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to another of the same taxpayer within the same state does not give rise to liability for the tax on the circulation of goods (ICM) (Decision of the 7th Chamber of the Second Instance Court of São Paulo on Appeal No. 29.353).

Excess Remuneration for Directors

Any excess remuneration for directors cannot be considered as a profit distribution as it is not a profit but an expense (Decision of the 4th Panel of the Federal Court of Appeals on Civil Appeal No. 55.400).

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COLOMBIA

The following is a brief summary of recent legal developments in Colombia regarding activities of foreign enterprises and individuals.

I. GOVERNING LAW IN LOAN AGREEMENTS

Decree 222 of 1983, adopted pursuant to Law 19 of 1982, which governs public sector contracts, opened up the possibility of foreign law and jurisdiction in public sector loan agreements where the agreement in question is to be "verified" outside of Colombia (section 239). This departure from recent Colombian policy remained somewhat obscure, as it failed to specify when a contract is "verified". There was some speculation that the restrictive terms of the Decree meant that foreign law could be stipulated only in connection with bond issues and not with regular unsecured agreements.

Decree 2875 of October 13, 1983, has clarified the position in a manner favorable to foreign law. Section 2 of the decree is of sufficient importance to be quoted *in extenso*:

For the purposes of section 239 of Decree 222 of 1983, it is understood that the execution of loan agreements is verified in such country where the essential obligations of the parties are to be undertaken, that is to say the provision of funds by the lender and repayment by the borrower.

For the purposes of the second paragraph of the said section, it is sufficient that either one of the obligations mentioned in the above-mentioned paragraph be undertaken abroad.

The implications of the decree are clear: if either draw down or repayment is to take place abroad then the foreign law and jurisdiction may be specified, and the foreign law in question is not limited to that of the countries in which draw down or repayment is to take place. There are, however, two complicating factors arising from the text of the decree itself and the manner in which the Colombian authorities appear to be interpreting its provisions.

Section 3 of Decree 2875 declares that its provisions apply to loan agreements "en trámite" and to those which are signed after its entry into force (October 13, 1983). It is clear that in any loan agreement signed after October 13, 1983, foreign law and jurisdiction may be stipulated where the appropriate conditions are met. But what is the significance of the expression "en trámite" which may be roughly translated as "in the course of being processed"? Presumably if this process is not completed before October 13, 1983, and the agreement is signed thereafter, then foreign law may be stipulated by virtue of the date of signature. If the process was completed before October 13th and the agreement signed before that date, foreign law could not have been stipulated in any case. A similar "en trámite" provision, obscure though it is, i.e. when is "processing" begun, when is it terminated, is important in section 300 of Decree 222 of 1983. While the legislature's intent is that all the provisions of the existing decrees governing public law contracts should apply to contracts already in "process", the new decree applies only to those contracts where "processing" begins after its entry into force. In the context of Decree 2875, the "en trámite" provision appears to be superfluous.

The second problem arises because section 239 of Decree 222 of 1983, while recognizing the possibility of stipulating foreign law and jurisdiction for the *execution* (in the sense of performance) of loan agreements, specifies that in all cases the signing ("celebración") of loan agreements will be subject to Colombian law and courts. This opens a Pandora's box since the combination of Decrees 222 and 2875 means that foreign courts can have jurisdiction over questions of interpretation while only Colombian courts can have jurisdiction over questions of signature, including the contractual capacity of the parties. This interpretation was applied to

the loan agreement for \$215 million signed in November 1983, between the government of Colombia and a syndicate of foreign banks led by Chemical Bank. As a result, foreign courts, faced with what seemed to be a question of execution, may have to suspend proceedings if they believe that a question of status, capacity or formality of the contract has been raised, since such questions would still be under the exclusive jurisdiction of the Colombian courts.

It seems clear that in Decree 222, Colombia sought to prevent its foreign exchange rules from being circumvented or weakened, while permitting stipulation of foreign law, and thus retaining control over the procedures by which foreign loan agreements are signed by Colombian parties. It is apparent that any foreign court would recognize the applicability of Colombian law to the determination of the status and capacity of the Colombian contracting party and the formalities required by Colombian law to enable the Colombian party to sign the loan agreement. The effect of Decree 222 is to provide for a possible suspension of procedures before a foreign court with consequent delay in resolving legal problems arising out of loan agreements and to make Colombian courts the exclusive forum for determining the status and capacity of the foreign contracting party.

Decree 2875 of 1983 also deals with the procedural requirements of foreign loan agreements made within the public sector. It provides that only those procedural sections of Decree 222 dealing specifically with loan agreements, capacity and representation of the parties and statutory prohibitions on contracting are applicable.¹ There is an exception for lenders, however, from most of the

1. These prohibitions are:

- a) Those arising from the constitution or the laws;
- b) Where a person is responsible for events which led a public-sector entity to invoke a compulsory termination clause in a contract;
- c) Where a person made another contract while under prohibition;
- d) Where a person was not duly registered or qualified as a bidder or competitor before a call for bids or a competition, in cases where such requirements exist;
- e) Where a person, at the date of signing the contract, is in default in income tax payments in Colombia. This prohibition is not applicable to legal representatives;
- f) Where a person has been deprived of public rights and functions as part of punishment by a court;
- g) Those who have in the year previous to the contract been public officials or members of the Board of Directors of the public sector entity;
- h) Companies in which public officials or members of the Board of Directors of the public-sector entity have a financial interest or in which they occupy posi-

provisions of section 7 of Decree 222 dealing with the requirement of opening a branch or appointing a Colombian legal representative. Instead, reference is made to the Banking Superintendency regulations concerning foreign banks which provide funds to Colombian entities. While these regulations in principle require that any foreign bank lending to Colombian entities must have a representative office in Colombia, there are exceptions of sufficient importance.² For example, in the case of a syndicated loan, only the agent would be required to have a representative.

There are other problems concerning loan agreements arising out of Decree 222 which remain to be resolved, in particular, the prohibition on tied credits (section 276) which, if taken at face value and in combination with section 286, would forbid any export financing (other than supplier credits) by non-governmental institutions where such financing was linked to the purchase of goods and services in a particular country. The Ministry of Finance has been assuring bankers that the prohibition is much more limited, however, designed to only cover credits accorded before calls for tender where the effect would be to influence such calls. A new decree would appear essential to clarify matters.

II. CHANGES IN FOREIGN INVESTMENT RULES

The National Planning Department (DNP) recommended to the government a series of changes to the laws and regulations governing foreign investment intended to ease restrictions on such investment, particularly in those sectors which can make an important contribution to the government's employment and balance of

tions of management or direction;

i) Companies in which the consort, concubine or parent of a public official or a member of the Board of Directors of the public-sector entity have jointly or separately more than 50% of capital or occupy positions of direction.

In this context "parent" means those within the 4th degree of consanguinity, second degree of affinity or first degree of civil relations. (sections 8 and 9 of Decree 222 of 1983).

2. These exceptions are:

a) Financial institutions which lend less than \$5 million annually to the public or private sector in Colombia;

b) Financial institutions whose operations in Colombia are limited to the granting of lines of credit to national financial institutions;

c) Subsidiaries of foreign banks whose parent company has a representative in Colombia, except where the subsidiary is contracting in its own name with the Colombian public sector;

d) Financial institutions which participate in syndicated lending, other than in the capacity of agent. (Resolution 4698/80 Art. 1)

payments targets. These recommendations include the following:

i) Increasing the rates of permitted profit remittances abroad in priority sectors. Under Andean Pact norms, these rates are 20 percent of registered foreign investment for all sectors. Resolution 36 of CONPES, The National Council on Economic and Social Policy, adopted in August 1983, had already raised remittance rates for new investment in certain sectors to 20 percent plus the average prime rate for the year in New York as determined by the Bank of the Republic. Existing investment in enterprises in these same sectors would also benefit from the high remittance rates where at least 50 percent of production was exported. The DNP recommendation would extend these benefits to enterprises in other manufacturing and agricultural sectors where such enterprises exported at least 50 percent of their production.

ii) Lifting restrictions on investment in the metropolitan areas of Bogotá, Medellín and Cali (where restrictions have already been lifted).

iii) Selective elimination of export obligations for new investment.

iv) Studies of the possibility of permitting foreign investment in the banking and leasing sectors. The contemplated investment would be in the form of a "mixed" enterprise, in which the majority of the shareholders would be Colombian. Since the adoption of Law 55 of 1975, no new foreign investment has been permitted in the banking and financial sectors apart from investment by Andean Pact countries in new banks where such countries accord similar rights to Colombian investors.³

v) Eliminating the remittance tax (now at 12 percent of net value after withholding tax of 40 percent) on the value of payments to foreign enterprises for technical services provided at pre-operational stage. It is also suggested that the permitted term of such contracts be increased to five years.

vi) Availability of foreign long-term credit to foreign investors with the prior approval of the Monetary Board. Resolution 87 of 1983 adopted by that Board on September 7, 1983, has provided the possibility of access to foreign credits for private enterprises

3. This exception permitted the creation of Banco Extebandes, an entity in which banks from Andean Pact countries are the principal shareholders along with a small participation from Banco Exterior de España.

(other than those in the distribution and housing sectors) under certain conditions (minimum term of three years, interest up to Libor plus 2.5 percent).

vii) Foreign enterprises which are in the process of transforming themselves under Andean Pact norms into "mixed" enterprises (i.e. with majority Colombian participation), should have the same rights as mixed enterprises with respect to credit, technical assistance contracts and reinvestment. Decree 3548 section 3 of December 29, 1983, has given effect to this recommendation in the area of technical assistance contracts and reinvestment, and has extended its benefits to purely foreign enterprises (i.e. those in which Colombian participation is less than 50 percent) where such enterprise's use of inputs is more than 50 percent Colombian or where more than 25 percent of its end product is exported. (c.f. viii below).

In this context, note should be taken of Monetary Board Resolution 116 of 1983 adopted on December 21, 1983, dealing with the creation of an Enterprise Capitalization Fund (Fondo de Capitalización Empresarial) in the Bank of the Republic. The purpose of the fund is to stimulate increased equity investment in companies quoted on national stock exchanges and operating in manufacturing, agro-industry, construction and national commerce and, in particular, the so-called "Sociedades Anónimas Abiertas" (companies whose shareholding is widely diffused). The Enterprise Capitalization Fund may rediscount financing provided to mixed or foreign enterprises by "Corporaciones Financieras" for new share issues. In the case of foreign enterprises, only so much may be financed as will enable Colombian investors to maintain their level of participation in the enterprise even with additional foreign investment. Where the company is in the process of transformation into a mixed enterprise under Andean Pact rules, this restriction will not apply. These provisions only apply to Sociedades Anónimas and, as in the case of financing to national enterprises, more attractive terms are offered to widely-diffused companies where up to 80 percent of a new share issue may be financed through the fund.

viii) Suspension of the Andean Pact obligation of transformation into a mixed enterprise where the foreign enterprise can demonstrate that more than 50 percent of its inputs are Colombian or more than 25 percent of its output is exported. This recommendation was placed into effect in Decree 3548 of December 29, 1983. Foreign enterprises which do not become mixed enterprises as a

result of this provision will not, however, be able to obtain certificates of origin in order to benefit by the right of preferred access to the Andean Market.

Decree 3548 also contains several important provisions including the possibility of permitting foreign enterprises in Colombia which meet the input and export criteria already mentioned, to sign technical assistance agreements with their parent company abroad and remit payments for such assistance as approved by the Royalties Committee and Exchange Office of the Bank of the Republic on the same basis as mixed enterprises, notwithstanding the prohibition on such payments in Article 21 of ANCOM Decision 24. Such foreign enterprises will also be able to annually reinvest undistributed profits in Colombia above the limit of 7 percent of registered capital fixed by Decision 24 of the Commission of the Cartagena Agreement. Decree 3548 also permits new foreign investment in the tourist transportation sector, and new foreign enterprises in the hotel and tourism infrastructure sectors can apply for exemption from any national participation in their capital.

It is recognized that certain foreign firms have been excused from compliance with export goals which were set as a condition of approval of their foreign investment. While the government has not yet formally accepted all the above DNP recommendations, it is believed that most of them will be implemented within the next few months.

III. NEW FOREIGN TRADE LAW

The new foreign trade law (48 of 1983) enacted by President Betancur on December 20, 1983, introduced several changes into the legal aspects of Colombia's foreign trade policy. Among these changes are:

i) The "Certificado de Abono Tributario" (CAT) created by Decree law 444 of 1967 has been replaced by a "Certificado de Reembolso Tributario" (CERT). The CAT is a certificate issued to exporters in return for their transfer of export earnings in foreign currency to the Bank of the Republic in accordance with foreign exchange regulations. The exporter receives a certificate for an amount in Colombian pesos equal to a set percentage of the value of the export earnings remitted. The certificate, which is freely negotiable, can be used after a certain period to pay income tax, sales tax and customs duties.

The CAT eventually created certain problems both in Colombia's relations with its trading partners and in domestic economic policy. The United States government regarded the CAT as the kind of export subsidy forbidden by Article XVI of GATT and the Code on Export Subsidies. The prospect of countervailing duties was brandished against several Colombian export sectors. From the Colombian government's point of view, the CAT was seen as too indiscriminate and inflexible an instrument of export promotion and fiscal policy. The CAT level and its maturity was fixed on an annual basis before August 30 of the preceding year.

The new CERT, which is also freely negotiable, is specifically designed to be both flexible and discriminatory. The trade law empowers the government to fix CERT levels at will and to favor specific sectors over others. Among the export sectors which may be favored is services. Furthermore, the government can freely determine the maturity of CERTs, the taxes which they may be used to offset, and the rate of such an offset. At present, those who receive CERTs directly from the Bank of the Republic may use them to offset income tax equivalent to 40 percent of the value of the CERT, where the holder is a sociedad anónima, and 18 percent where the holder is a limited company or a natural person.

The Colombian government believes the CERT to be compatible with GATT since the CERT, unlike the CAT, is not tied directly to either the level of export earnings of a particular exporter or the price of exported goods. It remains to be seen whether other countries, and in particular the United States, will adopt the same view.

ii) There is a sales tax exemption for processed goods which are exported, for capital goods made in Colombia which will be used in the production of export goods and for goods sold in Colombia to import-export agents where such goods are destined for export. These exemptions are in addition to those already provided for in Decrees 2815 of 1974 and 2803 of 1975 concerning goods covered by the so-called "special systems of importation and exportation," commonly known as the Vallejo Plan. Under this plan, the importation of primary materials is allowed tax free provided that such materials will be used in the production of export goods.

iii) The Fondo de Promoción de Exportaciones (PROEXPO) is authorized to provide financial aid to Colombian participants in calls for tenders held abroad and in international calls for tenders by Colombian bodies. At the signing ceremony for the foreign

trade law, President Betancur announced the government's intention to convert PROEXPO into an export development bank.

iv) The government is authorized to establish and regulate special systems of commerce such as exchange in kind, compensation, triangulation, and special methods of cross-border trade.

v) The law set out a series of principles which should govern the operation of free zones and authorized the government to establish a national register of foreign trade as a means not only of controlling activities in free zones but, more generally, as a means of controlling contraband.

IV. E.E.C. - ANDEAN PACT AGREEMENT

At a ceremony held in Cartagena on December 17, 1983, the Andean Pact Countries (Bolivia, Colombia, Ecuador, Perú and Venezuela) signed an economic cooperation agreement with the European Economic Community - the first of its kind between the E.E.C. and a Latin American integration group. Recognizing that the Andean countries constitute a developing region, the E.E.C. undertook to promote economic, financial and technical cooperation and, in particular, to promote greater trade between the two regions.

In this context, the signatories agreed to accord each other the status of most favored nation with respect to tariffs, customs regulations, national direct and indirect taxes, and international payment mechanisms. This treatment is independent of preferences forming part of economic integration activities or measures taken in the context of relationships between GATT members, or as part of special concessions by the Andean Pact countries to other developing countries within the GATT framework. In an annex to the agreement, the E.E.C. declared its willingness to seek means of improving the application of the generalized system of preferences to the Andean Pact countries.

While the immediate impact of the agreement on economic relations between the E.E.C. and the Andean Pact is likely to be very slight, all parties insisted in Cartagena on the importance of this document as symbolizing community support for Andean inte-

gration and increased economic and commercial links between the E.E.C. and the Andean Region.

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