

UNTYING THE GORDIAN KNOT: PROGRESSIVE LIBERALIZATION OF FOREIGN EXCHANGE CONTROLS IN ARGENTINA

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Introduction.

During 2015 the then-presidential candidate Mr. Mauricio Macri promised the electorate that he would do away with the so-called “*foreign exchange deadlock*” (FX Deadlock or *cepo cambiario*) in Argentina. *Cepo cambiario* was a part of the approximately 2,500 “A” communications issued by the Central Bank of Argentina (CBA) since the end of 2001, a great number of which constituted a type of ‘Gordian Knot’ made of a complex net of foreign exchange (FX) controls that locked much of the cross-border flow of foreign currency into and out of Argentina.

Such process began on December 17, 2015 (as we reported in our previous article¹), gradually easing several aspects of the foreign exchange controls and doing away with the “*Foreign Exchange Deadlock*”.

Then, on August 8, 2016, the CBA issued Communication “A” 6037, which introduced a major and substantive overhaul of the existing foreign exchange regulations on (i) general principles of the local single and free foreign exchange market (FX Market), (ii) payment of imports of goods, (iii) services and other transfers, (iv) financial indebtedness, (v) access by residents to the FX Market, (vi) derivatives and (vii) FX transactions with non-residents. Subsequently the index of code of concepts was reduced so as to expedite FX transactions². Communication “A” 6039 has been further amended by the CBA.

These regulations put an end to almost 15 years of tight and confusing FX controls in Argentina.

Very recently, the CBA issued Communication “A” 6094 (11/4/16) by which it abrogated regulatory restrictions on the purchase and sale of foreign currency allowing FX transactions in several other facilities or locations than those formerly authorized, with more flexible business hours of operations.

The purpose of this article is to briefly review the most significant changes introduced, showing how the Federal Government has maintained its promise to create a more flexible FX Market, with the ultimate goal of luring, facilitating and increasing incoming foreign investments in Argentina.

General Principles.

Every FX transaction must be performed at the exchange rate freely agreed to by the parties, subject to CBA’s regulations, through a CBA authorized entity. Every FX transaction must be

1 See Hernán D. Camarero, “*Winds of change in Argentina: New reforms in foreign exchange controls*”, March 2016 Volume 5, Issue 1, International Financial Products & Services Committee Newsletter, American Bar Association, Section of International Law.

2 CBA Communication “A” 6039 (8/8/16), by which the number of existing code of concepts (315) was slashed to 72.

recorded before the CBA by such entity, and be documented by a FX slip or deed. The intervening entity must notify the client about the receipt of funds not later than 24 business hours after the date of such credit in the correspondent bank's account.

Business hours for foreign exchange transactions have been deregulated.

Residents may access to the FX Market for (i) incoming transfers and payments related to transactions with non-residents; (ii) payment of obligations with local financial entities and of issue of foreign-currency-nominated debt securities, and (iii) the purchase or sale of their own foreign assets.

Although the residents' obligation to transfer the proceeds of the exports of goods into Argentina and convert into Pesos still remains, the mandatory term to do those has been extended widely to five years for all kind of goods as from the date of their lading (*cumplido de embarque*)³.

A very relevant change has been the simplification of the manner for requesting and closing a FX transaction: the filing of a duly signed FX affidavit of the relevant intervening financial or FX entity, stating the transaction's code of concept and the relevant information of the ordering party (with proof of identity or representation documents, if a juridical entity) and the beneficiary, shall suffice for access to the FX market by residents and non-residents alike, unless otherwise stated in specific FX regulations. This releases clients from the duty to file a significant amount of paperwork with the banks, with the associated reduction in costs (such as notary fees, accounting certifications and fees for stamps and copies) and delays. Electronic and digital signatures are also allowed, subject to specific requirements.

Standard Anti-Money Laundering and Know Your Customer statutory controls by banks and FX entities remain in place.

Another substantial change is the reinstatement of *foreign currency arbitrage* with financial entities' resident and non-resident clients, allowing one to avoid the costly and bureaucratic two-step process of selling incoming foreign currency (*divisas*) for Pesos, and then purchasing foreign currency in Argentina (bills) with Pesos (or vice-versa for outbound transfers). Now entities may *arbitrage* the *divisas vs. Pesos* at a 1=1 ratio (or, if different foreign currencies, at the applicable market FX rate for arbitrage of the foreign currencies). If the intervening entity charges a fee for such transaction, it must openly inform it to the public.

This means that if a resident has a foreign-currency-nominated local bank account, he may order the local bank to credit foreign currency received from abroad or debit it for further transfer abroad. This is even possible with foreign currency bound to be transferred to the FX Market and converted into Pesos (e.g. proceeds of exports of goods and services, advanced payments and pre-export financings).

Furthermore, financial entities' clients may permanently authorize their banks to credit all incoming foreign transfers of foreign currency in such clients' foreign-currency-nominated local accounts, with a US\$ 100,000 monthly cap in all the financial entities, subject to certain requirements. If the transfer corresponds to funds that are to be converted into Pesos, then such conversion should be performed in a timely fashion.

Any infringement to FX regulations shall be punished under the foreign exchange criminal regime (FXCR).

3 Resolution Nr 242/16, Ministry of Economy and Public Finances.

Payments of imports of goods.

The existing Imports' Payments Tracking System has been dismantled, and access to the FX market has been substantially simplified.

Imports may be payable in advance to the delivery date, at sight or at term (after the delivery date).

The FX access affidavit must be filed, jointly with proof of compliance with the "*Financial and Private Non-Financial Debt Securities and External Indebtedness Reporting Regime*" (Comm. "A" 3602) (Comm. "A" 3602) and the "*Direct Investments Reporting Regime*" (Comm. "A" 4237 as amended) (Comm. "A" 4237), if applicable.

The former DJAI system (Advance Sworn Import Declaration) is long gone. The existence of non-automatic import licenses does not preclude a resident from paying an import.

Services and other transfers.

Inbound transfers.

Foreign currency received by residents in connection with services rendered (export), and proceeds received from policies of insurance made with non-resident insurers, should be remitted to Argentina for further conversion into Pesos or credit in a foreign-currency-nominated account within 365 calendar days⁴ as from the date of their receipt abroad or in Argentina, or their credit in a foreign account. The amount to transfer shall be net of withholdings or discounts made abroad by the client or through an international and habitual offsetting agreement by which the net amount is made available to the resident.

The same terms and obligations apply to proceeds from the sale of non-financial, non-produced assets (being economic rights, such as fishing licenses, rights to minerals, space or electromagnetic spectrum, transfers of rights on sportsmen, patents, copyrights, concessions, leases, trademarks, and internet domains) by residents.

In both cases, such obligations shall not apply if the FX regulations allow the application or allocation of the proceeds to cancel foreign financial indebtedness.

Outbound transfers

The FX access affidavit, jointly with proof of compliance with Comm. "A" 3602 and Comm. "A" 4237, if applicable shall suffice for a resident to have access to the FX Market to pay foreign services, interest, earnings and dividends, and acquire or purchase non-financial, non-produced assets.

Financial Indebtedness.

The proceeds of any foreign financial indebtedness of financial and private non-financial sector and local governments may not be transferred or liquidated into the local FX Market and thus may remain abroad. However, and with the exception of local governments, residents must report the indebtedness in Comm. "A" 3602.

4 The abrogated regulations set forth a 15 business-day term.

All financial debts of the local financial and private non-financial sector with non-residents transferred into the FX Market must be agreed upon and cancelled after the passage of 120 calendar days (Mandatory Minimum Term), without the possibility of earlier cancellation of principal, irrespective of the manner of payment (with certain specific exceptions). If the disbursed funds are not transferred into Argentina, the debt may be paid at any time without access to the FX Market (e.g. with funds abroad).

Access to the local FX Market by residents to pay the principal of foreign financial indebtedness requires proof of compliance with Comm. "A" 3602 and passage of the Mandatory Minimum Term.

Payments to foreign creditors of advanced payments and pre-export financing without the application of exports' proceeds abroad shall be treated as a financial debt subject to these regulations, except for the following cases, in which they shall maintain their foreign trade nature: (i) reimbursement of exports' advanced payments due to delays to embark caused by a legal regulation or to rejection of the goods by importer and transfer back to the exporter; (ii) satisfaction of the balance of advanced payments and pre-export financing after application of exports' proceeds if it does not exceed the higher of US\$ 5,000 and 5% of the funds transferred into Argentina; and (iii) additionally to item (ii) hereinabove, the reimbursement to the foreign creditor of anticipated payments up to US\$ 10,000 per calendar month in all the entities authorized to operate FX.

Any indebtedness of local subsidiaries to their foreign head offices and related entities shall be treated as a foreign debt with any kind of creditor (as opposed to treatment under the former regime, which required the prior CBA approval for payments of intercompany debts –approval that was very rarely granted-).

Access by residents to the FX Market.

Natural persons, local private sector juridical persons that are not entities authorized to operate FX, trusts and other estates, and local governments may access the FX Market absent prior CBA authorization, for direct investments by residents, foreign portfolio investments by residents, and purchase of foreign currency bills and traveller's cheques. Certain requirements apply in case of purchases in excess of US\$ 2,500 per calendar month (e.g. debit from a local bank account, local e-transfer, or cheque).

Derivatives.

Residents may access the FX Market to pay premiums, constitute collaterals and cancel futures, forwards, swaps, options and other derivatives (Derivatives) settled in foreign institutionalized markets or with foreign counterparts (full-delivery settlement). In case of financial entities, such access is conditioned to compliance with the relevant CBA financial regulations.

The execution and cancellation of Derivatives, which settlement is performed in Argentina by compensation (set-off) in local currency are not subject to local FX regulations. These transactions fall under Argentine law; they are not distinguished by residency of the counterparts, and may not entail present or future obligations to make local payments of foreign currency or transfer foreign currency abroad.

FX transactions with non-residents.

Local financial entities may grant access to the FX Market to certain non-residents for the sale of foreign currency to transfer abroad, and the sale of foreign currency bills, cheques and traveller's cheques in foreign currency (these non-residents include international agencies, Export Credit Agencies, diplomatic representations, embassies and consulates and their personnel, local representatives of foreign tribunals and bureau, and bilateral agencies).

Likewise, the same access may be granted to other non-residents for transfers to their own foreign accounts of funds collected in Argentina, provided they reasonably demonstrate with appropriate documentation that the funds correspond to selected code of concept, without limit and absent prior CBA authorization.

Some of the most relevant concepts are as follows:

- payments at sight of Argentine imports;
- foreign debts caused in financial indebtedness granted by non-residents;
- yields of Sovereign Bonds issued in local currency;
- services, profits and other current transfers with abroad;
- repatriation of foreign direct investments in the private non-financial sector (in entities that do not control local financial entities) and/or real estate, as long as the foreign beneficiary resides or was incorporated in a cooperating jurisdiction, country or territory according to the Income Tax Law and its regulations, for any of the following concepts: sale of the direct investment, final liquidation of the direct investment, capital reduction of the local entity, and reimbursement of irrevocable capital contributions by the local entity;
- collection of services or sale of other portfolio investments and their profits (stock portfolio, stakes in local entities, investments in mutual funds and local trusts, purchase of loans portfolio granted to residents by local banks, investments in Peso and foreign-currency-nominated local bonds payable locally and the purchase of other internal or domestic credits). In these cases, a local financial entity or FX agency should certify the expiration of the Minimum Mandatory Term between the date of liquidation of the foreign currency to constitute these investments and the date of their repatriation. Some exceptions apply to the Minimum Mandatory Term.
- Indemnification decided by local tribunals in favour of non-residents.

Access to the FX Market may be made by a resident on behalf of a non-resident.

Any other FX transaction with residents is limited to US\$ 10,000 per calendar month in all entities authorized to operate FX (e.g. tourism).

More freedom for FX transactions.

The Federal Government is seeking to reduce the costs and margins of FX intermediation. Three categories of FX offices have been created, each with different scope of activities: FX houses, FX agencies and FX bureau.

Now commercial banks and financial companies may hold stakes in local and foreign FX houses or bureau. Although the CBA remains as the enforcement authority that grants or rejects

FX houses and bureau licenses, the requirements for opening them and even for opening new branches, are reduced (e.g. lower minimum guarantees and capitals). Branches may be located on the street, in hotels, tourist agencies, or car rental offices, and even in restaurants and businesses in general. There are no restrictions on hours of operation.

Conclusion.

Full liberalization of FX controls in Argentina remains a current topic on the agenda of the Executive Branch and the CBA. Nevertheless, a large leap towards such goal has already been made, and the not-so-long-ago twists and turns and by-passes that a lay person or business man had to navigate in order to remit foreign currency abroad or to receive the same, are over.

In the sphere of local banking, efforts regarding banking regulation levels are being made in order to simplify local banking transactions (e.g. regulations on electronic deposit of cheques, Communication "A" 6071, CBA). Coupled with that, the Tax Amnesty Law passed by National Congress⁵ is expected to generate a substantial incoming flow of foreign currency into Argentine banks and the loosening of FX controls seemed necessary in order to serve for that purpose.

So far the Federal Government has been able to loosen the Gordian Knot of FX regulations that had been tied tightly by the former Kirchner administration, without major disruption. Hopefully it will try to sever it completely in the near future.

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5 Law Nr. 27,260 as amended and its subsequent regulations.