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LEGAL MEMORANDA

Argentina

The following are summaries of recent measures taken by the Argentine government regarding habeas corpus and foreign borrowing.

I. NEW LAW OF HABEAS CORPUS

It must never be forgotten that the writ of habeas corpus is the precious safeguard of personal liberty and there is no higher duty than to maintain it unimpaired.¹

On October 19, 1984, President Alfonsín signed into law a new habeas corpus bill, recently passed by the Argentine Congress. Properly responding to a clamor for the protection of essential freedoms, Law No. 23,098, greatly expands the role of the habeas corpus proceedings in confronting illegal detentions and purportedly unconstitutional states of siege, while providing strict procedures designed to protect the rights of persons detained by government authorities.

General Dispositions

The first chapter of the law makes general dispositions which apply to every forum in Argentine territory. Nevertheless, the law will not preempt the application of provincial constitutions or laws that are considered to grant more effective protection of the rights to which it refers (article 1). National and provincial tribunals have jurisdiction to apply the law for alleged injurious acts carried out by national or provincial authorities, respectively (article 2).

A habeas corpus proceeding will be appropriate where an alleged act or omission of a public authority implies: (1) a limitation on or a present menace to one's physical liberty without the writ-

1. *Bowens v. Johnston*, 306 U.S. 19, 26 (1939).

ten order of a competent authority; or (2) an illegal aggravation of the form and condition in which the deprivation of liberty is imposed. Neither of the provisions should be construed, however, to limit the court's existing authority (article 3).

Constitutional Interaction

The new law also regulates article 23 of the national Constitution. Article 23 allows the suspension of constitutional guarantees during a state of siege, which may be declared when internal unrest or external attack jeopardize the Constitution and constitutional authorities. In such cases, the President of the Republic cannot unilaterally condemn or apply punishment, but is limited to arresting or transferring persons within the nation, if they do not prefer to leave Argentine territory. Recent history shows that, during the late 70's and early 80's, persons were arrested by those in the executive branch, for periods of up to seven years and were systematically denied the right of expatriation. Those arrests were, needless to say, equivalent to punishment since the prisoners, during their detention, never appeared before a judge.

In a specific case where a person's liberty is deprived by virtue of a state of siege declaration, the new habeas corpus proceeding can "tend to verify":

1. the legitimacy of the declaration of the state of siege;
2. the correlation between the order of deprivation of liberty and the situation that occasioned the declaration of the state of siege;²
3. the illegal aggravation of the form and conditions of the deprivation of liberty, which can never be carried out in penal institutions; and
4. the effective exercise of the option to leave the country provided by article 23 of the Constitution (article 4).

The writ of habeas corpus may be interposed by the person whose liberty is allegedly deprived or by anyone else on his or her behalf (article 5). By applying habeas corpus on their own initiative, judges may also declare the unconstitutionality of a limitation on liberty that is imposed by a written order of an authority acting under an unconstitutional precept (article 6). Sentences issued by

2. 296 Fallos 470 (1976); 300 Fallos 816 (1978).

appellate tribunals in habeas corpus proceedings will be final with appeal available to the Supreme Court. The appeal will proceed in the cases and forms provided by existing law (article 7).

Procedures

The second chapter of the law concerns procedures. A claim may be filed orally or in writing at any hour of the day with the secretary of the tribunal. The identity of the claimant will immediately be verified and, if that is not possible, without prejudice to the prosecution of the claim, the tribunal will devise the alternative measures necessary (article 9). The judge may reject the claim on its face or declare himself incompetent to rule on it, in which case the claim will be moved to the court of appeals, which will then decide within 24 hours whether to confirm the ruling or remit the claims to a competent judge. The judge cannot reject the claim for formal defects, and must take necessary measures to correct such defects, without prejudice to his rights to impose sanctions under article 24 (article 10).

When detention of a person is at issue; once the judge receives the writ he will order the respondent authority to present the detainee before the court, accompanied by order, with a report detailing the reason, form, and conditions of the detention. "A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by Congress; indeed, it is inherent 'habeas corpus'."³ If the detainee has been placed at the disposition of another authority, the report must state under which authority, for what cause, and under what precept he was placed there. In the case of a present menace of liberty deprivation, the respondent authority must also present this report. If the respondent authority is unaware of the detention or alleged injurious act, the judge will issue its orders to the authority's superiors in the bureaucratic hierarchy. The judicial order shall be in writing, but may also be oral when the judge considers it necessary to convene the proceeding in the place where the detainee is found. When the tribunal has knowledge of the place of detention of a person, and fears that the detainee may be transferred outside of its jurisdiction or otherwise suffer irreparable harm, it may expeditiously issue, on its own initiative, an order to bring the detainee or menaced party into its presence to

3. *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950).

resolve his rights (article 11).

The respondent authority has to immediately comply with the judge's order. If a physical impediment prevents the detainee from appearing before the judge, the respondent authority will report on the cause impeding fulfillment of the judge's order, and suggest how it can be fulfilled. The judge may convene proceedings where the detainee is held or even authorize a friend or relative to see the detainee in his presence (article 12).

Article 13 allows the party seeking protection to defend himself or name his defender, but forbids the judge to recuse himself except on declared grounds of partiality. In oral hearings, the detainee and his official defender must always be present (article 14). Articles 15 and 18 have detail procedures related to the proof, the hearing, the decision, and the pronouncement. Appeals may be interposed before the court of appeals, orally or in writing, within 24 hours (articles 19, 20).

Apportioning Legal Costs

A public ministry may intervene in the proceeding with the rights of the other parties, including the right to appeal; but he need not be given notice of subsequent actions (article 21). The petitioner may also intervene with full rights, including legal assistance, except for the right to notice and appeal (article 22). When the decision favors the petitioner, costs will be borne by the official responsible for the injurious act, or will be apportioned in accordance with article 6. When the petition is denied, each party will bear its own costs, except when the claim is manifestly illegal in which case the costs will be borne by the petitioner, the alleged injured party, or both parties depending on their relative responsibility for the wrongful action (article 23).

When the petition is malicious due to either mendacious or obfuscatory declarations, the petitioner will be fined 50 to 1,000 Argentine pesos or arrested for one to five days in a place determined by the judge, according to the grade of misconduct. Judges and responsible officials that unjustifiably fail to meet the time limits provided in the law will be sanctioned by the same fine, without prejudice to the provisions of article 45 of the national Constitution, which allows members of federal judicial tribunals to be accused only of common crimes, wrongful discharge, or criminal exercise of their functions.

Law 23.098 is a most welcomed protection for the liberties of the people. Through it, hopefully, due process shall replace the evils and dangers of both tyrannical government and subservient courts.

II. FOREIGN BORROWING: INTEREST RATES

A recent decision by the National Commercial Court of Appeals⁴ dealt with several matters relating to international lending.

Plaintiff borrowed money from Banco Sudameris ("Bank"); however, it was clear that the Bank was simultaneously borrowing the amount lent to the plaintiff from a foreign bank thereby acting as a credit intermediary between the foreign lender and the plaintiff.

After financial difficulties arose, plaintiff went to court challenging the validity of several provisions of the corresponding loan agreement. He claimed that: (i) a "LIBOR-ENGLAND"⁵ plus 3.5% interest rate exceeded the interest rate ceilings prevailing in Argentine courts; (ii) a "LIBOR-ENGLAND" plus 5% penalty interest rate was also invalid; (iii) a specific protection against withholding taxes through which plaintiff (as borrower) was compelled to pay Argentine income tax withholding on interest payments was not valid. The Court of Appeals decided: (a) that the interest rate mentioned above in (i) was valid and binding, since it was inside the market parameters prevailing at the time of the loan, irrespective of whether it in fact exceeded the domestic interest ceiling by 0.5%; (b) that the penalty interest rate referred to in (ii) above was also valid and binding, since it was triggered only by the debtor's default; and (c) that the tax indemnity clause mentioned in (iii) above could not be enforced, because it amounted to a hidden interest rate increase, the effect of which (in this particular case) was to create a real interest rate beyond what the court would allow.

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4. *Menning v. Banco Sudameris*, *El Derecho*, August 9, 1984, at 5.

5. LIBOR is an acronym for "London Inter-Bank Offered Rate."