

# Banking Regulation

Third Edition

# Global Legal Insights

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Contributing Editors: Peter Hsu & Rashid Bahar

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# GLOBAL LEGAL INSIGHTS - BANKING REGULATION

## THIRD EDITION

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## CONTENTS

<b>Preface</b>	Peter Hsu & Rashid Bahar, <i>Bär &amp; Karrer AG</i>	
<b>Albania</b>	Aida Maho, <i>Frost &amp; Fire Consulting</i>	1
<b>Andorra</b>	Miguel Cases & Laura Nieto, <i>Cases &amp; Lacambra</i>	12
<b>Argentina</b>	Javier L. Magnasco & Daniel Levi, <i>Estudio Beccar Varela</i>	24
<b>Bosnia &amp; Herzegovina</b>	Sanja Voloder & Emina Mameledžija, <i>CMS Reich-Rohrwig Hainz</i>	30
<b>Canada</b>	Pat Forgione, Darcy Ammerman & Sean Brandreth, <i>McMillan LLP</i>	37
<b>China</b>	Dongyue Chen & Xingyu Wu, <i>Zhong Lun Law Firm</i>	46
<b>Congo – D.R.</b>	Liliane Mubanga Wetungani & Blaise Lunda Masudi, <i>Thambwe-Mwamba &amp; Associates Law Firm</i>	53
<b>Ecuador</b>	Dr. Boanerges Rodríguez Freire & Boanerges Rodríguez Velásquez, <i>Coronel &amp; Pérez</i>	60
<b>Egypt</b>	Hossam Gramon & Nadia Abdallah, <i>Matouk Bassiouny</i>	66
<b>Finland</b>	Niina Nuottimäki & Janni Hiltunen, <i>Borenius Attorneys Ltd</i>	71
<b>France</b>	Jean L’Homme & Gaël Rousseau, <i>Fidal</i>	80
<b>Germany</b>	Sebastian Tusch & Dr. Benjamin Herz, <i>Gleiss Lutz</i>	89
<b>Ghana</b>	Ekua Hayfron-Benjamin, Johnnie Klutse & Helena Ayensu-Maikido, <i>Ashong Benjamin &amp; Associates</i>	99
<b>Greece</b>	George Bersis & Smaragda Rigakou, <i>Potamitis Vekris</i>	108
<b>India</b>	Shuchi Sinha, Pallavi Meena & Pragya Sood, <i>AZB &amp; Partners</i>	118
<b>Italy</b>	Emanuele Grippo & Andrea Banfi, <i>Gianni, Origoni, Grippo, Cappelli &amp; Partners</i>	128
<b>Japan</b>	Koichi Miyamoto, <i>Anderson Mori &amp; Tomotsune</i>	140
<b>Macedonia</b>	Dragan Dameski & Ana Hadzieva Angelovska, <i>Debarliev, Dameski &amp; Kelesoska, Attorneys at Law</i>	149
<b>Malta</b>	Louis de Gabriele, Andrei Vella & Stephanie Soler, <i>Camilleri Preziosi</i>	158
<b>Netherlands</b>	Roderik Vrolijk & Rogier Raas, <i>Stibbe</i>	166
<b>Singapore</b>	Regina Liew & Larry Lim, <i>Rajah &amp; Tann Singapore LLP</i>	175
<b>Spain</b>	Fernando Mínguez Hernández, Íñigo de Luisa Maíz & Rafael Mínguez Prieto, <i>Cuatrecasas, Gonçalves Pereira</i>	184
<b>Switzerland</b>	Peter Hsu, <i>Bär &amp; Karrer AG</i>	198
<b>Ukraine</b>	Oleksandr Zavadetskyi, <i>Zavadetskyi Advocates Bureau</i>	208
<b>United Kingdom</b>	Peter Snowdon, Simon Lovegrove & Matthew Gregory, <i>Norton Rose Fulbright LLP</i>	213
<b>USA</b>	Reena Agrawal Sahni & Timothy J. Byrne, <i>Shearman &amp; Sterling LLP</i>	226

## PREFACE

**B**anking has long had a global reach. It is also a heavily regulated industry. In the wake of the financial crisis of 2008, it has become the object of a number of regulatory initiatives which are being rolled out at a stunning rate across the globe. Simply staying abreast of these ongoing developments is a challenge even for the most dedicated specialist.

This is where this book comes in. It provides general counsels, regulators and lawyers with a comprehensive insight into banking regulation in 26 countries around the world. The chapters have been written by leading practitioners in each jurisdiction, who provide their analysis and views on the current state of regulation and ongoing developments. To facilitate comparisons, the structure of each chapter is the same: it starts by introducing the readers to the architecture of banking regulation, covering both regulations that are applicable to banks and the regulators in charge of supervising and enforcing them in each jurisdiction. It describes the key requirements for governance of the board of directors and senior management, as well as the internal control environment of the entire institution. It carries on with an overview of new trends in regulation and legal developments in the area. Furthermore, it presents regulatory capital requirements, analysing the role of national and international standards in defining these requirements, as well as the impact of international initiatives to improve capital and liquidity requirements in the jurisdictions that are surveyed. The chapters then extend to rules protecting clients, covering not only rules that apply to the conduct of banks when dealing with clients, but also rules on cross-border services and anti-money laundering initiatives. Overall, our hope is that this book will prove a stimulating and insightful read, which will prepare banks and their advisers not only to overcome but to master the challenges they and their clients are facing at a global level.

Peter Hsu & Rashid Bahar  
Bär & Karrer AG

# Argentina

Javier L. Magnasco & Daniel Levi  
Estudio Beccar Varela

## Introduction

Argentina began 2016 with a brand-new elected National Government, formed by a coalition that had opposed the former governing party. The public speech of the new authorities seems to be more business-/market-oriented, and certain urgent measures have already been taken in order to reflect that perspective, mainly in terms of deregulating sensitive sectors of the economy, including relevant aspects of banking and financial activity.

The official macroeconomic programme of the new government is guided by the following priorities: the normalisation of the foreign exchange market; the fight against inflation and public deficit; and the attraction of foreign investments that may help to reactivate economic growth.

To accomplish these targets, the main policies implemented so far by the new administration that have had a direct impact on the banking and financial sector include the prompt liberalisation of the foreign exchange market, a significant increase of local interest rates, the removal of mandatory caps for prices of retail banking products, and the eventual close of a long dispute that Argentina has maintained since the country's financial default in 2001 with certain minority bondholders.

If these recent policies prove successful, it would be reasonable to expect that more financial entities will feel attracted in the short- and mid-term to do and develop business in the jurisdiction (in fact, certain international credit agencies have already announced a renewed interest in the country). However, as Argentina is not immune to the international and regional context (i.e. two international banks have recently decided to close or reduce their business in the country due to global strategic decisions), the future will still be challenging, even in front of a more local optimistic scenario.

## Regulatory architecture: overview of banking regulators and key regulations

The head of the Argentine banking regulatory sector is the Argentine Central Bank, which is an autonomous body within the National Government. As that implies, the Argentine Central Bank has (or should have) the highest degree of independence from the executive branch, notwithstanding in recent years that political influence over the bank has gradually increased.

The Argentine Central Bank was created, and its powers are set forth, by its Organic Chart (Law No. 24,144). Pursuant to the Organic Chart, the main functions of the Argentine Central Bank comprise the following: (i) to regulate the Argentine financial system and enforce the financial entities' regulations; (ii) to regulate the quantity of currency and level of interest rates in the market, in order to orientate credit; (iii) to act as an agent of the country with international financial organisations; (iv) to collect and manage reserves in foreign assets; (v) to help the smooth functioning of the capital market; (vi) to enforce the foreign exchange policy; (vii) to regulate payment systems; and (viii) to protect the rights of users of financial services and antitrust principles.

As was mentioned above, one of the main functions of the Argentine Central Bank is to regulate the Argentine financial system and enforce the financial entities' regulations. In that sense, the Argentine Central Bank is the enforcement authority of the Argentine Financial Entities' Act (Law No. 21,526), which regulates financial intermediation, sets forth the types of financial entities that can operate

within the local market, establishes the requirements for banks to obtain authorisations, and regulates insolvency measures for financial crises.

One of the other main functions of the Argentine Central Bank is the enforcement of foreign exchange politics. The Argentine Central Bank is the enforcement authority of the local foreign exchange market, which is globally regulated by the Money Exchange Houses Act (Law No. 18,924) and by Decree No. 616/2005. Up to the end of 2015, this decree justified the imposition by the Argentine Central Bank of tough restrictions (some of them not written) to the inflow and outflow of foreign monies. However, as it was pointed out in the introduction to this chapter, the newly elected National Government (together with the newly appointed authorities of the Argentine Central Bank) rapidly derogated many of those restrictions, so that now the local foreign exchange market is becoming virtually deregulated.

The framework of the local financial legal system is complemented by dispositions that the Argentine Central Bank issues day by day in the form of “Communications”, by means of which it regulates every aspect of the financial system (including the creation, merger and transformation of financial entities, the foreign exchange market, currency and interest rates, accountancy requirements, liquidity and solvency ratios, governance, payment systems, reporting duties, etc.).

Other key regulations, which are not exclusive to the financial system but which have a relevant impact in the sector, include the Capital Market Act (recently enacted Law No. 26,831), the Anti-Money Laundering Act (Law No. 25,246), the Credit Cards Act (Law No. 25,065), the Data Protection Act (Law No. 25,326), the Antitrust Act (Law No. 25,156), and the Consumer Defence Act (Law No. 24,240). Even though all these specific regimes have their own enforcement authorities, the Argentine Central Bank has legal competence in order to regulate the effect of those regimes within the banking system and to coordinate their enforcement with the relevant authorities.

### **Recent regulatory themes and key regulatory developments**

The most recent regulations in the area can be identified in the foreign exchange market, the promotion of bankarisation, and the ability of banks to set the prices of retail banking products.

As mentioned above, the local foreign exchange market was strongly regulated by the end of 2015. Restrictions were imposed on the inflow of monies to the country (in order to discourage speculative investments) by means of subjecting 30% of any foreign investment and financing (except in certain specific cases – i.e. direct investments, imports financings, etc.) to a mandatory non-remuneratory deposit for a one-year period (called “*encaje*”). Apart from that, repatriation of foreign funds was required in certain cases (export of goods and services) and payments abroad were restricted, depending on whether an import, an investment, or a transfer of dividends was involved (in particular, companies and banks were informally limited to transfer dividends to their foreign shareholders). Since the beginning of 2016, much of these restrictions have disappeared, so that now no mandatory deposits are required to foreign investments, and subsidiary companies are again allowed to transfer dividends to their foreign headquarters.

Something similar happened with certain regulations that used to impose restrictions on banks for setting interest rates and prices to retail banking products. By the end of 2015, banks were induced by the Argentine Central Bank to facilitate subsidised-rate loans to small and medium-sized companies, and were obliged to keep consumer products at capped interest rates and commissions. Now, in 2016, banks are again entitled to freely agree their interest rates and commissions with their clients, except in the case of credit cards, which has always been a price-capped product in Argentina.

In a kind of exchange for this liberalisation of banking prices, and as an attempt to promote a wider bankarisation of society, the Argentine Central Bank eradicated certain costs for opening banking accounts to consumers, and for transferring funds through home banking and other electronic systems.

Setting aside these recent regulatory themes, the Argentine financial system has been making significant progress in recent years by increasing minimum capital requirements and strengthening compliance regulations (mainly in the anti-money laundering field) in order to comply with international standards. It is expected that these matters (capital requirements and compliance policies) will continue to be closely monitored and developed in the future.

## Bank governance and internal controls

Directors and top-level managers of banks in Argentina must be appointed and exercise their functions in accordance with specific dispositions given by the Argentine Central Bank, which evaluates their capacity, experience, reputation and ability in the financial field and must approve their appointment for it to be effective.

Apart from that, the Argentine Central Bank recently set forth certain guidelines for the corporate governance of banks, which constitute a mix of mandatory rules and soft law recommendations that are considered by the Argentine Central Bank as good practice.

As a consequence of this, banks must adopt and approve an internal corporate governance code regarding the management of the risks of their activity, taking into account the guidelines of the Argentine Central Bank.

The main targets towards which the corporate governance code must aim are: (i) establishing politics in order to comply with the corporate objectives of the bank; (ii) guaranteeing that the activities of the bank comply with the necessary levels of security and solvency, in full compliance with applicable laws and regulations; (iii) defining the risks to be assumed by the bank; (iv) protecting the interests of the depositors of the bank; (v) assuming liabilities *vis-à-vis* the shareholders of the bank, but also with other third interested parties; and (vi) effecting the daily transactions of the bank.

In summary, the following guidelines are considered good practice by the Argentine Central Bank and should be covered in the corporate governance codes of banks:

- (i) the different responsibilities of the board of directors and managers in approving and conducting the business and politics of the bank should not be mixed up;
- (ii) directors should be the real and ultimate responsible persons for the actions taken by the bank, and should supervise the managers in their activity;
- (iii) the board of directors should have a relevant number of independent members (specifically in the audit committee);
- (iv) the bank should have different committees to advise the board of directors, depending on the relevance of the activities in which the bank is involved;
- (v) the board of directors and the managers should encourage and regard the opinions of internal auditors, and should request the monitoring of independent external auditors;
- (vi) the bank should avoid granting incentives to its personnel that could encourage the latter to take decisions beyond the acceptable risks of the activity;
- (vii) the bank should promote transparency at every level; and
- (viii) the bank should adopt risk management policies in accordance with applicable regulations; among others.

Pursuant to these new recent policies, banks must implement adequate internal control procedures for monitoring compliance with corporate governance, compliance with applicable laws and regulations, and for reporting any deviation to the managers or the board of directors, as the case may be.

In connection with this internal control, the Argentine Central Bank has been developing certain minimum requirements that the internal control of financial entities must regard. The internal control should be focused on three different categories: (i) measuring the effectiveness and efficiency of transactions; (ii) testing the reliability of accounting information; and (iii) monitoring compliance with applicable laws and regulations.

For the Argentine Central Bank, all members of the financial entity are responsible for compliance with internal controls. However, such responsibility is specially assigned to the board of directors, the managers, the audit committee and the internal auditor.

Pursuant to recent regulations, banks must have an audit committee composed of at least two members from the board of directors as well as the internal auditor. The internal auditor must have functional independency, and its duties can be assigned to an independent professional.

The Argentine Central Bank establishes the guidelines and methodology that the internal control should follow in the design, instrumentation, evaluation and reporting strategy.



## Bank capital requirements

In accordance with section 32 of the Argentine Financial Entities Act (Law No. 21,526), banks must comply with the minimum capital requirements that the Argentine Central Bank may establish from time to time.

In recent years, the Argentine Central Bank has implemented policies in order to comply with the guidelines of Basel III in terms of minimum capital requirements and risk management, and it has designed a roadmap that plans to complete the programme by 2019.

The minimum capital that banks must comply with is the higher of the basic exigency (Ar\$26m for categories 1 and 2) and the sum of other exigencies determined by credit risk, interest rate, market risk and operational risk. In case the bank acts as a custody or registry agent, exigencies are higher, depending on the volume of securities in custody and/or registry.

As it was pointed out before, the Argentine Central Bank has been very active in this field, so it is expected that further regulations in terms of capital requirements will be approved in the forthcoming years.

## Rules governing banks' relationships with their customers and other third parties

Only financial entities duly authorised by the Argentine Central Bank are admitted to perform "financial intermediation" activities within the country. Offering banking services within the country to the general public without the prior authorisation of the Argentine Central Bank can be subject not only to administrative sanctions but also to criminal prosecution.

Financial intermediation activities include deposit-lending services, as well as certain other activities typically and traditionally performed by banks (including private banking/investment banking activities). Even though Argentine law contemplates different types of financial entities (financial companies, saving/housing banks, investment banks, etc.), most adopt the form of "commercial" banks, which are allowed to perform all such activities without limitations.

Pursuant to local regulations, banks can only perform financial intermediation activities and cannot conduct any other type of businesses. However, the Argentine Central Bank allows banks to carry on (either directly or through subsidiaries) certain specific activities which are considered to be "complementary" to the typical financial intermediation services (i.e. issuance of credit cards, trading, agencies, advisory services, clearing house, venture capital, microfinancing, among others). Some of these activities require the prior authorisation of the Argentine Central Bank.

As for relationships with customers, in January 2013 the Argentine Central Bank issued a new regulation for the protection of financial service users, which grants broad rights to banking consumers and sets forth detailed procedures for the management of consumer claims.

Apart from that, it is worth mentioning that in 2009 the Supreme Court of Argentina ruled on the case "*Halabi*", which admitted the possibility of individuals to initiate class actions in order to defend their rights. Even though class actions are still not legislated upon in Argentina, this court precedent opened the door for many new cases in which financial entities are currently involved.

It is also worth mentioning that in August 2015, the new Argentine Civil and Commercial Code entered into force, setting forth certain particular provisions regarding contracts that banks enter into with their customers, which reflect the latest regulations that have been promoted by the Argentine Central Bank and principles arising from case law in recent years.

Anti-money laundering and data protection dispositions have implemented additional requirements for the way in which banks deal day by day with their clients, mainly in terms of "know your customer" policies and in terms of handling and processing client information. Most of these dispositions follow international standard practices.

For dealing with banking insolvency, the Argentine legal system has specific procedures (which involve the intervention of the Argentine Central Bank) in order to protect customers and creditors. Section 35 *bis* of Law No. 21,526 establishes an exceptional restructuring procedure for banks, which differs from the ordinary bankruptcy laws that private corporations are subject to. The Argentine

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Central Bank is empowered to authorise the reorganisation of financial entities and is entitled to adopt different types of measures to reach that end, including, among others, the possibility to exclude certain assets and liabilities from the troubled banks and transfer them to third parties.

Argentina has also an Insurance Deposit System (called “*SEDESA*”) to protect the rights of depositors under crisis scenarios. This Insurance Deposit System is funded with periodic mandatory contributions made by banks and currently guarantees up to Ar\$350,000 per person, account and deposit.

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