WINDS OF CHANGE IN ARGENTINA: NEW REFORMS IN FOREIGN EXCHANGE CONTROLS

Hernán D. Camarero
Richards, Cardinal, Tutzer, Zabala & Zaefferer
Buenos Aires, Argentina

In furtherance of the promises made by the recently-elected President Macri during his political campaign for the national presidency of Argentina, since mid-December 2015 the Executive Power has been issuing several rules aiming to convert Argentina into a foreign investments-friendly country.

With regards to foreign exchange controls the new Government and the Central Bank of Argentina (CBA) issued several regulations which

(i) repealed the so-called "*Foreign Exchange Deadlock*" (FX Deadlock) and unified the local the FX market by the elimination of the different foreign currency rates (such as, "Savings Dollar", "Tourist Dollar", "Credit Card Dollar", etc.) that had sprouted up as a consequence of the prior very tight foreign exchange controls that affected local residents;

(ii) eased the tight foreign exchange controls on foreign trade, foreign indebtedness and foreign investments; and

(iii) eliminated restrictions to the so-called "blue-chip swap" transaction.

We review below the most important aspects thereof.

I. Unlocking the FX deadlock ("*cepo cambiario*")

In 2012, as a consequence of the continuous depletion of foreign reserves in the Central Bank of Argentina ("CBA"), the Government of former President Fernández de Kirchner implemented the so-called "FX Deadlock" by which pursuant to CBA Communication "A" 5318 (7/5/12) physical and juristic local persons (residents[1]) could not purchase foreign currency for purposes of savings, lending foreign currency to non-residents and making direct and portfolio investments abroad, *inter alia*.

Such prohibition was later slightly amended by allowing natural persons to purchase foreign currency in small amounts subject to a previous clearance system that had been created in the last

[5] To the extent foreign exchange regulations are concerned, "*resident*" in an economy means any physical or juristic person, whose focal point of economic interest or main activity is located within the boundaries of that economy. It is internationally accepted that a physical person is assumed to be resident of a country, it he resides therein for a period, continuing or not, of more than six months per calendar year. In case of juristic persons, residency is qualified by the country where the company was incorporated. See IMF Balance of Payments Manual (www.mecon.gov.ar/cuentas/internacionales/invdir/intro.htm) and CBA Communication "C" 39,316 dated Aug, 25, 2004.

quarter of 2011 by the Federal Administration of Public Income ("FX Transactions Control System" and "AFIP", respectively)[2].

In fact this system that lacked transparency was used by the Government as a gauge to arbitrarily control the outflow of foreign reserves from the CBA. The algorithm used by AFIP to determine the amount of Pesos that a resident could use to purchase foreign currency was fuzzy and almost impossible to know. Systematically AFIP only allowed purchases of foreign currency for approximately 30% of the requested nominal amount. The official reason for rejecting a request was *lack of sufficient economic-financial capacity to perform the transaction*.

This perverse system was dismantled on December 17, 2015 when AFIP issued General Resolution Nr. 3281/15, which terminated the FX Transactions Control System. Accordingly the CBA issued Communication "A" 5850 ("Comm. "A" 5850"). These rules did away with the FX Deadlock (Comm. "A" 5245 and ancillary communications).

Later on Comm. "A" 5850 was amended by CBA Communication "A" 5899 (2/4/16) that further loosened FX controls.

Pursuant to the new regulations as from December 17, 2015 natural and juristic resident persons of the private sector that are not entities licensed to operate in foreign exchange transactions, other estates (e.g. trusts) and local governments are entitled to purchase foreign currency in the local single and free foreign exchange market ("FX Market") up to US$ 2 Million per calendar month ("Monthly Cap") without CBA's or AFIP's prior approval for the aggregate of the following concepts: investments in real estate abroad, loans granted to non-residents, direct investments abroad, portfolio investments abroad by physical persons, other investments abroad by residents, portfolio investments abroad by legal persons, purchase of foreign currency bills and traveller checks.

Eligible residents should sign a sworn affidavit declaring their compliance with the applicable foreign exchange regulations. Purchases of foreign currency in excess of US$ 500 should be made against the debit of the relevant Pesos from a local bank account (debit, electronic transfer or check). Relevant KYC and AML regulations apply to every FX transaction.

The Monthly Cap shall not be applicable in case of sales of external assets (foreign currency) by a resident (for Pesos) in the FX Market for further purchases of foreign currency up to the amount of the external assets sold.

These measures necessarily entailed that the former official US$/Peso rate strongly controlled by the CBA under the exiting Administration (that was trading around US$ 1/Pesos 9.5) stepped up close to the so-called "blue market rate" (i.e. black or illegal FX market) that was trading around US$ 1/ Pesos 14.9. Consequently the different FX rates that had sprouted up as a consequence of the former tight FX controls disappeared.

However several days after the unification of the FX Market the US$/Peso rate did not only skyrocket but on the contrary it slightly went down to US$ 1/Pesos 13. In any case, the CBA has delegated powers to intervene in the FX Market for monetary and FX reasons (the so-called "dirty floating system"), which it has already exercised successfully. As of the date of this article, the US$

---

[2] AFIP General Resolution Nr. 3210/11.

is floating around Pesos 15.5 with specific interventions of the CBA. So far this policy has been working reasonably well for the Government.

Notwithstanding the foregoing the stabilization in time of the FX rates with regards to the Peso shall depend upon the Government's ability to pass a draft of bill abrogating the so-called "Padlock Law" Nr. 26,017 (*Ley Cerrojo*) and "Sovereign Payments Law" Nr. 26,886 (*Ley de Pagos Soberanos*) that is currently being discussed in the House of Deputies in the National Congress and to succeed in issuing sovereign debt in the international debt markets (around US$ 15 billion) in order to honour the *ad referendum* settlement agreements reached in 2016 in the litigation that Argentina has with the so-called Hold-Outs (Vulture Funds) and other bondholders[3] before the Courts of the Southern District of New York, NY, USA (Judge Griesa).

II. Foreign trade: payment of imports of goods and services.

The former Government had launched a set of rules and regulations that heavily restricted importers to access to the FX Market to purchase foreign currency to pay imports, either in advance, at sight or at a certain term. Due to the critical situation of Argentina's balance of payments and the political and economic instability that existed, foreign exporters usually demanded Argentinians importers to for their purchases in advance.

By creating a prior control system for such access to the FX Market by means of the so-called "DJAI" (Advance Sworn Import Declaration) run by AFIP[4], importers faced huge problems to make imports, affecting local production for the internal market, causing exporters to lose foreign markets and affecting exporters that manufactured goods with imported components.

The DJAI System caused the accumulation of a balance of unpaid imports that was around US$ 7 billion at the end of 2015, a legacy for the new Government to tackle with. Several countries complained about this system and eventually a case was filed before the World Trade Organization (WTO) on August 21, 2012 (USA filed and Mexico, Japan, EU, Canada, China, Australia, Guatemala, India, Israel, South Korea, Norway, Saudi Arabia, Switzerland, Taipei, Thailand and Turkey joined). On August 22, 2014 the WTO's panel report concluded that such system did not comply with GATT and that Argentina should adapt its legislation thereto, effective as from January 1, 2016[5]. This decision became final and binding to Argentina and was another hurdle inherited by the new Government.

AFIP General Resolution Nr. 3823/15 abrogated the DJAI System and replaced it with another one that should not be a hindrance to access the FX Market (Imports Monitoring Integral System).

---

[3] Such as NML Capital, Ltd, Aurelius Capital Master, Ltd., ACP Master, Ltd, Olifant Fund, Ltd., Montreux Partners, L.P, Renzo Beltramo and Paola Botta, *inter alia*.

[4] A system theoretically created for statistical purposes that was immediately used in a distorted way by the former Government as tool to delay or stop the access to the FX Market to purchase currency to pay imports.

[5] In fact the WTO Panel Reports constitute three separate Panel Reports identified as WT/DS438/R, WT/DS444/R and WT/DS445/R. Section 7.2. of the Panel Reports states: "… *With respect to the procedure for the Advance Sworn Import Declaration (DJAI), the Panel concludes that: a. The DJAI procedure, irrespective of whether it constitutes an import licence, constitutes a restriction on the importation of goods and is thus inconsistent with Article XI:1 of the GATT 1994; …*".

Likewise, Comm. "A" 5850 set forth that all imports embarked as from December 17th, 2015 may be paid through the FX Market subject to the general FX regulations on imports of goods. Automatic and non-automatic licenses to import goods were reinstated and integrated with such system[6].

With regards to the stock of foreign debt for imports of goods accrued until December 16, 2015 (i.e. the payments of imports that the former Government had frozen), Comm. "A" 5850 stated that imports of goods due or to be due as of December 16th, 2015 (i) of the National or Local Public Sector and/or of entities controlled by the National Public Sector, (ii) supported with an LC or a guaranteed letter issued by local financial entities until December 16th, 2015; and (iii) due by international institutions or official credit agencies and/or guaranteed by them; may be paid through the FX market at any time (Section 15).

With respect to the rest of the debt for imports such Communication (Section 16) set forth a schedule of payments through the FX Market, as follows: (i) between December 17, 2015 and January 31, 2016, up to US$ 2 million per importer; (ii) between February 1, 2016 until May 31, 2016, up to US$ 4.5 million per importer; and (iii) as from June 1, 2016, without cap.

Payment of imports of services (including royalties) was also restricted by the former Government with a system similar to the DJAI called Anticipated Affidavit for Imports of Services (DJAS)[7]. Although this system was not abrogated it does not appear to be useful anymore since the FX Transactions Control System was terminated.

Communications "A" 5850 and "A" 5870 set forth a similar schedule of payment for the stock of debt for services accrued and/or rendered as of December 16th, 2015 for these concepts, as follows: (i) between December 17, 2015 and January 31, 2016, up to US$ 2 million per importer per calendar month; however these FX purchases shall be computed within the Monthly Cap and shall reduce it accordingly; (ii) during February 2016 up to US$ 2 million per importer; (iii) from March 2, 2016 until May 31, 2016, up to US$ 4 million per importer; and (iii) as from June 1, 2016, unlimited.

III. Foreign indebtedness and foreign investments. Repatriation of foreign investments.

Payment of dividends to foreign investors.

Although CBA regulations on payment of dividends to foreign investors simply set forth some requirements[8] and was also conditioned to a prior approval system by AFIP[9], for many years the

---

[6] Resolution Nr. 5/15, Ministry of Production, based on Law Nr. 24,425.

[7] AFIP General Resolution Nr. 3276/12.

[8] Pursuant to CBA Comm. "A" 5377 as amended and restated, corporate documentation showing the corporate decision to pay dividends, the company's closed financial statements reviewed by external auditors and compliance with the CBA's foreign indebtedness reporting regime.

[9] *DAPE* or Foreign Payments Anticipated Affidavit, as per AFIP General Resolution Nr. 3417/12.

former Administration, through the CBA, had restricted *de facto* the payment of dividends abroad, only allowing it in certain cases for amounts much smaller than those requested by residents.

The New Government abandoned such practice and nowadays payment of dividends to foreign investors is unrestricted and only subject to compliance of the above-mentioned requirements.

Foreign Financial indebtedness.

Executive Order Nr. 616/05 required that all foreign financial indebtedness (with certain specific exceptions), all foreign funds remitted by non-residents to the FX Market for purposes of holding local currency, purchasing financial assets or liabilities of any kind of the private financial and non-financial sectors and investing in securities issued by the public sector in secondary markets, were subject to the constitution in a local financial entity of a USD-nominated, non-interest bearing time deposit for 365 days equivalent to 30% of the funds brought into the country, which could not be used as collateral or guarantee of any kind ("Mandatory TD")[10].

The reason for this highly distortive measure was that in 2005 there was an excess of incoming foreign funds for speculative purposes and hence the former Government tried to control it (i.e. funds that came and flew within a very short time span).

There were several exceptions to the Mandatory TD, especially, in case of foreign direct investments[11] by non-residents, foreign trade financial transactions[12] and securities issued in IPOs traded in self-regulated markets.

Although the new Government kept the Mandatory TD, it reduced the percentage to 0, which in practice translates into the elimination of such restriction to foreign capitals[13].

Likewise, the 365-days minimum mandatory stay for all foreign financial indebtedness transferred into Argentina or their renewal imposed by Executive Order Nr. 616/05[14] was reduced to 120 days as from the date of transfer of the funds into Argentina[15].

Furthermore, residents from the financial sector, private non-financial sector and local governments are no longer obliged to transfer into the FX Market and convert into Pesos the foreign currency

---

10 § 3 and § 4, Pars. c) and d), Executive Order Nr. 616/05.

11 A foreign direct investment reflects a un long-standing interest of a resident entity in an economy (in this case, foreign) for a resident entity in another economy (in this case, local), being accepted internationally that the acquisition of a real estate or an interest in the capital of an enterprise equal to or above 10%, qualify as such (see "*Balance of Payments Manual*", International Monetary Fund (IMF), Fifth Edition, 1993).

12 Mainly imports and exports financing.

13 § 2, Resolution Nr. 3/15 (December 16, 2015), Ministry of Economy and Public Finance.

14 Principal could not be cancelled by a resident before the lapse of such minimum term, either from the FX Market or from abroad).

15 § 1, Resolution Nr. 3/15 (December 16, 2015), Ministry of Economy and Public Finance.

disbursed abroad under a financial loan. In other words, the resident may choose to keep the foreign funds deposited abroad or to transfer them into Argentina, and in the latter case, to convert them into Pesos or to keep them in a foreign currency-nominated bank account in a local financial entity.

However, the payment of a financial loan from the FX Market requires necessarily that the disbursed funds have been transferred into Argentina and converted into Pesos; otherwise, the resident may only pay the financial loan directly from abroad (Comm. “A” 5850, Section 8).

Finally new foreign financial loans transferred and converted into Pesos in the FX Market may be totally or partially pre-cancelled from the FX Market as long as the minimum mandatory stay period has elapsed and certain additional requirements are met[16].

- Repatriation of foreign investments.

FX regulations on repatriation of foreign investments were not modified essentially except for those about portfolio investments (i.e. those not qualifying as foreign direct investments)[17].

In this sense Comm. “A” 5850 states that non-residents making new portfolio investments by transferring and converting foreign currency into the FX as from December 17th, 2015 may be entitled to repatriate them without the prior approval of the CBA, without any cap (prior regulations set forth a USD 500,000 monthly cap) and as long as they comply with the minimum mandatory stay term of 120 days.

IV. Blue-chip swaps.

The “*blue chip swap*” (known as “*contado con liquidación*” in Argentina) is a securities transaction by which an Argentinian resident purchases with Pesos deposited in Argentina, securities issued in Pesos or USD that can be converted in the market into American Depository Receipts (ADRs) in order to be traded in a stock exchange in the USA, for its further sale abroad for USD to be deposited in a foreign bank account to the order of the securities’ seller.

These transactions are practically simultaneous and are performed with the participation of a stock broker-dealer in Argentina and in the USA and the corresponding clearing houses for the transfer of the securities. Synthetically it allows a resident to purchase USD abroad with Pesos in Argentina through the securities market and without access to the local FX Market at the underlying implicit FX rate.

FX regulations do not prohibit this kind of transaction; however they have set forth some conditions, which were abrogated recently by the CBA with the issue of Communications “A” 5851 and 5864.

---

16 CBA Comm. “A” 5890.

17 This kind of investments include *inter alia* stock portfolios and stakes in local companies (less than 10%), participations in mutual funds and local trusts, purchase of local loan portfolios, local bonds issued in Pesos and foreign currency payable locally and the purchase of other internal credits.

However, the legality of this transaction when performed simultaneously has been challenged since 2006 by the CBA under the prior Administration. Between 2006 and 2015 the CBA considered that a simultaneous Blue Chip Swap was an infringement to FX regulations and to the Foreign Exchange Criminal Regime and therefore issued communications obliging the buyer of a security to hold it in its portfolio for at least 72 hours prior to its sale; accordingly similar rules were issued by the *Comisión Nacional de Valores* (CNV – Securities Exchange Commission) and the *Mercado Abierto Electrónico* (MAE – Elextronic Open Market). CBA sustained that such transaction was an FX transaction (requirement that must be present in any FX crime) and not a securities transaction.

As a consequence of the FX Deadlock for the last five years or so the blue-chip swap became the available way residents had to purchase USD abroad or to sell them for Pesos locally at an FX rate that was much higher than the official one.

CBA also had challenged these transactions even if the purchaser had complied with the 72-hours requirement if and when his "actual intention" was to purchase foreign currency abroad against Pesos locally, alleging that the purchaser's scienter showed that in fact he intended to make an FX transaction and not a securities' one (economic reality principle that it is not stated in the Foreign Exchange Criminal Regime).

This position was extensively debated before the National Criminal Economic Courts of the City of Buenos Aires in the leading case "*Banco Francés BBVA et. Al. on Infringement Law Nr. 24,144*" - which "saga" began with a judge decision in 2012 and ended up in 2015-. On March 14 2015 Panel B of the National Criminal Economic Court of Appeals acquitted the defendants by declaring that at the time of the facts the Blue-Chip Swap was a legal transaction that did not infringe FX regulations and that the subsequent CBA regulation did not prohibit it either. This decision became final and binding when the Federal Supreme Court rejected an extraordinary appeal by an official prosecutor.

Finally, last December 2015 the new Administration made a radical change in its approach to Blue-Chip Swaps, abrogated the CBA's communications that had set forth the 72-hours holding period and even the Minister of Economy Mr Prat-Gay declared in a press conference that it was a legal transaction.

V. Additional remarks.

President Macri's Administration shows a clear intent to begin to put aside some of the many messy and entangled FX regulations that since the end of 2001 the different Governments in Argentina have been issuing in an uncontrolled spree.

Although the situation of the Argentine economy is critical due to many years of disastrous political and economic decisions and even in spite of the Government's willingness not to apply in the short run a shocking legal reform package, undoubtedly the recent amendments in FX regulations show that the winds of change in Argentina seem to be blowing in the right direction.