RULES OF INTERNATIONAL PRIVATE LAW, PRIORITIES ON INSOLVENCY AND THE COMPETING RIGHTS OF FOREIGN AND DOMESTIC CREDITORS, UNDER THE ARGENTINE BANKRUPTCY LAW No 24522

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I. INTRODUCTION

Cross-border insolvencies, and their court-supervised proceedings in Argentina, give rise to numerous controversial questions which are real headaches for people involved with them. This situation seems to be common all over the world. The difficulty in identifying, comparing and harmonizing the rules of International Private Law seems to be an equally worldwide phenomenon. The study of Conflict of Law rules concerning insolvency with foreign elements, resembles the task of putting together a jig-saw puzzle, some of whose pieces are invariably missing and whose final design is unknown.

Argentine law of cross-border insolvencies is no exception, being likewise difficult and somewhat obscure. For these reasons, I would like to start by giving the following warnings:

a. Many problems of cross-border insolvencies do not have specific provisions in our written law (statutory laws or international treaties), and they have never been decided by judgments that could serve as judicial precedents.

b. Some other problems have specific provisions in Argentine written law but, frequently, the interpretation of those rules remains within the field of doctrinal or theoretical controversy, due to the absence of judicial precedents regarding those problems.

c. Finally, and quite the contrary, other problems of cross-border insolvencies do have legal provisions in our written law and the latter have been applied by our courts. Thus, considering these rules have already been tested, it is possible to predict about its construction hereafter.

I also wish to give a collateral warning: in our legal system -a Roman Law system-, the judgments are not, in principle, binding precedents for future causes: the "stare decisis" rule is unknown to us. However, in Argentina, judicial precedents are the most valuable auxiliaries for interpretation, and legal forecasts are usually based on them.

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Judicial precedents about cross-border insolvencies were scarce in the past. Political economics in Argentina was very closed from 1930 to 1990. During the last ten years, however, a dramatic opening of our economy has taken place and we are making progress with the integration process in the "Mercosur" (Southern Cone Common Market); at the moment, an international customs duties agreement between Brazil, Paraguay, Uruguay, and Argentina, with the purpose of establishing in the near future a full common market of about 220,000,000 inhabitants. The process seems to be an irreversible one. Its consolidation would increase the number of cross-border insolvencies in South America.

In brief: only a few controversial questions of cross-border insolvencies have an approximate predictable solution at present in Argentina. On the contrary, the solution of many others is still uncertain. Consequently, this report will provide an outline solely of the former.

II. ARGENTINA HAS TWO REGIMES OF INTERNATIONAL PRIVATE LAW FOR CROSS-BORDER INSOLVENCIES

There are two different Argentine regimes for cross-border insolvencies: one, deriving from international sources, contained in the Montevideo Treaties of 1889 and 1940 and the other, from national statutory sources, contained in the provisions of the Argentine Bankruptcy Law No. 24522 (ABL, hereinafter)[1[1]].

The Montevideo Treaties of 1889 and 1940 do not unify the insolvency laws of the countries that are parties to them; on the other hand, these treaties do unify numerous rules of International Private Insolvency Law.

The experience to be culled from the Montevideo Treaties and their application in various causes is an interesting field of observation. It allows empirical conclusions to be reached, especially about ineffective provisions and systems, which do not provide quick and efficient solutions to cross-border insolvency problems.

The Montevideo Treaty of 1889 is binding in cross-border insolvencies involving the following countries: Peru, Colombia, Bolivia, Paraguay, Uruguay and Argentina, whereas the Montevideo Treaty of 1940 binds solely Argentina, Paraguay and Uruguay. Cross-border insolvencies with international elements from any other country of the globe, are dealt with in Argentina by the rules contained in various provisions of the ABL, (chiefly, arts. 2, 3 and 4).

This report provides an outline solely of the controversial questions of cross-border

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[1[1]] In DYE 3, p. 157, was published my article titled “Rules of International Private Law, Priorities on Insolvency and the Competing Rights of Foreign and Domestic Creditors under the Argentine Bankruptcy Law No. 19.551”. A few months later, the Argentine National Congress passed the Bankruptcy Law No. 24.522, replacing the former regime of the Bankruptcy Law No. 19.551. The new regime is in force since August 1995. I have considered convenient to adapt the above-cited article to the new law, so as to treat the same issues, but under a different legal regime

insolvencies ruled by the ABL.

III. A SCHEMATIC APPROACH TO THE NEW REGIME OF ARGENTINE BANKRUPTCY PROCEEDINGS (ABL No. 24522)

The ABL regime is applied to both natural persons and artificial persons. The new law 24522 is also applied to government owned corporations and other state companies; however, it does not fully apply to financial institutions and insurance companies, which are generally dealt with under other laws. Mutual companies and pension fund companies are completely excluded from the ABL regime.

There are basically two types of insolvency proceedings, which are regulated by the ABL:

A. Reorganization proceedings (*"concurso preventivo"*)

The *"concurso preventivo"*, tending to the business reorganization of the insolvent debtor. This I shall call "reorganization proceedings" hereinafter. Its principal features are:

a. Only the debtor, or the management of the insolvent company, is entitled to initiate a reorganization case. The authority to make the filing decision lies solely with the debtor and his management team. Creditors are not able to initiate the reorganization case formally. However, indirectly they may force the debtors' decision, filing a petition for the initiation of liquidation proceedings.

b. Under the former ABL, the Argentine Security System and the employee claims had "super-priority" in bankruptcy reorganization cases: the debtor was not eligible for reorganization proceedings if he was delinquent on the payment of some of these debts (former ABL, art. 11 inc. 8). In fact, this legal provision meant that these debts had to be paid prior to the filing of the petition for the commencement of the reorganization case. The new ABL 24522 has abolished this "super-priority" so as to facilitate access to reorganization proceedings.

c. During the reorganization proceedings, the authority to make business decisions lies with the debtor and its management, who naturally remain in control of the company's assets. However, there are some limits, and a functionary called a *"síndico"* is appointed by the court from a list of independent accountants. The acts of ordinary business administration are subjected to the supervision of the *"síndico"*; some other acts are prohibited, for example: gratuitous transactions; finally, the acts that exceed the ordinary business administration are subject to previous authorization of the court. The new ABL 24522 has also established *"comités de acreedores"* (creditors' committees) in order to supervise and to give advice.

d. Debts are usually paid with adjustments made as to their amounts, deadlines, etc, according to an agreement or plan approved by the creditors and by the court. Normally the

agreement is carried out solely with the "general or ordinary creditors", (*"acreedores quirografarios"*; see: item IV.); the plan must be approved by a majority of the latter and by the judge. The debtor must satisfy the agreed terms, paying the obligations he has undertaken to meet. Usually, the payment is agreed to be carried out in money, (local or foreign currency), bonds or shares; on the rare occasion, by means of fixed assets.

e. The new ABL 24522 tends to facilitate the agreement allowing the debtor to propose different terms of agreement to its creditors. It also enables the creditors to be grouped in different classes, so as to offer different proposals for agreement to each class. The powers of the bankruptcy judge to reject the plan previously approved by the creditors have been radically diminished; the judge's confirmation of the agreement will be, from now on, a formal act.

f. Perhaps the most important reform introduced by the new ABL 24522, art. 48, is the so called *"salvataje de la empresa"* (business salvage or rescue) by the creditors or by any other third party interested in the acquisition of the firm. This mechanism may be used in the reorganization proceedings of certain companies (i.e.: corporations, limited liability companies, government owned companies and cooperative companies), after the failure of the debtor's attempts to arrive at an agreement with its creditors during the first period of the reorganization proceedings (*"período de exclusividad"*). Once it is clear that the debtor has not arrived at an agreement with its creditors, instead of converting the reorganization proceedings into liquidation proceedings, the judge opens a new period (*"período de salvataje"*) in an attempt to preserve the business as a going concern. During this period, some creditors and/or third parties may offer proposals for agreement to the company's creditors. If the offerers obtain the majorities (from the ordinary creditors first, and -in some cases- from the shareholders, later on) required by the law, and the judge approves the plan, liquidation is avoided and the offerers become the owners of the company.

B. Liquidation proceedings (*"quiebra"*)

The chief purpose of the *"quiebra"* is the liquidation of the debtors' assets, in order to distribute the money thereby obtained among the creditors. Hereinafter we shall use the term "liquidation proceedings" for this instance. Its principal features are:

a. The liquidation petition may be filed either by the debtor or by a creditor. It may also be adjudged by the indirect conversion of a reorganization attempt. For example, the debtor loses the voting session or if the plan is approved its terms are not fulfilled, (the debtor does not meet his obligations). Consequently, reorganization proceedings become liquidation proceedings. There are other less frequent hypotheses that also bring about liquidation proceedings, by the "spreading" (*"extensión"*) of prior bankruptcy proceedings.

b. The company's management loses the control of its assets, transferred to the *"síndico"* who takes over its liquidation in order to distribute the proceeds among the creditors. The company itself ceases to exist.

c. The personal liabilities of the company's administrators are severely increased

when reorganization attempts fail. In bankruptcy liquidation cases, the administrators of the insolvent company may face the following risks: (i) Personal disqualifications (for example: the prohibition to be administrators in other companies, or to operate businesses as sole proprietors), which last one year, except if they are considered to have been involved in criminal acts (in this case, disqualifications could last for several years); (ii) Legal obligation to compensate losses with their personal assets, when, acting with malice, have produced, facilitated, permitted or aggravated the insolvency or the reduction of the company's estate; (iii) Personal bankruptcy of the administrators, by extension of the company's bankruptcy liquidation, in some extreme cases of abusive acts.

d. In the event of liquidation, payments are made according to a distribution statement, a balance sheet with different classes of creditors ranked according to their priorities. These priorities determine the percentages that are to be collected. Generally, the creditors lower down on the list obtain very poor distribution rates, if indeed anything at all.

e. Payments are made in court and in a standardized form, in the so called *"moneda de quiebra"* ("bankruptcy money"). This is the local currency which creditors receive at different distribution rates according to their priorities (an outline of the regime of priorities is provided in the next item).

The differences between reorganization proceedings and liquidation proceedings are important under the Argentine rules of Conflict of Laws for cross-border insolvencies. Consequently, the rule of local preference, which subordinates the credit payable abroad belonging to foreign bankruptcy proceedings, only applies in liquidation cases.

IV. A SCHEMATIC APPROACH TO THE ARGENTINE REGIME OF PRIORITIES IN BANKRUPTCY PROCEEDINGS: CREDITORS' PREFERENCES

A. Priorities under Argentine law

The Argentine law regime of priorities has always been somewhat complicated. There are -and there have always been- different classes of creditors according to their rank or degree.

The new ABL No. 24522 contributes two important new provisions to this issue:

a. Hereinafter, the ABL is the solely comprehensive source for the identification of all the priorities in bankruptcy proceedings (ABL, art. 239). Other statute laws are no longer sources of creditors' preferences in the event of debtors' bankruptcy.

b. The "super-priority" in favor of the Argentine Security System in the bankruptcy reorganization cases (former ABL No. 19551, art. 11 inc. 8) has been abolished.

I shall provide an outline of the regime of priorities, avoiding details that would

make its comprehension difficult for an observer not familiar with Argentine law.

What is the rank of credits in Argentine bankruptcy proceedings?

First, the *"créditos con privilegio especial"* ("especially privileged credits").

These are secured credits with rights over specific property. Creditors of this kind have the priority over all other creditors to collect from the product of the liquidation of the goods assigned to their priority.

In the event of various creditors with special privileges on the same goods, there are different rules for competing, which establish degrees among some of them, and impose the proportional distribution in a few cases. The unpaid percentage of a specially privileged credit, in principle, becomes "ordinary credit" (*"crédito quirografario"*).

The most frequent credits with special privileges are: mortgage credits, loans secured by a pledge, certain credits regarding work or labor, mechanics' lien, right of retention and some property taxes.

Second, the *"gastos de conservación y de justicia"* ("administrative expenses").

These are preferred creditors who have a right which is enforceable against the estate of the bankrupt party due to their actions on behalf of -or in order to benefit- the rest of the creditors, after the inception of bankruptcy proceedings.

After being paid the specially privileged credits, the creditors of the estate have the subsequent priority over all other creditors, which is enforceable over the debtors' unsecured property as a whole.

The principal credits of this type are the fees of various bankruptcy functionaries and the credits of suppliers of goods or services to the debtors' business after the inception of bankruptcy proceedings.

In the event of insufficient product, the latter is shared among them proportionally.

Third, the *"créditos con privilegio general laboral"* ("ordinarily privileged credits regarding labor").

They are paid after the former two classes. The total amount of these credits may be satisfied in this degree. In the event of insufficiency, the concurrence within the class is proportional.

Fourth, the *"créditos con privilegio general, no laboral"* (the rest of not labor "ordinarily privileged credits").

After the satisfaction of the former classes, 50% of the remaining money (if there

be any, of course), is assigned to the payment of the ordinarily privileged creditors. If that 50% is not sufficient to satisfy the total amount of credits of this type, they receive proportional shares according to the amount of each credit, and the unpaid percentage becomes an "ordinary credit".

The most frequent credits of this class are security systems' credits and various taxes.

Fifth, the *"créditos quirografarios o comunes"* ("ordinary credits").

The remaining 50% of money not distributed among the former classes is destined to paying, proportionally, the general credits. These are all the credits without special or ordinary preference, and the credits that having those preferences have lost them or have not been able to fully collect according to their original preference.

Sixth, the *"créditos subordinados"* ("conventionally subordinated debts").

Only in the event of total payment of the former five prior classes, can the subordinated debts be satisfied. They are credits whose owners have agreed to collect after the payment of all other debtors' obligations. This is a class which is not frequent to date, but it will be usual in the future, due to the employment of "subordination clauses" in present-day debt instruments such as "*obligaciones negociables*" ("negotiable obligations"). The amendment of the Argentine Civil Code, art 3876, by law No. 24441, passed by in January '95, recognized the possibility of subordination by agreement, an already existing commercial practice. The new ABL regime also recognizes this category, establishing that the subordinated debts will be ruled by the terms of the subordination agreement.

In liquidation cases, the possibilities of this class of creditors collecting any money are remote.

Seventh, the *"créditos extranjeros postergados al saldo"* ("foreign credits payable after all others have been settled" or "foreign credits subordinated by the ABL, art. 4").

In Argentine liquidation proceedings, this class is composed of credits that, being payable outside Argentina, belong to foreign bankruptcy proceedings. These creditors are entitled to collect from the remaining money, after all the claims from the prior classes have been settled. In point of fact, in liquidation proceedings there rarely, if ever, exists any remaining money. The possibility of collecting is, therefore, for all practical purposes virtually non-existent. This rule of subordination of some foreign credits is not applied in reorganization proceedings.

Eighth, the *"accionistas"* or *"socios"* ("shareholders" or "partners") of the bankrupt company.

If after the satisfaction of all the prior classes (this being strictly hypothetical and

never actually happening) and where the debtor is a company, the remaining money must be distributed among the partners or the shareholders. In the case of bankruptcy liquidation, the company ceases to exist.

B. Priorities ruled by foreign law, when claimed in Argentine Bankruptcy proceedings

In the event of a credit whose privilege is ruled by a foreign law, and which is recognized in Argentine bankruptcy proceedings but which is not submitted to the "rule of local priority" (see: item VII. D.) the question arises of which law should be applied to the privilege itself, Argentine law or the foreign law?

Although the ABL has no provision on this issue, the question was treated *in re "Arthur Martin SA"*[2][2], where the court stated that the ranking of all priorities -whether domestic or foreign- should be governed by the *lex fori*, and this is the Argentine law when the proceedings have been opened by the Argentine judge. This is also the prevalent opinion of Argentine insolvency specialists[3][3]. In my opinion, priorities of foreign claims should be recognized in Argentine bankruptcy proceedings according to our so called "rule of reciprocity"; however, the ranking of all priorities -whether domestic or foreign- should be governed by the *"lex fori"*, and this is the Argentine law when the proceedings have been opened by the Argentine judge.

V - THE DEBTOR DOMICILED OUTSIDE ARGENTINA WITH ASSETS PLACED IN ARGENTINA

A. The Argentine courts' jurisdiction over insolvent debtors domiciled abroad: general principle and special rule

Argentine insolvency law applies, in principle, to debtors domiciled in Argentina. Citizenship or nationality of the debtor are of no consequence, given that our National Constitution establishes equality under the law for all "inhabitants" (those who have fixed their residence in Argentina).

There is a general rule according to which Argentine courts may adjudge bankrupt any person or entity whose domicile is fixed in Argentina. Thus, in principle, Argentine courts have no jurisdiction over debtors domiciled abroad.

However, a special rule (ABL, art. 2 inc. 2) establishes an exception to the latter: in

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[2][2] *Juzgado Nacional de Primera Instancia en lo Comercial No. 7*, September 11, 1989, cited by María Blanca Noodt Taquela, *Derecho Internacional Privado*, Ed. Astrea, Buenos Aires, 1992, p. 400.

[3][3] Antonio Boggiano, *Derecho Internacional Privado*, Ed. Abeledo-Perrot, Buenos Aires, 1991, t. II, p. 1005; María Elsa Uzal, *El art. 4 de la ley 19.551. Algunas reflexiones sobre su filiación sistemática*, RDCO 1985-527; Inés Weinberg de Roca, *Concursos internacionales en la ley 24.522*, ED, December 5, 1996; Adolfo A.N. Rouillon, *Cuestiones de Derecho Internacional Privado en la ley concursal argentina 24.522*, Anales de la Academia Nacional de Derecho y Ciencias Sociales de Buenos Aires, Año XLIII, Segunda época, No. 37, p. 1.

the case of a debtor domiciled outside Argentina who has assets placed in Argentina and obligations payable in this country. Such being the case, "local" creditors (the owners of credits payable in Argentina, whatever their nationality, citizenship or domicile) may file a petition to initiate the bankruptcy liquidation proceedings of their debtor. The Argentine court may declare the bankruptcy judgement, but with limited effects:

a. The effects of this type of bankruptcy remain within Argentine territory ("territoriality")

b. Assets in Argentina are submitted to bankruptcy rules, but the status of the debtor is not affected, and there is no disqualification for the bankrupt person.

c. The sole purpose is the liquidation of assets placed in Argentina in order to distribute the proceeds among "local" creditors, according to the rules of Argentine insolvency law.

Applying this special rule (ABL, art. 2 inc. 2), Argentine courts have declared bankrupt corporations domiciled outside Argentina[4][4].

B. Assets placed in Argentina belonging to insolvent debtors domiciled abroad without credits payable in Argentina

In Argentina, there are hardly any judicial precedents for the case of debtors domiciled abroad, with assets placed in Argentina, but without credits payable in this country.

It is clear that these debtors may not be adjudged bankrupt in Argentina; the opinion of legal authors (what we call *"doctrina"*) is unanimous on the subject. An Argentine Court of Appeal accepted the petition for the initiation of bankruptcy proceedings filed by a creditor whose domicile of payment was outside Argentina[5][5].

However, there are controversial opinions among legal authors about how Argentine courts should decide in the event of a foreign bankruptcy trustees' claim regarding the assets placed in Argentina. The principal problems we would expect to encounter would be the following :

a. How would an Argentine court arrive at the conclusion that there are no "local" creditors, and how should it handle the foreign claim?

b. The recognition of foreign trustees, receivers and other representatives.

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[4][4] *In re*: "Pacesetter Systems Inc", CNCom, sala C, 10/2/93, following the opinion of the *"Fiscal de Camara"* Raúl Calle Guevara No. 66844/92; CSJN, 9/6/94, ED 159-59.

[5][5] *In re*: "Sager, Gerold", 26/12/86, CCC Santa Fe, Sala 2a.

In my opinion, to date there are still no clear answers to these issues. The sole reported precedent, in re "Panair do Brasil SA", is an old case and the judgments pronounced on it were so unusual that it is highly unlikely that they would be followed by Argentine courts at present[6][6].

VI. THE INFLUENCE AND EFFECTS OF FOREIGN BANKRUPTCY PROCEEDINGS IN ARGENTINA, WHEN THERE ARE ASSETS AND LOCAL CREDITORS IN THIS COUNTRY, BUT NO BANKRUPTCY PROCEEDINGS HAVE BEEN OPENED IN ARGENTINA

A. First rule: "territoriality" of the foreign bankruptcy order

In ABL, art. 4, there is a first rule for this situation: the foreign bankruptcy proceedings may not be invoked, in Argentina, in order to dispute the rights of "local" creditors, enforceable on assets placed in Argentina. Neither may the foreign bankruptcy proceedings be invoked to set aside the acts brought about in Argentina by the debtor.

For example, in principle the acts brought about by the debtor with creditors in Argentina, that would be considered submitted to revocation in the country where bankruptcy proceedings have been opened, remain valid in Argentina. Neither would a stay of proceedings regarding local assets be applicable in Argentina, even when a stay had been ordered in foreign bankruptcy proceedings.

B. Second rule: limited "extraterritoriality" of the foreign bankruptcy order

In the same art. 4 of the ABL, there is another rule for the situation under analysis. The foreign bankruptcy judgment -the order opening the *"concurso"* (bankruptcy proceedings in general) in another country- may be used by "local" creditors, and by the debtor himself, in order to obtain the inception of a *"quiebra"* (bankruptcy liquidation proceedings) in Argentina. In this case, evidence of the debtors' insolvency need not be produced. The foreign bankruptcy judgment has, in this way, "extraterritoriality", i.e., validity beyond the border of the country where bankruptcy has been ordered. This validity is limited: it may only be used as an "act of bankruptcy" in Argentina. Now this is a curious state of affairs, indeed, given that the general rule under our insolvency law is that creditors who claim the bankruptcy liquidation of their debtor, must prove the "inability of the debtor to meet obligations as they come due" (this is the meaning of "insolvency" in the ABL sense).

The rule under comment has posed a problem of interpretation namely how to

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[6][6] The chief judgments in re "Panair do Brasil SA" were: CNCom, sala B, 18/11/70, LL, 143-146 y JA, 12 [1971] 217; CSJN, 5/7/72; Juzg Nac 1a. Inst Com, 29/12/75, ED, 70-387; CNCom, sala B, 13/9/76, ED, 70-390; there are full transcriptions in Boggiano, A., op. cit., tomo II, p. 936 and p. 951. In the doctrinal field: Radzyminski, Alejandro P., "Sistema de Derecho Internacional Privado Argentino", RDCO, 1990-A-222, esp. note 61.

identify which foreign proceedings regarding insolvency may be considered equivalent to the Argentine term *"concurso"*.

In re "Pan American", the Argentine judge considered that American reorganization proceedings of Chapter 11 (American Bankruptcy Code, 1978) could be subsumed in the terms *"concurso declarado en el extranjero"* (ABL, art. 4). Thus, Pan American bankruptcy liquidation proceedings (*"quiebra"*) were opened in Argentina.

VII. THE SITUATION OF "FOREIGN" CREDITORS IN ARGENTINE BANKRUPTCY PROCEEDINGS: RECOGNITION OF CLAIMS, PRIORITIES, SUBORDINATION

A. The present trend

After the 1983 amendment of the former ABL No. 19551, art. 4, by the statute law No. 22917, the discrimination of foreign creditors in Argentine bankruptcy proceedings has been reduced. The ABL 24522 follows the same trend.

The so-called "rule of reciprocity", in force since 1983, tends to eliminate the differences between domestic and foreign creditors within Argentine bankruptcy proceedings. However, some discrimination still remains.

It may be pointed out that the tendency to equalize foreign and domestic creditors was not popular seventeen years ago.

Nowadays, on the contrary, winds in favour of the elimination of postponement seem to be blowing. It is desirable that a reform of the insolvency statute law be carried out to that effect. It also seems probable that future judicial construction will minimize the discrimination rules. This we believe will be the case, provided that Argentine public opinion and government policy remain in favour of international free trade, open economics, and integration of the country into international tariff agreements and/or international common markets[7][7].

B. "Foreign" and "domestic" creditors

According to the ABL, the difference between "foreign" and "domestic" **credits** (rather than "foreign" and "domestic" **creditors**), lies in the following criteria:

a. Foreign credit is the credit payable solely outside Argentina.

b. Domestic or "local" credit is the credit payable in Argentina.

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[7][7] *Vide*: CSJN, 9/6/94, "Luis de Ridder Ltda SA", JA 1995-I-646; CCC San Isidro, 4/3/93, "Clement, Jorge"; CCC Mar del Plata, 17/11/94, "Emiliani S.P.A. en Ventura, quiebra".

c. Credit with two or more alternative domiciles of payment, even when the option is with the creditor (the right to choose the country of enforcement), should be considered domestic credit. Under the law came into force in 1983, courts have not rendered judgment on such cases to date. But a former doctrine did exist, the "Trading Americas SA"[8][8] doctrine, construed under the partially reformed art. 4 of the former ABL No. 19551 of 1972. This was more discriminatory than the present-day version (ABL No. 24522, art. 4). It is highly probable, therefore, that the cited doctrine will be used (*"a fortiori"*) in future cases[9][9].

C. The proof and acceptance of foreign credits: the "rule of reciprocity"

The acceptance of foreign credits in Argentine bankruptcy proceedings makes it essential to produce evidence that a similar but domestic credit should be recognized, accepted, and could be collected, in the same conditions, in bankruptcy proceedings opened in the country where the foreign credit is payable ("reciprocity").

The principal problem of the construction of this rule has been to determine the onus of proof of the foreign law: who has the burden of proof of the foreign law?

Although the terms of the ABL, art. 4, are imprecise, it may be observed that the judicial construction of this topic tends to be broad and flexible. This has become specially true since the Argentine ratification of the CIDIP II "Interamerican Convention on the General Rules of International Private Law", approved by the "Specialized Interamerican Conference on I.P.L.", Montevideo 1979 (ratified by Argentine statute law No. 22921, December 1, 1983).

Even in cases involving foreign laws of countries that are not parties to the cited International Convention, Argentine courts have applied its principles. For example, *in re* "Cacace, Horacio / Inc de impugnación por Sherrant SA", the court decided it had the power to order the parties -the creditor, the debtor and the trustee- to identify and produce evidence of the foreign law involved in the rule of reciprocity; thus meaning that the burden of proof was not solely with the creditor[10][10] .

The proof of foreign law was admitted with latitude, *in re* "D'Angelo, Lydia v. Paino, Myriam", where the court considered sufficient a copy of the American Bankruptcy Code of 1978, in order to produce evidence satisfying the rule of reciprocity, and accepted

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[8][8] CNCom, sala E, 15/9/83, JA, 1983-IV-186.

[9][9] *Vide*: Boggiano, A., op. cit., tomo II, p. 1030.

[10][10] CNCom, sala B, 22/8/90, following the opinion of the "Fiscal de Camara" Raul Calle Guevara, No. 62710/90.

a credit of the holder in due course for a check payable in U.S.A.[11][11].

In another case, an Argentine judge considered that the rule of reciprocity was satisfied when the creditor, with domicile of payment in England, exhibited the opinion of a British expert explaining that there were non-discrimination rules for foreign creditors according to the bankruptcy law of the United Kingdom[12][12].

The principal reform introduced by the ABL No. 24522, art. 4, on this subject is that the secured creditors are excluded of the rule of reciprocity hereinafter. The creditors with *"garantía real"* (mortgage security, pledge) do not have to produce evidence of the foreign law as the unsecured creditors must to.

D. Collecting a foreign credit: the "rule of local priority"

Once the foreign creditors' claim has been accepted in Argentine bankruptcy proceedings, and the rule of reciprocity has been satisfied, different situations arise regarding the collection of the credits:

a. Where the Argentine bankruptcy proceedings involve reorganization (*"concurso preventivo"*), there is no discrimination[13][13].

b. Where the Argentine bankruptcy proceedings constitute liquidation (*"quiebra liquidativa"*):

1. There is no discrimination when the foreign credit does not belong to other foreign bankruptcy proceedings[14][14];

2. The "rule of local priority" applies when the foreign credit, (payable solely outside Argentina), also belongs to foreign bankruptcy proceedings. The exact legal meaning of "belonging" to foreign bankruptcy proceedings is not clear and there is no judicial construction of the rule. However, it is clear that this "rule of local priority" only applies in the case we are discussing.

The effect of the "rule of local priority" is the subordination of this type of foreign credit ("payable abroad **and** belonging to foreign bankruptcy proceedings"), ranking it

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[11][11] JCCRosario, 1a. Nom., 11/12/87, RJVS, II-201, commented on by Alejandro Menicocci.

[12][12] JCCRosario, 13a. Nom., 26/2/96, "Massey Ferguson SA", DYE 5-306, commented on by Mario Eugenio Chaumet.

[13][13] CSJ Buenos Aires, 19/10/93, "Alfredo Alejandro Scola y Cía. SCA", JA 1994-II-256.

[14][14] CCC Mar del Plata, 17/11/94, "Emiliani SPA en Ventura, quiebra"

behind all other classes of credits (see: item IV. A.). In bankruptcy liquidation proceedings, this type of foreign credit could be collected solely in case of surplus proceeds (*"saldo"*), i.e., after the total amount of credits of all prior classes and degrees has been satisfied. In fact, in bankruptcy liquidation proceedings money never remains for this type of foreign credits. When this subordination rule is applicable, the collecting possibilities are in fact non-existent.

E. Conclusions

In brief:

a. Credits payable solely abroad, and only these, are considered foreign credits;

b. When claimed in Argentine bankruptcy proceedings, foreign credits must satisfy the test of reciprocity;

c. In principle, after being accepted, there is no discrimination regarding foreign credits with respect to their collecting position; except:

d. In case of liquidation , when some foreign credits are postponed to the lowest degree. This rule of subordination is applicable only to credits payable solely outside Argentina and if they also belong to foreign bankruptcy proceedings.

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