), a holder of electronic money will not be affected.

2) Changes to debit card or automatic payments

In the sale of higher priced goods or services, businesses cannot charge purchasers who pay with debit or credit cards, nor other electronic means, more money than purchasers who pay with cash. Preexisting agreements for the sale of such goods or services are exempt from this modification up until 1 year after the Act comes into effect or until such agreement terminates (whichever occurs first). The Consumer’s Protection Agency will sanction violations of these provisions.

Financial intermediary institutions are prohibited from requiring businesses (i.e. issuers of credit or debit cards) to simultaneously accept the use of credit and debit cards if they do not wish to do so. The UCB is authorized to sanction violations of this provision.

II) Uruguay’s Payment System

1) Modifications to the payment of wages, salaries and social benefits

Under the Act, such payments are to be made exclusively through bank accounts or instruments of electronic money. The Act
grants individuals the right to choose where they receive their payments; an employer cannot require accounts be opened in certain banks. The following will require charges through accounts with a financial intermediary institution or other electronic means:

a) For employees, the payment of salaries and other amounts they are entitled to receive.

b) For independent workers, the payments arising out of the performance of personal services.

c) For independent professionals, the collection of fees agreed upon for the services provided.

d) For retirees or pensioners, the retirement income they were receiving, pensions or retirement funds of any social security institution or insurance company.

e) For any receiver of social benefits, the collection thereof (i.e., family allowances, supplementary wages, subsidies, temporary indemnifications, or rent allowances for the permanently incapacitated).

Issuers of electronic money must meet certain conditions in collecting benefits to encourage free use of the accounts. A forthcoming schedule will stipulate the dates upon which it will become obligatory to pay all wages electronically. Preexisting contracts between companies and employees regarding such accounts will remain valid for one year after the law’s enactment or until the end of the contract period, whichever occurs first.

The Act essentially aims to create more favorable conditions for developing bank credit over salaries and pension payments. The Act also promotes automatic debit.

2) Payroll Credit

The Act creates a new type of loan known as “payroll credit” that may apply to the institution with which workers hold bank accounts. Payroll credit will be made in the following forms:

a) Food pensions.

b) Withholdings for rent provisions from the General Accounting Office, insurance companies, or other entities so authorized by the UCB.

c) Union dues.

d) Dues related to credit granted by the Social Credit Division of the Bank of the Oriental Republic of Uruguay.

e) Dues related to credits granted by the Mortgage Bank of Uruguay, the National Housing Agency and MEVIR.

f) Dues related to contracts for life insurance with the State Insurance Bank or other companies authorized by the UCB.

g) Dues affiliated with collective medical assistance institutions.

h) Dues related to payroll credit granted by the institutions.

3) Other Payments to be regulated by Law

As of June 1st, 2015, cash may not be used to make the following payments:

a) The price of a sale of goods or services equal to or greater than approximately USD 5,000 if one of the parties to the agreement is a legal or physical person acting in the capacity of a sole proprietor, partnership, unincorporated association, or similar social society.

b) The price of a sale of goods or services equal to or greater than USD 20,000 regardless of the contracting parties’ statuses.

c) Payment for the transfer of real estate, inheritances, and possessory rights to property in excess of approximately USD 5,000. Such payments must be made electronically or by bills of exchange issued by a financial intermediary institution. The same applies to sales of motor vehicles greater than approximately USD 5,000.

d) Payments to and by the State will comply with these provisions, with few exceptions.

e) The payment of national taxes, as well as tax returns shall be paid through
electronic means, certificates of credit issued by the tax authority or checks. Exceptions will be regulated.

IV) Tax Provisions

The Act reduces the Value Added Tax (VAT) rate by 2 percentage points for sales of goods and services so long as the payment is made electronically. The Act also enables the Executive Power to reduce the VAT rate for sales of goods or services greater than or equal to approximately USD 500 provided that the payment is made through electronic means. Additionally, the law exonerates loan interests by administrative credit businesses, businesses of reduced economic size, and contributors to certain taxes regarding the sale of agricultural goods.

V) Other Terms

1) Youth Savings Program

The Act creates a program to encourage savings for young workers to increase their access to housing. Workers between the ages of 18 and 29 at the time of registration who can demonstrate that they have a savings account shall enroll in this program under the terms to be defined by law.

2) Fiscal credit for the sale of real property

The Act modifies this preexisting benefit by requiring identification of the lessor, a statement of the price agreed upon, and proof of payment received through a bank account with a local financial intermediary institution.

Contributor: Héctor Ferreira, Hughes & Hughes, Montevideo. For further information, please send an e-mail to hferreira@hughes.com.uy.

◊ Venezuela

EMPLOYMENT LAW: INTERNATIONAL EMPLOYMENT CONTRACTS

Score one for international private law in relation to international employment contracts.

Traditionally, the jurisprudence in Venezuela has been that if an employee (typically a foreign executive) terminates his/her employment relationship in Venezuela—regardless of where the employee was contracted, where else in the world the employee worked for the same employer or for how many years the employee had been in Venezuela, as opposed to elsewhere—then as a matter of public policy the Venezuelan labor law has been deemed to be applicable to determine the labor indemnities, or termination benefits, payable to the ex-employee.

Given that the scheme of the Venezuelan labor law provides for extraordinarily generous termination benefits as compared to the norms on termination in the labor law context of most home countries of multinational corporations, this led to the anomaly that some high-level and long-serving executives of non-Venezuelan, multinational companies would seek to be fired or simply resign in Venezuela and then claim termination benefits based on the Venezuelan labor law, which usually produced payouts far in excess of what the individual would have received under the law of the home country of the company in question (to illustrate, in the case of one ex-general manager of a major multinational in Venezuela one of his superiors exclaimed that this person would, under Venezuelan law, be entitled to “more than my bosses boss will get on his retirement!”).

To be more precise about this situation, first, it should be noted that the scheme of the Venezuelan labor law, while still skewed in economic terms from the perspective of employers, in that it requires large payouts upon the termination of an employee, whether voluntary or involuntary, nevertheless is in the context of relatively low salaries when compared to those of other countries.
Also it may be noted that several years ago the courts did begin to limit to some extent the application of the Venezuelan labor law in the cases of international executives and technical personnel by limiting the applicability of the formula for calculating the labor indemnities to just those years actually worked in Venezuela rather than all of the years the individual had with the same employer.

Now, however, the Supreme Tribunal of Justice (Political Administrative Chamber, File No. 2013-0757, decided on July 23, 2014) has gone further by upholding an exclusive law and jurisdiction provision in an international employment contract, determining that when an international company contracts the employment services of an individual outside of Venezuela and the parties to the employment contract expressly stipulate that at least the termination aspects and benefits of that employment relationship are to be exclusively governed by a foreign law and jurisdiction then, based on Venezuela's Law of International Private Law, that stipulation has to be honored by the Venezuelan courts.

Labor lawyers who prepare such contracts should be pleased by this new decision of Venezuela's supreme court, but they will also be well advised to pay particular attention to the drafting of such contracts to be precise as to the intention of the parties and the requirements of the Law of International Private Law.

Contributors: John R. Pate, Carlos Bachrich, Lorena Mingarelli and Marian Basciani, De Sola Pate & Brown, Caracas. For further information, please send an e-mail to jtpate@desolapate.com, cbachrich@desolapate.com, lmingarelli@desolapate.com or mbasciani@desolapate.com.