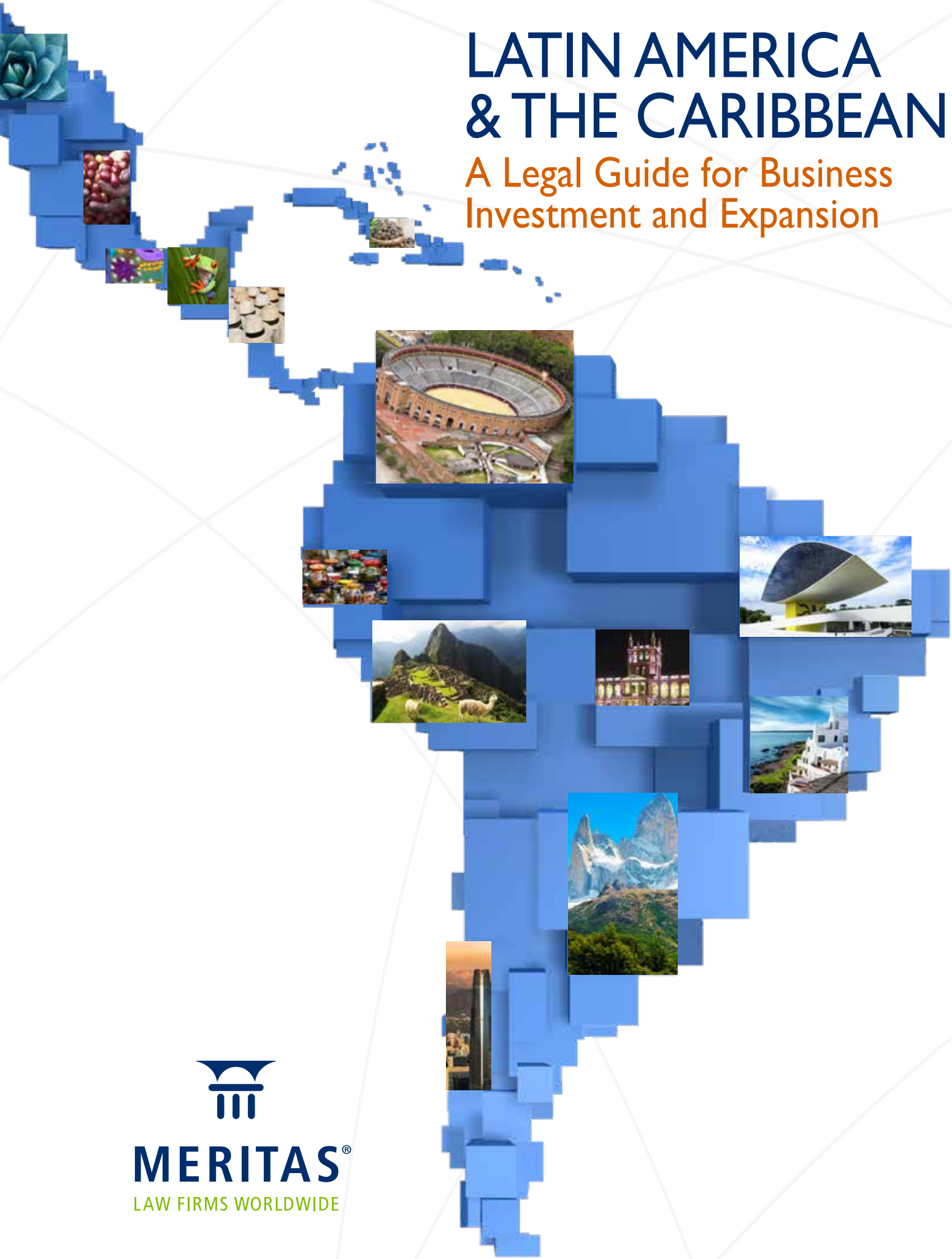
LATIN AMERICA & THE CARIBBEAN

A Legal Guide for Business Investment and Expansion



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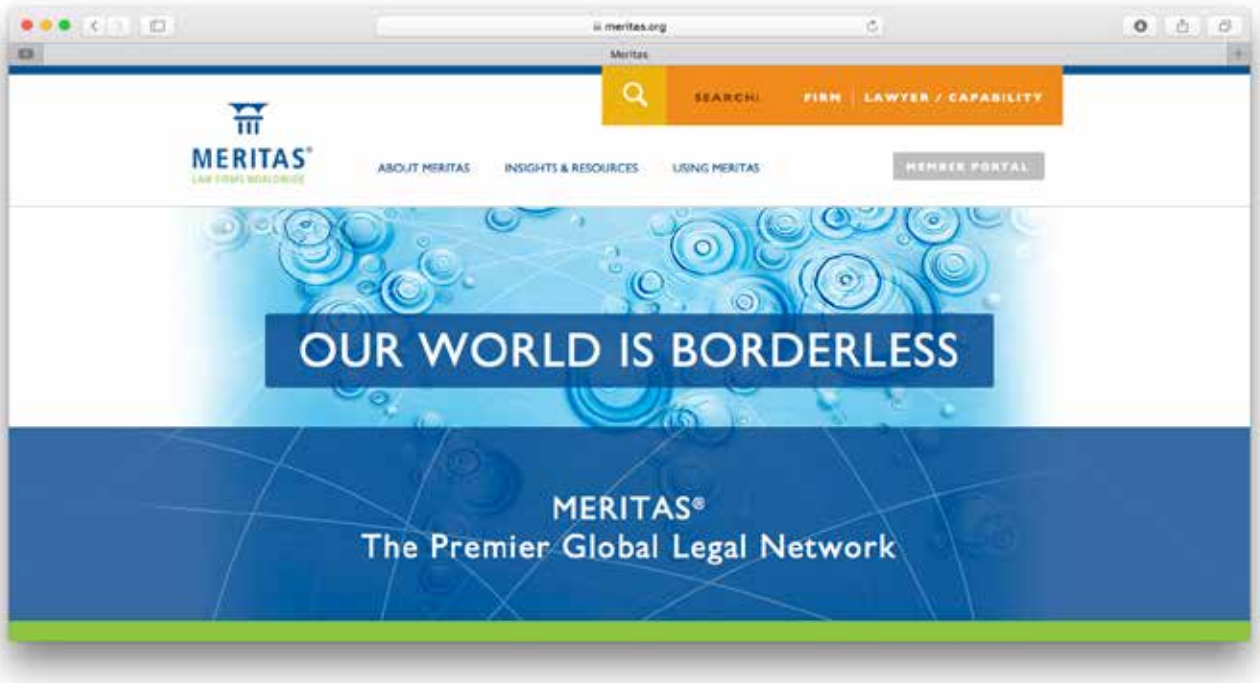

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ARGENTINA

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1. What role does the government of Argentina play in approving and regulating foreign direct investment?

Argentina's government has issued general regulations regarding foreign investment, and has, in general, allowed the market and investment opportunities to self-regulate. There are no agencies which directly control or regulate foreign investment.

The legal regime for foreign investment is governed by the Foreign Investment Act (*Ley de Inversiones Extranjeras*) (law 21,382) as per its amended wording in force from 1993. For the purpose of this law there is no distinction between national and foreign investors, irrespective of the type of business they become involved in. Foreign investors have the same rights and obligations as local ones under the parameters stated by the Argentine Constitution regarding the development of lawful economic activities in Argentina. There are no limitations on the participating percentage of foreign ownership in a local entity, regardless of the type of vehicle chosen.

Argentina has also executed a number of Bilateral Investment Treaties (BITs) with third countries and is a member of the Multilateral Investment Guarantee Agency (MIGA), the Overseas Private Investment Corporation, and the International Centre for the Settlement of Investment Disputes (ICSID), which further strengthen the protections for foreign investors.

2. Can foreign investors conduct business in Argentina without a local partner? If so, how does the Argentine government regulate commercial joint ventures between foreign investors and local firms?

Foreign investors can conduct business in Argentina without the need of a local partner. In order to operate in Argentina on a permanent basis, foreign investors must incorporate a branch, or a wholly or partially owned subsidiary.

The subsidiary may operate under any of the several types of corporate entities available. The most common are:

- The stock corporation (Sociedad Anónima or S.A.); and
- The general partnership (Sociedad de Responsabilidad Limitada or S.R.L.), similar to an LLC, in which members cannot exceed 50 partners and which has the advantage that its operations are subject to fewer formalities.

The decision between a branch or a subsidiary usually stems from the fact that the liabilities of the branch are fully attributable to the head office, while both Sociedad Anónima and Sociedad de Responsabilidad Limitada limit partners' liability to their capital contribution.

Further, the decision on whether to create a Sociedad Anónima or a Sociedad de Responsabilidad Limitada may be influenced by other considerations, such as tax matters; for instance, in certain jurisdictions a Sociedad de Responsabilidad Limitada may be considered as a "pass through" entity and therefore offer certain tax advantages.

Pursuant to a recent amendment to the Companies Act (*Ley de Sociedades Comerciales*) (law 19,550, as amended), it is now possible to incorporate a sole stockholder corporation (Sociedad Anónima Unipersonal or S.A.U.) in Argentina, although this type of entity is not commonly used, as it is subject to more formalities than a general partnership (S.R.L.) or a standard stock corporation (S.A.), and to additional scrutiny by the Office of Companies.

Foreign investors, through their local vehicles, can also participate in joint ventures or similar associations (*agrupaciones de colaboración* or *uniones transitorias de empresas*).

3. What laws influence the relationship between local agents and distributors and foreign companies?

The Argentine Commercial and Civil Code contains provisions governing the relationship between local agents and distributors, on the one hand, and the principals or manufacturers/owners of the goods, on the other hand. Such provisions apply to agency and distribution agreements irrespective of whether the principals or manufacturers/owners of the goods are individuals or local or foreign companies.

AGENCY AGREEMENTS

The Argentine Commercial and Civil Code defines an agency agreement as an agreement (which must be executed in writing) between an agent and a principal, whereby the agent promotes business for and on behalf of the principal in a stable, continuous and independent way, without there being any employment relationship. An agent does not assume any risk of the transactions and does not act in representation of the principal. The Code further establishes that the agent does not represent the principal for the conclusion and execution of agreements.

The agent will have the exclusive right to promote the principal's business within a specific territory or for a group of people as stated by the agreement. Moreover, the Argentine Commercial and Civil Code states that the agent is allowed to provide its services to a large number of principals, with the prohibition of accepting transactions of the same sector, or transactions that are in direct competition with the principal's business. However, the principal may authorize the agent to act as agent to other principals in direct competition.

Unless it is previously agreed, compensation shall consist of a commission paid to the agent by the principal, which varies according to the volume or to the value of transactions carried out by the agent.

Agency agreements are understood to be for an indefinite period of time, unless otherwise agreed, and may be terminated unilaterally at will. However, the termination must be preceded by prior notice of one month for every year of validity of the agreement. If the agent caused a significant increase on the principal's transactions that can continue on time, the agent has the right to receive compensation (which cannot exceed the amount equivalent to one year's payments) even after the agreement is terminated. Such compensation, however, is not applicable when the principal terminates the agreement due to breaches by the agent, or when the agreement is unilaterally terminated by the agent.

Finally, the agent is prohibited from appointing subagents, unless expressly authorized by the agent, who in such case will be jointly and severally liable for the actions carried out by the subagent.

CONCESSION AGREEMENTS

(Rules also applicable to Distribution Agreements, as appropriate)

The Argentine Commercial and Civil Code does not provide for specific rules applicable to distribution agreements. However, it states that the rules governing concession agreements shall apply to distribution agreements as appropriate. A concession agreement exists every time a concessionaire that acts in its own name vis-à-vis third parties compels himself in exchange of a payment, to provide his business structure in order to market goods and services provided by the grantor.

Unless otherwise agreed, the concession is exclusive for both parties. Thus, in principle, the grantor is not able to authorize another concession in the same area, while the concessionaire is not allowed to develop activities outside the established limits.

The grantor has the obligation to provide the concessionaire with the minimum number of goods in order to allow the concessionaire to fulfill its sales expectations. The grantor also has the obligation to respect the assigned areas to the concessionaire, and to provide the necessary information for the proper exploitation of the concession. The concessionaire, in exchange, has the obligation to buy goods exclusively to the grantor, abstain from marketing outside the assigned area, provide the proper facilities to comply with the concession and train its personnel in accordance to grantor's regulations.

Concession agreements cannot be executed for less than 4 years. If a lower period of time is agreed, or if the agreement is executed as an indefinite term contract, it will be considered as executed for 4 years. Exceptionally, the agreement can be executed for a period of 2 years in the cases where the grantor provides the concessionaire with the facilities needed to develop the business.

If the term set forth in the agreement is expired and the performance of the agreement continues without establishing a new term, the agreement will be considered as an indefinite term contract.

Concessionaires have the right to receive a compensation that can consist of a commission on the price of sold units or a fixed retribution.

The same termination procedures and consequences applicable to agency agreements are applicable to concession agreements. Note that in the case of termination of an indefinite term contract, the grantor will be compelled to repurchase products and spare parts bought by the concessionaire at the same price paid by the concessionaire in the first place.

Unless otherwise agreed, the concessionaire is not allowed to designate any sub-concessionaire or agents.

4. How does the Argentine government regulate proposed merger and acquisition activities by foreign investors, and are there any areas of the economy where they are prohibited (e.g. natural resources, energy, telecommunications or real estate)?

Argentine law does not provide for specific regulations of mergers and acquisition activities by foreign investors and generally accepts investments in all areas of commercial life, although there are certain regulations regarding land ownership that have made investment in certain industries more restrictive for foreign investors, and there are regulations in place to control economic concentrations, regardless of whether a foreign investor is involved in a merger or not.

The Rural Land Act (Régimen de Protección al Dominio Nacional sobre la Propiedad, Posesión o Tenencia de las Tierras Rurales) (law 26,737) establishes a limit to the total rural land that may be owned by foreign individuals or entities (the law describes who is to be considered a foreign individual or entity, as well as any exceptions to the general rule). This general limit currently stands at 15% of the total of rural land. This limit is national, provincial and municipal, meaning that the land owned by foreign investors may not exceed 15% of the rural land in the municipality, the aggregate in the province and the national aggregate.

In addition, this limit of 15% is also subdivided in that no particular nationality may own more than 30% of that 15%. Further, no foreign individual or entity may own more than 1000 hectares of rural land in the "central" area, or equivalent amount in the outlying areas (as determined by an Inter-Ministerial Rural Land Committee).

The Rural Land Act specifically states that the acquisition of rural land shall not qualify as "investment" under any Bilateral Investment Treaty (BIT), given that land constitutes a nonrenewable natural resource of the country. This therefore excludes the acquisition of land from "national treatment" clauses present in most BITs, and therefore the law cannot be challenged based on this argument. Further, the law itself states that it is international public policy and therefore prevails over international regulations.

Additionally to this regulation, and related to it, is the regulation relating to "safety zones", particularly border safety zones and areas surrounding military or certain civil establishments and buildings, as per Decree 15,385/44 (as amended). Said decree establishes that foreign nationals must require prior authorization in order to acquire land included in "safety zones", as defined in the Decree and subsequent implementing regulations.

These regulations have a relevant effect in both agribusiness and mining industries, given the land and geographical location requirements of both industries.

Now, the Antitrust Act (Ley de Defensa de la Competencia) (law 25,156, as amended) regulates concentration transactions, irrespective of whether foreign investors are part of such transaction or not. Concentration transactions affected by merger control are those resulting in

the control or substantial influence, directly or indirectly, of one or more companies, which include mergers, transfers of ongoing concerns, stock acquisitions, shareholders agreements, joint venture agreements and any other agreement granting dejure or de facto control or substantial influence over management decisions of a business.

Transactions are required to request clearance if certain thresholds are met for both (i) the combined net sales of the acquiring group and the target, and (ii) the price or value of the Argentine portion of the transaction. There are, however, certain exemptions for the clearance requirement, even if the thresholds are met, such as the "newcomer" exemption, which applies to acquisitions of a single Argentine company by a foreign company which owns no assets in Argentina or shares in other Argentine companies.

Should a transaction be subject to merger control, request for antitrust clearance may be filed up to one week after closing of the transaction. That is to say, merger control may be done on an ex post basis, rather than as a pre-closing condition. In general, transaction documents set forth which party will retain the "antitrust" risk, and therefore bear any cost which may be associated with eventual requirements from the antitrust authority.

5. How do labor statutes regulate the treatment of local employees and expatriate workers?

LABOR STATUS REGARDING LOCAL EMPLOYEES

Argentina has fairly complex labor legislation designed to protect the rights of employees and workers, by setting special rules concerning the employment of women, as well as rules governing working conditions and working hours, providing for payment of salaries during illnesses, setting surcharges on salaries for overtime and unhealthy work, establishing annual vacations, and requiring the payment of indemnification in the event of wrongful dismissal.

Unlike most other domestic laws that can be waived or modified by agreement, Argentine labor laws generally embody public policy principles. As a result, the waiver by employees of rights afforded under labor regulations is generally unenforceable and employers or third parties may not adversely affect these rights.

Also, dismissal of employees is subject to specific rules. Although there are some caps for highly paid employees, any employee is entitled to one month salary per year of service plus one or two months as prior notice, the latter depending on seniority.

Those compensations do not apply in case
of dismissal for just cause. Employees on a trial period (i.e., during the first 3 months of employment) are not entitled to severance payment, exception made to prior notice (15 days).

LABOR STATUS REGARDING EXPATRIATE WORKERS

There is no restriction regarding the employment of foreigners, provided they hold temporary or permanent residence permits.

Temporary residences will entitle foreign individuals to work in Argentina for a two-year period. After the first two-year period, the employee will be able to request a permanent residence.

Argentine companies (either local subsidiaries or branches of foreign companies) may request to the Argentine Migrations Office temporary residence permits for employees:

- Who they are planning to bring into Argentina; or
- Who are at that time residing in Argentina.

Alternatively, this temporary residence permit may be requested directly by the employee. In case of applying for a temporary residence for the employee's family members, the corresponding family ties should be proven.

6. How do local banks and government regulators deal with the treatment and conversion of local currency, repatriation of funds overseas, letters of credit, and other basic financial transactions?

In 2002, law 25,561 repealed the convertibility regime which pegged the Argentine peso to the U.S. dollar at a one-to-one rate, thus establishing the "free float" of the Argentine peso.

As a result of substantial amendments introduced in foreign exchange regulations at that time, foreign currency proceeds from exports of goods must be liquidated in the Argentine Foreign Exchange Market.

All loans made with foreign lenders must be registered with the Argentine Central Bank. As a result of recent changes in foreign exchange regulations, it is no longer a requirement to liquidate proceeds from loans with foreign lenders through the Argentine Foreign Exchange Market, thereby allowing local borrowers to retain the loan in foreign currency in either local or foreign bank accounts. However, only loans that have been liquidated in the Argentine Foreign Exchange Market may be serviced through currency transfers from Peso-denominated local bank accounts.

Argentine Central Bank regulations authorize Argentine residents (whether individuals or legal entities) to transfer abroad accrued interest to foreign creditors through the Argentine Foreign Exchange Market.

Local residents are also allowed to remit profits and dividends to foreign equity holders when resulting from annual financial statements certified by external auditors.

7. What types of taxes, duties, and levies should a foreign investor in Argentina expect to encounter?

Foreign investors conducting business in Argentina through a local branch or a wholly or partially owned subsidiary are subject to the same taxes, duties and levies as any other local entity. These may be federal, provincial or municipal, and therefore, may vary depending on where the entity's local headquarters are located, where it carries out its business and on the activities it performs.

The most relevant or common taxes that such entities may encounter in Argentina are the following:

- Corporate Income Tax (CIT): 35% of the entity's net taxable income (calculated on a worldwide basis). Dividends and other corporate distributions paid to foreign shareholders are not subject to additional withholdings unless distributed from the entity's exempt income.
- Value Added Tax: Its general rate is 21% (although other rates apply to specific cases), and it applies to the sale of tangible personal property within Argentina, the import of tangible property and services into Argentina and the provision of services within Argentina.
- Minimum Presumed Income Tax (MPIT) (as from January 1, 2019, this tax shall no longer exist): 1% of the entity's total assets (provided they exceed a minimum amount).
- Financial Transactions Tax: 0.6% of all bank credits and debits held at Argentine financial institutions, as well as particular cash payments (a credit against the CIT or MPIT is granted for a portion of amounts paid corresponding to this tax).
- Gross Turnover Tax: Approximately 3% of the gross turnover generated by an entity engaging in business within a given Argentine jurisdiction (such tax is deductive for CIT purposes).
- Stamp Tax: Most Argentine jurisdictions assess stamp tax on contracts and other instruments documenting transactions entered into for a consideration, provided they are executed or have effects within such jurisdiction. Rates vary depending on the jurisdiction and the transaction involved.

8. How comprehensive are the intellectual property laws of Argentina, and do the local courts and tribunals enforce these laws regardless of the nationality of the parties?

In Argentina, protection of intellectual and industrial property, which is very comprehensive, derives in the first instance from the intellectual property clause of the Argentine Constitution, which mandates that "Every author or inventor is the exclusive owner of his work, invention, or discovery for the term granted by law". The protection of intellectual and industrial property is enacted through the Intellectual Property Act (law 11,723). In addition Argentina is a party to some of the most relevant treaties and international agreements addressing this subject matter, including, among others:

- The Agreement on Trade-Related Aspects of Intellectual Property Rights, including trade in counterfeit goods;
- The Berne Convention for the Protection of Literary and Artistic Works;
- The Universal Copyright Convention;
- The WIPO Copyright Treaty;
- The WIPO Performances and Phonograms Treaty;
- The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- The Geneva Phonograms Convention;
- The Paris Convention for the Protection of Industrial Property; and
- The International Convention for the Protection of New Varieties of Plants.

The Transfer of Technology Act (law 22,426) governs the chargeable transfer of licenses for trademarks, copyrights, patents, industrial designs, technology and know-how from non-Argentine residents to Argentine residents and provides that the related agreements shall be registered with the National Institute of Intellectual Property (INPI), the authority in charge of enforcing the Transfer of Technology Act, for statistical purposes. Although this registration is not mandatory, it has relevant consequences, since it enables the Argentine licensee to deduct, for income tax purposes, the royalties paid abroad and, in certain cases, to apply lower withholding taxes on the payments to foreign beneficiaries.

9. If a commercial dispute arises, will local courts or international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

It is generally advisable that foreign investors rely on arbitration for the resolution of commercial disputes. This is particularly so given that commercial disputes submitted to local courts may take several years before a first instance decision is issued. Additionally, for commercial disputes there is a filing fee (Tasa de Justicia) that is 3% of the total amount in dispute, which makes commercial court litigation an expensive endeavour. Further, in many cases arbitrators are better suited to resolve highly technical matters that may involve complex operations or procedures.

When resorting to arbitration, foreign investors may choose a local institutional arbitration (such as the Arbitration Tribunal of the Buenos Aires Stock Exchange), a foreign institutional arbitration (such as the International Chamber of Commerce) or an ad hoc arbitration. It may further be agreed that the arbitral award will be final and binding for the parties.

10. What advice can you provide for how best to negotiate or conduct business in Argentina?

Tax and labor matters are probably the most relevant matters that a foreign investor must keep in mind. It is important to note that in addition to rather long-term exposure, both these issues have specific regulations. In that sense, labor laws are designed to protect employees and not employers, and the employment relationship is presumed. It is therefore suggested that investors have specialized advisors in labor matters in order to avoid any potential liabilities.

Regarding tax matters it is important to note that the political organization of the country as a federal country means that there are three tiers for tax matters: federal, provincial and municipal taxes. Each tier will have its own taxes and these are cumulative. Further, particularly at a municipal level, taxes are industry-specific. Targeted advice should be sought in order to avoid any potential risks for noncompliance with taxes.

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