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The Exchange Control Regulations in Venezuela

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I

Introduction

The purpose of this article is to explain the exchange control regulations in the Bolivarian Republic of Venezuela ("**Venezuela**"), which have a considerable impact in the banking activities in our country. Starting in the year 2003, the President of Venezuela (the "**President**"), the Ministry of Popular Power for Finance (the "**Ministry**"), the Central Bank of Venezuela (the "**Central Bank**"), the Commission for the Administration of Foreign Currency, CADIVI (**"Cadivi**"); and the National Assembly implemented exchange controls in Venezuela, for which they enacted, among others, the following rules (jointly, the "**Exchange Control Rules**"):

(i) Decree Number 2,302 issued by the President and published in the Official Gazette Number 37,625 of 5 February 2003, as subsequently modified through publication in the Official Gazette Number 37.664 of 6 March 2003 (the "**Decree 2,302**");

(ii) The exchange agreements executed by the Ministry and the Central Bank (the "**Exchange Agreements**"), which include, but are not limited to, (a) Exchange Agreement Number 1, executed on 5 February 2003, among the Ministry and the Central Bank, as subsequently modified pursuant to publication in the Official Gazette Number 37,625 of 19 March 2003 (the "**Exchange Agreement 1**"); and (b) Exchange Agreement Number 2, executed on 5 February 2003, among the Ministry and the Central Bank, as subsequently modified pursuant to publication in the Official Gazette Number 38,138 of 2 March 2005 (the "**Exchange Agreement 2**").

(iii) The regulations issued by Cadivi regarding the acquisition or sale of foreign currency at the Official Exchange Rate and other related matters (the "**Cadivi Regulations**"); and

(iv) Two laws passed by the National Assembly, namely the the Law against Exchange Crimes, published in the Official Gazette Number 38,272 of 14 September 2005 (the "**Former Exchange Crimes Law**") and the Law against Exchange Crimes, originally published in the Official Gazette Number 5.867 (Extraordinary) of 28 December 2007, as modified in the Official Gazette Number 38.879 of 27 February 2008 (the "**Current Exchange Crimes Law**").

Additionally, there are other instruments which do not qualify as Exchange Control Rules, but which contain rules that are applicable regarding payments in foreign currency, such as the Law on the Central Bank of Venezuela, published in the Official Gazette Number 38,232 of 20 July 2005 (the "**Central Bank Law**"); and the Decree with Force of Law for the Protection of Persons in the Access to Goods and Services, published in the Official Gazette Number 5,889 of 31 July 2008 (the "**Current Consumer Law**"), as was the case of the the Law on Consumer and User Protection, published in the Official Gazette Number 37,930 of 4 May 2004 (the "**Former Consumer Law**").

The Exchange Control Rules may be summarized as follows, bearing in mind the changes introduced by the Current Exchange Crimes Law:

Decree 2,302 created Cadivi, which, according to Exchange Agreement 1, is in charge of the coordination, administration and supervision, as well as the establishment of requirements, procedures and restrictions, pertaining to the exchange controls.

Generally speaking, Exchange Agreement 1 sets the framework for the exchange controls, specifying that the Central Bank will centralize the purchase and sale of foreign currency; and that both the Central Bank and the Ministry shall set a fixed rate of exchange (the "**Official Exchange Rate**") and adjust it when they consider it necessary. The above has been done through Exchange Agreement 2, which, prior to the conversion of the Bolivar (Bs.) into the Bolivar Fuerte (Bs. F.), fixed the Official Exchange Rate on Bs. 2,144 per US dollar for the purchase and Bs. 2,150 per US dollar for the sale. We understand that, due to such conversion, the Official Exchange Rate is now Bs. F. 2.15 per US dollar.

The main purpose of the Cadivi Regulations is (i) to establish the requirements and proceedings that must be complied with for the acquisition of foreign currency from the Central Bank, at the Official Exchange Rate; and (ii) to create and regulate the obligation to sell the foreign currency to the Central Bank, at the Official Exchange Rate, in certain cases. This is very important, since the Official Exchange Rate is substantially lower than (A) the black market exchange rate and (B) the exchange rate implicit in transactions over securities that can be purchased by paying a price in local currency and sold by receiving a price in foreign currency, or vice versa, including transactions over sovereign debt bonds (the **"Securities Transactions**").[1]

Pursuant to the Exchange Control Rules, individuals and corporations can obtain foreign currency from the Central Bank at the

[1] The Securities Transactions include the following transactions: (a) the purchase of Venezuelan sovereign debt bonds for a price in local currency, the exchange of such bonds for US sovereign debt bonds and the sale of said US sovereign debt bonds for a price in foreign currency; or (b) the purchase of US sovereign debt bonds for a price in foreign currency, the exchange of such bonds for Venezuelan sovereign debt bonds and the sale of said Venezuelan sovereign debt bonds for a price in local currency

Official Exchange Rate only for certain purposes, including, but not limited to, (i) payments related to foreign direct investments, such as dividends and repatriation of capital; (ii) payments of importation of goods, services and technology; and (iii) payment of private external debt. Even in these cases, the possibility of acquiring the foreign currency may be subject to availability and governmental priorities.

For purposes not specifically provided for in the Exchange Control Rules, it is not possible to obtain foreign currency from the Central Bank at the Official Exchange Rate.

Individuals and corporations who apply for foreign currency for the purposes provided for in the Exchange Control Rules must obtain a registration with Registry of Users of the System for the Administration of Foreign Currency (the "**Rusad**") and the corresponding authorization granted by Cadivi for the acquisition of foreign currency at the Official Exchange Rate (the "**Cadivi Authorization**"), which takes some time and may eventually be refused.

The Exchange Control Rules impose an obligation to sell foreign currency to the Central Bank, through the banking, financial and exchange institutions that are authorized to act in the exchange market (the "**Exchange Agents**"), at the Official Exchange Rate, in certain cases. The most important of these cases are (i) the compulsory sale of the price in foreign currency obtained by exporters from the exportation of goods, services or technology –for purposes of identifying the exportation of services, we refer to the Law on the Value Added Tax, published in the Official Gazette Number 38,632 of 26 February 2007 (the "**VAT Law**"), as explained below; (ii) the compulsory sale of foreign currency received by Exchange Agents and (iii) the compulsory sale of any foreign currency which enters into Venezuela by the person who introduces such currency into the country. With respect to this last case, the prevailing interpretation is that the entry-into-Venezuela requirement is not met whenever a payment is credited to an account in a bank or financial institution outside of Venezuela, in which case the accountholder does not have the obligation to sell the corresponding amount to the Central Bank through the Exchange Agents at the Official Exchange Rate. Indeed, the prevailing interpretation is that actual entry into the country

(through the financial system or in cash or checks) is needed in order to trigger the obligation provided for under (iii) above.

Since the Exchange Control Rules only impose an obligation to sell foreign currency to the Central Bank in certain cases, in all other cases this obligation does not exist. For instance, if an individual or corporation sells in Venezuela or abroad an investment situated in Venezuela or abroad for a price in foreign currency paid outside Venezuela, this does not fall under (i) or (ii) above, so this individual or corporation is not under the obligation to sell such currency to the Central Bank through an Exchange Agent at the Official Exchange Rate, unless (iii) above applies (but such individual or corporation may be subject to a fine if the investment is situated in Venezuela, pursuant to Article 19 of the Current Exchange Crimes Law).

Finally, under the Exchange Control Rules, it is not forbidden to own foreign currency, except in the specific situations in which the sale of such foreign currency to the Central Bank is compulsory.

II

Introduction to the Current Exchange Crimes Law

The Current Exchange Crimes Law entered into force on 27 January 2008.

Both the Former Exchange Crimes Law and the Current Exchange Crimes Law were enacted to be applied during the time at which exchange controls are in force, such as the present moment. During this time, the restrictions established by the legislator or the administration, with respect to the freedom to enter into foreign currency contracts, to receive or keep foreign currency and to exchange local currency into foreign currency and vice versa, are to be implemented.

The Exchange Control Rules, including, at the present time, the Current Exchange Crimes Law, can only be applied to the cases specifically provided in the corresponding Articles, and not to similar

cases, since the Exchange Control Rules are of a restrictive nature, establish exceptions to other rules and impose penalties.

III

Prohibition to Offer Certain Transactions in Foreign Currency

A

Offers, agreements and payments

Until 27 January 2008, when the Current Exchange Crimes Law entered into force, the Exchange Control Rules had never forbidden individuals or corporations to enter into agreements that provide for a payment in foreign currency. Some limitations were enacted in certain laws for certain cases, but not in the Exchange Control Rules.

But now, according to Article 19 of the Current Exchange Crimes Law, *"[t]he individuals and corporations that offer in this country to the public or in private the acquisition, sale or lease of goods and services in foreign currency"* shall be subject to a fine.

So, starting on 27 January 2008, it appears that, whenever exchange controls are in place, it is not legal for individuals or corporations to offer in Venezuela goods or services in exchange of a price in foreign currency.

Further, Venezuelan law mandates that in order for an agreement to be valid, the consideration and the object thereof must be legal. Thus, in case that, by virtue of Article 19 above, the offer of sale, acquisition or lease of goods or services for a price or rent in foreign currency is not valid, then, by virtue of Articles 1141, 1155 and 1157 of the Civil Code, if this offer is accepted, it develops into an agreement that is not legal either. As a consequence, it would not be legally possible to sign agreements that provide for the payment of the goods or services referred to in Article 19 of the Current Exchange Crimes Law in foreign currency abroad, because they would be null

and void. Furthermore, the payments under these agreements would also be illegal.

Indeed, the foreign currency prohibition of Article 19 of the Current Exchange Crimes Law applies to the offers made by the providers or acquirers of goods and services. This Article does not mention agreements or payments, so agreements stipulating prices in foreign currency or payments actually made in foreign currency may never be punished with the fine provided for in such Article; but any such agreement would be null and void and any such payment should be reversed, if they follow an offer made in violation of said Article. The above would occur since the consideration and the object of the agreement would not be licit, in case it results from the acceptance of an offer that is contrary to Article 19, in which event there would be no obligation that can validly be paid.

Further, any such agreement may serve as evidence of an offer contravening Article 19 and any such payment may serve as evidence of the existence of an agreement executed by virtue of an offer which breaches Article 19.

Also, certain activities related to such transactions may imply the violation of other articles of both laws related to the obligation to declare the entrance of foreign currency into the country, if such is the case.

B

Scope of the prohibition

It is not entirely clear, at the present moment, how the prohibition of Article 19 of the Current Exchange Crimes Law will be applied, bearing in mind that Article 116 of the Central Bank Law establishes the following: "*Unless special agreement to the contrary, payments stipulated in foreign currency may be made by paying the equivalent in Bolivars, at the exchange rate applicable in such place on the date of payment*". Thus, there is a general rule according to which the parties may agree to pay or receive foreign currency.

A conservative approach to Article 19 of the Current Exchange Crimes Law is that, while exchange controls are in place, Article 116 of the Central Bank Law is suspended, insofar as this article allows (i) providers to establish a price in foreign currency for their goods and services in Venezuela or (ii) acquirers of goods and services in Venezuela to offer to pay their price in foreign currency.

But an argument may eventually be made that the prohibition of Article 19 of the Current Exchange Crimes Law must only be applied in certain specific cases in which the legislator has established exceptions to the general rule according to which the parties may agree to pay or receive foreign currency, established by Article 116 of the Central Bank Law.

Please bear in mind that, under the Former Exchange Crimes Law, agreements in foreign currency and the corresponding payments were not penalized, except if they were forbidden by other laws or regulations, in which case a fine could be imposed.

Indeed, in certain cases, restrictions or exceptions to this general rule have been established, the most important of which are those provided for in the Current Consumer Law (as was the case of the Former Consumer Law). Thus, pursuant to Article 73(9) of the Current Consumer Law, standard-form agreements that stipulate payments in foreign currency for obligations due in Venezuela, as a means to escape rent-control regulations or other laws of public or social interest, are null and void (an equivalent provision was included under Article 87(7) of the Former Consumer Law). And Article 52 of the Consumer Law provides that the price of products or services must be visible and fixed in bolivars (a similar but more restrictive provision was included in Article 57 of the Former Consumer Law). So it may eventually be argued that, in all cases in which these restrictions or exceptions do not apply, the parties may still agree to bind themselves to pay or receive foreign currency.

It can also be said that the word “offer”, employed in Article 19 of the Current Exchange Crimes Law, refers to price proposals divulged to the public at large or divulged privately to a certain number of persons, which price cannot be quoted in a foreign currency. From this

perspective, this Article would not apply to contracts agreed to individually between two persons.

However, since it is still too early to know how the prohibition of Article 19 of the Current Exchange Crimes Law will be interpreted, the conservative approach seems to be more reasonable, according to which providers and acquirers cannot offer, negotiate or establish in their contracts or other documents a price in foreign currency for the goods and services offered in Venezuela. This seems to have been the intent of the legislator. Indeed, the equivalent provision of the Former Exchange Crimes Law established that the fine could only be imposed if such offer was made in violation of existing laws or regulations; but this requirement was deleted from Article 19 of the Current Exchange Crimes Law.

C

Cases not covered by the prohibition

As stated above, from 27 January 2008, onwards, the prohibition of Article 19 of the Current Exchange Crimes Law applies to individuals or corporations that offer goods or services in Venezuela, the price of which must not be established in foreign currency. So this Article does not apply to goods sold or services rendered abroad. Exports of goods and services are subject to other rules, namely the provisions according to which the price in foreign currency obtained from the exportation of goods or services must be sold to the Central Bank, through the Exchange Agents, at the Official Exchange Rate. Similarly, such prohibition does not apply to imports of goods or services, for the price of which the importers may request foreign currency from the Central Bank, at the Official Exchange Rate, if they obtain the Cadivi Authorization.

Further, individuals and corporations have validly binded themselves to obligations stated in foreign currency, if the offer which, when accepted, created the agreement, was made before the application of the Current Exchange Crimes Law, which started on 27 January 2008. This would be the case even if the agreement or payments are made after said date.

Also, the aforementioned prohibition does not apply to offers made abroad or deemed as made abroad (for instance, because the recipient of the offer is abroad).

Further, it is valid to agree to foreign currency payments if such payments do not refer to the **price** of goods or services. This would be the case, for example, of an insurance coverage stipulated in foreign currency, provided that the insurance premium is fixed in bolivars. Indeed, in this case, the foreign currency would refer to the good or service, rather than to its price.

Likewise, if the payment relates to an activity other than sale, acquisition or lease, the prohibition would not be applicable. For instance, if two parties settle a controversy involving payments in foreign currency, in theory Article 19 does not apply. Also, if costs and expenses incurred in foreign currency are reimbursed, this would not fall under the scope of the aforementioned Article.

Also, commissions for services which are based on prices validly set in foreign currency would not fall under the scope of the prohibition. For instance, if a service is rendered in relation to export activities and the price of such service is a percentage of the price paid by the purchaser to the exporter for the goods exported, then, in our opinion, such foreign currency commission is legal.

Finally, this Article does not apply if (a) the payor chooses to make a payment in foreign currency in order to extinguish (i) an obligation contracted in local currency or (ii) an obligation regarding which there is no indication of the applicable currency, and (b) the payee accepts such foreign currency payment. In this case, the payor and the payee will have made and received a foreign currency payment without breaking any law, because there has been no offer that falls under Article 19.

The above are a few examples of cases that are not expressly forbidden by Article 19 of the Current Exchange Crimes Law, which refers only to *“[t]he individuals and corporations that offer in this country to the public or in private the acquisition, sale or lease of*

goods and services in foreign currency". This prohibition cannot be applied to other persons or to situations not listed in such Article.

The individuals or corporations that bind themselves to obligations stated in a foreign currency must then comply with such obligations, as follows: (i) by delivering the corresponding foreign currency to the person they promised it to, or, (ii) according to Article 116 of the Central Bank Law, by delivering bolivars at the applicable exchange rate, unless there is a *"special agreement to the contrary"* (that is, a clause in the existing contract or an additional contract establishing that the foreign currency obligation will be paid in the chosen foreign currency, and not by delivering an equivalent amount of bolivars).

The individuals and corporations who bind themselves to pay foreign currency, either before the application of the Current Exchange Crimes Law or in the cases not forbidden by its Article 19, will not be able to purchase such currency at the Official Exchange Rate, if such currency is not requested for the purposes provided for in the Exchange Control Rules. But such individuals and corporations may dispose of foreign currency outside Venezuela with which to comply with their obligations, since, as a general rule, it is not forbidden to own foreign currency.

D

Export of services as opposed to services used in Venezuela

As stated above, the Exchange Control Rules include provisions according to which the price received in foreign currency by the exporters of goods or services, and any foreign currency entering into Venezuela, must be sold to the Central Bank, through the Exchange Agents, at the Official Exchange Rate. And, in our opinion, whenever these rules do not apply, there is no limitation or prohibition for Venezuelan individuals and corporations having bank accounts abroad or otherwise owning foreign currency. What is prohibited, under the existing exchange controls, are activities such as the following: (i) to exchange local currency for foreign currency or viceversa, (ii) to

introduce foreign currency in excess of ten thousand dollars (US$ 10,000) into Venezuela without declaring it and selling it at the Official Exchange Rate to the Central Bank through the local banking system, and (iii) not to sell to the Central Bank the foreign currency acquired in certain specific compulsory sale cases.

The Exchange Control Rules establish that the price received in foreign currency for the export of goods and services must be sold to the Central Bank through the Exchange Agents at the Official Exchange Rate, even if such price does not enter into Venezuela. Exports of goods are relatively easy to identify, in order to apply this rule.

But the situation is less straightforward when it comes to the exports of services. Even though the Exchange Control Rules establish that the price received in foreign currency for the export of services must be sold to the Central Bank through the Exchange Agents at the Official Exchange Rate, the Exchange Control Rules do not define what an export of services is; so, in our opinion, the definition of export of services of the VAT Law applies. Under the VAT Law, there is no export of services whenever the service is to be used, at least in part, in Venezuela.

Accordingly, if a service provided to a person abroad is to be used by such person, at least in part, in Venezuela, then such service does not qualify as an export of services under the VAT Law, the definition of which can be applied here due to the lack of definition of the Exchange Control Rules; and, thus, the service-provider can keep abroad the price of such service. Only if the service-provider decides to bring the corresponding foreign currency into Venezuela, then it will have to sell it to the Central Bank.

Finally, the foreign currency prohibition of Article 19 of the Current Exchange Crimes Law does not affect the payments made to the providers for their services, to the extent that the offers that lead to the contracts under which the payments are made are not offers made in violation of such Article. Indeed, this Article applies to certain offers made in Venezuela, which would result in the illegality of the agreements perfected when these offers are accepted, as well as the corresponding payments. However, an offer may be understood (i) to

have been made abroad, particularly if the recipient of the service is located abroad; (ii) to have been made prior to the application of the Current Exchange Crimes Law; or (iii) not to be subject to Article 19 of the Current Exchange Crimes Law due to any other valid reason.

Further, as stated above, this Article does not apply to payments in general. Payments are subject to other provisions, such as the rules according to which the price received in foreign currency by the exporters of goods or services must be sold to the Central Bank, through an Exchange Agent, at the Official Exchange Rate, which, as stated above, does not affect the providers of services to be used, at least in part, in Venezuela. As explained, only if a foreign currency payment is made under an agreement that is null and void, because it is the result of an offer made in violation of such Article, can this payment be considered to be illegal.

IV

Black Market Prohibition

The second paragraph of Article 9 of the Current Exchange Crimes Law provides that a fine can be imposed on *"[w]hoever in one or more transactions in the same calendar year, without the intervention of the Central Bank of Venezuela, buys, sells or in any other way offers, disposes of, transfers or receives foreign currency",* insofar as the aggregate amount of such transactions exceeds US$10,000 per year. Pursuant to the third paragraph of the same Article, if the aggregate amount of such transactions exceeds US$20,000 per year, the person who buys, sells or in any other way offers, disposes of, transfers or receives foreign currency may be imprisoned.

In our opinion, this provision does not refer to payments of goods or services, but to exchange transactions, that is, to the purchase and sale of foreign currency for a price in bolivars.

Accordingly, this provision does not forbid individuals or corporations to pay or receive foreign currency abroad. These

individuals or corporation may comply with the agreements they are a party to pursuant to which a payment in foreign currency is to be made abroad. They may comply with these agreements either by making such payment or by receiving such payment.

Indeed, this provision was included in the Article of the Current Exchange Crimes Law that deals with the purchase and sale of foreign currency by exchange operators. In fact, the first paragraph of the same Article 9 refers to the Central Bank's role as the entity centralizing *"the purchase and sale of foreign currency",* which purchase or sale must be made *"through duly authorized exchange operators";* and Article 4 of the Current Exchange Crimes Law provides that this law regulates the persons who are involved in *"exchange transactions".* Thus, in our opinion, when the second paragraph of Article 9 refers to persons who offer, dispose of, transfer or receive foreign currency, it means the individuals or corporations who do so within the context of *"exchange transactions",* that is, *"the purchase and sale of foreign currency"* for a local currency price.

Further, all the activities listed under Article 9 are activities which are required for the performance of an exchange transaction. Indeed, in order for an exchange transaction to be conducted, one of the parties must offer, dispose of, sell, and transfer foreign currency to the other party, who must (i) receive and purchase such foreign currency and (ii) offer, dispose of, sell, and transfer local currency to the first party. If such operations are performed by non authorized exchange operators, they are illegal exchange transactions. The argument that Article 9 does not intend to establish a general rule forbidding individuals or corporations to pay or receive foreign currency abroad is reinforced by the fact that the Former Exchange Crimes Law included the words "*import or export*" as part of the forbidden acts. These words, which are not an implicit and necessary part of an exchange transaction, were deleted from the new version of the provision.

V

Securities Transactions

Securities Transactions were legal in Venezuela in the light of the Former Exchange Crimes Law, and, in our opinion, they are still legal in Venezuela in the light of the Current Exchange Crimes Law, for the following reasons:

First, both the Former Exchange Crimes Law and the Current Exchange Crimes Law define the term "*divisa*". According to the official dictionary of the Spanish Language (Diccionario de la Lengua Española de la Real Academia Española), "*divisa*" means *"foreign currency referred to the [monetary] unit of the relevant country."* And there is a legal definition of "*divisa*" or foreign currency in Article 2 of the Former Exchange Crimes Law and Article 2 of the Current Exchange Crimes Law*.* Even though this legal definition goes a little bit further than the official dictionary, it does not go so far as to include securities, which would have been a regrettable distortion of the Spanish language. This legal definition cannot be applied to terms other than those covered by it, because this would contradict the meaning of the word *"divisa"* and the intent of the legislator, and it would result in broadening the scope of a rule to be interpreted restrictively.

Indeed, according to Article 2 of the Current Exchange Crimes Law, "*divisa*" or foreign currency means "*the currency expression made in metallic coins, bank bills, bank cheks and other modalities, other than the bolivar, the latter being the currency of the Bolivarian Republic of Venezuela*". The words "*and other modalities"* are new, since they were not present in the definition of Article 2 of the Former Exchange Crimes Law. These words seem to refer to checks other than bank checks. They may be construed as referring to travelers' checks, particularly those issued by entities other than banks. They may also be applied to eventual innovative currency expressions other than metallic coins, bank bills and bank checks. The inclusion of these words adds some ambiguity to the new drafting of the legal definition of "*divisa*" or foreign currency. In any event, we believe that the

reference to other modalities cannot refer to securities, because securities are not a "*divisa*" or foreign currency, but a document representing an obligation assumed by an issuer that is not the monetary authority of a foreign country. Crimes under these laws refer to transactions made or offered to be made with a *"divisa"* or foreign currency, which, as indicated, does not include securities, and, thus, Securities Transactions are not penalized.

In fact, when the National Assembly was in the process of discussing the draft of the Former Exchange Crimes Law, the Minister of Finance made it publicly known that the Securities Transactions, particularly those involving sovereign debt, should not be forbidden, and the National Assembly modified the draft law in order to clarify that the Securities Transactions are not against the Former Exchange Crimes Law. Indeed, in a draft of the Former Exchange Crimes Law, the following words had been added to the definition of *"foreign currency"* set forth in Article 2: "*and other securities;*" but the final version of the Former Exchange Crimes Law, which was approved by the National Assembly, authorized by the National Executive and published in the Official Gazette, eliminated these words. Similarly, when the Current Exchange Crimes Law was being discussed, National Assembly member Iroshima Bravo, who was promoting the draft law, issued a public statement declaring that, under such law, the Securities Transactions would not become illegal.

Accordingly, Securities Transactions are not characterized as being criminal, since securities were not included in the definition of "foreign currency," which is relevant to determine if there is a currency exchange transaction in violation of the Current Exchange Crimes Law.

Second, Article 6 of the Former Exchange Crimes Law and Article 9 of the Current Exchange Crimes Law expressly exclude transactions made with securities from the application of the sanctions provided under the same Articles, which punish the individuals or corporations that perform illicit exchange transactions. Such Articles establish, in their relevant part, the following: "*The transactions performed with securities are excluded."* This is redundant, since securities were not included in the definition of *"foreign currency;"* but

the legislators' intent not to criminalize the Securities Transactions becomes even more evident.

Accordingly, Securities Transactions are (i) not to be deemed to be exchange operations pursuant to the definition of *"foreign currency"* provided by Article 2 of the Former Exchange Crimes Law and Article 2 of the Current Exchange Crimes Law, so are not punishable under these laws, and, (ii) even if securities were mistakenly considered to be foreign currency, then Article 6 of the Former Exchange Crimes Law and Article 9 of the Current Exchange Crimes Law, which is the rule that sanctions illicit exchange transactions, is not applicable to Securities Transactions, pursuant to an express exception regarding securities set forth in such Articles.

Even prior to the enactment of the Former Exchange Crimes Law, the government made clear the fact that the Securities Transactions were not to be prohibited. In fact, on 9 May 2005, a Criminal Court issued an order to all brokers according to which all Securities Transactions should cease, which was delivered to the Caracas Stock Exchange on 12 May 2005. This order was widely and immediately criticized. The same court revoked this order on the following day. Later on, the appointment of the judge who issued such prohibition was revoked, probably for having irresponsibly tried to curtail the Securities Transactions. This was followed by the Minister of Finance's efforts to expressly legalize the Securities Transactions, which resulted, as indicated above, in the drafting of Articles 2 and 6 of the Former Exchange Crimes Law, explained above.

Further, Securities Transactions are made very often, by individuals and corporations having local currency and needing foreign currency or vice versa. Many of the operators in the so-called parallel market of Securities Transactions are well known corporations that include important brokers and banks. In many instances, public officials have acknowledged this parallel market's existence, and it has never been curtailed by the government, which has even benefited from its existence, (i) by financing itself by means of the issuance of public debt that will be placed with persons who may operate in the parallel market, and (ii) by relieving the pressure to acquire foreign currency in areas in which the persons who need US dollars do not have access to them at the Official Exchange Rate. It is apparent that

government officials at the highest levels are aware that the Securities Transactions are both necessary and legal, because, (a) for the economy to function, individuals and corporations must be permitted to have access to local and foreign currency in cases other than those limited cases specifically provided for in the Exchange Control Rules; (b) the government needs to finance itself through the issuance of sovereign debt, which is consistent with allowing Securities Transactions; and (c) Securities Transactions do not qualify as a black market operations, since the purchasers and the sellers of securities such as sovereign debt bonds are not buying, selling or otherwise transferring foreign currency.

Article 17 of the Current Exchange Crimes Law forbids announcing exchange rates other than the Official Exchange Rate. Until then, the parallel market worked openly in Venezuela, and the resulting exchange rate was often quoted in the press and in television broadcasts. This can be the case again sometime in the future, since (i) National Assembly member Iroshima Bravo, in the public declarations referred to above, pointed out that the prohibition of Article 17 does not apply to the exchange rate implicit in the Securities Transactions; (ii) Article 17 refers to foreign currency, the definition of which does not include securities; and, (iii) strictly speaking, parallel market transactions are transactions over securities, as opposed to transactions over foreign currency.

In fact, Veneconomía, a very respected organization that divulges information of economic and political nature, is not publishing, as it did until the end of 2007, the parallel market exchange rate, but it is publishing the following information: (i) the price of the Venezuelan sovereign debt bonds in local currency and (ii) the price of the same bonds in US dollars. In many of its editions of January 2008, Veneconomía explained that (i) above can be multiplied by the Official Exchange Rate and divided by (ii) above, in order to obtain the exchange rate implicit in the Securities Transactions.

VI

Legal Uncertainty

In view of the above, even though there are exchange controls in Venezuela, it is not illegal (i) to enter into agreements that provide for payments in foreign currency, except in cases in which the prohibition of Article 19 of the Current Exchange Crimes Law applies; (ii) to make payments in foreign currency, in order to comply with such agreements; (iii) to unilaterally decide to make payments in foreign currency, even in the presence of an agreement that establishes an obligation to pay in local currency, provided that the payee accepts receiving foreign currency instead; (iv) to enter into agreements that do not specify the currency in which a payment is to be made and then to comply with these agreements by making a payment in a foreign currency; (v) to own or receive foreign currency abroad; (vi) to convert such foreign currency into bolivars or bolivars into foreign currency by means of Securities Transactions; and (vii) not to sell the foreign currency a person owns or receives to the Central Bank, except in the specific cases in which such an obligation is established in the Exchange Control Rules.

However, certain public officials have issued isolated statements against the Securities Transactions, as if they were illegal (as is the case of the black market). In addition, some commentators have given the restrictions of the Exchange Control Rules a scope that is much broader than what the wording of the corresponding provisions actually allows (for instance, some attorneys have declared that (i) the provisions of Articles 9 and 19 of the Current Exchange Crimes Law, referred to above, do not allow persons who acquire dollars through Securities Transactions to use such dollars to pay their suppliers, and, taken literally, go so far as to forbid imports; or (ii) the provisions of Article 9 prohibit Venezuelans to own foreign currency abroad). Further, the Exchange Control Rules are very badly drafted and have often led to confusion. All this, added to the peculiarities of President Chávez's government, may eventually result in some government official or judge deciding, for political reasons, that transactions that appear to be legal (such as the Securities Transactions and certain

agreements contemplating payments in foreign currency) are nevertheless against the law.

VII

Conclusions

First, regarding agreements and payments in foreign currency, the general rule is that individuals and corporations are free to enter into foreign currency agreements and make the corresponding foreign currency payments.

However, while exchange controls are in place, the following exception applies: Individuals and corporations that offer in Venezuela, to the public or in private, the acquisition, sale or lease of goods and services in foreign currency, shall be subject to a fine. This general prohibition started to apply in January 2008. It is too early to know precisely how this prohibition is going to be applied. Nevertheless, it is important to take into account that agreements resulting from the acceptance of these offers are not legal, and foreign currency payments made pursuant to these agreements are also illegal.

Please bear in mind that the aforementioned prohibition does not apply in the following cases: a) If the offer was made before 27 January 2008; b) If the offer is made abroad or deemed to have been made abroad; c) If the offer is related to export prices or import prices of goods or services; d) If the offer does not refer to the sale price or rental price of a good or service, for instance, it is (i) an offer to reimburse a cost or expense or (ii) an offer to borrow or lend an amount in foreign currency or (iii) settlement agreement; e) The offer refers to an obligation other than the payment of the price of a good or service, for instance, it is (i) an offer to buy a security denominated in foreign currency for a price paid in local currency (as in Securities Transactions), or (ii) an offer to provide insurance coverage in foreign currency for a premium paid in local currency; or f) there is no forbidden offer. For instance, an obligation is contracted in local currency or with no indication of the currency in which a payment is to

be made, in which case the payor may nevertheless decide to pay foreign currency and the payee may accept it.

Second, the general rule regarding foreign currency holdings is that individuals and corporations are free to keep and dispose of the foreign currency they may own or receive.

However, while exchange controls are in place, the following exception applies: Individuals and corporations must sell to the Central Bank at the Official Exchange Rate through Exchange Agents the foreign currency they obtain from certain transactions. The most important of these transactions are the following: (i) the price obtained from the exportation of goods, services or technology, (ii) the foreign currency received by Exchange Agents and (iii) the foreign currency that enters into Venezuela. This obligation started to apply in February 2003.

Please bear in mind that the aforementioned obligation does not apply in the following cases: a) Foreign currency received before 5 February 2003; and b) Foreign currency received in cases other than those in which an obligation to sell the foreign currency was established. For instance, an individual or corporation sells an investment abroad for a price in foreign currency.

Third, regarding conversion of local currency into foreign currency the following occurs:

Firstly, individuals and corporations can obtain foreign currency from the Central Bank at the Official Exchange Rate through Exchange Agents only for certain purposes. The most important cases in which the foreign currency may be acquired are the following: (i) payments related to foreign direct investments, such as dividends and repatriation of capital; (ii) payments of importation of goods, services and technology; and (iii) payment of private external debt. Please take into account that certain requirements apply and that, even if these requirements are met, the acquisition of foreign currency is subject to availability and governmental priorities. These requirements and limitations exist since February 2003.

Secondly, individuals and corporations can perform Security Transactions; that is, buy securities for a price in local currency and sell securities for a price in foreign currency. The exchange rate implicit in Securities Transactions is considerably higher than the Official Exchange Rate. Securities Transactions have never been illegal; but, starting on 27 February 2008, it is forbidden to make public an exchange rate other than the Official Exchange Rate.

Fourth, regarding conversion of foreign currency into local currency the following occurs:

Firstly, as indicated above, compulsory sale to the Central Bank is required in certain cases , in which cases such sale takes place at the Official Exchange Rate, which, as indicated, in considerably lower than the rate implicit in Securities Transactions.

Secondly, in cases other than those referred to above, individuals and corporations can perform Security Transactions; that is, buy securities for a price in foreign currency and sell securities for a price in local currency. The amount of bolivars they will receive will be considerably higher than the amount that would result from the application of the Official Exchange Rate.

Thirdly, black market exchange transactions (as opposed to Securities Transactions) are punishable with a fine, and also with a prison term if the aggregate amount of such transactions exceeds US$20,000 per year. The black market exchange rate is similar to the rate implicit in Securities Transactions.