

EMPLOYMENT IN ECONOMIC DISTRESS

Jorge De Presno – Mercedes Balado Bevilacqua
Basham, Ringe y Correa S.C. MBB Balado Bevilacqua Abogados
Ciudad de México, México Buenos Aires, Argentina

I. GOVERNMENT MEASURES BEFORE CRISIS: MEXICO AND ARGENTINA EXAMPLES

Argentina and Mexico have faced different serious and recurrent economic crisis with similar causes: a) high inflation, b) increase of prices, c) high unemployment rate, d) mass terminations, e) social unhappiness, etc.

In face of such crisis, the Governments have historically, taken measures aimed to stabilize the labour and social scenarios.

I. a. The Mexican Case

Mexico faced recurrent economic crises during the late 1970's, 80's and at the beginning of the 90's. During these periods, the Mexican Government imposed several counter-measures related to trade, tax and employment to contain the crisis and reduce the high level of foreign debt, inflation rates and devaluation of the national currency ("the peso"). However, the implementation of these measures was not enough to achieve rapid and sustainable economic growth and meet the expectations of the business community or the Mexican Society.

In 1976 former president José López Portillo y Pacheco took office. During the first two years of his administration, Mexico discovered several immense oil fields, so the government believed that the economic crisis would finally come to an end but instead of keeping austerity measures, Mexico requested loans to invest in oil infrastructure, which caused Mexico's unpayable debt increase.

In 1982, Mexico's foreign debt considerably increased to an unprecedented level and the peso was devaluated more than 400%.

Mexico was the first of many Latin American countries to default on its foreign debt. The economy shrank and turned into a recession.

The Mexican government was under pressure due to protests that took place by different sectors of society including independent unions and workers who requested economic stability and salary increases.

On March 1982, president López Portillo published a decree by which employers shall mandatorily increase 10, 20 or 30 percent over the current salaries at that time based on different conditions and collective bargaining agreements and negotiations thereto. The percentage increase was determined by the economic capacity of the employer depending on the number of employees, company's facilities and the benefits granted to employees. This triggered massive strike calls by Unions that felt the increases were insufficient.

Moreover, the government once again turned to the International Monetary Fund for loans which were conditioned to the implementation of structural reforms and a series of free market measures to control the devaluation of the peso. These were: (1) fiscal austerity, (2) stringent monetary policy; (3) reduction in trade barriers, (4)

privatization of state-owned companies, (5) industrial deregulation, (6) foreign investment deregulation and (7) the implementation of stabilization programs.

Those stabilization programs that were implemented during the following ten years as of the breakout of the crisis in 1982 were known as: ***“Pacto de Solidaridad Económica (PSE)”***, ***“Pacto de Estabilidad y Crecimiento Económico de México (PECE)”*** and the ***“Acuerdo de Unidad para Superar la Emergencia Económica”***.

In general, all the programs had one strategy in common, to reduce and/or eliminate inflation and maintain a balance between wages and the prices of goods and public services. For such purposes, the stabilization programs, in a higher or lesser degree, 1) reduced government's expenditure and social programs, 2) froze-out all salaries by increasing them very little or not at all and, 3) increased public utilities and services cost (electricity, telephone and fuel).

I.b. The Argentine Case

Although Argentina went through different crisis since 1970's with a strong indebtedness that strengthen during the military government, special focus will be made to the Government measures related to the labor and employment arena that were taken during: i) the most relevant crisis suffered in 2001 which cause the collapse of the country and ii) the current situation.

Several external factors occurred during the 1990's contributed to the major Argentine social and economic crisis, such as: a) the Mexican crisis that took place during 1994-1995, b) the economic crisis of Southeastern Asia, c) the Russian financial crisis of 1998 and the d) abrupt devaluation of the Brazilian currency in 1999.

These factors together with internal factors such as: a) damage in the fiscal balance occurred in 1998, b) the local currency “artificially” tied to the US dollar to favor investments caused serious external debt, c) execution of abusive investment treaties that placed the country in a very weak position and d) serious corruption of the government, caused an economic recession, reduction of income, extraordinary expenses and devaluation of the currency (Gross Internal Product fell more than 10%, devaluation reached 400% in weeks).

It was not just an economic crisis but a serious general one with unequal impact on the social scenario (Poverty rate was 54%, unemployment more than 20%). All these factors built up a situation where the continuity of the National State was questioned. People on the streets demanded for solutions and the situation resulted in the death of 48 persons and the resignation of President Fernando De la Rúa, who left the House of Government in a helicopter. Five (5) presidents followed De la Rúa within eleven (11) days until Eduardo Duhalde assumed government in January 1, 2002.

Given the emergency of the situation. Law No. 25,561 was enacted in 2002.

Such Law declared basically: a) that the country was under a public emergency situation concerning social, financial, administrative, economic and foreign exchange matters; b) granted the President with special rights related to foreign exchange and economic matters, renegotiation of the public services prices with private companies, and determination of the prices of a basic food goods, c) abolition of the parity between the Argentine peso and the US currency, and c) suspended terminations without cause for a period of 180 days, in case of violation, double

severance must be paid. Complementary regulations were passed establishing the extension of the prohibited term until 2007.

Nowadays, in face of another crisis – not as serious as the one faced in 2001-, the National Government passed Decree No. 1043/18 ("The Decree") which intention was to try to resume relationships with the union sector after a complex year of: a) high inflation (annual of 43,9% calculated in November 2018), b) increase of prices, c) mass terminations produced in the industrial sector.

The Decree establishes: a) a procedure that consists on a communication to the Ministry of Labour and Production ("MLP") prior to terminate employees with no cause and b) grants an allowance with no compensation nature (bonus) to employees of the private sector.

The intent of the Decree was to discourage dismissals through the intervention of labour authorities.

II. IMPACT OF THE MEASURES IN SALARY, SEVERANCE COMPENSATION, BONUS, INCENTIVES AND STOCK OPTIONS

II.a. The Mexican Case

Mexico did not establish strong measures on wages and severance.

Wages were gradually increased which in most cases were not enough to face the price of the basic goods and public services but benefits and incentive compensation following dismissal were not affected by the measures implemented during the 80's and 90's crisis. On the contrary, employers acknowledged and honored all employment conditions and benefits (such as vacations, Christmas and vacation bonuses, commissions, bonuses, stock options, social benefits, social security rights or any other kind of incentive legal or contractual) granted to its employees.

As it will be seen different is the case of Argentina where the Government measures impacted on severance compensation and wages.

II.b. The Argentine Case

As referred to before, Law No. 25,561 established the prohibition of termination without cause for 180 days and, in case of violation, double severance should be paid.

Complementary Decrees No. 264/02 and 265/02 established special procedures to follow in case of: a) termination without cause that would take place during the suspension period and b) suspensions and terminations due to *force majeure* or economic reasons. This procedure was called preventive crisis procedure. Although we may say that the regulation has the noble purpose of trying to reduce terminations and protect employment positions, further measures should have been taken at the same time to ensure the genuine creation of job positions.

During 2002-2007 other Emergency and Necessity Decrees were passed by the Executive Power that reduced the fine of 100% of severance compensation in case of terminations without cause to 80% in 2004 and 50% in 2005.

Law No. 25,972 in force since December 18, 2004 determined that the suspension of terminations will not apply to labor relationships that have begun as from January 1, 2003 that have implied and increase in the payroll of employers.

Given the fact that suspension of terminations has a limited period, several Emergency and Necessity Decrees followed to extend such period of time until 2007. In special, Decree 823/04 granted the right to the Executive to reduce the percentage of fine according to the variations of the unemployment rate published by the INDEC (*Instituto Nacional de Estadísticas y Censos*). Also, it determined that the suspension shall come to an end when the unemployment rate was less than 10%, which happened in 2007.

As seen, the fine established by the government of an extra 100%-50% of severance compensation in case of terminations done during the suspension period, impacted directly on bonus, incentives and other compensation concepts as they may be part of the calculation base for purposes of severance compensation.

It is important to note that the extension of the suspension of terminations done by means of enactment of Emergency Decrees have been questioned based on its unconstitutionality and there has been certain case law that have supported such position, but this is not the point in this article.

Under the current scenario the Decree passed in November did not establish any provision that impact directly on the severance compensation but grant a non-compensatory allowance (bonus) to private sector employees.

The amount of the bonus will be five thousand pesos (ARS 5,000 – Approximately USD 136. Current exchange rate: USD 1 = ARS 37), and will be granted in two installments: 50% with November salaries (to be paid in December 2018) and the remaining 50% with the salaries of January 2019 (to be paid in February 2019);

When the provision of services is less than the legal or conventional working day, employees will receive a proportional part of the allowance;

The allowance may be absorbed if a salary increase was agreed in a complementary way to the salary negotiated with the trade union for 2018. The absorption of the allowance also applies to employers who unilaterally granted other increases on their employees' salary as of January 1, 2018;

However, there is a clear intention of the Government in pursue of replacement of the mandatory severance compensation by a "termination fund" (*fondo de cese*).

III. LOOKING FORWARD

III.a. The Mexican Case

Nowadays, Mexico is facing an important structural reform to its labor legislation as a direct consequence of international commitments assumed by the federal government last year, such as the renegotiation of the North American Free Trade Agreement (NAFTA) today known as United States-Mexico-Canada Agreement (USMCA); the ratification by Mexico's Senate on September 27, 2018 of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98) of the International Labor Organization.

On December 22, 2018, a bill to amend and partially repeal various provisions of the Federal Labor Law submitted by "Morena" (which by the way is the ruling party nowadays) to the house of deputies of the Federal Congress was published in the Parliamentary Gazette.

The proposed bill pretends to incorporate the amendments introduced to Mexico's Constitution related to the labor justice system in effect since January 24, 2017 and expressly recognizes and ensures the exercise of free association and effective collective bargaining rights.

The main amendments of this bill are in general, the transformation of the labor justice system, it introduces a new set of rules for the ordinary labor-law procedure and implements new mechanisms that ensures the exercise of free association and effective collective bargaining rights.

The proposed bill does not amend, nor repeal in any way provisions related to employment termination nor the items that integrate the statutory severance which employees are entitled to if they are terminated without a justified ground for dismissal nor affects fringe benefits whatsoever in any way (stock options, bonus schemes, profit share etc).

III.b. The Argentine Case

The initial purpose of the Decree was that the MLP would summon the parties to find mechanisms to minimize or cancel the dismissals.

However, the lack of regulation of the Decree and the inaction of the MLP have resulted in the failure of the goal foreseen and terminations without intervention of the MLP continued to occur.

The Government, nonetheless, continue with its intention to flexibilize labour regulations in order to create a suitable environment for foreign investors considering the fact that the region has already experienced major labor amendments in Brazil.

In regard to terminations the Government intends to replace the severance mandatory compensation with the creation of a "termination fund" (*fondo de cese*). Such fund will consist on monthly deposits that the employer will make according to a given percentage calculated upon the employee's monthly salary. Such percentage will vary according to the employee's seniority. Under this new scenario, bonuses, benefits, incentives and SOP will not impact in termination payments, in contrast to what was described above.

However, considering the social and economic situation of Argentina, the priority is not related to a labor flexibilization but to update to the minimum mandatory wage and grant stability to the current labour scenario.

Without that it would be unthinkable to try any modification to current labour and employment regulations.

REFERENCES

Argentina:

- Law No 25,561, Official Gazette, January 7, 2002
- Decree No. 1224/2007. Official Gazette, September 11, 2007
- Decree No. 1043/18, Official Gazette. November 13, 2018
- <https://www.lanacion.com.ar/2202117-inflacion-indec-noviembre-2018>
- El Cronista, “Decreto antidespidos: las empresas deberán informar al Gobierno 10 días antes”, November 8, 2018, <https://www.cronista.com/economiapolitica/Decreto-antidespidos-empresas-deberan-informar-al-Gobierno-10-dias-antes-20181106-0076.html>
- <https://www.unicen.edu.ar/content/las-causas-de-la-crisis-de-2001>
- <https://www.legislaw.com.ar/legis/ley25561yotras-suspension-despidos>.
- <https://chequeado.com/el-explicador/ley-de-emergencia-economica-caracteristicas-fundamentales/>

Mexico:

- <https://prezi.com/nrrhtorupyhy/pactos-de-concertacion-economica-de-mexico/>
- https://www.economia.com.mx/devaluacion_con_lopez_portillo.htm
- https://elpais.com/diario/1988/12/15/economia/598143615_850215.html
- <http://sincronia.cucsh.udg.mx/jimenezw06.htm>
- <https://economics.rabobank.com/publications/2013/september/the-mexican-1982-debt-crisis/>
- http://www.shcp.gob.mx/SALAPRENSA/doc_comunicados_prensa/1995/b48-95.html