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The Fax as Valid Evidence in Argentine Law

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SOX that Fit? Argentina Announces a New Corporate Governance Code

The new code enhances internal auditing of good governance and requires corporate boards to indicate whether or not they will comply with its recommendations. This new report will be required for publicly traded companies beginning with their filing of financial statements for fiscal years beginning on or after January 1, 2008. Page 3

New Foreign Exchange Activity Regulations In Brazil

Brazil recently passed a comprehensive foreign exchange activity bill, which features new regulations governing securities-regulated markets and the incorporation, organization, operation and dissolution of stock exchanges, mercantile and futures exchanges and organized over-the-counter markets. It also contains specific provisions on access screens for trading (or negotiating) on foreign exchanges, and all the details are here. Page 9

Investment Protection Measures Under the U.S. - Peru Trade Promotion Agreement

On November 8, 2007 the United States House of Representatives passed a bill approving the groundbreaking U.S. - Peru Trade Promotion Agreement. One of the most salient features of the Act is the set of measures for the protection of investments by U.S. investors in Peruvian territory and vice-versa. These and other such measures of the Act are aimed at creating a favorable and stable environment for the flow of investments between the U.S. and Peru. Page 15

Multinationals Urge Collaboration with Latin American Governments to Prioritize Competitive Tax Reform

Businesses looking to invest in Latin America see simpler tax systems as a major priority for governments in the region, but do not believe that current plans to reform taxes will reduce complexity, according to a poll of multinational corporations carried out by KPMG International. Asked if current tax reform plans in the Latin America region would simplify tax compliance, a surprising 78 percent said no. Page 26

CONTENTS

Argentina

SOX that Fit? Argentina Announces a New Corporate Governance Code. By Luis A. Arana Tagle (Negri & Teijeiro Abogados)........p.3

The Fax as Valid Evidence in Argentine Law. By Leandro Javier Caputo and Felipe Eduardo Zabalza (M. & M. Bomchil).....................................p. 4

Brazil

Amendment 3 and the Social Security Authority’s Power to Determine Employment Status. By Luiz Marcelo Figueiras De Góis (Barbosa, Müßnich & Aragão Advogados)...........................................p. 6

Brazil Legal Bulletin: Petroleum News. By Glenn Faass (Macleod Dixon) and Alexandre Bittencourt Calmon (Veirano Advogados)...........................p. 7

Improvement on Regulations Regarding Derivative Transactions in Brazil. By Walter Stuber and Adriana Maria Gödel Stuber (Walter Stuber Consultoria Jurídica)..............................p. 8

New Foreign Exchange Activity Regulations in Brazil. By Walter Stuber and Adriana Maria Gödel Stuber (Walter Stuber Consultoria Jurídica)...................................................p. 9

Mexico

Perspective of the Mexican Private Equity Industry: Should European and US LPs Start Paying More Attention to Private Equity Managers in Mexico? By Luis Perezcano (Nafta Fund)..........................................................p. 11

Mexico Tries to Turn Dream into Reality with Punta Colonet Project. By Michael Mackey (Cargo News Asia)..............................................................p. 13

Contents Continued on Page 2
Contents Continued from Page 1

Peru
Investment Protection Measures Under the U.S. - Peru Trade Promotion Agreement. By María Victoria Vargas (King & Spalding LLP).........................p. 15

Uruguay
Uruguayan Courts Take Action to Preserve Constitutional Rights. By Enrique Radmilovich and Lucía Ottati (Hughes & Hughes)..............................p. 18

Venezuela
Venezuelan Legal & Business Developments. By Vera de Brito de Gyarfas (Travieso Evans Arria Rengel & Paz). p. 21

Regional
Multinationals Urge Collaboration with Latin American Governments to Prioritize Competitive Tax Reform. By KPMG International..............................................p. 26
Who’s Where..............................................................p. 27
Issues Surrounding Security Regulation in Latin America and the Caribbean. By Hugo Nemirowsky and Jesse Wright (Inter-American Development Bank)......p. 28

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The Fax as Valid Evidence in Argentine Law

By Leandro Javier Caputo and Felipe Eduardo Zabalza (M. & M. Bomchil)

Under Argentine law, the facsimile transmission (fax) is not acceptable under certain circumstances. A recent decision in “Flowtex France S.R.L. v. Flowtex Servicios Urbanos S.A.,” handed down by the National Court of Appeals on Commercial Matters, Chamber A, stated that “a simple photocopy of a fax is not enough proof of the existence of a loan contract.”

As background to this matter, the Argentine court ruled in an international case regarding a loan made by a French company to an Argentine company, with particular consideration of the facsimile as valid evidence in commercial proceedings.

The Fax as Valid Evidence

A contract can be made either verbally or in writing. However, there are a number of specific statutes applicable in Argentina that state a requirement for something to qualify as “writing”. At present, under Article 2246 of the Argentine Civil Code (hereinafter “CC”) a loan can be contracted verbally, but it cannot be proved without a public instrument, or a private instrument with certain date, if the loan is more than the sum of ARS10,000 (US$3,188).

In the Flowtex case, the Court faced a specific legislative requirement for a written agreement. The plaintiff - a French company – was alleged to have lent the Argentinean company the amount of DEM300,000 (now Á153,388, or US$224,666) through a banking transfer, and further that the evidence of the agreement that said transfer was the consequence of a loan contract was reflected in a fax sent by the Argentinean company to the lender.

The Court of Appeals took on the complaint filed by the French company on the basis of the following rationale: the facsimile provided by the plaintiff was not enough evidence so as to demonstrate the existence of a loan agreement.

In fact, the only evidence alleged by the plaintiff to prove the loan was a photocopy of the fax.

The Court pointed out that the fax is a special instrument of new communication technology that allows, through several security devices like particular number codes, exclusive codes, encryption methods, and verification processes by the addressee of the authenticity of the provenance of the document.

With regard to this, the Court considered the fact that the plaintiff did not provide the original document sent through the fax, neither any formal evidence of the remittance of the facsimile nor had it even produced the document issued by the facsimile machine acknowledging the transmission of the document.

In fact, the Court ruled that the deficient photocopies that were presented did not stand sufficiently to identify the sender machine; neither could they if they suffered any adulteration through mechanical erasures or other smudge. Surprisingly, no other proofs were offered.

The court made this rationale prevail by the fact that the officer of the Argentine company who signed the facsimile recognized his own signature at court. The Court stated that the plaintiff did not show with any documentary evidence the typical conduct of those that usually celebrate contracts delivered through fax or other electronic devices, in which the imputation of authorship is done with reciprocal identification. This means that the one receiving the message must immediately put forth confirmation to the issuer terminal. Then, if this is confirmed, its content is imputed to the intellectual author of the message, not to its material author, who could be a subordinate, really anyone in change of sending the original fax.

As a consequence, it was concluded that there was no evidence at all of the authenticity of authorship by the fax that the plaintiff produced, as it was not applicable to the solution of the case.

Within this scope, in re “Barbalia, Daniel Cristian vs. La Economía Comercial Argentina S.A. de Seguros Generales (on ordinary proceeding)”, Chamber A of the same Court of Appeals stated that the fax can be considered a valid instrument of proof in a trial, but it does not allow for the invocation of the issuance of it and allege its content. It is still necessary to demonstrate its text and reception.

Conclusion

The practice of contracting through the use of facsimiles is growing rapidly. While businessmen are anxious to close a deal, the practice of law is the art of finding practical solutions to problems. More important, it is – on the part of the attorney - to anticipate and prevent clients from eventual problems regarding forms of contracts. Businessmen need to understand legal procedures so that they can make an informed business decision.

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Even apart from legislative requirements for a "writing", the parties to a contract should consider the evident issues of having only a facsimile copy of the contract. The execution of a contract through a facsimile transmission leaves open the issue of how to subsequently prove the terms of that contract and make it clear when an offer has been made and when it is accepted.

Upon the foregoing bases and this formal point of view, no matter how a contract is formed, to prove it perfected by fax, parties will have to: (i) exhibit the original document sent through the fax, duly signed; (ii) display the document issued by the facsimile machine acknowledging the transmission of the document; and (iii) evidence the issuance and reception of the fax through other proofs (e.g., reciprocal identification or witnesses).

Thus the weight of a facsimile as evidence will remain subject to the verification of having been sent, received and maintained in the regular course of business. It is important to avoid the rather common habit of copying facsimiles on archival quality paper for preservation purposes and destroying those on thermal paper without going through a formal certification process (a process similar to that carried out for microfilm).

Hence, it would be wise to cover all bases when performing a contract. According to the quoted cases above, we see as probable that the Argentine Courts are going to maintain these criteria in future decisions.