

Venezuela

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Exchange control regulation in Venezuela

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Baker & McKenzie
Caracas

The exchange controls imposed on February 5 2003 have had a significant impact on corporate finance transactions in Venezuela. The Exchange Control regulations (the Regulations) established a limited and restricted market for the purchase and sale of foreign currency in Venezuela. In general terms, the Exchange Agreement No 1, entered into between the Central Bank of Venezuela (the CBV) and the National Executive (the Agreement) established: (i) a system for the mandatory sale of foreign currency to the CBV in certain cases; and (ii) a system for purchasing foreign currency from the CBV in certain cases expressly established in the Agreement. The Agreement also provided that the CBV will centralize the purchase and sale of foreign currency within Venezuela.

Pursuant to the Regulations, there are two main instances where private sector corporations are obligated to sell foreign currency to the CBV: (i) when foreign currency originates from the export of goods, services or technologies made on or after February 5 2003; and (ii) when, for any reason, foreign currency enters Venezuela. The difference between the two obligations is that, while the obligation set out in item (i) requires mandatory repatriation regardless of the place where the exporter receives the foreign currency, the obligation set out in item (ii) arises only when currency is brought into Venezuela. The Regulations also set out other cases of mandatory sale of foreign currency to the CBV.

On the other hand, the Regulations provide that access to foreign currency from the CBV is subject to the prior authorization of the Commission of Administration of Foreign Currency (the Cadivi). For this purpose, companies willing to purchase foreign currency must register with the Cadivi and, subsequently, file an application to purchase foreign currency (an AAD) each time they want to effect a purchase.

The Regulations list the specific activities and cases that are entitled to apply for the purchase of foreign currency. Among such activities the Regulations include: (i) payment of imports of goods and services into Venezuela; (ii) payments of private foreign debt outstanding as of January 22 2003; (iii) payments of dividends to foreign investors; (iv) repatriation of capital; and (v) payments of royalties and copyrights. Activities other than those expressly recognized by the Regulations may not have access to purchase foreign currency from the CBV.

It is important to point out that the granting of an AAD is subject to the availability of foreign currency as set out by the CBV and the general guidelines set out by the National

Executive. Furthermore, the Regulations grant Cadivi broad discretionary powers. The eventual decision of Cadivi not to grant an AAD to the applicant may not be appealed. Therefore, the Regulations do not create rights to obtain foreign currency. That is, although the applicant may satisfactorily meet all of the requirements set out therein, there is no certainty that it will actually be able to acquire the foreign currency requested.

Mergers and acquisitions

Acquisitions are normally made in Venezuela through either asset or share purchases, which are governed by general principles of contract law. Apart from the Commercial Code rules on statutory mergers, and the rules governing public offers in general, transfer of employment contracts, bulk sales and competition rules prohibiting certain economic concentrations, there is little legislation governing mergers and acquisitions in Venezuela.

Besides the buyer and seller's specific commercial considerations, the choice between a share transaction and an asset transaction is principally influenced by tax considerations and the need, if any, to avoid the assumption of hidden liabilities by operation of law.

The seller normally prefers a share purchase because it usually provides more latitude for tax minimization. From the buyer's perspective, a share purchase may be attractive if the target company has significant tax loss carry-forwards. Such losses continue to be available to offset income of the company after the acquisition. The buyer may also regard the absence of value added tax in the case of a share transaction as an advantage.

The buyer will typically find an asset transaction more advantageous. This is because the buyer may obtain a stepped-up tax cost basis for depreciable assets, including goodwill, equal to the purchase price and, through the proper application of bulk sales rules, avoid exposure to certain liabilities not otherwise expressly assumed in the purchase agreement. To the extent that the asset transaction has been taxed, there is no tax on dividends. This means that the seller will not have an additional tax burden when ultimately receiving the proceeds of an asset transaction. In the case of an asset transaction, however, the selling company's tax loss carry-forwards are not available to the buyer. In addition, the selling company may not include the original inflation adjustment to depreciable non-monetary assets in its tax cost basis.

The seller must withhold, at the source, 5% of the purchase price both of asset and share acquisitions unless payment is made in kind, for example in marketable securities. In the case of asset acquisitions a value-added tax is also applicable to the portion of the purchase price allocable to tangible personal property, which may create a cashflow problem for the buyer unless the buyer's existing or projected sales volume is relatively high.

Acquisition of a publicly traded company

The Venezuelan Capital Markets Law (the CML) contains the rules for the acquisition of the stock of publicly traded companies. The approval of the National Securities Commission (the NSC) is required when a person or group of related persons intends to acquire, in one or several transactions, a number of shares of a listed company that is deemed to represent a signif-

icant equity participation. In this case, a public tender offer must be made and all shareholders are afforded an opportunity to sell their shares on a *pro rata* basis.

The regulations concerning public offerings for the acquisition of shares define a significant equity participation as a number of shares representing 10% or more of the listed company's stock. These regulations cover tender offers made in cash or in kind in the context of both hostile and non-hostile takeovers.

Public offering of securities

Prior authorization from the NSC is required to carry out: (i) a public offering of securities issued in Venezuela; (ii) a public offering in Venezuela of securities issued by international agencies, foreign governments and institutions, companies domiciled abroad and any other similar person; and (iii) a public offering outside of Venezuela of securities issued by persons domiciled in Venezuela.

Publicly traded companies must meet certain requirements set out by the CML that do not apply to private companies, such as the distribution of a minimum dividend and limitations with respect to the remuneration that may be granted to members of the board of directors, among others. In addition, in companies that make public offerings of securities, any group of shareholders representing at least 20% of the capital subscribed are entitled to elect a proportional number of members of the board of directors.

Acquisition of financial institutions

Any direct or indirect acquisition of a financial institution's shares by virtue of which the buyer, or individuals or legal persons related to the buyer, come to own, either individually or jointly, 10% or more of the capital stock or voting power at the shareholders' meetings, must be previously authorized by the Office of the Superintendent of Banks and other Financial Institutions. In any event, the superintendent must be notified of share acquisitions that do not require the superintendent's prior approval within five business days after the date on which the acquisition is made.

Where the direct or indirect acquisition is carried out by a shareholder that owns 10% or more of the capital stock or voting power at the shareholders' meeting, such acquisition will require authorization from the superintendent when it involves a direct or indirect acquisition of shares equal to or greater than 5% of the capital stock or voting power at the shareholders' meeting in a period of six months.

Gaining control over a partnership or company that owns or holds shares in banks is also deemed to be an acquisition of shares.

Banking and capital markets

Recommended firms

Baker & McKenzie

D'Empaire Reyna Bermúdez

Mendoza Palacios Acedo Borjas Páez Pumar & Cía

Rodner Martínez & Asociados

Rodríguez & Mendoza

Tinoco Travieso Planchart & Núñez

Travieso Evans Arria Rengel & Paz

Hoet Pelaez Castillo & Duque

Torres Plaz & Araujo

Mergers and acquisitions

Recommended firms

Baker & McKenzie

D'Empaire Reyna Bermúdez

Hoet Pelaez Castillo & Duque

Rodríguez & Mendoza

Steel Hector & Davis

Tinoco Travieso Planchart & Núñez

Project finance

Recommended firms

Baker & McKenzie

Rodner Martínez & Asociados

Rodríguez & Mendoza

D'Empaire Reyna Bermúdez

Mendoza Palacios Acedo Borjas Páez Pumar & Cía

Torres Plaz & Araujo

Travieso Evans Arria Rengel & Paz

Anzola Raffalli y Rodríguez

Macleod Dixon

Steel Hector & Davis

Baker & McKenzie

Baker & McKenzie's Caracas office was its first outside the US when it opened in 1955. Over the past 49 years it has become the largest law firm in Venezuela, with over 70 lawyers and offices in Caracas and Valencia, and presences in Maturín and Puerto La Cruz. The well-respected Roberto Mendoza is the managing partner of Baker & McKenzie's Caracas office, and heads up the firm's overall activities in Venezuela.

Clients are keen to praise Baker & McKenzie's prowess across the practice areas. One said that the firm "offers an excellent service which really demonstrates its local and international knowledge," while another backs this up, claiming that Baker & McKenzie is "an excellent firm with a deep knowledge of both national and international issues, and fully prepared for the corporate legal environment."

The banking practice, run by partner Carlos Plaza, has advised JP Morgan Chase on winding down a local bank and local securities firm; it has also assisted more than 30 multinational corporations to navigate through the challenging environment created by the imposition of exchange control regulations in Venezuela a year ago.

It is the quality of the firm's corporate and M&A practice, however, that really justifies its top-tier reputation. The firm – one of only two US firms among the top players in the market (the other being Steel Hector & Davis) – is seen as having an edge because "most of the investment flowing into the country comes from the US." Headed by Roberto Mendoza, last year the department advised Vopak Logistics in connection with the \$20 million cross-border acquisition of terminals and logistics businesses in Colombia, Ecuador and Venezuela. It has also provided general corporate advice to ITT Industries' Venezuelan branch in connection with public bidding and several corporate and contractual matters in

Venezuela, and to Intesa in connection with services agreements and joint ventures with Petróleos de Venezuela. Lastly, Christian Perez Font and Carlos Delgado represented Dredging International in connection with the public bidding for the dredging of the Orinoco river and the Maracaibo lake, and also provided advice on the financial structuring of the operation.

Other clients of the firm include Aguas Industriales de Jose (Earthtech) and Compañía Anónima Nacional Teléfonos de Venezuela (CanTV). Leading lawyer Eugenio Hernández-Bretón appears in Euromoney's *Guide to the World's Leading Project Finance Lawyers*.

Key contact partner

Roberto Mendoza

Leading lawyers

Eugenio Hernández-Bretón
Roberto Mendoza

D'Empaire Reyna Bermúdez

D'Empaire Reyna Bermúdez has been providing the Venezuelan business community with high-quality legal advice since 1972. The firm now boasts 35 lawyers, including 14 partners, all of whom are admitted to practise in Venezuela, and several of whom are also admitted to practise in New York. It is well-respected in the market, with one client describing the firm as "competent, with a thorough understanding of international operations."

The political situation in the country has drastically slowed down the amount of deals that are getting done. However, D'Empaire does show up on much of the high-profile M&A work that does reach conclusion, and this justifies its promotion to the top tier this year. Most notably, in April 2004 the firm acted for Tenaris (a leading global manufacturer of seamless steel pipe products) and Sidor (Venezuela's largest steel producer) in connection with their \$120 million purchase of Posven's industrial facilities for the production of pre-reduced hot briquetted iron in Ciudad Guayana, Venezuela.

Before this deal the firm represented Coca Cola Femsa in relation to its acquisition of Panamco, advised Sidor on its \$1.8 billion debt restructuring, and acted for Credit Suisse First Boston on Venezuela's \$1.5 billion sovereign debt buyback.

Leading lawyer

Fulvio Italiani

Macleod Dixon

Canadian firm Macleod Dixon opened its Caracas office in 1997, and now boasts 11 partners and 17 associates after the recruitment of a new associate, María Alejandra Maldonado, in 2003. Clients interviewed seem perfectly satisfied with the quality of advice the firm delivers, one commenting that it is

"an excellent firm, which offers an excellent service in areas ranging from corporate to tax."

Elisabeth Eljuri manages the corporate and commercial department which, despite the continued downturn in the flow of deals, has been kept reasonably busy over the past year. In October 2003 Eljuri, assisted by Gabriela Rachadell de Delgado and Natalija Vojvodic, advised WilPro Energy Services on the \$230 million project financing for world's largest gas compression project, Pigap II, and two months later the team acted for Smit International in connection with the sale of shares (through a tender offer) of Terminales Maracaibo.

At the time of writing Macleod Dixon is representing Mitsubishi Corporation on the negotiation of the LNG Mariscal Sucre project and related contracts, and acting as project and corporate counsel to Orimulsion in respect of the joint venture between CNPC and PDVSA (Bitor).

Key contact partners

Elisabeth Eljuri
Jorge Neher
Gabriela Rachadell de Delgado

Mendoza Palacios Acedo Borjas Páez Pumar & Cía

With offices in both Caracas and Valencia, Mendoza Palacios has had a strong year – some achievement considering the fragile political state of the country and of the markets. Many rivals agreed that the firm should be included in the top tier of banking firms, saying that it is "always working on the bank's side in any major deal" and "has been much more active" over the past year.

And clients echoed this praise, one describing Mendoza Palacios as "an excellent firm which can offer up-to-date advice ... it has distinct lawyers that deal with different matters and offer personal efficient answers to problems," and another simply calling it "the obvious choice." Manuel Acedo is singled out by clients as being a "very efficient lawyer."

The corporate practice is headed up by Acedo and Arminio Borjas, and comprises 11 partners (all but one of whom are based in Caracas) and 17 associates, six of whom work out of the Valencia office. In recent times the firm has advised on the reinsurance of Seguros Mercantil and Lexington Insurance Company, alongside three international law firms, acted for the banking syndicate and certain government entities on the restructuring of the debt of Sidor, the most important Venezuelan steel producer, and represented the former shareholders of Banco del Orinoco and Seguros Orinoco in relation to ongoing issues arising from the sale of Banco del Orinoco to Corp Banca and the sale of Seguros Orinoco to Inversiones y Valores Mercantil.

Key contact partners

Carlos Acedo
 Manuel Acedo
 Carlos Bello
 Arminio Borjas

Leading lawyer

Manuel Acedo

Rodner Martínez & Asociados

Rodner Martínez was set up in 1977, and specializes in the finance side of the business law market. Rodolfo Beloso Guzmán heads the corporate department, which comprises four partners and two associates.

Over the past two years the firm has advised on the largest local public bidding procedure, the acquisition of export-oriented industrial companies by multinational corporations, the reorganization processes of several subsidiaries of multinational corporations, and on the dissolution and liquidation procedures for two subsidiaries of multinational corporations, including the termination of joint-venture agreements.

And in relation to project financing transactions, the firm has acted on around \$1 billion-worth of financing transactions for suppliers, and has handled \$360 million-worth of financial debt restructuring work. Peers agree that the firm's top-tier ranking is correct, one stating that the firm "has the best clients" and "is the leader in this area." As far as banking work goes, peers are quick to single out name partner James Otis Rodner, one describing him as "the very best individual in the country in banking," and the "outstanding" Jaime Martinez-Estevez.

Leading lawyers

Jaime Martinez-Estevez
 James-Otis Rodner

Steel Hector & Davis

In contrast to market opinion, US firm Steel Hector & Davis has undergone a rapid period of expansion in recent times. Four new associates joined the firm between October 2003 and February 2004, most notably senior associate Arghemar Pérez, who moved across from rival firm Torres Plaz & Araujo in February.

Six partners and eight associates now handle corporate and commercial transactions for the firm, which in August 2003 advised on the Venezuelan aspects of Pfizer's sale of its Schick business, and in November 2003 acted for HPFS on its purchase of Hewlett Packard's financial and leasing assets. Both Juan José Delgado and María Cecilia Rachadell are picked out by peers and clients for their technical skills and the all-round high quality of their legal advice.

Leading lawyers

Juan José Delgado
 María Cecilia Rachadell

Other notable firms

At **Torres Plaz & Araujo**, Guillermo de la Rosa Stolk heads up the corporate department, which counts Centelsa, Filmtex, Sofasa, Banque Tequendem and Schering-Plough among its clients. It is described by peers as "more active in M&A," and by one client as "very capable and professional." Clients also praise **Travieso Evans Arria Rengel & Paz**, calling it "very good, with integrity" and single out the highly regarded Andres Meszgravis as being "a guy to watch out for."