

LATIN AMERICAN LEGAL DEVELOPMENTS June 2005

Edited by the Latin America and Caribbean Law Committee

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ARGENTINA

Legislative and Regulatory Developments:

Corporate Law

National Decree No. 540/2005

Official Gazette, June 1, 2005

Capital Reduction or Dissolution Requirements Suspended

During the 2001 financial crisis, the government suspended the application of certain corporate law provisions that would have required many businesses that experienced significant losses to dissolve or liquidate. Specifically, the law required companies experiencing a capital loss to dissolve. Companies whose losses exceeded reserve funds and fifty percent of its capital were, for their part, required to reduce their capital. The new law extends until December 10, 2005 the suspension of these provisions.

The suspension is available only to companies that have satisfied their financial reporting requirements. In addition, the corporate minutes approving the relevant financial statements must recite the circumstances that would have otherwise subjected the company to the liquidation or dissolution provisions. Companies who take advantage of the suspension may continue regular operations without liability to the principals.

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Finance and Investment Law

National Decree 616/2005
Official Gazette, June 10, 2005

Argentine Central Bank
Communications "A" 4359 and 4360
Official Gazette, June 10, 2005

Argentine Central Bank
Communication "A" 4377
Official Gazette, June 29, 2005

Ministry of Economy and Production
Resolution 365/2005
Official Gazette, June 29, 2005

Restrictions on Foreign Currency Inflows and Outflows

The government has instituted new regulations on foreign currency inflows and outflows to discourage speculative investment and to protect the Peso from strengthening against the dollar.

Among other requirements, the new law requires registration with the Central Bank of all foreign currency inflows and outflows to and from the domestic exchange market, as well as all borrowing transactions by residents that may result in future payments in foreign currency to non-residents. The new regulations also apply to foreign capital inflows made for the purpose of holding domestic currency, purchasing financial assets or liabilities of any kind (but excluding foreign direct investment and initial debt issuances offered publicly and listed on self-regulated markets), as well as to investments in public sector securities purchased in secondary markets.

Capital inflows from transactions subject to the regulations must be credited to a domestic account. A reserve equal to 30% of the transaction amount must be maintained for 365 calendar days. Moreover, foreign capital inflows may not be repaid or otherwise transferred outside the domestic exchange market any earlier than one year after the funds are received, irrespective of the method of payment. There are several exceptions to the foregoing, including an exception for financing transactions involving foreign trade and for initial issuances of debt securities offered publicly and listed on self-regulated markets.

Additionally, private sector residents who receive foreign proceeds from the sale of foreign assets exceeding US \$50,000 per month must report the transaction to the tax authorities.

As to loans disbursed prior to May 26, 2005 that are pending settlement, they shall be governed by the exchange provisions in effect at the time of disbursement, but only as to the minimum terms to access the exchange markets for the cancellation thereof.

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Finance and Investment Law

Argentine Central Bank
Communication "A" 4344
Official Gazette, June 9, 2005

Mandatory Conversion of Foreign Capital Inflows

The new regulation requires residents to convert into Pesos proceeds derived from the disposal of unrealized non-financial assets within 30 calendar days after the proceeds are received. Unrealized assets include sports team franchises, patents, trademarks, copyrights, royalties, license rights, concessions, leases and other assignable contracts

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Finance and Investment Law

Argentine Central Bank
Communication "A" 4361
Official Gazette, June 13, 2005

Exchange Controls Relaxed for Export Proceeds

The Central Bank has relaxed the requirements for mandatory liquidation into Pesos of export proceeds. Pursuant to the new regulation, a person has 120 days to effect a liquidation of foreign currency received from the export of goods and services in the single and free exchange market.

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Internet Law

Law No. 26.032

Official Gazette, June 16, 2005

Internet Communications are Protected Free Speech

The law extends free speech protections to information and ideas received and transmitted through the internet.

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Labor Law

National Association for Employment,
Productivity and Adjustable Minimum Living
Wage

Resolution No. 2/2005

Official Gazette, June 6, 2005

Minimum Wage Increased

The new resolution establishes incremental increases in the minimum wage paid to monthly full-time workers. Effective July 1, 2005, the minimum wage is \$630 per month.

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Judicial Developments:

Supreme Court

National Decree No. 620/2005

Official Gazette, June 13, 2005

Supreme Court Justice Resigns

This law accepts the resignation of Augusto César Belluscio from his position as Justice of the Supreme Court. Belluscio served on the Supreme Court for over 20 years. He has broad experience in family law matters and has a long academic career that includes many publications on the subject.

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BRAZIL

Legislative and Regulatory Developments:

Bankruptcy Law

Federal Decree 11.101

Official Gazette (Supplemental Edition)

February 9, 2005

Bankruptcy Law Takes Effect

The Bankruptcy Law enacted in February 2005 became effective on June 9, 2005. The new law substitutes the archaic system of the “concordata” with a more comprehensive and dynamic system of judicial restructuring.

In order to address the immediate difficulties of dealing with the new procedures, the Appellate Court of São Paulo has created two specialized courts to hear bankruptcy cases, as well as a special bankruptcy appellate court to hear appeals. All the open cases filed before the new law took effect will continue to be processed in the civil courts where they were first assigned.

Brazilian companies in financial difficulty have already begun to seek court protection under the new law, including the Brazilian airline, Varig. The cases are being closely followed, as they will create new jurisprudence. Companies that filed under the old law—including Parmalat--were granted permission to transform their cases into a judicial reorganization, thus giving them more time to submit a plan of reorganization.

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Environmental Law

Federal Decree 5.472

Official Gazette, June 21, 2005

Convention on Organic Pollutants Adopted

The President promulgated the Stockholm Convention on Persistent Organic Pollutants, adopted on May 22, 2001. The Convention aims to protect human health and the environment from persistent organic pollutants. Countries that adopt the Convention undertake to prohibit and/or adopt necessary legal and administrative measures to

eliminate the production, use and trade in certain listed chemical substances, which list includes hexachlorobenzene and polychlorinated biphenyls (PCBs). Adopting states also agree to restrict the production and use of DDT.

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Criminal Procedure

Ministry of Justice
Ordinance 1.288
Official Gazette, July 1, 2005

Search Warrants with Respect to Law Firms

The ordinance sets forth the circumstances under which law firms will be subject to search-and-seizure warrants issued by the judiciary to the federal police. In order to obtain a warrant, there must be evidence or strong indicia of the firm's participation in a criminal offense. There must also be evidence that the firm is in possession of the fruits of the crime, or documents or objects that are essential for determining whether a crime has been committed.

Acts inherent to the regular practice of law—such as drafting contracts, legal opinions and other documents, preparing procedural documents, or acting as a person's attorney-in-fact—are not grounds for issuing a warrant. The ordinance also identifies specific types of documents and objects that are not subject to search or seizure, including specifically documents relating to clients who are not suspects, as well as communications with the client/suspect that are subject to the attorney-client privilege.

For a warrant to issue, the request must specify that the subject of the search is a law firm. Additionally, the police are required to notify the appropriate chapter of the Brazilian Bar Association prior to conducting the search.

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Judicial and Administrative Decisions:

Dispute Resolution

Highest Court of Appeals
Têxtil União S/A v. L'Aiglon S/A
June 2005

Foreign Arbitration Award Recognized

In this decision, the Highest Court of Appeal upheld a foreign arbitration award entered against the Brazilian company, Têxtil União, in the amount of approximately US\$900,000 in favor of the Swiss company, L'Aiglon S/A for breach of contract.

The claim involved the breach of two purchase and sale agreements for raw cotton originating from Senegal and the Ivory Coast. In both agreements there was an express clause appointing the Liverpool Cotton Association as the competent arbitral court to settle any controversies. According to the record, the Brazilian company failed to make continuing payments on the grounds that the quality of the cotton did not conform with that called for in the contract. Têxtil União at no time during the default period raised the question of the arbitral court's competence to resolve the matter.

At trial, Têxtil União argued that the parties never agreed to submit their dispute to arbitration, since there was no specific language requiring the parties to arbitrate. This argument was rejected by the court, which found that the award did not conflict with the Brazilian Arbitration Law or the New York Convention.

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Criminal Law / Environmental Law

Highest Court of Appeals
Department of Justice of the State of Santa Catarina and Auto Posto 1270 – Ltda – Micro-company
June 2005

Companies and Officers Liable for Pollution

In this decision, the court found that a legal entity can be held liable for environmental crimes, an issue that judges themselves acknowledge as highly controversial in Brazilian doctrine and case law. The decision was made pursuant to a special appeal lodged by the Department of Justice against a decision of the Supreme Court of the State of Santa

Catarina. The case involved a private company and two of its administrators, who were accused of discharging harmful byproducts from the company's operations into a local river. The discharge included harmful pollutants, including greases, oil, sludge, sand and chemical products.

The Highest Court of Appeals held that the Federal Constitution of 1988 and the Law of Environmental Crimes establish unequivocally that a corporate pollutant can be held criminally liable for damage it causes to the environment. The decision emphasized that such liability was established by the political process in order to both punish offenders and to prevent future pollution. The court pointed out that the biggest culprits of environment damage are businesses, and further opined that civil penalties are rather limited in their effectiveness to punish and prevent corporations from polluting.

In response to the argument advanced by the defense that legal entities are incapable of criminal intent, the court responded that if an entity has a distinct legal existence and performs acts in the social sphere, it can commit wrongful acts and be held accountable for them. As to personal liability of a company's officers, the court found that a legal entity cannot operate without the assistance of natural persons. As a result, if a company can be held liable for wrongful acts, so also may natural persons acting on the corporation's behalf be found liable for same, to the extent of their culpability.

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GUATEMALA

Administrative Developments:

Foreign Investment

Ministry of External Affairs
Official Gazette, June 3, 2005

Guatemala and Switzerland Approve Investment Treaty

On March 10, 2005, the President ratified a treaty between Guatemala and Switzerland for the reciprocal promotion and protection of investments, subscribed in Guatemala on September 9, 2002.

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Foreign Investment

Ministry of External Affairs
Official Gazette, June 7, 2005

Guatemala and Ecuador Approve Treaty

On March 10, 2005, the President ratified a treaty between Guatemala and Ecuador for the reciprocal promotion and protection of investments, subscribed in Quito, Ecuador on August 14, 2002.

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MEXICO

Legislative and Regulatory Developments:

Industrial Property Law

Presidential Decree
Official Gazette, June 16, 2005

Famous and Notoriously Known Trademarks

The decree amends the Industrial Property Law in order to establish the requirements and procedures for requesting official recognition of "famous" or "notoriously known" trademarks. Pursuant to the decree, "famous trademarks" refer to marks recognized by a majority of consumers. "Notoriously known" trademarks refer to marks recognized by a specific segment of the public or within domestic commercial circles as a result of a person's commercial activities with respect to its products and services, whether such activities take place within or without Mexico. "Notoriously known" trademarks also include marks recognized within the relevant territory as a consequence of promotional activities or publicity with respect to products and services.

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Foreign Investment

National Commission on Foreign Investments
Official Gazette, June 22, 2005

Limitations on Foreign Investment

The Foreign Investment Law requires prior authorization from the National Commission of Foreign Investments (the "Commission") for acquisitions by foreign investors of more than 49% of the capital stock of a Mexican company, where the value of the company's assets exceeds a specified amount to be determined annually by the Commission. The new resolution establishes an asset-value threshold of \$2,013,519,000 Mexican Pesos (approximately US\$186 million).

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Tax Law

Presidential Decree
Official Gazette, June 23, 2005

Taxpayers' Rights Law

The government has enacted the Taxpayers' Rights Law in order to confirm and ensure that taxpayers' rights are honored and respected by tax authorities. The law provides certain general rights to taxpayers, including, among other rights, the right to be informed and assisted by the tax authorities, the right to request tax reimbursements, the right to know the status of tax procedures, the right to know the identity of the authorities in charge of a tax process, and the right to be treated with respect and dignity by the tax authorities.

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Judicial Decisions:

Tax Law

Supreme Court (Binding Opinion)
June 3, 2005

Real Estate Transfer Tax Upheld

The Supreme Court issued a binding opinion holding that the local transfer tax charged when real property located in Mexico City is transferred is constitutional. The Supreme Court found no constitutional violations for imposing a transfer tax calculated on alternative bases. The transfer tax in question is calculated on the basis of the purchase price, a city appraisal or a tax appraisal, whichever is highest.

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VENEZUELA

Legislative and Regulatory Developments:

Civil Aeronautics Law

Law of the National Assembly
Official Gazette No. 38.215, June 23, 2005

Reform of the Civil Aeronautics Law

The National Assembly has enacted a new Civil Aeronautics Law that substantially modifies, in several important respects, the previous Civil Aviation Law of 2001. The new Civil Aeronautics Law is shorter and less detailed than the previous law, leaving many aspects to regulation by the National Civil Aeronautics Institute ("INAC"), which is to be created by a special law to be approved by the National Assembly (until then the law is to be administered by the existing National Civil Aviation Institute).

Among the more salient features of the new law are that the authority and autonomy of INAC are enhanced, security interests through chattel mortgages appear to be strengthened, lessor/owners are no longer potentially liable for harm caused by aircraft, and the tax exemptions contemplated in the old law have now been made effective.

Of particular importance for vendors of aircraft with reserve of title and for lessors of aircraft are the provisions in the new law that shift the entire liability for harm caused by the operation of aircraft, broadly defined, to the licensed operators thereof; previously under various circumstances owners could be held jointly liable. In order to encourage the development of the national aeronautics industry, the state is offering generous tax incentives, including total tax exemption on income deriving from sales of passenger tickets and for the definitive importation of all aircraft, motors, replacement parts and other equipment necessary for the aviation industry for a period of five years, plus others. On the other hand, the state has now reserved the authority to set airline fares; these are to be negotiated between INAC and the airlines, but if no agreement is reached, they will be imposed by INAC.

Overall, the new law appears to be an advance toward international standards and practices, especially for international vendors, creditors and lessors, while at the same time shifting responsibility and obligations to the national authorities and domestic air operators. However, it should be noted that many of the provisions of the new law are vague and subject to interpretation, and so will depend on the future regulation by INAC.

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Limitations on Bank Commissions

Central Bank Resolution No. 05-06-01
Official Gazette No. 38.215, June 23, 2005

Further Restrictions on Bank Charges

Continuing with the policy of regulating the interest and fees that may be charged by the financial sector, the Central Bank has issued a new resolution restricting the commercial prerogatives of banks and other financial institutions. To the benefit of the banks, this resolution establishes that the minimum interest rate that banks must pay for time deposits applies only on deposits over 28 days and that in the case of savings accounts with no activity for over six months, and with balances of less than Bs.1,000 (less than \$5), banks may charge a commission equal to said balance. However, this same resolution also imposes limitations on the following bank commissions: 5% for cash withdrawals against credit cards, 3% on factoring and financial leasing transactions, and 7.5% per annum on obligatory microcredits.

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Foreign Investment/Tourism

Tourism Organic Law
Official Gazette No. 38.215, June 23, 2005

Amendment to Tourism Organic Law

On May 31, 2005, the Venezuelan Congress amended the Tourism Organic Law, which has been in force since November 2001. The purpose of the law is to promote and regulate tourism as a source of sustainable development by creating a system for coordinating and controlling tourism, as well as to foster both public and private sector participation in tourism. Since the law contains public order provisions ("normas de orden publico") and since tourism is an activity for the public benefit and general welfare, investors will not be able to circumvent its provisions.

Among the most significant amendments include a requirement that Venezuela protect capital invested in tourism by foreign and domestic investors and that indigenous communities have preferential rights to benefit from the tourism and recreational potential of their habitats and collective lands. Commercial and universal banks will be required to dedicate a certain percentage of their loan portfolios to persons engaged in the tourism industry, such percentages to be determined by the Tourism Ministry. Banks will also be required to grant preferential interest rates on such loans at rates to be set by the Tourism Ministry and the Central Bank. The amendments also permit the President to exempt foreign tourists from the airport tax, provided that there be a minimum stay of seven days. The President may also grant exemptions from the value-added tax on purchases made by foreign tourists previously authorized by SENIAT.

In addition to the foregoing, the National Institute for the Promotion of and Training on Tourism ("INATUR") is required to promote Venezuela as a tourist destination. INATUR will be overseen by the Tourism Ministry, which will serve as the highest administrative authority regarding tourism and in such capacity, will head up the National Tourism System. The Tourism Ministry and INATUR will work with the Ministry of Education to promote the inclusion of tourism as a subject in the curricula of elementary schools, high schools, and colleges. To stimulate internal tourism, the National Executive shall coordinate with the Ministries of Labor and

Education for national holidays and vacations to be moved to the nearest Friday or Monday.

The law also places certain restrictions applicable to coastal areas, including a prohibition on placing barriers, fences or obstacles to limit free access to beaches and a requirement that beachfront developments clean and maintain the local beaches. Any developments currently blocking access to beaches, lakes, lagoons or rivers by the general public or emergency vehicles have one year from the date of the amendments to provide the necessary access.

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Tax Law

Presidential Decrees Nos. 3,692 and 3,693
Official Gazette No. 38.201, June 3, 2005

Certain Automotive Sales Exempt from Value-Added Tax

On May 30, 2005, President Hugo Chavez founded the Venezuela Móvil Program ("Venezuela Móvil"), a 3-year government initiative that aims to stimulate the expansion of the domestic automotive sector as well as to make entry-level passenger vehicles available to a wider cross-section of Venezuelans. Under Venezuela Móvil, directed by the Ministry of Light Industries and Commerce, participating multinational auto companies with manufacturing or assembly operations in Venezuela must design "basic" (i.e., economical) passenger car models, while observing predetermined guidelines regarding specifications, features, quality, and price. Of course, commercial participants may continue to manufacture other models.

As an incentive for auto companies and dealers to participate in the program, President Chavez issued a second, related decree that exempts virtually all value-added taxes on activities directly related to the government program, including the importation of "strictly necessary" components, the sale of nationally produced components, and the sale of assembled units at every stage of distribution. Buyers of Venezuela Móvil cars, who must be private Venezuelan citizens, are allowed one purchase per year and must not transfer the vehicle within 3 years after purchase unless they also pay the (originally exempted) added-value tax.

The beneficiaries of the Venezuela Móvil program are at least threefold: low-income consumers, who

will have access to a variety of brand-new economy cars; automobile and parts manufacturers, whose businesses will be stimulated and expanded by orders for these cars; and skilled workers, who will be employed for the manufacture of the cars and car parts. Overall, the program appears to be consistent with the present administration's express mission to spread middle-class amenities to more Venezuelans. In any case, the creation of this program will likely fuel new activity in the Venezuelan automotive sector while garnering popularity for the current regime.

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INTERNATIONAL TRADE

Developments in Ocean Commerce:

Space Charter

Federal Register, June 29, 2005

Space Charter Agreement Filed with Commission

On June 29, 2005, Compañía Sudamericana de Vapores ("CSAV"), a Chilean publicly traded shipping company, and Nippon Yusen Kabushiki Kaisha ("NYK") filed a space charter agreement with the Federal Maritime Commission. The agreement authorizes CSAV to charter space on NYK vessels to ship motor vehicles between Baltimore, USA and various ports in Venezuela. This agreement is subject to approval by the Federal Maritime Commission.

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Developments in Trade Agreements:

Free Trade Agreements

Organization of American States-- SICE Foreign
Trade Information System
June 30, 2005

Chile and China Negotiate Free Trade Agreement

On June 30, 2005, Chile and China concluded the third round of negotiations on a free trade agreement between the two countries. These negotiations included information about tariff reduction, inventory of goods, laws and rules of origin. Both countries hope to reach a free trade agreement by the end of 2005.

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The submission deadline for the July 2005 Report is Friday, August 12, 2005. Please send submissions to CGiovine@HatchParent.com.

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