

## Restructuring & Insolvency 2013 – Argentina

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### Actions prior to a formal proceeding

1 What duties do directors or officers of a company owe creditors or other third parties if the company is insolvent or in financial difficulties, or has negative net worth? Is there a standard of care towards third parties? In what circumstances can officers and directors be found civilly or criminally liable for continuing to operate a company in financial difficulties? In practice, are such liabilities commonly enforced?

The Argentine Corporation Law, No. 19.550, contains a special section on the responsibility of the administrators of a company. For instance, article 59 states that “Administrators and company representatives must perform their duties with loyalty and diligently as a good businessman. Those who do not comply with such obligation will be held unlimitedly and jointly responsible for damages both for their actions and omissions.” Therefore, those who fail to comply with these obligations and cause the insolvency or financial distress of a company, or lead the company towards a negative net worth will be responsible not only with the company’s assets but with the administrators personal assets. Article 279 also states that both shareholders and third parties affected by any such situation will be able to initiate an individual responsibility claim against the directors in order for them to be held liable for the damages caused.

The legal system states that the company administrator is not held responsible for the risks associated with the management or the outcome of the business. He only assumes the obligation of means as described in article 59 as being a “good businessman”, which means he must take care of the operability of the company and not its successfulness.

Notwithstanding, the jurisprudence has interpreted these articles in numerous cases. For instance the National Commercial Chamber of Appeal, Room D on 22 September 2010 in *Pérez, Héctor Pedro et al vs. Scharer S.A.I.C. et al* stated that article 279 is not meant to repair indirect damages. That is to say, it is not meant to bear more damages, and of the same nature, than those borne by the company or the shareholders, but only those direct damages borne directly and personally by the associate or partner.

Regarding the civil responsibility of the administrators for the direct damage, the major part of the doctrine and jurisprudence sustain that the administrators will be held responsible in certain circumstances where a foreseeable breach of the contractual obligation is present. Such circumstances are based on the situation of the net worth of the company and other objective and subjective factors that influence the expectation of a reorganisation or recovery of the company.

Finally, administrators could be held criminally responsible should the company become insolvent only in those exceptional circumstances expressly specified in the Argentine Criminal Code, for instance, in the event of a fraudulent bankruptcy or an illegal association in order to commit a felony.

2 What actions are available to creditors (secured or unsecured) prior to a formal insolvency proceeding to recover on a defaulted loan or obligation of a debtor? Are there any expedited formal proceedings?

Those creditors that have a security on their credit, such as a mortgage security or a personal guarantee, will be able to initiate an expedited procedure. These procedures usually last around two years. Yet in Argentina, for instance, the mortgage executions were suspended by provisional laws under the “National Emergency” framework. Before initiating a judicial proceeding, the parties are summoned to mediation, where they are given the opportunity to cancel their pending obligations before going to trial in an extrajudicial proceeding. Finally article 85 of the Bankruptcy Act states that at any given time and prior to the declaration of bankruptcy, the creditor can request the judge to pronounce precautionary measures to protect the debtors’ net worth. There are certain evidential requirements for the grant of precautionary measures such as the plausibility of the invoked right and danger in any possible delay. Some of these preliminary measures are the injunction on the transfer of the debtor’s property or the controlled intervention in its business.

3 Can a creditor that has secured debt foreclose on the collateral or sell collateral in a private sale? If so, what rules exist to ensure the sale or foreclosure generates the maximum amount of sales proceeds possible? Can lenders take possession or control of the underlying collateral? Can they take control of the board by exercising voting rights attached to pledged shares? Are there any accelerated procedures available for secured creditors, and if so, under what circumstances can they be used?

Article 23 of the Bankruptcy Act regulates the non-judicial foreclosures by auction. It stipulates that the holders of secured loans (property mortgages or liens on property) are entitled to execute the goods that secure their credit through non-judicial auction or, if applicable, partners with unlimited liability, must render accounts in the legal proceeding by accompanying the titles of their respective credits and vouchers, within 20 days after the closing of the auction. Once the judge issues an injunction, the creditor loses in favour of the legal proceeding and remaining creditors 1 per cent of the amount of credit for each day of delay. Once the individual creditor collected his debt, the remainder of such auction must be deposited within the period set forth by the judge. Thus a control is set by this private sales framework to safeguard the debtors’ assets and obtain the highest possible revenue from the sale. In the foreclosure proceedings neither an auction nor the adoption of precautionary measures preventing the debtor to use the property are permitted, if a request for the verification of the credit and its privilege within the insolvency process has not been filed.

In a bankruptcy procedure, those creditors with mortgage, pledge or guaranteed warrants may claim payment at any time by selling the property or good once their credit and privilege are verified and the creditor deposits a bond.

Security in the form of capital contributions or pledged shares does not entitle the creditor to exercise any right or control in the board of directors or

any right to vote, given that the owner or shareholder (ie, the debtor) retains all economic and political rights.

There are no special or summary proceedings for secured creditors. But there is an expedited proceeding for those who possess expedited credits and securities or holders of instruments such as cheques and promissory notes.

#### 4 Are there legal or regulatory concerns that secured creditors should consider in connection with a sale or foreclosure?

As a general principle, in limited liability entities (both limited liability company and corporations) the responsibility of each member is limited to the capital subscribed. However, the Corporation Law authorises the lifting of the corporate veil to take direct legal action against the owners. This can only be requested in exceptional and specific conditions. Creditors may request the application of this doctrine in cases where there is abuse of rights or defrauding the law. In recent years, the courts have found the shareholders of the limited liability companies responsible in cases of tax evasion or labour fraud such as for unregistered employment cases.

### Formal proceedings

#### 5 What types of insolvency proceedings are available in your jurisdiction? Are different insolvency proceedings available for individuals and companies? Is there any distinction made between "preventative" insolvency proceedings and "actual" insolvency proceedings?

In Argentina there are two procedures to resolve insolvency or default: (i) the reorganisation and (ii) bankruptcy. Both are similar procedures affecting natural and legal persons including those where national, provincial or municipal government takes part.

A bankruptcy proceeding can arise from the conversion of a reorganisation of creditors to bankruptcy, or a direct request made by the debtor or creditor.

#### 6 On what grounds may a debtor company be placed into an insolvency proceeding? Who may do this? What are the grounds for a voluntary proceeding? If an involuntary proceeding is filed, must a bond be posted or is there any risk of liability to the creditor or creditors who filed the action? What effect, if any, does a filing have on a subsidiary or affiliate of the debtor? Are there any grounds for consolidating or coordinating insolvency proceedings involving related parties?

The debtor in default can request its own reorganisation. In limited liability companies the board of directors must decide to reorganise and this decision must be later ratified by the governing body or shareholders' meeting. After such request, the judge has five days to issue a statement and make a pronouncement. By means of Law No. 26.684, a further requirement was added to such reorganisation request to include a list of the current payroll, detailing address, category, seniority and last remuneration. An affidavit by a certified public accountant must be issued with the statement of other labour debts and other debts with social security agencies.

Furthermore chapter VI of the Bankruptcy Act deals with reorganisation in cases of clustering (economic group). The debtor may apply for the reorganisation of creditors of a whole group of companies including subsidiaries and affiliates, if one of the company's defaults affect the other companies. Meanwhile chapter III provides for the extension of bankruptcy to groups. This extension of bankruptcy is extended to partners with unlimited liability, to controlling companies of defaulted ones, and to those defrauding creditors.

#### 7 What notifications and meetings are required after the company has been placed in an insolvency proceeding? Do the insolvency laws recognise bondholders under an indenture? What must they show to prove their ownership interest in the underlying debt?

Once the judge opens the reorganisation proceedings, the debtor is automatically notified of various issues such as the setting of the hearing to appoint a trustee, the date for the verification of creditors' claims, publication of edicts, injunction on the transfer of the debtor's property, the order for filing the corporate and accounting books. The debtor and the employees are notified to attend the evidence gathering proceeding. The debtor or its representative must appear

in court to receive notifications every Tuesday and Friday, except in those cases where he will be notified by edicts. Meanwhile the trustee will send notification letters to all reported creditors and to the members of the steering committee who will be appointed to represent all creditors. Once the debtor is notified of the opening of the proceeding, he must present all proof deemed appropriate to his right, within five days.

The bondholders will participate in the reorganisation by verifying their claim. In case of bankruptcy if the debtor issued and has unpaid debentures or bonds, if they have special security, the same right governing mortgages or pledges in bankruptcy is applied. If they are floating or common secured, the fiduciary acts as executor with the trustee.

#### 8 How are contingent creditors dealt with? Are inter-company or affiliate claims treated differently from other creditor claims in terms of recovery or voting? If so, has this been challenged and with what result? Are there special rules for certain contracts?

There is no special treatment for contingent claims, all of them are "verifiable" as unsecured credits once their due amount is determined. Regarding the claims of the debtor's affiliates or subsidiaries there are no special treatments. However, many often subsidiary and affiliate relationships are used to obtain the necessary consents in the voting of the proposed agreement in a covert manner. It is clear that this manoeuvre is fraudulent and such votes will not be accepted if the judge takes due note of the circumstances.

There are other cases expressly provided for in the legislation relating to certain contracts, for example public services, which cannot be suspended in the reorganisation procedure or pending contracts which have to and could be honoured.

#### 9 What effect does the commencement of an insolvency proceeding have on the debtor and its operations? Is there an automatic stay that prevents third parties from acting against the debtor? Can a debtor terminate or reject contracts to which it is a party?

The main effect of a reorganisation procedure is that the debtor retains control of its assets and obligations but under strict supervision of the trustee and requires special permission for certain actions. Third parties may not take action against the reorganisation procedure for obligations prior to the filing of such procedure and must verify its credits in the insolvency process.

Meanwhile, in the bankruptcy process, there are personal effects as well as effects on the existing legal relationships. The debtor is not allowed to dispose of assets, additionally he is not allowed to leave the country without prior consent of the court, and all correspondence and communications are intercepted and redirected to the trustee. Related to the effects on the existing legal relationships, there is a "period of suspicion" on all those actions between the default and the actual bankruptcy declaration. All actions throughout this period are considered ineffective.

#### 10 In what circumstances could transactions entered into before an insolvency proceeding be challenged? How far does the look-back period extend? Who can bring such challenges and who bears the burden of proof? How frequently are such challenges made and upheld?

As stated above, the review period known as the "period of suspicion" occurs between the default and the actual bankruptcy declaration. These operations shall be declared null and void by an operation of law. Such is the case of free of charge donations, debt prepayments of debts before they were due or the constitution of a mortgage or pledge regarding obligations that have not matured.

#### 11 How are secured creditors treated in an insolvency proceeding? How do they protect their collateral, particularly liquid assets? Can they seek remedies? Must their approval be obtained to use or dispose of their collateral? How are unsecured creditors treated? How are equity holders treated? Could an equity holder recover prior to creditors being paid in full?

The secured loans are considered by law as special with privilege and there-

fore will collect their debt once other preferred credits are satisfied, such as reorganisation of creditors' expenses, labour debts and tax debts. If the creditor proves that there is a plausible risk on any of the goods or property pledged or on mortgage, special precautionary measures can be requested to protect the property. In all cases, the debtor requires the trustees' approval of any sale. Debts with no guarantee or privilege are considered unsecured and will collect their debt pro rata should there be sufficient funds left. Shareholders will only collect if all liabilities are settled.

## 12 What is the effect of an insolvency proceeding on current and retired employees?

In the reorganisation process, the company will continue to operate under the supervision of the trustee and court. All employees with employment and labour claims arising prior to the filing of the reorganisation process will also maintain their rights once they have verified their credits and were granted a prompt payment. The recent legislative amendment by Law No. 26.248 dealt with several changes concerning the employees' privileges in insolvency proceedings to maintain their employment. In addition, a 3 per cent of gross monthly income reserve was created, in order for the trustee to distribute to the labour claims and employment credits in an advance manner. Perhaps the most important modification is the incorporation of equal powers of labour or work cooperatives to acquire the shares or assets of the debtor, to block certain actions or participate in decisions in either reorganisation or bankruptcy.

Bankruptcy does not dissolve the labour contract, but it suspends it as a matter of law for 60 days. After such period with no agreement on the continuation of the company, the contract is dissolved as of the date of declaration of bankruptcy. All credits arising from the latter can be verified as per the provisions of articles 241, subsection 2 and 246, subsection 1. If the continuation of the company is decided within the said period, the labour contract will be considered to be partially varied, yet the worker will be able to claim their rights to request verification of the accrued compensation damages.

## 13 Do directors or officers of companies in insolvency proceedings suffer any consequences?

All members of the board of directors must fully cooperate and immediately comply with the judge's summons and request permission to travel abroad. In the case of bankruptcy of companies, the disqualification extends to those members of the managing body who represented the company as from the date of the default and for a full year after the bankruptcy declaration.

## 14 How do the various types of claims rank in an insolvency proceeding? Do some claims automatically have higher priority? May claimants with lower priority receive consideration under a reorganisation plan even though claimants with higher priority are not paid in full?

Argentine law is based on a system of "privileges" ranking creditors. The law also imposes some privileges and the priority of certain creditors, including expenses for construction and conservation of the property as long as it still exists in the debtors' net worth; wage claims (including the past 6 months of wages, compensation, etc); credits on taxes, rates, mortgages, pledges, warrants and floating debentures and bonds or with a special warranty.

## 15 Are local creditors treated differently from foreign creditors in practice? What laws exist to prevent such disparate treatment? What factors contribute to how effectively those laws are applied?

There is no discrimination between local and foreign creditors. Naturally foreign creditors will have higher costs regarding counsel and collecting fees. The law determines that the verification of the creditor whose claim is payable abroad is subject to proving legal reciprocity.

## 16 What level of creditor support is needed to approve a reorganisation plan? Can secured creditors and other priority claim holders that do not approve a reorganisation proposal be "crammed down"? Are there any substantive criteria that a plan must satisfy? Must hearings take place or documents be distributed?

The approval of the debtors' proposal requires the absolute majority of the creditors within all categories, representing two thirds of the calculating capital within each category. For special privileged creditors, unanimity is required. Those creditors with preferred credits will be able to request either the payment through the sale of the guaranteed object or property or the bankruptcy of the debtor. Yet only those creditors with preferred credits who gave up on their privileges will be able to take part in the approval of the proposal.

For the agreement to be valid, it must comply with all the procedures and requirements in the Bankruptcy Act. In particular it must respect the principle of equality of the proposal in each of the categories, and there cannot be any provisions that depend on the debtors' will or that are abusive or fraudulent or evasive as to the law.

As for the cramdown (which is not identical to the common law concept), the law provides that once the exclusivity period has expired without having been able to obtain the consents for the reorganisation agreement, bankruptcy is not declared. A register is opened where creditors and even the work or labour cooperatives may acquire the company to continue operations and maintain the source of employment. The exclusivity period is the period granted by law for the debtor to present a proposal and obtain the needed majorities to avoid bankruptcy. The cramdown has a specific procedure within the legislation that includes the appraisal and the judge's final decision.

## 17 May creditors trade their claims during the course of a reorganisation? What impact, if any, will it have on voting for a plan?

In practice private agreements with certain creditors who collect their credit based on the agreement out of the reorganisation procedure declaring their conformity with the proposal are common. This is not lawful given that the law authorises the agreements once the credits are verified within the reorganisation proceeding.

## 18 What kind of court supervision is there in each type of insolvency proceeding? Is a trustee or receiver (or other court-appointed officer) appointed to supervise the debtor or can the debtor continue to control operations during the insolvency proceeding? Can creditors form creditors' committees? What formal role do creditors (or creditors' committees) play in the process? Do insolvency proceedings permit competing reorganisation plans? Are the judges that supervise and administer the process specialised? Does a debtor company or its creditors have any power to select or influence the selection of the trustee, receiver or other court-appointed officer?

Once a bankruptcy proceeding is opened, a hearing date is set where the trustee is drawn from a list of candidates who have already signed up in the courthouse. The trustee will be responsible for monitoring and supervising the debtor's control of the company. There is also a steering committee, which consists of the three unsecured creditors with the highest amounts due as per the debtors' declaration. Together with these three, a representative of the workforce will be elected by all of them. This committee acts as a controller until the judge makes his decision regarding the creditors' categories. Only then will a new committee be formed and it will consist of at least one creditor per established category, where the creditor with the highest amount due will represent his category and two new workforce representatives elected by the workers must join the worker originally assigned in the previous committee. All previous members will terminate their mandate.

However in the bankruptcy process, since the debtor is divested from its assets, in the resolution that declares the bankruptcy, the judge orders the appointment of a trustee to manage the assets and decide upon its disposition as per the law. The debtor's assets are passed to the trustee following their seizure and completion of an inventory.

The system guarantees the complete independence of the trustee so that none of the parties (bankrupt or debtor) can influence the appointment. Once the trustee is appointed, however, attempts to negotiate start.

Notwithstanding the above, the competent commercial court will have the last word on the proceedings.

19 May a debtor obtain financing while in insolvency? Will the lender enjoy special rights or preferences for providing DIP financing? Can a DIP lender “prime” or come ahead of an existing lien? What difficulties typically arise in obtaining such funding or any required approval thereof?

Argentine law is silent regarding further financing while in insolvency. Since it is a system in search of the liquidation of the company, it is not likely for the debtor (in a bankruptcy process) to obtain further financing. The ability to obtain credit or acquire new obligations is limited to the reorganisation process where the debtor retains the company’s management, and it will also be able to obtain credit in the cramdown proceedings. However, banks are quite reluctant to provide further financing to companies in distress and with financial problems. They usually request for additional information or assurances that support their ability to repay.

20 If a debtor company has issued debt securities, does your jurisdiction’s insolvency or securities law provide for any exemptions from registration of those securities under applicable securities law?

If the company has issued debt securities, the law provides a mechanism whereby after a board meeting the holders of bonds or notes shall present them to be verified in the insolvency process.

21 May creditors offset debts owed to them by the debtor in an insolvency proceeding? Does this require court approval? Can creditors recover the expense of participating in the process? How?

In the context of an insolvency process ultimately all actions require court approval. The creditors who filed to verify their claims against the debtor but also had debts with them will be able to set them off. The law was expressly amended in 2011 giving the labour and work credits the possibility to set off their credits with the purchase price in a cramdown.

22 If a debtor company has tax losses prior to a reorganisation, will it retain and be able to use such losses after it emerges from the reorganisation?

Some taxes can be passed on to the corporate reorganisation in the following cases:

- The accumulated defaulted taxes which are not prescribed (ie, less than 5 years old) and are still claimable.
- The latter does not apply when there was a transfer of the company’s goodwill or when the company was absorbed by another one. In particular it is applied in one-man companies or companies exclusively formed by people both if they are the transferring the goodwill or being absorbed.
- The tax valuation of the material goods the exchange goods and immaterial goods, despite the value it was assigned at the time of transferring the goods.
- The depreciation systems of both immaterial and material goods.

Notably, it has been argued whether this short list of rights and obligations is exhaustive. We believe that the list is not exhaustive since in the case of corporate reorganisation statute provides that the continuing company will have the same tax attributes as its predecessor in the proportion of the transferred property.

23 What happens at the end of an insolvency proceeding? If there is a discharge of prior claims, is it permanent or subject to any conditions subsequent?

The reorganisation proceeding is a legal mechanism for the debtor to restructure all its liabilities up to the date of the filing of the proceeding, but not for those debts acquired after such filing. Thus, the debtor may encounter financial difficulties thereafter and should the company fail to fulfil its obligations under the reorganisation agreement, it can turn the reorganisation procedure into a bankruptcy. The company may not be in a reorganisation procedure again for a year following the judicial declaration of compliance of previous reorganisation proceeding. It will not be able to convert a declaration of bankruptcy into a reorganisation procedure.

24 How long do restructurings last? Is there a formal deadline?

The law does not stipulate a deadline to complete the process, but it does set deadlines for each step or action. It would be expected to last at least two years.

25 Is there an expedited or summary proceeding available to obtain court approval of an out-of-court restructuring plan? If so, what types of claims and creditors may participate and how does the process work?

In our legal system there is what is called “preventive extrajudicial agreement”, which is a private agreement between the debtor in default or in economic or financial distress with its creditors, that must be judicially approved later. In this situation, a negotiation and the final private agreement must be presented to the commercial judge to appraise the legality and the fairness of the agreement. The extrajudicial proposal must have the approval of the absolute majority of unsecured creditors representing two thirds of all unsecured debt. In order for a thorough appraisal from the judge, the company must present further documentation such as the composition of assets and liabilities, lawsuits and such. The extrajudicial agreement, once approved by the judge, has the same effect as that agreement agreed upon judicially.

#### Additional considerations

26 Does the government tend to play an active role in insolvency proceedings? What factors determine this?

Generally the central government does not usually take an active role in this type of legal proceedings. It is only by the intervention of the legislature in the enactment of laws, or through the judiciary when applying the said laws. This will depend on the different government policies and different levels of interventionism. A clear example of interventionism that has occurred several times in our country is seen in the suspension of the foreclosures.

27 How are extraterritorial bankruptcy or insolvency proceedings recognised? Could a bankruptcy or insolvency judgment abroad substantially delay an insolvency proceeding in your jurisdiction? Does your jurisdiction contemplate ancillary or parallel insolvency proceedings with respect to a foreign proceeding? If a company organised under the laws of your jurisdiction entered into extraterritorial bankruptcy or insolvency proceedings, would those proceedings be recognised in your jurisdiction?

Our system provides the possibility of parallel procedures. Thus, if a debtor is declared bankrupt abroad, this is sufficient for the same or any creditor to request the opening of such a procedure in our country to collect its debt. Never can a bankruptcy proceeding abroad invoke any right to infringe the rights of those creditors in the country.

On the other hand, if a bankruptcy is declared in Argentina when there is process abroad, foreign creditors will collect their debts on the remaining of the local bankruptcy.

28 How frequently do debtor companies reorganise and emerge from bankruptcy as opposed to liquidation? What factors determine this?

In Argentina the reorganisation process has been and still is vital to the private sector. It is common for companies to reorganise and try to restructure all the liabilities to succeed. In fact, many times it has been good business to consider a reorganisation process, since it implies the reduction in the due payments with significant waiting periods involved that allows the company to financially stabilise. On the other hand, it is very convenient for those companies with tax debts, since our tax collection agency has very favourable conditions for these situations.

29 What is the appeal process for an insolvency proceeding in your jurisdiction and what effect do appeals have on approved plans? How long do appeals take to resolve?

In our jurisdiction, and as a general principle, decisions are final, that is to say, not subject to further review except in those cases expressly contained in the Bankruptcy Act.

In those cases provided by law where an appeal is considered, the previous resolution does not apply until the decision of the Court of Appeals is final.

For example, the debtor may appeal for reconsideration when bankruptcy is declared as a result of the request of the creditor. The deadlines depend on each course and type of reconsideration, but in our previous example, the reconsideration action must be brought within five days of the notification of the declaration of bankruptcy. The judge must then rule within ten days of the filing of the reconsideration request.

30 Are there any common techniques that debtors use to manipulate or control insolvency proceedings? Have any of these techniques been challenged, and if so, what was the result?

Mainly in the reorganisation of creditors, debtors try to “negotiate” or “manipulate the existing loans” with their creditors to achieve the best possible composition of committees that will vote on the proposed preventive agreement. To obtain this, the debtors usually increase or create other fictitious credits, or make payment arrangements with certain creditors out of the reorganisation scheme requesting in return a vote in favour of the proposed agreement. This agreement most surely complies with the requirements for its legal judicial agreement but it will imply a substantial reduction in the amounts the creditors will receive.

Since the reorganisation is fairly convenient in financial terms when there are large tax debts, another usual case is the “manufacturing” of private debtors to comply with the principle of multi (or several) debtors.

31 What impact, if any, has the ongoing volatility in the global credit markets and rise in corporate restructurings had on your jurisdiction's insolvency regime? Are any amendments to your jurisdiction's insolvency laws envisaged?

Obviously, the lack of credit or the increasing in market risks is causing more companies to initiate insolvency proceedings. There is also a lack of predictability and much legal uncertainty due to constant regulatory changes.

There are no current scheduled new amendments to the Bankruptcy Act. Law No. 26,684, published in the Official Gazette on 30 June 2011 amended the act to focus on the rights of workers. The purpose of the introduced amendment was to create mechanisms to ensure a continuing operation of the company either in a reorganisation or bankruptcy proceeding, protecting employees, suppliers and the assets of that company.

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