

PECRB

■ Insolvency Proceedings in Argentina

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The purpose of the following *Insolvency Proceedings in Argentina* is to provide information to those seeking to invest in Argentina. It is hereby expressly understood that no individual person or entity shall act or refrain from acting exclusively based on the information and comments expressed herein. For that reason, we recommend that each transaction be analyzed and examined by competent professionals.

Introduction

Within the Argentine bankruptcy legal system, all debtor's assets and liabilities are subject to execution for its creditor's benefit. When a debtor is in insolvency or with economic or financial distress of a general nature, its creditors have two remedies: individual or collective execution. If the debtor's assets are not enough to satisfy all credits, individual execution turns inefficient and collective execution becomes the suitable remedy.

The law applicable to collective execution proceedings is Law N° 24,522, as amended and supplemented (the "Argentine Bankruptcy Law"). The Argentine Bankruptcy Law applies to legal entities (including those partially owned by the government) and physical persons. It excludes public persons or entities, as well as insurance companies, pension funds, mutual companies and financial institutions, all of which are regulated by special regimes.

The Argentine Bankruptcy Law sets forth flexible procedures, which tend to reduce the power of courts while increasing the freedom of action granted to debtors and creditors. There are three main insolvency proceedings:

1. Reorganization Proceedings ("*Concurso Preventivo*").
2. Out of Court Agreements or Workouts ("*Acuerdo Preventivo Extrajudicial*").
3. Bankruptcy Proceedings ("*Quiebra*").

1

Reorganization Proceeding (“*Concurso Preventivo*”)

- > **Overview and Filing Requirements**
- > **Procedure**
- > **Endorsement and Control
of the Reorganization Plan**

Overview and filing requirements

A reorganization proceeding is a remedy by which a debtor obtains financial relief through a judicially supervised reorganization proposal made to its creditors. Only the debtor may seek reorganization proceedings (legal entity or physical person). The main purpose of a reorganization proceeding is to allow the debtor to negotiate its liabilities with its creditors while maintaining the administration and property of its estate, under the supervision of the trustee. Nevertheless, court’s approval must be obtained by the debtor prior to engaging in various activities that exceed the ordinary course of business. Other certain activities such as transactions that affect the interests of creditors are forbidden during the course of this process.

All requirements established in the Argentine Bankruptcy Law must be met by the debtor before the court can declare the commencement of the reorganization proceeding. In this regard, the debtor must explain the cause of its insolvency, submit proof of registration and by-laws if applicable, a detailed recount of its assets and liabilities as of the date of filing, copy of financial statements corresponding to the previous three (3) fiscal years, a creditors list, a commercial books list, and a declaration that it has not filed a reorganization petition within a one (1) year period or that it has not withdrawn from an open proceeding during that same period.

Procedure

Upon declaration of commencement of the reorganization proceeding, the court will: appoint the trustee, determine the due date for submitting creditors’ proof of claim, order the publicity of such reorganization proceeding commencement, order the submission of corporate books if applicable, register the commencement in the Reorganizations Registry, hold lien on estate, order the deposit of proceeding’s costs within three (3) days from declaration of commencement, establish the date in which the trustee must submit an individual report recommending unsecured creditor’s claim and a general report, determine the date in which the informative meeting would take place, and elect of the provisional creditor’s committee, among other orders.

Upon conclusion of the verification period in which all creditors (secured and unsecured) must file evidence of their proof of claim with the trustee, the latter must prepare and submit the individual and general report, including a recommendation in favour or against each and every claim filed by creditors and the reasons as well as the date of insolvency. The court will then decide which claims are admissible and which are not. Meanwhile, within ten (10) days from the date in which the court decides on the admissibility of credits, the debtor must present (before the court and the trustee) a reorganization proposal. This proposal is then submitted to the creditors who will vote in favour or against it within the period of exclusivity which is of ninety (90) days (this period can be extended for up to thirty (30) more days).

Voting and Approving a Reorganization Plan

Upon submission of a reorganization plan to the admitted creditors, the debtor shall attain creditor's approval within the period of exclusivity. The reorganization plan will be considered approved once the debtor has obtained the affirmative vote of the majority of creditors within each and every creditor's category that represent two thirds of the total outstanding indebtedness in each category. Failure to obtain such majorities will lead the court to declare bankruptcy except when the salvage proceeding or cramdown remedy is available.

Salvage Proceeding or Cramdown

When debtor is a corporation, a limited liability company, a cooperative or a company partially owned by the Federal, Provincial or Municipal Government and it has not reached a reorganization plan, bankruptcy is not declared ipso facto in order to allow any creditor or a third party interested in the purchase of the company to submit their own proposal based on their interest in taking over the company. The debtor may also participate in this second instance, making new or resubmitting the previous reorganization proposals in order to compete with the salvage creditors or interested third parties. In turn, the debtor, salvage creditors or the third parties interested will have to attain the creditors approval to their proposals by a majority vote of creditors within each and every category representing two thirds of the total indebtedness in each category. If such salvage proceeding fails, bankruptcy shall then be declared by the court.

Endorsement and Control of the Reorganization Plan

Once debtor, salvage creditors or interested third parties have obtained the approval of their reorganization proposals from creditors, the court will endorse the reorganization plan and elect a steering committee in charge of controlling the performance thereof. The reorganization proceeding finalizes upon completion of all acts and cancellation of all liabilities by the debtor pursuant to, and in accordance with, the reorganization plan.

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Out of Court Agreement or Workout (“*Acuerdo Preventivo Extrajudicial*”)

- > **Overview and Filing Requirements**
- > **Procedure**
- > **Endorsement**

Overview and filing requirements

In a critical economic and financial situation or a state of insolvency scenario, debt restructuring can also be achieved through the “*Acuerdo Preventivo Extrajudicial*” (“APE”). This out-of-court debt restructuring instrument has been incorporated into the Argentine Bankruptcy Law system through Law N° 25,589 in 2002.

APE is a private out-of-court agreement between the insolvent debtor and its participating creditors. It structures the terms and conditions under which the parties agree on the restructuring and repayment of debts. There are no content formalities regarding the terms of the APE under arm’s length conditions.

Procedure

Certain majorities must be achieved in order to obtain the court’s approval. The Argentine Bankruptcy Law requires that a debtor should achieve the support of:

- More than half (absolute majority criteria) of its unprivileged creditors.
- Representing two-thirds of its total outstanding unprivileged indebtedness. Privileged creditors are expressly excluded from the count.

Creditors may oppose the APE under three circumstances:

- If they were not declared by the debtor.
- In the case of a fraudulent or malicious debt declaration by the debtor.
- If required majorities were not achieved.

Endorsement

Once endorsed by the court, the APE becomes binding on all unprivileged creditors, whether or not such creditors have participated in the agreement.

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Bankruptcy Proceeding ("Quiebra")

- > **Overview and Filing Requirements**
- > **Procedure**
- > **Final Distribution of Proceeds to Creditors**

Overview and Filing Requirements

Bankruptcy proceedings may be filed voluntarily by the debtor or a creditor (direct bankruptcy), or as a consequence of one of the following circumstances (indirect bankruptcy): (i) failure of a reorganization proceeding or salvage proceeding; (ii) failure of an out of court agreement; (iii) breach or nullity of an out of court agreement; (iv) extension of the bankruptcy to unlimited partners, or due to abuse by related persons, third party simulation or fraudulent acting in personal benefit.

The debtor's insolvency must be proven only in cases of direct bankruptcies, especially if the bankruptcy is requested by a creditor. In turn, creditors must file evidence proving their credits, the debtor's insolvency and that the debtor is not among those persons excluded from the scope of the Argentine Bankruptcy Law. In cases of indirect bankruptcies, insolvency is evidenced by the failure of any of the previous insolvency remedies or the extension of bankruptcy to third persons.

The bankruptcy petition must be notified to the debtor, who has five (5) days to prove its solvency, i.e. its ability to timely honour its obligations. If within the five-day period the debtor fails to prove such circumstance, the court will then pass a bankruptcy judgment. The bankruptcy declaration will produce the debtor's dispossession, i.e., the forfeiture of all disposition and administration rights over its assets, except for certain rights specifically enumerated in the Argentine Bankruptcy Law. The court will then appoint a trustee ("síndico"), who will preserve and administer the debtor's assets. The Court will further order the closing down of the debtor's premises and the suspension of all its activities. However, the trustee may exceptionally continue with the debtor's activities, when the court deems it necessary and grants the corresponding authorization.

The bankruptcy declaration also produces certain personal effects; the debtor is forbidden to leave the country unless authorized by the court, among others.

Procedure

After the bankruptcy declaration, creditors must submit proof of claims to the trustee within the verification period established by the court. In turn, the trustee must promote the formation of a steering committee composed of creditors, which will perform controlling functions during the liquidation proceeding.

The trustee is entitled to foreclosure the debtor's assets in order to pay admitted creditors with the sale proceeds. The Argentine Bankruptcy Law envisages different ways of liquidating assets, in an order of preference:

- In case debtor is a legal entity, sale of the company, as an going concern.
- Sale of the assets as a whole, in case of close down of the activities.
- Sale of all or some of the assets individually.

Final Distribution of Proceeds to Creditors

After the foreclosure is concluded, the trustee prepares a final report including a proposal for the final distribution of the proceeds. Upon approval of the report, distribution takes place. The Argentine Bankruptcy Law establishes certain privileges or preferences for the payment of creditors with the foreclosure proceeds.

Upon completion of the liquidation and distribution stage, the bankruptcy proceeding is concluded. Other than total payment, bankruptcy proceedings may also terminate by way of settlement or conversion into a reorganization proceeding, among others.

Preferences

Preferences or privileges emerge from several laws. The Argentine Bankruptcy Law has attempted to unify the system of preferences applicable in insolvency matters. Notwithstanding this, other laws may establish other privileges in the future.

The Argentine Bankruptcy Law establishes the following rank of preferences:

- Special preferences, which are granted exclusively over certain specific assets. However, it must be taken into account that bankruptcy expenses with regard to these credits have first priority and must be cancelled first. Among the credits which most frequently have special preference we find: credits secured by a mortgage or a pledge; certain labor credits; and taxes which levy certain assets.
- Litigation and administrative expenses must be satisfied as soon as payable. However, if some of these expenses remain unpaid upon the final distribution, then they can only be paid after the credits with special preference.
- General preferences, which are granted over all of the debtor's assets. Among these preferences, those relating to certain labor claims must be paid before the other credits with general preference, which include: certain essential expenses of the debtor; certain taxes; certain credit sale invoices; social security credits, among others. When the foreclosure proceeds are not enough to pay the credits with general preference, the distribution shall be prorated between them.
- Non-preferential credits include any other credit which lacks privileges. When the foreclosure proceeds are not enough to pay the non-preferential credits, the distribution shall be prorated between them.
- If parallel proceedings are opened in Argentina and a foreign country, resulting in bankruptcy being declared in Argentina, creditors in the foreign bankruptcy proceeding are subordinated to creditors in the Argentine proceeding.
- Debtor: after satisfying all the other classes of creditors, the remaining proceeds, if any, must be distributed among the debtor or debtors.

The creditor may agree with the debtor to subordinate its credit to other credits. This is known as "subordinated credit". The ranking of this class of credit is determined by the parties' agreement. However, the parties may only agree to postpone payment, but not to improve the ranking.

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Cross-border Insolvency

- > **Overview**
- > **Enforcement**

In modern times the number of international business failures has increased, in a context where creditors and assets are spread across the world. In these cases, there are several important aspects of an insolvency proceeding that must be carefully analyzed, including its enforcement in a foreign jurisdiction. The following section will describe the key legal and enforcement issues to keep in mind when dealing with cross-border insolvencies and bankruptcies as prescribed by the Argentine Bankruptcy Law and other applicable provisions within the Argentine Legal System.

Overview

Section 2 of the Argentine Bankruptcy Law determines that Argentine courts have jurisdiction over bankruptcy proceedings initiated by or against debtors domiciled in Argentina or foreign debtors when they have assets in Argentina exclusively in relation to such assets.

In turn, Section 4 of the Argentine Bankruptcy Law establishes that a foreign insolvency proceeding may enable the commencement of such proceeding in Argentina if it is petitioned by a debtor or a creditor whose credit is payable in Argentina. It must be born in mind that a foreign insolvency proceeding may not be invoked against creditors whose credits are payable in Argentina in relation to local assets or the annulment of acts binding upon debtor, unless otherwise prescribed by applicable international treaties.

In the case of bankruptcy, if parallel proceedings are opened in Argentina and in a foreign country, creditors in the foreign bankruptcy proceeding are subordinated to creditors in the Argentine bankruptcy proceeding.

A creditor whose credit is exclusively payable in a foreign country and has not been admitted in a foreign insolvency proceeding may only prove claims in a local insolvency proceeding based on comity. Secured creditors are not subject to this provision since their claims are governed by the “lex situs”, meaning that the court where the secured property is located has jurisdiction.

Aside from the system created by the Argentine laws, there are two (2) international treaties binding upon Argentina that establish certain insolvencies mechanisms.

The Treaty of Montevideo signed on 1889 is applicable among Argentina, Peru, Bolivia and Colombia. The Treaty of Montevideo signed on 1940 is binding upon Argentina, Uruguay and Paraguay. The 1940 treaty includes all types of insolvency proceedings while the 1889 treaty deals exclusively with liquidation proceedings.

As for the enforcement of local insolvency proceedings by foreign courts, the following section will provide some examples.

Enforcement

The enforcement of insolvency proceedings by foreign courts is subject to the specific applicable regulations in each particular foreign state. For ease of reference, some examples of how local insolvency proceedings have been enforced in the United States of America (“US”) are described below.

There are two ways by which a foreign debtor may resolve cross-border insolvencies within the US legal system: (i) dual plenary insolvency proceedings; and (ii) Chapter 15 of the US Bankruptcy Code ancillary proceedings (“Chapter 15”).

Within the US Bankruptcy Code, a foreign debtor may qualify as an eligible Chapter 7 or Chapter 11 if it has some property or a place of business in the United States. In this case, a full bankruptcy proceeding will be voluntarily or involuntarily opened parallel to other bankruptcy proceedings in other jurisdictions. The relationship between both bankruptcy proceedings would be based on comity. However, this proceeding has been found to be costlier, time-consuming and cumbersome for foreign debtors due to the substantive and procedural requirements that must be met under the US Bankruptcy Code. In turn, when dealing with foreign debtors, the new Chapter 15 has established a limited mechanism to prevent the commencement of a full scale bankruptcy proceeding.

Chapter 15 facilitates the recognition of foreign insolvency proceedings, affording certain relief mechanisms to aid such proceedings. In turn, a debtor who opens a restructuring proceeding in Argentina may

obtain its recognition and enforcement in the United States pursuant to Chapter 15, which has replaced Section 304 of the such Code.

Ancillary relief may be sought to prevent creditors from initiating concurrent proceedings in the United States, and at the same time to facilitate the preservation of the debtor’s assets in that country. The petition must be filed by a “foreign representative”, which is defined in the US Bankruptcy Code as “a person or body (...) authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding”¹. The foreign representative must file a verified petition seeking recognition.

The US court will determine whether the foreign proceeding may be classified as a “main” or a “non-main” proceeding. In the former case, the court will automatically order the stay of proceedings by creditors against the debtor’s assets in the United States. In the latter case, the court has discretion to grant the ancillary relief, depending on whether all creditors are afforded sufficient protection.

Upon recognition by the court, not only does the stay of proceedings take place, but also the foreign representative is thereby authorized to administer the foreign debtor’s assets.

The question has arisen whether an Argentine APE may seek judicial recognition through the ancillary relief set forth in Chapter 15 (formerly Section 304). The problem was solved by the US Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”) in re Board of Directors of Multicanal S.A. In that case, ARC (a Delaware creditor) resorted to the Bankruptcy Court alleging that the APE presented by Multicanal S.A. (“Multicanal”) before an Argentine court violated its rights. Multicanal S.A. responded by filing a petition under Section 304 of Chapter 11 of the US Bankruptcy Code seeking the stay of any actions initiated by the claimant. The Bankruptcy Court rejected ARC’s demands. Some months later, the Bankruptcy Court recognized the Argentine court endorsed APE. Similar decisions have been adopted by United States courts in Telecom Argentina S.A. and Cablevisión S.A.

1. 11 U.S.C. § 101(24) (2006).