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LEGAL MEMORANDA

ARGENTINA

The following is a brief summary of recent legislative and judicial developments in Argentina.

FOREIGN INVESTMENT LEGISLATION AMENDED

Argentina has just relaxed its foreign investment regulations. Under Law 23,697, (known as the "Economic Emergency Law") the Argentine Congress, *inter alia*, decided:

1) All provisions of Law 21,382 (the Foreign Investment Law) which require the prior approval of the federal executive power or the implementing authority for foreign capital investments in Argentina shall be repealed; and

2) Equal treatment for national and foreign capital invested in productive activities within Argentina shall be guaranteed.

As a result of these changes, the law also states that applications for foreign investments approvals currently pending before the federal executive power and the implementing authority shall be returned to their respective applicants.

The new law, however, leaves one critical question unanswered—whether Law 23,697 should be construed broadly to abrogate not only the provisions requiring the federal executive power's prior approval under the Foreign Investment Law, but also provisions under other specific statutes, such as the Financial Entities Law, and the Industrial Promotion Law.

There has been no final determination. At this point, foreign investors should perhaps wait for further clarification by the authorities, which will probably emerge in the form of a regulating and implementing decree. For the time being, the safest assumption is that approvals required under laws other than the Foreign

Investment Law itself are still necessary.

The changes provided for under Law 23,697 are necessary steps in the right direction. Clearly the general or permanent controls damage the infrastructure which generates the wealth and power of the foreign investors, undoubtedly keeping foreign investors away.

CONSEQUENCES OF NEGLIGENT LENDING

Recently, an Argentine court in *Establecimiento Metalúrgico Pecú S.A. s/quiebra v. Permanente, S.A. Cía. Financiera* (National Commercial Court of Appeals, Chamber D), held that a lender's failure to exercise reasonable care can subject the lender to unforeseen consequences, where the lender knew or should have known about the deteriorating situation of the borrower.

In *Metalúrgico*, the lender issued a loan, secured by a mortgage, to an unusual borrower. The borrower was a company which had been dormant, without any kind of commercial activity, for eleven years. Furthermore, the company had no personnel of any kind, its capital equipment, for all practical purposes, was idle and obsolete, and its total net worth was less than fifty percent of the amount lent.

When the borrower went bankrupt, its creditors challenged the validity of the loan and security interest. The court decided that the loan should not be included in those debts to be repaid by the bankruptcy estate.[1]

The court in *Metalúrgico* based its decision on Articles 122 and 123 of the Bankruptcy Law. These articles provide that a court appointed officer (Síndico) of the bankruptcy estate may move the court either to subordinate to other interests or discount altogether those contracts entered into by a third party and the debtor during a so-called "suspicion period" preceding bankruptcy, where the third party knew about the debtor's insolvency. Thus, the court imposed a duty of reasonable care on the lender, and found that the lender negligently failed to discharge the duty.

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1. If fraud had been present in the transaction between the lender and the borrower, the lender would have been liable for damages caused by the loan transaction to third parties.

SOVEREIGN IMMUNITY: IMPLIED ASSERTION

The principal international institutions in charge of protecting refugees are the United Nations High Commissioner for Refugees ("UNHCR"), an international agency for refugee protection, and the 1951 Convention Relating to the Status of Refugees, which defines the fundamental rights of refugees and the basic standards for their treatment.

A private party sued the UNHCR in an Argentine labor court. When served with notice of the suit, the UNHCR neither waived its immunity, nor did it respond in any manner. The Ministry of Foreign Affairs subsequently requested the UNHCR's appearance in court. Once again, the UNHCR failed to appear or respond.

In *Dutto, Rodolfo v. Alto Comisionado de las Naciones Unidas Para los Refugiados*, the National Labor Court (Chamber II), on May 31, 1989, decided that the UNHCR's failure to respond did not result in an implied waiver of its immunity.

Argentina is a party to the United Nations Convention on Privileges and Immunities of November 21, 1947, which was ratified by Decree 7672/63. Under the 1947 Convention, U.N. officers enjoy all immunities necessary for the exercise of their functions. Accordingly, the court held that it was bound to observe the UNHCR's immunity from Argentine jurisdiction.

LOAN AGREEMENT WITH PROMISSORY NOTES: STAMP TAX

Argentina's federal stamp tax is assessed on documents or written agreements entered into, delivered or having effect in the federal jurisdiction. In principle, most contractual documents are subject to this tax, regardless of their legal validity. For many years, the business community has complained about the tax, arguing that it clearly acts as a business deterrent by providing an expensive hurdle for law abiding people.

In *Sánchez Gandolfi, Mario v. Morano, Tomás J.*, the National Commercial Court of Appeals (Chamber D) on June 6, 1989, heard a case which resulted in conflicting opinions. The issue before the court was whether a loan agreement, which included promissory notes,[2] was to be taxed both on the loan agreement and

2. The promissory notes provided the creditor with a more expedient collection method in the event of a default by the borrower.

the related promissory notes.

The court decided that because the loan agreement itself was taxed, it was "absurd and excessive" to oblige the parties to pay a double tax by requiring the promissory notes as well. Thus, the entire loan transaction, including the promissory notes, was, for stamp tax purposes, considered a single transaction. In this particular instance, whatever legal independence and autonomy which the notes may have had for other purposes were disregarded.

A New Treaty with Brazil: Economic Integration, Cooperation, and Development is Approved

On August 15, 1989, Congress approved the Treaty on Integration, Cooperation and Development (the "Treaty"), executed by Argentina and Brazil on November 29, 1988. In the Treaty, both countries agreed to define their "common objective" as the implementation of a process through which they intend to economically integrate and cooperate. The ultimate goal of the process is a "single economic space" composed of both Argentine and Brazilian territories.

The process has two stages. During the first stage, all tariff and non-tariff barriers to the trade of goods and services are to be gradually eliminated over a period of ten years. Furthermore, both parties have undertaken to harmonize their customs, trade, agriculture, industrial, transportation, communication, scientific, and technological policies, as well as to coordinate their monetary, tax, foreign exchange, and capital regulations. The harmonization and coordination will, nevertheless, require specific legislative approval of measures on a case by case basis. The second stage shall be devoted to the harmonization of all other policies necessary to establish a common market between Argentina and Brazil.

As agreed, a Joint Integration Committee (under the co-chairmanship of both Presidents) and a Joint Ad Hoc Legislature Committee have been entrusted with the duty of coordinating all efforts required to integrate the two countries. The parties have further agreed that, after five years of joint efforts under the Treaty, they will consider requests from countries which are members of the Latin American Integration Association ("ALADI") and are interested in becoming associated with them. Argentina or Brazil can, however, withdraw from the Treaty by giving notice to its counterpart one year prior to its withdrawal.

This constitutes a bilateral effort in the long-delayed Latin American integration process. Both countries, however, should concentrate on restructuring their overburdened governments by concentrating on the elimination or substantial reduction of the mesh of controls, licensing systems, monopolies, restraints of trade, and similar inhibitions on the activities of private enterprise. Their successful implementation will result in a better allocation of resources and the unleashing of both countries' most energetic, imaginative, and productive people.

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